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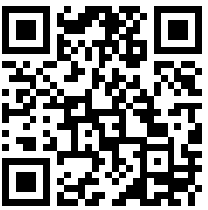

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BRIEFS

ON THE

LAW OF INSURANCE

By ROGER W. COOLEY

IN FIVE VOLUMES

VOLUME 4

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1. EXTENT OF LOSS IN GENERAL.

(a) Actual total loss of vessel.
(b) Same—Sale of vessel from necessity.
(c) Actual total loss of cargo or profits.
(d) Actual total loss of freight.
(e) Partial loss.

(a) Actual total loss of vessel.

In respect of the insurance of property there may be, on the happening of the peril insured against, either a total or a partial loss; and it is on the extent of the loss that the extent of the liability of the insurer depends. So far as their ordinary meanings are concerned, the terms "total loss" and "partial loss" define themselves. In the law of marine insurance there have arisen certain qualifications of the meaning of the term "total loss," by which the rights and duties of the parties have been profoundly modified. In the view of the law **a total loss may be "actual" when there is a physical destruction of the property, or "technical" when the property is not actually destroyed, but is lost from the control of the owner, or "constructive" when there is an actual partial loss amounting to a certain per cent. of the value of the property, which by custom or agreement is regarded as equivalent to a total loss.** A technical total loss is also usually regarded as a constructive total loss.

In general terms, **an actual total loss occurs when the subject of the insurance wholly perishes or its recovery and preservation is rendered irretrievably hopeless.** Thus, in order to constitute an actual total loss of a vessel, the ship must have become a total wreck. It must have perished, and have ceased to exist as a ship, although fragments of the wreck may remain and may reach the home port. (Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun, [N. Y.] 383). The qualifying words, "ceased to exist as a ship," are important. The structure may retain the general form and appearance of a vessel,

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and still be an actual total loss. **The essential element is not absolute destruction, but destruction in specie.** Therefore, if, by reason of the violence of the winds and waves, a vessel upon the high seas has become a wreck, incapable of being saved and brought into port, the insurers may be held liable for an actual total loss (Walker v. Protection Ins. Co., 29 Me. 317).

Reference may also be made to Crosby v. New York Mut. Ins. Co., 19 How. Prac. [N. Y.] 312; Duncan v. Great Western Ins. Co., 1 Abb. Dec. [N. Y.] 562.

As was said in the Duncan Case, the loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury.

Where the claim is for a total loss of a vessel, the opinion of her master as to the impracticability of saving her at the time when she was abandoned is admissible (Walker v. Protection Ins. Co., 29 Me. 317).

Even the sinking of the vessel does not necessarily constitute a total loss (Sewall v. United States Ins. Co., 11 Pick. [Mass.] 90); but, though the vessel is raised again, there is a total loss if, after being raised, she is no longer a vessel in specie (Merchants' S. S. Co. v. Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 444). On the other hand, if the vessel, after a disaster, reaches her place of destination without sinking, an insurer "against actual total loss only" is not liable (Burt v. Brewers' & Maltsters' Ins. Co., 78 N. Y. 400, affirming 9 Hun, 383). So the fact that a vessel stranded and filled, and lost her spars and boats, and in the opinion of the master became a complete wreck, does not show a total loss if in fact she was recovered and repaired, and for years thereafter was a sound and seaworthy vessel (McColl v. Sun Mut. Ins. Co., 34 N. Y. Super. Ct. 313). If, however, the injury is so great that the vessel is not repairable, except at an expense exceeding its value when repaired, the loss is actually total (Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643); and the valuation in the policy fixes the value of the vessel for the purpose of determining this question.

Where a wrecked vessel, insured against "actual total loss only," is sold to satisfy a claim of salvors employed by the insurers, who had the right under the policy to rescue the vessel, the insured not being a party to the contract with the wreckers, nor having notice of the sale, and having served a notice of abandonment which was not

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accepted, the insurers cannot deny that the vessel was a total loss (Carr v. Providence Washington Ins. Co., 109 N. Y. 504, 17 N. E. 369).

The capture and condemnation of the vessel is a total loss (Watson v. Marine Ins. Co., 7 Johns. [N. Y.] 57), provided it is by a court of competent jurisdiction; and this is true though the master of the vessel purchased her on his own account, without previous authority or subsequent assent on the part of the owner (Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291). But the seizure and appropriation of an insured vessel by a foreign government, without the sentence of a court of competent jurisdiction, does not devest the owner of his right of property; and so long as the vessel exists, there is the spes recuperandi, and he cannot recover as for a total loss (Barney v. Maryland Ins. Co., 5 Har. & J. [Md.] 139).

(b) Same—Sale of vessel from necessity.

If there be an urgent necessity for the sale of an insured vessel damaged by the perils of the sea, the master has a right to sell the vessel; and such sale constitutes a total loss.

Reference may be made to Williams v. Suffolk Ins. Co., 29 Fed. Cas. 1406; Prince v. Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676; Dunning v. Merchants' Mut. Marine Ins. Co., 57 Me. 108; Mutual Safety Ins. Co. v. Cohen, 3 Gill (Md.) 459, 43 Am. Dec. 341; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. (Mass.) 249; Graves v. Washington Marine Ins. Co., 12 Allen (Mass.) 391; Wright v. Williams, 20 Hun (N. Y.) 320.

Such a sale is, however, generally regarded as a technical total loss, which must be converted into a constructive total loss by abandonment;[1] or it may be regarded as a technical total loss without abandonment (Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325).

The determining factor is, of course, the necessity of the sale (Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342). Generally speaking, a sale cannot be regarded as made from necessity unless the circumstances antecedent thereto were such as to render the saving of the vessel extremely improbable—such as to justify an abandonment, in fact.

Church v. Marine Ins. Co., 5 Fed. Cas. 667; Howell v. Philadelphia Mut. Ins. Co., 12 Fed. Cas. 706; Greely v. Tremont Ins. Co., 9 Cush. (Mass.) 415.

[1] See post, p. 2938.

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Yet the fact that the vessel remains in specie (McCall v. Sun Mut. Ins. Co., 66 N. Y. 505), or that she is afterwards saved (Hall v. Ocean Ins. Co. [C. C.] 37 Fed. 371), is not controlling.

The necessity for the sale depends only on the moral obligation resting on the master of a faithful performance of the duties imposed by the circumstances in which he is placed, and is not affected by the fact that he is part owner (Prince v. Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676). It should, however, appear that the master exercised good judgment and discretion (Stephenson v. Pacific Mut. Ins. Co., 7 Allen [Mass.] 232, 83 Am. Dec. 681).

That the repairs will cost more than the vessel will be worth is generally regarded as justifying a sale. Graves v. Washington Marine Ins. Co., 12 Allen [Mass.] 391; Avery v. New York Mut. Ins. Co., 58 N. Y. Super. Ct. 226, 11 N. Y. Supp. 49. But the survey on which the necessity of repairs is based is not conclusive evidence of the necessity of the sale. Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. [Mass.] 249.

(c) Actual total loss of cargo or profits.

The foregoing principles apply also in determining the extent of the loss when the insurance is on the cargo. **It is a total loss where, by reason of the peril insured against, the cargo is permanently prevented from arriving at the port of destination** (Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002). And though it was said in Brooke v. Louisiana Ins. Co., 5 Mart. N. S. (La.) 530, that there must be a physical total loss, it is doubtful if the court meant to state the broad proposition that there must be an absolute physical destruction to constitute a total loss. It is true, such a principle seems to be supported by Williams v. Kennebec Mut. Ins. Co., 31 Me. 455, where it was said that if the article insured arrives in specie, or can by reasonable care be carried to its destination, though it may be worthless when it arrives, the insurer is not accountable for a total loss. Yet the better rule seems to be that laid down in Insurance Co. v. Fogarty, 19 Wall. 640, 22 L. Ed. 216, where it was said that **it is not necessary that there should be an absolute extinction or destruction of the thing insured, so that nothing of it can be delivered at the point of destination, but a destruction in specie, so that, while some of its component elements may remain, the thing itself, in the character or description by which it was insured, is destroyed, is a total loss.** So it has been held in New York that to show a total loss the insured must show either the physical extinction of the property insured, or the extinction of

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its value arising from the perils insured against (Young v. Pacific Mut. Ins. Co., 34 N. Y. Super. Ct. 321). There cannot, of course, be a total loss of cargo if a portion of the goods reach their destination in safety. Thus, a jettison of cargo, either to lighten ship or to save it, is not an absolute total loss, within a policy insuring against "absolute total loss only," if part of the goods are saved. (Monroe v. British & Foreign Marine Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179.)

Similarly, under a contract of insurance of the profits on a cargo "against total loss only" there is no actual total loss of profits where any part, however small, of the cargo, is saved, and reaches the owner in condition to earn a profit; and in such case no recovery can be had (Insurance Co. of North America v. Canada Sugar Refining Co., 87 Fed. 491, 31 C. C. A. 65, reversing [D. C.] 82 Fed. 757). But if the insured has no interest in the cargo, but only in the profits, a salvage of a small portion of the cargo, which was never delivered or paid to him, will not reduce his loss to a partial one (French v. Hope Ins. Co., 16 Pick. [Mass.] 397). It is, of course, elementary that, where there is a total loss of cargo, there is also a total loss of profits under a policy on profits (Patapsco Ins. Co. v. Coulter, 3 Pet. 222, 7 L. Ed. 659).

Where an agreement was made to pay a supercargo, on a voyage out and home, a gross sum out of the return cargo, or to give him goods out of it to that amount at his election, and the vessel on her return was obliged to break her homeward voyage, and the cargo was sold at a port of necessity, paying commission to merchants there, there was a total loss as to the supercargo's interest, for which the insurer would be liable (Robinson v. New York Ins. Co., 2 Caines [N. Y.] 357).

A usage for the master of a vessel to sell the cargo without necessity, when the vessel is stranded, is void, as against public policy (Bryant v. Commonwealth Ins. Co., 6 Pick. [Mass.] 131).

(d) Actual total loss of freight.

When the insurance is on freight, a total loss occurs only when the circumstances are such as to render the ultimate earning of freight impossible or practically hopeless (Hubbell v. Great Western Ins. Co., 74 N. Y. 246). Thus, there is a total loss on freight if the ship is lost after a part of the cargo is on board, and the whole is ready for shipment.

De Longuemere v. Phœnix Ins. Co., 10 Johns. (N. Y.) 127; De Longuemere v. New York Fire Ins. Co., 10 Johns. (N. Y.) 201.

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If there is a total loss of the vessel while on the voyage, and no freight pro rata itineris has been earned, or if, on injury to the vessel, the expense of transshipment would equal the freight to be earned, there is a total loss under a policy insuring freight.

Willard v. Millers' & Manufacturers' Ins. Co., 30 Mo. 35; Robertson v. Atlantic Mut. Ins. Co., 68 N. Y. 192; Blanks v. Hibernia Ins. Co., 36 La. Ann. 599. The loss of the vessel may be only constructively total. Center v. American Ins. Co., 7 Cow. (N. Y.) 564; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45.

Thus, there is a total loss of freight if no freight is due until the round voyage is completed, and the vessel is lost at the outward port (Silloway v. Neptune Ins. Co., 12 Gray [Mass.] 73). And even where part of the freight was due on the discharge of the vessel at the outward port, the balance being payable at the end of the voyage, and the vessel was lost on the outward voyage (Meech v. Philadelphia Fire & Inland Navigation Ins. Co., 3 Whart. [Pa.] 473), the contract was held to be entire, so as to entitle the insured to recover for a total loss. So, too, it is a total loss if the vessel is so damaged that she cannot carry her cargo, though she might carry a more buoyant one (Abbott v. Broome, 1 Caines [N. Y.] 292, 2 Am. Dec. 187). But the mere loss of the vessel short of her destination will not amount to a total loss on freight if the shipowner may still earn his freight by forwarding the cargo to its detination by other means of conveyance (Hubbell v. Great Western Ins. Co., 74 N. Y. 246, reversing 10 Hun, 167).

Though speaking in general terms, a total loss of the cargo is a total loss of the freight, circumstances will govern the result. Thus, where a vessel put into a port from necessity, the cargo, which was taken out for the purpose of repairing the ship, was found greatly deteriorated, and in a state not fit to be reshipped, and was accordingly sold. The vessel was, however, repaired, so as to be able to prosecute her voyage. It was held that the insured could not recover for a loss of the freight, as the subject still remained in specie, though damaged. (Saltus v. Ocean Ins. Co., 14 Johns. [N. Y.] 138.) If the cargo remains capable of delivery in specie at the port of destination, though damaged, there is not a total loss on freight (Lord v. Neptune Ins. Co., 10 Gray [Mass.] 109). This principle also governed Allen v. Mercantile Ins. Co., 44 N. Y. 437, 4 Am. Rep. 700, reversing 46 Barb. 642. But if the cargo is so injured by perils of the sea as to become wholly worthless and incapable of being carried with safety to the vessel and the remaining

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cargo, and is therefore thrown overboard, there is a total loss of freight on that part (Parsons v. Manufacturers' Ins. Co., 16 Gray [Mass.] 463). The same result would follow if the cargo, by delay in the voyage, becomes so deteriorated as to endanger the health of those on board (Hugg v. Augusta Ins. & Banking Co., 12 Fed. Cas. 821).

The important question is whether freight is or can be earned. For instance, though the vessel was disabled, if the cargo was actually delivered there is no loss on freight (Fiedler v. New York Ins. Co., 13 N. Y. Super. Ct. 282). On the other hand, if the cargo is not carried to its place of destination, but under compulsion is received by the supercargo, no freight is earned, and it is a total loss, within the meaning of a policy on freight (Hurtin v. Union Ins. Co., 12 Fed. Cas. 1050). If the cargo reaches the port of destination, so that freight is earned, there can be no recovery as for a total loss, though the ship is prohibited from landing her cargo (Morgan v. Insurance Co. of North America, 4 Dall. 455, 1 L. Ed. 907). So, a temporary retardation and subsequent sale of the cargo by the owner, since it does not deprive the carrier of his right to the freight money, does not entitle him to recover from the insurer of the freight (Murray v. Ætna Ins. Co., 17 Fed. Cas. 1043). Similarly, where the cargo is sold by the master and shippers merely because it would take several months to repack it in condition to be shipped, there cannot be a recovery for a total loss of freight (Jordan v. Warren Ins. Co., 13 Fed. Cas. 1105). If the cargo is abandoned to the insurers thereof, but reaches them, it is equivalent to reaching the owner, so far as earning freight is concerned, and there is not, therefore, a total loss, under a policy insuring the freight (Hubbell v. Great Western Ins. Co., 74 N. Y. 246, reversing 10 Hun, 167). In the same case it was said that if no attempt was made to transship the cargo, but a wrecking company was permitted to take possession and transship, thus subjecting it to a large claim for salvage, a total loss because of the salvage cannot be maintained. But ordinarily, under an insurance upon freight, a loss is total when the proceeds of the only goods saved are all awarded to the salvors (Huth v. New York Mut. Ins. Co., 21 N. Y. Super. Ct. 538).

(e) Partial loss.

Where an injury results to a vessel from a peril insured against, but the loss is neither actually nor constructively total, it is a par-

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tial loss (Globe Ins. Co. v. Sherlock, 25 Ohio St. 50). If the vessel is injured before the expiration of the policy, but the total loss resulting from such injury did not occur until after such policy had expired, the company is liable only for the partial loss that occurred up to the expiration of the policy.

Howell v. Protection Ins. Co., 7 Ohio, 284, pt. 1; Same v. Cincinnati Ins. Co., 7 Ohio, 276, pt. 1.

Generally, if any part of the cargo or goods insured are safely landed at their destination or placed in the possession of the owner, the loss is partial.

Donath v. Insurance Co. of North America, 4 Dall. 463, 1 L. Ed. 910; Mobile Marine Dock & Mut. Ins. Co. v. McMillan, 27 Ala. 77; Sale v. Sun Mut. Ins. Co., 26 N. Y. Super. Ct. 602.

Where part of a cargo libeled as prize was sold by order of the court at less than its value, the proceeds, however, being paid to the insured, there was a partial loss on such portion of the cargo, but, the residue having been restored to the insured and sold by him, though at less than its value, he could not claim even a partial loss as to that portion (Baltimore Ins. Co. v. McFadon, 4 Har. & J. [Md.] 31). If there is a partial loss on cargo, there can, of course, be only a partial loss on profits (Loomis v. Shaw, 2 Johns. Cas. [N. Y.] 36).

Where insurance is on freight on a boat or barge, and the barge is lost, but her cargo is transferred to the boat, and freight earned on it, if the insured, by picking up cargo along the river, have earned other freight by means of the barge, there is a partial loss of freight.

Stillwell v. Home Ins. Co., 23 Fed. Cas. 92; Stilwell v. Commercial Ins. Co., 2 Mo. App. 22.

If freight is earned pro rata itineris, as where the cargo is delivered to the owner at an intermediate port, there is a partial loss only.

Merchants' Mut. Ins. Co. v. Butler, 20 Md. 41; Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 323.

So, if the insured is master and part owner and consignee, the sale by him of the cargo at a port of necessity, where the voyage was broken up, is considered a reception of the goods by him as owner, and a pro rata freight is earned thereby (Williams v. Smith,

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2 Caines [N. Y.] 13). But if the agent of the consignee at an intermediate port accept the goods and pay the whole freight, the underwriters are not liable (Law v. Davy, 2 Serg. & R. [Pa.] 553).

Where part of the cargo was destroyed and the ship was injured, and the master returned to the port of departure, and restored the sound part of the cargo to the shipper, as it could not be forwarded at a lower rate of freight, it was held that the insurer of the freight was liable for the loss of freight on the part of the cargo destroyed alone (McGaw v. Ocean Ins. Co., 23 Pick. [Mass.] 405).

2. CONSTRUCTIVE TOTAL LOSS AND RIGHT TO ABANDON THEREFOR.

(a) Right to abandon for constructive total loss.
(b) Necessity of abandonment.
(c) Constructive total loss in general.
(d) Cause of loss.
(e) Same—Sale from necessity.
(f) Effect of repairs, recovery, or recapture.
(g) Amount of damage—Fifty per cent. rule.
(h) Same—Determination of amount.
(i) Questions of practice.

(a) Right to abandon for constructive total loss.

As has been pointed out, a marine loss, though not actually and absolutely total, may be practically total. For instance, the vessel or cargo may be still in existence, but lost to the owner, constituting a technical total loss. Or it may be that the subject of the insurance is not actually destroyed, but its destruction is highly probable, or the loss is so great in extent that any recovery is exceedingly doubtful or too expensive to be worth the attempt. Under such circumstances the insured may convert what is really a partial loss into a total loss by abandoning or ceding to the underwriter all his right to the recovery of the property insured, and claiming indemnity as for a total loss; that is to say, **the loss may be of such extent or so probably total as to be regarded as a constructive total loss, giving the insured the right to abandon the property to the insurer.**

It is deemed sufficient to refer to Howland v. Marine Ins. Co., 12 Fed. Cas. 741; Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98; Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002; Townsend v. Phillips, 2 Root (Conn.) 400; Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563; Hanau v. Louisiana Mut. Ins. Co., 15 La. Ann. 201; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 4 Am. Dec. 163;

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Earl v. Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Ocean Ins. Co. v. Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Radcliff v. Coster, 1 Hoff. Ch. (N. Y.) 98; McConochie v. Sun, etc., Ins. Co., 16 N. Y. Super. Ct. 99; Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun, (N. Y.) 383; McLain v. British & Foreign Marine Ins. Co., 16 Misc. Rep. 336, 38 N. Y. Supp. 77; Hubbell v. Great Western Ins. Co., 74 N. Y. 246; Fuller v. McCall, 2 Dall. (Pa.) 219, 1 L. Ed. 356; Id., 1 Yeates (Pa.) 464, 1 Am. Dec. 312.

Under a wager policy the loss must, from the very nature of the contract, be actually total. There can be no abandonment for a technical or constructive total loss. Clendining v. Church, 3 Caines (N. Y.) 141; Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 318.

Where a person insures but part of his interest, he may abandon that part only (Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341). So, if different sorts of goods are specified and separately valued in the same policy, the insured may abandon any one sort or article, in case of loss, and retain the rest, in the same manner as if the different articles had been insured by different policies (Deidericks v. Commercial Ins. Co., 10 Johns. [N. Y.] 234). And if cargo and profits are insured separately, an abandonment of the cargo to the insurer on cargo, does not preclude the insured from abandoning under the policy on profits (Mumford v. Hallett, 1 Johns. [N. Y.] 433).

The right to abandon may, of course, be controlled by special provisions of the policy (Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235). It has been held in Massachusetts that a policy on a ship against "total loss only," even if a time policy, covers a constructive total loss (Heebner v. Eagle Ins. Co., 10 Gray [Mass.] 131, 69 Am. Dec. 308), but the contrary rule is announced in Missouri (Willard v. Millers' & Manufacturers' Ins. Co., 24 Mo. 561).

It is to be noted that **it is not only the certainty of loss that gives the right to abandon for a constructive total loss** (Wallace v. Thames & Mersey Ins. Co. [C. C.] 22 Fed. 66). **The right exists whenever, in the opinion of those skilled in the business, there is no probability of saving the property at risk, though the property is finally saved at less than half its value.**

Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98; Wallace v. Thames & Mersey Ins. Co. (C. C.) 22 Fed. 66; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563; Thompson v. Mississippi Marine & Fire Ins. Co., 2 La. 228, 22 Am. Dec. 129; Graham v. Ledda, 17 La. Ann. 45; McConochie v. Sun Mut. Ins. Co., 16 N. Y. Super. Ct. 99; Hundhausen v. United States Fire & Marine Ins. Co., 3 Tenn. Cas. 184.

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This probability must, however, be based on information of the existence of facts and circumstances justifying a belief in the probability; that is to say, such facts and circumstances as would sustain the abandonment if actually existing.

Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Munson v. New England Marine Ins. Co., 4 Mass. 88.

On the other hand, **an abandonment for a constructive total loss cannot be based on a mere apprehension that a loss has taken place, or a fear that the vessel has encountered a peril said to exist.**

Smith v. Universal Ins. Co., 6 Wheat. 176, 5 L. Ed. 235; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Craig v. United Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222; Corp v. United Ins. Co., 8 Johns. (N. Y.) 277; Messonier v. Union Ins. Co., 1 Nott & McC. (S. C.) 155.

So, the breaking up of the voyage by reason of the fear of the master that his vessel will be captured by the enemy does not justify an abandonment.

King v. Delaware Ins. Co., 14 Fed. Cas. 516, affirmed 6 Cranch, 71, 3 L. Ed. 155; Richardson v. Maine Fire & Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Cook v. Essex Fire & Marine Ins. Co., 6 Mass. 122; Amory v. Jones, Id. 318; Lee v. Gray, 7 Mass. 349; Tucker v. United Marine & Fire Ins. Co., 12 Mass. 288; Brewer v. Union Ins. Co., 12 Mass. 170, 7 Am. Dec. 53; Craig v. United Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222.

Though the offer to abandon is based on the information received by the insured, the ultimate right must, of course, rest on the existence of the facts and circumstances to justify an abandonment at the time the offer is made; that is to say, **it is the actual state of facts at the time of an abandonment, and not the intelligence received, that is the proper test of the validity of an abandonment.**

Rhinelander v. Pennsylvania Ins. Co., 4 Cranch, 29, 2 L. Ed. 540; Alexander v. Baltimore Ins. Co., 4 Cranch, 370, 2 L. Ed. 650; Olivera v. Union Ins. Co., 3 Wheat. 183, 4 L. Ed. 365; Marshall v. Delaware Ins. Co., 16 Fed. Cas. 838, affirmed 4 Cranch, 202, 2 L. Ed. 596; Peele v. Merchants' Ins. Co., 19 Fed. Cas. 198; Marks v. Nashville Marine & Fire Ins. Co., 6 La. Ann. 127; Dorr v. Union Ins. Co., 8 Mass. 502; Robinson v. Jones, Id. 536, 5 Am. Dec. 114; Greene v. Pacific Mut. Ins. Co., 9 Allen (Mass.) 217; Snow v. Union Mut. Marine Ins. Co., 119 Mass. 592, 20 Am. Rep. 349; Earl v. Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Radcliff v. Coster, 1 Hoff. Ch. (N. Y.) 98; Suarez v. Sun Mut. Ins. Co., 4 N. Y. Super. Ct. 482.

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If, therefore, a loss otherwise total is converted into a partial loss before abandonment, the right to abandon is lost (Dickey v. American Ins. Co., 3 Wend. [N. Y.] 658, 20 Am. Dec. 763). So, too, if a peril insured against does act on the subject assured, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss (Smith v. Universal Ins. Co., 6 Wheat. 176, 5 L. Ed. 235). The right to abandon is not devested, however, by a sale of the vessel before the abandonment was made (Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342).

A sale of the cargo and an investment of the proceeds in other merchandise at a port of necessity by the owner of one-sixth thereof, for the purpose of remittance, a technical loss having happened, does not destroy the right of the other owners, who had insured their separate interests in the cargo, to abandon the same to the underwriters, if, under the circumstances of the case, it would have been the duty of the master to have made the same investment for the benefit of whom it might concern (Pacific Ins. Co. v. Catlett, 4 Wend. [N. Y.] 75).

(b) Necessity of abandonment.

Where there is an actual total loss, abandonment is, of course, unnecessary.

Fosdick v. Norwich Marine Ins. Co., 3 Day (Conn.) 108; Williams v. Kennebec Mut. Ins. Co., 31 Me. 455; Gordon v. Bowne, 2 Johns. (N. Y.) 150; Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun (N. Y.) 383; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81.

Nor is abandonment necessary if the insured claims only for a partial loss (Murray v. Insurance Co. of Pennsylvania, 17 Fed. Cas. 1048).

If, however, the loss is not actually total, but is of such character and extent as to fall within the definition of a constructive total loss, it is not only the right, but the duty, of the insured to abandon if he claims as for a total loss.

Insurance Co. of North America v. Canada Sugar Refining Co., 87 Fed. 491, 31 C. C. A. 65; Townsend v. Phillips, 2 Root (Conn.) 400; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Gomila v. Hibernia Ins. Co., 40 La. Ann. 553, 4 South. 490; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Sherlock v. Globe Ins. Co., 1 Wkly. Law Bul. 26, 7 Ohio Dec. 17; Thomas v. Rockland Ins. Co., 45 Me. 116; Taber v. China Mut. Ins. Co., 131 Mass. 239; Smith v. Manufacturers' Ins. Co., 7 Metc. (Mass.) 448;

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Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun (N. Y.) 383; Tom v. Smith, 3 Caines (N. Y.) 245; Hubbell v. Great Western Ins. Co., 74 N. Y. 246.

Especially is this true where the vessel remains in specie, though the cost of repairs exceeds its value when repaired.

Globe Ins. Co. v. Sherlock, 25 Ohio St. 50; American Ins. Co. v. Francia, 9 Pa. 390. And in the latter's case it was said that surveys of the estimated cost of repairs, when proved by the parties making them, are admissible in evidence as part of the res gestæ.

If, however, the policy provided that there could be no abandonment except in case of absolute total loss, it was not necessary, in case of constructive total loss, to prove abandonment (McLain v. British & Foreign Marine Ins. Co., 16 Misc. Rep. 336, 38 N. Y. Supp. 77). This holding was based on the principle that otherwise the insured would be remediless.

The abandonment may, however, be waived by the insurers (Force v. Providence Washington Ins. Co. [D. C.] 35 Fed. 767); and in any event **an omission to abandon, for good cause, will not deprive the assured of his right to recover the actual loss which he has sustained.**

Murray v. Insurance Co. of Pennsylvania, 17 Fed. Cas. 1048; Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138; Gracie v. New York Ins. Co., 8 Johns. (N. Y.) 237; Watson v. Insurance Co. of North America, 1 Bin. (Pa.) 47.

Though the right and the duty to abandon may be kept in suspense by mutual agreement of the parties (Livingston v. Maryland Ins. Co., 6 Cranch, 274, 3 L. Ed. 222), the assured has no right to wait, in order to find out the extent of a loss on the sale of property assured, and deteriorated by perils insured against, before abandonment. **The right to abandon cannot depend upon events which take place after the peril is over** (Teasdale v. Charleston Ins. Co., 2 Brev. 190, 3 Am. Dec. 705). And though the vessel sustains injury to an amount exceeding half her value, the assured cannot abandon as for a technical loss after the vessel has arrived in a repairable state at her port of destination where her owners reside (Pezant v. National Ins. Co., 15 Wend. [N. Y.] 453).

(c) Constructive total loss in general.

In marine insurance, a constructive total loss is one upon the happening of which the insured may abandon the subject-matter of the

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insurance; and, unless there remains something of value to pass to the underwriter, there is nothing to abandon, and no case for the application of the doctrine of constructive total loss (Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co. (C. C. A.) 133 Fed. 636. **In its broadest sense there is a constructive total loss where a vessel insured remains in specie, and is susceptible of repairs or recovery, but at an expense exceeding its value when restored.**

King v. Middletown Ins. Co., 1 Conn. 184; Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561; Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

That a marine policy provides "that there can be no abandonment of the subject insured" does not necessarily prevent a constructive total loss (Devitt v. Providence Washington Ins. Co., 65 N. E. 777, 173 N. Y. 17, affirming 70 N. Y. Supp. 654, 61 App. Div. 390).

There may be a constructive total loss, although the damage is caused by successive perils, and there is no evidence that the damage caused by any one peril is sufficient to justify an abandonment (Taber v. China Mut. Ins. Co., 131 Mass. 239). The mere stranding of a vessel does not of itself constitute a constructive total loss.

Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90.

The stranding must be of such character as to render it, in the exercise of good judgment, hopeless to get the vessel off.

Howland v. Marine Ins. Co., 12 Fed. Cas. 741; King v. Hartford Ins. Co., 1 Conn. 422.

The loss of the voyage from necessity may cause a constructive total loss (Williams v. Suffolk Ins. Co., 29 Fed. Cas. 1406); but not the mere delaying of the voyage (Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123). Nor is the loss of a voyage as to the cargo a loss of the voyage as to the ship, so as to be a constructive total loss (Alexander v. Baltimore Ins. Co., 4 Cranch, 370, 2 L. Ed. 650).

Inability to procure repairs may result in a constructive total loss (Stagg v. United Ins. Co., 3 Johns. Cas. [N. Y.] 34); but not if it is due to the laches of the owner (American Ins. Co. v. Ogden, 20 Wend. [N. Y.] 287, reversing 15 Wend. 532) or fault of the master (Neilson v. Columbian Ins. Co., 1 Johns. [N. Y.] 301).

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A constructive total loss of cargo cannot be claimed if the cargo, or part of it, arrives, though in a damaged condition.

Hugg v. Augusta Insurance & Banking Co., 12 Fed. Cas. 821; Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co., 24 La. Ann. 305; Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73.

So, where an insured cargo was damaged to some extent from perils of the sea, and after reaching the port of delivery both vessel and cargo were sold in satisfaction of a claim for salvage, but there was no evidence to show the amount of the damage to the cargo, nor was the value of the salvage services ever ascertained, and there was no abandonment prior to the sale, there could not be an abandonment afterwards, to create a constructive total loss, the property having passed beyond control of the insured (Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co. [C. C. A.] 133 Fed. 636).

A loss of the voyage or abandonment thereof from necessity is a constructive total loss of the cargo.

Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; Akin v. Mississippi Marine & Fire Ins. Co., 4 Mart. N. S. (La.) 661; Delaware Ins. Co. v. Winter, 38 Pa. 176.

But such will not be the result if the voyage is abandoned from an insufficient cause.

Ludlow v. Columbian Ins. Co., 1 Johns. (N. Y.) 335; Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342.

Nor can there be a constructive total loss of freight in such case (Marks v. Louisiana State Marine & Fire Ins. Co., 3 Rob. [La.] 454).

The constructive total loss of a whaling ship at a port where whaling outfits are bought and sold, and where the outfits are in safety, is not a constructive total loss of the outfits, although no vessel is obtainable within a reasonable time to carry forward the outfits on the voyage insured.

Taber v. China Mut. Ins. Co., 131 Mass. 239; Macy v. Same, 135 Mass. 328.

Where there is an abandonment of the cargo for a total loss, there may also be a constructive total loss of profits.

Canada Sugar Refining Co. v. Insurance Co. of North America, 20 Sup. Ct. 239, 175 U. S. 609, 44 L. Ed. 292, reversing 87 Fed. 491, 31 C. C.

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A. 65. See, also (D. C.) 82 Fed. 757; Boardman v. Boston Marine Ins. Co., 146 Mass. 442, 16 N. E. 26.

A constructive total loss of freight cannot be claimed where there has been no total loss of the ship, and the goods could have arrived in specie at the port of destination, although the ship has been obliged, by a peril insured against, to put back to her port of departure, and the goods, after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there, according to the interests of all parties except the insurers on freight (Lord v. Neptune Ins. Co., 10 Gray [Mass.] 109).

A total loss of the vessel short of the port of destination, whether actual or constructive, involves a constructive total loss of freight.

Hart v. Delaware Ins. Co., 11 Fed. Cas. 683; Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341; Thwing v. Washington Ins. Co., 10 Gray (Mass.) 443; Field v. Citizens' Ins. Co., 11 Mo. 50; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290; Whitney v. New York Firemen's Ins. Co., 18 Johns. (N. Y.) 208; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; Robertson v. Atlantic Mut. Ins. Co., 37 N. Y. Super. Ct. 442; Hubbell v. Great Western Ins. Co., 74 N. Y. 246, affirming 10 Hun, 167. So, also, in case of a total loss of cargo. Williams v. Kennebec Mut. Ins. Co., 31 Me. 455.

In the case of a constructive total loss of a vessel, this result is not changed, though the vessel is afterwards repaired and proceeds on the voyage and earns all the freight (Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341). A vessel may not be detained an unreasonable length of time for the purpose of making repairs (Roe v. Crescent Mut. Ins. Co. of New Orleans, 11 La. Ann. 408). But where the vessel was damaged, and put into a harbor of refuge for repair, and it was found that two months would be required for making the repairs and unloading and reloading, it was held that this was a reasonable time within which the repairs could be made, preventing the insured from abandoning the freight for a total loss (Clark v. Massachusetts Fire & Marine Ins. Co., 2 Pick. [Mass.] 104, 13 Am. Dec. 400). If the cargo is voluntarily surrendered to the shipper at the port of detention without demanding freight, there can be no claim on the insurer (Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437, 4 Am. Rep. 700, reversing 46 Barb. 642).

Whether or not there was a constructive total loss in view of the circumstances was considered in the following cases: Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 12 L. Ed. 834; Hugg v. Augus-

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ta Ins. & Banking Co., 12 Fed. Cas. 821; Russel v. Union Ins. Co., 21 Fed. Cas. 28; Humphreys v. Union Ins. Co., 12 Fed. Cas. 876; Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002; Greene v. Pacific Mut. Ins. Co., 9 Allen (Mass.) 217; Marmaud v. Melledge, 123 Mass. 173; Parage v. Dale, 3 Johns. Cas. (N. Y.) 156; Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; Id., 3 Johns. 321, 3 Am. Dec. 490; Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342; Devitt v. Providence Washington Ins. Co., 65 N. E. 777, 173 N. Y. 17; Callender v. Insurance Co. of North America, 5 Bin. (Pa.) 525.

(d) Cause of loss.

To constitute a constructive total loss the cause of loss must, of course, be one of the perils insured against (Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643). **In the absence of any stipulation limiting the right, the insurer may, on receiving notice of the capture of the vessel, abandon as for a constructive total loss.**

Queen v. Union Ins. Co., 20 Fed. Cas. 131; Ruan v. Gardner, 20 Fed. Cas. 1295; Rhinelander v. Pennsylvania Ins. Co., 4 Cranch, 29, 2 L. Ed. 540; Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 263; Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514; Bohlen v. Delaware Ins. Co., 4 Bin. (Pa.) 430; Mey v. Tunno, 2 Bay (S. C.) 307; Oliver v. Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77; Munson v. New England Ins. Co., 4 Mass. 88; Dorr v. Union Ins. Co., 8 Mass. 494; Delano v. Bedford Ins. Co., 10 Mass. 347, 6 Am. Dec. 132; Dorr v. New England Ins. Co., 11 Mass. 1; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Dutilh v. Gatliff, 4 Dall. (Pa.) 446, 1 L. Ed. 903; Brown v. Phœnix Ins. Co., 4 Bin. (Pa.) 445.

If, however, the policy contains a stipulation not to abandon in case of capture until condemnation, or until the detention has continued for a specified time, a constructive total loss cannot be claimed until the condition is fulfilled.

Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Law v. Goddard, 12 Mass. 112; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; De Peau v. Russel, 1 Brev. (S. C.) 441, 2 Am. Dec. 676. A letter from the agent of the insured is sufficient proof of the fulfillment of the condition (Reynolds v. Ocean Ins. Co., 22 Pick. [Mass.] 191, 33 Am. Dec. 727). Where a policy contained a clause warranting not to abandon, in case of capture or detention, until six months after notice thereof to the insurers, and the vessel was condemned in less than a month after her capture, it was held that the assured might abandon immediately after condemnation; the warranty being confined to the cases of capture and detention only (Ogden v. Columbian Ins. Co., 10 Johns. [N. Y.] 273).

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If the captured property is restored and accepted by the insured, or if it is not condemned, there is a partial loss only.

Speyer v. New York Ins. Co., 3 Johns. (N. Y.) 88; Donath v. Insurance Co. of North America, 4 Dall. (Pa.) 463, 1 L. Ed. 910.

Seizure for breach of neutrality laws or revenue laws constitutes a constructive total loss.

Williams v. Suffolk Ins. Co., 29 Fed. Cas. 1402; Magoun v. New England Marine Ins. Co., 16 Fed. Cas. 483; Smith v. Steinbach, 2 Caines, Cas. (N. Y.) 158.

Restraint or detention by reason of an embargo, in consequence of which the voyage is lost, is a constructive total loss, though the subject-matter of the insurance is in safety and in the control of the owner.

Odlin v. Insurance Co. of Pennsylvania, 18 Fed. Cas. 583; McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 299; Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310, 4 Am. Dec. 359; Ogden v. New York Firemen's Ins. Co., 10 Johns. (N. Y.) 177; Id., 12 Johns. (N. Y.) 25; Delano v. Bedford Marine Ins. Co., 10 Mass. 347, 6 Am. Dec. 132.

But if the voyage is merely delayed by an embargo, for which the insured may not abandon, a war breaking out during the delay does not give the insured a claim for a total loss (Delano v. Bedford Marine Ins. Co., 10 Mass. 347, 6 Am. Dec. 132).

It is a cause for abandonment that the port of destination was shut, by being in possession of an enemy, or by interdiction of trade, or by blockade.

Simonds v. Union Ins. Co., 22 Fed. Cas. 165; Schmidt v. United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; Craig v. United Ins. Co., 6 Johns. 226, 5 Am. Dec. 222.

So, where a vessel, in the prosecution of her voyage, put into a port at which she was permitted by the policy to stop, and while there the place was so closely invested by the enemy's cruisers that if she had attempted to escape she would inevitably have been captured, this was a "restraint of princes" or "of men of war," within the policy, so that the insured might break up the voyage and abandon for a total loss (Saltus v. United Ins. Co., 15 Johns. [N. Y.] 523). But a mere warning that a port is blockaded, whether

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true or false, is not cause for abandonment as for constructive total loss.

King v. Delaware Ins. Co., 14 Fed. Cas. 516, affirmed 6 Cranch, 71, 3 L. Ed. 155; Richardson v. Maine Fire & Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

Nor is there a detention by blockade when the vessel goes to a neighboring port permitted by the policy (Ferguson v. Phœnix Ins. Co., 5 Bin. [Pa.] 544).

It is not a restraint or detention amounting to a constructive total loss when the vessel is detained only until security is given that the cargo will not be carried to the port of destination (Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047); nor abandonment of the voyage by reason of threat or fear of capture (Shapley v. Tappan, 9 Mass. 20; Corp v. United Ins. Co., 8 Johns. [N. Y.] 277).

(e) Same—Sale from necessity.

Though a sale of the vessel or cargo from necessity has in some cases been held to constitute an actual total loss,[1] in others a sale from necessity is regarded as a technical total loss, giving the insured the right to abandon as for a constructive total loss.

Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047; Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45.

A sale may be made by agreement of the parties concerned (London Assurance v. Companhia de Moagens do Barreiro, 68 Fed. 247, 15 C. C. A. 379, 28 U. S. App. 439, affirmed 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113), but otherwise it is authorized only in cases of necessity.

Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55; Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002; Peck v. Nashville Marine & Fire Ins. Co., 6. La. Ann. 148. And the sale must be public (Gomila v. Hibernia Ins. Co., 40 La. Ann. 553, 4 South. 490).

The right to sell, as well as the right to abandon, depends on the state of facts at the time; and the fact that the vessel was repaired immediately after the sale, at the port of disaster, does not show that the sale was unnecessary (Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325). A master will be presumed, in ordering the sale of his ship, to have done his duty properly, if there are no

[1] See ante, p. 2922.

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proofs to the contrary (Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002), especially when he has no opportunity to consult the owners or insurers (Hall v. Franklin Ins. Co., 9 Pick. [Mass.] 466). If the master is present in charge of the vessel, he, only, can make the sale (Paddock v. Commercial Ins. Co., 2 Allen [Mass.] 93). Generally, the master has authority to sell if he deems it expedient and for the best interests of all concerned (Vaughan v. Western Marine & Fire Ins. Co., 19 La. 54). But the master has no power to judge of the necessity of selling a damaged ship, if he has the power of communicating with and consulting the owners or insurers (Peirce v. Ocean Ins. Co., 18 Pick. [Mass.] 83, 29 Am. Dec. 567).

Reference may also be made to Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Allen v. Commercial Ins. Co., 1 Gray (Mass.) 154.

Even a survey and a report thereon recommending a sale is not conclusive as to the necessity in the absence of an order of condemnation.

Cort v. Delaware Ins. Co., 6 Fed. Cas. 604; Peck v. Nashville Marine & Fire Ins. Co., 6 La. Ann. 148.

It is not necessary for the assured, on the vessel's reaching its destination in a foreign port, to give notice to the underwriters of its condition, before a sale could be had, enabling insured to abandon for a total loss (Cohen v. Charleston Fire & Marine Ins. Co., Dud. Law [S. C.] 147, 31 Am. Dec. 549).

Whether the sale was necessary was considered in Robertson v. Western Marine & Fire Ins. Co., 19 La. 227, 36 Am. Dec. 673; Rugely v. Sun Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466; Paddock v. Commercial Ins. Co., 2 Allen (Mass.) 93; Allen v. Commercial Ins. Co., 1 Gray (Mass.) 154.

(f) Effect of repairs, recovery, or recapture.

Attention has already been called to the principle that the proper test of the validity of an abandonment is the actual state of facts at the time the offer is made. It is obviously a corollary to this principle that, **if abandonment as for a constructive total loss is justified by the facts existing when the offer is made, its validity is not affected by a subsequent change.** Thus, a valid abandonment on information of capture is not affected by the subsequent release of the vessel or cargo.

Dorr v. New England Marine Ins. Co., 4 Mass. 221; Lee v. Boardman, 8 Mass. 238, 3 Am. Dec. 134; Munson v. New England Marine Ins.

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Co., 4 Mass. 88; Wood v. Lincoln & Kennebeck Ins. Co., 6 Mass. 479. 4 Am. Dec. 163; Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341; Lovering v. Mercantile Marine Ins. Co., 12 Pick. (Mass.) 348; Slocum v. United Ins. Co., 1 Johns. Cas. (N. Y.) 151; Bordes v. Hallett, 1 Caines (N. Y.) 444. The contrary rule apparently asserted in Smith v. Touro, 14 Mass. 112, must be regarded as influenced by the peculiar facts existing in that case.

It was held in several early cases that a release of the captured vessel unknown to the insured at the time of abandonment would not affect his right.

Mumford v. Church, 1 Johns. Cas. (N. Y.) 147; Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 263; Livingston v. Hastie, 3 Johns. Cas. (N. Y.) 293.

This doctrine was, however, repudiated almost at soon as announced (Church v. Bedient, 1 Caines, Cas. [N. Y.] 21; Hallett v. Peyton, Id. 28), and it is now well settled that **if the insured, before abandonment, recovers the subject insured or indemnity for its loss, there is no longer a constructive total loss for which he may abandon** (Murray v. Harmony Fire & Marine Ins. Co., 58 Barb. [N. Y.] 9). Therefore, a release of the captured vessel before abandonment devests the right to abandon.

Clendining v. Church, 3 Caines (N. Y.) 141; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Adams v. Delaware Ins. Co., 3 Bin. (Pa.) 287; De Peau v. Russel, 1 Brev. (S. C.) 441, 2 Am. Dec. 676.

This is true, though the decree of restitution may not have been executed at the time of the offer to abandon (Marshall v. Delaware Ins. Co., 4 Cranch 202, 2 L. Ed. 596). The restitution must, however, be complete, and a redelivery on bail (Lovering v. Mercantile Ins. Co., 12 Pick. [Mass.] 348), or on payment of ransom to avoid an appeal (Vandenheuvel v. United Ins. Co., 1 Johns. [N. Y.] 406), is not sufficient. So, too, a purchase of the vessel by the insured under a sentence of confiscation does not impair his right to recover for a total loss (Bourke v. Granberry, Gilmer [Va.] 16, 9 Am. Dec. 589).

If the vessel is recaptured before abandonment, it takes away the right (Muir v. United Ins. Co., 1 Caines [N. Y.] 49), though there may be a recovery for salvage and other expenses (Story v. Strettell, 1 Dall. [Pa.] 10, 1 L. Ed. 15). If the recapture be as prize and the salvage be very high, or if further expenses be necessary, and

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the underwriters will not agree to pay them, the assured may abandon (Queen v. Union Ins. Co., 20 Fed. Cas. 131). The effect of recapture to terminate the right to a constructive total loss is, however, dependent on circumstances, and if, by the capture, the vessel lost her papers, so that she cannot pursue her voyage, recapture does not prevent a constructive total loss.

Marine Ins. Co. v. Tucker, 3 Cranch, 357, 2 L. Ed. 466; Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 79.

Where, before abandonment for capture, the vessel is illegally rescued by the master and retaken, and is afterwards condemned for the rescue, the insured are not entitled to abandon; but the rule is otherwise if the vessel is legally rescued, and afterwards retaken.

Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114; McLellan v. Maine Fire & Marine Ins. Co., 12 Mass. 246.

Similarly, if a vessel be repaired before abandonment, the right to abandon as for a constructive total loss is gone.

Depau v. Ocean Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Ritchie v. United States Ins. Co., 5 Serg. & R. (Pa.) 501. Where a clause in one of several policies gives the company issuing it the option to recover and repair, on the failure of the company to exercise the option it does not inure to the benefit of the other companies (Fulton Ins. Co. v. Goodman, 32 Ala. 108).

The restoration must be complete and perfect; and if, though in fact restored, the vessel remain subject to a lien for the expenses of repair to more than half her value, insured may abandon (Dickey v. New York Ins. Co., 4 Cow. [N. Y.] 222). So, too, partial repairs, sufficient to put the vessel in a condition to go in ballast to a port where thorough repairs may be made at less expense, will not affect the right to abandon (Suarez v. Sun Mut. Ins. Co., 4 N. Y. Super. Ct. 482). And under the general rule, if the situation of the vessel, the circumstances, and conditions are such as to render her recovery impracticable to such an extent as to justify an abandonment, the fact that a year later she was raised and repaired at a cost of less than half her value does not affect the right to abandon (Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63).

(g) Amount of damage—Fifty per cent. rule.

To constitute a constructive total loss of a vessel injured by a peril insured against, the injury must generally be of such extent

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that the expense of recovery and repair will exceed 50 per cent. of her value.

Reference to the following cases is deemed sufficient: Hart v. Delaware Ins. Co., 11 Fed. Cas. 683; Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123; Howell v. Philadelphia Mut. Ins. Co., 12 Fed. Cas. 706; Insurance Co. of North America v. Canada Sugar Refining Co., 87 Fed. 491, 31 C. C. A. 65; King v. Hartford Ins. Co., 1 Conn. 422; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Hyde v. Louisiana State Ins. Co., 2 Mart. N. S. (La.) 410, 14 Am. Dec. 196; Riley v. Ocean Ins. Co., 11 Rob. (La.) 255; Wood v. Lincoln & Kennebeck Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. (Mass.) 249; Peele v. Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; Bryant v. Commonwealth Ins. Co., 13 Pick. (Mass.) 543; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Citizens' Ins. Co. v. Glasgow, 9 Mo. 411; Goold v. Shaw, 1 Johns. Cas. (N. Y.) 293, affirmed in 2 Johns. Cas. (N. Y.) 442; Smith v. Bell, 2 Caines, Cas. (N. Y.) 153, overruling Dwpuy v. United Ins. Co., 3 Johns. Cas. (N. Y.) 182; Abbott v. Broome, 1 Caines (N. Y.) 292, 2 Am. Dec. 187; Suarez v. Sun Mut. Ins. Co., 4 N. Y. Super. Ct. 482; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342; Fiedler v. New York Ins. Co., 13 N. Y. Super. Ct. 282; Hubbell v. Great Western Ins. Co., 74 N. Y. 246; Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414; Devitt v. Providence Washington Ins. Co., 70 N. Y. Supp. 654, 61 App. Div. 390; Memphis & A. R. Packet Co. v. Peabody Ins. Co., 7 Ohio Dec. 30, 1 Wkly. Law Bul. 42; Ralston v. Union Ins. Co., 4 Bin. (N. Y.) 386; Jones v. Western Assur. Co. of Toronto, 47 Atl. 948, 198 Pa. 206; Cohen v. Charleston Fire & Marine Ins. Co., Dud. Law (S. C.) 147, 31 Am. Dec. 549; Hedley v. Nashville Insurance & Trust Co., 6 Rich. Law (S. C.) 130; Hundhausen v. United States Fire & Marine Ins. Co. (Tenn. Sup.) 17 S. W. 152.

It is sometimes stated that there must be damage equal to half the value of the vessel; but in a majority of the cases it is said that the damage must exceed half the value.

If the damage exceeds 50 per cent., it is a constructive total loss, though the vessel has performed her voyage and has lain 24 hours in port (Peters v. Phœnix Ins. Co., 3 Serg. & R. [Pa.] 25).

The requirement that the loss shall exceed fifty per cent. of the

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value does not apply if the master is unable to procure funds to make the necessary repairs.

American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532; Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342. This exception would not prevail, however, if the failure to procure funds was due to the want of ordinary diligence on the part of the owner. American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287.

In view of the general principle that it is the probability of loss that is the basis of the right to abandon for a constructive total loss, it has been asserted that, **where a case of extreme hazard is presented, the insured may abandon if the expense of recovery and repair would probably exceed one-half of the value; and the fact that the vessel is subsequently recovered and repaired at less expense will not affect the previous abandonment.**

This principle is asserted in the leading case of Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98, and also in Fulton Ins. Co. v. Goodman, 32 Ala. 108; Fontaine v. Phœnix Ins. Co., 11 Johns. (N. Y.) 293; Hundhausen v. United States Fire & Marine Ins. Co., 3 Tenn. Cas. 184; and Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

The Massachusetts courts have taken the opposite view, holding that, if the vessel is recovered and repaired at less than half her value, the previous abandonment will not avail.

Wood v. Lincoln & Kennebeck Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Marmaud v. Melledge, 123 Mass. 178.

An important, if not a controlling, factor, is that repairs at an expense amounting to less than one-half the value are impracticable. If, however, the injury is of such character that by making partial repairs the vessel can be safely navigated to another port, where her repairs can be completed at such a sum that the whole expense will not exceed half the value of the vessel, the insured cannot abandon.

Peck v. Nashville Marine & Fire Ins. Co., 6 La. Ann. 148; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

But the expenses of the partial repairs, the voyage, and the permanent repairs must amount to less than half the value to affect the right to abandon (Lincoln v. Hope Ins. Co., 8 Gray [Mass.] 22).

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The general rule that the insured may abandon in all cases where the object insured has been damaged to the amount of half its value applies to an insurance on cargo.

Seton v. Delaware Ins. Co., 21 Fed. Cas. 1093; Brooke v. Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141; Ludlow v. Columbian Ins. Co., 1 Johns. (N. Y.) 335; Budd v. Union Ins. Co., 4 McCord (S. C.) 1.

But circumstances may justify the assured in abandoning, though the cargo is damaged to less than half its value (Mordecai v. Firemen's Ins. Co., 12 Rich. Law [S. C.] 512). For instance, if the voyage is lost, though the cargo insured be not damaged half its value, the insured may abandon for a total loss (Fuller v. McCall, 2 Dall. [Pa.] 219, 1 L. Ed. 356). If only certain articles are covered by the policy, and a moiety of them be lost, the assured may abandon as for a total loss, though less than a moiety of the whole cargo is lost (Vandenheuvel v. United Ins. Co., 1 Johns. [N. Y.] 406).

On the other hand, if the cargo itself is not damaged, and can be forwarded to its destination for less than 50 per cent. of its value, a sale by the master cannot make a constructive total loss (Bryant v. Commonwealth Ins. Co., 13 Pick. [Mass.] 543). So, too, if it is a distinct portion of the cargo that is destroyed, leaving a considerable portion, though less than 50 per cent., undamaged, which, the voyage not being broken up, is delivered in safety, the insured cannot abandon as for a total loss.

This principle is asserted in Forbes v. Manufacturers' Ins. Co., 1 Gray (Mass.) 371, on the authority of Seton v. Delaware Ins. Co., 21 Fed. Cas. 1093.

A loss of more than half the freight insured may be regarded as a constructive total loss.

Rogers v. Nashville Ins. Co., 9 La. Ann. 537; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45.

(h) Same—Determination of amount.

In determining whether the vessel has been damaged to an extent exceeding half the value, is the proportion to be based on the actual value or on the valuation in the policy? The weight of authority undoubtedly is that **it is the actual value that is to be used as the basis for estimating the extent of damage.**

The rule is asserted in Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123;

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Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98; Wallace v. Thames & Mersey Ins. Co. (C. C.) 22 Fed. 66; Fulton Ins. Co. v. Goodman, 82 Ala. 108; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; Peabody Ins. Co. v. Memphis & Arkansas River Packet Co., 5 Am. Law Rec. 499, 5 Ohio Dec. 417; American Ins. Co. v. Francia, 9 Pa. 390.

Moreover, it is her actual value at the time and place of the disaster, and not the value at the vessel's home port.

Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123.

So, too, it is her general value, and not her value for any particular voyage or purpose, that is to be taken (Center v. American Ins. Co., 7 Cow. [N. Y.] 564).

It is true, in Massachusetts and in some late New York cases the rule has been laid down that the valuation in the policy must be taken as the basis of the estimate of the amount of damage.

Winn v. Columbian Ins. Co., 12 Pick. (Mass.) 279; Lovering v. Mercantile Marine Ins. Co., 12 Pick. (Mass.) 348; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Boardman v. Boston Marine Ins. Co., 146 Mass. 442, 16 N. E. 26; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287; Fiedler v. New York Ins. Co., 13 N. Y. Super. Ct. 282; Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414.

But it is certain that in many of these cases the decision is grounded on the stipulation in the policy that, to entitle the insured to abandon, the loss must exceed one-half "the agreed value." When such stipulation exists, its controlling effect has been recognized, too, in the federal courts.

Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643; Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

As a general rule, the expense of repairing at the port of necessity is the criterion for determining the extent of the loss.

American Ins. Co. v. Center, 4 Wend. (N. Y.) 45; Center v. American Ins. Co., 7 Cow. (N. Y.) 564; Saurez v. Sun Mut. Ins. Co., 4 N. Y. Super. Ct. 482.

If, however, full repairs cannot be made there, but only in part, and sufficient to enable her to pursue her voyage, then, to the proba-

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ble expense at the port of necessity, it is proper to add the expense of the additional repairs at the place where she could be repaired in full (American Ins. Co. v. Center, 4 Wend. [N. Y.] 45). So, too, if there are no reasonable means of repairing a vessel at the port to which she is brought, and she can be safely navigated to another port, where the repairs would be cheaper, the expense of repairing is to be estimated according to the cost at the latter port (Hall v. Franklin Ins. Co., 9 Pick. [Mass.] 466).

In determining whether the expense of repairs exceeds half the value of the vessel, defects existing prior to the inception of the policy, if not such as to render her unseaworthy, cannot be taken into consideration (Depau v. Ocean Ins. Co., 5 Cow. [N. Y.] 63, 15 Am. Dec. 431). The cost to be estimated is what it will cost to completely and thoroughly repair the vessel, and not merely to render her seaworthy.

Lincoln v. Hope Ins. Co., 8 Gray (Mass.) 22; Prince v. Equitable Safety Ins. Co., 12 Gray (Mass.) 527; Center v. American Ins. Co., 7 Cow. (N. Y.) 564.

In estimating the cost of repairs, the rule established by the weight of authority is that there shall be no deduction of one-third new for old.

This rule is supported by Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98; Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002; Wallace v. Thames & Mersey Ins. Co. (C. C.) 22 Fed. 66; Phillips v. St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Peabody Ins. Co. v. Memphis & Arkansas River Packet Co., 5 Am. Law Rec. 499, 5 Ohio Dec. 417; American Ins. Co. v. Francia, 9 Pa. 390.

In New York and Massachusetts the contrary rule has been adopted.

Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Winn v. Columbian Ins. Co., 12 Pick. (Mass.) 279; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Orrok v. Commonwealth Ins Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall v. Ocean Ins. Co. 21 Pick. (Mass.) 472; Reynolds v. Same, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Smith v. Bell, 2 Caines, Cas. (N. Y.) 153, overruling Dwpuy v. United Ins. Co., 3 Johns. Cas. (N. Y.) 182; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Pezant v. National Ins. Co., 15 Wend. (N. Y.) 453; Fiedler v. New York Ins. Co., 13 N. Y. Super. Ct. 282.

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General average charges should not be added to the cost of repairs in order to bring the amount of damage up to the required per cent.

Padelford v. Boardman, 4 Mass. 548; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Winn v. Columbian Ins. Co., 12 Pick. (Mass.) 279; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Hall v. Same, 21 Pick. (Mass.) 472; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Greely v. Tremont Ins. Co., 9 Cush. (Mass.) 415; Ellicott v. Alliance Ins. Co., 14 Gray (Mass.) 318; Fiedler v. New York Ins. Co., 13 N. Y. Super. Ct. 282.

But if the owner of the vessel is owner of the cargo and freight, general average contributions for which the freight and cargo would be liable must be deducted from the cost of repairs (Pezant v. National Ins. Co., 15 Wend. [N. Y.] 453).

If the cargo is taken out of a stranded vessel, in determining whether the loss on the goods, if sent on to the port of destination, would have equaled 50 per cent. of the invoice value, thus entitling the assured to abandon, the premium required to insure against the risks of plunder and weather during the transportation should not be considered, those risks being covered by the policy (Bryant v. Commonwealth Ins. Co., 6 Pick. [Mass.] 131). If a constructive total loss is sought to be maintained upon the mere ground of the deterioration of the cargo at an intermediate port to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate (Marcardier v. Chesapeake Ins. Co., 8 Cranch, 39, 3 L. Ed. 481). Where the insurance was on certain articles specified in the policy, and a part were lost by jettison, and a part, being damaged, were sold at a port of necessity, the residue, being less than a moiety, arriving at the port of destination, the assured may abandon, notwithstanding that, by deducting the sum which the part sold produced from the prime cost of all that part of the subject which never arrived, it would reduce it to less than a moiety of the prime cost of the whole (Moses v. Columbian Ins. Co., 6 Johns. [N. Y.] 219).

Where distinct voyages are covered, freight earned on an outward voyage cannot be deducted in computing a constructive total loss of freight on a voyage home (Thwing v. Washington Ins. Co., 10 Gray [Mass.] 443).

Various elements of expense have been considered in determining the extent of loss. Interest on funds raised for repairs (Heebner v. Eagle Ins. Co., 10 Gray [Mass.] 131, 69 Am. Dec. 308), expenses in re-

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moving cargo in order to float the vessel (Harvey v. Detroit Fire & Marine Ins. Co., 79 N. W. 898, 120 Mich. 601), and the cost of taking the vessel to the nearest port where she can be completely repaired (Lincoln v. Hope Ins. Co., 8 Gray [Mass.] 22; Ellicott v. Alliance Ins. Co., 14 Gray [Mass.] 318; Young v. Ins. Co. [D. C.] 24 Fed. 279), have been included. The expense of raising the vessel has been excluded (Jones v. Western Assur. Co., 47 Atl. 948, 198 Pa. 206). And if, by the memorandum, the insurers were exempted from loss occasioned by a boiler explosion, in estimating a constructive total loss the value of the engines and boilers is not to be taken into consideration (Citizens' Ins. Co. v. Glasgow, 9 Mo. 411).

Generally, reference may be made to Levi v. New Orleans Mut. Ins. Ass'n, 15 Fed. Cas. 418; Ralston v. Union Ins. Co., 4 Bin. (Pa.) 386; Hundhausen v. United States Fire & Marine Ins. Co. (Tenn. Sup.) 17 S. W. 152; Id., 3 Tenn. Cas. 184; McConochie v. Sun Mut. Ins. Co., 16 N. Y. Super. Ct. 99; Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414; Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190, 3 Am. Dec. 705.

(i) Questions of practice.

In an action on a policy of marine insurance an allegation of a total loss covers a constructive, as well as an actual, loss (Snow v. Union Mut. Marine Ins. Co., 119 Mass. 592, 20 Am. Rep. 349), and the declaration need not aver an abandonment (Hodgson v. Marine Ins. Co., 5 Cranch, 100, 3 L. Ed. 48). If the declaration alleges a total loss and claims recovery therefor, and also alleges an abandonment and that the loss amounted to more than half the whole value declared in the policy, but does not allege that the loss amounted to less than the whole value, a demurrer that the declaration is double, repugnant, ambiguous, and multifarious does not raise the question whether, under the allegation of total loss, the insured may recover as for a constructive total loss (Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. [C. C.] 66 Fed. 69).

Reports of surveyors, subscribed but not verified, are not admissible to show the extent of the loss (Murray v. Great Western Ins. Co., 39 Hun [N. Y.] 581). So, a surveyor's report upon a damaged vessel, stating his opinion concerning the repairs necessary to be made and an estimate of their cost, is not admissible in evidence where the only evidence to corroborate such report is the testimony of the surveyor himself that the condition of the ship appeared fully in the report (Howard v. Orient Mut. Ins. Co., 25 N. Y. Super. Ct. 539). Since the burden is on the insured to justify the abandonment, evidence as to the prices demanded by mechanics in the port of distress for necessary repairs is admissible (Osborne v. New York

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Mut. Ins. Co., 53 Hun, 633, 6 N. Y. Supp. 103, affirmed 127 N. Y. 656, 28 N. E. 254). The fact that the insurer demanded and accepted payment of a premium note after receiving notice of loss and of abandonment does not relieve the insured from the necessity of proving the loss to entitle him to recover on the policy (Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601).

3. ABANDONMENT AND EFFECT THEREOF.

(a) Persons who may abandon.
(b) Time when abandonment must be made.
(c) Form and sufficiency of abandonment.
(d) Revocation of abandonment.
(e) Acceptance of abandonment.
(f) Same—Taking possession for purpose of repairs.
(g) Waiver of abandonment.
(h) Operation and effect of abandonment.
(i) Same—Title conferred on insurer.
(j) Rights and liabilities of insurer after abandonment.

(a) Persons who may abandon.

The existence of a constructive total loss, giving the right to abandon, being conceded, it is, of course, elementary that **the insured is generally the proper person to make an abandonment.** Even where one insures for whom it may concern, payable in case of loss to himself, he is prima facie authorized to abandon (Reynolds v. Ocean Ins. Co., 22 Pick. [Mass.] 191, 33 Am. Dec. 727). Abandonment by one part owner of his interest in the vessel to the insurer of such interest does not affect the interest of other part owners, nor the master's control over the vessel, so far as their interest is concerned (Kirby v. Thames & Mersey Ins. Co. [D. C.] 27 Fed. 221).

If, however, the insured has been devested of his ownership by process of law (Rice v. Homer, 12 Mass. 230), or by bill of sale with an agreement for the application of the proceeds to the payment of his debts (Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. [Mass.] 249), he cannot abandon. **A mortgagor may generally abandon, especially if the mortgagee subsequently assents thereto** (Fulton Ins. Co. v. Goodman, 32 Ala. 108); or if the mortgage expressly provides that the owners shall control and possess the vessel until default in the payment of the mortgage (Murray

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v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414, affirmed 147 N. Y. 711, 42 N. E. 724).

The agent who makes insurance for his principal has authority to abandon to the underwriters without a formal letter of attorney.

Chesapeake Marine Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Cassedy v. Louisiana State Ins. Co., 6 Mart. N. S. (La.) 421.

Authority to abandon may be conferred on an agent by parol (Parker v. Towers, 2 Browne [Pa.] 80).

(b) Time when abandonment must be made.

Though an election to abandon cannot be made until receipt of advice of loss (Bosley v. Chesapeake Ins. Co., 3 Gill & J. [Md.] 450, 22 Am. Dec. 337), **notice of the election to abandon must be given within a reasonable time after intelligence of the loss has been received.**

Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047; Mellon v. Louisiana Ins. Co., 5 Mart. N. S. (La.) 563; Livermore v. Newburyport Marine Ins. Co., 1 Mass. 264; Smith v. Same, 4 Mass. 668; Fuller v. McCall, 2 Dall. (Pa.) 219, 1 L. Ed. 356; Id., 1 Yeates (Pa.) 464, 1 Am. Dec. 312; Bell v. Beveridge, 4 Dall. (Pa.) 272, 1 L. Ed. 830; Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190, 3 Am. Dec. 705.

The mere report of an accident to the vessel does not impose on the insured the obligation of abandoning at once (Earl v. Shaw, 1 Johns. Cas. [N. Y.] 313, 1 Am. Dec. 117). He has the right to wait for more definite information, so long as the delay is not with intent to speculate on the chances (Reynolds v. Ocean Ins. Co., 22 Pick. [Mass.] 191, 33 Am. Dec. 727). **If, however, the loss is well authenticated, abandonment must at once be tendered** (Duncan v. Koch, 8 Fed. Cas. 13).

Reference may also be made to Livermore v. Newburyport Ins. Co., 1 Mass. 264, Smith v. Newburyport Marine Ins. Co., 4 Mass. 668, Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271, and Krumbhaar v. Marine Ins. Co., 1 Serg. & R. (Pa.) 281, where specific instances of delay after adequate information was received are considered.

Where the insured under a marine policy wrote the insurer, inquiring whether he must make an abandonment by judicial act, or if the "present letter, expressing an intent to abandon, will do," the insurer's answer, ignoring the informal tender, and denying

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any liability under the policy, excuses a delay in making the formal tender (De Farconnet v. Western Ins. Co. [D. C.] 110 Fed. 405).

The existence of a pestilence excuses the insured from making an abandonment immediately after knowledge of the ship's loss (McCalmont v. Murgatroyd, 3 Yeates [Pa.] 27); and it has also been held that a failure to abandon for capture until after condemnation is excused where it was known that the capture was illegal (Dorr v. Union Ins. Co., 8 Mass. 494; Same v. New England Ins. Co., 11 Mass. 1).

An offer to abandon, made as soon as preliminary proofs of loss were obtained, was held to be in time in Gardner v. Columbian Ins. Co., 9 Fed. Cas. 1165. In the absence of evidence to show the facilities for communication between the place of loss and the place of the insured's residence, a delay of three weeks in offering to abandon has been held not to be unreasonable.

Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414, affirmed 147 N. Y. 711, 42 N. E. 724.

In a recent case it has been held that notice given before the contract for permanent repairs was made was in time, though the insured delayed to obtain information as to the expenses and charges incurred (Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601, 79 N. W. 898). The question whether notice of abandonment has been given within a reasonable time is generally regarded as a mixed question of law and fact.

Chesapeake Marine Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Maryland Ins. Co. v. Ruden's Adm'r, 6 Cranch, 338, 3 L. Ed. 242; Livingston v. Maryland Ins. Co., 7 Cranch, 506, 3 L. Ed. 421; Smith v. Newburyport Marine Ins. Co., 4 Mass. 668; Parker v. Towers, 2 Browne (Pa.) 80; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727. See, also, Mellon v. Louisiana State Ins. Co., 5 Mart. N. S. (La.) 563; Id., 6 Mart. N. S. (La.) 424; and Bell v. Beveridge, 4 Dall. (Pa.) 272, 1 L. Ed. 830.

The right to abandon may, of course, be kept in suspense by mutual consent (Livingston v. Maryland Ins. Co., 6 Cranch, 274, 3 L. Ed. 222). Thus, where the policy provides that there shall not be abandonment on detention or capture until six months has elapsed, an abandonment made at the expiration of such period is, of course, in time (Clarkson v. Phœnix Ins. Co., 9 Johns. [N. Y.] 1). But it must be made before the cause of loss is removed (Dorr

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v. Union Ins. Co., 8 Mass. 502). And when the policy provided that in case of detention abandonment should not be made for 60 days after notice (Savage v. Pleasants, 5 Bin. [Pa.] 403, 6 Am. Dec. 424), an abandonment made in May was too late, where notice of the detention was received February 1st, preceding. Whether or not the insurer was prejudiced by the delay was regarded in Taber v. China Mut. Ins. Co., 131 Mass. 239, as immaterial. A different opinion was, however, expressed in Young v. Union Ins. Co. (D. C.) 24 Fed. 279.

(c) Form and sufficiency of abandonment.

To constitute a valid abandonment it is not necessary that any particular form should be followed, or even that it should be in writing.

Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507; Fulton Ins. Co. v. Goodman, 32 Ala. 108; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Thwing v. Washington Ins. Co., 10 Gray (Mass.) 443; Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73; Bell v. Beveridge, 4 Dall. (Pa.) 272, 1 L. Ed. 830.

And even when the policy provides that notice of abandonment shall be in writing, a telegram is a compliance therewith (Richelieu & O. Nav. Co. v. Thames & Mersey Ins. Co., 72 Mich. 571, 40 N. W. 758). An abandonment to the agent of the insurers is an abandonment to the insurers (Fosdick v. Norwich Marine Ins. Co., 3 Day, 108).

While no particular form is necessary, a notice of abandonment should show directly, affirmatively, and explicitly a present intent to abandon, and, if that is done, the notice is, in its general terms, sufficient.

Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507; Thomas v. Rockland Ins. Co., 45 Me. 116; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; Bell v. Beveridge, 4 Dall. (Pa.) 272, 1 L. Ed. 830. But see Cassedy v. Louisiana State Ins. Co., 6 Mart. N. S. (La.) 421, where it was held that a demand of payment for a total loss amounted to an abandonment.

The insured must always state a sufficient reason for his offer to abandon, but if a sufficient cause is stated he need not communi-

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cate other additional causes, although they were known to him, if the underwriters refuse to accept the abandonment.

Dederer v. Delaware Ins. Co., 7 Fed. Cas. 341; King v. Delaware Ins. Co., 14 Fed. Cas. 516, affirmed in 6 Cranch, 71, 3 L. Ed. 155.

If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event without a new abandonment.

King v. Delaware Ins. Co., 14 Fed. Cas. 516, affirmed 6 Cranch, 71, 3 L. Ed. 155; Suydam v. Marine Ins. Co., 1 Johns. 181, 3 Am. Dec. 307; Dickey v. New York Ins. Co., 4 Cow. 222; Id., 3 Wend. 658, 20 Am. Dec. 763. But it was said in Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138, that if the assured assign a wrong cause of abandonment, although he cannot recover for a total loss, he may recover for his actual loss.

The letter of abandonment should state with sufficient certainty the cause of loss, and this must appear to have been a peril insured against.

Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643; Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307.

But if the abandonment is claimed because of condemnation after a survey under the "rotten clause," the particulars of the defects need not be stated (Griswold v. National Ins. Co., 3 Cow. [N. Y.] 96); and, when the cause of loss is a matter of public notoriety, a reference thereto in general terms as "the late disaster" is sufficient (Citizens' Ins. Co. v. Glasgow, 9 Mo. 411).

The letter of abandonment should also state the extent of loss in general terms (McConochie v. Sun Mut. Ins. Co., 26 N. Y. 477); but it is sufficient if it appears that the loss exceeds 50 per cent. of the value (Perkins v. Augusta Insurance & Banking Co., 10 Gray [Mass.] 312, 71 Am. Dec. 654).

Statements as to the extent of loss are expressions of opinion only, and are not conclusive on the insured. Peabody Ins. Co. v. Memphis & A. Packet Co., 5 Ohio Dec. 417.

Though there is not an operative abandonment if the insured retains possession of the property for his own purposes (Louisville Underwriters v. Pence, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176), yet **it is not necessary, in an offer to abandon, for the insured to**

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tender or give a deed of cession, as the property is completely transferred by the abandonment.

Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047; Northwestern Transp. Co. v. Thames & Mersey Ins. Co., 59 Mich. 214, 26 N. W. 336; Richelieu & O. Nav. Co. v. Thames & Mersey Ins. Co., 72 Mich. 571, 40 N. W. 758.

Nor is it necessary that the insured should specify in his notice of abandonment the exact fractional interest abandoned (Insurance Co. of North America v. Johnson, 70 Fed. 794, 17 C. C. A. 416, 37 U. S. App. 413). Moreover, the absolute rejection by the insurer of an abandonment which contains an offer to make any further conveyance or assurance of title to the abandoned vessel which may be required is a waiver of the right to object to the form of the abandonment.

The sufficiency of the abandonment, in view of the facts, has been considered in the following cases: Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739; Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Macy v. Whaling Ins. Co., 9 Metc. (Mass.) 354; Lincoln v. Hope Ins. Co., 8 Gray (Mass.) 22; Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Thwing v. Washington Ins. Co., 10 Gray (Mass.) 443; Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Sherlock v. Globe Ins. Co., 1 Wkly. Law Bul. 26, 7 Ohio Dec. 17.

(d) Revocation of abandonment.

The revocation of an abandonment before it is accepted by the underwriters may be inferred from the conduct of the assured, but it is generally a question of fact for the jury (Columbian Ins. Co. v. Ashby, 4 Pet. 139, 7 L. Ed. 809). For instance, the purchase of property damaged by the perils insured against by the owner, who has been insured, has the effect of revoking an abandonment, and turning the total into a partial loss (Robertson v. Western Marine & Fire Ins. Co., 19 La. 227, 36 Am. Dec. 673). This is also the doctrine of Oliver v. Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77. But where a vessel was captured and sent in for condemnation, and the supercargo made an arrangement to redeem the vessel and cargo on allowing the captors two-thirds of the sale, the owners, on return of the vessel, receiving a part of the remaining third in an investment in the homeward voyage, this did not revoke a previ-

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ous offer to abandon (Radcliff v. Coster, Hoff. Ch. [N. Y.] 98). If, however, the abandonment has been accepted, it is irrevocable by either party without the assent of the other.

Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98; Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507.

(e) Acceptance of abandonment.

The vice president of an insurance company does not, merely by virtue of his office, have authority to accept an abandonment (Jellinghaus v. New York Ins. Co., 21 N. Y. Super. Ct. 281); and if the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or assistants, or a plurality of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company (Beatty v. Marine Ins. Co., 2 Johns. [N. Y.] 109, 3 Am. Dec. 401).

When freight is separately insured under a policy providing that no claim for total loss shall be made except in the case of an actual or technical loss of the vessel under the policies of insurance on her, if an abandonment of vessel and cargo is accepted by the underwriters they cannot refuse to accept an abandonment of the freight; for, after accepting an abandonment of the vessel and cargo, the question whether the loss was partial or total is no longer open (Hubbell v. Great Western Ins. Co., 10 Hun [N. Y.] 167).

The acceptance of an abandonment need not be in any particular form or by express words. It may be inferred from circumstances. As said in Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98, a leading case on this branch of insurance law, it may be laid down as a general proposition that, whenever the underwriter does any act in consequence of an abandonment which can be justified only under a right derived from it, that act is of itself decisive evidence of an acceptance.

As recent applications of the general rule, reference may be made to New Orleans & N. Packet & Nav. Co. v. Louisville Underwriters (C. C.) 45 Fed. 370; Singleton v. Phenix Ins. Co., 132 N. Y. 298, 30 N. E. 839, affirming Same v. Phœnix Ins. Co., 57 Hun, 590, 11 N. Y. Supp. 141. Reference may also be made to the important case of Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398, where it was said that the question whether there has been a constructive acceptance of an abandonment is for the jury. See, also, Bell v. Smith, 2 Johns. (N. Y.) 98.

Where the insured notified the underwriters that he had wired the master that if he could not raise the vessel he should wreck her, and

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the underwriters replied, "All right," this was not an acceptance of an abandonment (Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phoenix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739).

If the acts of the insurer amount to an acceptance, the intent is immaterial.

Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Badger v. Ocean Ins. Co., 23 Pick. (Mass.) 347.

The Peele Case, already referred to, lays down the further principle that the acts of the underwriter may prevail even over his express declaration, and in this it is followed by Gloucester Ins. Co. v. Younger, 10 Fed. Cas. 495.

It often happens that underwriters take steps to care for and preserve from further loss the property insured. They are not bound to do this, and, as their acts in such case are for the benefit of all concerned, the courts do not regard their conduct as a constructive acceptance of an abandonment.

Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; Id., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1; Cincinnati Mut. Ins. Co. v. May, 20 Ohio, 212. Especially will this rule apply where the "sue and labor" clause expressly provides that acts of the insured or insurer in recovering, saving, and preserving the property insured in case of disaster shall not be considered a waiver or an acceptance of an abandonment. Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49, affirming 82 Fed. 296, 27 C. C. A. 134. See, also (C. C.) 106 Fed. 116.

A shipment of cattle insured against "absolute total loss only" was in part jettisoned, the vessel having struck upon a reef. Part of the jettisoned cattle reached shore, and were taken possession of and sold by a salvors' association, which had been employed by the underwriters to go to the wreck and act for the interests of all concerned, with an agreement that they should have a lien on the property saved, with power of sale for their reimbursement, but it did not appear for what reason the sale was made. It was held that the owner of the cattle could not recover on the policy, in the absence of proof that the underwriters directed an unauthorized sale, or that salvage was actually claimed and the sale made in satisfaction thereof, and that he could not by due diligence have discharged the lien of the salvors, and thus secured the remnants of the cargo (Monroe v. British & Foreign Marine Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179).

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(f) Same—Taking possession for purpose of repairs.

The insurer, believing that he can reduce the loss to a partial one, may conclude to repair the vessel himself. It has been held in Massachusetts that if the insurer, after an offer of abandonment, takes possession of the vessel and repairs her, restoring her to the insured within a reasonable time, this will not amount to a constructive acceptance of the abandonment.

Wood v. Lincoln & Kennebeck Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Commonwealth Ins. Co. v. Chase, 20 Pick. (Mass.) 142; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Id., 1 Metc. (Mass.) 160.

This principle seems, however, to be peculiar to the courts of Massachusetts. It has been explicitly repudiated in the federal courts, where the rule is laid down that **if, after an abandonment, the underwriter takes possession of the vessel, though for the purpose of repairing and restoring her to the owner, it is an acceptance of the abandonment** (Peele v. Merchants' Ins. Co., 19 Fed. Cas. 98); and this is true though the insurer has expressly refused to accept the abandonment (Gloucester Ins. Co. v. Younger, 10 Fed. Cas. 495). And it has been said in Northwestern Transportation Co. v. Thames & Mersey Ins. Co., 59 Mich. 214, 26 N. W. 336, that the exception of the sue and labor clause does not apply when possession is taken for making repairs. On the other hand, though the general principle was approved in Norton v. Lexington F., L. & M. Ins. Co., 16 Ill. 235, it was said that the rule would be different under the sue and labor clause.

But whatever may be the rule when an offer to restore is made within a reasonable time, the courts are agreed on the rule that **if, after an abandonment, the underwriter takes possession of the vessel, and gets her off and repairs her, it is an acceptance of the abandonment if he does not return her in a reasonable time.**

Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398; Phœnix Ins. Co. v. Copelin, 9 Wall. (U. S.) 461, 19 L. Ed. 739; Young v. Union Ins. Co. (D. C.) 24 Fed. 279; Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Peele v. Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Richelieu & O. Nav. Co. v. Thames & M. Ins. Co., 72 Mich. 571, 40 N. W. 758. And what is a reasonable time is a question for the jury. Copelin v. Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504.

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Of course, where no repairs are made, but the vessel is tendered to the owner in her unrepaired condition, there is also a constructive acceptance of the abandonment.

Northwestern Transp. Co. v. Continental Ins. Co. (C. C.) 24 Fed. 171; Northwestern Transp. Co. v. Thames & Mersey Ins. Co., 59 Mich. 214, 26 N. W. 336.

Though the offer to abandon is refused as not justified by the facts, if the insured persist in the abandonment, and the insurers take possession of the vessel without declaration of their object, and refuse to return the vessel unless their expenses for repairing are paid, this is an acceptance of the abandonment (Cincinnati & Ohio Ins. Co. v. Bakewell, 43 Ky. [4 B. Mon.] 541).

But it has been held that, if the policy provides that the insurer shall not be liable for a partial loss unless it amounts to half the value of the vessel, the insurer, on repairing for less than that amount, may recover the expense of saving and repairing (Commonwealth Ins. Co. v. Chase, 20 Pick. [Mass.] 142).

If the insurer takes possession under a purchase from persons to whom a stranded vessel had been sold by the master, which sale was ratified by the owners, the failure to restore her will not constitute an acceptance of the abandonment, as the insurers hold under a distinct right (Badger v. Ocean Ins. Co., 23 Pick. [Mass.] 347).

If the underwriter takes possession and repairs the vessel and tenders her to the insured, the latter is not bound to receive her if there is any material deficiency in the repairs.

Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Copelin v. Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504. But the underwriters are not obliged to make good the decayed parts of a vessel unless the accident within the peril insured against will not admit of repairs, so that the decayed parts may be used as formerly (Hyde v. Louisiana Ins. Co., 2 Mart. N. S. [La.] 410, 14 Am. Dec. 196).

If the insured refuses to receive the vessel, but does not point out any deficiencies in the repairs, there is no constructive acceptance of the abandonment.

Marmaud v. Melledge, 123 Mass. 173; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727.

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But where the deficiencies are obvious, so that, to be seen, they do not need to be pointed out, and are very great as compared with the repairs actually made, it is not incumbent on the assured to point them out, in order to justify his refusal of the vessel, and to maintain his action on the policy (Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739).

(g) Waiver of abandonment.

A waiver by the insured of the abandonment may be inferred from facts and circumstances (McLellan v. Maine Fire & Marine Ins. Co., 12 Mass. 246). Thus, a use of the abandoned property by the insured for his own purposes will be regarded as a waiver (Sherlock v. Globe Ins. Co., 7 Ohio Dec. 17, 1 Wkly. Law Bul. 26). **But waiver will not be inferred from the acts of the owner or his representatives in the line of their duty as agents of the insurer after abandonment** (Catlett v. Pacific Ins. Co., 5 Fed. Cas. 291), especially when such acts are by the express authority of the insurer (King v. Hartford Ins. Co., 1 Conn. 333). Thus, where a port of destination was blockaded, the going to another port for the purpose of delivering her cargo will, after an abandonment, be considered as having been done for the benefit of the insurer (Schmidt v. United Ins. Co., 1 Johns. [N. Y.] 249, 3 Am. Dec. 319). And while the redelivery of a captured vessel on bail to an agent appointed by the master is not a waiver of an abandonment (Lovering v. Mercantile Ins. Co., 12 Pick. [Mass.] 348), the receiving and disposing of a vessel and the proceeds of cargo by the insured, or a person whom he has put in as ostensible owner, in order to claim in case of capture, will operate as a waiver of a previous abandonment.

Oliver v. Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77; Smith v. Touro, 14 Mass. 112.

A sale of the vessel by the insured or his representatives after abandonment is not a waiver if the sale is public, and not for his own benefit, but on account of the insurer.

Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325; Livingston v. Hastie, 3 Johns. Cas. (N. Y.) 293; Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310, 4 Am. Dec. 359.

And where the abandonment was by the mortgagor of the vessel, assented to by the mortgagee, the subsequent sale of the vessel by

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the mortgagee under his mortgage was not a waiver of the abandonment so far as the mortgagor is concerned (Fulton Ins. Co. v. Goodman, 32 Ala. 108).

The purchase of a vessel, after abandonment, by the original owner or by his representatives, and afterwards assented to by him, is not a waiver of the abandonment if the sale is open and fair, and the purchase is made, not for the benefit of the owner, but as agent for the insurer.

King v. Middletown Ins. Co., 1 Conn. 184; Abbott v. Sebor, 3 Johns. Cas. 39, 2 Am. Dec. 139; Abbott v. Broome, 1 Caines (N. Y.) 292, 2 Am. Dec. 187; Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310, 4 Am. Dec. 359.

But if the sale is not bona fide, and the insured purchases on his own account and for his own benefit, it will amount to a waiver of the abandonment.

King v. Hartford Ins. Co., 1 Conn. 333; Ogden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 25. But a purchase by the son of the insured at a sale made by the master of the damaged cargo was not sufficient to show that the purchase was made on account of his father, or in any manner to affect the validity of the sale. Vaughan v. Western Ins. Co., 19 La. 276.

Whether an abandonment is waived or not is, however, generally a question for the jury, to be decided by the circumstances of the case (Curcier v. Philadelphia Ins. Co., 5 Serg. & R. [Pa.] 113).

(h) Operation and effect of abandonment.

A mere notice of abandonment at a given time, without actual abandonment, amounts to nothing; and, if the parties act as if no abandonment were made, they are not bound (Delaware Ins. Co. v. Winter, 38 Pa. 176). But **when an abandonment is made and accepted it is binding on both parties.**

Child v. Sun Mut. Ins. Co., 4 N. Y. Super. Ct. 76; Buffalo City Bank v. Northwestern Ins. Co., 30 N. Y. 251.

This is true, though the acceptance is under circumstances of doubt as to the right to abandon (Cincinnati & Ohio Ins. Co. v. Bakewell, 4 B. Mon. [Ky.] 541). But, of course, an invalid abandonment is ineffectual.

Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Id., 13 Pick. (Mass.) 543; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32

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Am. Dec. 271; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 21 Sup. Ct. 1, 179 U. S. 1, 45 L. Ed. 49, affirming 82 Fed. 296, 27 C. C. A. 134.

An abandonment to the underwriters is not a ratification of an unauthorized sale by the master (Ward v. Peck, 18 How. 267, 15 L. Ed. 383). Nor does it relieve one personally liable for a contribution to general average (Delaware Ins. Co. v. Delaunie, 3 Bin. [Pa.] 295).

An abandonment rightfully made relates back to the time of the loss.

Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123; Dederer v. Delaware Ins. Co., 7 Fed. Cas. 341; The Manitoba (D. C.) 30 Fed. 129; Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Clamageran v. Banks, 6 Mart. N. S. (La.) 551; Graham v. Ledda, 17 La. Ann. 45; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Sun Mut. Ins. Co. v. Hall, 104 Mass. 507; Snow v. Union Mut. Marine Ins. Co., 119 Mass. 592, 20 Am. Rep. 349.

But this relation back is for the protection of the underwriters, and cannot be used as a means of enabling the owners to obtain a lien for services that they were bound to render before abandonment (The Manitoba [D. C.] 30 Fed. 129). **An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it** (The Sarah Ann, 21 Fed. Cas. 432, affirmed 13 Pet. 387, 10 L. Ed 213).

It is a general rule that **upon the occurrence of a constructive total loss the master becomes the agent of the insurer, at least after an abandonment.**

Dederer v. Delaware Ins. Co., 7 Fed. Cas. 341; Hammond v. Essex Fire & Marine Ins. Co., 11 Fed. Cas. 387; Lawrence v. New Bedford Ins. Co., 15 Fed. Cas. 75; The Sarah Ann, 21 Fed. Cas. 432, affirmed 13 Pet. 387, 10 L. Ed. 213; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514; Mordecai v. Firemen's Ins. Co., 12 Rich. Law (S. C.) 512; Phillips v. St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Badger v. Ocean Ins. Co., 23 Pick. (Mass.) 347; Mowry v. Charleston Ins. & Trust Co., 6 Rich. Law (S. C.) 146, 60 Am. Dec. 122.

It was, on this ground, held in the Jumel Case that the master could not by any act of his convert the total into a partial loss. It has, however, been held that the insurer would not be bound

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if the master is part owner (Peirce v. Ocean Ins. Co., 18 Pick. [Mass.] 83, 29 Am. Dec. 567), or ostensible owner for the purpose of avoiding condemnation in case of capture (Smith v. Touro, 14 Mass. 112). But it is the doctrine of Prince v. Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676, that the fact that the master is part owner does not affect his status. Indeed, it has been held in other cases that on an abandonment the insured, his agent, and his consignee become the agents of the insurer.

'Chesapeake Marine Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141; Miller v. Depeyster, 2 Caines (N. Y.) 301; Curcier v. Philadelphia Ins. Co., 5 Serg. & R. (Pa.) 113.

(i) Same—Title conferred on insurer.

An abandonment of property under a policy transfers to the underwriter the entire interest of the insured in such property to the extent that such interest is covered by the policy.

Reference may be made to Chesapeake Marine Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Dederer v. Delaware Ins. Co., 7 Fed. Cas. 341; Murphy v. Dunham (D. C.) 38 Fed. 503; Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; Norton v. Lexington Fire, Life & Marine Ins. Co., 16 Ill. 235; Mellon v. Bucks, 5 Mart. N. S. (La.) 371; Clamageran v. Banks, 6 Mart. N. S. (La.) 553; Hooper v. Whitney, 19 La. 267; Phillips v. St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Graham v. Ledda, 17 La. Ann. 45; Peirce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Badger v. Same, 23 Pick. (Mass.) 347; Union Ins. Co. v. Burrell, Anth. N. P. (N. Y.) 128; Atlantic Ins. Co. v. Storrow, 1 Edw. Ch. (N. Y.) 621; Rogers v. Hosack's Ex'rs, 18 Wend. (N. Y.) 319; Merchants' & Manufacturers' Ins. Co. v. Duffield, 2 Handy (Ohio) 122; Evans v. Ingersol, 15 Ohio St. 292.

This is the result of the abandonment, though there is no actual acceptance by the insurer.

Mellon v. Bucks, 5 Mart. N. S. (La.) 371; Gould v. Citizens' Ins. Co., 13 Mo. 524.

And a separate or formal deed of cession is not necessary to give effect to such transfer.

Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047; Richelieu & O. Nav. Co. v. Thames & M. Ins. Co., 72 Mich. 571, 40 N. W. 758.

It has also been held that, if the insured is paid as for a total loss, the property insured passes to the insurer without any formal abandonment (Grummond v. The Burlington [D. C.] 73 Fed. 258).

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Consequently, if the owner has parted with his interest by an abandonment, which was accepted, he cannot abandon under another policy (Higginson v. Dall, 13 Mass. 96). The transfer extends even to claims for general average contribution (The Mary E. Perew, 16 Fed. Cas. 975). If the abandonment is made by a mortgagee, it operates to discharge the mortgage by way of estoppel.

Northwestern Transp. Co. v. Continental Ins. Co. (C. C.) 24 Fed. 171; Northwestern Transp. Co. v. Thames & Mersey Ins. Co., 59 Mich. 214, 26 N. W. 336.

Where there are several underwriters, they become the owners, by the abandonment, of the entire vessel, each being a part owner in the proportion that his insurance bore to the entire insurance (Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43).

In the case of partial insurance there is a tendency on the part of some courts to regard the owner as an insurer to the extent of the uninsured value, and consequently to that extent entitled to a proportionate share in the abandonment.

White v. The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Natchez & New Orleans Packet & Nav. Co. v. Louisville Underwriters, 44 La. Ann. 714, 11 South. 54.

That such a rule will prevail when the interest insured is that of a part owner, or when the entire owner insures some definite part, is recognized by the federal court in The Manitoba (D. C.) 30 Fed. 129, and it is probable that, as limited, the rule is approved in other jurisdictions.

Harvey v. Detroit Fire & Marine Ins. Co., 79 N. W. 898, 120 Mich. 601; Cable v. St. Louis Marine Ry. & Dock Co., 21 Mo. 133; Merchants' & Manufacturers' Ins. Co. v. Duffield, 2 Handy (Ohio) 122; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 200, 67 Am. Dec. 339.

But when the insurance reaches every part of the ownership indiscriminately, an abandonment will extend to the entire property, though its value exceeds the amount of the insurance.

This rule is laid down in The Manitoba (D. C.) 30 Fed. 129; Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700. The rule seems also to have been recognized in Kentucky. Cincinnati & Ohio Ins. Co. v. Bakewell, 4 B. Mon. 541. See, also, The St. Johns (D. C.) 101 Fed. 469, where it was held that the collection from an insurance company of the full amount at which a vessel was valued

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in the policy, on account of injury by collision, does not import an abandonment of the vessel by the owners to the insurer, where she was undervalued in the policy, and the owners refused to abandon.

(J) Rights and liabilities of insurer after abandonment.

As a necessary incident to the transfer of title by abandonment and acceptance thereof, the insurer acquires all the rights and remedies of the insured, including the spes recuperandi.

Mutual Safety Ins. Co. v. Cargo of the George, 17 Fed. Cas. 1082; Hooper v. Whitney, 19 La. 267; Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285.

Thus, when a master of a vessel, acting in his capacity as master, and from an alleged necessity, sells a damaged ship, since the owners may, against the vendee, show that there was no such necessity, and that therefore the property was not devested, upon an abandonment the same right would pass to the insurers (Peirce v. Ocean Ins. Co., 18 Pick. [Mass.] 83, 29 Am. Dec 567).

The underwriter is entitled to the property and proceeds thereof, and may consequently sue therefor in his own name.

Chesapeake Marine Ins. Co. v. Stark, 6 Cranch, 268, 3 L. Ed. 220; Simonds v. Union Ins. Co., 22 Fed. Cas. 166; Mellon v. Bucks, 5 Mart. N. S. (La.) 371; Clamageran v. Banks, 6 Mart. N. S. (La.) 553; Hooper v. Whitney, 19 La. 267; Graham v. Ledda, 17 La. Ann. 45; Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55; Sun Mut. Ins. Co. v. Hall, 104 Mass. 507; Union Ins. Co. v. Burrell, Anth. N. P. (N. Y.) 128; Atlantic Ins. Co. v. Storrow, 1 Edw. Ch. (N. Y.) 621; Rogers v. Hosack's Ex'rs, 18 Wend. (N. Y.) 319; Evans v. Ingersol, 15 Ohio St. 232. So, too, an underwriter who has accepted an abandonment which devests the original claimant of all interest may be admitted to intervene, and become the dominus litis in a suit in rem, such as libel to enforce the lien of a bottomry bond. The Ann C. Pratt, 1 Fed. Cas. 947.

In view of the general rights of the insurer heretofore referred to, it is obvious that any purchase by the insured or his agents of the property that has been abandoned should be regarded as made for the benefit of the insurer.

United Ins. Co. v. Robinson, 2 Caines (N. Y.) 280; Robinson v. United Ins. Co., 1 Johns. (N. Y.) 592; Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283. This right may, however, be waived by the underwriters. Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159.

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Though underwriters cannot make any claim for salvage property in admiralty unless there has been an abandonment of the property to them, and an acceptance (The Henry Ewbank, 11 Fed. Cas. 1166), yet when there has been an abandonment, and acceptance thereof, the underwriter is entitled to the salvage.

Hurtin v. Phœnix Ins. Co., 12 Fed. Cas. 1047; Taylor v. Insurance Co. of North America (C. C.) 6 Fed. 410; King v. Hartford Ins. Co., 1 Conn. 333; Storer v. Gray, 2 Mass. 565; Lewis v. Eagle Ins. Co., 10 Gray (Mass.) 508; Dumas v. United States Ins. Co., 12 Serg. & R. (Pa.) 437. But not as against a lender bottomry and respondentia. Delaware Mut. Safety Ins. Co. v. Gossler, 96 U. S. 645, 24 L. Ed. 863.

The insurer of a cargo, which has been so damaged by a peril insured against as to become a total loss, or as to make an abandonment inevitable, has such an interest in the salvage of such cargo, even before abandonment, as to entitle him to come into equity to protect the same, and to assert, as against the master of the vessel or others, his right to be consulted as to the disposition of such salvage (Insurance Co. of North America v. Svendsen [C. C.] 77 Fed. 220).

Similarly, the effect of the abandonment of a vessel sunk in collision is to vest in the insurers the right to whatever may be afterwards recovered or received as a compensation for the loss; and damages recovered from the vessel in fault for the collision, for the loss of prospective earnings of the vessel sunk, belong to the insurers, and not to the insured (Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700). If, however, the owner, because of partial insurance, is regarded as a co-insurer, he is entitled to his proportion of the salvage (Phillips v. St. Louis Ins. Co., 11 La. Ann. 459); and so is a mortgagee of the uninsured interest (Rice v. Cobb, 9 Cush. [Mass.] 302).

After an abandonment of a vessel is accepted by the underwriters, they are entitled to the freight subsequently earned.

Hammond v. Essex Fire & Marine Ins. Co., 11 Fed. Cas. 387; United Ins. Co. v. Lennox, 1 Johns. Cas. (N. Y.) 377; Id., 2 Johns. Cas. (N. Y.) 443.

But if the voyage insured is broken up, and a new voyage undertaken, the underwriter cannot claim freight earned on such new voyage as in the nature of salvage freight.

Jordan v. Warren Ins. Co., 13 Fed. Cas. 1105; Simonds v. Union Ins. Co., 22 Fed. Cas. 166.

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The freight earned before the loss, if any, belongs, of course, to the insured (Kennedy v. Baltimore Ins. Co., 3 Har. & J. [Md.] 367, 6 Am. Dec. 499). As an abandonment of the vessel to the insurer on the vessel does not preclude the insured from recovering on the policy on freight (Livingston v. Columbian Ins. Co., 3 Johns. [N. Y.] 49), **if vessel and freight are separately insured, and an abandonment made to each set of underwriters, the underwriters on the freight are entitled to the freight earned before that time, and the underwriters on the vessel to the freight earned after.**

Hammond v. Essex Fire & Marine Ins. Co., 11 Fed. Cas. 387; Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341; Davy v. Hallett, 3 Caines (N. Y.) 16, 2 Am. Dec. 241.

If there is but a partial insurance by a part owner, but the vessel, after repairs, completed her voyage and earned the whole freight, the insurer is entitled to a reasonable freight from the commencement of the voyage to the port where she was repaired, and the remainder should go to the owners, the insurer taking his proportionate share, according to the part abandoned to him (Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341).

The general rule is that an insurer on the cargo has nothing to do with the freight, and the acceptance of the net proceeds of the cargo by the insurers, after abandonment, forms no ground for a claim of freight against them.

Marine Ins. Co. v. United Ins. Co., 9 Johns. (N. Y.) 186; Caze v. Baltimore Ins. Co., 7 Cranch, 358, 3 L. Ed. 370; Armroyd v. Union Ins. Co., 3 Bin. (Pa.) 437.

But if part of the goods be saved, the underwriters are liable for freight, pro rata, to the owner, for the owner has a lien on the goods for freight (Teasdale v. Charleston Ins. Co., 2 Brev. 190, 3 Am. Dec. 705). Where, on recapture, the vessel and cargo were sold to pay the salvage, the vessel bought in by the former owners, and the proceeds of the cargo sent home in her, the agents abroad charging commissions on such transmission, the insurers, to whom the cargo had been abandoned, were entitled to such proceeds, deducting merely such commissions and the balance of freight on the outward voyage remaining after deducting the salvage on the ship (Union Ins. Co. of Philadelphia v. Burrell, Anth. N. P. [N. Y.] 128).

If, after an abandonment, the voyage is continued by the underwriters without objections, it is presumed to be continued on the

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original terms as to compensation of the master and seamen, and the insurer is liable for such wages as owner, not as insurer.

Hammond v. Essex Fire & Marine Ins. Co., 11 Fed. Cas. 387; Frothingham v. Prince, 3 Mass. 563; McBride v. Marine Ins. Co., 7 Johns. (N. Y.) 431. And the seamen are still entitled to their lien for wages (In re Ripley, 9 Daly [N. Y.] 252).

If the master makes a special contract to receive a moiety of the freight in lieu of wages, and procures insurance of his part of the freight, and abandons as for a total loss, and freight is subsequently earned, his abandonment does not operate as an assignment of the freight so subsequently earned, and he is entitled to recover his moiety of the same freight against the abandoners of the vessel (Hammond v. Essex Fire & Marine Ins. Co., 11 Fed. Cas. 387).

The insurer who has accepted an abandonment is liable for reasonable compensation to the master in preserving and looking after the salvaged property, and for reasonable expenses incurred by him in performing such services.

Lawrence v. New Bedford Commercial Ins. Co., 15 Fed. Cas. 75; Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43.

Where there are several insurers, since they become the owners, by the abandonment of the insured vessel, in proportion as they are each liable for her insurance, each is also liable for the same proportion of the entire indebtedness incurred by the master for work done in the attempt to rescue the vessel (Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43). And generally the several underwriters are liable separately, and not as partners, for the amounts expended for necessary repairs; each being liable for a sum bearing the same ratio to the whole sum so expended as the sum underwritten by him bore to the whole amount underwritten (United Ins. Co. v. Scott, 1 Johns. [N. Y.] 106).

Where a vessel insured for one-third its value was abandoned, and the insurance paid as for a total loss, the rule as to abandonment by a co-tenant does not apply; and if the underwriters, after examination by their agent, neither raise, nor prevent the assured from raising, the wreck, they are not liable to the insured for any part of its value (Alleghany Ins. Co. v. Ransom, 69 Pa. 496).

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4. LIMITATION OF LIABILITY BY MEMORANDUM CLAUSE AND EXCEPTION OF PARTICULAR AVERAGE.

(a) Nature and purpose of memorandum clause.
(b) Articles included in memorandum clause.
(c) Necessity of actual total loss.
(d) Total loss of portion of subject-matter.
(e) Restrictions as to cause of loss.
(f) Determination of extent of loss.

(a) Nature and purpose of memorandum clause.

Of the various kinds of property, goods, etc., which may be the subject of marine insurance, some are more liable to injury by the perils insured against than others. Some classes of articles are in their nature perishable, rendering it extremely difficult, and sometimes impossible, to determine whether the damage to such articles is due to the peril or to their inherent tendency to decay. This has led insurers to limit their liability as to such articles by a clause known as the "memorandum clause." This clause, in its common form, provides that certain articles recognized as perishable "are warranted free from particular average," or "are warranted free from average unless general or the ship be stranded." Other articles less perishable "are warranted free from average under" a certain per cent., and as to all other goods, the ship and the freight, they "are warranted free from average under" a certain other per cent., "unless general or the ship be stranded." The object of the clause is to exempt the insurer from trivial losses as to articles generally, and from any partial loss to articles perishable in their nature. But this exemption depends on the cause of loss. If the loss is by stranding, or is otherwise what is known as a general average loss, the clause does not apply. It is only when it is in the nature of a particular average loss that the limitation is brought into operation. And as said in Potter v. Suffolk Ins. Co., 19 Fed. Cas. 1186, **the effect of the memorandum clause is not to enlarge the perils insured against, but to exempt the underwriters from certain losses within those perils.** The insertion of the memorandum excepting the articles therein specified from particular average does not vary the rule by which, when a loss on such articles happens from shipwreck or by damage to the vessel, it is deemed a partial or total loss (Poole v. Protection Ins. Co., 14 Conn. 47). **The clause merely limits the liability of the insurer when the loss is partial.**

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A particular average loss is one suffered by and borne by particular interests—a loss which occurs under such circumstances as do not entitle the owner to call on the other owners concerned in the venture to contribute for his reimbursement (Orrok v. Commonwealth Ins. Co., 21 Pick. [Mass.] 456, 32 Am. Dec. 271). A general average loss, on the other hand, is one which gives a claim to general average contribution from all the owners concerned in the venture, and occurs when there is some voluntary sacrifice made or voluntary expense incurred for the common benefit.

Columbian Ins. Co. v. Ashby, 13 Pet. 331, 10 L. Ed. 186; Peters v. Warren Ins. Co., 19 Fed. Cas. 370, 373; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727.[1]

A loss, whether in the nature of a general average loss or a particular average loss, may be total or partial. By commercial usage, however, the term "particular average," as used in the memorandum clause, has come to be synonymous with partial loss.

Coster v Phœnix Ins. Co., 6 Fed. Cas. 611; Riley v. Ocean Ins. Co., 11 Rob. (La.) 255.

Consequently a warranty "free from average unless general" exempts the insurer from all losses except a general average loss and a total loss (Wadsworth v. Pacific Ins. Co., 4 Wend. [N. Y.] 33). Therefore under the warranty the insurer is liable for a general average loss, however small.

Fireman's Ins. Co. v. Fitzhugh, 4 B. Mon. (Ky.) 160. See, also, Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138, and De Farconnet v. Western Ins. Co. (D. C.) 110 Fed. 405.

If, however, the clause is merely "free from average," without qualifying words, the insurer is exempt from all partial losses, whether they are in the nature of general average losses or not.

Coster v. Phœnix Ins. Co., 6 Fed. Cas. 611; Bargett v Orient Mut. Ins. Co., 16 N. Y. Super. Ct. 385. And a written clause "free from average" will prevail over a printed clause excepting general average.

(b) Articles included in memorandum clause.

Where, in the memorandum clause, certain enumerated articles are warranted free from average unless general, "and all other articles perishable in their own nature," it may be shown that other

[1] For the rules and principles governing general average and contribution therefor, see Century Digest, vol. 44, "Shipping," cc. 739–789, §§ 598–636.

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articles not enumerated are also perishable in their own nature (Nelson v. Louisiana Ins. Co., 5 Mart. N. S. [La.] 289). Corn, grain, and vegetables are generally included in the memorandum as perishable articles, and it has therefore been held that potatoes, though not specifically named, are perishable articles, within the memorandum.

Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002; Williams v. Cole, 16 Me. 207.

It was, however, held in Coit v. Commercial Ins. Co., 7 Johns. (N. Y.) 385, 5 Am. Dec. 282, where vegetables and roots were enumerated, that, in view of the usage in New York, sarsaparilla root was not perishable so as to fall within the memorandum. But in the absence of evidence of a usage to the contrary, a root, though dried and prepared so as to be deprived of its germinating qualities, will be included by the general clause enumerating vegetables and roots (Klett v. Delaware Ins. Co., 23 Pa. 262).

The following articles have been held not to be perishable in their own nature: Deer skins, Bakewell v. United Ins. Co., 2 Johns. Cas. (N. Y.) 246; furs, Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; pickled fish, Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289; fertilizers, Mayo v. India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 9 L. R. A. 831, 23 Am. St. Rep. 814. Ice was held to be perishable in Tudor v. New England Mut. Marine Ins. Co., 12 Cush. (Mass.) 554.

Though the enumeration of hides and skins necessarily includes deer skins (Bakewell v. United Ins. Co., 2 Johns. Cas. [N. Y.] 246), it does not include furs when such articles are not perishable in their nature (Astor v. Union Ins. Co., 7 Cow. [N. Y.] 202). The enumeration of "fruit" includes dried prunes (De Pau v. Jones, 1 Brev. [S. C.] 437), and, under a policy exempting the insurer from liability for partial loss on "bar or sheet iron," evidence that, by a custom in the iron trade, the words "bundles of rods" referred to bar iron, was admissible (Evans v. Commercial Mut. Ins. Co., 6 R. I. 47).

In determining whether certain articles are within the memorandum in a policy of insurance providing against particular average, evidence that the agent of the assured urged the taking of the risk, on the ground that the articles would be free from particular average, is not admissible. Nor is evidence showing insurance at a higher premium on nonmemorandum articles for the same voyage at other offices (Astor v. Union Ins. Co., 7 Cow. [N. Y.] 202).

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Where the memorandum clause provides that the insurer shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, etc., grain of all kinds, etc., nor for any partial loss on hemp or flax, unless the same shall amount to 20 per cent. on the whole aggregate value thereof, the latter provision does not modify the former, so as to render the insurer liable if the loss on bar iron exceeds 20 per cent. (Evans v. Commercial Mut. Ins. Co., 6 R. I. 47). Conversely when the policy contained the usual memorandum clause, by which certain enumerated articles, including wire of all kinds and steel, were "warranted by the assured free from average, unless general"; and also a rider reading, "Free of particular average, but liable for absolute total loss of a part, if amounting to 5 per cent.," it was held that the memorandum clause and rider were in pari materia, and, construed together, exempted the insurer from liability for particular average as to all articles covered by the policy, whether or not they were within the enumeration of the memorandum (Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. [C. C.] 106 Fed. 116).

(e) Necessity of actual total loss.

As has been pointed out in subdivision (a), the purpose of the memorandum clause is to exempt the insurer from liability for a partial loss on certain perishable articles; but it is the general rule, as to which the authorities are unanimous, that **under the general provision of the memorandum, "warranted free from average unless general," the insurer is not liable except for a total loss.**

Morean v. United States Ins. Co., 1 Wheat. 219, 4 L. Ed. 75, affirming 16 Fed. Cas. 707; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49, affirming 82 Fed. 296, 27 C. C. A. 134, Id. (C. C.) 106 Fed. 116; Louisville Fire & Marine Ins. Co. v. Bland, 9 Dana (Ky.) 143; Brooke v. Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Brooke v. Louisiana Ins. Co., 5 Mart. N. S. (La.) 530; Aranzamendi v. Louisiana Ins. Co., 2 La. 432, 22 Am. Dec. 136; Skinner v. Western Ins. Co., 19 La. 273; Williams v. Kennebec Mut. Ins. Co., 31 Me. 455; Maggrath v. Church, 1 Caines (N. Y.) 196, 2 Am. Dec. 173; Neilson v. Columbian Ins. Co., 3 Caines (N. Y.) 108; Le Roy v. Gouverneur, 1 Johns. Cas. (N. Y.) 226; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; Devitt v. Providence Washington Ins. Co., 70 N. Y. Supp. 654, 61 App. Div. 390.

Thus, in Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138, part of the memorandum articles were jettisoned, constituting as to these a

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general average loss. For this the insurers were liable, but as to the other perishable articles there could be no recovery, though they were damaged beyond half their value. And, indeed, there can be no recovery on the memorandum articles, though the loss equals 99 per cent. (Robinson v. Commonwealth Ins. Co., 20 Fed. Cas. 1002).

In many of the early cases it was said that, in view of the memorandum clause, the loss must be actually total, and this seems to be still the rule in Louisiana.

Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 318; Neilson v. Columbian Ins. Co., 3 Caines (N. Y.) 108; Aranzamendi v. Louisiana Ins. Co., 2 La. 432, 22 Am. Dec. 136; Gould v. Louisiana Mut. Ins. Co., 20 La. Ann. 259.

It is, however, recognized in later cases that the rule as to the necessity of total loss on memorandum articles does not mean that there must be an actual total loss—that is, an actual physical destruction, so that the articles no longer exist in specie. There may be a technical total loss, as a loss of value, though the article remains in specie, or the article though existing in specie may be lost to the owner, as by sale at intermediate port.

Reference may be made to Morean v United States Ins. Co., 1 Wheat. 219, 4 L. Ed. 75; Poole v. Protection Ins. Co., 14 Conn. 47; Williams v. Cole, 16 Me. 207; Murray v. Hatch, 6 Mass. 465; Tudor v. New England Mut. Marine Ins. Co., 12 Cush. (Mass.) 554; Bryan v. New York Ins. Co., 25 Wend. (N. Y) 617; De Peyster v Sun Mut. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664, reversing 26 N. Y. Super. Ct. 528. See, also, Nelson v Louisiana Ins. Co., 5 Mart. N. S. (La.) 289. So where a chariot was insured "free from average," and a box of it thrown overboard, it was held that as the chariot did not arrive in specie the insured was entitled to recover for a total loss (Judah v. Randal, 2 Caines, Cas. [N. Y.] 324).

The rule has also been recognized as to insurance on freight (Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 12 L. Ed. 834).

Some confusion is found in the cases as to the question whether there can be a constructive total loss of memorandum articles. The text books have added to the confusion by failing to discriminate between those cases in which a constructive total loss was claimed because of a technical loss and those in which it was attempted to abandon for a partial loss exceeding 50 per cent. The cases which decide that there cannot be a constructive total loss of memorandum

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articles are those of the second class—that is, the loss was not even technically total, but simply a partial loss exceeding 50 per cent.

Reference may be made to Marcardier v. Chesapeake Ins. Co., 8 Cranch, 39, 3 L. Ed. 481; Marean v. United States Ins. Co., 16 Fed. Cas. 707, affirming 1 Wheat. 219, 4 L. Ed. 75; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49, affirming 82 Fed. 296, 27 C. C. A. 134; Monroe v. British & Foreign Marine Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. (C. C.) 106 Fed. 116; Merchants' S. S. Co. v. Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 444; Waln v. Thompson, 9 Serg. & R. (Pa.) 115, 11 Am Dec. 675. See, also, Aranzamendi v. Louisiana Ins. Co., 2 La. 432, 22 Am. Dec. 136.

This is strictly in accord with the principle laid down in Poole v. Protection Ins. Co., 14 Conn. 47, to the effect that the memorandum clause does not vary the rule by which a loss is determined to be a partial or a total loss. Therefore, where the loss on memorandum articles is technically total, there is no reason why the principle of abandonment as for a constructive total loss should not apply. And it seems that in all cases where a constructive total loss of memorandum articles has been recognized there was a technical total loss.

Reference may be made to Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Greene v. Pacific Mutual Ins. Co., 9 Allen (Mass.) 217; Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664, reversing 26 N. Y. Super. Ct. 528; Chadsey v. Guion, 46 N. Y. Super. Ct. 118; Delaware Ins. Co. v. Winter, 38 Pa. 176. In Mayo v. India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 9 L. R. A. 831, 23 Am. St. Rep. 814, the article for which loss was claimed was held not to be perishable within the memorandum. The contrary doctrine is held in Skinner v. Western Ins. Co., 19 La. 273, in view of the Louisiana rule that the loss must be actually total.

So, also, where an open policy of insurance in common form, containing the usual memorandum clause, also contains the clause, "partial loss on sheet iron, iron wire, brazier's rods, iron hoops, and tin plates is excepted," the insurers are liable for a constructive total loss of tin plates (Kettell v. Alliance Ins. Co., 10 Gray [Mass.] 144).

(d) Total loss of portion of subject-matter.

In some cases the question has been raised whether a total loss of a particular portion of the subject-matter is such a loss as will

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render the memorandum clause inoperative. In an early case (Biays v. Chesapeake Ins. Co., 11 U. S. 415, 3 L. Ed. 389) the rule was laid down that when the cargo consists of memorandum articles of one species there can be no recovery for a total loss of part. The same principle has been applied where the cargo is insured as an integral subject (Guerlain v. Columbian Ins. Co., 7 Johns. [N. Y.] 527), or in bulk as so many bushels of wheat (Haenschen v. Franklin Ins. Co., 67 Mo. 156).

The foregoing principles were applied in Hernandez v. New York Mut. Ins. Co., 12 Fed. Cas. 34; Hernandez v. Sun Mut. Ins. Co., 12 Fed. Cas. 34; Humphreys v. Union Ins. Co., 12 Fed. Cas. 876; Neidlinger v. Insurance Co. of North America, 17 Fed. Cas. 1293; Poole v. Protection Ins. Co., 14 Conn. 47; Kettell v. Alliance Ins. Co., 10 Gray (Mass.) 144; Pierce v. Columbian Ins. Co., 14 Allen (Mass.) 320; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; Hotchkiss v. Commercial Mut. Ins. Co., 24 N. Y. Super Ct. 489; Chadsey v. Guion, 48 N. Y. Super. Ct. 267, affirmed 97 N. Y. 333; Newlin v. Insurance Co. of North America, 20 Pa. 312; Id., 5 Clark (Pa.) 116, 1 Phila. 273.

The mere fact that the article is in separate packages, separately valued, does not change the rule.

Hernandez v. Sun Mut. Ins. Co., 12 Fed. Cas. 34; Haenschen v. Franklin Ins. Co., 67 Mo. 156; Newlin v. Insurance Co. of North America, 20 Pa. 312. But see American S. S. Co. v. Indemnity Mut. Marine Ins. Co. (D. C.) 108 Fed. 421, affirmed in 118 Fed. 1014, 56 C. C. A. 56.

Nor does it affect the result whether the policy, after valuing the separate packages, does or does not name the total valuation (Hernandez v. New York Mut. Ins. Co., 12 Fed. Cas. 34). And though the policy insures against the loss of the goods "or any part thereof," these words printed in the policy cannot control the provisions of the memorandum clause (Hernandez v. Sun Mut. Ins. Co., 12 Fed. Cas. 34).

Circumstances may, however, cause a modification of the rule. Thus where the vessel was condemned as unseaworthy at an intermediate port and the cargo transshipped into two other vessels, one of which was wrecked and lost with its cargo, and the other arrived safe at the port of destination, the goods being insured "free of particular average," it was held that notwithstanding the transshipment the insurers were liable for the portion lost (Pierce v. Columbian Ins. Co., 14 Allen [Mass.] 320). So, too, a policy on "per-

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sonal effects," consisting of clothing, silverware, nautical instruments, etc., of the insured and his family, and containing the clause, "Warranted free from all average," must be applied distributively to the various articles, and the stipulation will not exempt the insurer from liability for articles which are totally lost, merely because a few articles of wearing apparel are saved (Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63, modifying [D. C.] 84 Fed. 283).

The parties may by agreement provide that there may be a recovery for a total loss of a part of the goods. Thus a rider on the margin of a policy stating, "Free of particular average, but liable for absolute total loss of a part if amounting to 5 per cent.," is in pari materia with a memorandum by which goods are "warranted by the assured free from average unless general," and qualifies the memorandum, so that, instead of limiting the liability to an actual total loss, it permits recovery for an actual total loss of a part.

Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 21 Sup. Ct. 1, 179 U. S. 1, 45 L. Ed. 49, affirming 82 Fed. 296, 27 C. C. A. 134. The same principle is applied in Chicago Ins. Co. v. Graham & Morton Transp. Co., 108 Fed. 271, 47 C. C. A. 320, rehearing denied 109 Fed. 352, 48 C. C. A. 397.

Where the policy covers several species of memorandum articles, a recovery may however be had for a total loss of one species of article.

Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73. But where the insurance is on "cargo" composed principally of lemons and oranges, if the whole of the oranges are lost on the voyage by perils insured against, and the lemons are saved and arrive, the underwriter is not liable for the loss of the oranges under the usual memorandum, which warrants the underwriter free from particular average on "fruit" (Humphreys v. Union Ins. Co., 12 Fed. Cas. 876).

Where the hull and machinery of a steamship are separately valued in a policy of marine insurance, the parts thus separated are to be treated as distinct insurances, to be applied to each part as though each were insured by an independent policy (American S. S. Co. v. Indemnity Mut. Marine Ins. Co. [D. C.] 108 Fed. 421, affirmed 118 Fed. 1014, 56 C. C. A. 56).

(e) Restrictions as to cause of loss.

The memorandum clause usually qualifies the exception of particular average by the words "unless the ship be stranded" or others

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of like import. If the loss occurs by stranding, the exception of particular average does not, of course, apply (Potter v. Suffolk Ins. Co., 19 Fed. Cas. 1186). In some policies, however, the exception is that the insurer shall not be liable unless the loss amounts to a certain per cent. "and happen by stranding." In such case no recovery can be had, though the loss equals the per cent. required, unless the loss was caused by stranding (Lake v. Columbus Ins. Co., 13 Ohio, 48, 42 Am. Dec. 188). If, however, the policy exempts the insurers from liability for any partial loss on certain goods perishable in their nature, unless it amount to 7 per cent. and happens by stranding, and for partial loss on other goods or on the vessel or freight unless it amount to 5 per cent., the insurers are liable for a partial loss exceeding 5 per cent. on the freight of a cargo consisting of such perishable articles and of other goods, although not occasioned by stranding (Lord v. Neptune Ins. Co., 10 Gray [Mass.] 109). And of course in the case of a total loss the insurers are liable, though not occasioned by stranding (Williams v. Cole, 16 Me. 207).

Under an open policy providing that the insurer should not be liable for leakage of liquids unless occasioned by stranding, a certificate covering petroleum was issued containing an exception of particular average unless the vessel be stranded. The vessel containing the petroleum became disabled at sea, and in being towed to the nearest harbor became stranded, and pounded for half an hour on a coral reef, causing excessive damage to the bottom. Its cargo on the first warehousing, pending the repairing of the vessel, appeared to be in good condition, and experienced witnesses testified that the damage was caused by contact with sea water, detention in a tropical climate, and frequent handling. It was held that the loss by leakage was caused by stranding, within the policy (De Farconnet v. Western Ins. Co. [D. C.] 110 Fed. 405). If the memorandum clause provides that the policy shall cover "extraordinary leakage loss, if amounting to 3 per cent. of the amount insured," the language used naturally imports and is designed to express insurance for all loss by leakage, however caused, and is not restricted to leakage caused by sea perils (Indemnity Mut. Marine Ins. Co., Limited, v. United Oil Co. [D. C.] 88 Fed. 315).

Under a memorandum clause by which grain was to be "free from damage from dampness except caused by actual contact of sea water" with the articles damaged, damage to sacks of grain not reached by the sea water, but caused by the damp vapor arising from other

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sacks which were reached by sea water, is not within the exception (Neidlinger v. Insurance Co. of North America, 17 Fed. Cas. 1293). But when the policy included "all risks of lighterage" the insured could recover for a partial loss by lighterage, though as to the vessel itself the loss was to be free of particular average (Hills v. Rhenish Westfalian Lloyd Transp. Ins. Co., 39 Hun [N. Y.] 552). Though collision damages are usually a particular average, and hence within the exception of the memorandum clause (Peters v. Warren Ins. Co., 19 Fed. Cas. 373), yet if the policy contains a clause, "free of particular average unless the vessel be in collision," the insurer is liable for a loss subsequent to the collision, whether resulting therefrom or not.

London Assurance v. Companhia de Moagens do Barreiro, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, affirming 68 Fed. 247, 15 C. C. A. 379, 28 U. S. App. 439. See, also, The Liscard (D. C.) 56 Fed. 44.

(f) Determination of extent of loss.

In determining the extent of loss the computation should be based on the value of the entire shipment, if the cargo consists of but one kind of memorandum articles (Haenschen v. Franklin Ins. Co., 67 Mo. 156). **But if there are several classes of memorandum articles enumerated, the computation should be based on the value of that particular article to which the damage occurred** (Insurance Co. v. Bland, 9 Dana [Ky.] 143). Whether the amount of the premium will be added or deducted from the valuation depends on the custom of the port.

Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259.

It was held in Maryland Ins. Co. v. Bosley, 9 Gill & J. (Md.) 337, that the extent of loss should be computed on the value of the cargo actually at risk when the injury occurred, so that if part of the cargo has been landed and the injury occurs while the balance is being landed only the value of that not yet landed is to be made the basis of the computation. The accepted rule, however, is that **the computation must be based on the value of the cargo as originally laden.**

Gracie v. Marine Ins. Co., 8 Cranch, 75, 3 L. Ed. 492; Same v. Maryland Ins. Co., 8 Cranch, 84, 3 L. Ed. 495; McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 170.

The damage, too, must be determined as to each article injured, so that an excess on one cannot be added to the damage on another to

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make an average of the per cent. required (Donnell v. Columbian Ins. Co., 7 Fed. Cas. 889). So, under a policy covering all shipments of oil to certain ports, including "leakage amounting to 5 per cent. on each barrel over ordinary leakage, which is agreed to be 2 per cent.," the company is not liable to pay for leakage unless the leakage on each barrel on which leakage is claimed amounts to 7 per cent. or upward; but when it becomes so liable it is liable for the whole leakage on such barrel, without deducting either 7 per cent. or the 2 per cent. (Phetteplace v. British & F. Marine Ins. Co., 23 R. I. 26, 49 Atl. 33).

A clause in the policy requiring a partial loss to be "settled" on the principles of salvage loss applies to the ascertainment of the loss as well as to its payment, and the loss sustained amounting, when ascertained on such principles, to more than the required per cent of the sound value of the goods, the insurance company was liable. La Fonciere Compagnie d'Assurances Contre les Risques de Transports de Toute Nature v. Koons, 75 Fed. 110, 21 C. C. A. 249, affirming (D. C.) 71 Fed. 978.

In computing the amount of damage, repairs of necessity will be regarded as a general average; but repairs of benefit are a particular average loss (Brooks v. Oriental Ins. Co., 7 Pick. [Mass.] 259). An accidental collision is a particular average loss (Peters v. Warren Ins. Co., 19 Fed. Cas. 373), and the insured may claim not only for the injury sustained by the ship, but also the amount apportioned upon her on account of the injury to the other vessel (Peters v. Warren Ins. Co., 19 Fed. Cas. 370).

Wages and provisions of a crew cannot form part of a claim for particular average (Billow v. Western Marine & Fire Ins. Co., 1 La. Ann. 57); nor can the damage due to the loss of value of the cargo because of bad reputation it has on account of injury to a part of it (Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389). In estimating the cost of repairs necessarily made in dry dock, a reasonable charge for the use of the dock should be included (Snapp v. Merchants' & Manufacturers' Ins. Co., 8 Ohio St. 458); but if repairs are made at home no commission for the repairs can be included, nor can the cost of the survey (Brooks v. Oriental Ins. Co., 7 Pick. [Mass.] 259). The usual deduction of one-third new for old should be made (Sanderson v. Columbian Ins. Co., 21 Fed. Cas. 328). The expenses incurred for rescuing the property, restoring it to its former condition, loading and unloading, costs of protest,

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etc., may be added to the damage done the property itself (Hall v. Rising Sun Ins. Co., 1 Disn. 308, 12 Ohio Dec. 639).

Under a policy of insurance containing the clause, "free from particular general average less than 50 per cent.," there can be no recovery from the insurer of salvage and agent's expenses, when there are other insurers, and the proportion of loss payable by the respondent is less than 50 per cent. of the amount of the policy. Buzby v. Phœnix Ins. Co. (D. C.) 31 Fed. 422.

When the insurance is on the ship successive partial losses by distinct perils cannot be added together to make up the requisite per cent.

Luma v. Atlantic Mut. Ins. Co., 15 Fed. Cas. 1109; Hagar v. England Mut. Marine Ins. Co., 59 Me. 460; Paddock v. Commercial Ins. Co., 104 Mass. 521; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259.

It was, however, suggested in the Brooks Case that the rule might well be different in the case of damage to the cargo, as such damage cannot be ascertained until the cargo is unloaded. The rule that successive losses on cargo may be added together to make up the required per cent. of loss was adopted in Donnell v. Columbian Ins. Co., 7 Fed. Cas. 889.

It is a question for the jury whether the losses to a vessel in two gales, ten days apart, in the first of which she lost part of her sails and bulwarks, and in the second the movables on deck, were distinct, or consequent one upon the other, so as to constitute a single loss (Luma v. Atlantic Mut. Ins. Co., 15 Fed. Cas. 1109).

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5. AMOUNT OF LIABILITY AND DETERMINATION THEREOF.

(a) Determination of liability in general.
(b) Value of subject-matter.
(c) Same—Valued policies.
(d) Extent of interest of insured.
(e) Insurance of part of value.
(f) Successive losses.
(g) Particular elements and grounds of liability.
(h) Same—Expenditures.
(i) Same—Repairs.
(j) Same—General average contribution.
(k) Liability as affected by duties of owner, master, and crew after loss.
(l) Effect of other insurance.
(m) Deductions and offsets.

(a) Determination of liability in general.

The determination of the extent of the insurer's liability in case of a loss, whether total or partial, involves the consideration of numerous factors, varying in the different cases. The problems presented are as various as the cases, and that presented by each case can usually be solved only after due consideration and weight has been given to the particular facts. It would serve no useful purpose to discuss in detail the various combinations presented. It is intended to discuss only the fundamental principles on which the determination of liability is based.

In a general sense the method of determining the extent of liability is the same whether the loss is total or partial. Of course, a partial loss with an accepted abandonment will be adjusted as a constructive total loss (Buffalo City Bank v. Northwestern Ins. Co., 30 N. Y. 251). So, too, will a loss which by agreement of the parties is converted into and considered as a constructive total loss (London Assurance v. Companhia de Moagens do Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113). But the fact that a loss has just been adjusted on certain principles with one or more of several individual underwriters does not impose any obligation on the other underwriters (Trenholm v. Alexander, 2 Brev. [S. C.] 238). Under ordinary policies, however, a foreign adjustment will usually be regarded as binding (Strong v. New York Firemen Ins. Co., 11 Johns. [N. Y.] 323). Under an English valued policy, providing that salvage charges shall be payable "according to foreign state-

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ments * * * or per rules of port of discharge," at the option of the insured, the law of New York, the port of discharge, governed as to the amount payable by the insurer on account of salvage arising from stranding, there adjusted (International Nav. Co. v. Sea Ins. Co., 129 Fed. 13, 63 C. C. A. 663).

A contract of insurance against fire on a vessel lying moored, and not in use as a vessel, is not maritime, and liability for a loss will be determined under the rules applicable to fire policies, and not under the rules of marine insurance (City of Detroit v. Grummond, 121 Fed. 963, 58 C. C. A. 301).

Under a provision in a fire policy on a vessel that the insurer shall not be liable for more than it would cost the insured to repair or replace the same with material of like kind and quality, the insured cannot be compelled to prove the exact extent of the damage, where the vessel, while burning, sunk in water so deep that she could be examined only by divers. Jackson v. British America Assur. Co., 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636. But where part of the damage to a cargo was sustained prior to the placing of the insurance, no notice thereof being given to the insurers, the duty of ascertaining what part of the damage occurred before and what part after the insurance devolves on the insured. Batchelder v. Ins. Co. of North America (D. C.) 30 Fed. 459.

Under the "running down" clause the liability of the insurer is limited to the damage done and actually paid to the owners of the vessel run down and its cargo (Goucher v. Providence Washington Ins. Co., 3 Pa. Super. Ct. 230, 40 Wkly. Notes Cas. 112).

In cases of partial loss it is of course necessary to determine the percentage of loss. In the case of a vessel or damage to the whole cargo, this is generally a matter of ordinary computation. Where the policy is on cargo, however, and only a part of the goods are damaged, the computation is more complicated. The rule in such cases seems to be to deduct the gross produce of sales of the damaged goods at the port of arrival from the gross produce of the sales of such goods if they had arrived sound, to ascertain the proportion or percentage of loss, and to take that percentage upon the cost of the goods insured, or their value in the policy, as the amount which the insurer has to pay.

Lamar Ins. Co. v. McGlashen, 54 Ill. 513, 5 Am. Rep. 162; Brooke v. Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Lawrence v. New York Ins. Co., 3 Johns. Cas. 217; Evans v. Commercial Mut. Ins. Co., 6 R. I. 47.

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It is not necessary to sell the sound and damaged goods to ascertain the loss. Appraisers may be appointed to estimate the partial loss, the importation cost being assumed as the standard of damage (Stewart v. Western Ins. Co., 11 La. 53). So, too, a particular custom may under proper circumstances modify the general rule (Fulton Ins. Co. v. Milner, 23 Ala. 420). The policy may contain a provision for separating the damaged from the undamaged goods. Such a provision applies only to the case of a partial, not a total, loss, constructive or absolute (Delaware Ins. Co. v. Winter, 38 Pa. 176). And an authority by the insurer's agent to concur in measures for the separation on the occurrence of a loss does not imply authority to assume ownership of the goods in the company's behalf (Jellinghaus v. New York Ins. Co., 13 N. Y. Super. Ct. 1).

In estimating the damage to goods in case of a partial loss, it is competent to prove the appraisement, the sale at auction of the goods damaged, the value of sound goods, and the custom of merchants in relation to the sale. Stanton v. Natchez Ins. Co., 5 How. (Miss.) 744.

When there is a claim of partial loss by capture the spes recuperandi cannot be resorted to as a criterion by which to ascertain, without any other evidence, the amount of the loss sustained. Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139.

If a portion of the damage is claimed to be the result of a cause not within the policy, it is for the insurer to show affirmatively the extent, character, and amount of the injuries which resulted from such cause (Woodruff v. Commercial Mut. Ins. Co., 2 Hilt. [N. Y.] 130).

(b) Value of subject-matter.

It is evident that any computation of the extent of loss must be based on the value of the subject-matter. It is therefore necessary to determine that value at the outset. When the policy is an open one, the rule as to the vessel is that its value is to be taken as at the place of the commencement of the risk.

Carson v. Marine Ins. Co., 5 Fed. Cas. 178; Wolf v. National Marine & Fire Ins. Co., 20 La. Ann. 583; Clark v. United Fire & Marine Ins. Co., 7 Mass. 365, 5 Am. Dec. 50; Le Roy v. United Ins. Co., 7 Johns. (N. Y.) 343; Graves v. Washington Marine Ins. Co., 12 Allen (Mass.) 391.

It is the actual value, and not the cost of the vessel, that is to be taken (Snell v. Delaware Ins. Co., 22 Fed. Cas. 713). In Leaven-

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worth v. Delafield, 1 Caines (N. Y.) 573, 2 Am. Dec. 201, the court took into account the natural deterioration of the vessel, and regarded four-fifths of its value at the port of departure a fair valuation.

In the case of an insurance on cargo the basis of estimating the extent of loss is the value of the cargo at the time and place of shipping, including the expense of lading.

Pleasants v. Maryland Ins. Co., 8 Cranch, 55, 3 L. Ed. 486; Carson v. Marine Ins. Co., 5 Fed. Cas. 178; Phillips v. Insurance Co. of Pennsylvania, 19 Fed. Cas. 514; Rogers v. Mechanics' Ins. Co., 20 Fed. Cas. 1121; Stewart v. Western Ins. Co., 11 La. 53; Leftwitch v. St. Louis Ins. Co., 5 La. Ann. 706; Clark v. United Fire & Marine Ins. Co., 7 Mass. 365, 5 Am. Dec. 50; Warren v. Franklin Ins. Co., 104 Mass. 518; Leavenworth v. Delafield, 1 Caines, 573, 2 Am. Dec. 201; Suydam v. Marine Ins. Co., 2 Johns. (N. Y.) 138; Minturn v. Columbian Ins. Co., 10 Johns. (N. Y.) 75; Bailey v. South Carolina Ins. Co., 3 Brev. (S. C.) 354.

On a trading voyage the value of the cargo is to be estimated as at the port from which the vessel sailed last preceding the loss (Catlett v. Columbian Ins. Co., 5 Fed. Cas. 287), and the same rule is applied in an insurance on freight (Stillwell v. Home Ins. Co., 23 Fed. Cas. 92).

Though the cost of the goods is not necessarily the rule of value (Carson v. Marine Ins. Co., 5 Fed. Cas. 178), bills of lading and invoices may be received as evidence of the value.

Graham v. Pennsylvania Ins. Co., 10 Fed. Cas. 935; Coffin v. Newburyport Marine Ins. Co., 9 Mass. 436; Gahn v. Broome, 1 Johns. Cas. (N. Y.) 120. The contrary rule was asserted in Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.

Evidence relating to the value of the vessel or cargo was considered in Western Massachusetts Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. 201, 20 L. Ed. 380; Bentaloe v. Pratt, 3 Fed. Cas. 241; Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Billow v. Western Marine & Fire Ins. Co., 1 La. Ann. 57; Slocovich v. Orient Ins. Co., 13 Daly, 264, affirmed in 108 N. Y. 56, 14 N. E. 802; Gilchrist v. Perrysburg & T. Transp. Co., 21 Ohio Cir. Ct. R. 19, 11 O. C. D. 350.

From the foregoing principles it is evident that the increased value of the cargo at the place of discharge cannot be taken into consideration (Welles v. Gray, 10 Mass. 42). And where the owner of a vessel, who has himself supplied the cargo, effects an insurance on freight, in case of loss he can recover, not the profits he might have made, but the usual and reasonable rate of freight for the voy-

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age at the port of departure (Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596). Of course when the policy so provides the measure of damages may be determined according to the value of the property at the place of the disaster (Savage v. Corn Exch. Fire & Inland Ins. Co., 36 N. Y. 655); but in such case the insured is not entitled to recover in addition to such value his freight and charges. Presumptively, the enhanced value at the place of loss covers the freight, etc., to the place of loss (Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1).

The premium for insurance is considered as part of the value insured, and is to be added to the value of the vessel or the cost and charges of the goods.

Louisville Fire & Marine Ins. Co. v. Bland, 9 Dana (Ky.) 143; Ogden v. Columbian Ins. Co., 10 Johns. (N. Y.) 273; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Bailey v. South Carolina Ins. Co., 3 Brev. (S. C.) 354.

An alleged local custom to keep back one-third the gross freight for charges in a policy on freight where the loss is total is unreasonable, and will not control (McGregor v. Insurance Co. of Pennsylvania, 16 Fed. Cas. 129).

(c) Same—Valued policies.

If the policy is a valued one, the valuation therein stated, under the general rules of commercial law, settles the true value of the subject insured, as between insurers and insured, unless the valuation is fraudulent or enormously excessive.

Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. Ed. 200; Watson v. Insurance Co. of North America, 29 Fed. Cas. 433; Gardner v. Columbian Ins. Co., 9 Fed. Cas. 1165; Griswold v. Union Ins. Co., 11 Fed. Cas. 69; Carson v. Marine Ins. Co., 5 Fed. Cas. 178; Mutual Safety Ins. Co. v. Cargo of the George, 17 Fed. Cas. 1082; Hancox v. Fishing Ins. Co., 11 Fed. Cas. 409; The Livingstone (D. C.) 122 Fed. 278; The St. Johns (D. C.) 101 Fed. 469; International Nav. Co. v. British & Foreign Marine Ins. Co., 108 Fed. 987, 48 C. C. A. 181, affirming (D. C.) 100 Fed. 304; Same v. Brown, Id.; Akin v. Mississippi Marine & Fire Ins. Co., 4 Mart. N. S. (La.) 661; Brooke v. Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Forbes v. Manufacturers' Ins. Co., 1 Gray (Mass.) 371; Phœnix Ins. Co. v. McLoon, 100 Mass. 475; Lockwood v. Sangamo Ins. Co., 46 Mo. 71; Whitney v. American Ins. Co., 3 Cow. (N. Y.) 210; American Ins.

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Co. v. Whitney, 5 Cow. (N. Y.) 712; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77; Howell v. Protection Ins. Co., 7 Ohio, 284, pt. 1; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81.

See, also, the following cases, where valued policies on freight were involved: Griswold v. Union Mut. Ins. Co., 11 Fed. Cas. 69; Mutual Safety Ins. Co. v. Cargo of Brig George, 17 Fed. Cas. 1082; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289; Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50; Delano v. American Ins. Co., 42 Barb. (N. Y.) 142.

But in a policy on freight, the sum insured cannot be assumed as the valuation of the freight, nor adopted as conclusive evidence of the amount of the charterer's interest (Mellen v. National Ins. Co., 1 N. Y. Super. Ct. 500).

Though a valued policy is, in general, conclusive as to the value of the property, this ceases to be obligatory if the loss is partial (Watson v. Insurance Co. of North America, 29 Fed. Cas. 433). It is generally recognized to be the rule in case of a partial loss of goods covered by a valued marine policy that the measure of the insurer's liability is the proportion which the loss bears to the sound value at the port of discharge (Ursula Bright S. S. Co. v. Amsinck [D. C.] 115 Fed. 242); and in Massachusetts the rule is applied even to an insurance on the vessel, and it is held that in the adjustment of all partial losses valued policies are to be treated like open policies (Clark v. United Fire & Marine Ins. Co., 7 Mass. 365, 5 Am. Dec. 50). The rule in New York, however, seems to be (Providence & S. S. S. Co. v. Phœnix Ins. Co., 89 N. Y. 559) that in insurance on a vessel the valuation is conclusive. It has therefore been held in International Nav. Co. v. British & Foreign Marine Ins. Co. (D. C.) 100 Fed. 304, a case arising in the Southern District of New York, that in the case of a valued policy on the vessel a partial loss is to be estimated on the policy value, and not, as in a valued policy, on goods on the actual sound value at the port of discharge. In Lamar Ins. Co. v. McGlashen, 54 Ill. 513, 5 Am. Rep. 162, it was said that even a partial loss on goods must be estimated on the policy value.

Though a mere overvaluation made in good faith will not affect the right of recovery, if the insured puts at risk a much less amount of goods than indicated by the valuation the recovery must be in proportion.

Alsop v. Commercial Ins. Co., 1 Fed. Cas. 564; Watson v. Insurance Co. of North America, 29 Fed. Cas. 433; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429.

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The general rule that the valuation in a valued policy is conclusive must give way before evidence of a conspiracy to load the vessel with a worthless cargo and issue bills of lading as for a valuable cargo for the purpose of defrauding the company (Voisin v. Commercial Mut. Ins. Co., 62 Hun, 4, 16 N. Y. Supp. 410); but the burden is on the insurance company to show that all the goods on which the valuation stated in the policy was based were not actually shipped (Voisin v. Providence Washington Ins. Co., 65 N. Y. Supp. 333, 51 App. Div. 553).

(d) Extent of interest of insured.

The extent of the insurer's liability is of course limited by the extent of the insured's interest in the subject-matter. Therefore one who has only a part interest can recover only such a proportion of the amount insured as is represented by his interest, though he has insured for the whole value in his own name.

Ohl v. Eagle Ins. Co., 18 Fed. Cas. 629, 630; Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.) 21 Fed. 778; Dumas v. Jones, 4 Mass. 647; Pearson v. Lord, 6 Mass. 81; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Finney v. Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302; Pacific Ins. Co. v. Catlett, 4 Wend. 75; Voisin v. Commercial Mut. Ins. Co., 66 N. Y. Supp. 638, 32 Misc. Rep. 393. This rule has been applied when the vessel was under bottomry: Williams v. Smith, 2 Caines (N. Y.) 13; Watson v. Insurance Co. of North America, 29 Fed. Cas. 433; Read v. Mutual Safety Ins. Co., 5 N. Y. Super. Ct. 54. One insured on advances may recover to the extent of his advances proved not to exceed the amount of the policy. Kinsman v. China Mut. Ins. Co. (D. C.) 49 Fed. 876.

But one who, owning a part interest, hires the remaining interest, may insure the whole value, and recover the full amount of the policy.

Oliver v. Greene, 8 Mass. 133, 8 Am. Dec. 96; Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

So, too, a common carrier who insures cargo for his own and the owner's benefit may recover the full amount of the policy.

Munich Assur. Co. v. Dodwell & Co., 128 Fed. 410, 63 C. C. A. 152, affirming (D. C.) 123 Fed. 841; Delahunt v. Ætna Ins. Co., 97 N. Y. 537.

Where a vessel under a marine policy receives a fatal injury while owned by the insured, he can recover to the extent of the injury,

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though he sells her subsequently and before the destruction is visibly complete.

Crosby v. New York Mut. Ins. Co., 18 N. Y. Super. Ct. 369, 19 How. Prac. 312; Duncan v. Great Western Ins. Co., 1 Abb. Dec. 562, *42 N. Y. 394.

(e) Insurance of part of value.

In the case of partial insurance the insurer is liable on a partial loss for only such proportion of the loss as the amount of insurance bears to the value of the property, though the loss is less than the amount insured (Whiting v. Independent Mut. Ins. Co., 15 Md. 297); **and if the valuation in the policy is less than the actual value, the insurer is liable for such proportion of the actual loss as the sum insured bears to the actual value.**

This rule is laid down in Western Assur. Co. v. Southwestern Transp. Co., 68 Fed. 923, 16 C. C. A. 65, 30 U. S. App. 373; Fay v. Alliance Ins. Co., 16 Gray (Mass.) 455. Reference may also be made to Breed v. Providence Washington Ins. Co., 4 Fed. Cas. 48, where, however, a provision of the policy was a determining factor.

The theory of the rule is probably the principle on which Egan v. British & Foreign Marine Ins. Co., 61 N. E. 1081, 193 Ill. 295, 86 Am. St. Rep. 342, affirming 88 Ill. App. 552, was decided, namely, that, where a vessel is insured for a part only of its value, the owner is a co-insurer as to the uninsured part, and in case of a loss such part, called the "owner's risk," is to be taken into consideration in fixing the proportion of the loss to be paid by the insurer.

Where the policy covered a fire risk it was held (Eureka Ins. Co. v. Robinson, 56 Pa. 256, 94 Am. Dec. 65), that the insurer was not entitled to salvage; but in Egan v. British & Foreign Marine Ins. Co., 88 Ill. App. 552, it was said that if the owner of a vessel insured for a part of its value and damaged by another vessel, recovers of the owners of such vessel for the loss, and the policy provides that expenses of such recovery shall be a charge on the property, he is liable to the insurance company as a co-insurer for its proportionate share of the amount recovered by him. So when but two-thirds of the valuation of a vessel is insured, the owner is his own underwriter for the balance, and the net proceeds of a sale of the vessel should be divided as salvage between the parties in proportion to the amount each had at risk (Phillips v. St. Louis Perpetual Ins. Co., 11 La. Ann. 459).

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Where insurance is made on a vessel on one-fourth, valued at the sum insured, the valuation applies to the interest insured, and not to the whole ship (Post v. Phœnix Ins. Co., 10 Johns. [N. Y.] 79). Therefore, in case of a total loss, the insured can recover the whole amount of the insurance (Ursula Bright S. S. Co. v. Amsinck [D. C.] 115 Fed. 242). So, in view of the principle that when the voyage covered is a trading voyage the value of the subject-matter is to be estimated as at the last port before the loss, it has been held that where goods are insured to a specified amount on a trading voyage under a policy on time, and the value of the whole cargo exceeds the sum insured, the insurer is liable to the full amount of the subscription, if, after landing a portion of the cargo in safety, the residue is totally lost by one of the perils insured against, and at the time of the loss the goods on board equaled in amount the sum insured (American Ins. Co. v. Griswold, 14 Wend. [N. Y.] 399).

(f) Successive losses.

Under the general law of marine insurance, independently of any particular clause in the policy or local usage, if a partial loss is repaired, and there is a subsequent partial or total loss, the insurer is liable for the amount of both losses, although exceeding the amount named in the policy.

Christie v. Buckeye Ins. Co., 5 Fed. Cas. 653; Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Matheson v. Equitable Marine Ins. Co., 118 Mass. 209, 19 Am. Rep. 441; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Saltus v. Commercial Ins. Co., 10 Johns. (N. Y.) 487; Sherlock v. Globe Ins. Co., 7 Ohio Dec. 17, 1 Wkly. Law Bul. 26.

But where the underwriters were exempt from risks of capture and condemnation by all powers, but insured against dangers of the sea and perils not excepted even while detained and afterwards, and the vessel suffered damage by perils of the sea, in consequence of which she was forced into a port of France, where the vessel and cargo were seized and sold by officers of the government, it was held that the partial loss was merged in the subsequent total loss, and a recovery could not be had therefor (Rice v. Homer, 12 Mass. 230).

If the policy provides that all claims paid thereunder shall reduce any further liability thereunder to the extent of the sums so paid, unless the amount is made good by additional insurance and an additional premium paid therefor, in the absence of the payment

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of additional premium the insurer is entitled to have the amount paid on a claim for a loss deducted from the amount of the policy before determining the amount of its liability for a subsequent loss (Ronan v. Indemnity Mut. Marine Assur. Co. [D. C.] 127 Fed. 757). And where a settlement is made of mutual demands for premiums earned and items for partial losses, with an agreement that the policy should be canceled as of the date of settlement, there can be no recovery for a total loss occurring before the settlement and of which both parties were ignorant (Soper v. Atlantic Ins. Co., 120 Mass. 267).

(g) Particular elements and grounds of liability.

In addition to the direct loss or damage to the vessel, cargo, or freight which is the subject of the insurance there are certain other charges and expenses incurred by the owner for which the insurer may be liable. Thus the insurer is liable not only for the direct injury to the insured vessel by collision, but also for the damages incurred and paid to the other vessel for her injuries by the same collision.

Walker v. Boston Ins. Co., 14 Gray (Mass.) 288; Whorf v. Equitable Marine Ins. Co., 144 Mass. 68, 10 N. E. 513; Peters v. Warren Ins. Co., 19 Fed. Cas. 370, 373.

The insurer is not liable for marine interest, unless it clearly appears that there were no other means of raising money than by bottomry.

Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283.

While the insurer is liable for regular commissions due third persons, commission on advances for repairs at the home port are not chargeable against the insurer.

Peters v. Warren Ins. Co., 19 Fed. Cas. 370; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259; Fontaine v. Columbian Ins. Co., 9 John. (N. Y.) 29; Webb v. Protection Ins. Co., 6 Ohio, 456.

The owners of a fishing vessel may recover on a policy on "advances" for money paid to the crew in advance, and for money paid to and used by the captain to buy bait (Burnham v. Boston Marine Ins. Co., 139 Mass. 399, 1 N. E. 837); but where an advance is in the nature of freight earned under the contract, the insurers are not liable for it as for freight lost, although the master had, on the claim

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of the charterers, restored it to them (Kinsman v. New York Mut. Ins. Co., 18 N. Y. Super. Ct. 460). The loss of profits is not covered by an ordinary cargo policy (Edgar Thompson Steel Co. v. Boylston Mut. Ins. Co., 12 Mo. App. 244), and it is a general rule that the insurer is not liable for remote consequential damages (Teasdale v. Charleston Ins. Co., 2 Brev. 190, 3 Am. Dec. 705).

Salvage and the expenses incident thereto are generally a charge on the insurers.

The Two Catherines, 24 Fed. Cas. 424; Williams v. Suffolk Ins. Co., 29 Fed. Cas. 1402; International Nav. Co. v. Atlantic Mut. Ins. Co. (D. C.) 100 Fed. 304, affirmed in 108 Fed. 987, 48 C. C. A. 181; Shultz v. Ohio Ins. Co., 1 B. Mon. (Ky.) 336; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Dix v. Union Ins. Co., 23 Mo. 57; Muir v. United Ins. Co., 1 Caines, 49; Hall v. Rising Sun Ins. Co., 12 Ohio Dec. 639.

But the insurer cannot be held liable for an erroneous distribution of the salvage (The Clintonia [D. C.] 105 Fed. 256), and where there are other insurers, and an exception of particular average under a certain per cent., the insurer is not liable unless its liability would amount to more than the specific per cent. (Buzby v. Phœnix Ins. Co. [D. C.] 31 Fed. 422).[1]

Where salvage expenses were paid by the shipowner, as adjudged in two salvage suits, one against the ship and freight and another against the cargo, together with the legal expenses, the assured was entitled to recover the amount adjudged against the ship and freight from the insurance, less its own proportionate share as owner of the freight interest, and also the legal expenses in the action against ship and freight (International Nav. Co. v. Atlantic Mut. Ins. Co. [D. C.] 100 Fed. 304).[2]

(h) Same—Expenditures.

As a general rule all expenses resulting as a direct and immediate consequence of a peril insured against are covered by the policy (Hale v. Washington Ins. Co., 11 Fed. Cas. 189). Therefore the

[1] Direct liability of an insurer for salvage, see Chapman Derrick & Wrecking Co. v. Providence Washington Ins. Co. (D. C.) 68 Fed. 932, and Barney Dumping Boat Co. v. Niagara Fire Ins. Co., 67 Fed. 341, 14 C. C. A. 408, 35 U. S. App. 100.

[2] What are salvage services and proper compensation therefor, see Century Digest, vol. 43, "Salvage," cc. 1779-1977, §§ 1–137.

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insurer is in general liable for all expenses incurred for the preservation or recovery of the property insured.

Wallace v. Thames & M. Ins. Co. (C. C.) 22 Fed. 66; Lamar Ins. Co. v. McGlashen, 54 Ill. 513, 5 Am. Rep. 162; Indianapolis Ins. Co. v. Mason, 11 Ind. 171; Fireman's Ins. Co. v. Fitzhugh, 4 B. Mon. (Ky.) 160; Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Shiff v. Mississippi Ins. Co., 1 La. 304; Giles v. Eagle Ins. Co., 2 Metc. (Mass.) 140; Watson v. Marine Ins. Co., 7 Johns. (N. Y.) 57; Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; McBride v. Marine Ins. Co., 7 Johns. (N. Y.) 431; Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; Bridge v. Niagara Ins. Co., 1 N. Y. Super. Ct. 276; Providence & S. S. S. Co. v. Phœnix Ins. Co., 89 N. Y. 550; McColdin v. Greenwich Ins. Co., 10 N. Y. St. Rep. 390; Perry v. Ohio Ins. Co., 5 Ohio, 305. If the policy so provides, the computation of such charges will be governed by the law of the port of discharge. International Navigation Co. v. Sea Ins. Co. (D. C.) 124 Fed. 93, affirmed in 129 Fed. 13, 63 C. C. A. 663. And where the insurer is liable for expenses which have been paid by the insured, the latter will be allowed interest from the time of making the advance. Vandenheuvel v. United Ins. Co., 1 Johns. (N. Y.) 406.

Thus the insured is entitled to recover counsel fees and costs incurred and paid in preserving and recovering the property.

Blanchard v. Equitable Safety Ins. Co., 12 Allen (Mass.) 386; Lawrence v. Van Horne, 1 Caines (N. Y.) 276; Heilner v. China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177; Pride v. Providence Washington Ins. Co., 6 Pa. Dist. R. 227. But where the shipowner is not entitled to freight, and defends, on a claim of freight, a suit brought against him by the owner of the cargo for the proceeds of a sale thereof, he cannot recover from the underwriters on freight any part of the expenses of such defense. Lord v. Neptune Ins. Co., 10 Gray (Mass.) 109. And the owners of a cargo, who have defeated a claim against the cargo on a bottomry bond in the courts, cannot, in an action against the insurers, brought under the "sue and labor" clause of the policy, recover their expenses in the former suit, when the ship was unseaworthy when she sailed on the voyage during which the bond was given. Cunningham v. Switzerland Marine Ins. Co. (D. C.) 26 Fed. 46.

Under the clause requiring the insured to sue, labor, and travel, and use all reasonable means for the security, preservation, and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk, the sum at risk is the valuation of the property as stated in the policy, which is conclusive between the parties; and the rule

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is not changed because such sum happens to equal the sum insured, thus obligating the insurer to pay the whole of the expense incurred under the sue and labor clause (Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co. [C. C. A.] 133 Fed. 636). But even the "sue and labor" clause does not cover expenses incurred by the insured in sending a tug to look for insured scows, which were reported to have gone adrift, but were in fact in a safe place (Barney Dumping-Boat Co. v. Niagara Fire Ins. Co., 67 Fed. 341, 14 C. C. A. 408, 35 U. S. App. 100). Nor will the clause render the insurer liable for expenses, beyond the amount insured, incurred for temporary repairs upon the vessel insured, in order to make her seaworthy, she being at the time safe in port. That clause has reference to charges not covered by the insurance, and does not embrace expenditures to repair losses caused by the risks insured against (Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 253, reversing 49 Barb. 475).

The insured is not entitled to the expenses of a survey made at home (Brooks v. Oriental Ins. Co., 7 Pick. [Mass.] 259; Giles v. Eagle Ins. Co., 2 Metc. [Mass.] 140).

The ordinary wages of the crew while navigating the vessel into port after injury (Webb v. Protection Ins. Co., 6 Ohio, 456) are not a charge on the insurer; neither are the wages during a detention by accident or embargo.

Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Jolly's Ex'rs v. Ohio Ins. Co., Wright (Ohio) 539; Perry v. Ohio Ins. Co., 5 Ohio, 305; May v. Delaware Ins. Co., 19 Pa. 312; Insurance Co. of North America v. Jones, 2 Bin. (Pa.) 547, reversing Jones v. Insurance Co. of North America, 4 Dall. (Pa.) 246, 1 L. Ed. 819, and overruling Kingston v. Girard, 4 Dall. (Pa.) 274, 1 L. Ed. 831. But see Fireman's Ins. Co. v. Fitzhugh, 4 B. Mon. (Ky.) 160. And a policy on the vessel on time does not cover the wages paid to hands who were of the crew, but who were discharged at the port of repair, and reemployed as common work hands in the repair, except for wages as ordinary hands. Webb v. Protection Ins. Co., 6 Ohio, 456.

And generally expenses incurred by reason of a detention in port, such as expenses for provisions, demurrage, etc., cannot be charged to the insurer.

Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Penny v. New York Ins. Co., 3 Caines (N. Y.) 155, 2 Am. Dec. 260; Perry v. Ohio Ins. Co., 5 Ohio, 305; Insurance Co. of North America v. Jones, 2 Bin. (Pa.) 547, overruling Kingston v. Girard, 4 Dall. (Pa.) 274, 1 L. Ed.

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831, and reversing Jones v. Insurance Co. of North America, 4 Dall. (Pa.) 246. 1 L. Ed. 819. But see Fireman's Ins. Co. v. Fitzhugh, 4 B. Mon. (Ky.) 160.

An insurer on cargo is not generally liable for the increased freight on a transshipment.

Dodge v. Union Marine Ins. Co., 17 Mass. 471; Low v. Davy, 5 Bin. (Pa.) 595; Shultz v. Ohio Ins. Co., 1 B. Mon. (Ky.) 336. See, also, Macy v. China Ins. Co., 135 Mass. 328, where a policy on a whaling ship provided that catchings shipped home during the voyage shall be at the risk of the insured. In this connection reference may be made to Field v. Citizens' Ins. Co., 11 Mo. 50.

To render an insurer liable, the expenses of a transshipment must appear to have been necessary, at a reasonable price, and for the interest of all concerned.

Shultz v. Ohio Ins. Co., 1 B. Mon. (Ky.) 336; Mumford v. Commercial Ins. Co., 5 Johns. (N. Y.) 262; Ogden v. General Mut. Ins. Co., 9 N. Y. Super. Ct. 204; Robertson v. Atlantic Mut. Ins. Co., 68 N. Y. 192.

(i) Same—Repairs.

On damage to the vessel the insurer is liable for repairs only to the extent of their actual cost (Humphreys v. Union Ins. Co., 12 Fed. Cas. 876), and charges and expenditures in addition thereto, such as for dockage, will not usually be allowed.

Snapp v. Firemen's Ins. Co., 2 Handy (Ohio) 252; Webb v. Protection Ins. Co., 6 Ohio, 456. But the policy may provide that insured should sue, labor, and travel for the benefit of the property insured, and the underwriter should contribute for the charges therefor in proportion to the sum insured. Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 253.

As to the liability for repairs, reference may be made to Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14; Ralston v. Union Ins. Co., 4 Bin. (Pa.) 386; Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co., 18 Fed. Cas. 447, affirmed Western Massachusetts Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. 201, 20 L. Ed. 380.

Where a master in good faith makes temporary repairs in a foreign port of an injury covered by the policy, and permanent repairs are made at the end of the voyage, the underwriter is liable for both (Brooks v. Oriental Ins. Co., 7 Pick. [Mass.] 259). But a clause in a marine policy by which insured agreed to "sue, labor, and travel" for the benefit of the property insured, and the underwriter agreed to contribute to the charges thereof in proportion to the sum in-

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sured, does not cover expenditures incurred for temporary repairs on the vessel insured, when safe in port, in order to make her seaworthy, but only applies to charges not covered by the insurance (Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 253).

Damages for strain of the vessel are not usually recoverable in addition to the cost of repairs, unless the injury is irremediable except by rebuilding.

Sage v. Middletown Ins. Co., 1 Conn. 239; Peele v. Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; Giles v. Eagle Ins. Co., 2 Metc. (Mass.) 140; Hagar v. New England Mut. Marine Ins. Co., 59 Me. 460.

An insurer, pursuant to the terms of a policy issued by it on a canal boat, caused repairs necessitated by an accident to the boat to be made thereon in conformity with specifications reported by surveyors, and paid therefor, but the repairer with whom defendant contracted for the repairs, and to whom it turned over the boat for that purpose, made extra repairs, not required by the specifications, and in no way chargeable to the accident, yet proper to make the boat suitable for use. It was held that the question whether the repairer had the possession of the boat by joint direction of the parties, so as to exempt the insurer from liability for the repairer's refusal to surrender to the insured, because of the latter's failure to pay for the extra work, was, at most, a question of fact for the jury. (Murr v. Western Assur. Co. of Toronto, 64 N. Y. Supp. 12, 50 App. Div. 4.)

In estimating the amount of loss, in case of repairs, the insurer is entitled to a deduction of one-third new for old, without any distinction as to the age of the vessel, or whether she was new and on her first voyage, or not.

Humphreys v. Union Ins. Co., 12 Fed. Cas. 876; Sanderson v. Columbian Ins. Co., 21 Fed. Cas. 328; Fisk v. Commercial Ins. Co., 18 La. 77; Kerr v. Quaker City Ins. Co., 33 Mo. 158; Dunham v. Commercial Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374; Wallace v. Ohio Ins. Co., 4 Ohio, 234; Perry v. Same, 5 Ohio, 306; Sherlock v. Globe Ins. Co., 7 Ohio Dec. 17, 1 Wkly. Law Bul. 26; Read v. Mutual Safety Ins. Co., 5 N. Y. Super. Ct. 54; Nickels v. Maine Fire & Marine Ins. Co., 11 Mass. 253; Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

The rule applies to the temporary repairs necessary to enable a ship, which could not be fully repaired at the port of distress, to

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proceed on her voyage, as well as the complete repairs made at a subsequent port (Paddock v. Commercial Ins. Co., 104 Mass. 521). The deduction is made from the expense for labor, as well as material (Hall v. Ocean Ins. Co., 21 Pick. [Mass.] 472); but it does not apply to incidental expenses having no connection with the repairs (Potter v. Ocean Ins. Co., 19 Fed. Cas. 1173).

In determining the amount, the proceeds of the old materials not used in the repairs are first to be deducted from the gross expenses of the repairs, and then the deduction of one-third new for old is to be made from the balance.

Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259; Eager v. Atlas Ins. Co., 14 Pick. (Mass.) 141, 25 Am. Dec. 363; Byrnes v. National Ins. Co., 1 Cow. (N. Y.) 265.

A local custom to deduct one-third new for old from the gross amount of the expenses of repairs, without first deducting the proceeds of the old materials, not assented to by the contracting parties, will not control the general principle (Eager v. Atlas Ins. Co., 14 Pick. [Mass.] 141, 25 Am. Dec. 363). If the injury is received in collision, the amount recovered from the vessel at fault is to be deducted from the gross expense of repairs before the deduction of one-third new for old is made.

New England Mut. Marine Ins. Co. v. Dunham, 18 Fed. Cas. 66, affirming Dunham v. New England Mut. Ins. Co., 8 Fed. Cas. 46.

(J) Same—General average contribution.

While liability for general average is not a risk, it is an obligation incident to a sacrifice to avert a risk (Hunter v. General Ins. Co., 11 La. Ann. 139); consequently, when the losses and expenses incurred by the insured are subjects of general average, for which he is liable, he may recover therefor from the insurer.[8]

The Roanoke, 59 Fed. 161, 8 C. C. A. 67, 18 U. S. App. 407; Botsford v. Union Marine Ins. Co., Id.; Potter v. Ocean Ins. Co., 19 Fed. Cas. 1173; Mutual Safety Ins. Co. v. Cargo of The George, 17 Fed. Cas. 1082; Northwestern Transp. Co. v. Continental Ins. Co. (C. C.) 24 Fed. 171; The Roanoke (D. C.) 46 Fed. 297; Wheaton v. China Mut. Ins. Co. (D. C.) 39 Fed. 879; Hazleton v. Manhattan Ins. Co. (D. C.) 12 Fed. 159; Columbian Ins. Co. v. Ashby, 13 Pet. 331, 10 L. Ed. 186; Union Ins. Co. v. Cole, 18 Ill. App. 413; Thornton v. United States Ins. Co., 12 Me. 150; Dorr v. Union Ins. Co., 8 Mass. 494;

[8] For the principles determining the liability for and adjustment of general average, see Century Digest, vol. 44, "Shipping," cc. 739–789, §§ 598–636.

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Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259; Giles v. Eagle Ins. Co., 2 Metc. (Mass.) 140; Greely v. Tremore Ins. Co., 9 Cush. (Mass.) 415; Bedford Ins. Co. v. Parker, 2 Pick. (Mass.) 1, 13 Am. Dec. 388; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Maggrath v. Church, 1 Caines (N. Y.) 196, 2 Am. Dec. 173; Leavenworth v. Delafield, 1 Caines (N. Y.) 573, 2 Am. Dec. 201; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.) 274; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Saltus v. Commercial Ins. Co., 10 Johns. (N. Y.) 487; Heyliger v. Firemen's Ins. Co., 11 Johns. (N. Y.) 85; Delaware Ins. Co. v. Delaunie, 3 Bin. (Pa.) 295; Sansom v. Ball, 4 Dall. (Pa.) 459, 1 L. Ed. 908; Hall v. Rising Sun Ins. Co., 1 Disn. 308, 12 Ohio Dec. 639.

Since the charterer of a vessel is primarily bound to discharge average contributions upon the goods of the several cargo owners, he is entitled, under a policy insuring him against general average charges, to recover the amount of contributions paid by him on cargo owned by others as well as on cargo owned by himself (Dodwell & Co. v. Munich Assur. Co. [D. C.] 123 Fed. 841, affirmed in 128 Fed. 410, 63 C. C. A. 152). But where the ship, freight, and cargo are owned by the same person, and the freight and cargo are not insured, the assured on the vessel can recover of the insurers only the proportion of general average chargeable on the vessel (Jumel v. Marine Ins. Co., 7 Johns. [N. Y.] 412, 5 Am. Dec. 283). If the owners of ship and cargo are different, the owner of the ship may recover the whole amount of his loss, without any deduction of the general average due on the cargo. But where the shipowner is also owner of the cargo, the amount due from the cargo may be deducted from the total loss on the ship, by the underwriter (Potter v. Providence Washington Ins. Co., 19 Fed. Cas. 1180). In the case of partial insurance the extent of liability is proportionate to the sum insured.

Brewer v. American Ins. Co., 123 Mass. 78; Providence & S. S. S. Co. v. Phœnix Ins. Co., 22 Hun (N. Y.) 517.

As to liability for loss by way of general average, a contract of insurance is governed by the law of the place it was entered into (Shiff v. Louisiana State Ins. Co., 6 Mart. N. S. [La.] 629). But the parties may provide otherwise (Union Bank v. Union Ins. Co., Dud. Law [S. C.] 171). Though it was held in Lenox v. United Ins. Co., 3 Johns. Cas. (N. Y.) 178, that a foreign adjustment of general average is not conclusive on the parties, the general rule seems to be that, the liability being conceded, a foreign adjustment will be

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given effect, though the adjustment would have been different at the home port.

Loring v. Neptune Ins. Co., 20 Pick. (Mass.) 411; Strong v. New York Firemen Ins. Co., 11 Johns. (N. Y.) 323; (1825) Depau v. Ocean Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; Insurance Co. of North America v. Harris, 8 Phila. (Pa.) 136.

There can, of course, be no recovery against the insurer, under the liability for general average contribution, where the losses or expenditures are not subjects of general average.

Toledo Fire & Marine Ins. Co. v. Speares, 16 Ind. 52; Shiff v. Louisiana State Ins. Co., 6 Mart. N. S. (La.) 630; Dodge v. Union Marine Ins. Co., 17 Mass. 471; Dabney v. New England Mut. Marine Ins. Co., 14 Allen (Mass.) 300; Lenox v. United Ins. Co., 3 Johns. Cas. (N. Y.) 178; McBride v. Marine Ins. Co., 7 Johns. 431; Dunham v. Commercial Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374; De Pau v. Jones, 1 Brev. (S. C.) 437.

So, too, the insured cannot recover for both a total loss and for general average.

Schmidt v. United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 9; Walker v. United States Ins. Co., 11 Serg. & R. (Pa.) 61, 14 Am. Dec. 610.

Under a policy exempting the underwriter from liability for "all losses or expenses arising from or caused by the want of ordinary care and skill in navigating" the vessel, the insured cannot recover general average expenses incurred in rescuing the vessel from a peril brought about by negligence in her navigation (The Ontario [D. C.] 37 Fed. 220). An insurer on advances is liable only to the extent that the res as security is impaired by the peril insured against. There is no contribution for general average (Germond v. Anthracite Ins. Co., 10 Fed. Cas. 262). There can, of course, be no recovery for general average assessments under a fire policy on the vessel (Merchants' & Miners' Transp. Co. v. Associated Firemen's Ins. Co., 53 Md. 448, 36 Am. Rep. 428).

(k) Liability as affected by duties of owner, master, and crew after loss.

Not only is it the duty of the insured, the master, and crew to do all in their power to prevent a loss. It is also their duty to do all in their power to recover and preserve the property after loss has occurred and thus reduce the extent of the loss; and this duty

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exists irrespective of the clause requiring them to "sue, labor, and travel" for the preservation of the property.

Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739; The Henry, 11 Fed. Cas. 1153; Howland v. Marine Ins. Co. of Alexandria, 12 Fed. Cas. 741; King v. Delaware Ins. Co., 14 Fed. Cas. 516, affirmed 6 Cranch, 71, 3 L. Ed. 155; Hebner v. Sun Ins. Co., 157 Ill. 144, 41 N. E. 627; Same v. Oakland Home Ins. Co., Id.; Same v. Palatine Ins. Co., Id., affirming 55 Ill. App. 275; Cincinnati Mut. Ins. Co. v. May, 20 Ohio, 211; Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1; Jones v. Western Assur. Co. of Toronto, 47 Atl. 948, 198 Pa. 206.

Thus, where the vessel is damaged, but not to such an extent as to constitute a technical total loss, it is generally the duty of the owner or master to repair (Hubbell v. Great Western Ins. Co., 74 N. Y. 246, reversing 10 Hun, 167); and the efforts to procure the means of repair are not to be confined to the port of refuge, but an attempt should be made to procure workmen and materials at a neighboring port (Ruckman v. Merchants' Louisville Ins. Co., 12 N. Y. Super. Ct. 342).

The rule requiring vessels to repair, if possible, and prosecute the voyage without transferring the freight, does not apply to river craft. Blanks v. Hibernia Ins. Co., 36 La. Ann. 599.

It naturally follows that the owner is charged with the negligence of the master by which the damages are increased after the accident causing the loss.

Copeland v. Phœnix Ins. Co., 6 Fed. Cas. 507, affirmed Phœnix Ins. Co. v. Copelin, 9 Wall. 461, 19 L. Ed. 739; Howland v. Marine Ins. Co. of Alexandria, 12 Fed. Cas. 741; Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1.

But where insurers are notified that a wrecked vessel is abandoned to them, and the owners and master believe that the insurers will take possession of her, the fact that the master and owners take no further steps to save the vessel does not relieve the insurers from liability on the policy of insurance (The Natchez [D. C.] 42 Fed. 169).

Where the policy is on cargo or freight, and the vessel becomes disabled, it is the duty of the master to procure another vessel and forward the cargo, if such vessel can be procured at the port of distress or a contiguous port.

Herbert v. Hallett, 3 Johns. Cas. (N. Y.) 93; Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; Id., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490;

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Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270; Kinsman v. New York Mut. Ins. Co., 18 N. Y. Super. Ct. 460; Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 17; Schieffelin v. New York Ins. Co., 9 Johns. (N. Y.) 21.

But the master is not obliged to seek a vessel outside of the ports mentioned. Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270. And where a vessel was driven back to the port of departure, and there abandoned as for a total loss, no freight pro rata itineris being earned, the goods being accepted by the shippers, the master was not bound to procure another vessel and proceed with the goods to warrant a recovery upon the freight policy. Center v. American Ins. Co., 7 Cow. (N. Y.) 564; American Ins. Co. v. Center, 4 Wend. (N. Y.) 45.

Even where the policy contains the sue and labor clause, the insured or his representatives are not bound, in case of capture, to put in a claim for the property or to appeal in case of condemnation.

Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514; Thompson v. Mississippi Ins. Co., 2 La. 228, 22 Am. Dec. 129. The rule will, of course, be different if the insured has specially agreed to claim the property as neutral. Thatcher v. Bellows, 13 Mass. 111; Coolidge v. Blake, 15 Mass. 429.

And it is well within the power of the master or supercargo to compromise in case of capture, such compromise being binding on the insurer, if made in good faith.

Welles v. Gray, 10 Mass. 42; Clarkson v. Phœnix Ins. Co., 9 Johns. (N. Y.) 1; Waddell v. Columbian Ins. Co., 10 Johns. (N. Y.) 61.

(l) Effect of other insurance.

As the fundamental principle underlying all contracts of insurance on property is the principle of indemnity, the insured is in all events entitled to receive indemnity to the extent of his loss, but no more. It is, therefore, obvious that **the liability of an insurer will be greatly affected by the existence of other insurance on the property. If such other insurance covers identically the same property and interest, there is double insurance calling for an apportionment of liability between the insurers. But to constitute double insurance the property and interest must be identical in the several policies.**

Royster v. Steamboat Co. (C. C.) 26 Fed. 492; Warder v. Horton, 4 Bin. (Pa.) 529.

Thus, in Davis v. Boardmann, 12 Mass. 80, the policy covered the vessel and the cargo, and contained a clause providing, "Should this

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vessel and cargo be insured in England, this policy is to be canceled." It was held that the making of insurance in England on the vessel only, and not the cargo, discharged the liability on the vessel, but the insurer was still liable on the cargo. The court said that the intent of the parties was that if vessel and cargo, or either of them, should be insured in England, the policy should attach only on what should remain uninsured by such policy effected in England. So, insurance on advances is not double insurance in respect of insurance on the vessel, though it might be as to insurance on freight (Providence Washington Ins. Co. v. Bowring, 50 Fed. 613, 1 U. S. App. 183, 1 C. C. A. 583, affirming [D. C.] 46 Fed. 119). And where three policies, each for a third of the valuation, are issued on a vessel, there is not double insurance, as each covers a separate interest, and each insurer on a partial loss will be liable for a proportionate share (Whiting v. Independent Mut. Ins. Co., 15 Md. 297). If two policies are issued by the same insurer at the same time and to the same person, covering the same property, and a loss occurs within the terms of each, except that the amount is greater than the sums mentioned in either policy, but less than the aggregate of both policies, the assured is entitled to recover the full amount of his actual loss (Phœnix Fire Ins. Co. v. Cochran, 51 Pa. 143).

Though, in cases of double insurance on a marine risk, insured may, at his election, sue either underwriter (Thurston v. Koch, 23 Fed. Cas. 1183), the insurers are liable only proportionately to the amount insured by each, and not according to priority of contract.

Thurston v. Koch, 23 Fed. Cas. 1183; International Nav. Co. v. British & Foreign Marine Ins. Co., 108 Fed. 987, 48 C. C. A. 181, affirming (D. C.) 100 Fed. 304; Same v. Brown, Id.; Fabbri v. Mercantile Mut. Ins. Co., 64 Barb. (N. Y.) 85.

Where a steamer insured against fire in certain fire insurance companies, and by policies of marine insurance issued by certain marine underwriters, ran upon an unknown rock, and, after unavailing efforts to take her off, was destroyed by fire, equity had jurisdiction of a bill by the insured against all the insurers to determine what proportion of the loss should be borne by the fire and what by the marine underwriters, and to apportion the loss between the members of the two classes (Fuller v. Detroit Fire & Marine Ins. Co. [C. C.] 36 Fed. 469, 1 L. R. A. 801).

But where a marine carrier issues to shippers bills of lading binding it as an insurer of the cargo covered thereby, and against the risks so assumed takes out a marine policy providing that "this insurance is understood and agreed to be in effect a reinsurance of

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risks which are or may be assumed by the assured on a loss of cargo covered by bills of lading, the insurance company is liable for the full amount to the extent of the insurance named in the policy. The policy must be regarded as one of reinsurance and not of coinsurance, which would entitle the company to prorate the loss with the carrier (Ocean S. S. Co. v. Ætna Ins. Co. [D. C.] 121 Fed. 883). In case of a total loss, where two insurances have been made, the assured may abandon to the second underwriters and take from them so much as the second policy covers (Murray v. Insurance Co. of Pennsylvania, 17 Fed. Cas. 1048). If the double insurance is by an open and a valued policy, and the assured cedes to the insurer on the open policy as much as is covered by such policy, and obtains payment as for a total loss, he can afterwards recover on the valued policy only for such property as he could cede (Craig v. Murgatroyd, 4 Yeates [Pa.] 161).

Policies sometimes provide that other insurance shall be regarded as simultaneous insurance and contribute ratably according to their respective amounts. Such a clause, contained in a Lloyd's policy, does not refer to the liability of the different subscribers thereto, but to the apportionment of the loss between different policies on the same vessel (McAllister v. Hoadley [D. C.] 76 Fed. 1000). A policy on "disbursements" cannot be regarded as simultaneous with a policy on the vessel, the risk, subject-matter and conditions of the policies being different (International Nav. Co. v. British & Foreign Marine Ins. Co., 108 Fed. 987, 48 C. C. A. 181, affirming [D. C.] 100 Fed. 304). Where the policy provides "that other insurance on the property aforesaid, of date the same day as this instrument, shall be deemed simultaneous herewith," two policies issued on different days, but to become operative on the same future day at noon, are not simultaneous (Carleton v. China Mut. Ins. Co., 54 N. E. 559, 174 Mass. 280, 46 L. R. A. 166).

The policy may contain what is known as the "American clause," providing that, if there is prior insurance on the vessel, "this company shall be liable only for so much as the amount of such prior insurance shall be deficient towards fully covering the property hereby insured." Under this clause the second insurer is liable only for the excess of the value of the vessel over the amount of the prior insurance.

Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55; Murray v. Insurance Co. of Pennsylvania, 17 Fed. Cas. 1048.

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The American clause is applicable only in cases of double insurance, and the two policies must, therefore, cover identically the same property and interest.

Gross v. New York & T. S. S. Co. (D. C.) 107 Fed. 516; Whiting v. Independent Mut. Ins. Co., 15 Md. 297; Perkins v. New England Marine Ins. Co., 12 Mass. 214; Palmer v. Great Western Ins. Co., 10 Misc. Rep. 167, 30 N. Y. Supp. 1044.

To render the clause operative in favor of an insurer the other insurance must be actually prior (Hogan v. Delaware Ins. Co., 12 Fed. Cas. 309); and priority is to be determined by the date of the policy, and not the time the risk attached (Deming v. Merchants' Cotton Press & Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518). If the two policies bear the same date, the insurer in one policy, to entitle himself to an exoneration from payment of a loss under the clause as to insurance by prior policies, may show the actual time of execution of each policy (Potter v. Marine Ins. Co., 19 Fed. Cas. 1167).

If the property insured is fully covered by the prior policy, the second policy, under the operation of the American clause, will not attach.

Potter v. Marine Ins. Co., 19 Fed. Cas. 1167; Amory v. Gilman, 2 Mass. 1; Lewis v. Manufacturers' Fire & Marine Ins. Co., 131 Mass. 364. And this is so though the prior insurer becomes insolvent. Ryder v. Phœnix Ins. Co., 98 Mass. 185.

Cancellation of the prior policy before the second policy is actually issued will render the clause inoperative (Roelker v. Great Western Ins. Co., 32 N. Y. Super. Ct. 275), but not cancellation before the loss (Macy v. Whaling Ins. Co., 9 Metc. [Mass.] 354).

For specific examples of apportionment, reference may be made to McKim v. Phœnix Ins. Co., 16 Fed. Cas. 216; Kane v. Commercial Ins. Co., 8 Johns. (N. Y.) 229; Minturn v. Columbian Ins. Co., 10 Johns. (N. Y.) 75; Sherlock v. Globe Ins. Co., 7 Ohio Dec. 17, 1 Wkly. Law Bul. 26; Craig v. Murgatroyd, 4 Yeates (Pa.) 161.

(m) Deductions and offsets.

In determining the liability of the insurer, certain deductions are under some circumstances made from the amount found to be due on account of the loss. The most common is the deduction of the amount due for premiums or on premium notes.

Warren v. Franklin Ins. Co., 104 Mass. 518; Livermore v. Newburyport Ins. Co., 2 Mass. 232; Dodge v. Union Marine Ins. Co., 17 Mass.

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471; Hurlbert v. Pacific Ins. Co., 12 Fed. Cas. 1009; The Natchez (D. C.) 42 Fed. 169; Aldrich v. Equitable Safety Ins. Co., 1 Fed. Cas. 336; Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576. But see Hayden v. Nevins, 21 N. Y. Super. Ct. 234.

Not only premiums on the policy under which the loss occurred may be deducted, but also premiums on other policies entered into with the same insured.

Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. Ed. 332; Cleveland v. Clap, 5 Mass. 201. But premium notes on such other policies not due cannot be deducted. Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414, affirmed 147 N. Y. 711, 42 N. E. 724. And when the policy covers a cargo furnished by the shipowner to one chartering his ship, and is made payable to the latter, in which the insurer insured the owner "on account of whom it may concern," the insurer cannot set off notes of the owner given for previous premiums. Pacific Mail S. S. Co. v. Great Western Ins. Co., 65 Barb. (N. Y.) 334.

If the policy provides for an additional premium in case of increased risk, deduction therefor may also be made (Wright v. Sun Mut. Ins. Co., 30 Fed. Cas. 704).

Among the deductions that may be made, the insurer may deduct the proceeds of the sale of materials from a vessel broken up. Smith v. Manufacturers' Ins. Co., 7 Metc. (Mass.) 448; a claim on bottomry, Wiggin v. American Ins. Co., 18 Pick. (Mass.) 158; a judgment against insured, Hazlehurst v. Bayard, 3 Yeates (Pa.) 152.

The insurer cannot deduct on a total loss the cost of repairs to remedy defects which did not render the vessel unseaworthy. Depeyster v. Columbian Ins. Co., 2 Caines (N. Y.) 85. And on total loss of cargo the insurer cannot deduct the drawback allowed on exportation. Gahn v. Broome, 1 Johns. Cas. (N. Y.) 120. Under a policy insuring outfits of a whaling ship, by which one-fourth the catchings should replace outfit consumed, catchings shipped home cannot be deducted from a subsequent total loss. Mutual Marine Ins. Co. v. Munro, 7 Gray (Mass.) 246.

On a distributive policy, insurer may deduct the value of articles saved (Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63). Where a part of the property was recovered, the insurer is entitled to a reduction of the amount of the insurance due upon total loss in proportion to the value of the property recovered, less the cost of recovery; but if the company abandoned an attempt to recover the property, in the belief that it was not liable under the policy, it can-

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not hold the insured liable for any part of the expense incurred in the preparation for the recovery (Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563). The insurer is not liable for interest on proceeds which it holds, the owner not being known (Robinson v. Corn Exchange Ins. Co., 1 Abb. Prac. N. S. [N. Y.] 186).

Where a policy covered liability for collision, and provided that in case of loss a certain amount should be deducted in lieu of average, only one deduction should be made, though more than one vessel was injured in the collision (New York Cent. & H. R. R. Co. v. British & Foreign Marine Ins. Co. [D. C.] 58 Fed. 916). If the policy separately values the hull and the machinery, the per cent. of deduction in case of collision is to be computed on the valuation of the hull only, the machinery not being injured (American S. S. Co. v. Indemnity Mut. Marine Assur. Co., 118 Fed. 1014, 56 C. C. A. 56, affirming [D. C.] 108 Fed. 421). Where a policy stipulates that in case of loss the insurance shall abate so much per cent., it is to be calculated upon the amount of the loss, not on the value of the cargo or of all the goods covered by the policy (Louisville Marine & Fire Ins. Co. v. Bland, 9 Dana [Ky.] 143). The right to make the deduction is not affected by the existence of concurrent insurance (Ronan v. Indemnity Mut. Marine Assur. Co. [D. C.] 127 Fed. 757).

The insurer on freight may claim an allowance for freight earned prior to the breaking up of the voyage.

Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 410; Whitney v. New York Fireman's Ins. Co., 18 Johns. (N. Y.) 208. But an advance on freight returnable because not earned cannot be deducted. Hagedorn v. St. Louis Perpetual Ins. Co., 2 La. Ann. 1005. Advances by charterer are not such payments on the charter as may be deducted from a policy on freight. Benner v. Equitable Safety Ins. Co., 6 Allen (Mass.) 222. Where the policy covered the interest of a lender on a bottomry draft to be paid at port of final destination from the first amount of freight received, freight received at an intermediate port, and used for the necessities of the vessel, cannot be deducted from a subsequent total loss. Force v. Providence Washington Ins. Co. (D. C.) 35 Fed. 767.

But the insurer is not entitled to an allowance for freight earned on subsequent voyages.

Jordan v. Warren Ins. Co., 13 Fed. Cas. 1105; Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 410; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290.

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When the insurance is on freight for successive voyages, as for outward and return voyages, freight earned on the outward voyages cannot be deducted.

Hugg v. Augusta Ins. & Banking Co., 7 How. (U. S.) 595, 12 L. Ed. 834; Virginia Val. Ins. Co. v. Mordecai, 22 How. 111, 16 L. Ed. 329; Davy v. Hallett, 3 Caines (N. Y.) 16, 2 Am. Dec. 241.

Allowances for wages, provisions, and other charges on freight are not to be deducted from a total loss.

McGregor v. Insurance Co. of Pennsylvania, 16 Fed. Cas. 129; Stevens v. Columbian Ins. Co., 3 Caines (N. Y.) 43, 2 Am. Dec. 247.

Under a valued policy on freight, the insurer cannot claim an allowance in the nature of salvage for prepaid passage money (Delano v. American Ins. Co., 42 Barb. [N. Y.] 142).

If an insured vessel is damaged by collision, and the owner recovers from the offending vessel, the insurer, on payment of the loss, is entitled to an accounting as of the sum so recovered.

New England Mut. Marine Ins. Co. v. Dunham, 18 Fed. Cas. 66, affirming Dunham v. New England Mut. Marine Ins. Co., 8 Fed. Cas. 46.

Where the insured recovered from the shipowner for the loss of goods, and subsequently a judgment for the loss was recovered upon the policy, in the name of the insured, but for the benefit of the shipowner, the underwriters, upon a bill filed for that purpose, were allowed to deduct from the judgment the amount received from the shipowner by the insured, though the underwriters might have availed themselves of such recovery upon the bill of lading as a defense to the suit upon the policy. Atlantic Ins. Co. v. Storrow, 1 Edw. Ch. (N. Y.) 621. But see Georgia Ins. & Trust Co. v. Dawson, 2 Gill (Md.) 865.

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XX. RISK AND CAUSE OF LOSS—FIRE AND CASUALTY INSURANCE.

1. Place and cause of loss and excepted risks.
   (a) Place and circumstances of loss.
   (b) What constitutes a fire.
   (c) Negligence of insured.
   (d) Willful destruction of property by insured.
   (e) Matters subsequent to fire.
   (f) Risks specially excepted.
   (g) Same—Explosions.
   (h) Same—Fall of building.
   (i) Casualty insurance in general.
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2. Pleading and practice in relation to risk and cause of loss.
   (a) Pleading and burden of proof.
   (b) Admissibility of evidence.
   (c) Sufficiency of evidence.
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1. PLACE AND CAUSE OF LOSS AND EXCEPTED RISKS.

(a) Place and circumstances of loss.
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(i) Casualty insurance in general.
(j) Insurance against flood, storm, or lightning.

(a) Place and circumstances of loss.

It is a well-settled rule that there can be no recovery for the loss of property insured at a specified place if it is destroyed at a totally different place. The theory of the rule is that by the terms of the policy the location of the property is an essential element of the risk assumed. Whether location is an element depends, of course, on the wording of the contract. If the property is insured "while contained in" a certain building, the location of the property must

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be regarded as an element of the risk, and there can be no recovery for a loss if the property is destroyed elsewhere.

Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166; Lakings v. Phœnix Ins. Co., 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70; London Assur. Corp. v. Thompson, 62 N. E. 1066, 170 N. Y. 94, affirming 67 N. Y. Supp. 1138, 54 App. Div. 637; Montgomery v. Delaware Ins. Co., 55 S. C. 1, 32 S. E. 723; First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461; Ætna Fire Ins. Co. v. Brannon (Tex. Civ. App.) 81 S. W. 560; British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901. In the last case the property was insured "while located and contained as described therein and not elsewhere."

So where a policy covering household linen and wearing apparel stipulates that it only covers the property while in a certain building, a recovery cannot be had for loss to such property while hanging on a clothesline between the building mentioned in the policy and another building, in which the fire originated (Leventhal v. Home Ins. Co. of New York, 66 N. Y. Supp. 502, 32 Misc. Rep. 685). A policy insuring an express company against loss by fire on express matter, only while contained in cars while in transit upon lines owned, leased, or operated by a certain railroad company, covers express matter in cars in transit on lines acquired by the company after the execution of the policy, but not on lines lost within its duration (Traders' Ins. Co. v. Northern Pac. Exp. Co., 70 Ill. App. 143). It does not affect the limitation that the property was removed from the building for the purpose of its ordinary, necessary, and convenient use (Green v. Liverpool & London & Globe Ins. Co., 91 Iowa, 615, 60 N. W. 189). Consequently the insurer of wearing apparel "while contained in" the insured's dwelling is not liable for a loss of such property while being transported to a distant place, there to be used by the family of the insured while on a visit (Eaton v. Phœnix Ins. Co., 15 Ky. Law Rep. 441). A policy on live stock "while on the premises only" will not cover a loss of such property on different premises 20 miles distant (Lakings v. Phœnix Ins. Co., 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70). A policy on a fire engine "while located and contained in" the engine house, "and not elsewhere," does not cover a loss of the engine while out of the building and in use in an attempt to extinguish a fire (Village of L'Anse v. Fire Ass'n of Philadelphia, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410).

On the other hand, that the words "while located and contained

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as described herein and not elsewhere," will not limit the risk when the property insured is necessarily used outside of the described location, is asserted in McKeesport Mach. Co. v. Ben Franklin Ins. Co., 173 Pa. 53, 34 Atl. 16, where the policy covered the plant of a manufacturing company, and described the patterns as being in the pattern shop. It was held that the company was responsible for the destruction of the patterns while they were in actual use in the casting room. So where a policy on live stock contained the clause, "on the property described in the places herein set forth and not elsewhere," the words were construed as descriptive only, and it was held that the company was liable for a horse which had been removed to a new barn some distance from the old, and was there destroyed by the burning of the barn (De Graff v. Queen Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685).

Where property is described as "reapers, mowers, harvesters, and other farming utensils (excepting threshing machinery), wagons, buggies, and harness, in buildings on premises," the phrase "in buildings on premises" belongs to the entire series, and recovery cannot be had for a hay press which was not within any building at the time of the loss. Had there been no comma before the phrase "in buildings on premises" there might have been some ground for the contention that the phrase referred only to "wagons, buggies, and harness." Phœnix Ins. Co. v. Stewart, 53 Ill. App. 273.

In a policy of insurance containing a separate clause reading, "$500 on stallion 4 years old," pursuant to a requirement that "fancy stock shall be especially designated and a valuation placed upon each when insured," there is no restriction as to place of loss in respect to the stallion, though the preceding clause, covering other stock, has the limitation, "on live stock in or near said barns." Eddy v. Farmers' Mut. Ins. Co., 46 N. Y. Supp. 695, 20 App. Div. 109, affirming 41 N. Y. Supp. 854, 18 Misc. Rep. 297.

Analogous to the insurance of property "while contained in" a certain building is an insurance on a building and "contents." Such a policy will not cover property removed from the building to another building (Benton v. Farmers' Mut. Fire Ins. Co., 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237). So a policy on a barn, and the "contents therein," does not cover horses, which, though stabled in the barn, were killed by lightning outside (Farmers' Mut. Fire Ins. Ass'n v. Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284). The same effect has been given to the phrase "contained in" where the property is such that in its proper use it would be contained in the building. Thus where the policy covers

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"household goods" "contained in" a dwelling house (English v. Franklin Fire Ins. Co., 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377), there can be no recovery for the loss of the goods while they are in another building to which they have been removed, and this is so though the removal was caused by a previous fire in the dwelling house.

Where a policy covers a butcher shop and its contents and a smokehouse and its contents, it will cover a loss of smoked meats which have been removed from the smokehouse to the butcher shop. Graybill v. Pennsylvania Tp. Mut. Fire Ins. Ass'n, 170 Pa. 75, 32 Atl. 632, 29 L. R. A. 55, 50 Am. St. Rep. 747.

As to the effect of a description of the property as "contained in" a certain building, in limiting the risk the courts are not agreed. The weight of authority, however, supports the doctrine that the limitation is in such instances an essential element of the risk limiting the liability of the insurer for a loss.

Reference may be made to Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co., 8 Fed. Cas. 300; Shertzer v. Mutual Fire Ins. Co., 46 Md. 506; Annapolis & E. R. Co. v. Baltimore Fire Ins. Co., 32 Md. 37, 3 Am. Rep. 112.

So a policy on vehicles of a liveryman "contained in" a described livery stable will not cover a loss of a vehicle while temporarily at a repair shop (Bradbury v. Westchester Fire Ins. Co., 80 Me. 396, 15 Atl. 34, 6 Am. St. Rep. 219). On the other hand, it has been held in Iowa (McCluer v. Girard Fire & Marine Ins. Co., 43 Iowa, 349, 22 Am. Rep. 249) and in Virginia (Niagara Fire Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694, 17 Am. St. Rep. 115) that under such a policy vehicles are covered while at a repair shop undergoing necessary repairs. The same doctrine has been asserted in Kentucky (London & Lancaster Fire Ins. Co. v. Graves, 4 Ky. Law Rep. 706). And where a horse insured is described as "contained in" a certain building, recovery may be had if the horse is killed by lightning while in an adjoining field at pasture.

Haws v. Fire Ass'n, 114 Pa. 431, 7 Atl. 159; American Cent. Ins. Co. v. Haws (Pa.) 11 Atl. 107.

On the other hand, if the policy is on a barn and contents, and recites that the insurer shall not be liable for loss of any property while removed from the barn, it will not cover horses killed while in the fields at pasture (Haws v. St. Paul Fire & Marine Ins. Co.,

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130 Pa. 113, 15 Atl. 915, 2 L. R. A. 52, affirmed on rehearing 18 Atl. 621, 130 Pa. 113).

Where wearing apparel is described as situated in a certain house, the rule in Iowa is that the house is to be regarded only as its place of deposit when not in ordinary use, and the company is liable for its loss by fire while being worn away from the house (Longueville v. Western Assur. Co., 51 Iowa, 553, 2 N. W. 394, 33 Am. Rep. 146). But there can be no recovery where wearing apparel has been removed to a distant place, and the loss did not occur until several months thereafter (Towne v. Fire Ass'n of Philadelphia, 27 Ill. App. 433). An insurance on live stock "contained in" a barn (Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229), or situated in a certain place (Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494, 95 Am. Dec. 748), will cover the property anywhere while it is in its ordinary and necessary use. A similar principle has been asserted in Michigan (Hapeman v. Citizens' Mut. Fire Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535). But if the statute forbids an insurance company to insure property in buildings within 100 feet of other buildings, an insured cannot recover for a horse and harness insured as "farm property," which is destroyed while temporarily in a hotel barn, within 100 feet of other buildings (Wildey v. Farmers' Mut. Fire Ins. Co., 52 Mich. 446, 18 N. W. 212). Where the policy indemnified insured against damage or loss by fire "on horses and colts while in barn, and by lightning only while in use, or running in pasture or yard on his farm, in the town of L.," the risk of loss by lightning extended to the horses while in use or running in pasture at any place in the town of L. (Boright v. Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796). If the property insured in one place is of such nature that its use does not make it transitory, there can, of course, be no recovery for a loss occurring in another place (Giboney v. German Ins. Co., 48 Mo. App. 185).

A provision in the charter of a mutual live stock insurance company that the business of the company shall be confined to certain counties does not deprive one who has removed horses insured in those counties to another county from recovering on the policy for their loss (Coventry Mut. Live-Stock Ins. Ass'n v. Evans, 102 Pa. 281). It is to be noted, however, that in this case stress was laid on the fact that there was no increase of risk by the removal. It was on this feature of the case that a distinction was drawn in Reck v. Hatboro Mut. Live Stock Ins. Co., 8 Montg. Co. Law Rep'r

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(Pa.) 202, 10 Montg. Co. Law Rep'r, 17, where the by-laws of the company provided that stock insured should be confined to a distance of twelve miles from a given point. The insured permanently removed a horse insured beyond the limit, and it was held that there could be no recovery for a loss occurring thereafter, there being in the opinion of the court an actual increase of risk.

The theory of the cases is not that the policy is forfeited by the removal of the property, for removal merely does not have that effect (Montgomery v. Delaware Ins. Co., 32 S. E. 723, 55 S. C. 1), and a temporary removal merely suspends the risk, which again attaches when the property is restored to its original location (British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901). Even where the policy is on goods while they should be and remain in a certain building against any loss or damage which should happen by or by means of fire, the underwriters are liable for a loss and damage sustained by the removal of goods in case of imminent danger from fire (Holtzman v. Franklin Ins. Co., 12 Fed. Cas. 438).

A clause in an insurance policy that in case of loss the insured should make oath that the property insured was at the time in the building described in the policy is in effect a stipulation that the property shall not be removed. Harris v. Royal Canadian Ins. Co., 53 Iowa, 236, 5 N. W. 124.

Consent to the removal of the insured property to another locality, where it is to continue insured, is a new contract, and covers the goods in both places during removal, and thereafter in the new place only (Sharpless v. Hartford Fire Ins. Co. [Com. Pl.] 8 Pa. Co. Ct. R. 387). But such a permit cannot be construed as covering the goods in transit (Goodhue v. Hartford Fire Ins. Co., 184 Mass. 41, 67 N. E. 645).

Generally the insured must allege that the destroyed property was in the location described in the policy. Todd v. Germania Fire Ins. Co., 1 Mo. App. 472. And in the absence of an allegation of mistake in the terms of the contract it is error to admit evidence showing the destruction of property in a building other than the one described in the policy. Ætna Fire Ins. Co. v. Brannon (Tex. Civ. App.) 81 S. W. 560. But where a store destroyed by fire was only one story high, the petition in an action on a policy covering goods on the first floor was not objectionable for failure to allege that the merchandise when burned was on the first floor of the building. Pence v. Mercantile Town Mut. Ins. Co., 80 S. W. 746, 106 Mo. App.

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402. And see, also, Montgomery v. Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934, where it appeared that the property was removed from another building than the one described.

Where a policy on a harvesting machine, though running in terms for a year, contains a clause stating that it only insures the machine while operating in the grain fields, and in transit from place to place in connection with harvesting, the company is not liable for a loss of the machine by fire within the year, if at the time of such loss it was not actually in operation or in transit, as provided by such clause (Benicia Agricultural Works v. Germania Ins. Co., 97 Cal. 468, 32 Pac. 512). Consequently such a policy will not cover a machine which is at a shop undergoing repairs in preparation for the opening of the harvesting season (Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87), or a machine which is stored in a shed and dismantled after the close of the season (Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595, 55 Pac. 417).

A policy of insurance against fire was issued on a vessel while lying at anchor. The vessel was burned while on a beach a mile from the water at low tide. Plugs had been taken out of her hull to permit the water to run in and out, and her furniture, awnings, etc., had been removed. To prevent her moving, she was fastened by iron rails to the bow and on one side of her stern and to her anchor on the other. It was held that she was not lying at anchor at the time of the loss, within the meaning of the policy. Reid v. Lancaster Fire Ins. Co., 19 Hun (N. Y.) 284; Id., 90 N. Y. 382, affirming 23 Hun, 295.

(b) What constitutes a fire.

An explosion which consists in the rapid or instantaneous combustion of explosive substances is covered by a fire policy containing no restrictions against explosions.

Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw v. Missouri State Mut. Fire & Marine Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Pentz v. Receivers of Ætna Fire Ins. Co., 9 Paige (N. Y.) 568; Insurance Co. v. Foote, 22 Ohio St. 348, 10 Am. Rep. 735. Mitchell v. Potomac Ins. Co., 16 App. D. C. 241, affirmed 22 Sup. Ct. 22, 183 U. S. 42, 46 L. Ed. 74, and Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403, also define an explosion as "a sudden and rapid combustion," etc. See, also, dictum in Briggs v. Ins. Co., 53 N. Y. 446.

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But this rule of course does not apply where the explosion is the result of the sudden expansion of a substance, without combustion, as in the case of an explosion of a steam boiler.

Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15, 50 Am. Dec. 550; Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111.

It cannot be said that lightning constitutes a fire, so that damage caused solely thereby will be covered by an ordinary fire policy.

Kenniston v. Merimack County Mut. Ins. Co., 14 N. H. 341, 40 Am. Dec. 193; Babcock v. Montgomery County Mut. Ins. Co., 4 N. Y. 326, affirming 6 Barb. 637.

And it has been held that heat without ignition, though it was sufficient to char the property, was not a "fire," and that such damage was not covered; the heat itself not having been the result of a fire (Gibbons v. German Ins. & Sav. Inst., 30 Ill. App. 263).

Damage without ignition, resulting from a "friendly fire"—that is, a fire intentionally built within a stove, lamp, or other like place—is not covered by an ordinary fire policy.

Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124; Fitzgerald v. German-American Ins. Co., 30 Misc. Rep. 72, 62 N. Y. Supp. 824; Samuels v. Continental Ins. Co. (Com. Pl.) 2 Pa. Dist. R. 397. See, also, post, subdivision (g), for cases holding that since a friendly fire is not such a "fire" as is contemplated in the contract of insurance, an explosion caused by such a friendly fire is not covered by a policy excepting explosions.

But it might be noted that in the Cannon Case emphasis was placed on the fact that it did not appear that the water thrown upon the heated wall was necessary in order to prevent ignition. And in general, in the absence of any restriction, damage caused by any unintentional ignition, outside the friendly fire, though caused thereby, will be covered by the policy.

Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa, 193, 68 N. W. 600; Renshaw v. Missouri State Mut. Fire & Marine Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394; Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153.

This rule has been applied to damage caused by a fire in a chimney resulting from the accidental ignition of soot (Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55

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Am. St. Rep. 379). And in Collins v. Delaware Ins. Co., 7 Del. Co. R. (Pa.) 365, 9 Pa. Super. Ct. 576, it was held for the jury to say whether the fire resulting from the oil in a coal oil stove igniting, thereby damaging plaintiff's furniture with smoke and soot was outside the place where it was intended to burn, so as to entitle plaintiff to recover on his policy. But in Samuels v. Continental Ins. Co., 2 Pa. Dist. R. 397, damage caused by the smoke and soot of a lamp whose flame accidentally flared up above the lamp chimney to a height of several feet was held not within the terms of the policy.

An intentional explosion, ordered by the municipal authorities for the purpose of destroying the building and arresting the progress of a conflagration, has been held, without reference to any distinction between hostile and friendly fires, to constitute such a fire as is contemplated by an ordinary fire policy containing no exception applicable to such circumstances.

City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Pentz v. Receivers of the Ætna Fire Ins. Co., 9 Paige (N. Y.) 568.

It would seem that such a loss might be considered as a direct result of the conflagration, and therefore as within the policy (Greenwald v. Insurance Co., 7 Am. Law Reg. O. S. [Pa.] 282); but the court in the leading Corlies Case considered the question as determined by the fact the explosion was a fire, holding that it made no difference that it was a fire ordered by municipal authority. The question as to whether the building would have been burned in any event was dealt with only as showing that the city might be liable, and as bearing on the release of the company by the liability of the city.

(c) Negligence of insured.

It is a general rule that **in the absence of special stipulations the insurer is liable for a loss caused by a fire occasioned by the negligence of insured or those for whose conduct he was responsible.** This rule is based on the ground that a negligent fire, not being specially excepted, must be considered as within the meaning and intention of the parties, and as included within the general terms used, and also on the ground that in the absence of fraud the fire rather than the negligence should be considered as the proximate cause of the loss.

Reference may be made to the following cases: Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512; Catlin v. Springfield Fire Ins. Co., 5 Fed. Cas. 310; Firemen's Ins. Co. v. Appleton Paper & Pulp Co., 59 Ill. App. 511; Mickey v. Burlington Ins. Co., 35 Iowa, 174, 14 Am. Rep. 494; Des Moines Ice Co. v. Niagara Fire Ins. Co., 99

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Iowa, 193, 68 N. W. 600; Phenix Ins. Co. v. Sullivan, 39 Kan. 449, 18 Pac. 528; St. Paul Fire & Marine Ins. Co. v. Owens, 69 Kan. 602, 77 Pac. 544; Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. Law Rep. 958, 70 S. W. 274; Henderson v. Western Marine & Fire Ins. Co., 10 Rob. (La.) 164, 43 Am. Dec. 176; Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; Johnson v. Berkshire Mut. Fire Ins. Co., 4 Allen (Mass.) 388; Huckins v. People's Mut. Fire Ins. Co., 31 N. H. 238; Gates v. Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Hynds v. Schenectady County Mut. Ins. Co., 16 Barb. (N. Y.) 119; Brown v. King's County Fire Ins. Co., 31 How. Prac. (N. Y.) 508; St. John v. American Mut. Fire & Marine Ins. Co., 8 N. Y. Super. Ct. 371; O'Brien v. Commercial Fire Ins. Co., 38 N. Y. Super. Ct. 517; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298; Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20; Karow v. Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

In Young v. Washington County Mut. Ins. Co., 14 Barb. (N. Y.) 545, however, the decision that the insurer was liable for a loss by a fire starting in an adjoining building being rebuilt by insured, was based entirely on the showing that insured had been guilty of no negligence in the rebuilding.

This rule that the company will be liable for a loss by fire occasioned by the negligence of insured seems particularly applicable where, as is sometimes the case in the insurance of carriers or warehousemen, the indemnity promised is for a liability which would not have attached but for the negligence of insured or its servants.

California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; Liverpool & L. & G. Ins. Co. v. McNeill, 89 Fed. 131, 32 C. C. A. 173; Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132. See, also, Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 322, 6 Sup. Ct. 755, 29 L. Ed. 873, where it was held that insurance thus operating to protect the company from the negligence of its employés was not against public policy.

This, of course, does not imply that negligence of the carrier must be alleged where it claims to have been liable to the shipper under a common-law contract of carriage (Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132).

(d) Willful destruction of property by insured.

It is a rule so self-evident as to have apparently never been questioned that in no event can there be a recovery by insured for a loss caused by his intentional destruction of the property.

There seems to be no case directly deciding this self-evident proposition. Reference may, however, be made to the succeeding brief, where

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there is a discussion as to the burden and presumption of proof, and sufficiency of evidence to prove this defense.

And even though the insured does not himself kindle the fire, yet if he prevents the property from being removed or the fire from being extinguished, or intentionally permits an incipient fire to gain headway, and the destruction of the property results therefrom, he cannot recover.

Thornton v. Security Ins. Co. (C. C.) 117 Fed. 773; Chandler v. Worcester Mut. Fire Ins. Co., 3 Cush. (Mass.) 328; Huckins v. People's Mut. Fire Ins. Co., 31 N. H. 238; Phœnix Ins. Co. v. Mills, 77 Ill. App. 546. See, also, Spencer v. Farmers' Mut. Ins. Co., 79 Mo. App. 213, and Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa, 70, 64 N. W. 687.

It is not necessary that any indictable offense be shown in order to prevent a recovery for the willful burning of the property (Schmidt v. New York Union Mut. Fire Ins. Co., 1 Gray [Mass.] 529). Nor need it be shown that the conspiracy in accordance with which the fire was started extended to the property for which recovery is sought (Names v. Dwelling House Ins. Co., 95 Iowa, 642, 64 N. W. 628). But since an insane person cannot be held to have had any fraudulent or wrongful design in setting fire to his property, such act on his part will not relieve the company from liability.

D'Autremont v. Fire Ass'n of Philadelphia, 65 Hun, 475, 20 N. Y. Supp. 844; Showalter v. Mutual Fire Ins. Co., 3 Pa. Super. Ct. 448, 40 Wkly. Notes Cas. 76, affirming 17 Pa. Co. Ct. R. 558; Karow v. Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

The insurer is not liable to an insured partnership for a damage by a fire procured or caused by one of the partners (Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio Cir. Ct. R. 97, 10 O. C. D. 225). And in a case of conspiracy it is of course immaterial who actually sets the fire.

Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700; Names v. Dwelling House Ins. Co., 95 Iowa, 642, 64 N. W. 628; Joy v. Liverpool & L. & G. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822. See, also, McCarty v. Hartford Fire Ins. Co. (Tex. Civ. App.) 75 S. W. 934.

But in the absence of conspiracy or privity between the incendiary and insured it is no defense that the property was set on fire by some third person. This rule has been applied to a fire caused by an agent who had insurance on other property in the

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building (Henderson v. Western Marine & Fire Ins. Co., 10 Rob. [La.] 164, 43 Am. Dec. 176). And in Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540, it was held that in the absence of evidence connecting insured with the fraudulent destruction of the property she might recover, though it had been destroyed by her agent in whose sole charge it had been placed. So, also, loss occasioned by the willful act of the insured's wife is covered.

Walker v. Phœnix Ins. Co., 62 Mo. App. 209. See, also, Gove v. Insurance Co., 48 N. H. 41, 97 Am. Dec. 572, 2 Am. Rep. 168, where it appeared that the wife was insane and in the custody of her husband.

Conversely the company is liable for the willful destruction of the wife's property by the husband.

Perry v. Mechanics' Mut. Ins. Co (C. C) 11 Fed. 485; Plinsky v. Germania Fire & Marine Ins. Co. (C. C.) 32 Fed. 47; Union Ins. Co. v. McCullough, 2 Neb. (Unof.) 198, 203, 96 N. W. 79.

And in Malin v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S W. 56, it was held that insured was not chargeable with the unauthorized acts of his son in filling a stove in the building with combustible material.

Where the insurance has been effected for the benefit of another than the person named as insured, and the action is brought for the use of such beneficiary, defendant should be permitted to show that the beneficiary set fire to the property (McCarty v. Louisiana Mut. Ins. Co., 25 La. Ann. 354) So, also, under a policy taken out by a mortgagor, and payable to a mortgagee as his interest may appear, the incendiarism of the mortgagor bars the mortgagee of recovery. A mortgagee can claim under such a policy only through the insured mortgagor, and since the incendiarism would be an undoubted defense against the mortgagor the mortgagee is also barred. (Hocking v. Virginia Fire & Marine Ins. Co., 99 Tenn. 729, 42 S. W. 451, 39 L. R. A. 148, 63 Am. St. Rep. 862.) But where a policy issued to A. and B. contained a provision that the loss, if any, was to be first payable to A. as his interest might appear, and B., who really had no interest in the policy, afterwards caused the building to be burned without A.'s knowledge or consent, it was held that such act could not affect A.'s right to recover (Westchester Fire Ins. Co. v. Foster, 90 Ill. 121). And where the policy provides that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, or owner, it is obvious that a voluntary destruction by the owner

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will not prevent recovery by the mortgagee (Hartford Fire Ins. Co. v. Williams, 63 Fed. 925, 11 C. C. A. 503, 27 U. S. App. 493).

(e) Matters subsequent to fire.

The ordinary fire policy insures primarily against either all "loss or damage by fire," or all "direct loss or damage by fire."

The former of these phrases has been adopted in the standard policies of Maine, Massachusetts, Minnesota, and New Hampshire; the latter in Connecticut, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin.

These phrases include not only the destruction which results from the actual combustion of the property, but, in the absence of special stipulations, cover also all damage which is the direct and natural result of a hostile fire. Thus the explosion or rending resulting from the instantaneous combustion of an explosive substance is covered by a policy against loss or damage by fire.

Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw v. Missouri State Mut. Fire & Marine Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394; Pentz v. Receivers of the Ætna Fire Ins. Co., 9 Paige (N. Y.) 568; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258.

But in Caballero v. Home Mut. Ins. Co., 15 La. Ann. 217, this rule was held not applicable to an explosion in another building which merely by the concussion of the air injured the insured building.

The fall of a building directly resulting from an ordinary fire is within the terms of a policy against fire.

Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118. But in Cuesta v. Royal Ins. Co., 98 Ga. 720, 27 S. E. 172, it was held that damage to office fixtures, resulting from the fall of the building 25 days after the fire, was not covered, the building having been in the meanwhile repaired, and heavy rains having fallen which tended to weaken the structure. And see, in connection, Alter v. Home Ins. Co., 50 La. Ann. 1316, 24 South. 180.

Injury resulting from the use of water or chemicals in extinguishing the fire is considered as a direct result of the fire, and as covered by the policy.

Geisek v. Crescent Mut. Ins. Co., 19 La. Ann. 297; Lewis v. Springfield Fire & Marine Ins. Co., 10 Gray (Mass.) 159; Whitehurst v. Fayette-

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ville Mut. Ins. Co., 51 N. C. 352; Cohn v. National Fire Ins. Co., 96 Mo. App. 315, 70 S. W. 259.

Likewise injury resulting to goods from their removal from a burning building is within the terms of a policy of insurance against fire.

Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352; Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96, 75 Am. Dec. 638, affirming 3 Phila. 195.

And the same rule has been held to apply where the removal was induced by imminent danger of fire, though the building in which the goods were stored was not itself on fire, and though the goods would not in fact have been injured by the fire had they not been moved.

Holtzman v. Franklin Ins. Co., 12 Fed. Cas. 438; White v. Republic Fire Ins. Co., 57 Me. 91, 2 Am. Rep. 22; Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844. But see Hillier v. Allegheny Mut. Ins. Co., 3 Pa. 470, 45 Am. Dec. 656, where the insurance was against loss which might happen "by means of fire."

Obviously the insured will be liable where the loss by removal results from a bona fide attempt of the insured to comply with a specific provision of his policy requiring him to use all possible diligence to preserve the goods.

Case v. Hartford Fire Ins. Co., 13 Ill. 676. See, also, Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972, where the policy also provided that the company should not be liable for more than a certain proportion of "loss by removal from premises endangered by fire."

A loss by theft, consequent upon the confusion attending a fire, or the removal of the goods from the building, is also considered as a direct consequence of the fire, and as covered by a policy containing no restrictions against theft.

Witherell v. Maine Ins. Co., 49 Me. 200; Newmark v. Liverpool & L. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352; Tilton v. Hamilton Fire Ins. Co., 14 How. Prac. (N. Y.) 363; Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96, 75 Am. Dec. 638 (confined to theft during removal from a building actually on fire); Lukens v. Insurance Co., 25 Leg. Int. (Pa.) 61.

The rule as to loss by theft, as to that by loss by removal, is particularly applicable where the goods are being removed, at the

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instance of the company's agent, to avoid impending loss by fire (Leiber v. Liverpool, L. & G. Ins. Co., 6 Bush [Ky.] 639, 99 Am. Dec. 695); or where the removal is in accordance with a requirement that the insured labor for the protection of the goods (Talamon v. Home & Citizens' Mut. Ins. Co., 16 La. Ann. 426).

A loss resulting from the inability of the parties to repair, owing to an ordinance in effect at the time of the last renewal of the policy, has been held covered (Brady v. Northwestern Ins. Co., 11 Mich. 425); as has damage to machinery caused by a short circuit in wires, which in turn was caused by a fire in a remote part of the building (Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690, 29 L. R. A. 297, 35 Am. St. Rep. 540). But in Foster v. Fidelity Fire Ins. Co., 24 Pa. Super. Ct. 585, injury to the insured building caused by a fire engine on its way to a fire being deflected from its course, and colliding with the building, was held not covered.

(f) Risks specially excepted.

Nearly all fire policies contain provisions which either except from the general risk of "fire," fires originating in certain ways, or provide that the company shall not be liable for loss caused either directly or indirectly in a certain manner.

> In Connecticut, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin a provision of the standard policy adopted is as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but inability for direct damage by lightning may be assumed by specific agreement hereon."
>
> In Maine, Massachusetts, Minnesota, and New Hampshire the standard policy insures against "all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensued, and then to include that caused by fire only."

Such provisions are ordinarily strongly construed against the insurer. Thus a provision in the policy exempting the company

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from liability for loss resulting from "gross negligence" refers to a want of diligence which even careless men are accustomed to exercise.

Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Campbell v. Monmouth Fire Ins. Co., 59 Me. 430.

And a clause relieving the insurer from liability caused directly or indirectly by the neglect of insured to use all reasonable means to protect the property will defeat a recovery only as to the property lost in consequence of such neglect and misconduct (Wolters v. Western Assur. Co., 95 Wis. 265, 70 N. W. 62). Such an exception, however, will cover a loss arising from a failure of insured to extinguish the fire, when such result might have been accomplished by a slight or reasonable effort (Fleisch v. Insurance Co., 58 Mo. App. 596). Nor can there be a recovery under such circumstances on a policy providing that the insured must make diligent effort to save his property (Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578). And in Ellsworth v. Ætna Ins. Co., 89 N. Y. 186, a like provision was held applicable to a neglect to try to save the property after a commencement of the fire and an attempt to prevent others from doing so. To show due diligence in fighting fire, however, as required by a policy, it is not necessary to prove that the bystanders and neighbors were diligent (Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 254); and in the same case, where it was shown that the insured left the fire to take his sick wife to the doctor, the question was held for the jury.

Where a policy excepts losses caused by "riots," "riotous assemblages," etc., it is not necessary in order to exempt the company from liability that the fact of the riot be first established by the judgment of a competent court in a criminal proceeding (Dupin v. Mutual Ins. Co., 5 La. Ann. 482). **The liability of the company in such cases usually turns on whether the unlawful acts were sufficient to constitute a riot.**

The company is not rendered liable by the fact that the rioters assembled originally for a lawful purpose (Dupin v. Mutual Ins. Co., 5 La. Ann. 482). Fire set to loose straw by convicts in an attempt to escape falls within an exception as to a fire caused by persons engaged in a riot or notorious resistance to lawful authority (Strauss v. Imperial Fire Ins. Co., 16 Mo. App. 555). A breaker at a coal mine was set on fire at night by a party of men who fired a number of shots, drove the watchmen away, and then burned the breaker. It was held that the loss was caused by a "riot," though there was no proof of a previous unlawful assembling, accompanied by

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force or violence (Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. 89, 40 Am. Rep. 629). Rev. St. Ind. 1881, § 1981, provides that, "if three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot," and it was held that where five masked men at night forcibly break into a dwelling house, and compel the occupant to vacate under threats of personal violence, and then burn down the building, this constitutes a riot so as to relieve the company (Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868). But an exception as to "loss by fire occasioned by mobs or riots" does not extend to a loss caused by the burning of a bridge by order of the military authorities to prevent the advance of an armed force of rebels (Harris v. York Mut. Ins. Co., 50 Pa. 341).

It has been held that **the provision exempting the company from liability for loss "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," does not apply to the regularly constituted military power of the government, but should be construed as though it read, "any usurped military power."**

Boon v. Ætna Ins. Co., 3 Fed. Cas. 871, reversed on other grounds 95 U. S. 117, 24 L. Ed. 395; Boon v. Ætna Ins. Co., 40 Conn. 575; Portsmouth Ins. Co. v. Reynolds' Adm'x, 32 Grat. (Va.) 613. See, also, discussion in Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395. The Reynolds' Case is interesting historically, as deciding that the military authority of the United States was not a usurping military authority in Virginia, between the passage of the ordinance of secession and its ratification at the polls.

It is not, however, necessary, in order to render the exemption applicable, that it appear that the fire was started under the direct command of the officer of the usurping military power. It is sufficient that the usurped military power or invasion was the occasion and proximate cause of the fire (Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329). And in Ætna Fire Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, reversing 3 Fed. Cas. 871, it was held that the loss would be exempted though the fire was set by the regular military authority in order to prevent arms and munitions from falling into the hands of the usurping military power. The usurping military force, thus compelling the fire causing the loss of insured, should, it was argued, be considered as the proximate cause thereof. This view, however, has been rejected in Connecticut, and it would seem also in Virginia and Pennsylvania.

Boon v. Ætna Ins. Co., 40 Conn. 575; Portsmouth Ins. Co. v. Reynolds' Adm'x, 32 Grat. (Va.) 613; Harris v. York Mut. Ins. Co., 50 Pa. 341.

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Where a mob or riot or usurped military power is the cause of a fire, the exception will apply though the insured building is not the first structure destroyed.

Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, reversing on other grounds 3 Fed. Cas. 871 (Michigan Fire & Marine Ins. Co. v. Whitelaw, 25 Ohio Cir. Ct. R. 197).

And a stipulation excepting loss occasioned by order of any civil authority has been held to relieve the company from a liability for a destruction of grain occasioned by an escape from control of a fire started in an adjoining field by the county commissioners acting under a statute authorizing them to provide for the destruction of insects (Conner v. Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127).

Where there is a special clause exempting the company from liability for theft, no recovery can be had for property stolen, even though the theft be an accompaniment of the fire.

Sklencher v. Fire Ass'n of Philadelphia (N. J. Sup.) 60 Atl. 232; Webb v. Ætna Protection & Ins. Cos., 14 Mo. 3; Liverpool, L. & G. Ins. Co. v. Creighton, 51 Ga. 95. This has been held true though the removal of the property was advised by the fire warden, who in so doing was acting within the scope of his authority (Fernandez v. Merchants' Ins. Co., 17 La. Ann. 131).

An exception as to loss caused by the use of kerosene oil as a light extends to fires resulting from such use as well as the immediate effect of an explosion (Matson v. Farm Bldgs. Fire Ins. Co., 73 N. Y. 310, 29 Am. Rep. 149, reversing 9 Hun, 415). And a policy on goods during transportation, providing "that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire, and that no loss is to be paid arising from petroleum or other explosive oils," has been held not to cover a loss arising from a collision of the train carrying the insured goods with a train loaded with petroleum, which immediately burst into flames, thereby destroying the insured goods (Imperial Fire Ins. Co. v. Fargo, 95 U. S. 227, 24 L. Ed. 428). But in an early New York case it was held that where the contract covered a printer's stock, and permitted its use as a printing office, bindery, and book store, a clause in the policy excluding losses "occasioned by camphene" referred only to losses occasioned by the use of camphene in a relation or use outside the permission or privilege (Harper v.

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New York City Ins. Co., 22 N. Y. 441, affirming 14 N. Y. Super. Ct. 520).

The standard policy law of Wisconsin [1] provides for insurance against all direct loss or damage by fire, except as thereinafter provided. The exceptions are for loss caused by invasion, riot, etc., or (unless fire ensue and in that event for the damage by fire only) by explosion or lightning. The addition of any provision or condition to the policy is prohibited except schedules of property and other matters necessary to express the conditions of any particular risk, which conditions must not be inconsistent with or waive any of the provisions of the standard policy. Under these provisions it has been held that an exception of a fire loss caused by lightning cannot be added to the policy, and that a clause in a policy excepting any loss caused by an electric current, whether artificial or natural, could not be construed as referring to a loss by fire caused by an artificial current, since so to construe the clause would be to give a meaning to one portion thereof which would be invalid as applied to the other. This decision was made conceding that a fire resulting from an artificial current could be excepted. But it would seem, the court said, that taking the clauses of the statute together, such an exception could not in fact be added to the policy (Wausau Telephone Co. v. United Firemen's Ins. Co. [Wis.] 101 N. W. 1100).

Where the charter of a mutual fire company provides that the members present at the annual meeting shall have power to determine a limitation of hazards, adopt by-laws, etc., and a member who in his application has agreed to be bound by present and future by-laws, continues his membership with knowledge of a properly adopted by-law excluding losses from steam engines, he will be bound by such by-law and by the change in the terms of the policy (Bogards v. Farmers' Mut. Ins. Co., 79 Mich. 440, 44 N. W. 856).

Exceptions rendered necessary by the peculiar circumstances surrounding the property insured have been construed by the courts with special reference to the risks arising from such special circumstances.

An exception of "fires caused by the use of steam engines on the premises insured, other than threshing machine engines using coal for fuel with sufficient wood to kindle or start the fire," prevents recovery for a fire started by a threshing machine engine when wood was used for the purpose of making steam up to a short time before the fire occurred, even though coal was the last fuel put into

[1] Rev. St. 1898, §§ 1941–47.

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the fire box before the fire occurred (Thurston v. Burnett & Beaver Dam Farmers' Mut. Fire Ins. Co., 98 Wis. 476, 74 N. W. 131, 41 L. R. A. 316).

A fire occurring without the wall of a theater of such intensity as to heat the wall of the "theater proper" sufficiently to cause the interior of it to burn does not fall within an exception as to fires originating "in the theater proper" (Sohier v. Norwich Fire Ins. Co., 11 Allen [Mass.] 336).

A policy reading: "Carpenter's risk granted during the term of this policy; and it is understood and agreed, and this policy is upon the express condition, that the property shall not be operated as a distillery during the term of this insurance, it being intended by this policy to cover carpenter's risk only"—has been construed as excluding merely the other extraordinary risk named, viz., running the property as a distillery, and not as excluding the general risk common to all property. Therefore it was held the assured could recover for a loss accruing after the occupation for carpenter work ceased (Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91).

A policy on a hop kiln, building, and contents was conditioned to be valid only while other insurance, if any, should be retired or void "on account of the hop drying process or hazard." Another policy thereon was conditioned to be valid "except during hop harvesting." When the fire occurred the hops had been dried and stored, and were being baled for market. It was held that it was error, in the absence of a showing that baling is a part of the drying process, to charge that plaintiff should recover if harvesting included baling (Marsh v. Glens Falls Ins. Co., 42 N. Y. Supp. 622, 11 App. Div. 398).

(g) Same—Explosions.

Exception of loss by explosion, either generally, or unless fire ensues, is a common provision of fire policies. The word "explosion" as here used should be interpreted in its ordinary and popular sense, and not as a scientific man might perhaps define it.

Mitchell v. Potomac Ins. Co., 16 App. D. C. 241, affirmed 22 Sup. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

An "explosion" has been defined as a sudden and rapid combustion, causing violent expansion of the air and accompanied by a report (United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735). This definition is approved also in a slightly different form in the Mitchell Case, and in Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

And the whole clause should be reasonably construed, with a view to enforcing the intention of the parties.

A policy provided: "This company shall not be liable under this policy for loss or damage by fire in any of the following instances:

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* * * Second, if caused by lightning or explosions of any kind, unless fire ensues, and then for a loss by fire only." It was not intended that the policy should be interpreted as though written, "This company shall not be liable for loss or damage by fire if caused by lightning or explosion of any kind unless fire ensues, and then for the loss by fire only," but as though written, "This company shall not be liable for loss or damage if caused by lightning or explosion of any kind unless fire ensues, and then for the loss by fire only" (Heuer v. Westchester Fire Ins. Co., 44 Ill. App. 429, affirmed 151 Ill. 331, 37 N. E. 873).

An exception that the insurer be not liable for any loss "occasioned by explosions of any kind, by means of invasion," was held not to be limited to explosions occasioned by invasion, etc. (Smiley v. Citizens' Fire, Marine & Life Ins. Co., 14 W. Va. 33).

A clause declaring the insurer not liable for damages occasioned by the explosion of a steam boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances, exempts the company for damage occasioned by the explosive force of the gas without communicating fire to the insured property (Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228).

A policy providing generally against any liability for any loss caused or occasioned by explosion excludes a loss from a fire directly caused by an explosion.

Louisiana Mutual Fire Ins. Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; Tanneret v. Merchants' Mut. Ins. Co., 34 La. Ann. 249; St. John v. American Fire & Marine Ins. Co., 11 N. Y. 516, affirming 8 N. Y. Super. Ct. 371; Hayward v. Liverpool & L. Ins. Co., *42 N. Y. 456, 2 Abb. Dec. 349, affirming 20 N. Y. Super. Ct. 385; Greenwald v. Insurance Co., 3 Phila. (Pa.) 323, 7 Am. Law Reg. (O. S.) 282.

But where the provision was that the company should not be liable "for loss in case of fire happening by any insurrection * * * nor explosions of any kind whatever within the premises, nor by concussions merely," it was held that, the stipulation being ambiguous, the company would not be exempted from liability for loss by fire caused by an explosion (Heffron v. Kittanning Ins. Co., 132 Pa. 580, 20 Atl. 698). And in Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557, the same holding was made with reference to a stipulation to the effect that the company should not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil war, or commotion, or military or usurped power, * * * nor for any loss caused by the explosion

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of gunpowder, camphene, or any explosive substance, or explosion of any kind."

Where a policy provides that, if the property insured "be damaged or destroyed by explosion from any cause, this policy shall be null and void the instant the casualty by explosion occurs," there can be no recovery for a fire loss following an explosion, and it is immaterial whether or not the fire was caused by the explosion (Waldeck v. Springfield Fire & Marine Ins. Co., 56 Wis. 96, 14 N. W. 1). And it was held in Louisiana Mut. Fire Ins. Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65, that it was immaterial that the fire was not communicated directly to the insured property from the place of the explosion. Since the fire had burned continuously from its inception, the court argued, and had destroyed the insured property without any other cause intervening, its cause, or the explosion must be considered as the direct and efficient cause of the loss, though in the course of the fire, and before reaching the insured property, other intervening property had been destroyed. So, also, in Tanneret v. Merchants' Mut. Ins. Co., 34 La. Ann. 249, where it was shown that the fire was twice apparently extinguished, but broke out again within a short time, it was held that, in the absence of a contrary showing, the loss from the last two fires, as well as the first one, must be presumed to have been caused by the explosion.

Though the policy provides that the company shall not be liable for damage by explosion unless fire ensues, and then for the loss by fire only, yet if there is a negligent or hostile fire within the insured premises, and an explosion results therefrom, the company will be liable for any loss resulting from the explosion. Under such circumstances the fire is considered as the efficient or proximate cause of the loss, and the explosion as merely incidental.

Mitchell v. Potomac Ins. Co., 16 App. D. C. 241, affirmed 22 Sup. Ct. 22, 183 U. S. 42, 46 L. Ed. 74; Washburn v. Farmers' Ins. Co. (C. C.) 2 Fed. 304; Washburn v. Miami Valley Ins. Co. (C. C.) 2 Fed. 633; Washburn v. Artisans' Ins. Co., 29 Fed. Cas. 308; Washburn v. Union Fire Ins. Co., 29 Fed. Cas. 329; Washburn v. Western Ins. Co., 29 Fed. Cas. 330. The argument of the court in Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403, and Briggs v. North British & Mercantile Ins. Co., 53 N. Y. 446, affirming 66 Barb. 325, also supports the doctrine stated in the text. And attention should also be called to Greenwald v. Ins. Co., 7 Am. Law Reg. O. S. (Pa.) 282, where the company was held liable for a destruction of a burning house by gunpowder to stay the fire, though the policy specifically excepted loss by explosion of gunpowder. But in German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1007, 36 L. R.

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A. 238, 60 Am. St. Rep. 711, a policy insuring against lightning, but providing that it should not apply to loss by explosion, was held not to cover a loss by an explosion caused by lightning.

But where the explosion results not from a hostile fire, but from a friendly fire, such as the striking of a match or a burning gas jet, the company will not be liable. Even though the friendly fire be considered as the proximate cause of the loss, it cannot be said that such a fire was within the contemplation of the parties.

Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74, affirming 16 App. D. C. 241; Washburn v. Western Ins. Co., 29 Fed. Cas. 330; Heuer v. Northwestern Nat. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594, affirming Same v. Westchester Fire Ins. Co. (1892) 44 Ill. App. 429; Same v. Winchester Fire Ins. Co., 151 Ill. 331, 37 N. E. 873, affirming 44 Ill. App. 429; Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Cohn v. National Fire Ins. Co., 96 Mo. App. 315, 70 S. W. 259; Briggs v. North British & Mercantile Ins. Co., 53 N. Y. 446, affirming 66 Barb. 325; United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

And this is true though the burning match is intentionally applied by some person to the explosive (Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840). Nor can there be any recovery where a negligent fire in another building causes an explosion in such other building, and the injury to the insured building is caused entirely by the concussion.

Miller v. London & L. Fire Ins. Co., 41 Ill. App. 395; Hustace v. Phenix Ins. Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651, reversing 75 N. Y. Supp. 568, 71 App. Div. 309.

The fact that known explosive substances are insured in the written portions of the policy does not do away with the printed condition, excepting loss caused by explosion. The two clauses are not inconsistent, since the company may be willing to accept the risk of the explosives burning as any other material, or even of explosion resulting from an antecedent fire, or the effect of fire following the explosion, without being willing to undertake the risk of the damage directly resulting from an explosion not caused by an antecedent fire.

Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74, affirming 16 App. D. C. 241; Hayward v. Liverpool & London Life & Fire Ins. Co., 2 Abb. Dec. (N. Y.) 349, affirming (1860) 20 N. Y. Super. Ct. 385, and overruling it would seem Hayward v. Northwest-

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ern Ins. Co., 19 Abb. Prac. 116; United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Smiley v. Citizens' Fire, Marine & Life Ins. Co., 14 W. Va. 33.

(h) Same—Fall of building.

Where a building falls from any cause except fire, and loses its identity as a building, and thereafter the ruins catch fire, the damage to the ruins resulting from the fire is not covered by an ordinary fire policy.

Nave v. Home Mut. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394; Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153; Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

But where the building is merely moved from its foundation, and can still be identified as the subject of insurance, the company is liable for the damage resulting from a fire, even though the fire be occasioned by the moving of the building (Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153).

Where insured goods were described as "contained in a granite store," the insurers were held liable for a loss by fire occurring after the fall of the building by another cause, but before the insured goods could be removed (Lewis v. Springfield Fire & Marine Ins. Co., 10 Gray [Mass.] 159).

The effect of the falling of a building is, however, generally determined by an express stipulation in the policy to the effect that if the building shall fall except as the result of fire, the insurance shall immediately cease. Under such a clause in a policy on personalty the only question is as to whether the fall of the building was occasioned by fire, and, if it was not, it is immaterial that the building was burning at the time of the fall. (Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515.) It should, however, be noted that the Kiesel Case had to do with a policy on goods only, and that the court in its discussion seems to assume that if the fire had attacked the insured goods prior to the fall of the building the company would have been liable, though the building fell as the result of some other cause. It appears, indeed, that the lower court so charged the jury, the Court of Appeals upholding the charge as against an objection that it implied that plaintiff could in no event recover unless the insured goods were burning when the building fell. And in London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140, it was squarely held that, where an insured build-

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ing was burning before it fell, the subsequent fall would make no difference as to the liability of the company. Nor is it essential to the liability of the company under such clause that the fire causing the fall of the building be a fire within the insured property. If the burning of an adjoining building causes the fall of the insured building, such fall must be considered as the "result of fire," within the meaning of the condition (Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481). And though the building may have been shattered by some cause for which the company is not liable, so that it will fall more readily than before such accident, yet if its final fall is from the effects of fire the policy will not be terminated thereby (Eppens, Smith & Wiemann Co. v. Hartford Fire Ins. Co., 90 N. Y. Supp. 1035, 99 App. Div. 221).

Where, in addition to the stipulation terminating the insurance on the fall of the building except as the result of fire, it is further provided that there shall be no liability for explosions unless fire ensues, and then only for the loss resulting from the fire, the latter provision is held to impose on the company a liability for a fire loss following an explosion, though as an intermediate result of the explosion the insured building fell. The argument is that it would be construing the "falling building" clause too liberally in favor of the insurers to hold it to include the case of the destruction of a building by an explosion within the building itself, and of a fire immediately ensuing upon and connected with such explosion, the measure of the liability for which has been carefully and precisely defined in the other provision of the policy.

Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706, followed as law of the case in Orient Ins. Co. v. Leonard, 120 Fed. 808, 57 C. C. A. 176; Phœnix Ins. Co. v. Leonard, 121 Fed. 1021, 57 C. C. A. 680; Dows v. Faneuil Hall Ins. Co., 127 Mass. 346, 34 Am. Rep. 384. See, also, Friedman Co. v. Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757, where it is pointed out that the liability in such case must be confined to the loss by fire as distinguished from the loss by explosion.

(i) Casualty insurance in general.

Where a policy on live stock excepts death resulting from any act or fault of the insured, no recovery can be had for a death resulting from the overworking of the animals (Western Horse & Cattle Ins. Co. v. Timm, 23 Neb. 526, 37 N. W. 308); or for a death

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brought on by a brutal beating (Western Horse & Cattle Ins. Co. v. O'Neill, 21 Neb. 548, 32 N. W. 581).

It does not directly appear in the O'Neill Case that there was a special excepting clause in the policy, but the rule would doubtless be the same in either event.

It has been held that a policy of live stock insurance making no provision for liability for loss of stock intentionally destroyed does not authorize a recovery for such a loss though the stock was destroyed by direction of the company's president (Tripp v. Northwestern Live Stock Ins. Co., 91 Iowa, 278, 59 N. W. 1). And where there is a special exception as to animals destroyed by any society for the prevention of cruelty to animals, a loss is not covered caused by the killing of an animal by order of such a society on the ground that it was incurable (Hinsworth v. People's Mut. Live Stock Ins. Co., 2 Pa. Dist. R. 541). So, also, in Tripp v. Northwestern Live Stock Ins. Co., 91 Iowa, 278, 59 N. W. 1, it was held that a policy providing for good veterinarian care, and excepting fatal injuries occurring through the connivance or act of insured, did not cover the killing of a horse under the direction of a veterinarian sent by the company, and whose directions the insured had been instructed to follow, the killing having in fact taken place and been procured by insured not because the animal was in pain, but because it could not recover, and because the policy expired in about two hours.

But in Klopp v. Bernville Live Stock Ins. Co., 1 Woodw. Dec. (Pa.) 445, while it was held that a reasonable necessity for the killing of a horse could not in the case stated be presumed from the fact it was killed by the advice of a veterinary surgeon, and was afflicted with an incurable and infective disease, yet it was further held that a death occurring by the act of the owner was covered, if the act was necessary and done in good faith. And in a late Pennsylvania case an averment that a horse was taken with an incurable and contagious disease, and killed by the direction of a skilled veterinary surgeon, was deemed sufficient to require defendant to file an affidavit of defense.

Heffner v. Pennsburg Mut. Horse Ins. & Detective Co., 6 Del. Co. R. (Pa.) 168. See, also, Weikel v. Lower Providence Live Stock Ins. Co., 3 Montg. Co. Law Rep'r (Pa.) 207, 211, where it was held that a provision in the policy that if an animal becomes disabled through accident the company shall appoint a committee to examine the animal,

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and, if they consider it worthless and incurable, direct it to be killed, and appraise its value, does not render the report of such a committee binding on the insured or prevent him from maintaining an action where he has killed an animal in fact worthless and incurable.

Though as already noted an explosion by ignition is considered as a fire within the meaning of a fire policy containing no exceptions as to explosions, yet it is not a "fire" within the meaning of the exceptions of a plate glass insurance policy. Nor can the explosion of gas generated from gasoline being used to clean clothes be considered as a "blowing up of the building" within such an excepting clause.

Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555, 93 N. W. 569, 60 L. R. A. 838, 97 Am. St. Rep. 330; McMyler v. Union Casualty & Surety Co. (Sup.) 84 N. Y. Supp. 170.

A loss occasioned by the escape of water from an automatic sprinkler system thrown into operation by the heat of steam escaping from a broken steam pipe has been held covered by a policy against loss caused by an explosion of steam boilers (Hartford Steam Boiler Inspection & Ins. Co. v. Henry Sonneborn & Co., 96 Md. 616, 54 Atl. 610). But where a steam boiler insurance company has no power under its charter to insure against fire, and on the back of the policy is an exemption "for any loss or damage by fire resulting from any cause whatever," it will not be liable for a loss from an accidental fire, though on the face of the policy the insurance is against "explosion and accident." Furthermore, a destruction of the building by an explosive ignition of starch dust from a small accidental fire should be considered as a direct result of the accidental fire rather than an "explosion" or "accident," for which the company would be liable.

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, reversing (C. C.) 48 Fed. 198. It might, however, be noted, though no emphasis is placed on the point by the court, that the term "explosion" was by the policy limited to a boiler explosion, thus leaving only the term "accident," under which the explosion might have been classified, rather than "fire," in order to hold the company liable.

Oftentimes the peculiar character of the property, or of the danger to which it was subjected, has required a policy containing an

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exceptional clause as to the risk covered. Such clauses have been construed by the courts in the light of the special circumstances shown to exist.

An entry into a safe, and extraction of money therefrom, effected by a working of the combination lock on the outer door, and a breaking of the money drawer by tools and explosives, falls within the terms of a policy insuring against loss by the felonious abstraction of money by burglars from the safe, after entry into it effected by the use of tools or explosives directly thereon (Fidelity & Casualty Co. of New York v. Sanders, 32 Ind. App. 448, 70 N. E. 167).

A clause in a policy against the accidental discharge of an automatic sprinkler, providing that assured shall not be liable for loss caused by assured's neglect to use all reasonable means to preserve the property insured thereunder, refers to the care to be exercised after the accidental discharge of the apparatus, and has no reference to the care required to prevent the accident. Nor can it be successfully maintained that the neglect of a servant resulting in the accident falls either within such clause, or the further provision excepting loss caused by the willful act of insured (Weertheimer-Swarts Shoe Co. v. United States Casualty Co., 172 Mo. 135, 72 S. W. 635, 61 L. R. A. 766, 95 Am. St. Rep. 500).

(j) Insurance against flood, storm, or lightning.

A policy insuring against loss arising from "accidental" damage or destruction, except by fire or lightning, covers loss by flood (Hey v. Guarantors' Liability Indemnity Co., 181 Pa. 220, 37 Atl. 402, 59 Am. St. Rep. 644). And insurance against loss by storm has been held to cover a loss caused by the breaking in of a roof under the weight of snow and water which fell during a heavy snowstorm and a following rain (Tyson v. Union Mut. Fire & Storm Ins. Co., 2 Montg. Co. Law Rep'r [Pa.] 17). But a loss occasioned by freshet caused by rains and the melting of snow does not fall within the protection of such a policy (Stover v. Insurance Co., 3 Phila. [Pa.] 38). Nor can a loss, the proximate cause of which was a failure to make repairs, be considered as the result of a storm which was the more immediate occasion of the damage (Haas v. Line Lexington Mut. Fire Ins. Co., 8 Montg. Co. Law Rep'r [Pa.] 180).

The words "tornado" and "hurricane" have been held synonymous, and to mean a violent storm distinguished by the vehemence of the wind and its sudden changes. Therefore an admission that the loss was caused by a very high wind was equivalent to an admission that the property was destroyed by a tornado, cyclone,

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or hurricane, and overcame the effect of a prior denial that the loss was so caused. Nor did it make any difference that the damage was directly caused by a boat being driven by the wind against the insured property. The wind in such case was none the less the controlling cause of the injury (Hartford Fire Ins. Co. v. Nelson, 64 Kan. 115, 67 Pac. 440). And where a policy against wind storms contains a provision that the company "will not be liable for any loss or damage that may occur from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles, unless other damage occur," the words "unless other damage occur" apply only to the last member of the sentence, relating to minor damage by wind, and the company is not liable, in any event, for loss or damage occurring from hail or lightning (Holmes v. Phenix Ins. Co., 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308).

Where the printed clause in a policy of insurance provides that the insurer shall not be liable for loss by lightning unless fire ensues, such provision must yield to a written clause declaring that the policy shall also cover loss or damage by lightning whether fire ensues or not (Haws v. St. Paul Fire & Marine Ins. Co., 130 Pa. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52). But where defendant's charter authorized it to insure against fire only, no obligation was imposed on the company by reason of a by-law referred to in the policy recognizing damage by lightning as one of the risks covered (Andrews v. Union Mut. Fire Ins. Co., 37 Me. 256).

Though a policy primarily insures against "all loss or damage by fire," yet if it further makes insurer liable "for any loss or damage caused by lightning" it will cover all known effects of lightning, and not merely those arising from combustion (Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894). And insurance against lightning covers loss also from fire the immediate result of the lightning (Hapeman v. Citizens' Mut. Fire Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535). It has, however, been said that an insurance against direct loss by lightning affords no indemnity for damage occasioned by a concussion of the ground caused by lightning (Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447).

A policy which assumes liability for direct damage by lightning, but provides that it shall not include damage by wind, covers only damages directly due to lightning, though it appears that subse-

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quently, and during the same storm, the property was damaged by wind (Warmcastle v. Scottish Union & National Ins. Co., 201 Pa. 302, 50 Atl. 941). And it has also been held that under such a policy there could be no recovery for damage by wind, though, but for the weakening of the building by lightning, it would not have been blown down (Beakes v. Phœnix Ins. Co., 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267, reversing 71 Hun, 613, 24 N. Y. Supp. 544). So, also, in German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711, it was held that a policy covering loss by lightning, but excluding loss by explosion, did not cover a loss caused by an explosion, which in turn was caused by lightning.

2. PLEADING AND PRACTICE IN RELATION TO RISK AND CAUSE OF LOSS.

(a) Pleading and burden of proof.
(b) Admissibility of evidence.
(c) Sufficiency of evidence.
(d) Instructions.
(e) Trial and review.

(a) Pleading and burden of proof.

Where a policy insures generally against a particular peril, and contains a further clause exempting the company from liability for loss caused in a certain manner, which would otherwise have fallen within the general terms of the policy, the burden is upon the insurer to allege and prove that the loss fell within the exemption. Such a clause is considered as an exemption from liability and a defense, rather than as an exception proper limiting and defining the risk covered.

Western Assur. Co. v. J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; Catlin v. Springfield Fire Ins. Co., 5 Fed. Cas. 310; Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925, modifying Clark v. Phœnix Ins. Co., 36 Cal. 168; Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; Burlington Ins. Co. v. Rivers, 9 Tex. Civ. App. 177, 28 S. W. 453, overruling statements in Pelican Fire Ins. Co. v. Troy Co-op. Ass'n, 77 Tex. 225, 13 S. W. 980, and Phœnix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484; Hartford Fire Ins. Co. v. Watt (Tex. Civ. App.) 39 S. W. 200; Hong Sling v. Scottish Union Nat. Ins. Co., 7 Utah, 441, 27 Pac. 170; Cooledge v. Con-

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tinental Ins. Co., 67 Vt. 14, 30 Atl. 798. See, also, Bank of River Falls v. German-American Ins. Co., 72 Wis. 535, 40 N. W. 506.

The rule requiring the insurer to prove that the loss fell within the exemption was, however, held not to apply where it had been shown that a part of the loss fell within an exemption as to unauthorized alteration. After such showing it was for the insured to prove what part, if any, of the loss would have occurred, had not the alteration been made. (Howell v. Baltimore Equitable Soc., 16 Md. 377.)

This rule has been somewhat extended. Thus, it has been held applicable where a certain risk was covered, "provided * * * that due caution shall be exercised," etc. (Morris v. Farmers' Mut. Fire Ins. Co., 63 Minn. 420, 65 N. W. 655); where plaintiff was stated in the policy to be insured in a certain amount "on condition" that he take "all risks from cotton waste". (Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. [Mass.] 393); and where it was expressly stipulated in a separate clause that the policy did "not cover" certain risks (Ætna Ins. Co. v. Glasgow Electric Light & Power Co., 107 Ky. 77, 52 S. W. 975). And in Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005, it was applied, even though the clause defined the risk covered as "fire originating from any cause, except invasion," etc.

On the other hand, a policy insuring "against all direct loss or damage [excepting all losses caused directly or indirectly by fire or lightning] to the property" of the insured has been held to require a declaration stating that the loss was not caused directly or indirectly by fire (Western Refrigerator Co. v. American Casualty Ins. & Sec. Co. [C. C.] 51 Fed. 155). And in Sohier v. Norwich Fire Ins. Co., 11 Allen (Mass.) 336, a clause, "This policy not to cover any loss or damage by fire which may originate in the theater proper," inserted in a policy between the statement of what was insured and the promise to pay in case of loss, and in a different part of the instrument from the provisos, was declared to be an exception to the subject of the contract, and to throw the burden on insured to show that the fire did not originate in the theater proper.

The willful destruction of the property by insured is a matter of defense which must be pleaded and proved by the insurer.

Huchberger v. Merchants' Fire Ins. Co., 12 Fed. Cas. 794, affirmed 12 Wall. 164, 20 L. Ed. 364; Capuro v. Builders' Ins. Co., 39 Cal. 123; Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa, 70, 64 N. W. 687; Flynn v. Merchants' Ins. Co., 17 La. Ann. 135; Breard v. Mechanics' & Traders' Ins. Co., 29 La. Ann. 764; Spencer v. Farmers' Mut. Ins.

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Co., 79 Mo. App. 213; Heidenreich v. Ætna Ins. Co., 26 Or. 70, 37 Pac. 64; Alamo Fire Ins. Co. v. Heidemann Mfg. Co. (Tex. Civ. App.) 28 S. W. 910; Dwyer v. Continental Ins. Co., 57 Tex. 181; Alamo Fire Ins. Co. v. Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126; Joy v. Liverpool, L. & G. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Bank of River Falls v. German-American Ins. Co., 72 Wis. 535, 40 N. W. 506; Wolters v. Western Assur. Co., 95 Wis. 265, 70 N. W. 62.

It is no part of insured's original case to show that defendant is estopped to set up the defense of willful burning (Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247, 73 N. W. 372).

And this is true, though the complaint alleges the destruction of the property without the connivance of insured.

Corkery v. Security Fire Ins. Co., 99 Iowa, 382, 68 N. W. 792; Morley v. Liverpool, L. & G. Ins. Co., 92 Mich. 590, 52 N. W. 939; Mars v. Virginia Home Ins. Co., 17 S. C. 514.

In Western Horse & Cattle Ins. Co. v. Timm, 23 Neb. 526, 37 N. W. 308, an answer alleging special acts resulting in the destruction of the property was held to require a reply, though the complaint alleged generally that the property was lost without design or fraud on the part of plaintiff. But in Tennessee it has been held that evidence of incendiarism by insured is admissible under plea of the general issue (Knoxville Fire Ins. Co. v. Avery, 95 Tenn. 296, 32 S. W. 256).

The formal sufficiency of the allegations as to cause of loss are determined by the ordinary rules of pleading.

In Keeler v. Niagara Fire Ins. Co., 16 Wis. 523, 84 Am. Dec. 714, the allegations as to loss by fire were held sufficient. But in Rodi v. Rutgers Fire Ins. Co., 19 N. Y. Super. Ct. 23, they were deemed insufficient. The sufficiency of a complaint under a carrier's liability policy was considered in Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132. In Alamo Fire Ins. Co. v. Shacklett (Tex. Civ. App.) 26 S. W. 630, and Ferrer v. Home Mut. Fire Ins. Co., 47 Cal. 416, the complaints were held to sufficiently negative the agency of excepted causes. And in Dunn v. Springfield Fire & Marine Ins. Co., 104 La. 31, 28 South. 931, the allegations of the answer were held sufficient to admit testimony as to acts of the insured preventing the fire from becoming known.

The defense of incendiarism may be joined in the answer with a defense based on a refusal to submit to examination (Gross v. St. Paul F. & M. Ins. Co. [C. C.] 22 Fed. 74).

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(b) Admissibility of evidence.

On the issue of incendiarism, involving as it does moral turpitude and criminal intent, every circumstance tending to prove the guilt of the party charged is admissible in evidence.

> **Joy v. Liverpool, L. & G. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Huchberger v. Merchants' Fire Ins. Co., 12 Fed. Cas. 794, affirmed 12 Wall. 164, 20 L. Ed. 364; McWilliams v. Cascade Fire & Marine Ins. Co., 7 Wash. 48, 34 Pac. 140.**

Thus, the value and desirability of the property are relevant matters.

> **First Nat. Bank v. Fire Ass'n of Philadelphia, 33 Or. 172, 53 Pac. 8; Storm v. Phenix Ins. Co., 61 Hun, 618, 15 N. Y. Supp. 281, affirmed 133 N. Y. 656, 31 N. E. 625.**

It has, however, been held that evidence could not be given of insured's good character.

> **Stone v. Hawkeye Ins. Co., 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870; American Fire Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605. But see Spears v. International Ins. Co., 1 Baxt. (Tenn.) 370.**

The fact that the insured had been tried and acquitted on a criminal charge of arson is of no weight in a suit on the policy (Sibley v. St. Paul Fire & Marine Ins. Co., 22 Fed. Cas. 60). And where nothing else had been shown to cast suspicion on plaintiff as the author of the fire, it was held error to have admitted in evidence an indictment for arson against him relating to the fire which occasioned the loss (Crescent Ins. Co. v. Camp, 64 Tex. 521).

Nor can it be shown that no one had been indicted for burning the house (Liverpool & L. & G. Ins. Co. v. Joy, 26 Tex. Civ. App. 613, 62 S. W. 546, rehearing denied 26 Tex. Civ. App. 613, 64 S. W. 786), or that plaintiff on his trial for setting such fire did not attempt to explain its origin (Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013). But testimony that the insurer had employed detectives, and prosecuted the insured criminally for arson, has been held admissible on the theory that it was the company's intention, by so doing, to break the strength of insured's testimony (Phœnix Assur. Co. v. Stenson [Tex. Civ. App.] 63 S. W. 542).

Where a prima facie case of conspiracy in relation to the arson has been established, the acts and declarations of one conspirator are admissible against the others (McCarty v. Hartford Fire Ins. Co. [Tex. Civ. App.] 75 S. W. 934); as are communications be-

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tween the two showing an anxiety on the part of the insured (Joy v. Liverpool & London & Globe Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822). In order that the acts or statements of another may become admissible against insured, a connection between the two must of course be shown (Farmers' Alliance Mut. Fire Ins. Co. v. Trombly, 17 Colo. App. 513, 69 Pac. 74).

Testimony of skilled firemen has been held admissible as to whether there must have been more inflammable matter than the insured stock, and of a druggist as to whether there are substances which would produce such a fire as was shown to have occurred (First Nat. Bank v. Fire Ass'n of Philadelphia, 33 Or. 172, 53 Pac. 8).

The general rule that the willful burning of the property can be proved by circumstantial evidence, and often must be so proved, has resulted, also, in the introduction in evidence of various other matters, more or less closely connected with the burning.

In these the evidence proffered was held admissible: Menk v. Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158 (loss of uninsured property); Farmers' Mut. Fire Ins. Co. v. Crampton, 43 Mich. 421, 5 N. W. 447 (loss of uninsured property); Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247, 73 N. W. 372 (family trouble as motive for incendiarism; also false claims as to other insurance); Klein v. Franklin Ins. Co., 13 Pa. 247 (previous conversations with stranger inconsistent with fraudulent intent); Dwyer v. Continental Ins. Co., 63 Tex. 354 (excessive proofs of loss, coupled with transfer of policy after loss); Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027 (testimony as to attempt to burn other building, such attempt being connected with attempt to burn insured building); Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013 (showing that insured was in last stages of consumption); Agnew v. Farmers' Mutual Protective Fire Ins. Co., 95 Wis. 445, 70 N. W. 554 (conduct, appearance, and statements of insured at time of fire).

And in these inadmissible: Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848 (impeaching testimony based on immaterial testimony of insured); McDowell v. Connecticut Fire Ins. Co., 164 Mass. 394, 41 N. E. 669 (proof as to other fires); Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302 (proof as to other fires); Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 954 (statement by insured, when called to account for the fire, as to where it might have originated); Walker v. Phœnix Ins. Co., 62 Mo. App. 209 (declarations and conduct of wife at fire); First Nat. Bank v. Commercial Union Assur. Co., 33 Or. 43, 52 Pac. 1050 (evidence that insured's employé had the reputation of being a firebug); Jacoby v. Westchester Fire Ins. Co., 10 Pa. Super. Ct. 171, 44 Wkly.

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Notes Cas. 219 (evidence without sufficient foundation to show attempt by plaintiff to close the mouths of witnesses); Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239 (transfer of policy after loss); Phœnix Ins. Co. v. Padgitt (Tex. Civ. App.) 42 S. W. 800 (fear of insured by third persons; also lack of insurance by other persons in the same block); Phœnix Assur. Co. v. Stenson (Tex. Civ. App.) 63 S. W. 542 (evidence that insurer had caused insured to be discharged from various employments); Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795 (testimony by insured as to losing an indefinite amount of money in the fire).

The determination of the cause of loss, aside from the willful destruction of the property, is largely a question susceptible of proof by direct evidence. Nevertheless, circumstantial evidence having a bearing on the question is properly admitted.

The proffered evidence was deemed admissible in Orient Ins. Co. v. Leonard, 120 Fed. 808, 57 C. C. A. 176, followed in Phenix Ins. Co. v. Leonard (C. C. A.) 121 Fed. 1021 (testimony as to condition in relation to mill dust; also testimony of experts as to explosiveness of mill dust); Poggensee v. Mutual Fire, Lightning & Tornado Ins. Co., 69 Iowa, 157, 28 N. W. 485, 58 Am. Rep. 215 (testimony of damage done by storm as showing its character); Barry v. Farmers' Mut. Hail Ins. Ass'n, 110 Iowa, 433, 81 N. W. 690 (testimony as to injury by hail in a neighboring field); White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590, 71 S. W. 707 (testimony of expert as to cause of animal's death).

And inadmissible in Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515 (opinion testimony as to whether building was standing at time of fire); Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393 (declarations of purchaser and subsequent mortgagor not admissible against the original insured); White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590, 71 S. W. 707 (opinion of nonexpert as to cause of death of animal).

(c) Sufficiency of evidence.

For the purpose of determining whether the evidence is sufficient to justify a verdict, especially when the defense is that the loss was due to the wrongful act of the insured, various general rules have been applied. Thus, it has been said that there is a strong presumption of the innocence of a person charged with the destruction of his own property.

Decker v. Somerset Mut. Fire Ins. Co., 66 Me. 406; Morley v. Liverpool & L. & G. Ins. Co., 92 Mich. 590, 52 N. W. 939; First Nat. Bank v. Commercial Union Assur. Co., 33 Or. 43, 52 Pac. 1050.

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And therefore the evidence, to justify a finding for plaintiff, must be clear and convincing.

Mack & Co. v. Lancashire Ins. Co. (C. C.) 4 Fed. 59; Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700; Scott v. Home Ins. Co., 21 Fed. Cas. 833; Sibley v. St. Paul Fire & Marine Ins. Co., 22 Fed. Cas. 60; Decker v. Somerset Mut. Fire Ins. Co., 66 Me. 406; Anderson v. American Mut. Ins. Co., 33 N. J. Law, 151; Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio Cir. Ct. R. 97, 10 O. C. D. 225. But see Rothschild v. American Cent. Ins. Co., 62 Mo. 356, where it was held improper to call attention to the serious nature of the charge.

But this does not mean that the guilt must be shown beyond a reasonable doubt, as in the case of a criminal prosecution.

Mack & Co. v. Lancashire Ins. Co. (C. C.) 4 Fed. 59; Carlwitz v. Germania Fire Ins. Co., 5 Fed. Cas. 87; Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700; Scott v. Home Ins. Co., 21 Fed. Cas. 833; Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216; Regnier v. Louisiana State Marine & Fire Ins. Co., 12 La. 336; Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442; Smith v. California Ins. Co., 85 Me. 348, 27 Atl. 191; Schmidt v. New York Union Mut. Fire Ins. Co., 1 Gray (Mass.) 529; Johnson v. Agricultural Ins. Co. (N. Y.) 25 Hun, 251; Weir v. Ætna Ins. Co., 91 Hun, 217, 36 N. Y. Supp. 216; Kane v. Hibernia Ins. Co., 39 N. J. Law, 697, 23 Am. Rep. 239, reversing 38 N. J. Law, 441, 20 Am. Rep. 409; First Nat. Bank v. Fire Ass'n of Philadelphia, 33 Or. 172, 53 Pac. 8; Washington Union Ins. Co. v. Wilson, 7 Wis. 169; Blaeser v. Milwaukee Mechanics' Mut. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747.

The contrary rule was asserted in McConnel v. Delaware Mut. Safety Ins. Co., 18 Ill. 228, and Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489. But see in connection with the Illinois cases Orient Ins. Co. v. Weaver, 22 Ill. App. 122.

In Flynn v. Merchants' Ins. Co., 17 La. Ann. 135, it was held that the evidence must be inconsistent with any other rational conclusion than insured's guilt. And where the insurer's counsel admits that the burden of proof upon him is the same as in criminal cases it is proper to instruct the jury that the "matter relied on in defense" must be proved beyond a reasonable doubt (Butman v. Hobbs, 35 Me. 227).

Testimony of an alleged accomplice of insured in the burning must, in any event, be supported by extrinsic facts and circumstances, and should always be weighed in view of the probable motives and character of the witnesses (Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700). And while the willful destruction by insured of his own property raises no presumption of insanity, yet, taken in connection with insured's suicide, and the murder by him of mem-

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bers of his family, it is an element proper to be considered by the jury in determining his mental condition (Karow v. Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17).

The following cases contain decisions as to the sufficiency of the evidence to show a loss within the policy. In these the evidence was held sufficient to sustain the defense of incendiarism: Orient Ins. Co. v. Weaver, 22 Ill. App. 122; Names v. Dwelling House Ins. Co., 95 Iowa, 642, 64 N. W. 628; Breard v. Mechanics' & Traders' Ins. Co., 29 La. Ann. 764; First Nat. Bank v. Fire Ass'n of Philadelphia, 33 Or. 172, 53 Pac. 8. And in Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 611, 94 N. W. 1108, the newly discovered evidence of such wrong-doing was held sufficient to require that a motion for a new trial be sustained.

In the following the evidence was not considered strong enough to demand a submission of the question of incendiarism: Goodwin v. Merchants' & Bankers' Mut. Ins. Co., 118 Iowa, 601, 92 N. W. 894; Connecticut Fire Ins. Co. v. Carnahan, 10 O. C. D. 186; Heidenreich v. Ætna Ins. Co., 26 Or. 70, 37 Pac. 64.

Reference may be made to the following additional cases for a consideration of the sufficiency of evidence as related to various causes of loss: N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757 (fire or explosion); Renshaw v. Missouri State Mut. Fire & Marine Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904 (fire or explosion without accidental fire); Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894 (wind or lightning); Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447 (lightning or building's inherent defect); Clark v. Franklin Farmers' Mut. Fire Ins. Co., 111 Wis. 65, 86 N. W. 549 (lightning or freshet); Wilson v. Hawkeye Ins. Co., 70 Iowa, 91, 30 N. W. 22 (lightning or barb-wire cut).

(d) Instructions.

A charge bringing into the case an issue as to the cause of loss, which is not based on the pleading or as to which there is no evidence, is erroneous.

Phœnix Ins. Co. v. Mills, 77 Ill. App. 546; Newmark v. Liverpool & L. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447; Clark v. Franklin Farmers' Mut. Fire Ins. Co., 111 Wis. 65, 86 N. W. 549.

And obviously neither party can successfully object to a failure to give such an instruction.

Phenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628, 13 C. C. A. 58, 25 U. S. App. 190; Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; John Davis & Co. v. Insurance

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Co. of North America, 115 Mich. 382, 73 N. W. 393; Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

But where an issue as to the cause of loss has been properly presented, the defendant is entitled to an instruction setting forth the law in relation thereto.

Phœnix Ins. Co. v. Mills, 77 Ill. App. 546; Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Ellsworth v. Ætna Ins. Co., 89 N. Y. 186.

A defendant whose case is based on circumstantial evidence is entitled to a charge that incendiarism can be proved by evidence of that character (McWilliams v. Cascade Fire & Marine Ins. Co., 7 Wash. 48, 34 Pac. 140).

Where, however, an instruction has already been given setting forth the law as to the cause of the loss, it is not error to refuse to give substantially the same instruction in different words.

Bayly v. London & L. Ins. Co., 2 Fed. Cas. 1087; Huston v. State Ins. Co., 100 Iowa, 402, 69 N. W. 674; Transatlantic Fire Ins. Co. v. Bamberger, 11 Ky. Law Rep. 101, 11 S. W. 595; Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795.

Nor can hypercritical objections be sustained to instructions which, taken as a whole, present a clear and definite statement of the law applicable to the questions presented as to the cause of loss.

Orient Ins. Co. v. Leonard, 120 Fed. 808, 57 C. C. A. 176, followed in Phenix Ins. Co. v. Leonard (C. C. A.) 121 Fed. 1021; Eiseman v. Hawkeye Ins. Co., 74 Iowa, 11, 36 N. W. 780; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394; Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447; First Nat. Bank v. Fire Ass'n of Philadelphia, 33 Or. 172, 53 Pac. 8; Agnew v. Farmers' Mutual Protective Fire Ins. Co., 95 Wis. 445, 70 N. W. 554.

(e) Trial and review.

Questions as to how and when the loss occurred are peculiarly for the jury.

Beakes v. Commercial Union Assur. Co., 65 Hun, 621, 20 N. Y. Supp. 37; Landes v. Safety Mut. Fire Ins. Co., 190 Pa. 536, 42 Atl. 961.

Where there is expert testimony on both sides, the jury is not bound to adopt the opinion of any witness, but it is for them to determine, in the light of all the circumstances, what weight should be given to any opinion, theory, or conclusion stated by any witness (St. Louis Gaslight Co. v. American Fire Ins. Co., 33 Mo. App. 348).

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It is, however, for the court, as in the case of other disputed questions of fact, to determine as to the sufficiency of the evidence to justify a verdict, or the submission of the question to the jury (Smith v. California Ins. Co., 85 Me. 348, 27 Atl. 191).

Where the policy is made an exhibit in the petition, an objection by defendant to its introduction on the ground of variance or surprise will not lie, although the petition does not, as it should, allege that the fire was not occasioned by any of the excepted causes (Phœnix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484). And though there may be a variance between the complaint, alleging loss by fire generally, and the policy, covering loss by fire with certain exceptions, it is not error to permit plaintiff to amend his pleadings to conform with the policy (Clark v. Phœnix Ins. Co., 36 Cal. 168). But where the cause is submitted on the pleadings, a failure of plaintiff to reply to defendant's allegation of a loss by an excepted cause is fatal (Western Horse & Cattle Ins. Co. v. Timm, 23 Neb. 526, 37 N. W. 308).

Where the defendant has the burden of proving a loss by an excepted cause, and all the other allegations of the complaint are admitted, it is entitled to the closing and opening of the case.

Royal Ins. Co. v. Schwing, 87 Ky. 410, 9 S. W. 242; Fireman's Ins. Co. v. Schwing (Ky.) 11 S. W. 14; [1] Joy v. Liverpool, L. & G. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822.

And it was further decided in the Schwing Cases that this right was a substantial right, the denial of which justified a reversal, and that it was not waived by a subsequent motion for an instruction to the effect that plaintiff had the burden of proof.

The admission of opinion evidence by nonexpert witnesses, practically agreeing with testimony already given by an expert, has been held not to constitute prejudicial error (White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590, 71 S. W. 707). And obviously an objection by defendant will not lie to an instruction giving too broad a definition of the "gross negligence," which as an excepted risk was claimed to have been the cause of the loss (Campbell v. Monmouth Mut. Fire Ins. Co., 59 Me. 430).

A decision on appeal that loss caused by a fire following an explosion is within the terms of the policy becomes the law of the case, and binding as such (Orient Ins. Co. v. Leonard, 120 Fed. 808, 57 C. C. A. 176, following 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706).

[1] The Kentucky cases were decided under Civ. Code Ky. § 317.

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XXI. EXTENT OF LOSS AND LIABILITY OF INSURER—FIRE AND CASUALTY INSURANCE.

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1. EXTENT OF LOSS.

(a) Total loss.
(b) Effect of building regulations.
(c) Practice.

(a) Total loss.

In determining the extent of the insurer's liability it becomes important, especially in cases involving valued policies, to ascertain whether insured's loss was partial or total. Since in fire insurance the only question is whether there has been an actual total loss, the difficulty met with in marine insurance in ascertaining whether insured has suffered an actual, constructive, or technical total loss is not encountered, but the question is not free from difficulty in fire insurance. This difficulty, as is said in Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797, grows out of the inadequacy of language to express the legal conception of "total loss" so definitely as clearly to include every proper case and exclude every improper one. Could the rule be stated in language susceptible of only one construction, then, the court says, there would be little difference of opinion as to what evidence would be proper as tending to include or exclude a given case from its term. **The term "total loss" in an insurance policy does not mean that property remaining after the loss shall have no value** (Liverpool & L. & G. Ins. Co. v. Heckman, 64 Kan. 388, 67 Pac. 879). So, the words "wholly destroyed," as used in a valued policy law, refer to the property insured, and not solely to its value (Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767). And as a general proposition it may be said that **a total loss of a building exists when the building has lost its specific character, and is so broken and disintegrated that it cannot be designated as the structure which was insured, though some of its parts remain standing.**

Reference may be made to Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200; Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Liverpool & L. & G. Ins. Co. v. Heckman,

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64 Kan. 388, 67 Pac. 879; Palatine Ins. Co. v. Weiss, 109 Ky. 464, 59 S. W. 509, 22 Ky. Law Rep. 994; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107; Corbett v. Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318; Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93; Lindner v. St. Paul Fire & Marine Ins. Co., 93 Wis. 526, 67 N. W. 1125.

It is not necessary to show that all the material of a building was destroyed in order to support a finding of total loss (Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911). **There is a total loss if the building is so far destroyed that no substantial part or portion of it above the foundation remains in place, capable of being utilized to advantage in restoring the building to the condition in which it was before the fire.**

Thuringia Ins. Co. v. Mallott, 111 Ky. 917, 64 S. W. 991, 23 Ky. Law Rep. 1248, 55 L. R. A. 277; Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108; Same v. Sun Ins. Co., 85 Minn. 65, 88 N. W. 272; Poppitz v. German Ins. Co., 85 Minn. 118, 88 N. W. 438; Ampleman v. Citizens' Ins. Co., 35 Mo. App. 308; German Fire Ins. Co. v. Eddy, 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707; Pennsylvania Fire Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

Conversely, there can be no total loss if the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury.

Providence Washington Ins. Co. v. Board of Education of Morgantown School Dist., 49 W. Va. 360, 38 S. E. 679; Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797.

In New York the rule as to what constitutes a total loss appears to be unsettled. In Corbett v. Spring Garden Ins. Co., 85 Hun, 253, 32 N. Y. Supp. 1059, the Supreme Court, General Term, held it to be a question for the jury whether there was a total loss where the roof and interior woodwork of a building were destroyed, leaving the walls standing in a damaged condition. On further appeal (155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318) the Court of Appeals, however, held that, as the damaged building was restored for about one-third of its original value, the insured was not entitled to recover for a total loss; referring to the rule governing in marine insurance —that, unless the cost of repairing a ship will exceed one-half the value of the ship when repaired, there is not a constructive total

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loss. When the case subsequently came before the Appellate Division of the Supreme Court (40 App. Div. 628, 58 N. Y. Supp. 148), that court (McLaughlin, J., dissenting) proceeded on the theory that the Court of Appeals had regarded the rule prevailing in marine insurance as applying to fire insurance, and held that, inasmuch as there was evidence that the cost of reconstruction exceeded one-half the value of the restored building, it was a question for the jury whether there had been a total destruction, within the meaning of the policy. And this decision was afterwards affirmed without opinion in 167 N. Y. 596, 60 N. E. 1109. But the opinion on the first appeal of the case to the Court of Appeals can scarcely be regarded as expressing the decision of the court, as it received the assent of only three of the seven judges. And it is to be noted that O'Brien, J., who wrote the opinion, said that a total loss means that the building damaged has lost its character as a building and become a broken mass.

In Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93, it was held proper to refuse to charge that if the building could have been repaired for 50 per cent. of its original cost, and thereby made as good as it was before the fire, the loss was not total, since a building totally destroyed might be replaced for 50 per cent. of its cost.

Whether or not the remnant of a building is adapted to use as a basis to restore it to its condition before the fire depends on the question whether a reasonably prudent owner, uninsured, desiring such a structure as the building was before the injury, in proceeding to restore the building to its original condition, would utilize the remnant.

Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108; Same v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Poppitz v. German Ins. Co., 85 Minn. 118, 88 N. W. 438; Providence Washington Ins. Co. v. Board of Education of Morgantown School Dist., 49 W. Va. 360, 38 S. E. 679.

However, there is a total loss, even if the remnant can be utilized, if it will cost more to utilize such remnant than to build anew (O'Keefe v. Liverpool & L. & G. Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819). So, there is a total loss though a portion of a wall which remained standing after the fire was used in constructing a new building on the site of the old one, if it was so used against the protest of the architect, who considered it unsafe.

Murphy v. American Central Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407; American Cent. Ins. Co. v. Murphy (Tex. Civ. App.) 61 S. W. 956.

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There is a total loss where the remnant is inconsiderable compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burnt building (Murphy v. American Central Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407). So, there is a total loss where the part which remains standing is unsafe (Thuringia Ins. Co. v. Mallott, 23 Ky. Law Rep. 1248, 111 Ky. 917, 64 S. W. 991, 55 L. R. A. 277), and must be torn down (Palatine Ins. Co. v. Weiss, 22 Ky. Law Rep. 994, 109 Ky. 464, 59 S. W. 509). Likewise, when the expense of moving the undestroyed portion of a structure would be greater than the materials are worth, and it is of no value in its present condition, the loss is total.

Phœnix Ins. Co. v. Port Clinton Fish Co., 14 Ohio Cir. Ct. R. 160, 7 O. C. D. 468; Harriman v. Queen Ins. Co. of London & Liverpool, 49 Wis. 71, 5 N. W. 12.

As intimated above, the foundation walls of a building should not be taken into consideration in determining whether or not there has been a total loss, as the foundation of a building is not within the contemplation of the parties to an insurance contract.

Murphy v. American Cent. Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407; Lindner v. St. Paul Fire & Marine Ins. Co., 93 Wis. 526, 67 N. W. 1125; Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767.

Where a cold-storage plant is insured under a description of a four-story and basement brick building, and a brick engine and boiler house attached, and the engine house consists of a one-story brick structure attached to the main building, and the whole is operated as an entirety, the question as to total loss in an action on the policy must be applied to the structure as a whole (Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108). There is a total loss, within a hotel keeper's policy, indemnifying him against loss of use and occupancy, where the restaurant and the elevator are destroyed, and only 10 out of 115 rooms, and those on the top or seventh floor, escape damage by fire or water (Chatfield v. Ætna Ins. Co., 75 N. Y. Supp. 620, 71 App. Div. 164). And the fact that part of the machinery covered by a policy on a mill had been removed to facilitate improvements, and was consequently not destroyed when the mill burned, was in Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570, said not to render

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the loss a partial one, as the value of such machinery would be deducted from the amount of the policy. If a policy provided that the liability of the insurer should not exceed the cost of repairing or replacing the destroyed building with material of like kind and quality, the court did not err in refusing to instruct the jury as to what would constitute a total loss of the premises, as the question of fact was what the cost of rebuilding would be (McCready v. Hartford Fire Ins. Co., 70 N. Y. Supp. 778, 61 App. Div. 583).

The term "wholly destroyed," used in many valued policy laws, is in Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200, said to be equivalent to the term "total loss."

(b) Effect of building regulations.

If a building covered by a policy is located within the fire limits of a city, and is of such class that under certain conditions the city ordinances prohibit the repair or reconstruction of such building, recovery may be had as for a total loss when the repair or reconstruction of the building insured and damaged is prevented by reason of such ordinances.

Hewins v. London Assur. Corp., 184 Mass. 177, 68 N. E. 62; Brady v. Northwestern Ins. Co., 11 Mich. 425; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286; Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613.

However, if what remains of the damaged building has any value over and above the cost and expense of removing it from the premises, such excess value must be deducted from the amount of recovery (Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286). In analogy with the doctrine stated is the rule that, where the cost of restoring a building partly destroyed is increased by reason of building laws in force when the policy was issued, the insurer is, in the absence of provisions to the contrary, liable for the increased cost of restoring the building by reason of the building laws, not exceeding the amount of the insurance.

Hewins v. London Assur. Corp., 184 Mass. 177, 68 N. E. 62. See, also, Fire Association v. Rosenthal, 108 P. 474, 1 Atl. 303.

This rule applies even where the law requiring the improved construction is passed after the issuance of a policy, if it is in force when the loss occurs (Pennsylvania Company for Insurance v. Phil-

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adelphia Contributorship, 201 Pa. 497, 5 Atl. 351, 57 L. R. A. 510).[1] However, if a policy expressly provides that the loss or damage shall in no event exceed what it will cost insured to repair or replace the same with material of like kind and quality, and that insurer shall not be liable beyond the actual value destroyed by fire for loss occasioned by a law regulating the construction or repair of buildings, the increased cost of repairing a building by reason of a building law cannot be taken into consideration (Hewins v. London Assur. Corp., 184 Mass. 177, 68 N. E. 62). And in McCready v. Hartford Fire Ins. Co., 61 App. Div. 583, 70 N. Y. Supp. 778, it was held that a law passed after the enactment of the standard policy law, requiring buildings exceeding a certain height, erected or altered thereafter, to be of a fireproof construction, did not render inoperative a provision of the standard policy limiting the liability of insurers to the cost of repairing a building with material of the kind and quality destroyed, with reference to a building required to be of fireproof material by a law in force when the standard policy law was adopted. Consequently, the insured was not entitled to have the increased cost of repairing the building included in the recovery. Where the building insured was so injured as to be unsafe, and was consequently condemned by the municipal authorities, insured could claim a total loss, though the building, when insured, was unsound, and hence the indemnity was the value of the building (Monteleone v. Royal Ins. Co. of Liverpool & London, 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 784).

(c) Practice.

A naked averment, in defense to an action on a fire insurance policy, "denying that it was a total loss under the terms of the policy," without stating any facts, is insufficient (Miller v. Iron City Mut. Fire Ins. Co., 11 York Leg. Rec. 61). On an issue of total loss, evidence is admissible of the proportion of the building undamaged (Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797), the value of the remaining parts of the building, the cost of repairing the same, and the total cost of reconstruction (Northwestern Mut. Life Ins. Co. v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272), and as to what will be necessary to restore the building (Hartford Fire Ins. Co. v. Bourbon County

[1] This decision affirms Pennsylvania Company for Insurance v. Philadelphia Contributionship, 7 Lack. Leg. N. 87, 10 Pa. Dist. R. 181.

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Court, 24 Ky. Law Rep. 1850, 115 Ky. 109, 72 S. W. 739). But evidence is not admissible to show what it would cost to replace the property destroyed.

Palatine Ins. Co. v. Weiss, 22 Ky. Law Rep. 994, 109 Ky. 464, 59 S. W. 509; Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 115 Ky. 109, 72 S. W. 739.

Where a wall of a building had been bolted to a similar one of an adjoining building, thereby making a double wall, it is proper to show, as bearing on the question of total loss, that the double wall remaining was not suitable to be utilized, in place, in restoring both buildings (Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108). A valued policy law does not affect the character of evidence admissible on the issue as to whether a loss was total (Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797). In Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 115 Ky. 109, 72 S. W. 739, it was held that photographs of a building, though they seemed to bear out the theory that the building was not totally destroyed, were inconclusive, where some of the witnesses testified that the condition of the walls was such that they must be torn down—a fact which an examination of the photographs gave no intimation of. And in Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108, it was held that the evidence did not conclusively show a total loss. Ordinarily, it is a question of fact for the jury whether a loss was total or partial (Liverpool & L. & G. Ins. Co. v. Heckman, 64 Kan. 388, 67 Pac. 879). And where there is evidence to the effect that the walls of the building left standing after the fire were in good condition for rebuilding, and could have been utilized for that purpose, it is error to direct a verdict for plaintiff on the ground that he has suffered a total loss (Poppitz v. German Ins. Co., 85 Minn. 118, 88 N. W. 438). An instruction that if there remained "any substantial or considerable portion of the walls" that could be used for rebuilding, etc., "the building was not wholly destroyed," was in Ampleman v. North British & Mercantile Ins. Co., 35 Mo. App. 317, held to be misleading, as permitting too great a latitude of construction.

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2. LIMITATION OF LIABILITY BY CHARTER OR BY POLICY.

(a) Limitation of liability by charter or by-laws.
(b) Limitation of liability by provisions in policy.
(c) Same—Effect of valued policy law.
(d) Limitation of liability as to class of property insured.
(e) Limitation of liability to amount of assessment.

(a) Limitation of liability by charter or by-laws.

Though a mutual insurance company is authorized to insure property only to a certain proportion of its value, the company is nevertheless bound by the valuation agreed upon when the policy is issued, in the absence of fraud, and is liable for the whole amount of the insurance in a case of a total loss; and this is true even if there is an overvaluation.

Fuller v. Boston Mut. Fire Ins. Co., 4 Metc. (Mass.) 206; Phillips v. Merrimack Mut. Fire Ins. Co., 10 Cush. (Mass.) 350.

If there is an undervaluation, so that on the face of the policy the insurance exceeds the proportion permitted, the insured is also bound by the valuation, and can only recover the proportion allowed, based on such valuation (Holmes v. Charlestown Mut. Fire Ins. Co., 10 Metc. [Mass.] 211, 43 Am. Dec. 428). However, where it is provided that the company may have a revaluation in case of a loss, the insured can recover only the specified proportion of the value at the time of the loss (Post v. Hampshire Mut. Fire Ins. Co., 12 Metc. [Mass.] 555, 46 Am. Dec. 702). So, where it is provided that the directors shall determine the amount to be insured, not exceeding a certain proportion of the value of the property, and that in case of a loss the insured shall furnish an account of the property lost or damaged, with the value thereof at the time of loss, the insurance company is not bound by an overvaluation at the time the contract was entered into, so as to be liable on the basis thereof (Atwood v. Union Mut. Fire Ins. Co., 28 N. H. 234). And under this rule the insured can, in case of a total loss, recover the full amount of the insurance, if such amount does not exceed the proportion authorized, based on the value of the property at the time of loss, though it does exceed such proportion when based on the valuation stated in the application (Huckins v. People's Mut. Fire Ins. Co., 31 N. H. 238).

By-laws of an insurance company, rendering it liable for such

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proportion of the loss as the amount insured by it bears to the whole amount insured on the goods, will not reduce the recovery of one insured under a policy issued for the whole amount of the goods insured by it (Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. [Del.] 254). So, a constitutional provision that in case of other insurance the company shall pay only its pro rata share of two-thirds of the value of the property does not limit the company's liability on a certificate providing that a loss shall be paid, not exceeding a certain sum, where there is no other insurance (Reavis v. Farmers' Mut. Fire Ins. Co., 78 Mo. App. 14). But under a by-law of a company providing that it shall not be liable for a greater amount on any one building, and the contents thereof, than $6,000, a landlord and his tenant holding separate policies cannot recover more than $6,000, though their two policies, and the loss thereon, exceed $6,000 (Shoemaker v. Line Lexington Mut. Ins. Co., 15 Montg. Co. Law Rep'r [Pa.] 192). However, where there is no restriction in the charter, and the contracts are made by the company with full knowledge of the excess, and assessments on the whole amount are accepted for many years, the company will be liable for the full amount of the policies (Shoemaker v. Line Lexington Mut. Fire Ins. Co., 16 Montg. Co. Law Rep'r [Pa.] 162, 16 Pa. Super. Ct. 18). A provision in a constitution of a mutual insurance company, that "no risk shall be taken in no case to exceed two-thirds of the cash value of the property insured," means that no risk shall be taken in any case to exceed two-thirds of the cash value of the property insured (Reavis v Farmers' Mut. Fire Ins. Co., 78 Mo. App. 14).

(b) Limitation of liability by provisions in policy.

Policies of insurance often contain provisions limiting the insurance to a certain proportion of the value of the property insured, or the amount of recovery on a partial loss to the proportion which the insurance bears to the value of the property at the time of loss. With reference to a condition in an open policy that the insurer should be liable only for such proportion of the loss as the insurance bore to the value of the property at the time of loss, it was said in Christian v. Niagara Fire Ins. Co., 101 Ala. 634, 14 South. 374, that the condition was neither unreasonable nor unjust, though it might happen that a recovery on an open policy containing the condition would, under some circumstances, not be commensurate with the premiums paid. And the fact that a clause limiting the in-

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surer's liability to two-thirds of the value of the property insured was in fine print, and was not discovered by the holder of the policy until after loss, has been held not to deprive the insurance company of the benefit of such clause (Ervin v. New York Cent. Ins. Co., 3 Thomp. & C. [N. Y.] 213). A limitation in an application made a part of a policy is likewise binding on the insured. Thus, it was held in Egan v. Mutual Ins. Co., 5 Denio (N. Y.) 326, that where an application, referred to in a policy of insurance as forming a part thereof, provided that the insurers should only be obliged to pay as if they had insured two-thirds of the actual cash value of the property, a recovery for a loss should be limited to the proportion stated. So, a limitation of liability in a vacancy permit during the continuance of the vacancy will be binding on insured as a reasonable condition (Sullivan v. Germania Fire Ins. Co., 89 Mo. App. 106). And a stipulation limiting the insurer's liability, added to the policy subsequent to its delivery, is binding on the insured if supported by a sufficient consideration (Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447).

Where a policy provides that the company's liability shall not exceed a certain proportion of the actual cash value of the property at the time of loss, the company is not bound by the valuation in the application on which the policy was issued, unless the policy contains a proviso to that effect (Brown v. Quincy Mut. Fire Ins. Co., 105 Mass. 396, 7 Am. Rep. 538). And a limitation clause in a policy governs an insuring clause in the policy providing for insurance against loss to an amount not exceeding the amount of the policy, so that the insurer will be liable for only the specific proportion of the value of the property up to the face value of the policy (Millis v. Scottish Union & National Ins. Co., 95 Mo. App. 211, 68 S. W. 1066).

Where a policy limited the insurance to an amount not exceeding the sum stated in the policy, nor more than two-thirds of the actual destructible value of the building, and the same provision was contained in a condition annexed, as also in a by-law of the company, both being referred to and made a part of the contract, the insured could not recover more than two-thirds of the value of the building destroyed, though another condition annexed provided that "in settling a loss the damage is to be paid in full," not exceeding the whole amount insured, and "is to be estimated according to the fair value of the property" (Blinn v. Dresden Mut Fire Ins. Co., 85 Me. 389, 27 Atl. 263). And where a policy pro-

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vided that "in case of a total loss the company is not liable to pay more than two-thirds of the actual value of the building at the time of the loss, nor more than one-half the value of the personal property," the insured could, in case of total loss, recover only one-half the value of personal property, it being held that the words "at the time of the loss" were applicable to personal as well as real property (Singleton v. Boone County Home Mut. Ins. Co., 45 Mo. 250). So, where a burglary insurance policy, on jewelry, etc., which contains a proviso that insurer's liability for loss on jewelry shall not exceed, separately or together, $1,000, has attached a special agreement limiting the insurer's liability to $250 on any one article, the first clause, whatever its construction standing by itself, must be read with the second, which operates to limit the liability of the insurer to the sum of $250 on any one article of jewelry (Wormser v. General Acc. Assur. Corp., 87 N. Y. Supp. 974, 94 App. Div. 213). But where an insurance corporation, which had agreed to carry three-fifths of a $50,000 risk offered, afterwards indorsed on the policy that it should, on due notice, cover not exceeding $50,000 on the excess of $50,000 as therein described, the insurer was liable for the whole risk, and not three-fifths on the additional $50,000, especially where the subsequent dealings of the parties clearly showed that they so understood its meaning (Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650). And a condition in an open policy limiting the insurer's liability to the deficiency arising on the payment of another policy of prior date was in Stuart v. Columbian Fire Ins. Co., 1 Daly (N. Y.) 471, held not to apply to goods in another policy, intermediate the date of defendant's policy and its inscription thereon. In Home Ins. Co. of New Orleans v. Harrington, 95 Ga. 759, 22 S. E. 666, it was held that provisions in policy "that this company shall be liable only for such proportion of the whole loss as this insurance bears to the cash value of the whole property hereby insured at the time of the fire," and that "this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby injured shall bear to the whole insurance," were not susceptible of explanation by parol evidence. As the terms of a policy should be construed most favorably to the insured, the words "premises mortgaged," in a provision in a policy that in case of loss the company shall pay to the mortgagee "such proportion of the sum insured as the damage by fire to the premises mortgaged or charged shall bear to the

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value immediately before the fire," should be construed to mean so much of the mortgaged premises as was insured at the time of the fire; that is, the building insured, and not the whole lot mortgaged with the building thereon (Teutonia Fire Ins. Co. v. Mund, 102 Pa. 89).

A provision in a policy that the insurance recovered shall not exceed two-thirds of the value of the property does not limit a mortgagee to the recovery of two-thirds of the amount of the mortgage (Sanders v. Hillsborough Ins. Co., 44 N. H. 238). Where a policy provides that damages to property insured shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, the whole value of the property is to be taken to be what the property was actually worth at the time of the damage, not what it was valued at in the application for the policy (Peoria Marine & Fire Ins. Co. v. Wilson, 5 Minn. 53 [Gil. 37]).

A petition in an action on a policy in case of a total loss need not make any reference to a three-fourths value clause, as this is a matter of defense (Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299); and, if the insured fails to plead the limitation, the insurer must do so to make it available as a defense (Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447). But if a policy sued on is filed with the petition and referred to therein as a part thereof, its stipulations limiting the liability of the insurer are to be considered a part of the petition on demurrer (Hudson v. Scottish Union & National Ins. Co., 23 Ky. Law Rep. 116, 62 S. W. 513, 110 Ky. 722). An instruction which ignores a provision limiting the insurer's liability is, of course, objectionable (American Ins. Co. v. Crawford, 89 Ill. 62). Hence an instruction, in a suit on a policy which limits the insurer's liability to a certain proportion of the value of the property, that, if the jury find the value of the different classes of the property to amount to the insurance thereon, they shall find for plaintiff for the full amount of the insurance, is erroneous (Roberts v. Insurance Company of America, 94 Mo. App. 142, 72 S. W. 144). So, it is error to instruct the jury to find for insured in the amount of the insurance, when it is provided in the policy that the company shall not be liable beyond the actual cash value of the property insured (Westchester Fire Ins. Co. v. Wagner, 10 Tex. Civ. App. 398, 30 S. W 959).

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(c) Same—Effect of valued policy law.

A clause limiting the liability of the insurer to a certain proportion of the value of the property is, in states having a valued policy law, inoperative as to a total loss.

Reference may be made to Phœnix Ins. Co. v. Peak, 20 Ky. Law Rep. 1035, 47 S. W. 1089; Germania Ins. Co. v. Ashby, 65 S. W. 611, 23 Ky. Law Rep. 1564, 112 Ky. 303, 99 Am. St. Rep. 295; Home Fire Ins. Co. v. Bean, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; Sun Mut. Ins. Co. v. Holland, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 448; Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578.

Of course, where the valued policy law only applies to insurance on real estate, a stipulation of a policy on personal property limiting the insurer's liability is valid and binding.

Hudson v. Scottish Union & National Ins. Co., 62 S. W. 513, 23 Ky. Law Rep. 116, 110 Ky. 722; Queen Ins. Co. v. Jefferson Ins. Co., 64 Tex. 578.

In Tennessee it has been held (Burkett v. Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. 848) that a provision in a policy that the amount of loss or damages shall be estimated according to the actual cash value of the property at the time of the fire, which shall not exceed what it will cost to replace the building, is not in violation of or an evasion of a statute (Acts 1893, c. 107) requiring insurance companies to pay their policy holders the full amount of a loss, not exceeding the insurance, and providing that all stipulations in a policy to the contrary shall be void. But the Wisconsin Supreme Court has taken the position that, under a law (Laws Wis. 1874, c. 347) making the valuation placed upon insured buildings in a policy conclusive on the company in case of loss, stipulations in a policy that the true value shall be proved are unavailing.

Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552; Thompson v. St. Louis Ins. Co., 43 Wis. 459; Bammiessel v. Brewers' Fire Ins. Co., 43 Wis. 463.

So the Texas Court of Civil Appeals has held that under the valued policy law of that state [1] a stipulation in a policy that the

[1] Sayles' Civ. St. art. 2971.

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company issuing it shall be liable for indemnity only, and that the amount of the loss shall in all cases be fixed by agreement or appraisal, is void in case of a total loss (Continental Ins. Co. v. McCulloch, 15 Tex. Civ. App. 190, 39 S. W. 374). A statute [2] providing that stipulations in a policy that the insurer shall not be liable for the full amount insured shall be void cannot be waived by the acceptance of a policy containing such a stipulation (Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796).

(d) Limitation of liability as to class of property insured.

Where each of several classes of property is insured for a separate amount, each class must be considered separately in determining the amount of recovery (Ætna Ins. Co. v. Glasgow Electric Light & Power Co., 107 Ky. 77, 52 S. W. 975). And the insured is entitled to indemnity only out of the particular fund intended to indemnify a loss on the particular property (Carlwitz v. Germania Fire Ins. Co., 5 Fed. Cas. 87). Thus, a recovery on one class of property specifically insured is restricted to the value of the property not exceeding the amount insured thereon (Dwelling House Ins. Co. v. Freeman, 10 Ky. Law Rep. 496). Hence, under a policy of $900, distributed $650 on furniture and $250 on a violin, no more than $650 can be recovered on furniture, though it is worth more than that, and the violin is worth less than $250; or more than $250 on the violin, whatever the value of it and the furniture (Phœnix Ins. Co. v. Pfeifer [Tex. Civ. App.] 39 S. W. 1001). So, where a policy covering different items, each for specific amounts, provides that in case of a loss the insurer shall be liable for only three-fourths thereof, the insurer is liable for only three-fourths of the value of each item separately not exceeding the amount of insurance on such item (Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180). And neither class, if deficient in value, can be supplemented by excessive loss on the other (Home Ins. Co. v. Adler, 71 Ala. 516). Though a policy on several buildings and on "the hay and grain therein" separately values the buildings, the value of the hay and grain in one barn destroyed, not exceeding the amount insured, may be recovered (Rix v. Mutual Ins. Co., 20 N. H. 198). The policy involved in Cassidy v. Royal Exchange Assur., 99 Me. 399, 59 Atl. 549, covered lumber along-

[2] Acts Tenn. 1893, c. 107, § 1.

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side a railroad track, and contained this clause: "This policy to attach in each locality in proportion as the value in each bears to that of all. This clause to be inoperative when the lumber piles are less than 100 feet apart." The court held that the clause must be construed as a proviso, not as an exception, and that defendant had the burden of proof to show that the loss came within the proviso. In Citizens' Ins. Co. v. Ayers, 88 Tenn. 728, 13 S. W. 1090, the policy contained the clause, "This policy being for $1,000 covers pro rata on each of the following amounts," followed by a list of the articles insured, with the sum for which each was insured, aggregating $3,510. There was no other insurance on the property. It was held that the policy insured each article separately for $^{1000}/_{3510}$ of the sum named for it in the list.

(e) Limitation of liability to amount of assessment.

In the absence of provisions to the contrary, a mutual company is liable in full for a loss to a sum not exceeding the amount of the insurance, and is not limited to the amount derived from an assessment (Harl v. Pottawattamie County Mut. Fire Ins. Co., 74 Iowa, 39, 36 N. W. 880). And though the by-laws of a mutual fire insurance company provide that the funds for the payment of losses shall consist solely of moneys raised by assessments, still, if a policy issued by the company or association is an absolute promise to pay a certain sum in case of loss, it is proper that a judgment against the company should be entered as an absolute money judgment (Byrnes v. American Mut. Fire Ins. Co., 114 Iowa, 738, 87 N. W. 699). Where a mutual policy providing for the payment of full indemnity for a loss, not to exceed the amount insured, limits the insurer's liability to a pro rata payment of the losses in case the total losses and expenses of the company during the year exceed the amount collected on assessment, the burden is on the company to show that the amount realized on assessments is insufficient to pay the losses in full (Delle v. State Mut. Hail Ins. Co., 119 Iowa, 173, 93 N. W. 96).

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3. EXTENT OF LIABILITY IN GENERAL.

(a) In general.
(b) Partial loss.
(c) Liability for successive losses.
(d) Loss by removal of property from impending danger.
(e) Amount of interest of insured.
(f) Property insured for security of creditor or mortgagee.
(g) Policy insuring interest of mortgagee.
(h) Loss of rents and profits.
(i) Expenditures.
(j) Extent of liability under Lloyd's policies.
(k) Deductions and offsets in general.
(l) Unpaid premiums.
(m) Duties of insured after loss in general.
(n) Sale of goods after loss.

(a) In general.

If the property is so damaged by fire as to render it useless for the purposes for which it has been used, it is a destruction in law (Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759). But an insured is entitled to indemnity only for his actual loss, notwithstanding an agreement in the policy that in case of loss no proof of property is to be required (Hemmenway v. Eaton, 13 Mass. 108). And the liability of the insurer, except so far as limited by the policy, must be judged by the nature of the property insured, the risks to which it was subjected, and the natural accidents to which it is liable (Marcy v. Sun Ins. Co., 14 La. Ann. 264). However, a recovery by an insured is not restricted to indemnity for property destroyed, but may include damages to goods not destroyed (Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743). And in Cox v. Charleston Fire & Marine Ins. Co., 3 Rich. Law, 331, 45 Am. Dec. 771, it was held that a person insured by an open policy is entitled to recover the full value of the goods insured, the premium paid being a part of the amount insured. If losses occur to a mutual insurance company which exhaust all the funds of the company, an insured suffering a loss subsequently thereto is entitled to any part of the fund assessed for the payment of the first losses (Coston v. Alleghany County Mut. Ins. Co., 1 Pa. 322).

The fact that the fumes of burning sulphur prevented firemen from entering the insured premises at the time they were burned

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down does not affect the extent of the insurer's liability if the plaintiff had the right, under the policy, to use the building in the manner she was using it (Fire Ass'n v. Gilmer, 3 Walk. [Pa.] 234). And though an insured had instructed his agent not to save anything in case of a fire unless he could save everything, yet, since nothing could have been saved when the fire was discovered, had a contrary instruction been given, the instruction given by insured, though wrong, was held not to affect his right to recover (Willis v. Germania & Hanover Fire Ins. Cos., 79 N. C. 285). An insurer who sets up the negligent omission of the insured to save the property has the burden of proving that loss resulted from such negligence (Wolters v. Western Assur. Co., 95 Wis. 265, 70 N. W. 62). Where one of the issues in an action on a fire policy was whether plaintiff had destroyed goods after the fire to increase the loss, an instruction that whatever damage was done to plaintiff's property was a result of the fire, was improper (F. Dohmen Co. v. Niagara Ins. Co., 96 Wis. 38, 71 N. W. 69). Where an insurance company elects to repair, and then afterwards refuses to do so, it is liable for damages to the property by reason of its exposure to the weather during the intervening time (American Cent. Ins. Co. v. McLanathan, 11 Kan. 533).

Though an inventory made by an assured some time before a fire included wagons, etc., under the head of "Camp Equipage," this would not be binding, so as to prevent recovery for the loss of the wagons, etc., under the classification "Wagons, Sleighs, and Harnesses," where there was no evidence to show that the inventory had any connection with the insurance contract (Beyer v. St. Paul Fire & Marine Ins. Co., 112 Wis. 138, 88 N. W. 57). But under a policy of reinsurance confined to "naval stores in barrels while awaiting shipment in or on the warehouses or sheds of Downing & Co., at Brunswick, Ga.," the liability of the reinsurer applied only when and while the stores were thus placed (London Assur. Corp. v. Thompson, 47 N. Y. Supp. 830, 22 App. Div. 64). Still, if an insurance company promises a property owner that if he will find the property damaged, have it inspected, and sold at auction, it will pay the deficiency, the performance of these conditions will entitle the insured to recover, though the loss was not covered by the policy issued to insured (Willetts v. Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31). In Trustees of St. Clara Female Academy v. Northwestern National Ins. Co., 98 Wis. 257, 73 N. W. 767, it appeared that a building in process of construction under a contract re-

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quiring the owner to keep it insured for the joint benefit of the owner and contractor was insured by the owner in his own name, but for an amount intended to cover the entire property. The court held that the owner's right to recover the amount of the loss was not affected by the contractor's interest therein, nor by his restoration of the building.

(b) Partial loss.

If a partial loss occurs, insured is entitled to be indemnified in full up to the amount of the insurance, in the absence of any provisions to the contrary.

Nicolet v. Insurance Co., 3 La. 366, 23 Am. Dec. 458; Underhill v. Agawan Mut. Fire Ins. Co., 6 Cush. (Mass.) 440; Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215; Rix v. Mutual Ins. Co., 20 N. H. 198. This rule, of course, applies, though the property was insured for less than its value. Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215; Westchester Fire Ins. Co. v. McAdoo (Tenn. Ch. App.) 57 S. W. 409. If goods insured are damaged, the insured is bound for the difference between their value in their sound and damaged condition. Hoffman v. Western M. & F. Ins. Co., 1 La. Ann. 216.

Under a valued policy law fixing the worth of the property insured conclusively at the valuation written in the policy, the actual damage is the measure of recovery where the loss is partial (Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313). But in Natchez Ins. Co. v. Buckner, 4 How. (Miss.) 63, it was held that the measure of damages for a partial loss covered by a valued policy is the difference between the appraisement of the damaged article and that stipulated in the policy, with all necessary damages. And in Harris v. Eagle Fire Ins. Co., 5 Johns. (N. Y.) 368, it was held that on the total destruction of a part of the property covered by a valued policy insured was entitled to recover a proportionate amount of the total valuation, and was not limited to the actual loss.

However, if a policy limits the insurer's liability for a partial loss to the proportion of the amount insured which that amount bears to the whole value of the property, the insurer is only liable for the specified proportion of a partial loss.

Teague v. Germania Fire Ins. Co., 71 Ala. 473; Peoria M. & F. Ins. Co. v. Wilson, 5 Minn. 53 (Gil. 37).

So, a policy conditioned as by "ordinary form for open warehouses," on cotton in bales in assured's warehouse, only to cover

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such proportion of the whole loss as the insurance bears to the cash value of the whole property insured at the time of the fire, concurrent insurance being allowed without notice, is limited to such proportion, though there be no concurrent policies (Christian v. Niagara Fire Ins. Co., 101 Ala. 634, 14 South. 374). But under a policy which promised to pay all losses not exceeding $2,500, the said losses to be estimated according to the true value of the property at the time, and to be paid at the rate of two-thirds its actual cash value, all losses not exceeding $2,500, and not exceeding two-thirds of the value of the stock insured, were to be paid in full (Ashland Mut. Fire Ins. Co. v. Housinger, 10 Ohio St. 10).

Plaintiff in National Filtering Oil Co. v. Citizens' Ins. Co., 34 Hun (N. Y.) 556, was entitled to royalties amounting to not less than $3,000 annually. He effected insurance on these royalties, covering loss or diminution of them by fire. It was held that the insurer was liable for a diminution in the amount of royalties caused by a fire, though they were not reduced below $3,000 annually. In Branigan v. Jefferson Mut. Fire Ins. Co., 102 Mo. App. 70, 76 S. W. 643, it was held that under a law providing that in case of partial loss under an insurance policy the insurer must pay "a sum of money equal to the damage" or repair, at the option of the insured, where the insurer offers to repair or to pay a certain sum, the insured may decline both, and insist on payment in cash of a sum equal to the damage, without regard to insurer's estimate.

(c) Liability for successive losses.

An insurance company is liable for successive losses to property insured during the life of the policy, to the amount of the aggregate sum insured, but no more.

Trull v. Roxbury Mut. Fire Ins. Co., 8 Cush. (Mass.) 263; New Hampshire Mut. Fire Ins. Co. v. Rand, 24 N. H. 428; Crombie v. Portsmouth Mut. Fire Ins. Co., 26 N. H. 389.

Conversely, it may be said that where an insurance company has paid for a partial loss it is, in case of a subsequent total loss, liable only for the difference between the sum it had paid and the whole sum insured.

Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547; Trull v. Roxbury Mut. Fire Ins. Co., 3 Cush. (Mass.) 263; Lancashire Ins. Co. v. Bush, 82 N. W. 313, 60 Neb. 116.

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Where a policy provides that the insurer will make good all damages by fire to the premises during the term, not exceeding the amount insured, and the property is, on destruction thereof, rebuilt by the insurer in accordance with a provision reserving to it such right at an expense less than the amount of the insurance, the insurer is, on a subsequent loss, liable for the difference between the amount insured and the sum paid for rebuilding after the prior loss (Trull v. Roxbury Mut. Fire Ins. Co., 3 Cush. [Mass.] 263).

(d) Loss by removal of property from impending danger.

An insurance company is liable under a fire policy for goods lost while in process of removal from a building on fire (Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96, 75 Am. Dec. 638, affirming 3 Phila. 193), and the company is liable for damages to goods during their removal from a building endangered, and to some extent damaged, by a fire in the vicinity thereof, though the goods would neither have been burned nor injured had they been left in the building (Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844). Where a policy expressly provides that the insurer shall be proportionally liable for damages to the property by removal from a building in which it is exposed to fire, the company is, of course, liable for its proportional share in case of such damages (Peoria M. & F. Ins. Co. v. Wilson, 5 Minn. 53 [Gil. 37]).

In the early case of Hillier v. Alleghany Mut. Ins. Co., 3 Pa. 470, 45 Am. Dec. 656, it was held that the insurer was not liable for loss by damage to goods during their removal from a building under mere apprehension that they would be reached by a fire in a neighboring building. This decision was based on the doctrine that insurance against fire only covered damages resulting from actual ignition. But in the later case of Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844, it is said that this doctrine no longer prevails.

In analogy with the rule stated it may be said that a fire insurance company is liable for goods stolen while in process of removal from a building endangered by a fire in the neighborhood (Lukens v. Insurance Co., 25 Leg. Int. [Pa.] 61), especially if the removal is made at the instance of the company's agent (Leiber v. Liverpool, L. & G. Ins. Co., 6 Bush [Ky.] 639, 99 Am. Dec. 695).

(e) Amount of interest of insured.

Where insured makes no statement as to interest, and no inquiry is made in regard thereto, he is, on the happening of a loss,

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entitled to recover according to his real interest, whether absolute or qualified (Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551). And a person having a mere special interest in property insured may recover the value of that interest on an insurance of the entire subject-matter (Van Natta v. Mutual Security Ins. Co., 4 N. Y. Super. Ct. 490). But an insured can recover only for the value of his interest, or the actual loss proved, and not more than the amount of the insurance. However, it may be said, generally, that **the insured, who at the time of loss and at the time of insurance has an insurable interest, may recover the whole amount of damage done the property, not exceeding the amount for which it was insured, whether his insurable interest is a title in fee simple for life or simply equitable.**

Andes Ins. Co. v. Fish, 71 Ill. 620; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 392, 30 Am. Dec. 90.

But if the insured receives the amount of the loss, another owner may, of course, recover from him on proving that the insurance was made on his interest (Miltenberger v. Beacom, 9 Pa. 198).[1] And, strictly, the insured can recover only to the extent of his interest. Thus, a life tenant insuring the buildings on the premises as his own is only entitled to recover the actual value, at the time of the fire, of his right to use the buildings during his lifetime (Beekman v. Fulton & Montgomery Counties Farmers' Mut. Fire Ins. Ass'n, 66 App. Div. 72, 73 N. Y. Supp. 110), and not their full value (Agricultural Ins. Co. v. Yates, 10 Ky. Law Rep. 984). And a husband insuring the real estate of his wife, in which he has only an inchoate right of curtesy, is entitled to recover only such sum as will indemnify him for his loss, estimated according to the value of his inchoate right as tenant by the curtesy at the time of the fire (Doyle v. American Fire Ins. Co., 181 Mass. 139, 63 N. E. 394). So, an insured having a dower interest in the property, and holding a purchase-money note against it, can only recover to the extent of such interest (Hartford Fire Ins. Co. v. Haas, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64). But a husband who has insured in his own name, with his wife's authority, her real and personal property, whereof they are in joint enjoyment, etc., by a policy whose terms evince an intention to insure the entire ownership, is entitled to

[1] For a full discussion of this phase of the subject, see post, p. 3688.

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recover for the whole loss (Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543, 46 Am. Rep. 792). So, a husband's right to recover for the destruction of a house which he and his wife had occupied as a homestead, and which stood on land in which he has a life interest, extends to the amount of the damages not exceeding the sum insured, without regard to the insured's interest in the property (Merrett v. Farmers' Ins. Co., 42 Iowa, 11).

A tenant from year to year may recover the value of the tenement for occupation, subject to the rent for the unexpired term (Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551). And an insured who has conveyed the property to another, who has reconveyed it in trust for the original insured, may recover the extent of his actual loss, not exceeding the sum insured (Morrison's Adm'r v. Tennessee Marine & Fire Ins. Co., 18 Mo. 262, 59 Am. Dec. 299). So, an insured who has contracted to sell the premises is entitled to recover to the extent of the unpaid purchase price, with interest (Shotwell v. Jefferson Ins. Co., 18 N. Y. Super. Ct. 247). If, before insurance on a building is effected, the title to the property is in litigation, and the suit is decided against insured before the loss occurs, he cannot recover on the basis of the entire value of the property (Monroe v. Southern Mut. Ins. Co., 63 Ga. 669). But the fact that an insured has, before a fire, agreed to convey the building insured for a less amount than the insurance money, does not limit his recovery to the amount for which he had agreed to convey (Grant v. Elliot & Kittery Mut. Fire Ins. Co., 76 Me. 514). Nor will the fact that insured, after a fire, sells the premises for a price agreed on before the loss, preclude him from recovering substantial damages under the policy (Tiemann v. Citizens' Ins. Co., 78 N. Y. Supp. 620, 76 App. Div. 5). So, the lessees of a colliery who have insured the coal breaker, shafting, and all their "working interest" are entitled to recover the value of the property, though the slope fell in prior to the fire, and though, by such falling in, their working interest was of less value than the amount insured (Imperial Fire Ins. Co. v. Murray, 73 Pa. 13).

An agreement between an owner of logs and another that the latter shall erect a mill and saw the logs, keeping the lumber insured for the owner, and receive as compensation the lumber remaining after a certain amount has been realized, the owner reserving the right to take possession of the mill and logs in case the work is not pushed satisfactorily, does not pass title to the logs to the mill owner, so as to limit the recovery of the original owner

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of the logs in case of a loss to the amount yet to be realized for the lumber under the contract (West Branch Lumberman's Exchange v. American Cent. Ins. Co., 183 Pa. 366, 38 Atl. 1081). But where a builder has an enforceable contract for the conveyance of certain lots in part payment for his work on a building, the insurer is entitled to deduct the value of such lots from a recovery on a policy insuring the builder's interest in the building (Protection Ins. Co. v. Hall, 15 B. Mon. [Ky.] 411). And a contractor who insures a house he is engaged to move cannot recover for tools left in the house, which were burned, but only the profits lost by the accident (Planters' & Merchants' Ins. Co. v. Thurston, 93 Ala. 255, 9 South. 268).

An insured who has transferred goods by an executory contract of sale, and received a portion of the purchase money, can recover the whole amount of the insurance, and is not limited to the purchase money remaining due, since he is bound to refund that which is received as money had on a consideration which has failed (Boston & Salem Ice Co. v. Royal Ins. Co., 12 Allen [Mass.] 381, 90 Am. Dec. 151). But a person in possession of personal property under a conditional sale, who insures her interest in a policy indemnifying her to the extent of her loss, is entitled to recover from the insurer only the amount represented by her payments on the purchase price and interest thereon (Tabbut v. American Ins. Co., 185 Mass. 419, 70 N. E. 430, 102 Am. St. Rep. 353). However, where a person holding goods on consignment applies for insurance thereon in his own name, with the intention to insure the property to its full value, and the insurance agent writes the policy with that end in view, knowing the nature of the applicant's title, a clause in the policy limiting the liability to an amount not exceeding the interest of the applicant does not restrict the liability, in case of loss, to his personal interest, so as to prevent a recovery for the full value of the goods (Fox v. Capital Ins. Co., 93 Iowa, 7, 61 N. W. 211).

If goods stored with a warehouseman are destroyed without negligence on his part, he cannot recover on a policy insuring him against his "liability" on such cotton, since he is not liable (Allen v. Royal Ins. Co. [Tex. Civ. App.] 49 S. W. 931). So, where a policy issued to a warehouseman limits the liability to the interest of the insured, and requires goods stored to be separately and specifically insured, and the depositors of goods on storage have insured their own goods, the insurer is not responsible for goods on

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storage in which the insured warehouseman has no interest (Home Ins. Co. v. Gwathmey, 82 Va. 923, 1 S. E. 209). In conclusion it may be said that a defense based on a limitation of the interest of the insured by reason of incumbrances cannot be availed of unless pleaded (Home Ins. Co. v. Gaddis, 3 Ky. Law Rep. 159).

(f) Property insured for security of creditor or mortgagee.

A policy indemnifying the mortgagor and mortgagee, "as interest may appear," against loss or damage by fire, creates a several liability to the parties according to their respective interests (Kent v. Ætna Ins. Co., 84 App. Div. 428, 82 N. Y. Supp. 817). But an indorsement on a policy making it payable, in case of loss, to mortgagees of the insured property, "as their mortgage claim may appear," does not operate as a contract to insure the interest of the mortgagees (Franklin Saving Inst. v. Central Mut. Fire Ins. Co., 119 Mass. 240). And the sum for which the company is liable is not the loss sustained by the mortgagees, but the loss sustained by the insured (Baltis v. Dobin, 67 Barb. [N. Y.] 507). So, the holder of two policies of fire insurance—one taken out by himself, and the other by his lessees on machinery put on the insured property by them, and assigned to the lessor as collateral security for money loaned—is entitled to recover the full loss or damage sustained by him (Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257). And where insurance is procured by an owner, loss payable to any incumbrancer, the fact that the latter has realized from other securities the whole or a portion of his interest in the property does not entitle the insurer, in an action by the incumbrancer upon the policy, to a deduction from the amount of the policy (Cone v. Niagara Fire Ins. Co., 60 N. Y. 619).

If a policy is issued to a mortgagor and simply made payable to a mortgagee, the latter is not entitled to recover for a loss where the property has been restored by the mortgagor (Friedmansdorf v. Watertown Ins. Co. [C. C.] 1 Fed. 68). But a different rule prevails with reference to a policy issued to a mortgagee on his interest.

Ætna Ins. Co. v. Baker, 71 Ind. 102; Foster v. Equitable Mut. Ins. Co., 2 Gray (Mass.) 216.

(g) Policy insuring interest of mortgagee.

A mortgagee who has insured his interest is, in the event of a loss, entitled to recover the whole amount insured, not exceeding

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the amount due on his mortgage (Kernochan v. New York Bowery Fire Ins. Co., 12 N. Y. Super. Ct. 1), and is not obliged to look to the land for its value (Rex v. Merchants' Ins. Co., 2 Phila. [Pa.] 357). The fact that a mortgagee has foreclosed the mortgage on property partially destroyed by fire, to the full amount of the debt, is immaterial, as between the mortgagee and the insurer (Sun Ins. Office v. Beneke [Tex. Civ. App.] 53 S. W. 98). So, the fact that even after a fire the premises covered by the mortgage are sufficient to pay the debt constitutes no defense to an action by the mortgagee on his policy.

Ætna Ins. Co. v. Baker, 71 Ind. 102; De Wolf v. Capital City Ins. Co., 16 Hun (N. Y.) 116; Kernochan v. New York Bowery Fire Ins. Co., 12 N. Y. Super. Ct. 1; Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

Likewise the mortgagor's restoration of the buildings damaged so that they are as valuable as before the fire will not affect the mortgagee's right to recover.

Ætna Ins. Co. v. Baker, 71 Ind. 102; Foster v. Equitable Mut. Ins. Co., 2 Gray (Mass.) 216. But a contrary rule governs if the policy is merely made payable to the mortgagee. Friemansdorf v. Watertown Ins. Co. (C. C.) 1 Fed. 68.

Assigning a policy to a mortgagee with the consent of the insurer does not convert the policy into a contract of indemnity to the mortgagee, but the interest of the mortgagor only is covered (State Mut. Fire Ins. Co. v. Roberts, 31 Pa. 438).

In Haley v. Manufacturers' Fire & Marine Ins. Co., 120 Mass. 292, it was held that under the facts the mortgagee's interest was not diminished by a part payment under a contract which the court held to be collateral to the mortgage.

(h) Loss of rents and profits.

Under a policy insuring a building, the insured cannot recover rent for the time of rebuilding or repairing (Baroness of Pontalba v. Phœnix Assur Co., 2 Rob. [La.] 131, 38 Am. Dec. 205). Nor can he recover for his loss occasioned by the interruption or destruction of his business, carried on in such building, nor for any gains or profits which were morally certain to inure to him if the building had remained uninjured to the expiration of the policy (Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551). So, a policy on a bridge does not cover loss of toll sustained by the insured on its road while the bridge is rebuilding (Farmers' Mut.

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Ins. Co. v. New Holland Turnpike Co., 122 Pa. 37, 15 Atl. 563). And where a policy on a stock of goods limits the insurer's liability to the actual cash value of the property at the time of loss, not exceeding what it would cost to replace the goods, nothing can, in estimating the loss, be added to the cash value on account of estimated profits (Niagara Fire Ins. Co. v. Heflin, 60 S. W. 393, 22 Ky. Law Rep. 1212). But under a policy insuring a lessee on his interest, the insured is entitled to recover the profits lost by reason of a suspension of rent under his sublease (Carey v. London Provincial Fire Ins. Co., 33 Hun [N. Y.] 315). Where salvage goods are carried with a new stock, and sold by the insured as opportunity offers, such goods should be charged with their proper proportion of the expenses of the business (Palatine Ins. Co. v. Morton Scott Robertson Co., 106 Tenn. 558, 61 S. W. 787). Where a tenant was insured by a policy reciting that the policy was to indemnify the insured for any loss accruing to her by reason of having to pay rent for the property while untenantable by reason of a fire, that the sum insured was the annual rental of the property, and that a loss was to be computed on that basis, insured, having paid rent for a year during which the premises were untenantable by reason of fire, could recover of defendant the full amount of the policy, though six months after the fire the landlord went into possession of the lot to put up a larger building, extending onto other land, under an agreement with insured that he might do so without affecting insured's liability for rent under the old lease till completion of the new building, which insured agreed to rent, and though an insurance company in which the landlord had his rents insured, while denying liability, paid $2.000 to him for the benefit of insured (Heller v. Royal Ins. Co. of Liverpool, 35 Atl. 726, 177 Pa. 262, 34 L. R. A. 600).[2]

(i) Expenditures.

Under a policy providing that, in case the company shall be liable to a mortgagee of the premises insured, it may pay him either the loss or "the full amount secured by such mortgage," a tender, to be sufficient, must include necessary expenditures made by the mortgagee to secure the property from further loss (Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co., 142 Mass. 142.

[2] For a history of the case, see 4 Pa. Dist. R. 433, 133 Pa. 152, 19 Atl. 349, 7 L. R. A. 411.

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7 N. E. 550). And where machinery has to be removed before property damaged can be repaired, the fact that insured has a contract by which he can compel a third party to effect such removal does not affect the liability of the insurer, but the expense of removal may be considered in estimating the damages (Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724).

In the early case of Welles v. Boston Ins. Co., 6 Pick. (Mass.) 182, means taken, by leave of the insurer, to save an insured building in immediate danger of taking fire, were held a subject of general average, and the insured and insurer should contribute in proportion to the amount they had at risk; but neighboring buildings, which would have been endangered if the building had taken fire, were held to be too remotely affected to be liable to contribution.

(j) Extent of liability under Lloyd's policies.

The members of an association whose articles of agreement provide that a loss sustained is "to be borne by each and every of the several subscribers or members, in proportion to the sums of money by them subscribed," are liable in solido, like an ordinary partnership, though the insured is a member of the company, and the members are not discharged by paying their respective shares to their treasurer, where he becomes insolvent before paying over the money, especially if the insured, though a member, had no voice in the appointment of the treasurer (Shubrick v. Fisher, 2 Desaus. [S. C.] 148). But where a Lloyd's policy expressly provides that the underwriters shall be liable severally, and not jointly, each underwriter is only liable in severalty for his proportion as specified in the policy (Straus v. Hoadley, 23 App. Div. 360, 48 N. Y. Supp. 239). However, an underwriter who has subscribed for a certain proportion of the insurance on such a policy is liable to the insured for his proportion of the whole amount on the happening of a partial loss, and must look to his associates for reimbursement of the excess paid by him (Sumner v. Piza [D. C.] 91 Fed. 677). But an underwriter is not liable for a loss after the amount which he has subscribed, and to which his liability is limited by the policy, has been exhausted by the payment of prior losses (Burke v. Rhoads, 79 N. Y. Supp. 407, 39 Misc. Rep. 208, 82 App. Div. 325). Still, if an underwriter continues to sell policies after the funds of the association provided for by the original agreement have been exhausted, he cannot set up as a defense to a policy that he has paid the limit of his liability, but will be held to have renewed his contract on the original terms (Burke v. Rhoads, 82 App. Div. 325,

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81 N. Y. Supp. 1045). Where the policy provides that the underwriters shall not be liable for a greater proportion of any loss than the amount insured by their policy bears to the whole insurance, the underwriters are not liable for the whole amount of their subscriptions, where there is other insurance, as they cannot have a ratable satisfaction from the other insurers (Cook v. Loew, 69 N. Y. Supp. 614, 34 Misc. Rep. 276).

A stipulation in a Lloyd's fire policy binding the assured to resort first to a suit against the attorneys for the underwriters to determine the fact of the underwriter's liability is valid.

Enterprise Lumber Co. v. Mundy, 62 N. J. Law, 16, 42 Atl. 1063, 55 L. R. A. 193; Stieglitz v. Belding, 20 Misc. Rep. 297, 45 N. Y. Supp. 670, reversing 20 Misc. Rep. 714, 44 N. Y. Supp. 1130; Lawrence v. Schaefer, 20 App. Div. 80, 46 N. Y. Supp. 719, affirming 19 Misc. Rep. 239, 42 N. Y. Supp. 992. But see Biggert v. Hicks, 18 Misc. Rep. 593, 42 N. Y. Supp. 236.

Such stipulation and another one binding insured thereafter to resort to a trust fund in the attorney's hands, before he can sue the individual underwriters, are conditions precedent to a right of action by him against an individual underwriter, and must be pleaded and proved in order to entitle him to recover (Ketchum v. Belding, 68 N. Y. Supp. 1099, 58 App. Div. 295).[3] An underwriter can show that a judgment against the attorney was procured by fraud, and that the attorney had in part settled the loss (Cuff v. Heine, 58 N. Y. Supp. 324, 27 Misc. Rep. 498).

(k) Deductions and offsets in general.

In estimating a loss where a building has been totally destroyed, there is no settled rule of deduction from the estimated cost of a new building, for the difference between the value of the new and the old one, analogous to the rule in marine insurance, but the jury are to decide what sum will be an indemnity to the assured for his actual loss (Brinley v. National Ins. Co., 11 Metc. [Mass.] 195). Likewise, the law of marine insurance respecting salvage does not apply to a fire policy. On a fire policy insured is entitled to recover the amount of his insurance when the insured building is destroyed, without deducting the value of the materials which remain (Liscom v. Boston Mut. Fire Ins. Co., 9 Metc. [Mass.] 205),

[3] For a history of the case, see 31 Misc. Rep. 498, 64 N. Y. Supp. 550, and 32 Misc. Rep. 506, 66 N. Y. Supp. 307.

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in the absence of allegation and proof that the insured has converted such materials to his own use (Royal Ins. Co. v. McIntyre [Tex. Civ. App.] 34 S. W. 669). But if insured uses the material remaining to rebuild, the insurance company is entitled to deduct the value thereof (German Ins. Co. v. Eddy, 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707). So, all moneys received by a mortgagee from the sale of what remained of the insured property after the fire must be deducted from the amount which should otherwise be paid by the insurance company (Harris v. Gaspee Fire & Marine Ins. Co., 9 R. I. 207).

Though an insurance company's liability for a second loss extends only to the difference between the sum paid for a prior loss and the amount of the insurance, a verdict allowing a recovery on a fire policy, without any deduction on account of a prior loss for which proof had been made, was not erroneous, where there was no evidence of the amount of the prior loss, or that it had been adjusted and paid (Ackley v. Phenix Ins. Co., 25 Mont. 272, 64 Pac. 665). And though a policy confers an option on the insurer to repair within a given time after loss, evidence of repairs made in pursuance of such provisions, but not completed until after the time specified, is not admissible in mitigation of damages (Franklin Fire Ins. Co. v. Hamill, 6 Gill [Md.] 87). So, an insurance company cannot avail itself of a claim against certain brokers as a set-off to reduce the amount of recovery by an owner of property covered by a policy issued to the brokers "on account of whom it may concern" (Somes v. Equitable Safety Ins. Co., 12 Gray [Mass.] 531).

An insurance company's liability for a loss under a policy insuring the use and occupancy of an elevator in a specified sum per day is not dependent on the question whether the use of the elevator was profitable or otherwise. Nor is such liability affected by the fact that by the terms of a pooling agreement with other elevator owners the destruction of insured's elevator does not deprive him of his share in the earnings of the pool, since the policy issued by the insurer in this instance is not a contract of indemnity. (Buffalo Elevating Co. v. Prussian Nat. Ins. Co., 71 N. Y. Supp. 918, 64 App. Div. 182.) If an insured receives from a city part compensation for property destroyed, by order of the corporation, to prevent the spreading of a fire, the insurer is entitled to deduct such amount after making an allowance for its proportionate share of recovering the claim against the city (Pentz v. Ætna Fire Ins. Co., 9 Paige

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[N. Y.] 568, reversing 3 Edw. Ch. 341). And where insured sues the city for the full amount of the loss, and obtains a verdict, though it amounts to less than the insurance and the absolute loss, he cannot resort to the insurance company for the balance, as the verdict against the city is conclusive as to the amount of the loss (Pentz v. Receivers of the Ætna Fire Ins. Co., 3 Edw. Ch. 341).

Where a statute which prohibits an insurer from forfeiting a policy for a mistake or misrepresentation unless intentional or fraudulent, provides for a reduction of the amount of recovery in such proportion as the premium ought to have been increased if no mistake or misrepresentation had occurred, a recovery on a policy which would have been forfeited by nonoccupancy but for the statute is to be reduced as indicated by the statute, though the nonoccupancy was not the cause of loss (Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249). A provision that "in all cases of loss $200 shall be deducted" applies not alone to the first loss paid, but to each and every loss payable under the policy (Fernald v. Providence Washington Ins. Co., 50 N. Y. Supp. 838, 27 App. Div. 137).

A company is not entitled to have the salvage on machinery not covered by a policy, and appropriated by insured's landlord, deducted ratably from its liability, but the whole amount of such salvage is properly deducted from the landlord's proportion of the aggregate liability (Decatur Land Co. v. Cook [Ala.] 27 South. 559.) If the damaged goods are sold at auction with the insurer's consent or knowledge, the price which they bring is a fair criterion of their value (Wightman v. Western Marine & Fire Ins. Co., 8 Rob. [La.] 442), and may be considered by the jury in estimating the damage and in ascertaining the amount of the indemnity; but if the auction is had without notice to, or the consent of, the insurers, the amount realized on the sale is not sufficient evidence of the value of the goods in their damaged condition (Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216). Much less can it be asserted that the amount realized on an auction sale held against the insurer's protest is conclusive on the insurer (Reading Ins. Co. v. Egelhoff [C. C.] 115 Fed. 393).

Under a policy insuring dutiable goods imported and stored in public stores, insured is entitled to recover the value of such goods, estimated as if the duties had been paid (Wolfe v. Howard Ins. Co., 3 N. Y. Super. Ct. 124, affirmed 7 N. Y. 583). And a policy of insurance on whisky in a bonded warehouse covers the full value of

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the whisky, without any deduction on account of the tax due the government.

Queen Ins. Co. v. McCoin, 105 Ky. 806, 49 S. W. 800. See, also, Insurance Co. v. Thompson, 95 U. S. 547, 24 L. Ed. 487.

(l) Unpaid premiums.

In estimating a partial loss, the assessors may deduct the amount of the premium note unpaid and unearned (Livermore v. Newburyport Ins. Co., 2 Mass. 232). And though insured has paid the amount of the premium note to an insurance broker, he must submit to its deduction from the insurance, as provided in the policy in case of loss (Union Ins. Co. v. Grant, 68 Me. 229, 28 Am. Rep. 42). But where, by the express terms of the policy, a mutual company is bound to pay a loss "without any deduction therefrom," it cannot set up a custom or usage to retain, in case of total loss, out of the amount of the loss, 2 per cent. per month on the balance of the premium note, from the date of the last assessment thereon until the expiration of the policy (Swamscot Mach. Co. v. Partridge, 25 N. H. 369). So, if assignees in insolvency of persons insured by a mutual company have guarantied the payment of the premium note, and taken an agreement from the company that the policy shall be continued in force to them for an extended period of time, they may recover the full amount of a loss which subsequently occurs, without deducting the amounts due from the insolvent debtors to the company upon other premium notes, though the policy contains an agreement that in case of loss all sums due to the company from the insured shall be deducted before payment (Tripp v. Pacific Mut. Ins. Co., 7 Allen [Mass.] 230).

(m) Duties of insured after loss in general.

A provision in a fire insurance policy requiring insured, in case a fire occurs, to protect the property from further damage, and forthwith separate the damaged from the undamaged personal property, and put it in the best possible order, is an absolute requirement, which must be observed, unless waived or excused, as a condition precedent to any recovery on the policy (Thornton v. Security Ins. Co. [C. C.] 117 Fed. 773). But under such a condition the insured is not obliged, where the goods consist of shirts, bosoms, and collars, which have been injured chiefly by water or handling, to have them relaundered (Hoffman v. Ætna Fire Ins. Co., 24 N. Y. Super. Ct. 501). The fact that an insured is adjudicated a bank-

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rupt, and a receiver is appointed, does not violate the insurer's right to have the insured property cared for by the insured, as his interest in the property after the adjudication is not changed (Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879). On an issue as to whether or not plaintiff used all reasonable efforts to protect merchandise in a cold storage warehouse after a fire, evidence is admissible as to the management of the warehouse by the manager of the storage company, and his statement, made to plaintiff's manager, as to when he could move the goods, and his agreement to notify plaintiff's agent when they could be gotten out, and plaintiff's reliance thereon (Boak Fish Co. v. Manchester Fire Assur. Co., 84 Minn. 419, 87 N. W. 932).

(n) Sale of goods after loss.

The rights secured to an insurer by a provision requiring insured to exhibit the property remaining to the insurer as often as required, and giving the insurer the right to have the loss determined by appraisement in case of a disagreement, and an option to replace or repair the property lost or damaged on giving notice of an intention to do so within a certain time, are substantial, and the insurer is ordinarily entitled to the full period allowed within which to make its decision whether or not it will replace the goods. This right is not affected by the fact that there are several insurers who are only ratably liable, and may have divergent views. This does not prevent a several election, and they may conclude to join, with neither of which the insured has a right to interfere. And the insurer's right to have the goods exhibited as often as required is not affected by the fact that they were examined by adjusters of the company at a preliminary stage of the controversy, in an effort to arrive at an amicable settlement of the loss. Therefore, if insured sells the goods after distinct notice from the insurer that it insists on its rights, and thereby cuts off the insurer's rights under the provision, he forfeits his insurance, and cannot recover for the loss. It is no defense to a sale to say that the object of an appraisal is merely to determine the value, which is sufficiently shown by the sale itself. This is not the method provided by the policy, and cannot be substituted by the insured at will. (Astrich v. German-American Ins. Co., 128 Fed. 477.) So, evidence that an insured, after loss, separated the undamaged from the damaged personal property and sold the same, without consent of the insurer, before its adjuster had seen it, shows a breach of a provision re-

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quiring insured to separate the damaged and undamaged personal property, and make a complete inventory, and exhibit it, when required, to the company's adjuster (Oshkosh Match Works v. Manchester Fire Assur. Co., 92 Wis. 510, 66 N. W. 525). But the sale of salvage goods by an assured will not justify one of several insurers in refusing to pay the policy, when a sufficient amount is left on hand to enable the insurer to exercise its option to take its pro rata share of the salvage, the right of each insurer being limited to a pro rata share of the salvage (North German Ins. Co. v. Morton Scott Robertson Co., 108 Tenn. 384, 67 S. W. 816). And where two-thirds of the goods were totally destroyed, and the balance greatly damaged, and insured retained the damaged goods for 18 days after notice to the insurer of the loss, during which time none of the insurers, the goods being covered by several policies, claimed the goods, and advertised the sale in two daily papers, there was no such breach of the condition giving the insurer the option to take the damaged goods at their appraisal value within a reasonable time, on giving notice within 30 days after receipt of proofs of loss, as to forfeit the insurance (Davis v. American Cent. Ins. Co., 7 App. Div. 488, 40 N. Y. Supp. 248, affirmed 158 N. Y. 688, 53 N. E. 1124), especially where the insurer had taken an inventory prior to the sale, and was notified by telegraph of the sale, and it did not appear that the goods were worth more than they brought at the sale (Davis v. Grand Rapids Fire Ins. Co., 15 Misc. Rep. 263, 36 N. Y. Supp. 792).

4. VALUE OF PROPERTY OR INTEREST.

(a) Value in general.
(b) Personal property.
(c) Real estate.
(d) Crop insurance.
(e) Stipulations fixing the measure of damages.
(f) Valued policies.
(g) Effect of statutory provisions.

(a) Value in general.

Under an open policy it is incumbent on the insured to show the value of the property destroyed in an action to recover for a loss.

Reference may be made to Williams v. Continental Ins. Co. (D. C.) 24 Fed. 767; Hanover Fire Ins. Co. v. Lewis, 23 Fla. 193, 1 South. 863; German Fire Ins. Co. v. Von Gunten, 13 Ill. App. 593; Mil-

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laudon v. Western Marine & Fire Ins. Co., 9 La. 27, 29 Am. Dec. 433; Germier v. Springfield Fire & Marine Ins. Co., 109 La. 841, 33 South. 361; Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915.

Under this rule it is obvious that insured must plead the value of the property for which recovery is sought. German Fire Ins. Co. v. Von Gunten, 13 Ill. App. 593; Ramsey v. Philadelphia Underwriters' Ass'n, 71 Mo. App. 380; Sappington v. St. Joseph Mut. Fire Ins. Co., 72 Mo. App. 74; Wright v. Bankers' & Merchants' Town Mut. Fire Ins. Co., 73 Mo. App. 365.

The measure of the amount the insured is entitled to recover is the fair cash value of the property at the time and place of the loss, not exceeding the amount of the insurance.

This principle is supported by Mack v. Lancashire Ins. Co. (C. C.) 4 Fed. 59; Perry v. Mechanics' Mut. Ins. Co. (C. C.) 11 Fed. 485; State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207; Huckins v. People's Mut. Fire Ins. Co., 31 N. H. 238; Fowler v. Old North State Ins. Co., 74 N. C. 89; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389. In Ellmaker's Ex'rs v. Franklin Fire Ins. Co., 5 Pa. 183, it was said that the measure of damages is the amount of loss by fire, and interest on that sum.

But an insurance company, which is in any event liable for the full amount expressed in its policy, is not injured by an estimate of the value of the property destroyed, though made on an erroneous basis (Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650). If there is no controversy as to the value of the property, and plaintiff testifies to having paid a certain sum for it, and its value is stated at that sum in the application, in the absence of any evidence to the contrary, the jury may find its value in that sum (Siltz v. Hawkeye Ins. Co., 71 Iowa, 710, 29 N. W. 605). But generally proof of the cost of goods which have been in use for an indefinite period is insufficient to show value.

Germier v. Springfield Fire & Marine Ins. Co., 109 La. 341, 33 South. 361; City of De Soto v. American Guaranty Fund Mut. Fire Ins. Co., 102 Mo. App. 1, 74 S. W. 1.

So, the fact that insured applied for $3,000 insurance, and was allowed $2,000, and the loss was total, is not sufficient to show cash value at the time of loss, several months later (Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915). Where the

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royalties of a licensor of a patent were insured against fire on the premises of a licensee, the loss was properly measured by the amount of royalties paid for two months immediately preceding the fire, during the time the works were being restored, and for some months thereafter (National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473). And in computing a loss upon a policy issued in this country upon property situated in a foreign country an estimate should be made of such loss at the place where it occurred in the currency of that country, and its equivalent found in the country where suit is brought, by determining the actual intrinsic value of the currency of such country as compared with that of the foreign country (Burgess v. Alliance Ins. Co., 10 Allen [Mass.] 221). Where an insured at first claimed a less sum on account of her loss than she subsequently claimed in the action on the policy, she may, to explain the discrepancy, show that her first claim was made through a mistake as to the construction of the policy (Ætna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. 934).

(b) Personal property.

In the case of goods having a market value, such value is the one which should control in estimating insured's loss.

Sun Fire Office v. Ayerst, 37 Neb. 184, 55 N. W. 635; Williams v. Continental Ins. Co. (D. C.) 24 Fed. 767; Fisher v. Crescent Ins. Co. (C. C.) 33 Fed. 544; State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138; Fowler v. Old North State Ins. Co., 74 N. C. 89; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389; Hartford Fire Ins. Co. v. Cannon, 46 S. W. 851, 19 Tex. Civ. App. 305.

But if the property destroyed has no distinctly recognized market value, the recovery may be based on a fair value of such property (Gere v. Council Bluffs Ins. Co., 67 Iowa, 272, 23 N. W. 137); and such value is not what a junkshop or secondhand dealer would have given for the property, or what it would have brought under extraordinary circumstances, or at a forced sale (Sun Fire Office of London v. Ayerst, 37 Neb. 184, 55 N. W. 635). But in the case of old or secondhand furniture, which cannot be said to have a fixed market value, it is competent for the insurance company to prove the price at which the insured had offered to sell the property, to show value (Joy v. Security Fire Ins. Co., 83 Iowa, 12, 48 N.

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W. 1049). However, where the property had a market value, the estimate of the loss cannot be based on local or peculiar value (Fisher v. Crescent Ins. Co. [C. C.] 33 Fed. 544). And in the case of manufactured goods destroyed while owned by the manufacturer the actual cash or market value at the time and place of loss controls (Mitchell v. St. Paul German Fire Ins. Co., 92 Mich. 594, 52 N. W. 1017), regardless of what it would actually cost the manufacturer to reproduce the goods (Hartford Fire Ins. Co. v. Cannon, 19 Tex. Civ. App. 305, 46 S. W. 851). So, where dry or seasoned lumber is destroyed, a contract made by insured for the purchase of lumber to be cut in another state is inadmissible to show value (Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138).

(c) Real estate.

If the property destroyed is a building, the measure of damages is not the market value of the building at the time of the loss, nor what some one would have paid for the building, but the actual value of the property at the time of the loss, as the insured is entitled to be indemnified for the loss sustained. The market value cannot be used as the test in determining the amount of recovery for the destruction of a building for various reasons. If there was no market demand for the property, so that it could be sold, it would have no value, and consequently there would be no loss. A farmer might have an insured building of the value of $5,000 on a farm, and yet be held to have sustained no loss by its destruction because there was no demand for land in that location, and the farm could not have been sold. If not salable at all, it might have a value to the owner as a home for himself and family or for business purposes. Again, the market value of some buildings (as, for instance, tenement houses), may be much greater than their actual cash value. Besides, the market-value rule would render it almost, if not quite, impossible, in many cases, to determine the amount of a loss. A building and the land on which it is built may have a joint market value entirely different from what the aggregate would amount to if they were to be considered separately and detached from each other.

That the measure of damages is the actual value of the building at the time of loss is asserted in Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646; State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; Stenzel v.

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Pennsylvania Fire Ins. Co., 110 La. 1019, 35 South. 271, 98 Am. St. Rep. 481; Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207; Merchants' Ins. Co. v. Frick, 5 Ohio Dec. 47, 2 Am. Law Rec. 336.

In the Frick Case it is said that the measure of damages is the sum that would be required to replace the property. However, the rule thus broadly stated is misleading, as it would seem to imply that the measure of damages would be the cost of replacing a destroyed building. But this is not the true rule.

Hilton v. Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412; Waynesboro Mut. Fire Ins. Co. v. Creaton, 98 Pa. 451.

If a building destroyed was an old one, and had been in use a long time, a new building of the same material, construction, and dimensions would undoubtedly be worth more than the one destroyed. Therefore, the rule announced in the Frick Case is no doubt that the damages should be based on the cost of replacing a destroyed building in the same condition it was in at the time of the loss. In other words **the measure of damages is the cost of a new building of the same material and dimensions as the one destroyed, less the amount the destroyed building had deteriorated by use.** And this is unquestionably the rule supported by the weight of authority, though the Taylor Case contains a dictum to the effect that the rule of damages is not the cost of replacing the destroyed property. Thus, it is said in Stenzel v. Pennsylvania Fire Ins. Co., 110 La. 1019, 35 South. 271, 98 Am. St. Rep. 481, that in determining the value of destroyed buildings the aim must be to arrive, as near as possible, at the value of the buildings as they stood on the day of the fire, taking into consideration the cost of rebuilding, and allowing for difference in value between the new buildings and the condition in which the buildings were when destroyed. And even in State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281, it is said that in arriving at the value of a destroyed building the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of age and use, are all proper subjects of inquiry. So, it is said in Ætna Ins. Co. v. Johnson, 11 Bush (Ky.) 587, 21 Am. Rep. 223, that under a policy stipulating that the loss or damages shall be estimated according to the true and actual cash value of the property, which is the same as the common-law rule, the just measure of damages for the loss of an insured building is

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the value of the building as it stood upon the ground on the day it was destroyed, as compared with a new building of the same kind and dimensions (Ætna Ins. Co. v. Johnson, 11 Bush [Ky.] 587, 21 Am. Rep. 223). Likewise, it was held in Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207, that evidence as to the cost of a building such as the building destroyed at the time of the fire is admissible as one of the factors in determining the value. And in Cummins v. German-American Ins. Co., 192 Ga. 359, 43 Atl. 1016, it was held that, on an issue as to the actual cash value of insured property at the time of the loss, evidence is admissible of the value, at that time, of lumber similar to that which formed part of the destroyed building, and also of what it would cost to rebuild such a building. But, as said in the Johnson Case, the measure of damages is neither the original cost of the building, nor the cost of a new one, nor the difference between the value of the lot with the building on it and its value with the building destroyed, nor the market value of the building to be removed from the premises.

An owner of a building standing on leased ground is entitled to recover on a basis of the intrinsic value of the building, though the lease expires in a short time after the fire, and the building would have been worth to insured but a fraction of its intrinsic value had he been compelled to remove it when his lease expired (Laurent v. Chatham Fire Ins. Co., 1 N. Y. Super. Ct. 45). So, one who, after selling land with a reservation of the right to remove the buildings before a certain day, obtains insurance on them, is entitled, where they are burned before the expiration of the time limited for their removal, to have his recovery estimated on the intrinsic cash value of the buildings (Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503), and not their relative value to the assured for the purpose of the removal (Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. [C. C.] 13 Fed. 646).

The measure of damages in a case of insurance by a tenant from year to year is the amount that a stranger, having no contracts or engagements pending for the use of the premises, would have given for the unexpired lease when the loss occurred (Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551). And in a case of insurance by a life tenant, whose recovery is limited to the value, at the time of a loss, of his right to use the buildings during life, the value of such use is to be determined from the locality and sur-

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roundings of the property (Beekman v. Fulton & Montgomery Counties Farmers' Mut. Fire Ass'n, 66 App. Div. 72, 73 N. Y. Supp. 110). In this case it was held that a supreme court rule for determining the value of a life tenancy was not applicable in ascertaining the value of the annual use of a house, as it referred only to invested sums.

(d) Crop insurance.

The recovery under a policy insuring growing crops against damage by hail is the market value of the crop destroyed, less the expense of preparing it for the market.

Barry v. Farmers' Mut. Hail Ins. Ass'n, 110 Iowa, 433, 81 N. W. 690; McIlrath v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 244, 86 N. W. 310. In the Barry Case it is said that the rule governs, though insured is required to take care of the remainder of the crop until matured.

The loss in bushels, valued according to the market value, less the cost of maturing, harvesting, and getting to market, may be shown as indicating the amount of loss, where no evidence of additional elements of damage is introduced (McIlrath v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 244, 86 N. W. 310). But the damages to small grain and corn cannot, as to the grain, be based on the market value thereof at the time of threshing, less the expense of threshing and marketing, and, as to the corn, the price for which it could have been sold on the premises, less the expense of husking and cribbing, as this would be allowing recovery of the value of a mature crop, without deduction for expense in fitting it for the market.

Barry v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 186, 86 N. W. 290; McIlrath v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 244, 86 N. W. 310.

In estimating the damage to a corn crop by a hailstorm, the jury may consider the yield of other fields of similar kind and quality in the vicinity of the damaged crop (Condon v. Des Moines Mut. Hail Ass'n, 120 Iowa, 80, 94 N. W. 477). And evidence of the yield on lands in the neighborhood is admissible, though it does not appear that the tracts are of the same size or yielding capacity, or cultivated with the same care: this going only to the weight of he testimony (Barry v. Farmers' Mut. Hail Ins. Ass'n, 110 Iowa, 433, 81 N. W. 690). So, where one of insured's witnesses had stated on cross-examination the average yield of his own corn, and

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on redirect, without objection, that his crop was injured by hail, there was no prejudicial error in permitting him to further state that his corn was damaged by the same storm that damaged plaintiff's. And where insured, a farmer, testified as to the acreage of corn affected by the hailstorm, the jury was justified in finding that he knew very near how many acres he had in corn that year, as against the testimony of insurer's witnesses, who claimed to have figured out the exact number of acres by driving over the land and counting the rows of stalks the next spring. (Condon v. Des Moines Mut. Hail Ass'n, 120 Iowa, 80, 94 N. W. 477.)

(e) Stipulations fixing the measure of damages.

It is, of course, competent for the parties to an insurance contract to fix the measure of damages (Malin v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56). Hence, where an open policy specifies that the damages are to be estimated at the "true and actual cash value of the property at the time the loss may happen," the measure of damages is that which was agreed upon by the parties, and it is error to allow the jury to adopt any other rule (Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418). And the fact that the property destroyed was patented cannot affect a contract to measure the damages by its value when the loss occurred (Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418). If a policy provides that the loss shall be estimated according to the cash value of the property at the time of the fire, the measure of damages is the amount which it would cost the insured in cash to purchase property of like kind and quality (German Ins. Co. v. Everett [Tex. Civ. App.] 36 S. W. 125). And where it is provided that the insurer's liability shall in no event exceed what it would cost insured to repair or replace the property insured with material of like kind and quality, the measure of damages in the case of real property is the sum that it would cost insured to repair or replace the building with material of like kind and quality (McCready v. Hartford Fire Ins. Co., 70 N. Y. Supp. 778, 61 App. Div. 583); and, in the case of personal property, what it would actually cost insured to repair or replace the destroyed property (Standard Sewing Mach. Co. v. Royal Ins. Co., 201 Pa. 645, 51 Atl. 354), not the market value of the property (Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055). Under this stipulation the loss to an insured by the burning of a building is to be determined by deducting the value of the

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foundations and portions of the building not destroyed, if used at the same place, from the total value of the building, since the contract contemplated the cost of replacing the structure (Burkett v. Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. 848). If a stipulation of this tenor required a deduction for depreciation from use, the actual loss is the measure of damage, and the difference in values before and after the fire will not give such indemnity (Thompson v. Liverpool & London & Globe Ins. Co., 23 Fed. Cas. 1060). The recovery is to be estimated on the cost of repairs, if by repairs the property will be made as valuable as before, and not more so; but if by repairs the property will be made more valuable than before, or less so, then a corresponding deduction from, or addition to, the cash cost of repairing must be made (Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202). Where a policy makes the cost of rebuilding one of the criteria of liability in case of loss, the value of the house and the cost of replacing are admissible in evidence (Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848). And on an issue as to what it would have cost to rebuild a building at the date of its destruction, evidence of what it would cost two years later is admissible (Cummins v. German-American Ins. Co., 192 Pa. 359, 43 Atl. 1016). But where an insurer calls as a witness a carpenter and builder, who testifies to making measurements and an estimate of the cost of rebuilding the property destroyed, and states the figures, it is not proper for the insurer to ask if the witness is willing to rebuild at these figures, since what the witness is willing to do at the time of the trial is not a test of the amount of loss (Caraher v. Royal Ins. Co., 63 Hun, 82, 17 N. Y. Supp. 858, affirmed 136 N. Y. 645, 32 N. E. 1015).

A mere reservation of a privilege by a company to repair or replace the property destroyed is a reservation for the benefit of the company, which it may adopt or not as it thinks proper; and therefore the expense of repairing or replacing the property is not a proper rule for estimating the damages (Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418). But where a policy, allowing the insurer to repair or replace the damaged building, contained a provision that the insurer's liability should in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, the measure of damages was the cost of repairing or replacing; and if the insurer should waive the right to repair or rebuild, and agree to pay the amount of loss and damages in cash, that fact would not change the basis of esti-

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mating the loss and damages, and the same should be ascertained precisely in the same manner as if it were the purpose to repair, rebuild, or replace the structure (Providence Washington Ins. Co. v. Board of Education of Morgantown School Dist., 49 W. Va. 360, 38 S. E. 679).

(f) Valued policies.

Most fire insurance policies are what are known as "open policies." But valued policies may also be written. **A valued policy is one in which the value of the property insured is fixed and agreed upon by the parties to the contract** (Williams v. Continental Ins. Co. [D. C.] 24 Fed. 767), and not one which merely estimates the value of the property (Lycoming Ins. Co. v. Mitchell, 48 Pa. 367). The laws of California, Montana, North Dakota, and South Dakota define a valued policy as one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.[1]

The valuation agreed upon in a valued policy is conclusive on the parties in the absence of fraud.

Reference may be made to Perry v. Mechanics' Mut. Ins. Co. (C. C.) 11 Fed. 485; Continental Ins. Co. v. Moore, 62 S. W. 517, 23 Ky. Law Rep. 72; Harris v. Eagle Fire Ins. Co., 5 Johns. (N. Y.) 368; Kane v. Commercial Ins. Co., 8 Johns. (N. Y.) 229; Howell v. Protection Ins. Co., 7 Ohio, 284, pt. 1; Lycoming Ins. Co. v. Mitchell, 48 Pa. 367.

In the case of a total loss, the measure of damages under a valued policy is the amount for which the property was insured (Westinghouse Electric Co. v. Western Assur. Co., 42 La. Ann. 28, 7 South. 73; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323), though such amount exceeds the value of the property (Borden v. Hingham Mut. Fire Ins. Co., 18 Pick. [Mass.] 523, 29 Am. Dec. 614), except that a deduction may be made for any depreciation from the date of the policies to the time of the loss (Marshal v. American Guarantee Mut. Fire Ins. Co., 80 Mo. App. 18).

Where the board of appraisers of an insurance company fixed the value of a horse insured, such appraised value to continue for one year under the company's by-laws, and the horse was taken sick within the year, and died of the sickness after the expiration of

[1] Civ. Code Cal. 1903, § 2596; Civ. Code Mont. § 3460; Civ. Code S. D. 1903, § 1847; Rev. Code N. D. 1899, § 4497.

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the year, the company's liability was measured by the valuation fixed (Garner v. North Wales Mut. Live Stock Ins. Co., 4 Montg. Co. Law Rep'r [Pa.] 207).

If a policy states that the amount insured is not more than three-fourths of the value of the property, "as appears by the proposal of the insured," and the application of the insured contains a valuation of the property, the policy is a valued policy (Nichols v. Fayette Mut. Fire Ins. Co., 1 Allen [Mass.] 63). And where an insurer accepts insured's estimate of the value of the property, with knowledge, or the means of knowledge, of the actual value, the company is bound by the valuation accepted (Borden v. Hingham Mut. Fire Ins. Co., 18 Pick. [Mass.] 523, 29 Am. Dec. 614). But in the early case of Wallace v. Insurance Co., 4 La. 289, it was said that, as marine policies invariably used the term "valued at," a fire policy which did not contain such words or their equivalent was not a valued policy. And a policy which merely insures property for a certain amount, and provides for the payment of a loss according to the actual value of the property destroyed, not exceeding the amount of the insurance, is not a valued policy, but an open one.

Luce v. Springfield Fire & Marine Ins. Co., 15 Fed. Cas. 1071; Hanover Fire Ins. Co. v. Lewis, 23 Fla. 193, 1 South. 863; Farmers' Ins. Co. v. Butler, 38 Ohio St. 128.

An open policy is not converted to a valued one by the fact that the insurance company gives its consent to a second and valued policy on the same property (Millaudon v. Western Marine & Fire Ins. Co., 9 La. 27, 29 Am. Dec. 433). But a policy on profits is necessarily a valued one (Mumford v. Hallett, 1 Johns. [N. Y.] 433). And a policy on mill property which recites in the manuscript portion that insured "is the lessee of the mill for one year from date, and has paid the rent therefor in a specified amount, which interest, diminishing day by day in proportion to the whole rent for the year, is hereby insured," is a valued policy, though in the printed part of the policy it provides that the loss or damage shall be estimated according to the true and actual cash value at the time such loss or damage shall happen (Cushman v. North Western Ins. Co., 34 Me. 487).

Focht v. Douglass Mut. Live Stock Ass'n, 1 Woodw. Dec. (Pa.) 346, involved a policy insuring a cow at $22, and stipulating, in case of loss, for the payment of the whole amount mentioned in the report of the appraisement. It was held that the company was liable only

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for the amount originally insured, though the value of the cow, by the report of the appraiser, exceeded that amount, and though the company had been in the habit, in such cases, of paying the amount per the appraiser's report.

(g) Effect of statutory provisions.

The legislatures of many states have enacted statutes generally known as "valued policy laws." These statutes provide, in effect, that in the case of a total loss the amount of the policy is conclusive on the insurer as to the value of the property insured and destroyed, and shall be considered a liquidated demand against the insurer.[2]

The constitutionality of the "valued policy laws" has been ques-

[2] Arkansas: St. 1893, § 4140 (Act March 15, 1889), provides that a fire insurance policy in case of a total loss by fire of the property shall be considered a liquidated demand against the company for the full amount of the policy, except that the act shall not apply to insurance on personal property.

California: Civ. Code, § 2756, provides that the effect of the valuation in a policy of fire insurance is the same as in a policy of marine insurance, and section 2736 provides that the valuation in a policy of marine insurance is conclusive as between the parties thereto, if there is no fraud on the part of insured.

Delaware: Rev. Code 1852, as amended by Laws 1893, p. 586 (18 Del. Laws, p. 961, c. 695, March 29, 1889), provides that in case of total destruction by fire, tornado, or lightning of real property insured, the amount of the insurance shall be taken conclusively to be the true value of the property and true amount of loss and measure of damages, but that nothing in the act shall in case of loss prevent the company from adjusting the matter by replacing the property destroyed, and requires every policy to have indorsed across its face an agreement as to the value of the property insured.

Florida: Laws 1899, c. 4677, § 1, requires an insurer to examine and fix the value of any building or structure to be insured, and section 2 provides that, in case of total loss of property insured, the measure of damages shall be the amount on which the insured paid the premium.

Georgia: Code 1895, § 2110, provides that all insurance companies shall pay the full amount of loss sustained on the property insured by them, if said amount of loss does not exceed the amount of insurance expressed in the policy, and that all stipulations in the policy to the contrary shall be null and void. It is further provided that, in case of loss of stocks of goods and merchandise and other species of personal property changing in specifics and quantity by the usual customs of trade, the actual value of property at the time of loss may be recovered, not exceeding the amount expressed in the policy.

Iowa: Code 1897, § 1742, provides that in an action on a policy of insurance for the loss of a building the amount stated in the policy shall be received as prima facie evidence of the insurable value of the property at the date of the policy, and contains a proviso to the effect that the insurer may show actual value of the property at the date of the policy, and any depreciation before loss.

Kansas: Gen. St. 1901, § 3407, provides that where real property insured against loss by fire, tornado, or lightning is wholly destroyed, the amount of insurance written in the policy shall be taken conclusively to be the true value and true amount of loss and measure of damages.

Kentucky: St. 1903, § 700, provides

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tioned and passed on in several jurisdictions, and uniformly upheld.

Hartford Fire Ins. Co. v. Redding (Fla.) 37 South. 62, 67 L. R. A. 518.

The law is within the legitimate power of the state to regulate the business of domestic or foreign corporations (Orient Ins. Co. v.

that insurance companies taking fire or storm risks on real property shall be liable for the full estimated value of the property insured as the value thereof is fixed on the face of the policy in case of total loss, and contains a proviso to the effect that any depreciation between the dates of the policy and the loss may be deducted, and that the insured shall be liable for fraud in case the company be misled thereby.

Louisiana: Act No. 148 of 1894, p. 187 (Wolff's Rev. Laws, p. 467), provides that in case of total loss of immovable property the insurer shall pay the total amount for which the property is insured in the policy, provided the insurance is not in excess of the value of the property, and does not exceed three-fourths the value of the property, where the three-fourths clause is made a part of the contract.

Maine: Rev. St. 1883, c. 49, § 19 (1871, c. 49, § 18), provides that in applications for insurance the valuation or description of the property or of the interest of the insured therein, if drawn by an authorized agent of an insurance company, whose name is indorsed on the policy, is conclusive upon the company.

Minnesota: Laws 1895, c. 175, § 25, p. 401, provides that the insurer shall cause a building or structure to be insured to be examined by the insurer or his agent, and a full description made, and the insurable value fixed by the insurer or his agent, the amount of which shall be stated in the policy, and that in the absence of any change increasing the risk without the consent of the insurer, and in the absence of intentional fraud, in case of total loss the whole amount mentioned in the policy shall be paid, and in case of partial loss the full amount of partial loss shall be paid.

Mississippi: Code 1892, § 2330, provides that in suits upon policies of insurance on buildings the insurer shall not be permitted to deny that the property insured was worth, at the time of the issuing of the policy, the full amount insured therein. In case of total loss the measure of damages shall be the amount of the insurance, less depreciation in value.

Missouri: Rev. St. 1899, § 7969, provides that in all suits upon policies against loss or damage by fire the defendant shall not be permitted to deny that property insured thereby was worth, at the time of issuing the policy, the full amount insured therein, and that in case of total loss the measure of damages shall be the amount for which the property was insured, less any depreciation. Section 7970 provides that in the case of several policies on the same property the defendant in an action on the policy shall not be permitted to deny that the property insured was worth the aggregate of the several amounts for which it was insured, and further provides that this section and the preceding one apply only to real property insured. Section 7979, which provides for a uniform policy, contains a proviso that no company shall take a risk on any property in the state at a ratio greater than three-fourths of the value of the property insured, and that, when taken, its value is not to be questioned in any proceeding.

Nebraska: Comp. St. 1901, § 3451 (Laws 1889, c. 48, § 1), provides that in case of total loss by fire, tornado, or lightning, of real property insured, the amount of insurance shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.

North Dakota: Rev. Codes, § 4607, provides that the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance, and

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Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552), and does not violate the guaranty of equal privileges to citizens (Ætna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348), as a corporation is not a citizen, within the meaning of the guaranty (Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638). Nor

section 4593 provides that a valuation in a policy of marine insurance is conclusive between the parties in the absence of fraud on the part of insured.

Ohio: Bates' Ann. St. [4th Ed.] § 3643, requires insurance companies to examine, by their agents, buildings to be insured, and to make a full description thereof, and fix the insurable value, and provides that in the absence of any change increasing the risk without the consent of the insurer, and with intention of fraud on the part of insured, in case of total loss the whole amount mentioned in the policy on which the insurer receive a premium shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid.

Oklahoma: Rev. St. 1903, § 3199 (Act Dec. 25, 1890), provides that all companies issuing policies in the territory shall be required to pay, in case of total loss, the full amount for which the property is insured, provided, however, that no policy shall be issued "which shall contain a sum greater than 75 per cent. of the value of the property so insured." Section 3204—another section of the same act—provides that, if there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy, but that the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.

Oregon: Ann. St. §§ 3720, 3721, provide that if the property is worth, at the time of loss, the amount for which it was insured, the company shall pay the full amount of the policy, and that "the amount of insurance written in a policy of insurance on all buildings insured after the passage of this act shall be taken and deemed the true value of the property at the time of the loss, and the amount of the loss sustained," unless the insurance is procured by fraud. It is also provided that a company may rebuild if it elects so to do.

South Carolina: Code Laws 1902, § 1816, provides that no policy shall be written for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of insurance to be fixed by the insurer and insured at or before the time of issuing the policy, and that, in case of total loss by fire, the insured shall be entitled to recover the full amount of insurance and a proportionate amount in case of partial loss. If the aggregate sum of all the insurance exceeds the insurable value of the property as agreed upon, each company shall be liable for its pro rata share of the insurance.

South Dakota: Rev. Code 1903, § 1953, provides that the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance, and section 1939 provides that a valuation in a policy of marine insurance is conclusive between the parties, in the absence of fraud on insured's part.

Tennessee: Code 1896, § 3348, provides that insurance companies shall pay their policy holders the full amount of the loss sustained upon property insured by them if said amount of loss does not exceed the amount of insurance expressed in the policy, and that all stipulations in such policies to the contrary shall be null and void, but that insurance policies issued on cotton in bales shall not be subject to its provisions. Acts 1903, c. 539, amends the above statute by providing that a three-fourths value clause may be inserted in the policy, provided it be printed in bold type across the face of the policy, or on a separate form as a special agreement, and that, as a consideration therefor, a reduction in premium of not less than 25 per cent. was allowed, and also provides that a co-insurance clause may be

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does the law impair the obligation of contracts (Phœnix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. 992). Nor is it unconstitutional as denying persons the equal protection of the law (Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; Ætna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796), or as depriving persons of property without due process of law (Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796). Furthermore, it has been held that the Missouri and Tennessee laws are not retrospective (Daggs v. Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796).

A policy on real property in Wisconsin is governed by the valued policy law of that state, though the contract is made in another state (Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523). In this case the court said that the law was founded on what the legislature regarded as sound public policy, and manifestly was intended to apply to all insurance contracts, no matter where made, affecting real property in the state; furthermore, that it was as competent for the legislature to enact such a law as to enact one prescribing the mode of execution and the effect of deeds, leases, or other conveyances of real property situated in the state, no matter where such instruments were executed. A similar

inserted in a policy in consideration of a reduced premium.

Texas: Sayles' Ann. Civ. St. 1897, art. 3089 (Acts 1879, c. 73, p. 83), provides that a fire policy, in case of total loss, shall be considered a liquidated demand against the company for the full amount of the policy, the provisions of the article not to apply to personalty.

Washington: Ballinger's Ann. Codes & St. § 2833, provides that as to real property the amount of insurance "shall be taken conclusively in case of total loss to be the true value of the property then insured, and the true amount of the loss and measure of damages when destroyed."

West Virginia: Warth's Code 1899, p. 280, c. 34, § 18a (Act 1899, c. 33), provides that all fire companies doing business in the state shall be liable in case of total loss "as set out in the policy on any real estate insured for the whole amount of insurance stated in the policy," and that the basis in computing a partial loss shall be the amount stated in the policy of insurance.

Wisconsin: Rev. St. 1898, § 1943, provides that whenever any policy of insurance shall be written to insure real property, and the property insured shall be wholly destroyed without criminal fault of the insured or his assigns, "the amount of the insurance written in such policy shall be taken conclusively at the true value of the property when insured and the true amount of loss and measure of damages when destroyed."

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rule also appears to obtain in Mississippi. There it has been held that a policy issued by a foreign company at the request of a foreign mortgagee on real property in the state was subject to the law (Scottish Union & Nat. Ins. Co. v. Enslie, 78 Miss. 157, 28 South. 822). Conversely, a policy issued by a foreign company through its agency in the state where the property is located, to a resident of another state, is not subject to the valued policy law of the insured's domicile, but is governed by the law of the property's situs.

Gibson v. Connecticut Fire Ins. Co. (C. C.) 77 Fed. 561. See, also, Gibson v. St. Paul Fire & Marine Ins. Co., 26 Ins. Law J. 94.

It is, of course, obvious that a policy issued by a foreign company is controlled by the valued policy law of the state in which the property is situated, when the contract is consummated in such state with a resident thereof (Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 579).

Mutual companies are governed by the law as well as stock companies (Word v. Southern Mut. Ins. Co., 112 Ga. 585, 37 S. E. 897), **unless they are expressly exempted from the operation thereof** (Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515).

In the Gibson Case it was held that Laws Mo. 1895, p. 200, exempting mutual companies from the operation of the general insurance laws, did not relieve such companies from the operation of the valued policy law enacted that year (Laws 1895, p. 194), though such law was practically like the valued policy law of the general statutes of 1889 (Laws 1889, § 5897). From the operation of the valued policy law in the general statutes the companies were, however, exempted by the Laws of 1895 (Warren v. Bankers' & Merchants' Town Mut. Co., 72 Mo. App. 188).

The law does not preclude the insurer from setting up that the valuation required to be written in a policy was procured by fraud on the part of the insured (Hartford Fire Ins. Co. v. Redding [Fla.] 37 South. 62, 67 L. R. A. 518). **But the provisions of the law cannot be waived by the acceptance of policies containing stipulations in conflict therewith.**

Western Assur. Co. v. Phelps, 77 Miss. 625, 27 South. 745; Phœnix Ins. Co. v. Luce, 5 O. C. D. 210, 11 Ohio Cir. Ct. R. 476; Eureka Fire & Marine Ins. Co. v. Gray, 24 Ohio Cir. Ct. R. 268; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45. Policy holders in a mutual company, present at an annual meeting,

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cannot, by passing a resolution waiving and renouncing the benefits of the law, and instructing the officers and directors of the company to disregard it in making contracts of insurance for the company, prevent the act from operating on such contracts made by the company; and the fact that a policy holder received dividends which were larger than they otherwise would have been, because the provisions of the valued policy law were ignored in settlements made by the company with other policy holders, will not estop him from insisting on the application of the law (Word v. Southern Mut Ins. Co., 112 Ga. 585, 37 S. E. 897).

Provisions in a policy limiting the insurer's liability in conflict with the law are nugatory and invalid.

Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570; Insurance Co. v. Bachler, 44 Neb. 549, 62 N. W. 911; Medley v. German Alliance Ins. Co. (W. Va.) 47 S. E. 101. Thus have been held invalid stipulations limiting insurer's liability to the value of the property (Western Assur. Co. v. Phelps, 77 Miss. 625, 27 South. 745); to the cash value at the time of loss, depreciation "however caused" being deducted (Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 72 S. W. 739, 115 Ky. 109); to the market value (Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552); to what it would cost insurer to restore the property (Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 72 S. W. 739, 115 Ky. 109; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45); provision allowing the company to rebuild at its option (Russell v. Milwaukee Mechanics' Ins. Co., 6 Ohio N. P. 325, 8 Ohio Dec. 613); and agreements between the parties that the subject-matter of the insurance shall be considered as personal property (Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570).

Where the law provides for a deduction for any depreciation in value of the property insured, such deduction may, of course, be made in determining the amount an insured is entitled to recover for a loss.

Caledonian Ins. Co. v. Cooke, 101 Ky. 412, 41 S. W. 279; Baker v. Phœnix Assur. Co., 57 Mo. App. 559; Meyer v. Insurance Co. of North America, 73 Mo. App. 166.

Even if no provision is made for deducting a depreciation, the law will not prevent a reduction of the amount specified in a policy by reason of the depreciation in value by use, decay, or otherwise, as by accident or casualty, since such change arises from a super-

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vening cause, and an allowance therefor will not amount to a change of the value as fixed by the parties to the contract.

Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Burge Bros. v. Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342. Contra, Hausen v. Citizens' Ins. Co., 66 Mo. App. 29.

However, a proviso in the law that a deduction may be made for a depreciation between the dates of the policy and the loss does not authorize a provision entitling the insurer to a deduction for any depreciation, "however caused" (Hartford Fire Ins. Co. v. Bourbon County Court, 115 Ky. 109, 72 S. W. 739, 24 Ky. Law Rep. 1850). And in any event the burden is on the insurer to show the depreciation.

Baker v. Phœnix Assur. Co., 57 Mo. App. 559; Meyer v. Insurance Co. of North America, 73 Mo. App. 166.

A statute providing for valued policies in cases of fire insurance does not apply to a policy insuring property against lightning (Kattelmann v. Fire Ass'n of Philadelphia, 79 Mo. App. 447). And where a valued policy law is expressly limited to real property, or specifically exempts personal property from its provisions, it is obvious that the law does not apply to insurance on personal property, and hence the value of such property must be alleged and proved in an action to recover for a loss.

Trask v. German Ins. Co., 53 Mo. App. 625; Green v. Lancashire Ins. Co., 69 Mo. App. 429; Coleman v. Phœnix Ins. Co., 69 Mo. App. 566; City of De Soto v. American Guaranty Fund Mut. Fire Ins. Co., 102 Mo. App. 1, 74 S. W. 1.

However, if a law provides that policies of fire insurance on property in general, without any limitation as to kind, shall be valued, it appears that the law will apply to make a policy on personal property valued. Thus, it has been held in Missouri that a statute (Rev. St. 1899, § 7979) providing that no company shall take a risk on any property greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceeding, passed subsequent to the valued policy statutes which by their terms were limited to real property (Rev. St. 1899, §§ 7969, 7970), operated to make a policy on personal property a valued one, as the word "property" meant personal as well as real property, more especially as it was provided by a general statute that the word "property" in a legislative enactment

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should be construed to mean real and personal property, unless such construction would be plainly repugnant to the legislative intent or the context.

Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

A valued policy law limited to real property applies to a building erected on land by an assignee of a contract for a deed (Bode v. Firemen's Ins. Co., 103 Mo. App. 289, 77 S. W. 116); to a house erected by the owner on leased land (Orient Ins. Co. v. Parlin-Orendorff Co., 14 Tex. Civ. App. 512, 38 S. W. 60); to machinery constructed for and used in a mill.

Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107; British America Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335. In Phœnix Ins. Co. v. Luce, 11 Ohio Cir. Ct. R. 476, 5 O. C. D. 210, it was held that a finding that a boiler and engine constructed on a permanent foundation in the basement of a building were a structure, within a valued policy law, would not be disturbed.

But buildings and machinery placed on a mining lease for the purpose of carrying on mining operations are not a part of real property, within the purview of a valued policy law (Millis v. Scottish Union & National Ins. Co., 95 Mo. App. 211, 68 S. W. 1066). Where an electric power house and the machinery therein are insured for separate amounts by the same policy, the total loss of the house entitles insured to the full amount of insurance thereon, though the loss of the machinery be only partial (Ætna Ins. Co. v. Glasgow Electric Light & Power Co., 107 Ky. 77, 52 S. W. 975).

When a policy subject to a valued policy law is written for a certain amount, it is a valued policy for that amount (Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515). And in case of a total loss the actual value of the property is immaterial (Oshkosh Gaslight Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233), as the insured's right to the amount of the insurance is not affected by the actual value of the property insured (Schild v. Phœnix Ins. Co., 6 Ohio N. P. 134, 8 Ohio S. & C. P. Dec. 45). The valuation in the policy is the measure of recovery in case of a total loss (Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313). Therefore, evidence by the insurer as to the value of the property is inadmissible (Marshal v. American Guar-

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antee Mut. Fire Ins. Co., 80 Mo. App. 18), and the insured need not allege and prove the value of the property destroyed.

Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Thompson v. St. Louis Ins. Co., 43 Wis. 459. See, also, City of De Soto v. American Guaranty Fund Mut. Fire Ins. Co., 102 Mo. App. 1, 74 S. W. 1; Trask v. German Ins. Co., 53 Mo. App. 625; Green v. Lancashire Ins. Co., 69 Mo. App. 429. But the petition must show that the property insured and that destroyed are identical (Summers v. Home Ins. Co., 53 Mo. App. 521).

However, if the law give the insurer an option to rebuild, the value of the property is open to inquiry (Walker v. Phœnix Ins. Co., 62 Mo. App. 209); and, under a law [3] making the valuation of the agent "whose name shall be borne on the policy" conclusive on the company, a valuation by an agent whose name does not appear on a policy is not conclusive (Campbell v. Monmouth Mut. Fire Ins. Co., 59 Me. 430). But under a statute [4] providing that property shall not be insured for more than three-fourths of its value, and that the value shall not be questioned in any proceeding, a company issuing a policy on property already insured in another company cannot, in an action on the policy, deny that the value of the property bears at least the proportion of four to three to the total insurance (S. E. Hanna & Co. v. Orient Ins. Co. [Mo App.] 82 S. W. 1115).

The Iowa law [5] merely makes the amount stated in a policy on a building prima facie evidence of value. Under this statute the insurance company can prove that the actual value of property destroyed was less than the amount stated in the policy; but it has the burden of proving such fact (Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa, 193, 68 N. W. 600). And though the statute requires insured to prove the loss of the building and show proper notice of loss, it applies where proofs of loss have been waived (Scott v. Security Fire Ins. Co., 98 Iowa, 67, 66 N. W. 1054). But the statute does not apply to insurance on personal property.

Joy v. Security Fire Ins. Co., 83 Iowa, 12, 48 N. W. 1049; Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237.

An insurer cannot complain because the recovery on a policy governed by a valued policy law for a total loss was less than the amount fixed by the policy (Bammessel v. Brewers' Fire Ins. Co., 43 Wis.

[3] Rev. St. Me. 1871, c. 49, § 18. [4] Rev. St. Mo. 1899, § 7979.
[5] Code Iowa 1897, § 1742.

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463); and where counsel for a company admitted the entire destruction of the property, and that the valued policy law was applicable, the company could not, on appeal, claim that the law did not apply because no policy was in fact issued (King v. Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55). In Rochester German Ins. Co. v. Schmidt (C. C.) 126 Fed. 998, it was held that where an averment that the value of the property insured was not agreed on at the time of issuing the insurance, as authorized by the South Carolina valued policy law, was admitted by demurrer, the law had no application.

5. EFFECT OF OTHER INSURANCE AND APPORTIONMENT OF LOSS.

(a) In general.
(b) Insurance constituting other or concurrent insurance.
(c) Same—Identity of property insured.
(d) Same—Identity of interest insured.
(e) Apportionment of insurance.
(f) Same—Compound and specific policies.
(g) Same—Effect of co-insurance clause.
(h) Policy requiring other insurance.

(a) In general.

In the absence of provisions to the contrary, there is no limit to the amount of insurance that may be taken out by an insured on his interest. He may insure again and again, but in case of loss he can recover only one indemnity, no matter how much insurance he has taken out. (Millaudon v. Western Marine & Fire Ins. Co., 9 La. 27, 29 Am. Dec. 433.) If insured holds several policies on the destroyed property, he may recover judgment against either set of insurers to the extent of the loss covered by their policies, leaving them to claim contribution from the others. If he recovers only a part of his loss from one set of insurers, he may recover the excess from the others, but only the excess, as he is entitled to but one indemnity. (Cromie v. Kentucky & Louisville Mut. Ins. Co., 15 B. Mon. [Ky.] 432.) However, if a loss amounts to more than the aggregate sum of all the policies, insured is entitled to recover the total amount assumed by each insurer.

Ogden v. East River Ins. Co., 50 N. Y. 388; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Pencil v. Home Ins. Co., 3 Wash. St. 485, 28 Pac. 1031.

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Generally, a policy contains a provision limiting the insurer's liability, where insured has other insurance, to such proportion of the loss as the amount insured by the policy bears to the whole amount of the insurance on the property. **If a policy contains a pro rata clause, insured cannot recover beyond the proportion specified** (Howard Ins. Co. v. Scribner, 5 Hill [N. Y.] 298), where the total insurance exceeds the loss (German Ins. Co. v. Heiduk, 30 Neb. 288, 46 N. W. 481, 27 Am. St. Rep. 402). And the fact that a recovery is defeated on one policy does not affect the contribution clause of the other, nor increase the liability to the insured thereunder (Rickerson v. German-American Ins. Co., 6 App. Div. 550, 39 N. Y. Supp. 547). So, an insurer's liability to pay its proportionate part of the three-fourths of the value of the property insured, the extent to which the company could insure, is not affected by the fact that the insured has already received more than three-fourths of what is found by the jury to be the actual value of the property, by an adjustment with another mutual insurance company in which he held a policy upon the same property, which is not shown to have been issued prior to the policy in question (Bardwell v. Conway Mut. Fire Ins. Co., 118 Mass. 465.) But the principle of ratable apportionment is only applicable to cases where the insurance exceeds the loss. Therefore, **if the loss is greater than the whole amount of the several policies, each insurance company is liable to pay insured the whole amount of its policy.**

Phillips v. Perry County Ins. Co., 7 Phila. (Pa.) 673; Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. 28; Erb v. Fidelity Ins. Co., 99 Iowa, 727, 69 N. W. 261.

An insurance company cannot set up, as a defense to an action on a policy issued for the whole amount of goods insured, a particular custom by which its liability on the policy was to be limited to such proportion of the loss as the amount insured by the policy bore to the whole sum of insurance on the property (Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. [Del.] 254). And a valued policy law precludes any deduction from the amount of a policy by reason of concurrent insurance to which insurer had consented (Western Assur. Co. of Toronto, Canada, v. Phelps, 27 South. 745, 77 Miss. 625). Under such a law the aggregate of all the policies is, in case of a total loss, to be taken as the true value of the property. Hence an insurer who assents to additional insurance is not entitled to have the recovery against it reduced to a pro rata share of the total

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insurance, though it is so stipulated in the policy. (Barnard v. National Fire Ins. Co., 38 Mo. App. 106.) Each insurer is liable for the full amount of its policy, if the loss is total (Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570). And even though a law [1] which requires an insurer to pay the whole amount of its policy on a total loss provides that, in case there are two or more policies on the property, each policy shall contribute to the payment of the whole or partial loss in proportion, the liability of the insurer for the whole amount named in the policy, in case of total loss, is not affected by the fact that there are two or more policies on the property (Phœnix Ins. Co. v. Port Clinton Fish Co., 14 Ohio Cir. Ct. R. 160, 7 O. C. D. 468).

In Mullaney v. National Fire & Marine Ins. Co., 118 Mass. 393, it was held that a provision in a policy making it void if the premises should be occupied for any purpose classified as more hazardous, in the annexed printed conditions, than that described in the application, did not have the force to incorporate in the policy a provision on the back thereof that, in case of other insurance, the insured should be entitled to recover no greater proportion of the loss than the sum insured bore to the whole amount of insurance, a statute (Laws Mass. 1864, c. 196) requiring conditions to be stated in the body of a policy.

Though a policy provided that in case of additional insurance the loss should be apportioned with the other insurers, and the company's liability should be limited to two-thirds of the cash value of the property, yet it was held, in a case of a total loss which exceeded the total amount of the insurance, that the insurer was not entitled to have the loss prorated, as the limitation clause merely defined the insurer's maximum liability (Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. 28).

If an insured represents that the property is covered by other insurance in a certain way, he is estopped to assert that it was insured in a different way on adjustment of the liabilities of the insurers (McMahon v. Portsmouth Mut. Fire Ins. Co., 22 N. H. 15). But a condition that a loss shall be apportioned between the insurer and other insurers is not made inoperative by a waiver of a condition against other insurance in excess of a stated amount (Lycoming Mut. Ins. Co. v. Slockbower, 26 Pa. 199).

[1] Rev. St. Ohio, § 3643.

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(b) Insurance constituting other or concurrent insurance.

In adjusting a loss on a policy containing a pro rata clause, a question often arises as to whether or not other existing policies on the same property, the validity of which is questioned, constitute other or concurrent insurance which is to be taken into consideration in determining the extent of the insurer's liability. It is the settled law that **a policy which has become void by its own terms does not constitute other or concurrent insurance within the meaning of a general apportionment clause.**

Such is the doctrine of Leibrant & McDowell Stove Co. v. Fireman's Ins. Co. (C. C.) 35 Fed. 30; Forbush v. Western Massachusetts Ins. Co., 4 Gray (Mass.) 337; Hand v. Williamsburg City Fire Ins. Co., 57 N. Y. 41; Marshall v. Insurance Co. of North America (Pa.) 28 Wkly. Notes Cas. 283.

But in Saville v. Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542, it was held that a policy which has merely become voidable by a violation of its terms should be considered in apportioning a loss. And if a policy provides for an apportionment in case of other insurance, "whether valid or not," or "without reference to the solvency or liability of the other insurers," some courts take the position that the insured is bound by the condition, so that other insurance, even though invalid, must be taken into consideration in apportioning the loss.

Reference may be made to London & L. Fire Ins. Co. v. Turnbull, 5 S. W. 542, 86 Ky. 230, 9 Ky. Law Rep. 544; Cassity v. New Orleans Ins. Ass'n, 65 Miss. 49, 3 South. 138; Bateman v. Lumbermen's Ins. Co., 189 Pa. 465, 42 Atl. 184. The policy was voidable in Gandy v. Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

However, in some jurisdictions, it has been held that a policy which is void does not constitute other insurance, within the meaning of the condition.

Parks v. Hartford Fire Ins. Co., 100 Mo. 373, 12 S. W. 1058; Galantschik v. Globe Fire Ins. Co., 10 Misc. Rep. 369, 31 N. Y. Supp. 32; Marshall v. Insurance Co. of North America, 10 Pa. Co. Ct. R. 87.

In the Parks Case it was said that the words "valid or invalid," or "without regard to the liability of other insurers," refer to valid insurance, which, though in force at the time of the loss, may not constitute legal liability because of some breach of the terms of the policy or otherwise. Therefore, a void policy was not considered to be within the condition, and this opinion was shared by the court

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in the Marshall Case. But the latter case was overruled by Bateman v. Lumbermen's Ins. Co., 189 Pa. 465, 42 Atl. 184, wherein it was held that a policy invalid because insured was not the sole and unconditional owner was nevertheless within the condition.

In the Bateman Case it was further held that the fact that the additional insurance was procured by the agent of insurer, who had knowledge of all the facts as to ownership, and failed to give such information to the other company, did not change the liability of insurer.

In Iowa it is by statute [2] provided that no condition or stipulation in a policy fixing the amount of the liability or recovery under the policy with reference to the prorating with other insurance on property shall be valid except as to other valid and collectible insurance. Under this statute it has been held that a stipulation in a fire policy, in so far as it undertook to include invalid insurance in the matter of prorating, was unenforceable, though a company which had issued invalid insurance regarded its policy as valid, or paid something on the loss to avoid litigation (Gurnett v. Atlas Mut. Ins. Co., 124 Iowa, 547, 100 N. W. 542).

A condition in a policy for pro rata payment in case of other insurance, "valid or invalid," does not apply to policies issued at the instance of agents of the first company, and without the knowledge, consent, or ratification of the insured (London & L. Fire Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542). But if insured ratifies the agent's act in procuring the other policy by making proof of loss and instituting suit thereon, such policy comes within the condition as to prorating (Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757).

The case of Howard Ins. Co. v. Scribner, 5 Hill (N. Y.) 298, supports the proposition that a blanket policy on fixtures and stock does not constitute "other insurance" as to a specific policy on fixtures and stock, so as to require an apportionment of a loss between the two policies in favor of the company issuing the specific policy. But the decision in this case was overruled in Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492. However, the doctrine announced in the Scribner Case has been approved and followed in Pennsylvania.

Sloat v. Royal Ins. Co., 49 Pa. 14, 88 Am. Dec. 477; Royal Ins. Co. v. Roedel, 78 Pa. 19, 21 Am. Rep. 1; Clarke v. Western Assur. Co.,

[2] Code Iowa, § 1746.

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146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; Meigs v. Insurance Co., 205 Pa. 378, 54 Atl. 1053. But see Herr v. Greenwich Ins. Co., 20 Pa. Super. 169.

In Fairchild v. Liverpool & L. Fire & Life Ins. Co., 51 N. Y. 65, affirming 48 Barb. 420, it was held that where a policy provided that it should not extend to cover goods upon which there was already a specific insurance, except as to the excess of the loss insured against, over and above such specific insurance, the intent of the provision was to throw the loss upon the specific insurance, unless it exceeded such specific insurance. Hence, if the specific insurance exceeded the value of the goods destroyed, the company issuing the general policy could not be called upon to contribute. But in Merrick v. Germania Fire Ins. Co., 54 Pa. 277, it was held that, though policies covering property generally provided that, if insured had floating policies, such policies should be considered as covering any excess of value beyond the amount covered by specific policies, the liability of the insurers was not confined to the excess of loss above that covered by specific policies. Where a suit is brought against one of two companies which have separately insured certain premises, and have united in a notice of intention to rebuild under a stipulation of their policies, the whole loss may be recovered (Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396).

(c) Same—Identity of property insured.

If an insurer is to be entitled to have a loss apportioned with another policy, such other policy must cover the same property as that covered by insurer's policy, or some portion thereof.

Storer v. Elliot Fire Ins. Co., 45 Me. 175; Clem v. German Ins. Co., 36 Mo. App. 560; Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591; Roots v. Cincinnati Ins. Co., 12 Ohio Dec. 535, 1 Disn. 138.

But, as indicated, **it is not required that the policies shall exactly concur as to the property covered.** As said in N. J. Rubber Co. v. Commercial Union Ins. Co., 64 N. J. Law, 580, 46 Atl. 777, concurrent insurance is that which to any extent insures the same interest against the same casualty at the same time as the primary insurance, on such terms that the insurers would bear proportionately the loss happening within the provisions of both policies. Apportionment can thus be made with a policy which covers part of the property (Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311), or

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all of it and more (Corkery v. Security Fire Ins. Co., 99 Iowa, 382, 68 N. W. 792). But in prorating with a policy covering only a portion of the property, such concurrent insurance should not be treated as on the whole property (American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235). And the insurer is entitled to prorate with the other policy only as to the property covered by such policy (Haley v. Dorchester Mut. Ins. Co., 1 Allen [Mass.] 536). But it has been held that insured, who holds a specific policy on certain property and a compound policy covering the same and additional property, does not have double insurance, within the meaning of a pro rata clause in the specific policy.

Such is the doctrine announced in Howard Ins. Co. v. Scribner, 5 Hill (N. Y.) 298; Sloat v. Royal Ins. Co., 49 Pa. 15, 88 Am. Dec. 477; Royal Ins. Co. v. Roedel, 78 Pa. 19, 21 Am. Rep. 1; Clarke v. Western Assur. Co., 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; Meigs v. Insurance Co., 205 Pa. 378, 54 Atl. 1053. See, also, Baltimore Fire Ins. Co. v. Loney, 20 Md. 20, and Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

In Niagara Fire Ins. Co. v. D. Heenan & Co., 81 Ill. App. 678, it was held that where there are general policies upon an entire building, and special policies upon parts of it, there can be no theory of contribution or apportionment among the several policies which will relieve the general policies from liability to their full amount until the insured has received complete indemnity for his loss.

The decision in the Scribner Case was, however, overruled in Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492; and the weight of authority appears to support the doctrine that a loss covered by a specific policy and a compound policy covering the same and additional property is to be prorated between the two policies if the policies require a loss to be apportioned among the several insurers.

Reference may be made to Page v. Sun Ins. Co., 74 Fed. 203, 20 C. C. A. 397, 36 U. S. App. 672, 33 L. R. A. 249, affirming (C. C.) 64 Fed. 194; Schmaelzle v. London & L. Fire Ins. Co., 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233; Le Sure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761; Cromie v. Kentucky & L. Mut. Ins. Co., 15 B. Mon. (Ky.) 432; Angelrodt v. Delaware Mut. Ins. Co., 31 Mo. 593; Chandler v. Insurance Co., 70 Vt. 562, 41 Atl. 502.

Under the facts shown, the policies involved were held not to cover the same property in Storer v. Elliot Fire Ins. Co., 45 Me. 175; Clem v. German Ins. Co., 36 Mo. App. 560; Roots v. Cincinnati Ins. Co., 21 Ohio Dec. 535.

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(d) Same—Identity of interest insured.

The term "other insurance," as used in a policy providing for a pro rata distribution of the loss in the case of "other insurance" on the property, includes not only insurance made by the assured in his own name, but any other which he has, either in the name of another or by assignment for his benefit (Ætna Fire Ins. Co. v. Tyler, 16 Wend. [N. Y.] 385, 30 Am. Dec. 90). But the insurance must be on the same interest (Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591). And insurance obtained by a third person upon a distinct and insurable interest does not constitute "other insurance," within the meaning of an apportionment clause (Traders' Ins. Co. v. Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355, affirming 51 Ill. App. 252). Hence an insurance company which has issued a policy on a distinct interest in certain property, as that of a mortgagee, is not entitled to have a loss of the property prorated with a policy insuring another interest, such as that of a mortgagor or another mortgagee.

Traders' Ins. Co. v. Pacaud, 51 Ill. App. 252; Home Ins. Co. v. Koob, 68 S. W. 453, 113 Ky. 360, 24 Ky. Law Rep. 223, 58 L. R. A. 58, 101 Am. St. Rep. 354; Fox v. Phenix Fire Ins. Co., 52 Me. 333; Home Fire Ins. Co. v. Weed, 55 Neb. 146, 75 N. W. 539; Tuck v. Hartford Fire Ins. Co., 56 N. H. 326. This is true, even though a policy issued to the mortgagor without the mortgagee's knowledge is made payable to the latter. Johnson v. North British & Mercantile Ins. Co., 13 Fed. Cas. 776.

Under this rule a mortgagee to whom is made payable a policy containing the standard union mortgage clause is not affected by a policy taken out by the mortgagor on his interest and payable to himself.

Reference may be made to Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439; Hastings v. Westchester Fire Ins. Co., 12 Hun, 416, affirmed 73 N. Y. 141; Eddy v. London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686, affirming 65 Hun, 308, 20 N. Y. Supp. 216. The rule applies, even though a rider providing for apportionment is attached to the policy. Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395.

In the Hastings Case it is said that the term "assured," as used in the clause providing that in case of other insurance the assured shall be entitled to no greater proportion of the loss than the sum thereby insured bears to the total insurance, only applies to the owner, and not to the mortgagee. And the fact that, after a mortgagee

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has collected the amount due on a policy taken out by him without the mortgagor's consent, the mortgagor, in a suit to redeem, compels him to account therefor as a trustee ex maleficio, does not entitle a company which has insured the mortgagor's equity of redemption to have a loss apportioned between it and the company which had issued the policy to the mortgagee.

Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 32 N. E. 914, 19 L. R. A. 114, affirming 28 N. E. 919, 144 Ill. 490, 19 L. R. A. 114; Commercial Union Assur. Co. v. Same, 144 Ill. 506, 32 N. E. 916.

However, if a policy provides for apportionment with insurance "issued to or held by any party or parties having an insurable interest" in the property, it is held that this entitles a company insuring a lessee to prorate with a policy insuring the lessor's interest (Sun Ins. Office v. Varble, 103 Ky. 758, 46 S. W. 486, 41 L. R. A. 792), and one insuring a mortgagee to prorate with all other policies on the property, though a policy made payable to the mortgagee contains a union mortgage clause (Hartford Fire Ins. Co. v. Williams, 63 Fed. 925, 11 C. C. A. 503, 27 U. S. App. 493). In the Varble Case it was held, on authority of the Williams Case, that a union mortgage clause in a policy issued to a lessee for the benefit of the lessor and of mortgagees of the leasehold was controlled by the more particular provision for prorating the loss. But in Eddy v. London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686 (affirming 65 Hun, 308, 20 N. Y. Supp. 216), the court construed an apportionment clause of this sweeping nature in a policy made payable to a mortgagee, and containing a union mortgage clause, as only applying to other insurance on the mortgagee's interest or consented to by him. And a clause in a policy made payable to a mortgagee under the union mortgage clause, providing for a prorating of the loss with other insurance, "whether such other insurance applies in the same manner or not," does not require the mortgagee to prorate with policies on the mortgagor's interest, as the phrase quoted only has reference to whether the other insurance covers all the enumerated articles of property or not, in the same manner as the insurance under the policy (Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395). But a provision in the average clause of a fire insurance policy, issued to a carrier, that "any floating policy attaching in whole or in part to the property covered * * * shall * * * be considered as contributing insurance," applies to floating poli-

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cies taken out by the owners of the goods insured (Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162).

If different policies cover the same interest, they are subject to an apportionment clause, though they are made payable to different persons. Thus, policies issued to warehousemen on merchandise "their own, or held by them in trust, or in which they have an interest or liability" (Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868), or to consignees of merchandise "their own, or held by them in trust or on commission, or sold but not delivered" (Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591), and policies issued to the depositors or consignors of the merchandise, constitute double insurance, and should bear a loss proportionately. So, a policy on fixtures in a building issued to a lessee in the name of the lessor, and a policy issued to the lessor, are liable to contribution, though made payable to different parties (Western Ins. Co. v. Carson, 10 Ohio Dec. 728, 23 Wkly. Law Bul. 224). Likewise, policies issued to a depositor of goods and assigned to a warehouse company may be considered as in favor of the same insured, on the same interest in the same subject, and against the same risks, as policies issued directly to the warehouse company on goods their own or held by them in trust, and therefore liable for the respective proportions of the loss (Hough v. People's Fire Ins. Co., 36 Md. 398). Similarly, a policy issued to a member of a firm individually, prior to the formation of the partnership, and never assigned to the firm, though, by the terms of the partnership agreement, all insurance was to be, but which was shown to have been treated and dealt with, both by the firm and by the company issuing it, as a subsisting policy in full force in favor of the firm, could be made chargeable with its proportion of the loss, and to that extent to reduce the amount recoverable upon another policy issued to the firm (Liverpool, L. & G. Ins. Co. v. Verdier, 33 Mich. 138), especially as the policy had, after the loss, been assigned to other companies, insurers of the same property, upon payment by the latter of their share of the loss (Liverpool & L. & G. Ins. Co. v. Verdier, 35 Mich. 395).

Where property is insured to the amount of $15,000, and under a second policy is valued at $30,000, the second policy reciting that $15,000 is covered by the first, and that it covers the remaining $15,000, and the second policy is indorsed on the first, but the underwriters

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of the first policy refuse to accept the valuation of the property in the second, they cannot take advantage of the second policy for the purpose of reducing insured's recovery against them, as the second policy, being valued, covers a distinct interest of $15,000 after the first policy (Millaudon v. Western Marine & Fire Ins. Co., 9 La. 27, 29 Am. Dec. 433).

(e) Apportionment of insurance.

Where several insurance companies take separate risks upon the same property, and a loss occurs, the companies are liable in the ratio that their risks bear, respectively, to the total risk (Barnes v. Hartford Fire Ins. Co. [C. C.] 9 Fed. 813). And where there are several policies on the same risk, which provide for sharing a loss pro rata, the insured is only entitled to recover under each policy the proportion the policy bears to the whole insurance (Harris v. Protection Ins. Co., Wright [Ohio] 548). The formula for adjusting a loss under a policy providing that insured shall be entitled to recover no greater proportion of the loss sustained than the loss bears to the whole amount insured is: As the total insurance of a person insured is to his total loss, so is the company's policy to that part of the loss for which it is liable to that person (Robbins v. People's Ins. Co., 20 Fed. Cas. 865). And in ascertaining a company's proportionate share of a loss, reference must be had to the aggregate insurance, without regard to the fact that some of the companies have been settled with for a less sum than they were liable for (Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394, 2 N. E. 420), or have paid more than their share (Fitzsimmons v. City Fire Ins. Co., 18 Wis. 234, 86 Am. Dec. 761). But the amount of the whole loss cannot be fixed, except by agreement with each company or by a legal proceeding to which all are parties (Chenowith v. Phœnix Ins. Co., 12 Ky. Law Rep. 232). However, an insurance company which is in no way interested in an adjustment made between the insured and a subsequent insurer cannot question its correctness (Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650).

On a policy for $2,000, where there is other insurance of $5,000, the recovery must be for two-sevenths of the loss (Merchants' Nat. Bank v. Insurance Co. of North America, 4 Ohio Dec. 340, 1 Cleve. Law Rep. 339). And where a floating policy limits the insurer's liability on any one building to $600, and another such policy limits it to $300, both containing a pro rata clause, the insurer issuing the

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first policy is liable for two-thirds of the loss (Golde v. Whipple, 7 App. Div. 48, 39 N. Y. Supp. 964). Hanover Fire Ins. Co. v. Schellak, 35 Neb. 701, 53 N. W. 605, was an action on a policy of fire insurance for $4,000. It appeared that the premises covered were worth $8,000, and were totally destroyed, except a foundation worth $200, and that the total insurance was $7,000. Under such circumstances the court held that a verdict for $3,800 was not excessive. The expenses of the sale by an assured of the salvage goods are properly apportioned among the several insurers (North German Ins. Co. v. Morton Scott Robertson Co., 108 Tenn. 384, 67 S. W. 816).

Where the property involved is worth $90,000, and the total insurance thereon amounts to $60,000, an insurer who has issued a policy for $3,000, which itemizes the various items, contains a pro rata clause, and provides that each item is covered for only one-thirtieth of its value, is liable for one-twentieth of a loss, not exceeding the insurance (Illinois Mut. Ins. Co. v. Hoffman, 132 Ill. 522, 24 N. E. 413, affirming 31 Ill. App. 295). And an insurer who issues a similar policy on the property for $2,000, which limits the liability on each item to one forty-fifth of its value, is liable for one-thirtieth of the loss. (Hoffman v. Minneapolis Mut. Fire Ins. Co., 42 Minn. 291, 44 N. W. 67). So, an insurer issuing a policy for $1,500, which limits the insurer's liability to one-sixteenth of the value of each item, is liable for one-fortieth of the loss (Indiana Ins. Co. v. Hoffman, 128 Ind. 250, 27 N. E. 561; Citizens' Ins. Co. v. Same, 128 Ind. 370, 27 N. E. 745). And in Hoffman v. Germania Ins. Co. 88 Tenn. 735, 14 S. W. 72, it was held that under a policy similar to those involved in the Indiana cases the insurer was liable for its proportionate part of the live insurance at the time of the loss, to the extent of one-sixtieth of each item set out in the exhibit, and not merely one-sixtieth of the loss. In Hoffman v. Manufacturers' Mut. Fire Ins. Co. (C. C.) 38 Fed. 487, which involved a policy covering the same property as the policies litigated in the other Hoffman Cases, and similar to those policies, the court expressly held that the statement furnished by insured and inserted in the policy, which itemized the property and gave the value of each item, was neither a representation nor a covenant by insured that he had or intended to procure, and would maintain, insurance on each item in the amount set out opposite thereto. In the other cases the holdings were based on the fact that the policies did not

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require insured to maintain insurance on the property to its full value, and that the insurers' liability was not limited to a certain proportion of the loss. On the face of the policy involved in Richmondville Union Seminary v. Hamilton Mut. Ins. Co., 14 Gray (Mass.) 459, were written the words, "Additional to $9,000 insured in other offices and $8,000 to be insured in other offices." The application for insurance stated that there was $9,000 already insured, and "$8,000 wanted in other companies." It was held that defendant's liability was to be calculated by the amount of insurance actually procured, and not by the amount thus stated.

When there are several policies on the same property, with condition that only two-thirds of the estimated cash value shall be insured, in case of loss each policy is only liable to its pro rata amount of said two-thirds of the cash value (Lycoming Mut. Ins. Co. v. Stocklomn, 3 Grant, Cas. [Pa.] 207). And where a policy for $2,000 on property insured elsewhere for $3,000 provides that in case of a loss the company shall be liable to pay only such proportion thereof as the sum insured by it bears to the whole amount insured thereon, such amount not to exceed three-fourths of the actual value of the property at the time of the loss, the company is not liable for more than two-fifths of three-fourths of the value of the property (Haley v. Dorchester Mut. Fire Ins. Co., 12 Gray [Mass.] 545). In South Carolina it is by statute [3] provided that insurance policies shall not be written for more than the value of the property, the amount to be fixed by the insurer and insured; two or more policies on the same property to be deemed contributive insurance, and, if such aggregate insurance exceed the agreed insurable value of the property, the loss to be apportioned. The policy involved in Cave v. Home Ins. Co., 57 S. C. 347, 35 S. E. 577, was for $600, and valued the property at $1,000. Subsequent policies placed with other companies covered $1,100, and valued the property at $1,700. On these policies plaintiff recovered $600. It was held that the insurable value, as between plaintiff and defendant, being $1,000, of which defendant was to pay $600 in case of loss, and the sum of $1,700 as the agreed value with the other companies being in excess of the insurable value, it was a case of "contributive insurance," under the act, and the loss, as between plaintiff and defendant, should be prorated among the three companies on the value of $1,000.

[3] 22 St. at Large, p. 113; Code Laws 1902, § 1816.

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(f) Same—Compound and specific policies.

Little difficulty is met with in apportioning a loss between specific policies containing a pro rata clause. When the total insurance and the amount of the loss have been ascertained, it requires only a simple mathematical calculation to ascertain the proportion each insurer is to pay. But where some of the policies are specific, and others are compound, there arises a question as to apportionment about which there is more or less conflict among the authorities.

The Massachusetts court, in an early case (Blake v. Exchange Mut. Ins. Co., 12 Gray [Mass.] 265), reduced the compound insurance to specific by the proportion, as the value of the whole property is to the whole compound insurance, so is the value of each of the items to the insurance thereon. And the rule thus apparently laid down that the compound insurance is to be apportioned with the specific in proportion as the value of the specific property bears to the value of the property covered by the compound policy was applied in the recent case of Chandler v. Insurance Co. of North America, 70 Vt. 562, 41 Atl. 502. The rule announced in the Blake Case was cited with approval in Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492. But it is to be noted that in this case the entire property covered by the compound policy was destroyed. Under such conditions the court was of the opinion that the rule worked entire equity between the insurers and the insured, as well as between the several insurers. The rule thus approved in the Ogden Case was subsequently applied in Mayer v. American Ins. Co. (City Ct. N. Y.) 2 N. Y. Supp. 227, wherein the court held that in apportioning the liabilities of separate companies on property which was insured by itself in one company, and also together with other property, also damaged, for an entire sum in another company, the policies containing a pro rata clause, the compound insurance should be distributed among the parcels damaged in the proportion that such sum bears to the whole damage sustained in each parcel, and that a loss on a parcel doubly insured should be borne in the proportion which the portion of the compound insurance thus applicable thereto, and the specific insurance as a whole, bore, respectively, to the loss separately incurred on such parcel. A decision in line with those cited is that in Le Sure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761. In this case an insurance company which had issued a compound policy on lumber in three yards contended that its liability should be limited to the proportion which its policy bore to all the

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insurance on the lumber in the three yards, including the specific insurance on the lumber in one of the yards which was not injured. But the court held that the pro rata clause in the compound policy only meant that the company would not be liable for a greater proportion of the loss than the amount of the policy bore to the total insurance on the property actually injured or destroyed. In other words, the court held that the entire amount of the compound policy was to be distributed on the lumber destroyed or damaged. However, in Kansas City Paper Box Co. v. American Fire Ins. Co., 100 Mo. App. 691, 75 S. W. 186, it was held that a compound policy should only bear its pro rata share of a partial loss based on the total amount of the whole insurance, though each of the other policies contained an average clause to the effect that in case of a loss the policy should attach to each item in such proportion as the value of each item bore to the aggregate value of the property insured.

The converse of the rule just discussed was applied by the Circuit Court of Appeals in Page v. Sun Ins. Office, 74 Fed. 203, 20 C. C. A. 397, 36 U. S. App. 672, 33 L. R. A. 249, affirming (C. C.) 64 Fed. 194. There the court held that in a case of loss on the property described in a specific policy, and no loss on the additional property described in the compound policy, the latter policy covers the property to its full amount, so that the proportion to be borne by the specific policy is the proportion which that policy bears to the total amount of both policies.

In the early case of Cromie v. Kentucky & L. Mut. Ins. Co., 15 B. Mon. (Ky.) 432, the Kentucky court laid down the rule that, when compound policies cover property in addition to that covered by the specific ones, any loss on the property not covered by the specific policies is to be deducted from the amount of the compound policies, and only the remainder brought into the calculation by which the proportional liability of such policy is to be ascertained. And this rule appears to have been applied in Angelrodt v. Delaware Mut. Ins. Co., 31 Mo. 593. The rule in the Cromie Case was also applied in American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235. There the loss on the property covered by the specific policy was less than the amount of such policy, while the loss on the property not included in the specific policy exceeded the amount of the compound insurance. The trial court deducted the amount of the loss on the property covered by the specific policy, and made the loss remaining the basis of the compound insurer's

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liability. As the loss on the property not covered by the specific insurance was greater than the compound insurance, the Court of Civil Appeals held that the insurer could not complain of the plan adopted by the trial court.

A rule entirely at variance with those stated is announced in a recent Connecticut case (Schmaelzle v. London & L. Fire Ins. Co., 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233). It is there held that the compound insurance is not to be reduced to specific, but that instead the whole compound insurance is to be applied to one of the parcels covered by the specific policy and prorated therewith, the remainder to the next, and so on. The theory on which this rule is based is that the whole compound policy attaches to each item thereunder. In making the apportionment in that case the court applied the compound policy to each item in the order of the amount of the loss, beginning with that item on which the insured had sustained the greatest loss. The rule of the Schmaelzle Case also appears to have the sanction of Herr v. Greenwich Ins. Co., 20 Pa. Super. Ct. 169, and Sherman v. Madison Mut. Ins. Co., 39 Wis. 104. The latter case was an action on a compound policy for $1,500 on live stock. Insured had two other policies, each in the sum of $1,666.67. One provided that no animal should be valued at more than $500, and the other that the insurer should pay no more than $500 loss on any one animal. Each one of the policies contained a pro rata clause. The insured lost, by fire, two steers, which were valued at $336, and a bull valued at $2,000. It was held that each of the insurers was liable for that proportion of the value of the two steers which the whole amount insured by its policy bore to the whole amount insured by the three policies together, and as to the value of the bull, since the liability of one of the other insurers was limited to $500, while that of the second was limited to its proportion of $500 as the stipulated value of the animal, defendant was liable for such additional sum as would make good the whole loss upon the bull; thus entitling plaintiff to recover from the three insurers the whole amount of the loss.

Where the loss on the property specifically insured exceeds the amount of such insurance and the compound insurance applicable thereto, the company issuing the specific policy is, of course, liable to the full extent of its policy, unless otherwise provided (Angelrodt v. Delaware Mut. Ins. Co., 31 Mo. 593), and there is no occasion for an apportionment (Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492).

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(g) Same—Effect of co-insurance clause.

Another difficult problem is met with where there is a partial loss and part of the insurance policies contain a percentage co-insurance clause. The policy sued on in Farmers' Feed Co. v. Scottish Union & Nat. Ins. Co., 173 N. Y. 241, 65 N. E. 1105, contained a provision that the company should not be liable for a greater portion of any loss than the amount insured by its policy should bear to the "whole insurance." There were other policies covering the same property. Each of these policies, in addition to the apportionment clause, contained a percentage co-insurance clause providing that in event of loss the insurer should be liable for no greater proportion thereof than the sum insured bore to 80 per cent. of the cash value of the property, nor more than the proportion which the policy bore to the whole insurance. As the loss was partial, the question arose whether the apportionment should be based on the actual liability of the other insurers, or the face value of the policies issued by them. Insured contended for an apportionment on the former basis, as that would make the liability of defendant greater than in case the latter basis was used. But the court held that the "whole insurance" effected by the policies containing the co-insurance clause was the face value of such policies, and not the amount which in that particular instance could be recovered on such policies. In discussing this question the court says: "For the purpose of apportionment, the face value of the policies should be resorted to, regardless of the cash value of the property, and thus the whole amount of the insurance can be ascertained by a simple inspection of the policies. The face value of a policy is not reduced by the actual value of the property, or by the duty of apportioning the loss, or by the effect of a co-insurance clause in another policy on the same property. The amount of insurance is fixed at the inception of the policy, but the amount of liability is not fixed until a loss has occurred. The one depends upon the sum for which the policy is written, but the other depends upon a number of contingencies which may or may not happen, and hence cannot be known in advance. The fact that they are not known and may never come into existence, does not affect the amount of the policy." By this decision the Court of Appeals reversed that of the lower court (65 App. Div. 70, 72 N. Y. Supp. 732). Another case dealing with an apportionment of a loss between a policy without a co-insurance and one having such clause is Stephenson v. Agricultural Ins. Co., 116

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Wis. 277, 93 N. W. 19. The court in this case arrived at the same conclusion as the New York Court of Appeals in the Farmers' Feed Co. Case. The court held that the words "amount hereby insured," as used in the pro rata clause, mean the face of the policy, and the words "whole insurance" the face of all the policies written on the property. Therefore, a policy containing an 80 per cent. co-insurance clause is not, by force thereof, reduced in proportion to the amount of the deficiency of insurance under the 80 per cent., but in apportioning the insurer's liability was to be counted at its face value. In the Farmers' Feed Co. Case it was held that, though the total insurance was greater than the actual loss, insured was not entitled to recover the whole of such loss, as the amount he had agreed to bear had to be included in apportioning the loss. And in the Stephenson Case it was held that a statute prohibiting a company from issuing a policy containing a provision limiting the company's liability, or requiring a co-insurance clause, save at insured's option, was of no avail to insured in an action on the policies not containing the co-insurance clause. Furthermore, it was held that insured was not entitled to full indemnity under all the policies merely because the companies issuing the policies which contained no co-insurance clause had not been enriched by the consideration consisting of the reduced premium, inasmuch as their premium rates had been based on the clauses of their policies limiting their liability to such proportion of loss as the amount of insurance bore to the whole insurance.

(h) Policy requiring other insurance.

A co-insurance clause in a policy, limiting the risk of the insurer to such proportion of the loss as the sum insured bears to the value of the whole property covered, is reasonable and valid (Pennsylvania Fire Ins. Co. v. Moore, 21 Tex. Civ. App. 528, 51 S. W. 878). And a stipulation in a policy that, if insured shall fail to comply with a covenant on his part to maintain a total insurance of not less than 75 per cent. of the total cash value of the property, he shall be deemed to be a co-insurer to the extent of the deficiency, and in that event shall bear his proportion of any loss occurring under this policy, is not in contravention of a statute [4] providing that all insurance companies shall pay the full amount of loss sustained on the property insured by them, provided said amount does not exceed

[4] Civ. Code Ga. § 2110.

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the amount of insurance expressed in the policy, and which declares that all stipulations in such policies to the contrary shall be void, according to Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779. And in Quinn v. Fire Ass'n of Philadelphia, 180 Mass. 560, 62 N. E. 980, a rider attached to a policy which provided that insured should maintain insurance on the property to the extent of 80 per cent. of the cash value thereof, and, failing so to do, should be an insurer to the extent of such deficit, and to that extent should bear his proportion of the loss, if any, was held not objectionable, as not being within a statute [5] permitting companies to attach provisions adding to or modifying the standard form. But in Sachs v. London & L. Fire Ins. Co., 23 Ky. Law Rep. 2397, 113 Ky. 88, 67 S. W. 23, it was held that an 80 per cent. co-insurance clause was void on the ground that it was in violation of the Kentucky valued policy law.[6]

Where a slip attached to a policy provides that the insurer's liability shall be limited by any conditions of co-insurance or average contained in any other policy on the property, insured is bound by an 80 per cent. co-insurance clause in another policy (Catoosa Springs Co. v. Linch, 18 Misc. Rep. 209, 41 N. Y. Supp. 377). But the words "subject to co-insurance clause," in a policy of insurance, have in themselves, in the absence of evidence of usage, no definite meaning (Phenix Ins. Co. v. Wilcox & Gibbs Guano Co., 65 Fed. 724, 13 C. C. A. 88, 25 U. S. App. 201). And though a letter in which application for insurance is made states that a certain amount of insurance will be maintained, still, if there is no reference in the policy to an application, it will be held that the policy was not issued on the condition that the amount of insurance named should be maintained (Citizens' Ins. Co. v. Hoffman, 128 Ind. 370, 27 N. E. 745). In Belt v. American Cent. Ins. Co., 74 Hun, 448, 26 N. Y. Supp. 692, it appeared that plaintiff originally held a policy containing an 80 per cent. co-insurance clause, but applied for a reduction of premium, and accepted a policy containing a 100 per cent. co-insurance clause. As plaintiff had filed proofs of loss and accepted payment on the 100 per cent. basis, and surrendered the policy, the court held that he had ratified the substitution. But on further appeal of the case the Court of Appeals (148 N. Y. 624, 43 N. E. 64) held that plaintiff could show that the substitution was made after the loss, and that insured had no knowledge that any

[5] Mass. St. 1894, c. 522, § 60, cl. 7. [6] Ky. St. § 700.

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substitution had been made when the money was accepted and the policy surrendered.

Where an insurance company writes insurance on condition that insured shall procure other insurance in a certain amount, the company only assumes such proportion to the amount of insurance actually taken, in case it is less than required, as the amount of its policy bears to the total amount of other insurance which insured agreed to take (Armour v. Reading Fire Ins. Co., 67 Mo. App. 215). And where a policy provides that insured shall maintain insurance on the property to the extent of four-fifths of its cash value, and, in case of failure so to do, shall be a co-insurer to the extent of such deficit, insured is either bound to procure from others, or himself carry, insurance to such an extent that the total insurance amounts to four-fifths of the value of the property (Chesebrough v. Home Ins. Co., 61 Mich. 333, 28 N. W. 110). But in Hartford Fire Ins. Co. v. Shlenker, 80 Miss. 667, 32 South. 155, it was held that under a law [7] providing that in case of loss by fire of insured personal property, where the same, after issuance of the policy, is constantly changed in specifics and quantity, in the course of trade, only the actual value of the property at the time of loss may be recovered, not to exceed the amount expressed in the policy, where there was a policy of $2,000 on a stock of cotton worth $15,000, of which $4,000 worth was destroyed by fire, the insured could recover the $2,000, notwithstanding conditions in the policy expressly waiving all benefit under such law, and providing that the property should be insured to its full value, and that in case of loss the insurer should be liable only for such portion of the loss as the amount of the policy bore to the full value of the property insured at the time of the fire.

6. PLEADING AND PRACTICE WITH REFERENCE TO EXTENT OF LIABILITY IN GENERAL.

(a) Pleading.
(b) Issues and proof.
(c) Evidence.
(d) Trial and review.

(a) Pleading.

It is incumbent on an insured to aver the extent of his loss (German Fire Ins. Co. v. Von Gunten, 13 Ill. App. 593). And a petition

[7] Laws Miss. 1894, c. 63, § 1, as amended by Laws 1896, c. 56.

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on a policy covering several items specifically, which alleges only the loss of one item, will not permit a recovery for another item (Shaver v. Mercantile Town Mut. Ins. Co., 79 Mo. App. 420). But under an averment of a total loss plaintiff may recover for a partial loss (Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466).

In a suit on an open policy, the value of the property at the time of the loss must, of course, be alleged (Phœnix Ins. Co. v. Benton, 87 Ind. 132). And an allegation that plaintiffs had an interest in the property to an amount exceeding a sum named, and that they were the exclusive owners, is not a sufficient allegation of the cash value of the property (Royal Ins. Co. v. Smith, 8 Ky. Law Rep. 521). So, an allegation that plaintiff "had an interest" in the property insured to an amount exceeding the insurance is insufficient.

Sappington v. St. Joseph Mut. Fire Ins. Co., 72 Mo. App. 74; Wright v. Bankers' & Merchants' Town Mut. Fire Ins. Co., 73 Mo. App. 365.

But an allegation that the property insured was totally destroyed, and defendant failed to pay plaintiff for the loss occasioned thereby, raises the question of value (German-American Ins. Co. v. Paul, 2 Ind. T. 625, 53 S. W. 442). And if a complaint states the amounts of the losses upon the various kinds of property insured separately, and demands judgment for the aggregate sum of such losses, this will be sufficient for the purpose of informing the defendant how much, and on what account, the plaintiff claims to recover (Hegard v. California Ins. Co. [Cal.] 11 Pac. 594). So, an averment that insurance was given on the property to the amount of $1,200, and that the property insured was totally destroyed, would seem to be a sufficient averment of value after verdict (Jones v. St. Joseph Fire & Marine Ins. Co., 55 Mo. 342). Likewise a petition stating a loss under a policy, and specifying the amount lost upon each of the articles insured, is not bad because it fails to allege value (American Ins. Co. v. Leonard, 80 Ind. 272). Likewise, a declaration which states that plaintiff was interested to the value of a certain sum is good on general demurrer (Knickerbocker Ins. Co. v. Tolman, 80 Ill. 106). Similarly, if the whole petition shows that the goods destroyed were worth a given sum, and, being totally destroyed, plaintiff was damaged in such sum, it is not demurrable, as not stating a cause of action, however inartistic it may be in the fact (Shaver v. Mercantile Mut. Ins. Co., 85 Mo. App. 73). And though a petition may in some of its allegations confuse the value of the real and personal property insured, yet if, as a whole, it states that the

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personalty was insured for $1,500, and its value was $3,500, and the plaintiff was damaged in the last-named sum, and was entitled to $1,500 judgment, it is sufficient (Shaver v. Mercantile Mut. Ins. Co., 85 Mo. App. 73).

The fact that a policy limits insured's recovery for a loss to the actual cash value of the property destroyed does not require insured to allege the cash value of the property destroyed.

Hegard v. California Ins. Co. (Cal.) 11 Pac. 594; Osborne v. Phenix Ins. Co., 23 Utah, 428, 64 Pac. 1103.

A petition in an action on a policy containing a pro rata clause need not allege what other insurance there was on the property, as this is a matter of defense.

Ætna Ins. Co. v. McLeod, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320; Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. See, also, Knickerbocker Ins. Co. v. Tolman, 80 Ill. 106. But see Coats v. West Coast Fire & Marine Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

In Ætna Ins. Co. v. Glasgow Electric Light & Power Co., 107 Ky. 77, 52 S. W. 975, it was held that the trial court erred in refusing defendant to file an amended answer relying on a co-insurance clause, though the amendment was not offered until the commissioner had filed a report showing that insured had not maintained the full amount of insurance required. But in Continental Ins. Co. v. Moore, 62 S. W. 517, 23 Ky. Law Rep. 72, it was held that the court did not abuse its discretion in refusing to permit defendant to file an amended answer disputing the valuation fixed in the policy, where the amendment was not offered until after a judgment in defendant's favor had been reversed on appeal, and until several years after the property was destroyed.

(b) Issues and proof.

An issue of fact is made as to the amount due on a loss under a policy for $1,000 where the complaint alleges that plaintiff "sustained loss in a sum much greater than the amount stated in the policy," and the answer denies that "plaintiff had sustained loss in the sum of $1,000 or any other sum" (Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434). But a contention between the parties as to whether additional insurance has been taken, which would render the policy void, is not a "disagreement as to the amount of

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the loss" (Nelson v. Atlanta Home Ins. Co., 120 N. C. 302, 27 S. E. 38). A general allegation that certain insured property, otherwise fully described, was real property, did not require the insured to show that it was real property, and totally destroyed, and thereupon rely upon the valued policy law; but he could show its value without attempting to classify the property as real or personal (Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co., 53 Neb. 123, 73 N. W. 544).

An answer alleging that plaintiff made no effort to protect the property after the fire, and that, if it had been properly cared for, the damage would not have exceeded $100, is good as admitting $100 damages, and setting out such facts as a defense to the excess only (Sisk v. Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804). But a denial in an answer that said "plaintiffs, by the fire in question, sustained an actual loss exceeding the sum of $4,000," is not tantamount to an admission that plaintiffs' loss was equal to that sum (Hiles v. Hanover Fire Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637). Where the insurer admits that the amount claimed by insured's statement is the share due, if it is liable at all, insured need not prove an adjustment nor the extent of his loss (Jacoby v. North British & Mercantile Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226). An answer which in one count alleges other insurance as a ground of avoidance, and in another asks to prorate other insurance, if any be found, does not allege the existence of other insurance as a basis for prorating the loss (O'Leary v. German-American Ins. Co., 100 Iowa, 390, 69 N. W. 686). Where the receipt and retention of proofs of loss by the company are relied on as an acquiescence and agreement as to the amount of the loss, testimony as to the value of the property is irrelevant (Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499). And where a bill of particulars demanded in a suit on a policy covering a dwelling and household effects was obscure and evasive, and gave no additional information, it was error to admit proof of the contents of the dwelling, over an objection that the bill of particulars described the articles for which recovery was sought as "contents of house" (Knop v. National Fire Ins. Co., 101 Mich. 359, 59 N. W. 653). But a denial in toto of liability does not estop the insurer, if its liability is established, from contesting the amount of the loss, and requiring that it be proven by competent evidence (Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810).

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(c) Evidence.

It is incumbent on an insured to prove the extent of his loss, where the undertaking is to make good all loss, not exceeding a specified sum (German Fire Ins. Co. v. Von Gunten, 13 Ill. App. 593). Likewise he must prove the value of the property destroyed (Hanover Fire Ins. Co. v. Lewis, 23 Fla. 193, 1 South. 863). And such proof is not waived by an agreement that preliminary proof of loss had been duly made (Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915). But in the case of a total loss of property covered by a policy distributing the insurance on various items it is not necessary to prove the amount of loss on each item separately (Improved Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256, 80 N. W. 1088). The amount of the policy is not even prima facie evidence of the loss (Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45). But evidence that one of the insurers had inspected the houses insured before the policy was issued, and another before the renewal thereof, fixing the relative value of the houses is prima facie evidence of the value at the time of loss (Virginia Fire & Marine Ins. Co. v. Feagin, 62 Ga. 515). An insured or any person acquainted with the value of the property destroyed at the time of the fire, while not qualified as an expert, may testify as to such value.

Reference may be made to Baillie v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386; Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507; Thomason v. Capital Ins. Co., 92 Iowa, 72, 61 N. W. 843; Names v. Union Ins. Co., 104 Iowa, 612, 74 N. W. 14; Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572; Continental Ins. Co. v. Horton, 28 Mich. 173; Livings v. Home Mut. Ins. Co., 50 Mich. 207, 15 N. W. 85; Bowne v. Hartford Fire Ins. Co., 46 Mo. App. 473; Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Meyerson v. Hartford Fire Ins. Co., 16 Misc. Rep. 286, 38 N. Y. Supp. 112; Rademacher v. Greenwich Ins. Co., 75 Hun, 83, 27 N. Y. Supp. 155; Phœnix Mut. Fire Ins. Co. v. Bowersox, 6 Ohio Cir. Ct. Rep. 1, 3 O. C. D. 321.

Where an insured testifies as to value, his testimony presumably has reference to the cash value at time of loss (Erb v. German-American Ins. Co., 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845). And insured's testimony cannot be discredited by a tax list sworn to by him, as that is an admission for a special purpose (German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534). Of

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course, the opinion of a witness in respect to the value of property which he has never seen is not admissible (Westlake v. St. Lawrence Mut. Ins. Co., 14 Barb. [N. Y.] 206).

Books of account kept by insured are competent evidence in regard to the value of stock destroyed when properly verified or authenticated.

Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810.

The invoices, bills of purchase, books of account, amount of sales, inventories of stock taken immediately after the fire, and the testimony of the clerks of the assured are proper evidence of the amount of loss by a removal of goods insured when endangered by fire (Case v. Hartford Fire Ins. Co., 13 Ill. 676). But it is reversible error to allow an officer of an insured corporation to show the amount of goods on hand at the time of the fire by testifying to the purchases and sales between the date of an inventory in evidence and the fire, as recorded in the company's books, which were not kept by witness, were not verified in any way, and were not in evidence (F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69).

It is competent to show the amount of goods lost, by the last previous invoice, the goods bought after that time and before the fire, the amount received for sales during that time, and the average profit on such sales (Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180). Especially where the books of account were destroyed in the fire, evidence showing the amount of stock on hand when an inventory was taken, the quantity purchased afterwards and before the fire, the amount of sales made, and the average profits charged thereon, is admissible to prove the amount of the loss (Scottish Union & National Ins. Co. v. Keene, 85 Md. 263, 37 Atl. 33).

An inventory made before a fire, of goods totally destroyed, is admissible, in connection with the testimony of the parties who made it, as tending to show the amount and value of the goods destroyed.

West Branch Lumberman's Exchange v. American Cent. Ins. Co., 183 Pa. 366, 38 Atl. 1081; Id., 9 Pa. Dist. R. 363; Wallach v. Commercial Fire Ins. Co., 12 Daly, 387, affirmed 98 N. Y. 634; Phœnix Ins. Co. v. Padgitt (Tex. Civ. App.) 42 S. W. 800.

So, an inventory made shortly before a fire, though not made by insured, but by another person for the purpose of effecting a sale

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to the insured, is admissible to show the extent of the loss (Scottish Union & National Ins. Co. v. Stubbs, 98 Ga. 754, 27 S. E. 180). And where all other and better evidence has been destroyed, an inventory taken 6½ years before the fire is competent evidence of value, in connection with the books of account showing the purchases and sales of goods from the date of the inventory to the fire (German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481). So, where there are no books or inventories, or they have been destroyed, secondary evidence is admissible to show the value of the destroyed property.

Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810; Coleman v. Retail Lumbermen's Ins. Ass'n, 77 Minn. 31, 79 N. W. 588; Liverpool & L. & G. Ins. Co. v. Kearney, 2 Ind. T. 67, 46 S. W. 414; Brookshier v. Chillicothe Town Mut. Fire Ins. Co., 91 Mo. App. 599; Rissler v. American Cent. Ins. Co., 150 Mo. 366, 51 S. W. 755; Sherlock v. German-American Ins. Co., 21 App. Div. 18, 47 N. Y. Supp. 315.

Though the rental of a building at the time of its destruction may be given in evidence, as bearing upon the question of loss (Cumberland Val. Mut. Protection Co. v. Schell, 29 Pa. 31), the rental two years prior thereto is too remote (Atlantic Ins. Co. v. Manning, 3 Colo. 224). So, evidence that a horse sold some 18 months before a loss for less than the value fixed by the witnesses is not admissible to show his value at the time of the loss (Gere v. Council Bluffs Ins. Co., 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159). And evidence as to the value of the property fixed by the agent at the time of the issuance of the policy, and as to the value as stated in the policy, is inadmissible, in the absence of evidence that such values and the cash value at the date of loss are the same (German Ins. Co. v. Everett [Tex. Civ. App.] 36 S. W. 125).

The cost of the property destroyed is some evidence of its value (Bini v. Smith, 36 App. Div. 463, 55 N. Y. Supp. 842), as evidence of the cost price and length of time the articles destroyed had been used forms a basis for estimating their value at the time of the fire (Cheever v. Scottish Union & National Ins. Co., 86 App. Div. 328, 83 N. Y. Supp. 730). Thus, it was held in Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5, that a former owner of drug-store fixtures and the mechanic who made them could testify to their condition some years before the fire. And in Clement v. British America Assur. Co., 141 Mass. 298, 5 N. E. 847, it was held that plaintiff may show the cost of manufacturing the damaged goods, what they brought at auction after the fire, and, an auction

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being claimed to be an improper mode of disposal of them, may ask an expert whether there is any better mode of disposing of such goods. But in Merchants' Ins. Co. v. Frick, 5 Ohio Dec. 47, 2 Am. Law Rec. 336, it was held that evidence as to what the property cost insured is inadmissible on his behalf.

Evidence as to what the land sold for after the insured buildings were destroyed is not admissible to prove value (Bardwell v. Conway Mut. Fire Ins. Co., 122 Mass. 90). But it is competent to show what per cent. of the cost price could be obtained for goods damaged (Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180). However, evidence of the price at which cattle covered by the policy sold a year or more after they were injured is properly excluded (Lewis v. Burlington Ins. Co., 80 Iowa, 259, 45 N. W. 749). And the amount for which insured sold his policy after loss cannot be considered (Commercial Ins. Co. v. Friedlander, 156 Ill. 595, 41 N. E. 183). Evidence of the plaintiff tending to prove the expenses incurred by him in repairing the injury is competent as to the extent of the damage (Sherlock v. German-American Ins. Co., 21 App. Div. 18, 47 N. Y. Supp. 315, affirmed 162 N. Y. 656, 57 N. E. 1124).

Where a policy required that a certain estimate of each article destroyed should be made by appraisers to be appointed by the insurer and the assured, such appraisal was admissible in evidence upon the question of value (De Groot v. Fulton Fire Ins. Co., 27 N. Y. Super. Ct. 504). And an invoice taken by a sheriff under an attachment process after a fire is admissible to show the amount of goods on hand after the fire and their value (Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013). But the proofs of loss are not admissible as independent evidence of the value of property destroyed.

Cole v. Manchester Fire Assur. Co., 188 Pa. 345, 41 Atl. 593; Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810.

However, the proofs of loss are competent to refresh the memory of a witness as to the cost of the property; and if, when introduced in evidence, without objection, as the witness' answer, they show such cost to be much greater than the insurance, they constitute sufficient evidence of value (Bini v. Smith, 36 App. Div. 463, 55 N. Y. Supp. 842). As the amount of a fire insurance policy is no evi-

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dence of the amount or value of the goods insured (Standard Fire Ins. Co. v. Wren, 11 Ill. App. 242), evidence of a custom whereby the valuation in the policy was taken as the true valuation is not admissible (Meeker v. Klemm, 11 La. Ann. 104).

The admissibility of evidence was also passed on, with reference to extent of liability, in Home Ins. Co. v. Weide, 11 Wall. 438, 20 L. Ed. 197; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Gulf City Ins. Co. v. Stephens, 51 Ala. 121; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Siltz v. Hawkeye Ins. Co., 71 Iowa, 710, 29 N. W. 605; Western Assur. Co. v. Ray, 105 Ky. 523, 49 S. W. 326; Hills v. Home Ins. Co., 129 Mass. 345; Pennsylvania Fire Ins. Co. v. Kittle, 39 Mich. 51; St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; Sherlock v. German-American Ins. Co., 21 App. Div. 18, 47 N. Y. Supp. 315, affirmed 162 N. Y. 656, 57 N. E. 1124; Cheever v. Scottish Union & National Ins. Co., 86 App. Div. 328, 83 N. Y. Supp. 730; Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133; Cummins v. German-American Ins. Co., 192 Pa. 359, 43 Atl. 1016; Wells Whip Co. v. Tanners' Mut. Fire Ins. Co., 209 Pa. 488, 58 Atl. 894; Hegard v. California Ins. Co. (Cal.) 11 Pac. 594; Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 180; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Kelly v. Norwich Fire Ins. Co., 82 Iowa, 137, 47 N. W. 986; Bardwell v. Conway Mut. Fire Ins. Co., 122 Mass. 90; Knop v. National Fire Ins. Co., 101 Mich. 359, 59 N. W. 653; Metzger v. Manchester Fire Assur. Co., 102 Mich. 334, 63 N. W. 650; Taylor v. Roger Williams Ins. Co., 51 N. H. 50; Townsend v. Merchants' Ins. Co., 45 How. Prac. (N. Y.) 501; Schlesinger v. Springfield Fire & Marine Ins. Co., 58 N. Y. Super. Ct. 112, 9 N. Y. Supp. 727; Phœnix Fire Ins. Co. v. Philip, 13 Wend. (N. Y.) 81; Machin v. Lamar Fire Ins. Co., 90 N. Y. 689; Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724; Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908; F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69.

The sufficiency of the evidence was passed on in Fisher v. Crescent Ins. Co. (C. C.) 33 Fed. 544; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Barry v. Farmers' Mut. Hail Ins. Ass'n, 110 Iowa, 433, 81 N. W. 690; Phœnix Ins. Co. v. Dolan, 50 Kan. 725, 32 Pac. 390; Sisk v. American Central Fire Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Linde v. Republic Fire Ins. Co., 50 N. Y. Super. Ct. 362; Schlesinger v. Springfield Fire & Marine Ins. Co., 58 N. Y. Super. Ct. 112, 9 N. Y. Supp. 727; Rockey v. Firemen's Ins. Co., 83 App. Div. 638, 82 N. Y. Supp. 120; McFetridge v. American Fire Ins. Co., 90 Wis. 138, 62 N. W. 938; Rickeman v. Williamsburg City Fire Ins. Co., 120 Wis. 655, 98 N. W. 960.

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(d) Trial and review.

Where insurer was trying to show that certain photographs destroyed were those of plaintiff's family, and therefore had no value, a remark of the court in the presence of the jury, "You don't expect to insure property for value, and refuse to pay for it simply because it is a picture of a man's father or mother," is not error: the court leaving the jury to determine the question as to the value of the photograph (German-American Ins. Co. v. Paul, 2 Ind. T. 625, 53 S. W. 442). **The amount of a loss is a question for the jury under all the evidence** (Birmingham Fire Ins. Co. v. Pulver, 27 Ill. App. 17, affirmed 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598), where the evidence is conflicting (Petty v. Mutual Fire Ins. Co., 111 Iowa, 358, 82 N. W. 767); and the trial court is not justified in setting aside the jury's findings of value, and awarding plaintiff the full amount of the policy (Thorne v. Ætna Ins. Co., 102 Wis. 593, 78 N. W. 920). So, where plaintiff introduced evidence of the amount of loss sustained, and defendant introduced no evidence, the direction of a verdict for a less sum than the amount recoverable under the policy, without a request by either party for such direction, was erroneous, since the amount of damages sustained was for the jury (Marx v. Pennsylvania Fire Ins. Co., 32 Misc. Rep. 637, 66 N. Y. Supp. 481). Where plaintiff's testimony as to the value of the goods differs from the value as stated by him in the proof of loss, the truth of his explanation as to the discrepancy is for the jury (McSparran v. Southern Mut. Fire Ins. Co., 193 Pa. 184, 44 Atl. 317).

The correctness of instructions offered or given was passed on in Orient Ins. Co. v. Leonard, 120 Fed. 808, 57 C. C. A. 176; Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67; McIlrath v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 244, 86 N. W. 310; German Ins. Co. v. Read's Ex'r, 12 Ky. Law Rep. 371, 14 S. W. 595; Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; Martin v. Capital Ins. Co., 85 Iowa, 643, 52 N. W. 534; Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237; Corson v. Iowa Mut. Fire Ins. Ass'n, 115 Iowa, 485, 88 N. W. 1086; Schaefer v. Anchor Mut. Fire Ins. Co. (Iowa) 100 N. W. 857; Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407, 45 N. W. 356; Sappington v. St. Joseph Town Mut. Fire Ins. Co., 77 Mo. App. 270; Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427, 1 N. W. 384; Western Horse & Cattle Ins. Co. v. Putnam, 20 Neb. 331, 30 N. W. 246; Hooker v. Continental Ins. Co. (Neb.) 96 N. W. 663; Hibernia Ins. Co. v. Starr (Tex.) 13 S. W. 1017; Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722;

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Lion Fire Ins. Co. v. Heath, 29 Tex. Civ. App. 203, 68 S. W. 305; Pencil v. Home Ins. Co., 3 Wash. St. 485, 28 Pac. 1031.

The reasonableness of the verdict was considered in Case v. Manufacturers' Fire & Marine Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; Goodwin v. Merchants' & Bankers' Mut. Ins. Co., 118 Iowa, 601, 92 N. W. 894; British America Assur. Co. v. Kellner, 60 Neb. 411, 83 N. W. 175.

An erroneous charge respecting the amount which plaintiff is entitled to recover was in Gandy v. Orient Ins. Co., 52 S. C. 224, 29 S. E. 655, held cured by a remittitur of the greatest amount which could have been given under the charge. And in Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366, it was held that where it was proved, in an action for a loss on a stock of goods and store furniture, that the storehouse and stock were destroyed, and the insurer did not, at the trial, raise the point that the destruction of the furniture was not proved, a verdict including damages for loss of furniture should be sustained.

The conflict in the testimony was considered sufficient to make the verdict conclusive on appeal in Farmers' Alliance Mut. Fire Ins. Co. v. Trombly, 17 Colo. App. 513, 69 Pac. 74; Condon v. Des Moines Mut. Hail Ass'n, 120 Iowa, 80, 94 N. W. 477.

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XXII. RISK AND CAUSE OF LOSS—LIFE AND ACCIDENT INSURANCE.

1. Cause of death and excepted risks in life insurance.
   (a) Fact and time of death.
   (b) Cause of death in general.
   (c) Excepted risks.
   (d) Same—Death while engaged in unauthorized occupation.
   (e) Same—Death caused by intemperance or use of narcotics.
   (f) Same—Death while engaged in violation of law.
   (g) Same—Death at the hands of justice.
   (h) Same—Death caused by beneficiary or assignee.
2. Cause of death or injury in accident insurance.
   (a) What constitutes accident in general.
   (b) External or violent means of injury.
   (c) Risks of travel.
   (d) Risks of occupation.
   (e) Limitation as to time of death or disability caused by accident.
   (f) Questions of practice—Pleading.
   (g) Same—Evidence.
   (h) Same—Questions for jury.
3. Excepted risks in accident insurance.
   (a) General principles.
   (b) Excepted risks in general.
   (c) External and visible signs of injury.
   (d) Walking or being on railway roadbed or bridge.
   (e) Entering or leaving or standing on platform of moving car.
   (f) Poison.
   (g) Inhaling gas.
   (h) Bodily infirmities or disease.
   (i) Intoxication.
   (j) Violation of law—Fighting.
   (k) Intentional injuries.
   (l) Failure to exercise due diligence.
   (m) Voluntary exposure to unnecessary danger.
4. Suicide as an excepted risk in life and accident insurance.
   (a) In general.
   (b) Validity of conditions declaring suicide an excepted risk.
   (c) Effect of subsequent by-laws.
   (d) Statutory provisions.
   (e) Effect of clause declaring policy incontestable.
   (f) What constitutes suicide in general.
   (g) Involuntary self-destruction.
   (h) Effect of insanity.
   (i) Same—Under "sane or insane" clause.
   (j) Same—Cause of mental derangement.
   (k) Questions of practice—Pleading.

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1. CAUSE OF DEATH AND EXCEPTED RISKS IN LIFE INSURANCE.

(a) Fact and time of death.

In order to recover on a policy of life insurance, it is, of course, necessary that the plaintiff should prove the fact of death (Wackerle v. Mutual Life Ins. Co. [C. C.] 14 Fed. 23). **Though the fact of death must be shown by a preponderance of evidence** (Winter v. Supreme Lodge K. P. of the World, 69 S. W. 662, 96 Mo. App. 1; Id., 101 Mo. App. 550, 73 S. W. 877), **it is not necessary that it should be shown beyond a reasonable doubt** (Fidelity Mut. Life Ass'n v. Mettler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922); nor is it essential that the evidence should be direct and positive (Rogers v. Manhattan Life Ins. Co., 71 Pac. 348, 138 Cal. 285). Such evidence is not necessary, even though the policy stipulates for direct and positive evidence (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18), but circumstantial evidence is sufficient.

In the case of the disappearance of the insured it is obvious that proof of death must rest either on circumstantial evidence or presumption. **Death cannot be inferred from the mere fact of disappearance,** but all the facts and circumstances connected therewith must be considered (Fidelity Mut. Life Ass'n v. Mettler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922). So, where the time of death was in issue, the fact that insured had been seen on several occasions on four or five successive days, and was not seen thereafter, is insufficient to show that death occurred a short time after he was last seen (Johnson v. Pennsylvania R. Co., 60 N.

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Y. Supp. 129, 43 App. Div. 453, reversing 26 Misc. Rep. 241, 55 N. Y. Supp. 1050). Where insured was seen leaning out through a shutter in the bulwark of a vessel on which he was a passenger, was not seen to go ashore at any intermediate port, and could not be found when the vessel reached its destination, though his valise was still in his stateroom (Lancaster v. Washington Life Ins. Co., 62 Mo. 121), it was held that there was evidence tending to show that he was brought in contact with a specific peril, so as to give rise to a presumption of his death. Quite similar facts were held to justify a similar conclusion in Rogers v. Manhattan Life Ins. Co., 71 Pac. 348, 138 Cal. 285. So, where insured left home to bathe in a lake about a mile distant and never returned, his clothing and money being found on the shore, and there were footsteps leading into the water, these facts, in connection with proof that the locality was dangerous, justified a finding that the insured was dead (Supreme Council of Catholic Benevolent Legion v. Boyle, 10 Ind. App. 301, 37 N. E. 1105). It is generally sufficient if it can be shown that the insured came into contact with a specific peril (Fidelity Mut. Life Ass'n v. Mettler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922), but the locality and peril must be identified (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18).

The common-law presumption of death after an absence of seven years, during which the person has not been seen or heard from, is applied in the case of a disappearance of an insured.

Kendrick v. Grand Lodge A. O. U. W., 8 Ky. Law Rep. 149; Mutual Ben. Life Ins. Co. v. Martin, 55 S. W. 694, 108 Ky. 11; Hancock v. American Life Ins. Co., 62 Mo. 26; Supreme Commandery of Order of Knights of Golden Rule v. Everding, 20 Ohio Cir. Ct. R. 689, 11 O. C. D. 419.

The presumption is not conclusive (Policemen's Benev. Ass'n v. Ryce, 72 N. E. 764, 213 Ill. 9), but may be rebutted by evidence as to the circumstances under which the insured disappeared. Thus, while the fact that the person who has disappeared is a fugitive from justice does not prevent the presumption from arising, it may go far toward rebutting it (Mutual Benefit Life Ins. Co. v. Martin, 55 S. W. 694, 108 Ky. 11). Indeed, in Winter v. Supreme Lodge Knights of Pythias, 69 S. W. 662, 96 Mo. App. 1, the court seems to go so far as to regard the fact that the insured was a defaulter as reversing the presumption. **The presumption as to the fact of death arising from the absence of insured**

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does not, however, carry with it any presumption as to the time of death. That branch of the question must rest on proof.

Kendrick v. Grand Lodge of A. O. U. W., 8 Ky. Law Rep. 149; Hancock v. American Life Ins. Co., 62 Mo. 26; Supreme Commandery of Knights of Golden Rule v. Everding, 11 O. C. D. 419, 20 Ohio Cir. Ct. R. 689.

A provision in a beneficiary certificate, that no time of absence or disappearance 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). And where a policy stipulates that disappearance of insured shall not be evidence of death, or any right to recover, till the full term of expectation has expired, the beneficiary cannot sue on the theory that insured has not been heard from for more than seven years, without alleging that the full term of life expectancy has expired (Porter v. Home Friendly Soc., 41 S. E. 45, 114 Ga. 937).

In an action on a policy of life insurance, evidence other than the presence of the person insured is admissible to confute the fact of death (Schneider v. Ætna Life Ins. Co., 32 La. Ann. 1049, 36 Am. Rep. 276). But evidence that the insured, some 12 years before, had absconded, and was gone for some time, until he was supposed to have been murdered, and that he was a boy of bad habits and loose moral character, was properly excluded on the ground of remoteness (Tisdale v. Connecticut Mut. Life Ins. Co., 28 Iowa, 12). In the same case it was said that opinions of witnesses as to fact of death were inadmissible, and moreover that evidence that the insured was seen alive within three years prior to the granting of letters of administration on his estate was not sufficient to overcome the presumption of death arising from the issuing of such letters.

In the absence of a stipulation in the policy, there is no rule of law which makes it the duty of the beneficiary of life insurance to make search for the insured, her husband, after his disappearance, or to communicate to the company any information she may have on the subject (McAllister v. Connecticut Mut. Life Ins. Co., 78 Ky. 531). Consequently, a letter written by an agent of the insurance company to the plaintiff, requesting her co-operation in

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further efforts to find the insured, to which she made no reply, is not admissible evidence in behalf of the company (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18).

In Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. Ed. 446, reversing 107 Fed. 834, 46 C. C. A. 668, the defense interposed was that the insured and others had entered into a conspiracy to defraud the defendant and other companies; that in pursuance of such conspiracy it was falsely pretended that insured was dead, whereas in fact he was not dead, but was concealing himself. It was held that evidence of the existence of the alleged conspiracy was admissible against the beneficiary for the purpose of strengthening the probability that the insured was not dead, but was in fact concealing himself.

An answer in an action on a life policy does not deny the death of assured by merely denying that he died on the day stated in the complaint, his death being admitted in other portions of the answer. Parker v. Des Moines Life Ass'n, 78 N. W. 826, 108 Iowa, 117.

Among the questions that may arise in connection with the fact of death is the identity of the deceased with the person who was insured. If the identity is denied—and a general denial is sufficient for the purpose—the burden is on the plaintiff to prove the identity (Quirk v. Metropolitan Life Ins. Co., 12 Pa. Super. Ct. 250). The question of identity is for the jury (Wackerle v. Mutual Life Ins. Co. [C. C.] 14 Fed. 23); and where there is positive testimony of the parents declaring the identity of the dead body with the person of their son, the insured, testimony of the coroner identifying him from his pictures, and testimony showing that the condition of the teeth in the jaws of the deceased corresponded with the condition of insured's teeth, there is sufficient evidence to require the submission to the jury of the question of identity (Potter v. Union Cent. Life Ins. Co. of Cincinnati, Ohio, 46 Atl. 111, 195 Pa. 557). In Baxter v. Covenant Mut. Life Ass'n, 77 Minn. 80, 79 N. W. 596, the evidence as to identity was regarded as insufficient, notwithstanding the clothes and other articles found on the body were identified as belonging to the insured, but the body was that of a man only 5 feet 10 inches tall, whereas the insured was over 6 feet tall, and wore a No. 10 or No. 11 shoe, the shoe found on the body being a No. 6 or No. 7.

Records of a county hospital, showing the death of a patient of the same name as assured, and testimony of a witness that he was

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acquainted with assured, and saw him and conversed with him in the hospital, and saw him there after he died, and a receipt of an undertaker showing that the body was taken to a medical college, is sufficient proof of the death of the insured. Supreme Lodge, and Chicago Lodge 932, Knights of Honor, v. Goldberger, 72 Ill. App. 320.

(b) Cause of death in general.

Though the plaintiff is bound to prove the fact of death, it is not usually necessary as part of plaintiff's case to prove the cause of death, any question in that regard being a matter of defense (Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 56 Hun, 303, 9 N. Y. Supp. 346; Id., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839). Proofs of death submitted under the provisions of the contract are admissible as evidence of the cause of death, but are not conclusive.

Modern Woodmen v. Davis, 184 Ill. 236, 56 N. E. 300, affirming 84 Ill. App. 439; Modern Woodmen of America v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Modern Woodmen v. Kozak, 63 Neb. 146, 88 N. W. 248; Bradley v. John Hancock Mut. Life Ins. Co., 46 N. Y. Supp. 627, 20 App. Div. 22; Trudden v. Metropolitan Life Ins. Co., 50 App. Div. 473, 64 N. Y. Supp. 183; Hanna v. Connecticut Mut. Life Ins. Co., 44 N. E. 1099, 150 N. Y. 526; Bentz v. Northwestern Aid Ass'n, 41 N. W. 1037, 40 Minn. 202, 2 L. R. A. 784; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

But see Ætna Life Ins. Co. v. Kaiser, 24 Ky. Law Rep. 2454, 74 S. W. 203, 115 Ky. 539; Cook v. Standard Life & Acc. Ins. Co., 47 N. W. 568, 84 Mich. 12; where the proofs are held to be inadmissible because of their ex parte character.

While it has been held that misstatements in proofs of death are conclusive of the facts therein contained as against the claimant, unless before the trial the insurer has been furnished with a corrected statement, the strictness of this rule has been relaxed so that it now applies only when the insurer has been prejudiced in his defense by relying on the statements contained in the proofs (Employers' Liability Assur. Corp. v. Anderson, 47 Pac. 331, 5 Kan. App. 18). Though the proofs are prima facie evidence of the facts stated therein, it is well settled that the beneficiary may, by amended proofs or parol testimony offered at the trial, show that the proofs submitted are erroneous, and explain any discrepancies therein.

John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; Dischner v. Piqua Mut. Aid & Accident Ass'n,

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85 N. W. 998, 14 S. D. 436; Modern Woodmen of America v. Kozak, 63 Neb. 146, 88 N. W. 248; Hanna v. Connecticut Mut. Life Ins. Co., 44 N. E. 1099, 150 N. Y. 526; Denver Life Ins. Co. v. Price, 69 Pac. 313, 18 Colo. App. 30.

A stipulation in a policy that the claimant thereunder shall make satisfactory proof of death of the insured does not mean that such proof shall be made as shall in all cases satisfy the insurer of the cause of death, but the insurer is only entitled to reasonable proof of the fact of death, and reasonable proof as to the cause of death; and such proof, when the cause of death becomes a question, is not binding on the insurer or claimant (Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550). It is not error to refuse to charge, as to the cause of a death, that the family physician's certificate of death, adhered to by him in his testimony, is prima facie evidence that deceased came to his death as therein set forth, and to charge instead that it is entitled to the weight which the jury would give an opinion of a learned physician, who saw deceased shortly before his death, and had personal knowledge of him for some time before (Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371).

If the contract does not require the proofs to state the cause of death, they are not admissible for the purpose of showing the cause.

Neudeck v. Grand Lodge, 61 Mo. App. 97; Buffalo Trust & Safe Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 27 N. E. 942, 126 N. Y. 450, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303.

Moreover, if the proofs of death contain statements not of the beneficiary's own knowledge, but in the nature of hearsay, they are incompetent (Mutual Life Ins. Co. v. Schmidt, 40 Ohio St. 112, affirming 6 Ohio Dec. 901). Statements in proofs of death furnished to other companies are not admissible as evidence against the insured, where there is no primary testimony as to the cause of death (Trudden v. Metropolitan Life Ins. Co., 64 N. Y. Supp. 183, 50 App. Div. 473).

The record of the proceedings at a coroner's inquest were held to be admissible in Grand Lodge Independent Order of Mutual Aid v. Wieting, 48 N. E. 59, 168 Ill. 408, 61 Am. St. Rep. 123, affirming 68 Ill. App. 125; but the weight of authority is that such rec-

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ords are not admissible, as the beneficiary was not a party to the proceedings.

Louis v. Connecticut Mut. Life Ins. Co., 58 App. Div. 137, 68 N. Y. Supp. 683; Mutual Life Ins. Co. v. Schmidt, 6 Ohio Dec. 901; Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. 160.

In a large majority of the cases this question has arisen in connection with the defense that there could be no recovery because the insured committed suicide. Reference is therefore made to the discussion of suicide as an excepted risk for additional citations.[1]

In the absence of a law so declaring, the records of a board of health are not admissible in an action on a life policy to show the cause of death (Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 56 Hun, 303, 9 N. Y. Supp. 346; Id., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839).

In an action on a life policy it was not proper to ask an expert, "From the evidence that you have listened to, what is your opinion as to the cause of the death?" The evidence relied on should be stated where the opinion is competent at all. Neudeck v. Grand Lodge, 61 Mo. App. 97.

Where the evidence is conflicting, the cause of death is a question for the jury (Modern Woodmen of America v. Davis, 84 Ill. App. 439, affirmed in 56 N. E. 300, 184 Ill. 236). So, too, the weight to be given admissions in proofs of loss made by a beneficiary is a question for the jury, to be determined by a consideration of all the facts and circumstances showing or tending to show a knowledge of their contents or otherwise (Modern Woodmen of America v. Kozak, 63 Neb. 146, 88 N. W. 248).

(c) Excepted risks.

Policies of life insurance usually provide that certain risks shall not be covered—that there can be no recovery if death occurs under certain circumstances or is due to certain named causes. Such exceptions, since they limit the liability of the company and are solely for its benefit, will be strictly construed.[2] **They must be interposed and proved as part of the defense, and need not be introduced by the plaintiff as part of his case** (Metropolitan Life Ins. Co. v. McKenna, 73 Ill. App. 283.)

Where the complaint alleged that death was not caused by the breach of any of the conditions of the policy, but this allegation was

[1] See post, p. 8224.

[2] See ante, vol. 1, p. 632.

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denied in the answer, and it was averred that death was caused by an excepted risk, the other allegations of the complaint being admitted, the insurer had the affirmative of the issue, and was entitled to open and close. Murray v. New York Life Ins. Co., 85 N. Y. 236.

The policy may provide that the company shall not be liable if insured dies within a specified time after the contract takes effect. Such a provision is not repugnant to the general promise to pay on proof of death (Bruton v. Metropolitan Life Ins. Co., 48 Hun [N. Y.] 204), but is binding on the beneficiary, and there can be no recovery if death occurs within the time limited (Willison v. Jewelers' & Tradesmen's Co., 30 Misc. Rep. 197, 61 N. Y. Supp. 1125). Policies also provide that there shall be no liability if the insured comes to his death while residing in certain prohibited localities. If, however, a permit is granted to reside in such locality for a certain period, the insurer is liable for a death resulting from an illness contracted within such period, and which prevented the insured from leaving the prohibited district before the expiration of the permit (Baldwin v. New York Life Ins. & Trust Co., 16 N. Y. Super. Ct. 530). Where the insured, in passing, as a passenger, over a usual route of conveyance from one place of permitted residence to another, stopped at a place of prohibited residence to consult a physician, and on his advice remained there, and died shortly thereafter (Converse v. Knights Templars' & Masons' Life Indemnity Co., 93 Fed. 148, 35 C. C. A. 232), this was not necessarily within the exception of risk.

An affidavit of defense is sufficient which avers that the deceased died while residing within the prohibited district, and that he resided there at that time without the consent of the society. Bateman v. Grand Fraternity, 18 Pa. Super. Ct. 385.

A provision that the policy should not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces, includes only death from casualties or consequences of war or rebellion carried on or waged by authority of some de facto government. Hence, where the assured, not being himself in the military service, was shot and killed by a party of men not in uniform, who robbed other citizens in the vicinity, his death was not within the exception (Welts v. Connecticut Mut. Life Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518, affirming 46 Barb. 412). So, a provision in a policy on the life of a slave, excepting from lia-

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bility the cases of death "by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice," does not embrace the case of the death of the slave, who is killed in an armed and violent resistance of the authority of a patrol (Spruill v. North Carolina Mut. Life Ins. Co., 46 N. C. 126). In Slevin v. Board of Police Pension Fund Com'rs, 123 Cal. 130, 55 Pac. 785, 44 L. R. A. 114, the policy limited the liability of the company to death from natural causes, and it was held that the provision excepted intentional or accidental killing.

If the policy excepts certain specified diseases, it must appear that the cause of death was strictly within the exception. Thus, where a permit to go to Cuba provided that insured should take his own risk of "death from epidemics" (Pohalski v. Mutual Ins. Co., 36 N. Y. Super. Ct. 234), the death of the insured from yellow fever was not within the exception if the disease was not "epidemic" in the ordinary and popular sense of the word. The exception of smallpox from the risks covered, unless insured has been successfully vaccinated, usually takes the form of a waiver by the insured. Where insured stated in his application that he had not been vaccinated, and waived all claims under the policy if death resulted from smallpox until after he had been successfully vaccinated (Sovereign Camp Woodmen of the World v. Gray, 26 Tex. Civ. App. 457, 64 S. W. 801), his death from that disease was not within the exception if in fact he had been successfully vaccinated before the application was made. In Sovereign Camp Woodmen of the World v. Woodruff, 32 South. 4, 80 Miss. 546, it appeared that insured stated that he had never been successfully vaccinated, and waived claim under the certificate, should his death result from smallpox. Prior to his death the constitution and by-laws had been amended so as to require an applicant who had not been successfully vaccinated to waive claim for death from smallpox until he had been successfully vaccinated. It was held that, on the death of insured from smallpox after the amendment, the beneficiary could recover under the certificate; insured having been successfully vaccinated meanwhile. It was further held in the case that "successful vaccination means only vaccination which had produced the usual symptoms of vaccination, which is deemed effective, and does not mean such as would render the subject absolutely immune from smallpox.

Where the application for insurance waived on the part of the applicant the liability of the insurer for death of the applicant from

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smallpox, but neither the application nor a copy thereof was attached to the policy, as required by Ky. St. 1903, § 679, to make it a part of the contract, the waiver was not available to defeat liability on the policy for death of the applicant from smallpox. Grand Lodge A. O. U. W. of Kentucky v. Edwards (Ky.) 85 S. W. 701.

(d) Same—Death while engaged in unauthorized occupation.

A common exception in policies is one relieving the insurer from liability if death occurs while the insured is engaged in any extra-hazardous occupation, or in an occupation other than that he is engaged in when the policy issues. It must clearly appear that an exception is intended, however. So, it was held in Hobbs v. Iowa Mutual Benefit Ass'n, 47 N. W. 983, 82 Iowa, 107, 11 L. R. A. 299, 31 Am. St. Rep. 466, where the policy provided as a prerequisite to membership that the applicant should not be engaged in any extra-hazardous occupation, that the member's death while engaged in an occupation so classified, and which he had entered after he became a member, was not an excepted risk in the absence of any specific provision to that effect. Where insured described his occupation as "yard conductor or yard master," and waived any claim for death resulting from his occupation as "such yard master" (Moore v. Citizens' Mut. Life Ins. Ass'n, 75 Hun, 262, 26 N. Y. Supp. 1014), death resulting from his occupation as yard conductor is within the exception, if it appears that at times he acted both as yard master and yard conductor. The death of the insured while engaged in sinking a shaft for the purpose of opening a coal mine is within the exception of the risk of the occupation of coal mining (Northwestern National Life Ins. Co. v. Irwin, 103 Ill. App. 580). Though insured is called a "district yard brakeman," and is employed only within limited territory, he is a freight brakeman, within a provision excepting the company from liability if insured is killed while acting as freight brakeman (Snow v. Modern Woodmen of America, 24 Ohio Cir. Ct. R. 142).

The insured must be actually engaged in the prohibited occupation to come within the exception. So, where the policy provided that insured should not, without the consent of the company, keep a saloon, and that, if he died during a violation of the condition, the company should pay only a limited sum (Union Cent. Life Ins. Co. v. Hughes' Adm'r, 110 Ky. 26, 60 S. W. 850), the exception did not take effect if, at the time of his death, insured was not keeping a saloon, though he owned a half interest in one. Where a policy

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insuring the life of a slave as a laborer in a tobacco warehouse provided that he was not to be employed in a more hazardous occupation (Summers v. United States Ins., Annuity & Trust Co., 13 La. Ann. 504), the death of the slave from drowning while on a journey to be employed on a sugar plantation was not within the exception. Similarly, **a merely temporary or casual employment is not contemplated by the exception.** Thus, where one insured as a farmer is drowned while assisting to save people from a wreck, he is not engaged in "wrecking," within the exception in the policy (Tucker v. Mutual Ben. Life Co., 50 Hun, 50, 4 N. Y. Supp. 505, affirmed without opinion in 24 N. E. 1102, 121 N. Y. 718). **To fall within the exception the occupation in which insured was engaged at the time of his death must be distinct from his ordinary occupation.** Therefore, the insurance of one as a "dealer in pumps and well supplies" covers the risk of death from an explosion while attempting to blow out a well casing with dynamite in the course of his regular business, though "blasting, mining, handling, and transporting explosive substances" were risks not assumed by the insurer (Mortensen v. Central Life Assur. Ass'n, 124 Iowa, 277, 99 N. W. 1059).

If an insurance company knows at the time of the issuance of its policy that insured is engaged in an occupation prohibited by the terms of the policy without special permission of the company, the issuance of the policy to him will be a waiver of the prohibition as to such occupation. Triple Link Mut. Indemnity Ass'n v. Williams, 26 South. 19, 121 Ala. 138, 77 Am. St. Rep. 34.

(c) Same—Death caused by intemperance or use of narcotics.

Death caused by intemperance or the excessive use of narcotics is usually an excepted risk. Death by delirium tremens by the voluntary use of intoxicants is, of course, within the exception (New York Life Ins. Co. v. La Boiteaux, 5 Ohio Dec. 242, 4 Am. Law Rec. 1). Generally, to fall within the exception, death must have been caused by the excessive use of liquor (Ætna Life Ins. Co. v. Davey, 123 U. S. 739, 8 Sup. Ct. 331, 31 L. Ed. 315), but it has been held that the beneficiary cannot recover if death was caused by even the moderate use of liquor (Beller v. Supreme Lodge, K. P., 66 Mo. App. 449).

Where the defense was that the insured, contrary to the agreement in his application, became an habitual drunkard, and met his death from the use of intoxicating liquors, an instruction properly declares the law which tells the jury that an habitual drunkard is

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a person given to inebriety or excessive use of intoxicating drinks, who has lost the power or will, by frequent indulgence, to control his appetite for it. Sitton v. Grand Lodge A. O. U. W. of Missouri, 84 Mo. App. 208.

The use of liquor or narcotics, to fall within the exception, must have been voluntary (New York Life Ins. Co. v. La Boiteaux, 5 Ohio Dec. 242, 4 Am. Law Rec. 1). Consequently, **a use in a manner and means prescribed by a physician does not affect the right of recovery** (Endowment Rank Knights of Pythias v. Allen, 104 Tenn. 623, 58 S. W. 241); but, though the persistence in the use might be a species of insanity, this does not excuse the use so as to avoid the effect of the exception (Stratton v. North American Mut. Life Ins. Co., 7 Leg. Gaz. [Pa.] 313).

One of the important questions arising as to this and other excepted risks is whether the use of intoxicants or narcotics was the proximate cause of death. The general rule is that, **under a condition excepting from the risks assumed death caused by the use of intoxicants, the thing prohibited must be the direct cause of death** (Mutual Life Ins. Co. v. Stibbe, 46 Md. 302). In Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216, 7 Am. Rep. 122, the court defined proximate cause as one which immediately precedes and produces it, as distinguished from the remote, mediate, or predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote and which the immediate cause; yet this difficulty does not change the fact that the death is to be attributed to the proximate, and not the mediate, cause. It was said in Holterhoff v. Mutual Ben. Life Ins. Co., 5 Ohio Dec. 141, 3 Am. Law Rec. 272, that **death by reason of intemperance in the use of intoxicating liquors means a death from the direct use of intoxicating liquors, such use being the controlling or proximate cause of the death, and not the remote cause.** Consequently, an intemperate person, whose death was occasioned by a cold or the administration of a hurtful drug, while he was sick and enfeebled by the excessive use of intoxicating liquors, does not die "by reason of intemperance from the use of intoxicating liquors," within the exception. On the other hand, it was held in New York Life Ins. Co. v. La Boiteaux, 5 Ohio Dec. 242, 4 Am. Law Rec. 1, that, if the insured died of delirium tremens caused by his voluntary use of intoxicating drinks, his death is caused by the use of intoxicating liquors, within a policy rendering it void in case of such death, though death would not have

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occurred if his nurse and physician had not neglected to care for him. In Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216, 7 Am. Rep. 122; Id., 34 Iowa, 222—where insured, while suffering from an attack of delirium tremens, escaped from his attendant, and ran out into the open air scantily clothed, by reason of which congestion of the lungs set in, causing death, this was regarded as death caused by intemperance, within the exception. So, too, it has been held (Hanna v. Connecticut Mut. Life Ins. Co., 28 N. Y. Supp. 661, 8 Misc. Rep. 431) that there can be no recovery where death occurs from alcoholism and extreme prostration; it being immaterial that the cause of death was partly extreme prostration. But where insured died of consumption, the fact that he had been intemperate six months before does not bring the death within the exception (Union Cent. Life Ins. Co. v. Hughes' Adm'r, 60 S. W. 850, 110 Ky. 26).

Though it was held in Campbell v. American Popular Life Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591, that under a clause declaring that the company would pay the amount insured for if, in the opinion of their surgeon in chief, the party did not die of intemperance, creates a condition precedent to the right of the plaintiff to recover, so that she must prove the decision of the surgeon, or account for its absence, as part of her case, the general rule is that **the burden is on the insurer to prove that the death of the insured was caused by intemperance or the use of narcotics within the exception.**

> Newman v. Covenant Mutual Ins. Ass'n, 40 N. W. 87, 76 Iowa, 56, 1 L. R. A. 659, 14 Am. St. Rep. 196; Boisblanc v. Louisiana Equitable Life Ins. Co., 34 La. Ann. 1167; Van Valkenburgh v. American Popular Life Ins. Co., 70 N. Y. 605, affirming 9 Hun, 583; New York Life Ins. Co. v. La Boiteaux, 5 Ohio Dec. 242, 4 Am. Law Rec. 1; Woodmen of the World v. Gilliland, 11 Okl. 384, 67 Pac. 485.

So, too, the burden is on defendant to prove that the drug causing death is a narcotic (Denver Life Ins. Co. v. Price, 18 Colo. App. 30, 69 Pac. 313).

Where the defense was that the death of the insured was caused by narcotics within the exception (Endowment Rank Knights of Pythias v. Allen, 58 S. W. 241, 104 Tenn. 623), the testimony of non-expert witnesses that the insured was a physical wreck "from the use of morphine and liquor," that he "seemed unable to resist the habit longer," and that "he seemed to be a slave to morphine," was properly excluded as incompetent. So, too, the testimony of a

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physican, who prescribed morphine for the insured, that he did not know, but thought, the insured took more morphine than was prescribed, was incompetent as being mere conjecture. Where the defense was that death resulted from the use of narcotics (Neudeck v. Grand Lodge, 61 Mo. App. 97), it was permissible for defendant to prove the reputation of the insured as a drinking man in the community in which he lived; and, when evidence was introduced tending to show that insured died from the effect of intoxicants, it was within the discretion of the trial court to permit plaintiff to introduce in rebuttal evidence as to insured's habits (Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687, 65 N. W. 552).

Though the fact that the cause of death was alcoholism might be shown by statements in the proofs of death if not contradicted (Hanna v. Connecticut Mut. Life Ins. Co., 150 N. Y. 526, 44 N. E. 1099), such statements are not conclusive.

Modern Woodmen of America v. Davis, 184 Ill. 236, 56 N. E. 300; Bentz v. Northwestern Aid Ass'n, 41 N. W. 1037, 40 Minn. 202, 2 L. R. A. 784.

The sufficiency of the evidence to show that insured's death was due to alcoholism was considered in Newman v. Covenant Mut. Ins. Ass'n, 76 Iowa, 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; Arnold v. Connecticut Mut. Life Ins. Co., 95 Me. 331, 49 A. 1103.

Whether the death of insured was caused by the use of intoxicants within the exception is a question for the jury.

De Camp v. New Jersey Mut. Life Ins. Co., 7 Fed. Cas. 313; Supreme Lodge K. P. v. Lloyd, 107 Fed. 70, 46 C. C. A. 153; Modern Woodmen of America v. Davis, 184 Ill. 236, 56 N. E. 300, affirming 84 Ill. App. 439; Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687, 65 N. W. 552.

(f) Same—Death while engaged in violation of law.

In the absence of any provision in the policy excepting such a risk, the insurer in a life policy is liable, though the insured was killed while committing a felony, if it does not appear that it was obtained in contemplation of the commission of the felony and the consequent danger (McDonald v. Order of Triple Alliance, 57 Mo. App. 87). **It is customary, however, to insert in life policies a condition declaring, in substance, that the insurer shall not be liable if the death of the insured occurs at the hands of justice, or in consequence of, or while he is engaged in, the violation of any law. A similar exception is contained in accident policies, and**

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the general principles upon which such provisions are construed are the same, whether the contract is an ordinary life policy or an accident policy. No distinction will be made in this discussion between the two classes of policies. Conditions embodying this exception are valid and enforceable (Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469). The exception is, however, abrogated by a provision declaring the policy incontestable for a certain number of years (Sun Life Ins. Co. v. Taylor, 108 Ky. 408, 56 S. W. 668, 94 Am. St. Rep. 383).

The burden of proof is on the insurer to show a violation of the law within the exception (Matthes v. Imperial Acc. Ass'n, 110 Iowa, 222, 81 N. W. 484; Cluff v. Mutual Ben. Life Ins. Co., 13 Allen, 308; Id., 99 Mass. 317); but the defense need be established only by a preponderance of evidence, proof beyond a reasonable doubt not being necessary (New York Acc. Ins. Co. v. Clayton, 59 Fed. 559, 8 C. C. A. 213).

In the construction and application of this exception, the first question to be determined is whether it refers to breaches of civil as well as criminal law. A leading case is Cluff v. Mutual Ben. Life Ins. Co., 13 Allen (Mass.) 308, where the insured, to enforce the collection of a debt, attempted to forcibly take certain personal property from his debtor, and was shot by the latter. The court held that such a forcible taking, if done under an honest claim of right, however ill-founded, would not constitute the crime of robbery or larceny. The condition of the policy was that the insurer should not be liable if the insured should die "by the hands of justice or any known violation of any law" of the state or county where he resided or which he was permitted to visit. It was held that this provision must be construed to refer to a voluntary criminal act on the part of the insured, and that it did not extend to mere trespass against property or other infringement of civil laws to which no criminal consequences were attached. The case turned on the question whether insured committed an assault at the time, a court conceding that an assault would be a criminal act within the conditions of the policy. The principles thus laid down were followed in a subsequent appeal reported in 99 Mass. 317. A like policy on the same life and in the same company was considered in Bradley v. Mutual Ben. Life Ins. Co., 3 Lans. (N. Y.) 341, where the court declined to follow the Massachusetts case, and held that the exception did not refer merely to violations of the criminal laws, but construed it as intended to prevent the insured from doing any

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act in violation of law which would naturally lead to a conflict by which his life would be endangered. The Court of Appeals (45 N. Y. 422, 6 Am. Rep. 115) did not pass upon this phase of the question, but it was stated in the opinion that the members of the court were not in agreement upon that point, and the decision of the Supreme Court was reversed on other grounds. The question was considered again in Lehman v. Great Eastern Casualty & Indemnity Co., 7 App. Div. 424, 39 N. Y. Supp. 912, affirmed without opinion in 158 N. Y. 689, 53 N. E. 1127, where the law alleged to be violated was a provision of the general railroad law[8] declaring that no person shall walk on or along a railroad track, except where the same shall be laid across or along streets or highways.' The court held that, as the railroad company had permitted the public to use its tracks at a place not a street crossing for a sufficient length of time to create a license, a person crossing a track at such place was not guilty of violating the law within the exception. The court remarked, however, that the statute referred to forms no part of the criminal law of the state, and that no penalty is imposed for a violation thereof. It is simply one of the provisions of the general railroad law, and though, in a somewhat restricted sense, it may be said to have been induced by public considerations, it is designed primarily for the protection of railroad companies. Consequently, if the company consents to the use of the tracks by the public for the purpose of a highway crossing, it would require a strained construction of the law to hold that people availing themselves of the privilege thus afforded became, ipso facto, criminals. This remark on the part of the court affords a basis for the inference that the court regarded the exception as referring to violations of the criminal, and not the civil, laws.

The doctrine of the Cluff Case was, however, rejected in Indiana (Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469), and the court, after a careful consideration of the question, laid down the rule that **a violation of a positive law, whether the law was a civil or a criminal one, would avoid the policy, if the natural and reasonable consequences of the violation were to increase the risk. On the other hand, a violation of law, whether the law is a civil or criminal one, would not avoid the policy, if the natural and reasonable consequences of the act were not an increase of risk.** Such would seem, also, to be the opinion of the Supreme Court of the

[8] Laws N. Y. 1892, c. 676, § 53.

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United States in Travelers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. Ed. 155, where the court said that it was against the general species of danger attending nearly all infractions of law that the exception was directed.

In the Missouri courts, the question has been raised whether, conceding that the violations must be in the nature of a criminal act, the exception will be operative if it is a mere misdemeanor. In Harper's Adm'r v. Phœnix Ins. Co., 18 Mo. 109, it was held that the policy was not avoided if the insured was killed under circumstances which would make the slayer guilty of manslaughter. On second appeal, reported in 19 Mo. 506, the court considered the effect of the exception at some length. The exception provided that no liability should attach to the insurer if the insured should die "in consequence of a duel, or by the hands of justice, or in the known violation of any law of this state." On the ground that the associated exceptions imputed the commission of a felony by the insured, the court held, in accordance with the maxim "Noscitur a sociis," that the exception as to violation of law extended only to instances when the violation amounted to a commission of a felony. The principles of the Harper Case were approved in Overton v. St. Louis Mut. Life Ins. Co., 39 Mo. 122, 90 Am. Dec. 455, but it does not appear that the insured was guilty of any violation of the law at the time he was killed, and it cannot be said that the court passed upon the exact point considered in the Harper Case. In Wolff v. Connecticut Mut. Life Ins. Co., 5 Mo. App. 236, the condition was that the company should not be liable if the insured should die "by suicide, or in consequence of his violation of any law, or if he shall become so far intemperate as to impair his health or induce delirium tremens, or if he shall be convicted of a felony." The court held that none of the associated exceptions were felonious in Missouri, and therefore distinguished the case from the Harper Case, and held that the exception covered misdemeanors. But the court said in addition that, **while the exception is not confined to felonies, they do not wish to be understood as extending it to every misdemeanor of the nature of or calculated to induce a breach of the peace.** They confined their holding to the facts before them, according to which the insured met his death while committing a crime below the grade of felony, but of such a nature as to render the killing a case of justifiable homicide. The same question was again considered in Brown v. Supreme Lodge K. P., 83 Mo. App. 633, where the condition was that there should

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be no liability if the death of the insured should "result from suicide, or if such death shall be caused or superinduced by the aid of intoxicating liquors, or in consequence of a duel, or at the hands of justice, or in violation of any criminal law." As all of the associated exceptions were not offenses of the grade of a felony, the court distinguished the Harper Case, and regarded the facts as bringing the policy within the ruling of the Wolff Case. The court expresses the opinion that the exception ought not to be confined to a case where the insured lost his life in the commission of a felony. It should not be applied where he suffers death by reason of a "misdemeanor" in the full sense of the word, but should be construed to express any act of the insured which might be denominated a "crime"; and if his offense was of that character, whether it was a felony or not, and he lost his life in consequence of it, and under circumstances which made the killing justifiable homicide, a forfeiture ought to be declared.

Where the exception was that the insurer shall not be liable for death of the insured, occurring while he was engaged in "the known violation of any law," it has been held that the fact that the acts constituted a violation of the law must be known to the insured.

Dean v. American Mut. Life Ins. Co., 4 Allen, 96; Cluff v. Mutual Ben. Life Ins. Co., 13 Allen, 308; Id., 99 Mass. 317.

The exception is not avoided because the insured was at the time intoxicated (Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469), and it does not affect the result whether the death of the insured was accidental or caused by the intentional act of another (Murray v. New York Life Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658, affirming 30 Hun, 428).

The next question for determination is what constitutes a violation of law within the terms of the exception. In Matthes v. Imperial Acc. Ass'n, 110 Iowa, 222, 81 N. W. 484, where a violation of the Iowa law[4] prohibiting labor on Sunday was alleged, it was held that it must appear that the labor was not a work of necessity. Riding a bicycle to attend a funeral on Sunday is not a violation of the Maine Sunday Law[5] (Eaton v. Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048). On the other hand, where one walks from one town to another on Sunday for the purpose of hunting, he violates the Vermont law[6] forbidding hunting on Sunday, or traveling on Sunday, except from necessity or charity (Duran v. Standard Life

[4] Code 1873, § 4072. [5] Rev. St. c. 124, § 20. [6] Rev. Laws, §§ 4315, 4316.

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& Acc. Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637). To show a violation of the Texas statute[7] prohibiting seining in streams above tide water it must be shown that the stream was above tide water (Conboy v. Railway Officials' & Employés' Acc. Ass'n, 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154; Id., 43 N. E. 1017). So, there is not a violation of the Iowa statute[8] prohibiting placing across any body of water a trot-line, so as to prevent the free passage of fish, unless such line is so placed as to prevent the free passage of fish (Collins v. Bankers' Acc. Ins. Co., 64 N. W. 778, 96 Iowa, 216, 59 Am. St. Rep. 367).

Attempting to board a moving street car by the front platform is not a violation of a city ordinance declaring that "no persons except motormen, conductors or police officials in uniform shall be allowed on the front platform of any such cars, when in operation, except that such front platform shall be used for the ingress and egress of passengers at stoppages. The rear platform of the cars shall also be used for the ingress and egress of passengers." (Johanns v. National Acc. Soc. of City of New York, 45 N. Y. Supp. 117, 16 App. Div. 104.) The court said that, if the insured had a right to board the car at all when it was in motion, he no more violated the city ordinance by using the front platform for that purpose than he would have done by using the rear platform. In Evans v. Phœnix Mut. Relief Ass'n, 1 Pa. Dist. R. 27, the policy declared that it should be void if the insured should take his own life by any unlawful act. It was held that the clause did not apply if insured, while trespassing on a train, was thrown under the wheels and killed.

There must be some overt act to constitute a violation of law. Mere intent to violate is not sufficient. Thus, where the insured started out to hunt prairie chickens during the closed season, it was not a violation of law if no act contrary to the statute was actually performed (Cornwell v. Fraternal Acc. Ass'n of America, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. Rep. 601). So, making preparations to leave a train by getting out on the step while the train was still in motion is not a violation of a statute[9] making it a misdemeanor to get off or on railroad cars in motion (Smith v. Ætna Life Ins. Co., 88 N. W. 368, 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153).

[7] Willson's Cr. St. 1897, art. 510. [8] Acts 23d Gen. Assem. c. 34, § 6.
[9] Code Iowa, § 4811.

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In Hatch v. Mutual Life Ins. Co., 120 Mass. 550, 21 Am. Rep. 541, death of a woman from the effects of an abortion was regarded as not within the risks assumed in the policy, the basis of the holding being that public policy precludes a recovery when death ensues from an abortion voluntarily submitted to without any justifiable medical necessity. This reasoning was approved in Wells v. New England Mut. Life Ins. Co., 191 Pa. 207, 43 Atl. 126, 53 L. R. A. 327, 71 Am. St. Rep. 763, but it was also held that death from such cause fell within the terms of the exception of death resulting from violation of law.

In a few cases it has been contended by the insurer that the suicide of the insured was a violation of law within the exception. It was, however, held in Patrick v. Excelsior Life Ins. Co., 67 Barb. (N. Y.) 202, that **the exception cannot be construed to include suicide, though suicide has been called a felony.** The leading case in New York is Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430, where it was said that, though the attempt to commit suicide is a criminal offense, the actual successful suicide is not so declared, and it cannot be regarded as equivalent to an attempt.

This doctrine was followed in Freeman v. National Ben. Soc., 42 Hun, 252; Meacham v. New York State Mut. Ben. Ass'n, 46 Hun, 363.

It was, however, held in Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, that suicide, though not declared a crime, is at least an illegal act, within an exception of liability if the death of the insured should be caused by any illegal act of his own. The rule that suicide is not a violation of law within the usual exception has also been asserted in Minnesota (Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631) and Illinois (Royal Circle v. Achterrath, 68 N. E. 492, 204 Ill. 549, 63 L. R. A. 452, 98 Am. St. Rep. 224). And in Wisconsin it was said (Patterson v. Natural Premium Mut. Life Ins. Co., 75 N. W. 980, 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899) that though suicide is technically a crime, as the common law prevails, except as altered by statute, it is not a crime in the ordinary meaning of the term, in the absence of any statute punishing suicide or attempt to commit suicide.

In a majority of cases involving the consideration and application of this exception the insured has been engaged in an altercation with

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or an assault upon another. There seems to be no question as to the rule that **where the insured commits a direct and aggravated assault, or in the progress of an altercation so conducts himself as to justify his adversary in taking his life in self-defense, or under such circumstances as render the killing justifiable homicide, there is a violation of law on the part of the insured within the exception.**

This rule is illustrated in Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469; Prudential Life Ins. Co. of America v. Higbee's Adm'r, 22 Ky. Law Rep. 495, 57 S. W. 614; Payne v. Union Life Guards (Mich.) 99 N. W. 376; Wolff v. Connecticut Mut. Life Ins. Co., 5 Mo. App. 236; Brown v. Supreme Lodge K. P., 83 Mo. App. 633; Davis v. Modern Woodmen of America, 73 S. W. 923, 98 Mo. App. 713; Murray v. New York Life Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658, affirming 30 Hun, 428. And evidence as to threats made by the insured previous to the altercation or assault is admissible to show the character of his acts. Yale v. Travelers' Ins. Co., 2 Thomp. & C. (N. Y.) 221.

On the other hand, **if the insured is guilty of no more than a simple assault, or is fighting in self-defense, or, having engaged in a fight, has withdrawn and retreated, not for the purpose of gaining vantage ground, but with the intent to retire from the struggle, so that it is not justifiable homicide for the adversary to kill him, the death of the insured is not within the exception.**

This rule is illustrated in Robinson v. United States Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317; Harper's Adm'r v. Phœnix Ins. Co., 18 Mo. 109; Id., 19 Mo. 506; Overton v. St. Louis Mut. Life Ins. Co., 39 Mo. 122, 90 Am. Dec. 455.

Associated with the exception as to violation of law is sometimes found a provision that the insurer shall not be liable if the insured is killed in a duel. The word "duel" signifies a prearranged combat. Consequently, the fact that the insured was killed in a combat does not relieve the insurer, unless it appears that such combat was prearranged. (Davis v. Modern Woodmen of America, 98 Mo. App. 713, 73 S. W. 923.)

Whether the law violated be a criminal or a civil law, there must in all cases be some causative connection between the act which constituted the violation of law and the death of the insured (Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469).

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Death must have been caused by the violation of law, to exempt the company from liability. It cannot be the true meaning of the exception that the policy is to be avoided by the mere fact that at the time of the death the insured was violating the law, if the death occurred from some cause other than such violation (Bradley v. Mutual Benefit Life Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115). Thus, the fact that insured was killed while living in a state of fornication with his mistress (Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685), or while leaving a bawdy house and carrying concealed weapons (Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485), does not release the insurer unless the death of the insured was the necessary and natural consequence of the unlawful act as its probable and to be anticipated result. So, too, it is not sufficient that death or injury occurred while insured was taking steps preparatory to (Cornwell v. Fraternal Acc. Ass'n, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. Rep. 601), or intending (Supreme Lodge Knights of Pythias v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741, affirming 94 Fed. 751, 36 C. C. A. 467), a violation of law.

These principles are also illustrated in Standard Life & Accident Ins. Co. v. Fraser, 76 Fed. 705, 22 C. C. A. 499; Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.) 72 S. W. 1016; Conboy v. Railway Officials' Employés' Acc. Ass'n, 46 N. E. 363, 17 Ind. App. 62, 60 Am. St. Rep. 154; Smith v. Ætna Life Ins. Co., 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153.

Similarly, if the cause of death was otherwise within the policy, the insurer is not relieved from liability because the insured was at the time violating the Sunday labor law, unless the fact that it was Sunday contributed to the death (Matthes v. Imperial Acc. Ass'n, 81 N. W. 484, 110 Iowa, 222). So, the exception does not apply where insured was injured on Sunday while at a friend's house after hunting, though hunting on Sunday is prohibited by law (Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601).

Not only must there be a causative connection between the violation of law and the death, but such connection must be direct, and not indirect; proximate or immediate, and not remote. Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause. But the maxim, "Causa proxima non remota spectatur,"

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does not mean necessarily that the cause or condition which is nearest in time or space is to be deemed the proximate cause. On the contrary, as said in Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, it means that the law will not go further back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause. So, the fact that the death of the insured is the consequence of some illegal act of his is not sufficient if it did not occur while engaged in such illegal act as the direct result thereof. Thus, though one has committed an assault on or engaged in a combat with another, the violation of law involved therein does not relieve the insurer if the insured has ceased from his assault or retreated from the combat, and is killed by the other person from motives of revenge, though the acts immediately follow each other.

As illustrating these principles, reference may be made to Cluff v. Mutual Ben. Life Ins. Co., 13 Allen, 308; Id., 99 Mass. 317; Supreme Lodge K. P. v. Bradley (Ark.) 83 S. W. 1055, 67 L. R. A. 770.

A similar principle governed Goetzman v. Connecticut Mut. Life Ins. Co., 3 Hun (N. Y.) 515, 5 Thomp. & C. 572, where the insured was killed by H. shortly after having had illicit intercourse with the wife of H., and it was held that, even if the act of the insured was a violation of the law, he did not die in consequence of it, within the meaning of the policy.

The converse of the rule is well illustrated by the leading case of Travelers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. Ed. 155. Insured and another were driving in sulkies in a horse race, contrary to statute. The sulkies came into collision, and insured jumped to the ground uninjured. But in attempting to get hold of the reins, which had fallen, he became entangled in them, and was dragged against a stone, causing his death. It was held that the leap from the sulky and securing the reins, and the subsequent fall and injury, were so close and immediate in their relation to the racing, and all so manifestly part of one continuous transaction, that it could not be said that there was a new and controlling influence to which the disaster should be attributed.

An interesting phase of this question is presented by those cases in which death occurred while the insured was escaping from, or

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attempting to evade, arrest after the commission of a crime. In Griffin v. Western Mut. Ben. Ass'n, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848, the insured entered the office of the State Treasurer, and by show of arms obtained a sum of money, and was shot and killed while making his ecape, but before he had reached the outer door of the capitol. It was held that, as he had obtained the money and was making his escape while shot, he was not, at the instant of death, violating any law, within the terms of the exception. So, where insured was shot by a sheriff who was attempting to arrest him as a deserter, his death was not within the exception, especially as it appeared that the only reason for the shooting was that the insured did not put up his hands when commanded to do so (Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913). It was also held in Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, that suicide by the insured, committed to avoid arrest and trial for crime, is not the proximate result of the alleged crime, so as to relieve the insurer. On the other hand, it was held in Prudential Ins. Co. v. Haley, 91 Ill. App. 363, affirmed in 59 N. E. 545, 189 Ill. 317, where the insured was shot by a police officer a few minutes after he had committed a robbery, and while he was attempting to escape with the money, that his death was within an exception declaring that there may be no recovery in case the insured died in consequence of his own criminal action.

(g) Same—Death at the hands of justice.

Associated with the exception as to death while engaged in a violation of law is a clause releasing the insurer from liability if the insured should die by the hands of justice. Under this clause the insurer is exempt if the insured is executed in pursuance of a conviction of crime (Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482). **On considerations of public policy, however, the courts have held that execution for a crime is an excepted risk, though not so specified in the policy** (Kilpatrick v. Metropolitan Life Ins. Co. [Pa.] 13 Ins. L. J. [N. S.] 576). This principle has been discussed at length in Burt v. Union Cent. Life Ins. Co., 23 Sup. Ct. 139, 187 U. S. 362, 47 L. Ed. 216, affirming 105 Fed. 419, 44 C. C. A. 548. The court considers the question in two aspects: First, whether a policy of life insurance binds the insurer to pay the amount thereof in case the insured is legally and justly executed

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for crime; and, secondly, whether the company is so liable when, as alleged in this case, insured was not guilty of the crime for which he was convicted and executed. As to the first aspect of the question the court says: "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and, as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." As to the second aspect of the question, the court holds that there cannot be valid insurance against a miscarriage of justice. Such a contract would, in effect, be a speculation on whether the courts would do justice. It would tend to encourage want of confidence in the efficiency of the courts, and is therefore void as against public policy. There is a wagering feature in such stipulation which forbids its being incorporated into the policy, and, if it cannot be formally incorporated, its omission therefrom, or the failure to make a specific exception, cannot by implication give it life and validity.

The question was again discussed in Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 345, and it was held that execution for crime must be regarded as an excepted risk, not out of consideration for the insurer, but on grounds of public policy; and for the same reason a clause declaring the policy incontestable after two years will not prevent the insurer from relying on the defense.

(h) Same—Death caused by beneficiary or assignee.

On considerations of public policy, rendering unnecessary any express exception in the contract, the death of the insured intentionally caused by the beneficiary or assignee of the policy is, so far as the person causing the death is concerned, an excepted risk.

Reference may be made to New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Prather v. Michigan Mut. Life Ins. Co., 19 Fed. Cas. 1244; Schreiner v. High Court Illinois Catholic Order of Foresters, 35 Ill. App. 576; Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239, affirming 106 Ill. App. 665; Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

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The rule is analogous to that prevailing in fire insurance, where the fire is set by the insured,[10] and to that prevailing where the death of a testator is caused by the beneficiary under the will.[11]

Following the analogy to fire insurance, it has also been held that the killing of the insured by an insane beneficiary does not affect the right of recovery under the policy (Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183, reversing 51 Ill. App. 200); and in Schreiner v. High Court of Illinois Catholic Order of Foresters, 35 Ill. App. 576, the court, recognizing the rule where death is intentionally caused by the beneficiary, held that it did not apply when death was caused by the carelessness, or even an unlawful act, of the beneficiary. The court expressed the opinion that the insurer under its contract impliedly assumes the risk of all carelessness by every person, whether a possible beneficiary under the contract or not, from which the death of the insured may result, unless such acts of carelessness are especially excepted; therefore a death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract, and ought not to defeat the policy.

But conceding that, so far as the person intentionally causing the death of the insured is concerned, the insurer is released, that result will not follow as to other persons entitled to take under the policy. **The insurer's liability is not absolutely terminated, but the policy will be enforced for the benefit of the heirs or estate of the insured.**

> Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 70 N. E. 567, 209 Ill. 277, 65 L. R. A. 508, 101 Am. St. Rep. 239, affirming 106 Ill. App. 665; Schmidt v. Northern Life Ass'n, 83 N. W. 800, 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323; New York Life Ins. Co. v. Davis, 32 S. E. 475, 96 Va. 737, 44 L. R. A. 305.

It was contended by the insurer in the Menkhausen Case that the entire policy should be declared void on the ground that a beneficiary might be incited to commit murder by the fact that, if unable to collect the benefit himself, it would be payable to some other person or persons in whose welfare he was interested. But the court remarked that human experience teaches that those willing

[10] See ante, p. 3015.

[11] Causing death of testator as disqualification of devisee or legatee, see Century Digest, vol. 49, "Wills," cols. 2614, 2615, § 1692.

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to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential. And even were it otherwise, if the rule suggested by the insurer were established, the society would profit by the murder, and an incentive be created for the destruction of the life of the insured, that the interest of the insurer might be advanced. A policy will not, however, be enforced for the benefit of the heirs of the beneficiary or her assignee (Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323).[12]

The burden of proof to sustain the defense that the plaintiff murdered the insured to obtain money is on the insurer (Prather v. Michigan Mut. Life Ins. Co., 19 Fed. Cas. 1244). But the fact need not be proved beyond a reasonable doubt; a fair preponderance of evidence being all that is necessary.

Prather v. Michigan Mut. Life Ins. Co., 19 Fed. Cas. 1244; Jack v. Mutual Reserve Fund Life Ass'n, 113 Fed. 49, 51 C. C. A. 36.

The record of the court in which the beneficiary was tried and convicted of homicide, though admissible, is not conclusive as to the fact that the killing was of such character as to deprive her of her rights under the policy (Schreiner v. High Court of Illinois Catholic Order of Foresters, 35 Ill. App. 576). As bearing on the question of intent, it is proper to show that the assignee, who had caused the death of the insured, had obtained other policies on the life of the insured in other companies (New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997). The declarations of the insured, made just before his death, tending to show a conspiracy between the assignee of the policy and the person who actually administered the poison from which insured died, were admissible (Jack v. Mutual Reserve Fund Life Ass'n, 113 Fed. 49, 51 C. C. A. 36). And in the same case it was said that under an allegation of a conspiracy between plaintiff and another to defraud the company by procuring the issuance of the policy on the life of the insured, and then murdering him, statements, declarations, or acts of the co-conspirator are not inadmissible because made or occurring after the death of the insured, on the ground that the object of the conspiracy had been accom-

[12] Collection of life insurance as motive for homicide, see Century Digest, vol. 26, "Homicide," col. 539, § 331.

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plished, since it was not in fact accomplished, under such allegation, until the collection of the insurance.

The evidence was held insufficient to show that insured's death was caused by poison administered by the beneficiary in Mutual Life Ins. Co. v. Mellott (Tex. Civ. App.) 57 S. W. 887.

2. CAUSE OF DEATH OR INJURY IN ACCIDENT INSURANCE.

(a) What constitutes accident in general.
(b) External or violent means of injury.
(c) Risks of travel.
(d) Risks of occupation.
(e) Limitation as to time of death or disability caused by accident.
(f) Questions of practice—Pleading.
(g) Same—Evidence.
(h) Same—Questions for jury.

(a) What constitutes accident in general.

Policies of accident insurance usually insure against "bodily injuries caused by external, violent, and accidental means." The important factor in this description of the risk assumed is the word "accidental." In determining whether the cause of injury or death is one of the risks covered, it is therefore necessary to first determine what is meant by the term "accidental," and whether the particular cause was "accidental," within the definition. Strictly speaking, a means is accidental perhaps only when disassociated from any human agency, but this narrow interpretation is not recognized in the law of accident insurance. Whether or not the means is accidental is determined by the character of its effects. **Accidental means are those which produce effects which are not their natural and probable consequences.** The natural consequence of means used is the consequence which ordinarily follows from its use—the result which may be reasonably anticipated from its use, and which ought to be expected. The probable consequence of the use of a given means is the consequence which is more likely to follow from its use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is

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not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of such means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means. It is produced by means which was neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means. (Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653.)

For further illustrations of these principles, reference may be made to United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, affirming Barry v. United States Mut. Acc. Ass'n (C. C.) 23 Fed. 712; Travelers' Ins. Co. v. Selden, 78 Fed. 285, 24 C. C. A. 92; Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 30 C. C. A. 48; Newman v. Railway Officials' & Employés' Acc. Ass'n, 15 Ind. App. 29, 42 N. E. 650; Omberg v. United States Mut. Acc. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; Providence Life Ins. & Inv. Co. v. Martin, 32 Md. 310; Railway Officials' & Employés' Acc. Ass'n v. Drummond, 56 Neb. 235, 76 N. W. 562; Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; United States Mut. Acc. Ass'n v. Hubbell, 47 N. E. 544, 56 Ohio St. 516, 40 L. R. A. 453; North American Life & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Dec. 212; Richards v. Travelers' Ins. Co., 26 Pac. 762, 89 Cal. 170, 23 Am. St. Rep. 455.

It has been said, however, that if the injury results from ordinary acts, no unusual circumstances intervening (McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254), it cannot be regarded as accidental. Thus, where a carpenter, in the performance of his ordinary work, put forth an effort which was too severe for his then physical condition, an injury resulting therefrom is not an accident (Niskern v. United Brotherhood of Carpenters & Joiners of America, 87 N. Y. Supp. 640, 93 App. Div. 364). So, where insured, while in an emaciated condition, after safely alighting from a train, carried baggage weighing 60 pounds for 50 yards, and in doing so injured himself in an unexplained manner, so that, on putting the baggage down, a defect in his vision became noticeable, which resulted in loss of sight, he could not recover as for accidental injury (Cobb v. Preferred Mut. Acc. Ass'n, 96 Ga. 818, 22 S. E. 976). And in Feder v. Iowa State Traveling Men's Ass'n, 107 Iowa, 538, 78 N. W.

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252, 43 L. R. A. 693, 70 Am. St. Rep. 212, it was held that the death of the insured will not be considered accidental when it resulted from the rupture of an artery as he rose to close a window, in the absence of evidence that anything was done or occurred which he had not foreseen and planned, except the rupture.

In these cases the underlying theory seems to be that the acts of the insured were wholly natural and voluntary, so as to exclude the idea of accident. So it was held in Appel v. Ætna Life Ins. Co., 86 App. Div. 83, 83 N. Y. Supp. 238, that the insurer could not be held liable on the death of the insured resulting from an inflammation of the appendix caused by the regular movement of the psoas muscle while insured was riding his bicycle. And where one recovering from a sickness was asleep, and, being suddenly awakened, with the direction to dress quickly, arose, appearing somewhat dazed and confused, hurriedly attempted to remove his nightshirt over his head, and, while his arms were raised, became entangled therein, and, putting forth exertions, broke a blood vessel, his movements cannot be held to have been involuntary, so as to render the injury accidental (Smouse v. Iowa State Traveling Men's Ass'n, 92 N. W. 53, 118 Iowa, 436). In an early case (Southard v. Railway Passengers' Assur. Co., 22 Fed. Cas. 810), it was said that an injury caused by insured's jumping from the cars, or by running to see if they were coming, was not an injury caused by accidental means if he acted for his own convenience, and not from perilous necessity.

It must be confessed that it is difficult to reconcile these cases with the general principles as to what constitutes an accident, and with cases which recognize that injuries may be accidental, though received in the performance of ordinary acts, no known, extraordinary, or unforeseen causes intervening. Thus, it has been held that a sudden strain (North American Life & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212) or exertion causing unforeseen and unusual effects, such as the dilation of the heart (Horsfall v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846), are accidents within the terms of the policy. In the leading case of United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, the insured was fatally injured by jumping from a platform four or five feet from the ground. It appeared that two companions of the insured had jumped from the same platform just before him without any injury. The court held that the insured undoubtedly intended to

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alight safely, and thought that he would, and that the injury must therefore be regarded as accidental.

The following causes of injury or death have been regarded as accidental within the definition given above: Drowning, Konrad v. Union Casualty & Surety Co., 49 La. Ann. 636, 21 South. 721; Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620; rupture of blood vessel caused by sudden wrench of body, McCarthy v. Travelers' Ins. Co., 15 Fed Cas 1254; Standard Life & Acc Ins. Co. v. Schmaltz, 53 S. W. 49, 66 Ark. 588, 74 Am. St. Rep. 112; fright and physical exertion in attempt to restrain runaway horse, McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; asphyxiation by gas in well, Pickett v. Pacific Mut. Life Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618; blood poisoning resulting from abrasion of toe by shoe, Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; blood poisoning resulting from cutting a corn, Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985; blood poisoning from use of hypodermic needle, Bailey v. Interstate Casualty Co., 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed without opinion 158 N. Y. 723, 53 N. E. 1123; fall as result of stumbling, Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; inadvertent fall from moving train, Smith v. Ætna Life Ins. Co., 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153; hanging at the hands of a mob, Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206; poisoning by sting of insect, Omberg v. United States Mut. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; poison taken by mistake, Mutual Acc. Ass'n v. Tuggle, 39 Ill. App. 509; Hill v. Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187; Pollock v. United States Mut. Acc. Ass'n, 102 Pa. 230, 48 Am. Rep. 204. But see Carnes v. Iowa Traveling Men's Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306, where it was said that, if the insured took more morphine than he intended to take, his death was accidental; it was not accidental if he knew how much he was taking, and was merely ignorant that such an amount would cause death.

Even when the act causing the injury or death is the intentional act of another, it may, as to the insured, be an accident within the meaning of the policy.

Ripley v. Railway Passengers' Assur. Co., 20 Fed. Cas. 823, affirmed 16 Wall. 336, 21 L. Ed. 469; Robinson v. United States Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485; Campbell v. Fidelity & Casualty Co. of New York, 60 S. W. 492, 22 Ky. Law Rep. 1295, 109 Ky. 661; Furbush v. Maryland Casualty Co., 91 N. W. 135, 131 Mich. 234, 100 Am. St. Rep. 605; Collins v. Fidelity & Casualty Co., 63 Mo. App. 253; Hester v. Fidelity & Casualty Co., 69 Mo. App. 186; Accident

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Ins. Co. of North America v. Bennett, 90 Tenn. 256, 16 S. W. 723. 25 Am. St. Rep. 685; Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873.

It is true that in the foregoing cases the policy did not contain a condition declaring intentional injuries an excepted risk. But the principle that such an injury may fairly be regarded as an accident has been asserted even in cases where recovery was denied because such injuries were excepted.

Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Phelan v. Travelers' Ins. Co., 38 Mo. App. 640.

In American Acc. Co. v. Carson (Ky.) 30 S. W. 879, the court expressed the opinion that the death of an officer, resulting from wounds inflicted by a prisoner while resisting arrest, is not death from "accidental injuries," within the meaning of that phrase as used in an accident policy. But it is not clear from the opinion whether the court meant that an intentional injury could not be accidental, or that, in view of the clause excepting intentional injuries, such an injury was not an accident insured against. However that may be, on a second appeal (99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473) the court recognized the principle that an intentional injury may be accidental so far as the insured is concerned, within the terms of the policy; holding, moreover, that, owing to the peculiar phraseology of the exception, death by the intentional act of another did not fall within it. In the Hutchcraft Case the court, in deciding that an intentional injury can be an accident, limits its decision to cases in which the insured is not the aggressor, and the injury is not the result of his misconduct or participation. The same limitation is emphasized in Supreme Council Order of Chosen Friends v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298. So, where the insured has violently attacked another, and has in effect challenged him to a deadly encounter, his death at the hands of his adversary cannot be regarded as accidental (Taliaferro v. Travelers' Protective Ass'n of America, 80 Fed. 368, 25 C. C. A. 494). On the other hand, it has been held in Missouri (Lovelace v. Travelers' Protective Ass'n of America, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638) that the death of the insured was none the less accidental because he had voluntarily engaged in a fight in which he received

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his death wound, in the absence of anything to show that he anticipated that his death might ensue and voluntarily assumed the risk.

(b) External or violent means of injury.

But to fall within the terms of the policy the injury must be caused not only by accidental means, but also by "external and violent means." Obviously, when the injury is due to a fall, it is both external and violent (Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267). And this is true though the fall itself was due to some temporary and unexpected physical disorder.

Meyer v. Fidelity & Casualty Co. of New York, 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374; Interstate Casualty Co. v. Bird, 18 Ohio Cir. Ct. R. 488, 10 O. C. D. 211.

But it is not necessary that the external violence should be in the nature of a fall or blow. The phrase is designed to protect the company against hidden or secret diseases resulting in injury, and which are liable to occur from internal or natural causes (American Acc. Co. v. Reigart, 23 S. W. 191, 94 Ky. 547, 21 L. R. A. 651, 42 Am. St. Rep. 374). Thus, where death was caused by the sting of an insect, such cause was external and violent within the policy. (Omberg v. United States Mut. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413). **It is only necessary that the cause of death or injury should be external to the person, though it acts internally.** So, if death was caused by fright, and the means which produced the fright was external, it would fall within the clause (McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190). Though drowning is the result of the action of water internally, yet, as the water is external to the person, death by drowning is produced by external and violent means.

Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; Wehle v. United States Mut. Acc. Ass'n, 47 N. E. 35, 153 N. Y. 116, 60 Am. St. Rep. 598; Tucker v. Mutual Ben. Life Co., 50 Hun, 50, 4 N. Y. Supp. 505, affirmed (1890) 121 N. Y. 718, 24 N. E. 1102; De Van v. Commercial Travelers' Mut. Acc. Ass'n of America, 92 Hun, 256, 36 N. Y. Supp. 931; Knickerbocker Casualty Ins. Co. v. Jordan, 7 Wkly. Law Bul. 71, 10 Am. Law Rec. 625, 6 Ohio Dec. 1145; United States Mut. Acc. Ass'n v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; Travelers' Ins. Co. v. Rosch, 23 Ohio Cir. Ct. R. 491.

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And where death is the result of asphyxiation by gas, the gas in the atmosphere is an external violent agency.

Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758, 3 L. R. A. 443, affirming 45 Hun (N. Y.) 313; Pickett v. Pacific Mut. Life Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618.

In accordance with these principles it has been held that where death was caused by choking while eating (American Acc. Co. v. Reigart, 23 S. W. 191, 94 Ky. 547, 21 L. R. A. 651, 42 Am. St. Rep. 374), or by swallowing certain hard substances which injured the intestines (Miller v. Fidelity & Casualty Co. [C. C.] 97 Fed. 836), it was caused by external and violent means. So, death caused by inadvertently taking poison is, in Illinois, regarded as caused by external and violent means.

Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, reversing 35 Ill. App. 17; Travelers' Ins. Co. v. Dunlap, 59 Ill. App. 515; Mutual Acc. Ass'n v. Tuggle, 39 Ill. App. 509. But see Bayless v. Travelers' Ins. Co., 2 Fed. Cas. 1077; Hill v. Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187, where the contrary opinion is expressed.

Death by suicide is certainly violent, and, though it is brought about by the act of the insured himself, it is nevertheless external within the terms of the policy.

Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, affirming (C. C.) 27 Fed. 40; Blackstone v. Standard Life & Acc. Ins. Co., 42 N. W. 156, 74 Mich. 592, 3 L. R. A. 486.

The words "such injuries alone," in a clause of an accident policy, where the company agrees to make a certain payment if the death of insured "shall result from such injuries alone," refer to the kind of injury which furnished the basis of indemnity in case of partial or permanent disability—injury through external, violent, and accidental means. Moore v. Wildey Casualty Co., 57 N. E. 673, 176 Mass. 418.

(c) Risks of travel.

Under a policy limiting the risk to injuries received "while riding as a passenger in any public conveyance," it is essential that the insured should be a passenger at the time of the death or injury (Fidelity & Casualty Co. v. Teter, 136 Ind. 672, 36 N. W. 283). But the mere fact that a passenger by train had no ticket beyond a certain point does not terminate his character as a passenger when the train reaches that point, if he intends to go further on

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paying his fare in money on the train (Tooley v. Railway Passenger Assur. Co., 24 Fed. Cas. 53). A member of a party of prospectors being transported by steamer is a passenger, though some of the party are employed by the steamboat company, if he is not so employed and the boat is under the exclusive control of the company (Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, 51 C. C. A. 424).

In Brown v. Railway Passenger Assur. Co., 45 Mo. 221, it appeared that the company sold two classes of tickets, one known as the "travelers' risk," and the other as the "general accident risk," the latter being sold for the higher price. The insured, who was an engineer, purchased the second kind of policy, and was subsequently killed while on duty on his locomotive. The policy by its terms insured against death caused by accident while traveling in a public or private conveyance intended for the transportation of passengers. It was held that the deceased was insured against all accidents, without regard to the capacity in which he was acting; the court saying that the policy was designed to include and cover something more than an ordinary risk incurred by a passenger or traveler. Under the circumstances of this case the locomotive was a necessary part of the conveyance, and, though the fact that a locomotive is not a conveyance provided for the transportation of passengers might be regarded as controlling if the policy applied solely to passengers or travelers, it could not be so regarded under the circumstances. But where the policy covers injuries received "while riding in a public conveyance," it will not cover injuries received while insured was unnecessarily riding on the platform of a passenger coach.

Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 30 C. C. A. 48; Van Bokkelen v. Travelers' Ins. Co., 54 N. Y. Supp. 307, 34 App. Div. 399.

But see Richards v. Travelers' Ins. Co. (S. D.) 100 N. W. 428, 67 L. R. A. 175, where it was held that a provision in an accident policy classifying insured as "a cattle dealer or broker visiting yards by occupation," which restricts him to the occupancy of cars provided for transportation of passengers, is inoperative, and that he might ride on the top of a freight car when it became necessary in order to pursue his business in the ordinary and usual manner.

A policy covering injuries received while "traveling in a public conveyance," covers injuries received while the insured is getting off the train at his destination, and injuries received while getting

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off the train at an intermediate station, where insured left the car temporarily (Tooley v. Railway Passenger Assur. Co., 24 Fed. Cas. 53). In Northrup v. Railway Passenger Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724, reversing 2 Lans. (N. Y.) 166, the policy insured the holder against personal injuries "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers." In the course of a journey by a connecting steamboat and railway line, insured went upon a slippery sidewalk while walking from the steamboat landing to the railroad station, as was usual for travelers on that route, and thereby received injuries which caused her death. It was held that, as she was so walking in the actual prosecution of her journey, she must be regarded as having received the injury while traveling by public conveyance within the terms of the policy.

If, however, the traveler has reached his destination and has left the train, he ceases to be a passenger, and is no longer covered by the policy. He cannot, therefore, recover for an injury received if he had left the train and returned to it for the purpose of speaking to a trainman about a matter having no connection with his journey (Hendrick v. Employers' Liability Assur. Corp. [C. C.] 62 Fed. 893). So, where an insured was obliged to walk some distance to his home after reaching the terminus of his railway journey, the policy did not cover an injury received during such walk (Ripley v. Railway Passengers' Assur. Co., 16 Wall. 336, 21 L. Ed. 469, affirming 20 Fed. Cas. 823).

(d) Risks of occupation.

In the absence of any stipulation prohibiting the insured from engaging in an occupation other than that by which he is described in the policy, or limiting the liability of the insurer to injuries received in that particular occupation, the insured may recover, though the injury was received while he was performing duties not strictly pertaining to his described occupation.

Provident Life Ins. Co. v. Fennell, 49 Ill. 180 (switchman acting as brakeman); Providence Life Ins. & Inv. Co. v. Martin, 32 Md. 310 (locomotive engineer acting as brakeman).

Even where the policy is to be construed as assuming only the risks of the occupation in which the insured is described as being engaged, it will be regarded as covering all the risks incident to the performance of acts necessary in such occupation, though some are

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more hazardous than the ordinary duties of the occupation described.

Pacific Mut. Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264, 12 U. S. App. 704; National Acc. Soc. v. Taylor, 42 Ill. App. 97; Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; Neafie v. Manufacturers' Acc. Indemnity Co., 55 Hun, 111, 8 N. Y. Supp. 202; Richards v. Travelers' Ins. Co. (S. D.) 100 N. W. 428, 67 L. R. A. 175; Wilson v. Northwestern Mut. Acc. Ass'n, 55 N. W. 626, 53 Minn. 470; Jamison v. Continental Casualty Co., 78 S. W. 812, 104 Mo. App. 306.

The work of "pointing" a building is properly part of a brick mason's trade, and an injury received while so engaged is covered by a policy insuring one as a brick mason (Wilson v. Northwestern Mut. Acc. Ass'n, 55 N. W. 626, 53 Minn. 470). One described as a "supervising farmer" may perform such physical labor as may be necessarily incident to keeping the farm buildings and fences in repair (National Acc. Soc. of City of New York v. Taylor, 42 Ill. App. 97). Where the cashier of a bank entered a sawmill to have some lumber cut for a cabinet to be used in the bank, he was within the scope of his employment (Hess v. Van Auken, 11 Misc. Rep. 422, 32 N. Y. Supp. 126). So, a cattle dealer, insured under an accident policy which permits him to attend his cattle in transit, can rightfully do whatever is customary among reasonably prudent cattle dealers under like circumstances.

Pacific Mut. Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264, 12 U. S. App. 704; Richards v. Travelers' Ins. Co. (S. D.) 100 N. W. 428, 67 L. R. A. 175.

If, however, one is insured as a "stock dealer not working or tending in transit," entering a car to assist in unloading the stock is a duty not contemplated by the occupation described (Loesch v. Union Casualty & Surety Co., 75 S. W. 621, 176 Mo. 654).

As a "capitalist" may pursue various occupations, one insured as a capitalist may recover for an injury while pursuing any occupation not more hazardous than is usual among men so classed (Bean v. Travelers' Ins. Co., 94 Cal. 581, 29 Pac. 1113). But the operation of a buzzsaw as an amusement is not incident to the occupation or condition of a "retired gentlemen," so as to entitle one insured as such to recover for an injury received while operating the machine (Knapp v. Preferred Mut. Acc. Ass'n, 53 Hun, 84, 6 N. Y. Supp. 57). The rule that the policy covers risks incident

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to the occupation has been applied in some cases, even when the particular risk was made the subject of an exception. Thus, it has been held that **the exception of injuries incurred in a voluntary exposure to danger does not relieve the insurer if the danger incurred is in the line of insured's duty.**

Wilson v. Northwestern Mut. Acc. Ass'n, 53 Minn. 470, 55 N. W. 626; Jamison v. Continental Casualty Co., 78 S. W. 812, 104 Mo. App. 306.

An exception of injuries produced by unnecessary lifting does not apply if the lifting was apparently reasonable and was performed in the line of duty (Rustin v. Standard Life & Acc. Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136). So, an exception of injuries due to overexertion does not apply where the insured, a machinist, was injured by lifting a heavy piece of machinery (Standard Life & Acc. Ins. Co. v. Schmaltz, 66 Ark. 588, 53 N. W. 49, 74 Am. St. Rep. 112). The condition relieving the insurer from liability for injuries received while entering or leaving a moving train has been held not to apply to a railway conductor whose duties require him so to do (Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171). In many policies, however, railway employés are expressly excepted from the operation of the condition in consideration of a higher premium paid. One who, while a railway employé, had paid such higher premium, was entitled to the benefit of the exception, though he had ceased to be such employé and had become a farmer (Employers' Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869). One employed as a baggage checker of a transfer company, whose business required him to meet and board incoming trains, was a railroad employé within the exception (Cotton v. Fidelity & Casualty Co. [C. C.] 41 Fed. 506). But one not insured as an employé, who was injured while attempting to board a moving train, cannot take advantage of the exception of railway employés to bring himself within the provisions of a policy limiting the liability of the insurer to a less sum than the face of the policy if the insured is injured in any occupation or exposure claimed as more hazardous than that by which the insured is described (Miller v. Travelers' Ins. Co., 39 Minn. 548, 40 N. W. 839). So, a person whose occupation is that of a traveling salesman for a coal company is not within the exception in a clause of a policy of accident insurance which provides that there shall be no recovery in case the insured is in-

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jured while "walking or being on any railroad bridge or roadbed (railway employés excepted)," merely because the duties of his occupation render it necessary that he should go on the roadbeds of railroads (Yancey v. Ætna Life Ins. Co., 33 S. E. 979, 108 Ga. 349).

Under the laws of a corporation, organized to afford relief to employés of certain railroad companies, providing relief to those injured "by accidents while in the discharge of duty, and in the service of" the companies, an employé who, 15 minutes after having quit work for the day, and while going home from work, in crossing the railroad tracks, was killed by cars, was in the discharge of his duty and in the service of the company (Kinney v. Baltimore & O. Employés' Relief Ass'n, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142). It has been held in Texas that, as the death of the insured by a cyclone was due to an accident wholly unconnected with his occupation, it made no difference that he engaged in an occupation other than that by which he was insured (Standard Life & Accident Ins. Co. v. Koen, 11 Tex. Civ. App. 273, 33 S. W. 133).

Not only do the risks assumed include the risks of the actual and necessary duties of the occupation, hazardous or not. **The insurer cannot escape liability because of a change in occupation, unless there has been an actual change.** The mere fact that the insured occasionally employs himself in the performance of some duty which ordinarily belongs to a different occupation does not constitute a change of occupation, as where a farmer acts temporarily as superintendent of police at a state fair (Travelers' Preferred Acc. Ass'n v. Kelsey, 46 Ill. App. 371).

These principles are also illustrated by National Acc. Soc. v. Taylor, 42 Ill. App. 97; Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664; Hess v. Preferred Masonic Acc. Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444; Johnson v. London Guarantee & Acc. Co., 72 N. W. 1115, 115 Mich. 86, 40 L. R. A. 440, 69 Am. St. Rep. 549; Stone's Adm'rs v. United States Casualty Co., 34 N. J. Law, 371; Hoffman v. Standard Life & Acc. Co., 127 N. C. 337, 37 S. E. 466; Standard Life & Acc. Co. v. Koen, 11 Tex. Civ. App. 273, 33 S. W. 133; Hall v. American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

The policy may, however, provide that a temporary change of occupation shall relieve the insurer from liability, as in Thomas v. Masons' Fraternal Acc. Ass'n, 71 N. Y. Supp. 692, 64 App. Div. 22. In such a case the foregoing rule will not apply. One insured as cattle shipper and tender in travel is in that occupation while tending horses in transit (Brock v. Brotherhood Acc. Co. [Vt.] 54 Atl. 176).

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The important question, however, is not simply whether insured was engaged temporarily in an occupation more hazardous than that by which he was described, but whether he was injured while performing an act peculiarly embraced in such other occupation (Eggenberger v. Guarantee Mut. Acc. Ass'n [C. C.] 41 Fed. 172). The mere intent to change an occupation, accompanied by the preliminary steps for that purpose, is not sufficient. Thus, it was held in Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, 51 C. C. A. 424, where one insured as a lawyer lost his life while on his way to Alaska to become a prospecting miner, that as he had not actually begun prospecting, he was within his original occupation when killed.

In accordance with the foregoing principles it is obvious that **acts of the insured which are merely for recreation or convenience cannot be considered as indicating a change in occupation**—as, for instance, where one insured as a mining expert is killed while casually riding on a locomotive (Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 919, 41 L. R. A. 467, 66 Am. St. Rep. 49). So, the riding of a bicycle, not as a profession, but merely for convenience or pleasure, is not a change of occupation.

Baldwin v. Fraternal Acc. Ass'n, 21 Misc. Rep. 124, 46 N. Y. Supp. 1016; Eaton v. Atlas Acc. Ins. Co., 36 Atl. 1048, 89 Me. 570; Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 22.

Similarly, hunting for recreation and merely as an incident of daily life cannot be regarded as an occupation.

Star Accident Co. v. Sibley, 57 Ill. App. 315; Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664, affirming 33 Ill. App. 178; Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Kentucky Life & Acc. Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709; Union Casualty & Surety Co. v. Goddard, 76 S. W. 832, 25 Ky. Law Rep. 1035.

(e) Limitation as to time of death or disability caused by accident.

It is a condition of accident policies that they cover only injuries "which shall, independently of all other causes, immediately, wholly, and continuously disable" the insured. The word "immediately," as here used, has been construed in several cases as referring to time and not to causation.

Williams v. Preferred Mut. Acc. Ass'n, 91 Ga. 698, 17 S. E. 982; Pepper v. Order of United Commercial Travelers, 69 S. W. 956, 24 Ky.

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Law Rep. 723, 113 Ky. 918; Ritter v. Accident Ass'n, 185 Pa. 90, 39 Atl. 1117; Merrill v. Travelers' Ins. Co., 64 N. W. 1039, 91 Wis. 329.

That is to say, it does not mean "proximate" as opposed to "remote," or "direct" as opposed to "indirect," but is used in its primary sense as referring to a period of time. However, it was conceded in the Williams Case that it should not be understood as equivalent to "instantly," and the same principle was asserted in the Ritter Case. It is required, however, that the disability should follow the injury within a very short time (Preferred Masonic Mut. Acc. Ass'n v. Jones, 60 Ill. App. 106). In Pacific Mut. Life Ins. Co. v. Branham (Ind. App.) 70 N. E. 174, the Appellate Court of Indiana, without reference to the cases cited above, but relying on a Canadian case, construed the word as referring to causation and not to time.

In accordance with the rule laid down, it has been held that the insurer was not liable where the disability did not appear until 30 days or more had elapsed after the injury.

Williams v. Preferred Mut. Acc. Ass'n, 91 Ga. 698, 17 S. E. 982; Vess v. United Ben. Soc. of America, 47 S. E. 942, 120 Ga. 411; Pepper v. Order of United Commercial Travelers of America, 69 S. W. 956, 113 Ky. 918; Hagadorn v. Masonic Equitable Acc. Ass'n of the World, 69 N. Y. Supp. 831, 59 App. Div. 321; Merrill v. Travelers' Ins. Co. of Hartford, Conn., 91 Wis. 329, 64 N. W. 1039.

And even where five days elapsed between the injury and the disability, this was held not to be "immediately," within the policy (Preferred Masonic Mut. Acc. Ass'n v. Jones, 60 Ill. App. 106). But where the insured was a physician, the fact that on the day following the injury, impelled by a sense of duty, he visited a patient (Brendon v. Traders' & Travelers' Acc. Co., 84 App. Div. 530, 82 N. Y. Supp. 860), did not show that the disability was not immediate, especially in view of the further fact that he did not go out again for three weeks.

It is also provided in accident policies that the insurer shall be liable for a death loss only "if death shall result in 90 days" from the time of the injury. Under such a clause there may, of course, be no recovery if death resulted more than 90 days after the injury was received, though before the expiration of the policy (Brown v. United States Casualty Co. [C. C.] 95 Fed. 935). Under the general rule for the computation of time from an act done, the day the accident occurred must be included in determining whether death

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therefrom resulted in the 90-day period required by the policy (Perry v. Provident Life Ins. & Invest. Co., 99 Mass. 162).

Where the beneficiary, in making claim for loss of time under the policy, stated that the injury was received on March 23d, she was not thereby estopped to show, on making subsequent proof of death, that the injury was received on March 30th, so as to bring the death within the 90-day limitation (American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395).

In Rorick v. Railway Officials' & Employés' Acc. Ass'n, 119 Fed. 63, 55 C. C. A. 369, the policy provided that the insurance thereunder should "extend only to physical bodily injury resulting in disability or death, * * * which shall, independently of all other causes, immediately * * * disable the insured." It further provided that there should be no liability for more than one of the losses specified, on payment for any one of which the policy should terminate, and the first loss specified was "loss of life occurring within 90 days from the date of the accident causing the fatal injury." It was held that such provisions could not be construed to exempt the insurer from liability for death resulting from an accidental injury within 90 days, because such accident did not produce "immediate, total, and continuous" disability.

In Marshall v. Commercial Travelers' Mut. Acc. Ass'n, 170 N. Y. 434, 63 N. E. 446, reversing 68 N. Y. Supp. 1143, 57 App. Div. 636, the constitution of the association provided as follows: "Any member of this association, who, during his membership, sustains by accident the loss of an arm or leg, or is injured by an accident, which injury shall result in the loss of an arm or leg, shall be entitled to, and shall receive as an indemnity for such loss, a sum equal to one-half the amount collected from an assessment as for one death, which sum shall not exceed twenty-five hundred dollars ($2,500); any member of this association, who, during his membership, sustains by accident the loss of both arms, or both legs, or one arm and one leg, or is injured by an accident, which injury shall result in the loss of both arms or legs, or one arm and one leg, shall be entitled to, and shall receive as an indemnity for loss, a sum equal to the amount collected from an assessment as for one death, which sum shall not exceed five thousand dollars, provided such loss occur within three calendar months after the accident which causes it." The court, basing its decision wholly on the punctuation of the clauses, held that the limitation in the second clause as to the time within which a loss must occur to entitle the assured to recover does not apply to a loss provided for in the first clause, and that the fact that the loss of a leg occurred more than three months after the injury will not bar recovery.

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(f) Questions of practice—Pleading.

The complaint in an action on an accident policy must state that the injuries were received accidentally (Newman v. Railway Officials' & Employés' Acc. Ass'n, 15 Ind. App. 29, 42 N. E. 650), and by means of external violence (Hester v. Fidelity & Casualty Co., 69 Mo. App. 186); but it is not necessary to state the details and particular circumstances under which the injury was received.

> **Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; McElfresh v. Odd Fellows' Acc. Co. of Boston, 21 Ind. App. 557, 52 N. E. 819; Railway Officials' & Employés' Ass'n v. Beddow, 65 S. W. 362, 23 Ky. Law Rep. 1438, 112 Ky. 184.**

An averment that insured's death resulted solely from physical bodily injuries proceeding from and inflicted by external, violent, and accidental means, producing immediate death, sufficiently shows an accidental death (Railway Officials' & Employés' Acc. Ass'n v. Armstrong, 22 Ind. App. 406, 53 N. E. 1037). It is not necessary, however, that the injury should be specifically designated as a bodily injury (Maynard v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n, 51 Pac. 259, 16 Utah, 145, 67 Am. St. Rep. 602). An allegation that the insured "fell" sufficiently implies an accidental event (Richards v. Travelers' Ins. Co. [S. D.] 100 N. W. 428, 67 L. R. A. 175).

> **An allegation that insured sustained personal bodily injuries through external, violent, and purely accidental causes within the policy, which injuries solely caused his death within two days after the accident, in that, while he was employed as a railroad bridgeman, he was struck on the head with some hard substance, inflicting a mortal wound, from which he died, but that plaintiff could not give a more particular description of the circumstances of the accident, because they were to him unknown, was not objectionable for failure to allege that the mortal wound was received by accident, in that plaintiff disclaimed knowledge of how it was caused. Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812.**

An allegation that insured's death was caused from bodily injuries to his lungs or stomach, or the rupture of some blood vessel, caused by being strained in lifting or handling some heavy substance, and the said substance, while being so lifted or handled, fell against or struck assured, causing said injury, is sufficient (Pervanger v. Union Casualty & Surety Co. [Miss.] 37 South. 461).

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If the complaint fails to allege that death was caused by external and violent means, the defect is cured by the insurer's alleging that death did not occur by such means, and plaintiff, by his reply, putting such allegation in issue (Summers v. Fidelity Mut. Aid Ass'n, 84 Mo. App. 605).

A plea that insured "did not die of any bodily injuries sustained through external, violent, or accidental means," states a mere conclusion of the pleader (Dezell v. Fidelity & Casualty Co., 75 S. W. 1102, 176 Mo. 253).

It has been held in Vermont that, though it is sufficient generally if the proof shows that the injuries were received substantially as alleged, if the complaint alleges unnecessary particulars material to the injury, the proof must correspond substantially with such allegations (Clark v. Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639). If the effect of the injuries on the system is alleged, it is not necessary that the proof should show such effects, if it clearly appears that the injuries caused the death of the insured; and a special verdict that such effects did not follow the injury is not so contradictory to a general verdict for plaintiff as to require the latter to be set aside (Mercier v. Travelers' Ins. Co., 24 Wash. 147, 64 Pac. 158). A similar rule was applied in Ætna Life Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87. A variance between the proof on the trial and the statement in the preliminary proofs of death is immaterial, if the policy did not require that such preliminary proofs should show the mode in which the injury producing death was inflicted (North American Life & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212).

(g) Same—Evidence.

The burden of proof is, of course, on the plaintiff to show that the death or injury of insured was accidental.

National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658; Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 30 C. C. A. 48; Carnes v. Iowa Traveling Men's Ass'n, 76 N. W. 683, 106 Iowa, 281, 68 Am. St. Rep. 306; Taylor v. Pacific Mut. Life Ins. Co., 82 N. W. 326, 110 Iowa, 621; Couadeau v. American Acc. Ins. Co., 95 Ky. 280, 25 S. W. 6, 15 Ky. Law Rep. 667; Kling v. Masons' Fraternal Acc. Ass'n, 29 South. 332, 104 La. 763.

Nevertheless, if the circumstances are such that the cause of death may have been suicide, murder, or accident, without pre-

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ponderating evidence, the presumption is that the death was accidental.

Jenkin v. Pacific Mut. Life Ins. Co., 131 Cal. 121, 63 Pac. 180; Star Acc. Co. v. Sibley, 57 Ill. App. 315; Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Landon v. Preferred Acc. Ins. Co., 60 N. Y. Supp. 188, 43 App. Div. 487, affirmed without opinion 60 N. E. 1114, 167 N. Y. 577; Stevens v. Continental Casualty Co., 97 N. W. 862, 12 N. D. 463.

But see Carnes v. Iowa Traveling Men's Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306, where it was held that if, under the evidence, the death could have happened with equal probability from either one of two causes, one of which was accidental and the other not, the verdict should be for defendant.

In an action on an accident policy, evidence of the facts developed at a post mortem examination of the assured is competent, though notice of the examination was not given to the insurance company (Sun Accident Ass'n v. Olson, 59 Ill. App. 217).

If there is other evidence as to the accident and injury, the declarations of insured as to the circumstances of the accident, made immediately after the occurrence, are admissible, as part of the res gestæ.

Insurance Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; North American Acc. Ass'n v. Woodson, 64 Fed. 689, 12 C. C. A. 392; Union Casualty & Surety Co. v. Mondy, 71 Pac. 677, 18 Colo. App. 395; Omberg v. United States Mutual Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; Ten Broeck v. Travelers' Ins. Co., 6 N. Y. St. Rep. 100; Hall v. American Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

On the other hand, statements made some time after the accident cannot be regarded as part of the res gestæ, and are therefore inadmissible.

The statements were made several hours after the injury in National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3, and about 30 minutes after in Keefer v. Pacific Mut. Life Ins. Co., 51 Atl. 366, 201 Pa. 448, 88 Am. St. Rep. 822.

But it was held in Van Eman v. Fidelity & Casualty Co., 51 Atl. 177, 201 Pa. 537, that declarations made by insured to his wife after he reached home, some hours after the injury, were admissible, though he had made no complaint to any one else prior to that time. The court said: "It may be that the statement of the deceased, made to his wife several hours after he had left the train, ought not to have been received as part of the res gestæ, and we do not

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understand that it was offered as such. When the husband reached his home with his aching arm, the one person for whom he first looked, and to whom he would first tell the simple truth, was his wife. He might have said nothing to any passenger on the train, nor to any friend or passerby on his way home; but there he would tell what had happened, and first of all to the one to whom he would naturally turn for attention and comfort. Experience teaches us that he would speak the truth to her." Opinion evidence as to whether the death or injury was caused by the accident, as claimed, is not admissible where it is based on hypothetical questions assuming the existence of facts as to which there is no evidence (North American Acc. Ass'n v. Woodson, 64 Fed. 689, 12 C. C. A. 392), or where the facts on which the opinion is based are not stated (Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833).

A requirement in an accident policy that evidence of the injury causing the death shall be "direct and affirmative" cannot change the rules of evidence as to what constitutes sufficient evidence.

Konrad v. Union Casualty & Surety Co. of St. Louis, Mo., 49 La. Ann. 636, 21 South. 721; Reynolds v. Equitable Acc. Ass'n, 49 Hun, 605, 1 N. Y. Supp. 738.

On an issue as to the identity of a dead body, there was evidence to sustain the verdict, where witnesses testified that they were familiar with deceased in his lifetime, and that they recognized the body from certain physical marks upon it still discoverable, as well as from the clothing upon it, that was yet in a state of comparative preservation, and which they swore corresponded with that worn by deceased at the time he disappeared (Standard Loan & Accident Ins. Co. v. Thornton, 40 S. W. 136, 97 Tenn. 1).

The sufficiency of the evidence was considered in Stout v. Pacific Mut. Life Ins. Co., 130 Cal. 471, 62 Pac. 732; Metropolitan Acc. Ass'n v. Taylor, 71 Ill. App. 132; Globe Acc. Ins. Co. v. Gerisch, 45 N. E. 563, 163 Ill. 625, 54 Am. St. Rep. 486; Smith v. Ætna Life Ins. Co., 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153; Ætna Life Ins. Co. v. Milward, 26 Ky. Law Rep. 589, 82 S. W. 364; Konrad v. Union Casualty & Surety Co., 49 La. Ann. 636, 21 South. 721; Loesch v. Union Casualty & Surety Co., 75 S. W. 621, 176 Mo. 654; Western Travelers' Acc. Ass'n v. Holbrook (Neb.) 94 N. W. 816; Woodmen Acc. Ass'n v. Hamilton (Neb.) 96 N. W. 989; Landon v. Preferred Acc. Ins. Co., 60 N. Y. Supp. 188, 43 App. Div. 487; Taylor v. General Acc. Assur. Corp., 208 Pa. 439, 57 Atl. 830; Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184.

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(h) Same—Questions for jury.

What caused the death of the insured is a question for the jury.

Barry v. United States Mut. Acc. Ass'n (C. C.) 23 Fed. 712; Wehle v. United States Mut. Acc. Ass'n, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598.

And it is for the jury to say whether the cause of death was accidental, as distinguished from intentional (Duncan v. Preferred Mut. Acc. Ass'n, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, affirmed 29 N. E. 1029, 129 N. Y. 622 [mem.]).

Whether the evidence warranted a submission to the jury is considered in Reynolds v. Equitable Acc. Ass'n, 49 Hun, 605, 59 Hun, 18, 1 N. Y. Supp. 738; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; Atlanta Acc. Ass'n v. Alexander, 30 S. E. 939, 42 L. R. A. 188, 104 Ga. 709.

3. EXCEPTED RISKS IN ACCIDENT INSURANCE.

(a) General principles.
(b) Excepted risks in general.
(c) External and visible signs of injury.
(d) Walking or being on railway roadbed or bridge.
(e) Entering or leaving or standing on platform of moving car.
(f) Poison.
(g) Inhaling gas.
(h) Bodily infirmities or disease.
(i) Intoxication.
(j) Violation of law—Fighting.
(k) Intentional injuries.
(l) Failure to exercise due diligence.
(m) Voluntary exposure to unnecessary danger.

(a) General principles.

Accident policies usually contain clauses and conditions relieving the insurer from liability if the death or injury of the insured is due to certain specified causes, or if the accident occurs under certain specified circumstances. Among the risks thus excepted are intentional injuries, injuries of which there is no external or visible sign, injuries due to intoxication, violation of law, fighting, disease or bodily infirmity, poison, inhaling gas, entering or leaving moving conveyance, walking on railway track or bridge, and in general any injury received because of voluntary exposure to unnecessary

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danger. These are the usual exceptions, but different forms of policies may contain special exceptions.

The intent and effect of these exceptions is to exclude, from the injuries caused by "violent and accidental" means for which the company is to be liable, injuries caused in a certain manner or under certain circumstances (Southard v. Railway Passengers' Assur. Co., 22 Fed. Cas. 810). The effect of such exceptions is not destroyed by an additional clause providing that if the insured is injured in any "occupation or exposure" classed as more hazardous, and for which a higher premium is charged, the amount payable under the policy shall be only such sum as the premium actually paid would purchase at the rate fixed for such increased hazard (Yancy v. Ætna Life Ins. Co., 108 Ga. 349, 33 S. E. 979). The words "occupation or exposure," used in such clause, refer to an "occupation or exposure" not inconsistent with the exception. Under general rules of construction, exceptions will be construed strictly against the insurer. So, where a policy issued to a woman provides for the payment of a certain sum per week for injuries set forth in a schedule referred to, and also for a fixed sum to the beneficiary in case of death (Chatterton v. Central Acc. Ins. Co., 52 Atl. 212, 68 N. J. Law, 79), the right of recovery by the beneficiary in case of the death of the insured from accidental burning is not barred because in the schedule referred to it is provided that "accidents resulting in bodily injuries not specifically named therein are not covered under the woman's policy." That schedule refers only to certain injuries for which the specific sum per week is to be paid for the number of weeks mentioned therein, and does not refer to cases of accidental death.

Amendments to the constitution and laws of a mutual accident association declaring certain risks excepted risks cannot be construed as applying to contracts theretofore issued. Hall v. Western Travelers' Accident Ass'n (Neb.) 96 N. W. 170; Carnes v. Iowa Traveling Men's Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; Startling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709.

The exception of certain risks is, however, not available to the insurer if the act done or risk incurred is within the scope of or incident to the occupation of insured, so as to be fairly regarded as one of the risks assumed as a risk of the occupation. Thus, a condition forbidding unnecessary lifting is not broken if the act of lifting was performed in the line of duty (Rustin v. Standard Life &

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Acc. Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136). So, a provision that the policy does not cover injuries from overexertion does not apply when the insured, who was a machinist, was injured by lifting a heavy piece of machinery (Standard Life & Accident Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112). The condition relieving the insurer from liability for injuries received while entering or leaving a moving train does not apply to a railway conductor, whose duties require him so to do (Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171).

The exception of injuries received in a voluntary exposure to danger does not relieve the insurer if the danger incurred was in the line of insured's duty.

Wilson v. Northwestern Mut. Acc. Ass'n, 53 Minn. 470, 55 N. W. 626; Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812.

But the mere fact that one insured as a traveling salesman for a coal company was sometimes obliged, in the performance of his duties, to walk on or along a railroad track, does not make such walking an incident to the employment, so as to render inapplicable the exception as to injuries received while walking on a railroad track (Yancy v. Ætna Life Ins. Co., 108 Ga. 349, 33 S. E. 979).

To be available to relieve the insurer, the excepted risk must be the direct cause of the death or injury. Thus, a condition exempting the insurer from liability for injuries received in hunting does not relieve the insurer from liability for injuries received while insured was helping to bring in a log to make a fire while on a hunting expedition (Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016). **The excepted risk must be the proximate, and not the remote, cause** (Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560). When different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim, "Causa proxima non remota spectatur," is applied. But, as said in Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go further back in the line of causation than to find the active, efficient, procuring

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cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient, predominant cause, which, following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. Thus, though a wound received by the insured was accidental, and in itself was insufficient to cause death, yet if it caused him to fall into the water, where he was drowned, his death was accidental (Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410). That is to say, if the insured suffer death by drowning, the drowning is the proximate and sole cause of death, no matter what caused him to fall into the water, unless death would have been the result without the presence of water (Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620). But it was conceded in the Dorgan Case that if it is stipulated that the policy shall not cover injury or death caused "directly or indirectly" by certain excepted risks, if such a risk caused the fall into the water, the insurer would not be liable. However, the mere fact that, had it not been for the drowning, the excepted risk might have caused death, does not excuse the insurer (Wehle v. United States Mut. Acc. Ass'n, 31 N. Y. Supp. 865, 11 Misc. Rep. 36).

If the excepted risk from which death results is the effect of the accident, so as to be a mere link in the chain of causation between the accident and the death, the death must he attributed, not to such excepted risk, but to the accident alone.

Barry v. United States Mut. Acc. Ass'n (C. C.) 23 Fed. 712; Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; Atlanta Accident Ass'n v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; National Ben. Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233; Delaney v. Modern Acc. Club, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; Omberg v. United States Mut. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560; Martin v. Equitable Acc. Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; Martin v. Manufacturers' Acc. Indemnity Co., 151 N. Y. 94, 45 N. E. 377; Miner v. Travelers' Ins. Co., 2 Ohio N. P. 103, 3 Ohio Dec. 289; Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798; Hall v. American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

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If, however, the effect of the accident is merely to aggravate a pre-existing condition, such as disease, which is the cause of death, the excepted risk, and not the accident, must be regarded as the proximate cause.

National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658; Commercial Travelers' Mut. Acc. Ass'n v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Hubbard v. Mutual Acc. Ass'n (C. C.) 98 Fed. 930; Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; Miner v. Travelers' Ins. Co., 2 Ohio N. P. 103, 3 Ohio Dec. 289.

But though insured had previously had the disease, and was thus rendered peculiarly liable to its recurrence, an accident producing the disease must be regarded as the proximate cause, rather than the excepted risk (Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753).

In an action on a health policy insuring against inability to transact business by reason of diabetes, independently of all other causes, an instruction that insured was entitled to recover if he was wholly prevented by diabetes from transacting business pertaining to his usual occupation was not erroneous for failure to require that his disability should be caused by diabetes independently of all other causes, since he was entitled to recover on the policy, though he had some other malady, provided that it was the diabetes which disabled him from transacting the business, without regard to such other malady (Travelers' Ins. Co. v. Duvall, 74 S. W. 740, 25 Ky. Law Rep. 137).

In an action on an accident policy, plaintiff is not bound to set out in his complaint the proviso or exception of the policy, nor to prove the same, in order to establish his prima facie case (Crenshaw v. Pacific Mut. Life Ins. Co., 71 Mo. App. 42). It is sufficient to allege generally that the injury was received without any cause or negligence on the part of the insured, and that the terms of the contract had been complied with (Voluntary Relief Department v. Spencer, 17 Ind. App. 123, 46 N. E. 477). The fact that the death or injury was caused by an excepted risk is a matter of defense, which is unavailable unless specially pleaded.

United States Casualty Co. v. Hanson (Colo. App.) 79 Pac. 176; Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604; Railway Officials' & Employés' Acc. Ass'n v. Drummond, 56 Neb. 235, 76 N. W. 562; Employers' Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

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Where it has been shown that the death or disability of the insured resulted from a bodily injury inflicted through external, violent, and accidental means, this imposes, prima facie, a liability upon the company under the terms of the policy, and if it seeks to avoid liability on the ground that the injury was received in such a manner as to bring the case within one of the exceptions contained in the policy, the burden is upon the company to establish this defense.

Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113; Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604; Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; Sutherland v. Standard Life & Accident Ins. Co., 87 Iowa, 505, 54 N. W. 453; Hess v. Preferred Masonic Mut. Acc. Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444; Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Hester v. Fidelity & Casualty Co., 69 Mo. App. 186; Railway Officials' & Employés' Acc. Ass'n v. Drummond, 56 Neb. 235, 76 N. W. 562; Interstate Casualty Co. v. Bird, 18 Ohio Cir. Ct. R. 488, 10 O. C. D. 211.

If the policy stipulates that the insurance shall not extend to any case of death, the nature, cause, and manner of which is unknown, or incapable of direct and positive proof, it is not necessary to establish the fact and circumstances of death by witnesses actually present, but these may be inferred from the circumstances, and the jury may find any fact proved which may rightfully and reasonably be inferred from the evidence (Accident Ins. Co. of North America v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685).

Where there is no controversy as to the means by which insured came to his death, it is purely a question of law whether death resulted from a cause insured against by the policy (Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102). But if it appears that two or more causes contributed to the injury, and equally prudent persons would differ as to which was the efficient cause, the question is for the jury.

Martin v. Indemnity Co., 60 Hun, 535, 15 N. Y. Supp. 309; Martin v. Equitable Acc. Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; Continental Casualty Co. v. Lloyd (Ind. Sup.) 73 N. E. 824.

However a mere hypothesis of medical experts, derived from the result of an autopsy, that death, which occurred a month subsequent to a given accident, was indirectly caused thereby, through

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shock, is insufficient to carry the case to the jury, where it does not appear that the deceased ever complained of shock, or of the injury, for some time prior to death, and other medical testimony is contradictory (Thurber v. Commercial Travelers' Mut. Acc. Ass'n, 32 App. Div. 636, 52 N. Y. Supp. 1071).

(b) Excepted risks in general.

Under an exception of injuries received while insured is employed in the manufacture of any explosive compound or in handling firearms, the temporary handling of a gun in hunting for pleasure will not forfeit the policy (Thomas v. Masons' Fraternal Acc. Ass'n, 71 N. Y. Supp. 692, 64 App. Div. 22). So, too, a stipulation, exempting the insurer from liability for injuries received by the insured while hunting does not relieve the insurer from liability for injuries sustained by the insured while helping to bring in a log to make a fire while on a hunting expedition (Wilkinson v. Travelers' Ins. Co. [Tex. Civ. App.] 72 S. W. 1016). A provision exempting the company from liability for injury sustained when the insured was engaged in "adventures into wild and uninhabited or uncivilized regions" did not become operative because the insured had started on an exploring or prospecting journey into the interior of Alaska, where he was drowned in a storm while navigating a well-known bay on the seacoast, before he had entered upon the inland journey (Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, 51 C. C. A. 424). Where the accident occurred in a sawmill camp, in which some 300 people were residing, distant about 35 miles from a railroad station in the province of Ontario, Canada, it was not in a wild and uncivilized country, within an exception of injuries sustained in such a place (United States Casualty Co. v. Hanson [Colo App.] 79 Pac 176).

> **Where steeplechase riding was excluded from the risks of an accident policy, the fact that the agent of the insurer was aware that the insured occasionally rode such races would not affect the policy in that respect. Smith v. Ætna Life Ins. Co., 69 N. E. 1059, 185 Mass. 74, 64 L. R. A. 117, 102 Am. St. Rep. 326.**

Accident policies may also except death or disability caused wholly or in part from medical or surgical treatment. Under such an exception the insurer is not liable where death was caused by an overdose of opium, prescribed by a physician in proper doses (Bayless v. Travelers' Ins. Co., 2 Fed. Cas. 1077). **If, however, the insured receives a bodily injury which renders medical or sur-**

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gical treatment necessary, death resulting from such treatment is not within the exception.

Westmoreland v. Preferred Acc. Ins. Co. (C. C.) 75 Fed. 244; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

Injuries due to voluntary overexertion are usually declared to be excepted risks. The term "voluntary overexertion" means conscious or intentional overexertion, or a reckless disregard of consequences likely to ensue from great physical effort. (Rustin v. Standard Life & Accident Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136.) In determining whether there has been overexertion, the physical condition of the insured must be taken into consideration (Rose v. Commercial Mut. Acc. Co., 12 Pa. Super Ct. 394). It cannot be said, as a matter of law, that the slight elevation of a 300-pound weight by a strong man accustomed to lifting is voluntary overexertion (Rustin v. Standard Life & Accident Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136). So, too, a person, by riding in a bicycle race, does not, as a matter of law, overexert himself (Keeffe v. National Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854). It is usually a question for the jury (McKinley v. Bankers' Acc. Ins. Co., 106 Iowa, 81, 75 N. W. 670).

To fall within the exception, the overexertion must be voluntary and unnecessary, and not used in an emergency of danger (Reynolds v. Equitable Acc. Ass'n, 49 Hun, 605, 59 Hun, 13, 1 N. Y. Supp. 738, affirmed without opinion 121 N. Y. 649, 24 N. E. 1091). So, too, the exception does not cover overexertion, if the act was apparently reasonable and performed in the line of duty as an incident to insured's occupation (Rustin v. Standard Life & Accident Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136). Thus, where the overexertion consisted in lifting a heavy piece of machinery in the regular course of insured's employment as a machinist, it is not within the exception (Standard Life & Accident Ins. Co. v. Schmaltz, 53 S. W. 49, 66 Ark. 588, 74 Am. St. Rep. 112).

Where the statement of the insured was that, in endeavoring to move a pump stock, he felt a severe pain in his back, and fell to the ground helpless, and his daughter, the only other witness, testified that he was attempting to turn the pump stock around, but not to lift it; that she heard him fall, and found him lying on the platform, which was wet and slippery, it was held that a verdict that his injury was not caused by "lifting" or "undue exer-

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tion" was against the weight of the evidence. Metropolitan Acc Ass'n v. Bristol, 69 Ill. App. 492.

Another condition commonly found in accident policies is one exempting the insurer from liability for injuries received while violating the rules of a corporation. It is obvious that to fall within this condition the rule must be one which the corporation enforces, or at least uses reasonable efforts to enforce (Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305). Thus, where insured was killed while crossing certain railway tracks, and it was claimed that in crossing the tracks at that place he was violating a rule of the company, it may be shown that there was a custom of crossing the tracks at the place in question to reach the station, though it was not a public crossing (Duncan v. Preferred Mut. Acc. Ass'n, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, affirmed without opinion 129 N. Y. 622, 29 N. E. 1029). So, though the holder of an accident policy is not entitled to recover thereon for injuries received by being thrown from the platform of a passenger coach as it was approaching a station, where it was a violation of a known rule of the carrier to stand upon the platform of a moving train (Bon v. Railway Pass. Assur. Co., 56 Iowa, 664, 10 N. W. 225, 41 Am. Rep. 127), yet the fact that the insured was riding upon a platform of the train or on the steps when he was injured will not prevent him from recovering, if he can show that, by reason of the crowd on the train, there was no safer place to ride, and that the conductor permitted him to ride there, as in such case he could not be regarded as violating the rule of the corporation, within the meaning of the policy (Equitable Acc. Ins. Co. v. Sandifer, 12 Ky. Law Rep. 797). And where a rule forbidding passengers to ride on the platform of the car is generally disregarded by both passengers and trainmen, it cannot be said that one riding on the platform is violating "a rule of a corporation," within the exception (Marx v. Travelers' Ins. Co. [C. C.] 39 Fed. 321).

In order that the exception should be available to the insurer, the rule alleged to have been violated must have been known to the insured.

Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342, 93 N. W. 361; Equitable Acc. Ins. Co. v. Sandifer, 12 Ky. Law Rep. 797.

On the other hand, where the policy contained the analogous exception of injuries resulting from the violation of the rules of the

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employment (Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530), it was held that the insured was bound to inform himself of the existence of such rules.

Where the policy exempts the company from liability from injuries resulting from a violation of the rules of employment, such exemption must be specially pleaded by the insurer before it can be made available as a defense; and, if it be not pleaded, the court may exclude any evidence offered to establish the rule which it is claimed has been violated. Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530.

Suicide, sane or insane, is an excepted risk in accident policies as well is in ordinary life policies, and the principles governing the construction and operation of the exception in the one are the same as those applied in the other. The subject is discussed in a succeeding brief, where the cases involving both classes of insurance are brought together.

A provision in an accident policy that it shall not cover injuries received while assured is insane is lawful. Blunt v. Fidelity & Casualty Co., 78 Pac. 729, 145 Cal. 268, 67 L. R. A. 793.

In Bean v. Ætna Life Ins. Co., 78 S. W. 104, 111 Tenn. 186, the policy on its face provided that it insured the holder for a period of 12 months from noon of the 25th day of October, 1901; that the insurance began and ended at 12 o'clock noon, and that the insurance did not cover disability, temporary or permanent, from any disease if contracted within 15 days from noon of the date of the policy. It was held that the last provision was objectionable as cutting down the term from 12 months to 11½ months—a repugnancy which no sort of construction could reconcile.

(c) External and visible signs of injury.

Accident policies usually provide that the insurance shall not extend "to any bodily injury of which there shall be no external or visible signs upon the body of the insured." It has been held in several cases that this exception applies only when the bodily injury is relied on to support a claim for disability, and is inoperative when the injury results in the death of the insured.

Eggenberger v. Guarantee Mut. Acc. Ass'n (C. C.) 41 Fed. 172; Bernays v. United States Mut. Acc. Ass'n (C. C.) 45 Fed. 455; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7

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Am. Rep. 410; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 847, 8 Am. St. Rep. 758, 3 L. R. A. 443; Root v. London Guarantee & Accident Co., 86 N. Y. Supp. 1055, 92 App. Div. 578.

The theory of the foregoing cases is that the clause is necessary for the protection of the insurer in the case of a mere claim of disability by reason of injury, but that no such protection is necessary in the case of death, and, even if it were, the dead body itself is an "external and visible sign," within the purview of the exception.

It is not necessary that the sign of the injury should be externally visible at once, but it is sufficient if it becomes visible shortly after the accident (Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306). So, too, where death did not occur until some time after the injury was received, if there were external and visible signs of the injury shortly after the accident, it was immaterial that they had become obliterated before death (Bernays v. United States Mut. Acc. Ass'n [C. C.] 45 Fed. 455).

The "visible mark upon the body" required by the policy need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of an internal strain which may appear within a reasonable time after the injury is received, such as a discoloration of that part of the body affected.

Sun Acc. Ass'n v. Olson, 59 Ill. App. 217; Thayer v. Standard Life & Accident Ins. Co., 68 N. H. 577, 41 Atl. 182.

The pallor of the person injured has also been regarded as fulfilling the condition as to external or visible sign.

Barry v. U. S. Mutual Acc. Ass'n (C. C.) 23 Fed. 712; Root v. London Guarantee & Accident Co., 92 App. Div. 578, 86 N. Y. Supp. 1055; Horsfall v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846.

In Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677, the condition in the policy excepted injuries "of which there is no visible mark upon the body." It was held that the visible mark need not necessarily be on the surface of the body. The injury in this case was a blow on the head, and it was held that a localized redness of the tissues of the brain revealed by an autopsy was a visible mark, within the condition in the policy. In Freeman v. Mercantile Acc. Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, where the condition was in the usual form, the

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trial court, as shown by a note in the official report, instructed the jury that if there were symptoms or signs which would become visible, and did become visible, upon examination, by being able to inspect the interior of the body, it would be sufficient, whether the examination was made before or after death; and this instruction was approved on appeal. Similarly, in Gale v. Mutual Aid & Acc. Ass'n, 66 Hun, 600, 21 N. Y. Supp. 893, the court said that the injury need not be visible to the eye, and that the exception did not exempt the insurer from liability for a strain of certain muscles which could be ascertained by a physician by the sense of feeling, by applying the hands to the exterior of the body. So, a shrinkage of the muscles of insured's hip and leg, and the breaking down of the bones of the hip joint, perceptible to a digital examination, sufficiently fulfills a clause in an accident policy requiring a visible mark of the injury on insured's body (United States Casualty Co. v. Hanson [Colo. App.] 79 Pac. 176).

Where the death of the insured was caused by the inhalation of illuminating gas, which accidentally escaped into the room where insured was sleeping, the emanation of the gas from insured's lungs when artificial respiration was produced was regarded as an external and visible sign, within the policy (Menneily v. Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 51 Am. St. Rep. 716, 31 L. R. A. 686, reversing 72 Hun, 477, 25 N. Y. Supp. 230). Similarly, where the dead body of insured was taken from the water, and water ran from the mouth, and the body seemed to be filled with water, these were regarded as the visible and external signs of drowning as the cause of death (Wehle v. United States Mut. Acc. Ass'n, 11 Misc. Rep. 36, 31 N. Y. Supp. 865).

The following were regarded as external and visible signs of injury within the condition: Vomiting and unnatural discharges from the bowels, Barry v. United States Mutual Accident Ass'n (C. C.) 23 Fed. 712; nose bleed, Whitehouse v. Travelers' Ins. Co., 29 Fed. Cas. 1038; bloody froth from the mouth, United States Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805; hernia, Summers v. Fidelity Mut. Aid Ass'n, 84 Mo. App. 605.

Where the answer admitted the death of deceased from erysipelas ensuing upon the accidental cutting and laceration of one of his fingers, the subsequent allegation that "there was no visible mark of said alleged accidental injury upon the body of plaintiff's testator" was repugnant to the admission, and the defense was not well pleaded (Bernays v. United States Mut. Acc. Ass'n of New

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York [C. C.] 45 Fed. 455). The general rule as to burden of proof is apparently inapplicable in the case of this exception, and it has been held (Gale v. Mutual Aid & Acc. Ass'n, 21 N. Y. Supp. 893, 66 Hun, 600) that it is incumbent on the plaintiff to show that there was upon his body an external and visible mark or sign of the injury he claimed to have sustained.

(d) Walking or being on railway roadbed or bridge.

Injuries received by the insured while "walking or being on the roadbed or bridge of any railway" are usually excepted risks in accident insurance. The purpose of this exception is not to guard against injury resulting from a defective roadbed or bridge, or to avoid liability for injuries resulting from being on such structures unsafe in themselves. The exception is intended to guard against the danger of injury from trains passing on or over the railway tracks or bridges. So, where one alighting from a train standing on a bridge fell through a hole in the bridge (Burkhard v. Travelers' Ins. Co., 102 Pa. 262, 48 Am. Rep. 205), the injury was not within the exception. The cause of death or injury must be connected with the hazards peculiar to railway tracks and bridges. The mere fact that insured was on a railway track or bridge would not affect his right to recover if the accident causing the injury were in no way connected with the railway, as, for instance, if he is bitten by a dog or struck by lightning. (Dougherty v. Pacific Mut. Life Ins. Co., 154 Pa. 385, 25 Atl. 739.)

The term "roadbed" of a railroad means that part of the railroad company's right of way which is occupied by the ties and rails constituting the railroad track, including side tracks, but it does not refer to the entire space included in such right of way (De Loy v. Travelers' Ins. Co., 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787). Thus, the space between the double tracks of a railway is not the "roadbed" referred to in the exception (Meadows v. Pacific Mut. Life Ins. Co. of California, 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427). Nor does the roadbed include the ends of ties of unusual length, extending to a point where persons standing or sitting on them would be beyond the reach of passing trains (Standard Life & Acc. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427).

To come within the exception, the insured must be on the tracks voluntarily and intentionally, and the exception will not apply if he accidently stumbles and falls onto the track (Equitable Acc. Ins. Co. v. Osborn, 9 South. 869, 90 Ala. 201, 13 L. R. A. 267). So,

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if he necessarily goes on the roadbed to take a train, it is not within the exception (De Loy v. Travelers' Ins. Co. of Hartford, 171 Pa. 1, 32 Atl. 1108). The mere crossing of railroad tracks for the purpose of reaching the station is not within the exception (Duncan v. Preferred Mut. Acc. Ass'n, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, affirmed without opinion in 29 N. E. 1029, 129 N. Y. 622). But if he voluntarily goes on and walks along the tracks, the exception will be operative, though he falls, and is unable to get out of the way of an approaching train (Weinschenk v. Ætna Life Ins. Co., 183 Mass. 312, 67 N. E. 242). Such fall and the accompanying inability to get away do not constitute such an involuntary being on the tracks as will excuse him. But the phrase "walking or being on a railway roadbed or bridge" is not to be construed with absolute literalness. The condition is, at best, a warranty by the insured that he will not intrude upon that part of the roadbed which is not also a part of the highway or public thoroughfare, and that he will not loiter on the track, but it does not obligate him not to cross a railroad at a place provided for the public to cross (Traders' & Travelers' Acc. Co. v. Wagley, 74 Fed. 457, 20 C. C. A. 588, 45 U. S. App. 39). The exception does not apply to an accident occurring while the insured was carefully crossing a railroad track at a point well recognized as a thoroughfare to and from the station (Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342, 93 N. W. 361); and the fact that the way used was not, in a legal sense, a regularly laid out or established way, is immaterial. Consequently, the exception does not apply if the insured received the injury while attempting to cross a railroad by an old and well-used footpath leading over the tracks, which had been used by the public for many years, to the knowledge of the officers of the railway company, who, without objection, permitted the public to use the pathway for the purpose of crossing the tracks (Dougherty v. Pacific Mut. Life Ins. Co., 154 Pa. 385, 25 Atl. 739). The exception is intended especially to guard against the evil of what is known as "track-walking," which is necessarily very dangerous. It refers especially to the use of the roadbed as a footpath, or stopping on it in the course of such use, with the intention of ultimately continuing the journey thereon (Metropolitan Acc. Ass'n v. Taylor, 71 Ill. App. 132). So, where the insured was walking along and between the tracks of a railway, and was struck by an engine and killed, the insurer was not liable on the policy (Piper v. Mercantile Mut. Acc. Ass'n, 161 Mass. 589, 37 N. E. 759). And it is immaterial that the

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particular part of the track along which insured was walking had for more than 35 years been used by the people of the vicinity as a common pathway without objection on the part of the railroad (Weinschenk v. Ætna Life Ins. Co., 67 N. E. 242, 183 Mass. 312). It has, indeed, been held in Massachusetts (Keene v. New England Mut. Acc. Ass'n, 164 Mass. 170, 41 N. E. 203) that the exception applies where the insured was merely crossing the tracks near the station at a place where, with the permission of the railroad company, they were commonly crossed by the public.

The condition exempting the insurer from liability for injuries received while walking on a railway track or bridge may contain a special exception rendering it inapplicable to railway employés. Of course, such exception is limited in its operation to those who are actually employés of the railway company. So, it was held in Yancy v. Ætna Life Ins. Co., 108 Ga. 349, 33 S. E. 979, that a person whose occupation is that of a traveling salesman for a coal company is not within such exception merely because the duties of his occupation render it necessary that he should at times go upon the roadbeds of railways. In Pacific Mut. Life Ins. Co. v. Howell, 13 Ind. App. 519, 41 N. E. 968, the condition in the policy declared that the company should not be liable if the accident happened while the insured was "upon a railroad bridge, trestle, or roadbed (railway officers and employés, while engaged in their prescribed duties as such, excepted)." The insured was killed by being struck by a train while walking on the roadbed and track of the L. Railway Company. At the time of the accident he was not an employé of that company, but was in the employment of the E. Railway Company. He was returning home from his work, and was using the roadbed of the first-named company as his route home. It was held that he was not protected by the exception in the condition.

(c) Entering or leaving or standing on platform of moving car.

Accident policies generally provide that the insurance shall not extend to injuries received while entering or leaving a moving conveyance using steam, etc., as a motive power. Such conditions are valid, and will relieve the insurer from liability if the injury is so received (Travelers' Ins. Co. v. Snowden, 45 Neb. 249, 63 N. W. 392). Under this condition the question whether insured, as a prudent man, was justified, under the circumstances, in attempting to board the moving car, cannot arise, since, no matter how careful he may have been, the injury was one against which the company

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had not insured him, and it was not liable. So, it cannot be shown that the insured was accustomed to jump on the train while it was in motion (Mulville v. Pacific Mut. Life Ins. Co., 19 Mont. 95, 47 Pac. 650).

It does not excuse the insured that he slipped as he was about to board the moving train (Huston v. Travelers' Ins. Co., 66 Ohio St. 246, 64 N. E. 123); nor does it affect the operation of the condition that insured had alighted at an intermediate station, and, the train starting suddenly, was injured while trying to re-enter the moving car (Travelers' Ins. Co. v. Brookover, 71 S. W. 246, 71 Ark. 123). In Terwilliger v. National Masonic Acc. Ass'n, 63 N. E. 1034, 197 Ill. 9, reversing 98 Ill. App. 237, it appeared that when the insured reached the train, and attempted to enter, the car was not moving. The train started, however, before he had fairly entered the car. He held onto the end rail, in his effort to enter, for some distance, and, on releasing his hold, fell and was killed. It was held that his act could not be regarded as an attempt to enter a moving car, within the exception.

Where a rule forbidding passengers on a railroad train to ride on the platform of a car is generally disregarded by both passengers and trainmen, it cannot be said that to so ride is a violation of "a rule of a corporation," within the meaning of a policy of accident insurance. Marx v. Travelers' Ins. Co. (C. C.) 39 Fed. 321.

The condition exempting the insurer from liability for injuries received while entering or leaving a moving conveyance is not operative where the insured was injured while attempting to alight from a moving street car, and the policy contained a further provision stipulating for double indemnity if the injuries were received while insured was a passenger in a conveyance using steam, electricity, etc., as a motive power, as the insured must be regarded as a passenger in the car while alighting, and until he has completely disconnected himself therefrom (King v. Travelers' Ins. Co. of Hartford, 28 S. E. 661, 101 Ga. 64, 65 Am. St. Rep. 288).

In Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222, the policy promised indemnity for injuries received through violent, external, and accidental means, but provided no benefits should be payable "where the death or disability was caused by * * * jumping on or off of moving cars, engines, or vehicles, unless the claimant * * * shall establish by positive proof that the said death or personal injuries were caused by external, violent, and accidental means, not the result of design of the member or any

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other person." The court said, in construing the clause, that apparently the word "nor" was intended to be used in the sentence next before the word "unless," so as to make that the beginning of another clause providing for exemption from liability, but, as the word was not placed there, the effect of the phrase beginning "unless" is to render nugatory the preceding exemptions if the claimant shall show that the injury was "not the result of design." Consequently, the insurer was liable though the injury was received in jumping on a moving car, for it did not appear that the injury was the result of design.

Analogous to the exception of injuries received while entering or leaving a moving car is the exception usually found with it exempting the insurer from liability for injuries resulting from being on the platform of the moving car. The exception will not, however, be implied from the former one (Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305). Under the exception there could, of course, be no recovery if the insured was injured or killed while actually standing or riding on the platform; but merely passing across the platform in going from one car to another on the same train is not standing or riding on the platform, within the clause (Sawtelle v. Railway Pass. Assur. Co., 21 Fed. Cas. 555). So, too, a passenger who is on the platform of a railroad car for a temporary and necessary purpose is not riding upon the platform, within the meaning of the condition (Standard Life & Accident Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116). Thus, where the insured, being taken sick, went out on the platform for the purpose of vomiting, after he had tried the closet door and found it locked, he was not riding on the platform, within the exception (Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456). But if, for the purpose of leaving the train before it reached the station, the insured went out on the platform, so as to alight while the train made a short temporary stop at a switch, and was thrown off, the insurer was exempt under the exception (Hull v. Equitable Acc. Ass'n, 41 Minn. 231, 42 N. W. 936). The condition is sometimes in the form of a stipulation exempting the insurer from liability if the injury is received while insured is in any part of the conveyance not provided for occupancy by passengers. Such a condition relieves the insurer if the insured, when his train approached his station, stepped out on the platform while the train was yet moving, and fell (Overbeck v. Travelers' Ins. Co., 94 Mo. App. 453, 68 S. W 236). On the other hand, it was held in Berliner

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v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49, that a provision of an accident policy that the insurer shall not be liable for injuries or death caused while the insured is in or on any conveyance not provided for transportation of passengers does not defeat recovery for death from an injury received while riding by invitation in a locomotive drawing a passenger train, the locomotive and train together constituting a "conveyance" for transportation of passengers.

In view of the general rule that the policy must be construed as covering all risks naturally incident to the insured's occupation, irrespective of the exceptions, it has been held (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) that the exception does not apply when the insured is described in the policy as the conductor of a passenger train; the entering and leaving moving cars being a duty incident to his occupation. In many policies, however, railroad employés are especially excepted from the operation of the provision. One employed as a baggage checker for a transfer company, whose duties required him to meet and board connecting trains for the purpose of checking baggage to other railroad lines, was a railroad employé within the meaning of the exception (Cotten v. Fidelity & Casualty Co. [C. C.] 41 Fed. 506). So, where insured at the time of taking out the policy was a railroad employé, and contracted to pay the high premium demanded on account of the hazardous employment, he is entitled to the benefits of the exception allowing railroad employés to board a moving train, though before such accident he had ceased to be a railroad employé, and had become a farmer (Employers' Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869). On the other hand, in Hull v. Equitable Acc. Ass'n, 41 Minn. 231, 42 N. W. 936, the policy excepted, from the operation of the condition relating to standing or riding on the platform of a moving car, railway employés in the performance of their duties. Insured, while being carried in one of his employer's trains, went out on the platform while the train was yet in motion, intending to get off when it should stop at a crossing switch. It was held that, if the insured could be deemed in any proper sense to have been at that particular time an employé of the railroad company, his acts were not a necessary part of his duties, so that it could be said that the injury was received in the performance of his duty as such em-

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ployé. What he did was wholly for his own convenience, and in no sense a part of his service to the company.

A banker who was killed while attempting to get on a moving railroad train was insured under a policy providing that it should not cover accidents, injuries, or death from trying to enter a moving steam vehicle, this condition not being applicable to railway employés. It was held in Miller v. Travelers' Ins. Co., 39 Minn. 548, 40 N. W. 839, that a further provision of the policy limiting the liability of the company to a less sum than that named in the policy if the insured should be injured in any occupation or exposure classed as more hazardous than that specified did not apply, so as to bring the insured within the exception as to railroad employés.

The burden is on the insurer to establish the defense that the insured, at the time of the injury, was purposely leaving, or trying to leave, a moving car, and did not accidentally slip or fall from the steps (Smith v. Ætna Life Ins. Co., 88 N. W. 368, 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153). So, too, the burden is on the insurer to show that the insured was killed by being on the platform of a moving train (Anthony v. Mercantile Mut. Acc. Ass'n, 162 Mass. 354, 38 N. E. 973, 44 Am. St. Rep. 367, 26 L. R. A. 406). Whether the death or injury was the result of one of the risks so excepted is a question for the jury.

Myler v. Standard Life & Acc. Ins. Co., 92 Fed. 861, 35 C. C. A. 55; Anthony v. Mercantile Mut. Acc. Ass'n, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367.

The sufficiency of the evidence to show that insured was injured by falling from the train, and not by attempting to leave it while in motion, is considered in Travelers' Ins. Co. v. Snowden, 45 Neb. 249, 63 N. W. 392.

(f) Poison.

Where the policy provides that the insurance shall not extend to death or disability caused "by the taking of poison," the exception includes cases where the poison was taken accidentally, as well as those where it was taken intentionally.

McGlother v. Provident Mut. Acc. Co. of Philadelphia, 89 Fed. 685, 32 C. C. A. 318; Early v. Standard Life & Acc. Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. Rep. 445; Meehan v. Traders' & Travelers' Acc. Co., 34 Misc. Rep. 158, 68 N. Y. Supp. 821; Hill v. Hartford Acc. Ins. Co., 22 Hun, 187; Pollock v. United States Mut. Acc. Ass'n, 102 Pa. 230, 48 Am. Rep. 204.

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So, where the policy provides that the insurance shall not cover an accident or death resulting wholly or partially from "voluntary or involuntary" taking of poison, the term "involuntary," as so used, is not limited to an act forced on insured, but includes death from the accidental taking of an overdose of a poisonous medicine, instead of a prescription left by insured's physician (Kennedy v. Ætna Life Ins. Co., 31 Tex. Civ. App. 509, 72 S. W. 602).

Death results from poison when it is caused by the effect of a shock caused by swallowing, by mistake, aqua ammonia. Early v. Standard Life & Accident Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. Rep. 445.

It was, however, held in Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102, where the policy provided that it did not cover insurance resulting from anything accidentally or otherwise taken, administered, absorbed, or inhaled, that the exception did not preclude a recovery for unintentional death caused by medicine, even though containing a poison, taken or administered in good faith to alleviate physical pain.

In Illinois, the courts have assumed the position that the exception does not include the accidental taking of poison. In Healey v. Mutual Acc. Ass'n, 133 Ill. 557, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, the court held that death from the inadvertent taking of poison was caused by "external, violent, and accidental means," within the general clause in a policy. Basing the decision on this case, the court has held that where the policy exempts the insurer from liability, if death is caused by taking poison, the voluntary or intentional taking is referred to, and that no exemption results when the poison is taken accidentally.

Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355, affirming 59 Ill. App. 515; Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359, affirming 59 Ill. App. 522.

The Healey Case, however, did not involve the construction of a specific exception, the issue being merely whether the taking of poison was within the general insurance clause of the policy. The case is therefore clearly distinguishable from the cases in which death by poisoning is expressly excepted from the risks assumed, though the Illinois courts did not, apparently, so regard it.

The clause relating to poison usually provides that the insurer shall not be liable for injuries, fatal or otherwise, "resulting from

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poisoning or anything accidentally or otherwise taken, administered, absorbed, or inhaled." It was held in Miller v. Fidelity & Casualty Co. (C. C.) 97 Fed. 836, that where substances eaten as food, contained hard, pointed articles which caused injury, the exception did not apply. An interesting case is Maryland Casualty Co. v. Hudgins, 76 S. W. 745, 97 Tex. 124, 64 L. R. A. 349, reversing (Tex. Civ. App.) 72 S. W. 1047, where the death of the insured resulted from eating unsound oysters, not knowing them to be unsound. The Court of Civil Appeals held that the insurer was not exempt under the exception as to poisoning, and, moreover, that the word "anything," as used in the exception, did not refer to the eating of food ordinarily harmless, not knowing it to be unsound and dangerous in that condition; that the clause must be interpreted as having reference to those agencies which are not strictly denominated "poisons," but which have some elements of poison, and which may produce death if improperly taken. The Supreme Court, on the other hand, regarded the excepting clause as exempting the insurer from liability for all injuries caused by any substance, poisonous or not, voluntarily taken into his stomach by the insured, even as food. The oysters, whether poisonous or not, and whether taken accidentally or not, were consciously and voluntarily swallowed by insured, and, this being the case, it comes strictly and clearly within the terms of the excepting clause.

In some cases the question has been raised whether the poison must be taken internally to fall within the exception. In Preferred Mut. Acc. Ass'n v. Beidelman, 1 Monag. (Pa.) 481, the court intimated that the poison should be taken internally to give effect to the exception, but it was left to the jury to determine whether the sting of a venomous insect was within the exception. It was, however, held in Omberg v. United States Mut. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413, that death from blood poisoning caused by the sting of an insect is not the result of "poison in any form or manner," or of "contact with poisonous substances," within the meaning of those terms. The real basis of this case is undoubtedly the principle that death from blood poisoning is not, strictly speaking, death from poison, within the exception. So, it was held in Bacon v. United States Mut. Acc. Ass'n, 44 Hun (N. Y.) 599, that blood poisoning resulting from contact with putrid animal matter was not within the exception. On the other hand, in Kasten v. Interstate Casualty Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651, where the policy provided that the liability

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of the insurer should not extend to injuries resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, it was held that no liability could arise from a death caused by blood poisoning from the effects of the absorption of septic poison evolved in cotton inserted by a dentist to stop hemorrhage in wounds caused by the removal of teeth.

When the exception is as to injury resulting from poison or contact with poisonous substances (Meehan v. Traders' & Travelers' Acc. Co. of New York, 68 N. Y. Supp. 821, 34 Misc. Rep. 158), the exemption from liability is not confined to cases where the poison is taken internally, or the contact with poisonous substances is voluntary, and there can be no recovery if the injury is caused by carbolic acid thrown in the insured's face. So, too, no recovery can be had for inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye (Preferred Acc. Ins. Co. v. Robinson [Fla.] 33 South. 1005, 61 L. R. A. 145).

In United States Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805, where insured was asphyxiated by coal gas, the court refused to instruct the jury that inhaling coal gas was a taking of poison, the evidence as to whether coal gas is a poison being conflicting.

'The burden is on the insurer to show that the death of the insured was caused by poison, within the exception. Travelers' Protective Ass'n v. Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538. The fact may be shown under a simple denial of an allegation that death resulted wholly from accident. Bernays v. United States Mut. Acc. Ass'n (C. C.) 45 Fed. 455. But when the policy contains a provision that it does not cover injuries, fatal or otherwise, resulting from poison, etc., taken, administered, absorbed, or inhaled (anæsthetics administered by regular physician excepted), and the insured died while undergoing an operation, the burden is on plaintiff to show that the death was caused by the anæsthetic.

(g) Inhaling gas.

A common exception in accident policies is that exempting the insurer from liability for death caused by "inhaling gas." The leading case involving the construction of this exception is Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758, 3 L. R. A. 443, affirming 45 Hun, 313, where it was held that the exception refers only to the voluntary inhaling of gas—as, for instance, in the course of medical treatment—and that it will not relieve the insurer from liability for death caused by inhaling illu-

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minating gas which accidentally escaped into the room where the insured was sleeping. And even where the exception was as to death "arising from anything accidentally taken, administered, or inhaled," as in Menneily v. Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716, reversing 25 N. Y. Supp. 230, 72 Hun, 477, the court held that the clause contemplated a case where the insured voluntarily and consciously, though accidentally, inhaled something that was injurious, and that it could not extend to the involuntary inhalation of gas which accidentally escaped into a room where insured was sleeping. So, in Pickett v. Pacific Mut. Life Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618, where insured, having descended into a well, was asphyxiated by a deadly gas therein, it was held that the exception did not apply, as it referred only to the voluntary inhalation of gas.

The decision in the Paul Case was followed in Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654, affirming 59 Ill. App. 297, where it was held that accidental asphyxiation by illuminating gas which escaped into the room where insured was sleeping was not within a clause providing that the insurance did not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, absorbed, or inhaled. The court said that as the policy was issued several years after the decision was rendered in the Paul Case, holding that accidental asphyxiation was not within a clause exempting the insurer from liability for injuries caused by the taking of poison or inhaling of gas, but that such clause referred only to the voluntary and intelligent act of the insured, the policy must be read in the light of such decision. So, in Fidelity & Casualty Co. of New York v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450, affirming (C. C.) 88 Fed. 474, where the same question was involved, the court held that the same construction would be adopted in an action on a later policy for the death of the insured from the same cause, regardless of the views that the court might hold if the question was res integra.

The reasoning in the Paul Case was, however, disapproved in Richardson v. Travelers' Ins. Co. (C. C.) 46 Fed. 843.

On the other hand, where the insured died from the effects of chloroform administered for the purpose of a surgical operation,

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the exception operated, and there could be no recovery (Westmoreland v. Preferred Acc. Ins. Co. [C. C.] 75 Fed. 244).

Where insured met his death by inhaling coal gas, and the testimony as to whether or not coal gas was a poison or poisonous substance was somewhat conflicting, the court refused to instruct that inhaling coal gas was a taking of poison, if they believed coal gas to be a poisonous substance, which, when inhaled, destroyed life. United States Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805.

(h) Bodily infirmities or disease.

Among the important exceptions in accident policies is the clause exempting the insurer from liability for death or injury resulting from "bodily infirmity or disease." These words mean practically the same thing, and only include an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder, arising from some sudden and unexpected derangement of the system, though it produces unconsciousness (Meyer v. Fidelity & Casualty Co. of New York, 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374). The exception does not include fainting produced by indigestion or a lack of proper food, or any other cause which would show a mere temporary disturbance or enfeeblement (Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620). So, too, the term "disease" does not apply to a temporary derangement of the stomach, so as to preclude a recovery for insured's death by being thrown from the platform of a railway train, whence he had gone for the purpose of vomiting (Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456). And the fact that insured, directly before the fall which caused his death, was seen to stagger, does not conclusively prove that the fall was caused by "fits or vertigo" (Meyer v. Fidelity & Casualty Co. of New York, 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374).

Insanity is not generally regarded as a disease, within the terms of the exception.

Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, affirming (C. C.) 27 Fed. 40; Blackstone v. Standard Life & Acc. Ins. Co., 42 N. W. 156, 74 Mich. 592, 3 L. R. A. 486.

In construing an accident policy providing that the insurance shall not cover injuries received while under the influence of, or resulting directly or indirectly from, intoxicants, sunstroke, vertigo,

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hernia, or any disease or bodily infirmity, the phrase "disease or bodily infirmity" will not be limited by the specific exceptions, they not being related to each other.

Hubbard v. Travelers' Ins. Co. (C. C.) 98 Fed. 932; Carr v. Pacific Mut. Life Ins. Co., 100 Mo. App. 602, 75 S. W. 180.

Sunstroke is regarded as a disease, within the exception (Dozier v. Fidelity & Casualty Co. of N. Y. [C. C.] 46 Fed. 446, 13 L. R. A. 114), but if the policy provides that injuries or death caused or contributed to by disease are not covered by the policy, and also contains a clause that if the injury or death is caused by sunstroke while in the line of duty as a railroad employé, the insurer's liability shall be a certain specified sum, liability for death by sunstroke while insured was in the line of his duty cannot be avoided on the ground that it was a death by disease, within the general exception in the policy (Railway Officials' & Employés' Acc. Ass'n v. Johnson, 109 Ky. 261, 58 S. W. 694, 52 L. R. A. 401, 95 Am. St. Rep. 370).

The effect of the exception is determined by the relation between the accident, or its results, and the disease. **Under the doctrine of proximate cause, it is obvious that the insurer is, by virtue of the excepting clause, exempt from liability if disease is the cause of the accident, as where lesion of the heart or brain caused the insured to fall.**

Sharpe v. Commercial Travelers' Mut. Acc. Ass'n of America, 139 Ind. 92, 37 N. E. 353; Carr v. Pacific Mut. Life Ins. Co., 100 Mo. App. 602, 75 S. W. 180; Clark v. Employers' Liability Assurance Co., 72 Vt. 458, 48 Atl. 639.

Though, under a provision that the risk shall not extend "to any case except when the accidental injury shall be the proximate and sole cause of disability or death," if the insured suffer death by drowning, the drowning is the proximate and sole cause of death, no matter what the cause of falling in the water, unless death would have been the result without the presence of the water (Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620), yet it was said in the same case that under a provision that the risk shall not be extended to "accidental injuries or death resulting from or caused, directly or indirectly," by fits, vertigo, or other disease, an accidental death by drowning results from, and is caused indirectly by, fits, vertigo, or

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other disease, if the fall into the water from which drowning ensues is caused by such disease.

Where insured was in bathing, and was seized with cramps and drowned, the drowning, and not the cramps, was regarded as the proximate cause of death. Knickerbocker Casualty Ins. Co. v. Jordan, 7 Wkly. Law Bul. (Ohio) 71.

Though, if one walking in his sleep fell from the window and was killed, somnambulism might be regarded as the proximate cause of death, it would not be so regarded if insured wakened, and, falling asleep again, then fell from the window. Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

Another phase of the question is presented where the accident is the origin and cause of the disease. **If a disease resulting in death is the effect of an accident, so as to be a mere link in the chain of causation between the accident and the death, the death is attributable, not to the disease, but to the accident alone.**

McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254; Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Travelers' Ins. Co. v. Hunter, 30 Tex. Civ. App. 489, 70 S. W. 798; Hall v. American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

Thus the insurer is not relieved from liability where death results from peritonitis occasioned by a fall; and this, even though the insured had previously had peritonitis, and had thus been rendered peculiarly liable to a recurrence (Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753).

A common example of disease caused by injury is presented by cases in which the insured died of blood poisoning, and it may be regarded as settled that where the blood poisoning results from an accidental abrasion of the skin, wound, or sting of insect, the accident, and not the disease, is to be regarded as the proximate cause of death.

Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Delaney v. Modern Acc. Club, 97 N. W. 91, 121 Iowa, 528, 63 L. R. A. 603; Omberg v. United States Mut. Acc. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; Martin v. Equitable Acc. Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; Martin v. Manufacturers' Acc. Indemnity Co., 45 N. E. 377, 151 N. Y. 94.

On the other hand, death resulting from a malignant pustule, caused by contact with putrid animal matter containing poisonous "bacillus anthrax," is death from disease, and not from accidental cause, within the terms of an accident insurance policy. Bacon

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v. United States Mut. Acc. Ass'n, 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748, 9 L. R. A. 617, reversing 50 Hun, 605, 3 N. Y. Supp. 237, and 44 Hun, 599.

Hernia is usually declared to be an excepted risk, but this does not relieve the insurer if the accident is the cause of the hernia.

Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; Atlanta Acc. Ass'n v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; Summers v. Fidelity Mut. Aid Ass'n, 84 Mo. App. 605; Miner v. Travelers' Ins. Co., 8 Ohio Dec. 289, 2 Ohio N. P. 103.

But as was said in the Miner Case, if hernia already existed, and was a contributing cause of death, the exception would be operative. Nevertheless, if the insured at the time of the injury had an existing hernia in his system, it is incumbent on the company, after it is shown that an injury resulted from an accident, to show that the hernia was the contributing cause which brought about the injury resulting from the accident, and it is not sufficient to show that the existence of the hernia rendered the consequences more serious (Thornton v. Travelers' Ins. Co., 42 S. E. 287, 116 Ga. 121, 94 Am. St. Rep. 99).

So, in general, the mere fact that the insured was diseased at the time of the accident is not sufficient to render the exception operative, if the accident was in itself the independent and sufficient cause of death or injury.

Commercial Travelers' Mut. Acc. Ass'n v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; National Ben. Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233; Wehle v. U. S. Mut. Accident Ass'n, 31 N. Y. Supp. 865, 11 Misc. Rep. 36; Ætna Life Ins. Co. v. Hicks, 56 S. W. 87, 23 Tex. Civ. App. 74.

The effect of the concurrent existence of disease and the accident depends on the relation between them. If the disease aggravated the effect of the accident, and but for the existence of the disease the accident would not have been fatal, or if the accident aggravated the disease, the exception will relieve the insurer from liability.

McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254; National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658; Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton, 79 Fed. 423, 24 C. C. A. 654; Hubbard v. Mutual Acc. Ass'n (C. C.) 98 Fed. 930; Binder v. National Masonic Acc. Ass'n (Iowa) 102 N. W. 190; Ætna Life Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N.

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E. 254; Maryland Casualty Co. v. Glass, 67 S. W. 1062, 29 Tex. Civ. App. 159. But it would seem that mere weakness, as the result of disease, would not have that effect. Miller v. Fidelity & Casualty Co. (C. C.) 97 Fed. 836. And see Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 450, 97 Am. St. Rep. 560, where it was held that death from a rupture of a kidney, produced by an accidental fall, is the result of the accident, "independent of all other causes," within the provision of the policy, though a cancerous condition of the kidney made the rupture possible.

The rule as to which will be considered the proximate cause of death—the accident or the disease—is well stated in Barry v. United States Mut. Acc. Ass'n (C. C.) 23 Fed. 712, where it is said that if it is shown that the insured sustained an accidental injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the insured died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

If the death may have resulted from either disease or accident, there is no presumption as to the cause of death (Taylor v. General Acc. Assur. Corp., 57 Atl. 830, 208 Pa. 439), but the burden of proof is on the insurer to show that the cause of death was disease, and not accident.

McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254; Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 450, 97 Am. St. Rep. 560.

Though the opinion of a professional nurse is admissible on the issue whether insured had a certain disease (Standard Life & Acc. Ins. Co. v. Thomas, 17 S. W. 275, 13 Ky. Law Rep. 593), the opinion of lay witnesses is not admissible (American Acc. Co. v. Fidler's Adm'x, 35 S. W. 905, 18 Ky. Law Rep. 161). On such an issue, testimony showing the health of the insured from infancy is admissible (McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254), and where the defense was that the insured, who was a locomotive

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fireman, had for years been afflicted with chronic hernia, testimony of the engineer that he had been continuously at work prior to the accident was admissible (Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267). While declarations of the insured not so connected with the accident as to be fairly regarded as part of the res gestæ are not admissible (Hall v. American Masonic Acc. Ass'n, 57 N. W. 366, 86 Wis. 518), a statement made by the insured to his physician, upon which the physician formed his opinion and made a prescription, is competent evidence to prove the actual cause of illness and death (Dabbert v. Travelers' Ins. Co., 2 Cin. R. 98, 13 Ohio Dec. 792).

The sufficiency of the evidence to show whether the cause of death was an accident or disease is considered in Tennant v. Travelers' Ins. Co. (C. C.) 31 Fed. 322; Travelers' Ins. Co. v. Selden, 78 Fed. 285, 24 C. C. A. 92; Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton, 93 Fed. 621, 35 C. C. A. 493; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; Continental Casualty Co. v. Lloyd (Ind.) 73 N. E. 824; Standard Life & Acc. Ins. Co. v. Thomas, 17 S. W. 275, 13 Ky. Law Rep. 593; Peck v. Equitable Acc. Ass'n, 52 Hun, 255, 5 N. Y. Supp. 215; Larkin v. Interstate Casualty Co., 60 N. Y. S. 205, 43 App. Div. 365; Thurber v. Commercial Travelers' Mut. Acc. Ass'n of America, 64 N. Y. Supp. 174, 51 App. Div. 608; Landon v. Preferred Acc. Ins. Co., 43 App. Div. 487, 60 N. Y. Supp. 188, affirmed without opinion in 167 N. Y. 577, 60 N. E. 1114; Interstate Casualty Co. v. Bird, 18 Ohio Cir. Ct. R. 488, 10 O. C. D. 211; Maryland Casualty Co. v. Glass, 67 S. W. 1062, 29 Tex. Civ. App. 159; Hall v. American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

Where there is a conflict of evidence as to whether an accident or a disease caused the death of one insured against death by accident, the question is for the jury.

Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620; Railway Officials' & Employés' Acc. Ass'n v. Coady, 80 Ill. App. 563; Modern Woodmen Acc. Ass'n v. Shryock, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826.

(i) Intoxication.

Death or injury occurring while insured was, or in consequence of his having been, intoxicated, is usually an excepted risk in accident policies. In some policies the condition is that the insurer shall not be liable if the insured was "under the influence of" intoxicating liquor. The latter clause implies such an influence as amounts to intoxication (Standard Life & Acc. Ins. Co. v. Jones,

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94 Ala. 434, 10 South. 530). And in every case **there must be an undue and abnormal excitement produced by liquor, disturbing the natural action of the physical and mental faculties.**

Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530; Campbell v. Fidelity & Casualty Co., 109 Ky. 661, 60 S. W. 492; Shader v. Railway Passengers' Assur. Co., 5 Thomp. & C. (N. Y.) 643.

To render the exception operative, it must appear that insured was actually intoxicated. The mere fact that he had an opportunity to drink, and that his death occurred under circumstances indicating that he was not in his normal physical condition at the time of the accident, is not in itself sufficient (Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620). So, too, the mere fact that insured had been drinking does not bring the injury within the exception, if it appears that he had drunk but very little and was considered sober by those who observed him.

Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601; Couadeau v. American Acc. Co. of Louisville, 95 Ky. 280, 25 S. W. 6, 15 Ky. Law Rep. 667; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

A provision in an accident policy that the insurance does not cover a death resulting from intoxication is not waived because the agent who received and filled out the application knew that the applicant was an intemperate man, though the application stated that his habits were correct and temperate (Cook v. Standard Life & Acc. Ins. Co., 84 Mich. 12, 47 N. W. 568).

Under an accident policy providing for its avoidance for fraud or concealment in attempting to obtain indemnity, a claim made by one who was notoriously drunk at the time of the accident, stating that he had taken but one glass of claret before retiring, is such fraudulent concealment as to render the policy void. Pyne v. Mutual Acc. Co., 2 Dauph. Co. Rep. (Pa.) 110.

The fact that insured was at the time intemperate will not affect the right to recover (Prader v. National Masonic Acc. Ass'n, 95 Iowa 149, 63 N. W. 601), but, **if insured is actually intoxicated at the time of death or injury, insurer is exempt from liability, whether the intoxication contributed to the injury or not.**

Standard Life & Acc. Ins. Co. v. Jones, 94 Ill. 434, 10 South. 530; Shader v. Railway Passenger Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65, affirming 5 Thomp. & C. 643, and 3 Hun, 424.

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In Campbell v. Fidelity & Casualty Co., 109 Ky. 661, 60 S. W. 492, the court stated the rule to be that a recovery will not be denied on the ground that insured was injured "while" under the influence of or affected by intoxicants, unless he was drunk at the time he was injured, but a recovery will be denied on the ground that he was injured "in consequence of" being under the influence of or affected by intoxicants if he was so far under the influence of intoxicants that his injury was received in consequence of such influence, though it did not amount to drunkenness.

So, too, where insured was taken to a sanitarium for treatment for delirium tremens, and died from the effects of a dose of morphine administered hypodermically by a physician, insurer was held not to be liable, in view of an exception exempting the insurer from liability for injuries received while under the influence of intoxicating liquor or narcotics (Flint v. Travelers' Ins. Co. [Tex. Civ. App.] 43 S. W. 1079).

In Rhodes v. Railroad Passenger Ins. Co., 5 Lans. (N. Y.) 71, it was said that the intemperance of the insured is wholly immaterial, unless it contributed in some degree to cause the injury; but it does not appear from the report of the case whether the policy contained the usual exception.

Where the policy is conditioned that the insurance shall not cover injuries received while the insured is under the influence of liquor, etc., it is not necessary to negative in the complaint a breach of the conditions, though the policy provides that a compliance with the conditions is a condition precedent to its enforcement (Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485).

The burden is on defendant to show that insured received his injuries while intoxicated, within the exception.

Sutherland v. Standard Life & Acc. Ins. Co., 87 Iowa, 505, 54 N. W. 453; Hester v. Fidelity & Casualty Co., 69 Mo. App. 186.

Where defendant alleged that death resulted from disease or bodily infirmity, without alleging intoxication, it was error for the court to admit testimony to the effect that insured was not addicted to the use of intoxicating liquors, as such testimony was not relevant to any issue in the case (National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3). If the exception is not pleaded, it is competent for the insurer to show what insured's condition was when he received the injury; and, in order to do this, witnesses may be asked whether he impressed them as being

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intoxicated, whether he was drunk or sober, and whether, in their judgment, he was capable of taking care of himself as if he were sober (Cook v. Standard Life & Acc. Ins. Co., 84 Mich. 12, 47 N. W. 568).

Where the defense is that death was caused by assured's falling out of a window while drunk, evidence that on a previous occasion assured, while drunk, had attempted to jump from the window, is inadmissible. Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

Whether insured was under the influence of intoxicating liquor when the accident occurred, and whether the death resulted in consequence of his intoxication, are questions for the jury.

Follis v. United States Mut. Acc. Ass'n, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408; De Van v. Commercial Travelers' Mut. Acc. Ass'n, 92 Hun, 256, 36 N. Y. Supp. 931.

A finding on the issue as to intoxication, based on conflicting evidence, will not be disturbed.

Order of United Commercial Travelers v. McAdam, 125 Fed. 358, 61 C. C. A. 22; Sutherland v. Standard Life & Acc. Ins. Co., 54 N. W. 453, 87 Iowa, 505; Fidelity & Casualty Co. v. Chambers, 24 S. E. 896, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432.

(j) Violation of law—Fighting.

As in ordinary life policies, death or injury occurring while insured is engaged in any violation of law is declared an excepted risk in accident policies. The principles governing the construction and operation of this exception are the same in both classes of insurance. The application of these principles has already been discussed in the brief dealing with excepted risks in life policies,[1] and reference is made to that brief, where cases involving accident policies are collated.

In connection with the exception as to violation of law, accident policies usually declare that injuries received by the insured while fighting are not covered. It has been held that if the insured was within his legal rights in engaging in the struggle which resulted in the injury—as where a bartender, having ordered a noisy person from the premises, was assaulted by him, and was injured while forcibly resisting the assault or attempting to expel the aggressor from the room—the condition against fighting does not relieve the

[1] See ante, p. 3129.

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insurer (Coles v. New York Casualty Co., 83 N. Y. Supp. 1063, 87 App. Div. 41). It is true that it was held in United States Mut. Acc. Ass'n v. Millard, 43 Ill. App. 148, that, if the policy provides that it shall not cover injuries caused by fighting, the insured cannot recover for injuries so received, though he was not the aggressor. But in view of the Cole Case, and the case of Robinson v. United States Mut. Acc. Ass'n (C. C.) 68 Fed. 825, the generally accepted rule must be regarded as contrary to that laid down in the Illinois case. In the Robinson Case the real issue was whether insured met his death while engaged in a violation of law. Insured, while unarmed, engaged in an altercation, and was shot and killed. According to the evidence, insured had had no quarrel at the time he was shot, but was apparently a victim of nervous apprehension on the part of his adversary. The court held that insured's death was not within the exception. So, where a quarrel is really provoked by the insured, if he could not have reasonably expected injury to result therefrom, the exception is not available (Accident Ins. Co. of North America v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685), though it was conceded that if the insured provoked a quarrel, from the result of which he might reasonably expect injury, he could not recover. Obviously, when both parties willingly engage in mutual combat, and insured is injured therein, the fight must be regarded as the proximate cause of the injury, so as to relieve the insurer (Gresham v. Equitable Acc. Ins. Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263).

(k) Intentional injuries.

As has been pointed out, **so far as the insured is concerned, an injury intentionally inflicted by another without insured's connivance may be an accident.**[2] Therefore, in the absence of any provision expressly excepting such injuries from the risk assumed, intentional injuries are covered by the policy (Accidental Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685). **For the purpose of evading liability for intentional injuries, policies of insurance against injuries effected by external, violent, or accidental means usually contain a condition declaring that the insurance shall not cover death or disability due to injuries intentionally inflicted by the insured or any other person.** This condition may be waived by the insurer. Thus, where an applicant for insurance informed

[2] See ante, p. 3156.

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the agent that his life was in danger, and that he desired a policy to protect his family in case he was killed, and the agent assured him that the policy issued would be good in such case, the condition must be regarded as waived (Henderson v. Travelers' Ins. Co. [C. C.] 65 Fed. 438). The first paragraph of an accident policy indemnified the insured against death and injury by external means, leaving a visible mark on the body, and a wholly independent paragraph covenanted to pay a certain sum for an injury causing death, leaving no visible mark, or for such injury or death resulting from the intentional acts of others than the insured (Stephens v. Railway Officials' & Employés' Acc. Ass'n, 75 Miss. 84, 21 South. 710). It was held that the exception as to intentional injuries applied only to an injury which left no visible mark, and the insurer could not escape liability for an injury which left a visible mark by the plea that it was intentionally inflicted.

A provision that "in case of injuries * * * intentionally inflicted on himself by the insured, or inflicted on himself or received by him while insane," the company shall not be liable, exempts the insurer from liability for injuries to insured while insane, whether intentionally inflicted or not. Blunt v. Fidelity & Casualty Co., 78 Pac. 729, 145 Cal. 268, 67 L. R. A. 793.

Under the ordinary form of the exception, it will exempt the insurer from liability, whether disability or death ensues from intentional injuries. But in American Acc. Co. of Louisville v. Carson, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473, where a policy insuring against death or injury by accidental means provided in the exception only that it did not cover intentional "injuries" inflicted by the insured or other person, it was held that the exception referred to nonfatal injuries only; the theory of the court being that, as in all other conditions of the policy the words "injury or death" had been used, the omission of the word "death" in this exception must be regarded as significant.

Where insured is engaged in a hazardous occupation, and pays a higher rate of premium on that account, the fact that he is specially liable to intentional injuries in such occupation does not prevent the insurer from insisting on the exception—as, for instance, where one insured as a policeman or constable is intentionally injured in making an arrest or serving process.

Grimes v. Fidelity & Casualty Co. (Tex. Civ. App.) 76 S. W. 811; Miller v. Interstate Casualty Co., 17 Pa. Super. Ct. 360.

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Self-inflicted injuries are, of course, excepted by the terms of the condition; and, in determining whether an injury is self-inflicted, the financial condition of the insured may be considered, as showing motive, and the circumstances under which the policy was taken, and the declarations, acts, and conduct of the insured prior thereto, may be shown. Thus in Long v. Travelers' Ins. Co., 85 N. W. 24, 113 Iowa, 259, the insured was insolvent, and in pressing need of money to pay insistent creditors. Six days before the injury he took out a policy for $10,000, containing a provision that one-third of the amount should be paid on the loss of a foot or hand. In his conversations with others he spoke frequently of the indemnity procurable from accident insurance—especially with reference to the amount payable in case of loss of a foot or hand—mentioned a presentiment and dream of the loss of his foot, and declared his purpose to load up with insurance preparatory to a hunting trip he had in view. Within an hour before starting on the hunting trip he procured eight insurance policies, of $3,000 each, which he supposed contained conditions similar to the main policy. He only went about two miles into the country, and on his return shot himself—as he claimed, accidentally—in the foot. It was held that these facts justified a submission to the jury of the question whether the wound was or was not self-inflicted. So, in Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 30 C. C. A. 48, where the injury was the loss of a hand, the insurer had a right to show that the insured had told a friend that he was hard up, but that he was going to make a stake, and, when asked in what manner, replied, "What did I take out three insurance policies for?" The insurer was also entitled to show that the insured had on several occasions held conversations with a physician regarding an injury to the foot or hand, as to danger of death from such an injury, and how to stop the flow of blood, etc.

A complaint alleging that insured fell asleep from weariness and the motion of the cars, and when it was quite dark, "and while he was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, involuntarily arose from his seat and walked unconsciously to the platform of said car, and, without fault on his part, fell therefrom to the ground," and was thereby injured, sufficiently negatives the self-infliction of the injury. Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

In Pollock v. United States Mut. Accident Ass'n, 102 Pa. 230, 48 Am. Rep. 204, the court intimated that, if the act which caused

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the injury was intentional, it would fall within the exception, although the result of the act was unforeseen. This is certainly opposed to the general theory of accidental injury, and has been expressly repudiated in several cases.

Reference may be made to Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222; and to the cases involving voluntary exposure to danger.[3]

In Button v. American Mut. Acc. Ass'n, 92 Wis. 83, 65 N. W. 861, 53 Am. St. Rep. 900, the policy insured against injuries through external, violent, and accidental means, except when resulting from "intentional injuries" and certain other specified causes. The specified causes all involved acts in which the insured must be a participant by intent or consent. It was held, therefore, that the exception as to intentional injuries did not exempt the insurer from liability from injuries inflicted independently by third persons. On the other hand, **where the policy excepts intentional injuries inflicted by another person, it is not necessary that the insured should have participated in the intent of such other persons, to render the exception operative.** The injury may be wholly accidental as to the insured, in that it was unexpected.

Orr v. Travelers' Ins. Co., 120 Ala. 647, 24 South. 997; Fischer v. Travelers' Ins. Co., 77 Cal. 246, 19 Pac. 425, 1 L. R. A. 572; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 25 Pac. 713, 11 L. R. A. 297, 22 Am. St. Rep. 410; De Graw v. National Acc. Soc., 51 Hun, 142, 4 N. Y. Supp. 912; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 S. W. 811, 65 Am. St. Rep. 61.

Consequently **the exception of intentional injury inflicted by another person exempts the insurer from liability though the insured is murdered, irrespective of the motive of the murder.**

Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Travelers' Protective Ass'n of America v. Langholz, 86 Fed. 60, 29 C. C. A. 628; Brown v. United States Casualty Co. (C. C.) 88 Fed. 38; Jarnagin v. Travelers' Protective Ass'n, 66 C. C. A. 622, 133 Fed. 892; Orr v. Travelers' Ins. Co., 120 Ala. 647, 24 South. 997; Fischer v. Travelers' Ins. Co., 77 Cal. 246, 19 Pac. 425, 1 L. R. A. 572; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 25 Pac. 713, 11 L. R. A. 297, 22 Am. St. Rep. 410; Railway Officials' & Employés' Acc. Ass'n v. McCabe, 61 Ill. App. 565;

[3] See post, p. 3216.

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Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 10 Ky. Law Rep. 260, 12 Am. St. Rep. 484; Ging v. Travelers' Ins. Co. of Hartford, 74 Minn. 505, 77 N. W. 291; Phelan v. Travelers' Ins. Co., 38 Mo. App. 640; Johnson v. Travelers' Ins. Co., 15 Tex. Civ. App. 314, 39 S. W. 972; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61.

Where it was alleged that insured died from a shot fired by third persons while he was in the custody of officers of the law under arrest, and that his death was caused by the negligence of such officers in failing to protect deceased, the proximate cause of his death was the shot, and not the negligence of the officers in failing to protect him. Jarnagin v. Travelers' Protective Ass'n, 66 C. C. A. 622, 133 Fed. 892.

It is held, however, in accordance with recognized principles, that **a provision exempting the company from liability for death from "intentional" injury inflicted by the insured or any other person does not preclude a recovery where the insured was killed by an insane person, incapable of forming a rational intent.**

Berger v. Pacific Mut. Life Ins. Co. (C. C.) 88 Fed. 241; Corley v. Travelers' Protection Ass'n, 105 Fed. 854, 46 C. C. A. 278; Marceau v. Travelers' Ins. Co. of Hartford, 101 Cal. 338, 35 Pac. 856, rehearing denied 36 Pac. 813.

But the insanity which will render the act unintentional, and entitle the act to be regarded as accidental, within the policy, must be such mental derangement as deprives the person committing the act of sufficient capacity to understand the nature of the act and the consequences which will result from it. Therefore the intoxication of the person inflicting the injury will not render the exception inoperative if he was not so far intoxicated that he could not understand the nature of the act (Travelers' Ins. Co. v. Houston, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 429). On the other hand, if the person inflicting the injury is so intoxicated that he did not realize the nature of his act, and was incapable of forming a rational intention, the injury must be regarded as unintentional (Northwestern Benev. Soc. v. Dudley, 27 Ind. App. 327, 61 N. E. 207).

Though it was held in Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, where the policy provided that the insurance should not extend to any cause of death unless the claimant should show by positive proof that the death was not the result of design either on the part of insured or any other per-

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son, and it appeared that the insured died from the effect of a blow struck by another person, that the exemption would not apply if the person inflicting the blow did not mean to kill the insured, such does not seem to be the accepted rule. It is true that death at the hands of another may be purely accidental, as where one is accidentally shot by a robber (Railway Officials' & Employés' Acc. Ass'n v. Drummond, 76 N. W. 562, 56 Neb. 235). So, too, where the insured, a deserter from the army, was shot by a sheriff attempting to arrest him (Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913), it was held that unless the officer knew the person he fired at was the deserter, and intended to kill him, it could not be said that insured lost his life by the design of the officer, within the meaning of a condition declaring that the insurance should not extend to any case of death unless it was shown that the death or injury was not the result of design. Yet, if a deadly weapon is used in a manner calculated to cause death, a presumption of intent to kill will arise, within the exception (Travelers' Ins. Co. v. Wyness, 34 S. E. 113, 107 Ga. 584). **So, if the act was intentional, was directed against the insured, and some injury to him was intended, the insurer was released, though the injury was different in its nature and effects from that intended by the perpetrator** (Matson v. Travelers' Ins. Co., 93 Me. 469, 45 Atl. 518, 74 Am. St. Rep. 368). Thus, where insured made an unjustifiable assault, and the assaulted person, to protect himself, struck and injured the insured, the injury was intentionally inflicted, though he may not have intended to have inflicted all the injury that resulted (Fidelity & Casualty Co. of New York v. Smith, 31 Tex. Civ. App. 111, 71 S. W. 391).

To be available to the insurer, the defense that the death or disability of the insured was caused by injuries intentionally inflicted must be specially pleaded.

Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604; Stevens v. Continental Casualty Co., 97 N. W. 862, 12 N. D. 463.

Where the issue is whether the injury was purely accidental or intentional, the presumption, in the absence of evidence to the contrary, is that it was accidental.

Peck v. Equitable Acc. Ass'n, 52 Hun, 255, 5 N. Y. Supp. 215; Stevens v. Continental Casualty Co., 97 N. W. 862, 12 N. D. 463; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811; 65 Am. St. Rep. 61.

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The burden of proof is on the insurer to show that the injury was intentional.

Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113; Guldenkirch v. United States Mut. Acc. Ass'n (City Ct. N. Y.) 5 N. Y. Supp. 428; Stevens v. Continental Casualty Co., 97 N. W. 862, 12 N. D. 463.

On the issue whether the insured was killed intentionally, evidence tending to show a quarrel between insured and the person who shot him, and that the latter admitted having killed him, is admissible; but the indictment of such person, or a record of his pardon after conviction, are not admissible (Masons' Fraternal Acc. Ass'n v. Riley, 45 S. W. 684, 65 Ark. 261). So it was held in Standard Life & Acc. Ins. Co. v. Askew, 11 Tex. Civ. App. 59, 32 S. W. 31, that the indictment of one who had threatened the insured was not admissible to show whether he was killed accidentally or murdered.

It is necessary only that the evidence of intentional killing should preponderate against the presumption of accident (Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61). Statements in the proofs of death are not conclusive that the death resulted from intentional injuries.

Stevens v. Continental Casualty Co., 97 N. W. 862, 12 N. D. 463; Guldenkirch v. United States Mut. Acc. Ass'n (City Ct. N. Y.) 5 N. Y. Supp. 428.

Where the evidence is conflicting, the question whether the injury was intentional or accidental is for the jury (Guldenkirch v. United States Mut. Acc. Ass'n [City Ct. N. Y.] 5 N. Y. Supp. 428).

The sufficiency of the evidence was considered in Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862; Northwestern Ben. Soc. v. Dudley, 27 Ind. App. 327, 61 N. E. 207.

(l) Failure to exercise due diligence.

Accident policies may provide that insured shall use due diligence for his personal safety or protection. Under such a clause, insured is not bound to use more than ordinary care. The clause imposes on him the duty to exercise only the care which an ordinarily prudent man would use under the same circumstances.

Tooley v. Railway Passengers' Assur. Co., 24 Fed. Cas. 53; Travelers' Protective Ass'n v. Small, 115 Ga. 455, 41 S. E. 628; Kentucky

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Life & Acc. Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709; Duncan v. Preferred Mut. Acc. Ass'n, 13 N. Y. Supp. 620, 59 N. Y. Super. Ct. 145.

If insured's employment is a hazardous one, he is required to exercise only such care as is customary among reasonably prudent and careful persons engaged in such occupation (Pacific Mutual Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264).

But see Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530, where insured was a switchman, and the insurer pleaded that insured failed to use due care, but contributed directly to his injury by getting off a moving engine with his back towards the direction in which it was going, and it was held that a replication which does not deny that the insured failed to use due care, but only alleges that he was insured as a switchman, and that the injury occurred while in the discharge of his customary duties, is insufficient, in assuming that the policy would cover all such injuries, whether the insured was in the exercise of due care or not.

In the absence of an express condition exempting insurer from liability for injuries due to voluntary exposure to danger, the mere negligence of the insured will not defeat a recovery for injuries received in consequence of such negligence.

Providence Life Ins. & Inv. Co. v. Martin, 32 Md. 310; Wilson v. Northwestern Mut. Acc. Ass'n, 53 Minn. 470, 55 N. W. 626; Champlin v. Railway Pass. Assur. Co., 6 Lans. (N. Y.) 71; Ætna Life Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87; Schneider v. Provident Life Ins. Co., 24 Wis. 28, 1 Am. Rep. 157.

The very purpose of an accident policy, as its name imports, is to indemnify against loss arising by accident. It is to protect against inadvertence and mistake on the part of the insured that usually prompts the securing of an accident policy (North American Acc. Ins. Co. v. Gulick, 25 Ohio Cir. Ct. R. 395). Consequently the rules for determining what constitutes contributory negligence, so as to defeat a recovery for personal injuries caused by the negligence of another, have no application in actions on accident policies which do not in terms exempt the insurer from liability for injuries caused by the negligence of the insured (Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305).

The burden is on the insurer to show that the insured did not use due care, as required by the policy.

Freeman v. Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372; Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N. E. 769, 13

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L. R. A. 263; Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Mulville v. Pacific Mut. Life Ins. Co. of California, 19 Mont. 95, 47 Pac. 650.

Whether insured exercised due care for his own safety and protection, as required by the policy, is for the jury.

Payne v. Fraternal Acc. Ass'n, 93 N. W. 361, 119 Iowa, 342; Stone's Adm'r v. United States Casualty Co., 34 N. J. Law, 371; Duncan v. Preferred Mut. Acc. Ass'n, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, judgment affirmed (mem.) 129 N. Y. 622, 29 N. E. 1029.

Failure to exercise due care or negligence on the part of insured is not necessarily shown where insured, after having been advised of his condition by one physician, failed to follow the course of treatment prescribed, but was examined by, and followed the treatment of, other physicians, who are presumed to be of standing and ability, United States Casualty Co. v. Hanson (Colo. App.) 79 Pac. 176; where insured, while hunting, sat on a rail fence, with his gun cocked, and the gun was discharged by the turning of the rail, Kentucky Life & Acc. Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709; where insured, who was a passenger on a vestibuled train, passed from his car into the dining car while the train was running at full speed, Robinson v. United States Ben. Soc., 94 N. W. 211, 132 Mich. 695, 102 Am. St. Rep. 436; where insured, carrying an umbrella, which cut off his view, crossed railroad tracks, and was killed by a freight car which had been kicked along a track, Keene v. New England Mut. Acc. Ass'n, 161 Mass. 149, 36 N. E. 891; where, at the time he was killed, insured was riding on the platform of a street car, Sutherland v. Standard Life & Acc. Ins. Co., 54 N. W. 453, 87 Iowa, 505. That insured was killed by a train does not necessarily show negligence on his part. Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263. That death resulted from an accidental strain does not show that it was caused by unreasonable imprudence. North American Life & Accidental Ins. Co. v. Burroughs, 69 Pa. 43.

On the other hand, insured was guilty of negligence where he carelessly put his arm out of the window of a railroad car in motion, so that his hand came in contact with a post standing near the track, Morel v. Mississippi Val. Life Ins. Co., 4 Bush (Ky.) 535; where insured sat down on the end of a railroad tie, dangerously near the side track, and fell asleep, so that his arm was crushed by a passing train, Standard Life & Acc. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; where insured was killed by a train while running along the track in front of it at night for the purpose of getting on a train approaching in the opposite direction on a parallel track, Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316.

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(m) Voluntary exposure to unnecessary danger.

For the purpose of avoiding liability for injuries due to the negligence of insured, accident insurance companies have incorporated in their policies a condition declaring, in effect, that the insurance shall not cover death or disability happening in consequence of voluntary exposure to unnecessary danger. Such a condition is valid, and is not repugnant to the general clause of indemnity (Metropolitan Acc. Ass'n v. Taylor, 71 Ill. App. 132). **Mere negligence on the part of the insured, however, does not constitute a voluntary exposure, within the condition.**

Keene v. New England Mut. Acc. Ass'n, 164 Mass. 170, 41 N. E. 203; Lehman v. Great Eastern Casualty & Indemnity Co., 7 App. Div. 424, 39 N. Y. Supp. 912, affirmed without opinion in 158 N. Y. 689, 53 N. E. 1127. And see Schneider v. Provident Life Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, where the condition was against "willful and wanton exposure."

The negligence of the insured, to bring his acts within the exception, must be accompanied by knowledge of the existence of danger, or knowledge that injury is likely to result from his acts.

Ashenfelter v. Employers' Liability Assur. Corp., 87 Fed. 682, 31 C. C. A. 193; Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 53 N. E. 973, 23 Ind. App. 657; Thomas v. Masons' Fraternal Acc. Ass'n, 71 N. Y. Supp. 692, 64 App. Div. 22.

Moreover, there must be a knowledge of the special danger, and a knowledge of the generally dangerous character of the acts or the locality is not sufficient (Collins v. Bankers' Acc. Ins. Co., 96 Iowa, 216, 64 N. W. 778, 59 Am. St. Rep. 367). So, where the insured was warned that sleeping over the boiler of a steamboat was dangerous, it does not charge him with knowledge of danger of injury by reason of escaping steam (Travelers' Ins. Co. v. Clark, 22 Ky. Law Rep. 902, 59 S. W. 7, 109 Ky. 350, 95 Am. St. Rep. 374). A knowledge of the insured need not, however, be actual knowledge that injury is certain to result (Carpenter v. American Acc. Co., 46 S. C. 541, 24 S. E. 500), but **there must be knowledge or notice of such facts as would cause a reasonably prudent man to apprehend danger.**

Fidelity & Casualty Co. v. Sittig, 54 N. E. 903, 181 Ill. 111, 48 L. R. A. 359, affirming 79 Ill. App. 245; Campbell v. Fidelity & Casualty Co., 22 Ky. Law Rep. 1295, 60 S. W. 492, 109 Ky. 661; Carpenter v. American Acc. Co., 46 S. C. 541, 24 S. E. 500.

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So, where the train on which insured was a passenger stopped on a bridge at night, and insured, with others, stepped off the train, and fell through a hole in the bridge (Burkhard v. Travelers' Ins. Co., 102 Pa. 262, 48 Am. Rep. 205, reversing 39 Leg. Int. 420), it was said that he could not be reasonably charged with notice of the defect in the bridge. In North American Acc. Ins. Co. v. Gulick, 25 Ohio Cir. Ct. R. 395, where the exception was of injuries due to unnecessary or negligent exposure to obvious danger, the court said that the danger to which the insured must not subject himself is a danger that is evident, manifest, or understood. It is not a danger that a person might have known of by the exercise of ordinary care, but a danger that he is conscious of and knows to exist; that is to say, he must not wantonly and willfully take the risk of a known danger. Thus, where insured, who was a house painter, was injured while using a rope sling 30 feet above his barn floor, by the breaking of a truck supporting it, and the evidence showed that he had used the apparatus before, and on this occasion examined it carefully, and was accustomed to working at great heights, on church spires, the danger was not, as to him, obvious (Matthes v. Imperial Acc. Ass'n, 81 N. W. 484, 110 Iowa, 222).

If the insured acts as an ordinarily prudent man would act under the circumstances, injury resulting therefrom cannot be said to be due to a voluntary exposure to unnecessary danger.

Travelers' Protective Ass'n v. Small, 115 Ga. 455, 41 S. E. 628; Price v. Standard Life & Acc. Ins. Co., 99 N. W. 887, 92 Minn. 238; Duncan v. Preferred Mut. Acc. Ass'n, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, affirmed 129 N. Y. 622, 29 N. E. 1029 (mem.); Burkhard v. Travelers' Ins. Co., 102 Pa. 262, 48 Am. Rep. 205.

And in the absence of evidence that the insured was negligent, the exception does not operate to relieve the insurer (Irwin v. Phœnix Acc. & Sick Ben. Ass'n, 127 Mich. 630, 86 N. W. 1036). Since opinions as to what acts are prudent or imprudent may vary in different communities, the question whether the insured has acted as an ordinarily prudent man would act is to be determined by the consensus of opinion in the community (Travelers' Ins. Co. v. Seaver, 86 U. S. 531, 22 L. Ed. 155). Thus, since different and equally intelligent and unbiased men might fairly differ in opinion, whether risk or injury is necessarily incurred by riding in a bicycle race, a person riding in such a race cannot be said, as a matter of law, to voluntarily expose himself to danger, within the provision of the policy (Keeffe v. National Acc. Soc. of New York, 4 App.

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Div. 392, 38 N. Y. Supp. 854). **The acts of the insured, to constitute a voluntary exposure to unnecessary danger, must be grossly and wantonly negligent.**

Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620; Johnson v. London Guarantee & Acc. Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549.

Thus, where insured, in going from his place of business to a railroad station in the evening, instead of selecting one of two safe ways over the public streets of the city, passed through the railroad yards, where trains were momentarily passing in opposite directions, and, finding his way blocked, climbed upon a slowly moving freight train, which was going in his direction, and shortly after, in alighting therefrom, was struck by a semaphore and injured, he was guilty of voluntary exposure to avoidable danger, within the terms of the policy (Alter v. Union Casualty & Surety Co., 83 S. W. 276, 108 Mo. App. 169).

It was, however, held in Shevlin v. American Mut. Acc. Ass'n, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52, where the words "willfully and wantonly" were not in the condition, that the exception included injuries resulting if the insured failed to use ordinary care. The court distinguished Schneider v. Provident Life Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, as the words "willfully and wantonly" qualified the condition in that case.

The mere fact that the act of the insured is in itself voluntary does not control the determination of the question whether it falls within the exception. It does not follow, because the act was voluntary, that the exposure to danger was voluntary.

Conboy v. Railway Officials' Employés' Acc. Ass'n, 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154; Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485; Smith v. Ætna Life Ins. Co., 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271; Equitable Acc. Ins. Co. v. Osborn, 9 South. 869, 90 Ala. 201, 13 L. R. A. 267.

The purpose for which the danger, whether known or unknown, is incurred, is an important factor. So it was not an unnecessary exposure to danger where one was injured while attempting to get pigeons from the interior of his barn, to serve as food for himself and family (Matthes v. Imperial Acc. Ass'n, 110 Iowa, 222, 81 N. W. 484). Danger incurred for the purpose of saving life is not within the exception. Thus, where one is injured while rescuing

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persons from a wrecked vessel (Tucker v. Insurance Co., 50 Hun, 50, 4 N. Y. Supp. 505, affirmed without opinion 24 N. E. 1102, 120 N. Y. 718), or while preventing a person from being run over by a train (Williams v. United States Mut. Acc. Ass'n, 82 Hun, 268, 31 N. Y. Supp. 343, affirmed without opinion 147 N. Y. 693, 42 N. E. 726 [4]), it is not a voluntary exposure to an unnecessary danger, within the exception.

On the principles discussed, it may be deduced as the proper rule that **to constitute a voluntary exposure to unnecessary danger, within the meaning of the policy, there must be a disregard of a known danger, and a voluntary assumption of the risk accompanying such danger.**

Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; Ashenfelter v. Employers' Liability Assur. Corp., 87 Fed. 682, 31 C. C. A. 193; Keene v. New England Mut. Acc. Ass'n, 161 Mass. 149, 36 N. E. 891; North American Acc. Ins. Co. v. Gulick, 25 Ohio Cir. Ct. R. 395; De Loy v. Travelers' Ins. Co. of Hartford, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787; Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873.

So, where the insured, on a dark night, attempted to pass over a trestle, which he knew to be dangerous, other ways of travel being open to him (Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270), or where one unnecessarily jumped from a moving train after it had passed a station (Smith v. Preferred Mut. Acc. Ass'n, 104 Mich. 634, 62 N. W. 990), there was a disregard of an obvious danger, and a voluntary assumption of a risk.

On the other hand, where a traveling salesman, who holds an accident policy issued to him as such salesman, is confronted, while in pursuit of his business, with possible danger because of a slough in a public road on his regular line of travel, over which he has passed twice a year for 13 years, and makes inquiry of other men living in the vicinity as to the existence of danger at the time, and receives opinions, some expressing fears of danger, and others to the contrary, and, acting on his own judgment, formed from such opinions, and from his previous knowledge, and from appearances at the time, in good faith concludes that there is no danger to his life in crossing, and attempts to cross, and is accidentally drowned, such attempt is not a "voluntary exposure to unnecessary danger,"

[4] For the judicial history of this case, see 60 Hun, 580, 14 N. Y. Supp. 728, reversed in 133 N. Y. 366, 31 N. E. 222.

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within the meaning of the policy (United States Mut. Acc. Ass'n v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453). Similarly, where one sent back, in the line of his duty, to flag a train, sits down on the track, and involuntarily goes to sleep, and while in such condition is struck by the train, the accident is not caused by his voluntary exposure to unnecessary danger, within the clause exempting the insurer from liability for an accident resulting from such conduct on the part of insured (Bateman v. Travelers' Ins. Co. [Mo. App.] 85 S. W. 128).

In accord with the general rule is the well-established principle that **where the risk is connected with the ordinary occupation of the insured, and is incurred in the performance of the duties connected with such occupation, the insured, in assuming the risk, is not guilty of voluntary exposure to unnecessary danger, within the policy.**

Cotten v. Fidelity & Casualty Co. (C. C.) 41 Fed. 506; Pacific Mut. Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264; Providence Life Ins. & Inv. Co. v. Martin, 82 Md. 310; Wilson v. Northwestern Mut. Acc. Ass'n, 53 Minn. 470, 55 N. W. 626; Jamison v. Continental Casualty Co., 78 S. W. 812, 104 Mo. App. 306; Richards v. Travelers' Ins. Co. (S. D.) 100 N. W. 428, 67 L. R. A. 175.

In view of the general rule that, to relieve the insured, the excepted risk must be the proximate cause of death or injury, **a mere voluntary exposure to unnecessary danger will not exempt the insurer, unless the injury or death was due to the unnecessary exposure** (Ætna Life Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87). Thus, while there might have been an unnecessary exposure to danger of attack by other persons in taking a certain path alone at night, this would not relieve the insurer if the death of the insured was caused by a fall into a ditch (Employers' Liability Assur. Corp. v. Anderson, 5 Kan. App. 18, 47 Pac. 331).

It is not a voluntary exposure to unnecessary danger for the insured to attempt to scale a bank with a loaded gun in hand, Cornwell v. Fraternal Acc. Ass'n of America, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. Rep. 601; but placing a gun, loaded and cocked, against a fence, and, after climbing over it, attempting to draw the same through the fence, is an unnecessary exposure to danger, Sargent v. Central Acc. Ins. Co., 112 Wis. 29, 87 N. W. 796, 88 Am. St. Rep. 946. The cleaning of a gun not known to be loaded is not a voluntary exposure to unnecessary danger, Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L.

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R. A. 765; Union Casualty & Surety Co. v. Goddard, 25 Ky. Law Rep. 1035, 76 S. W. 832. Steeplechase riding is a voluntary exposure to unnecessary danger, Smith v. Ætna Life Ins. Co., 69 N. E. 1059, 185 Mass. 74, 64 L. R. A. 117, 102 Am. St. Rep. 326; but riding in a bicycle race is not such an exposure, as a matter of law, Keeffe v. National Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854. Engaging in a fight is not necessarily a voluntary exposure to danger, Campbell v. Fidelity & Casualty Co. of New York, 22 Ky. Law Rep. 1295, 60 S. W. 492, 109 Ky. 661; Yale v. Travelers' Ins. Co. of Hartford, 2 Thomp. & C. (N. Y.) 221; and this is true, though the insured brought on the difficulty himself, Collins v. Fidelity & Casualty Co., 63 Mo. App. 253. Attempting to escape from a police officer by lowering one's self from a window by a strip of bed ticking is a voluntary exposure to unnecessary danger. Shaffer v. Travelers' Ins. Co., 31 Ill. App. 112; Id., 22 N. E. 589.

Attempting to board a moving train may be negligent, but it is not willful and wanton exposure to danger, Schneider v. Provident Life Ins. Co., 24 Wis. 28, 1 Am. Rep. 157; nor is it, as matter of law, voluntary exposure to unnecessary danger, but it is rather a question for the jury, Johanns v. National Acc. Soc. of City of New York, 45 N. Y. Supp. 117, 16 App. Div. 104; Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; Anthony v. Mercantile Mut. Acc. Ass'n, 162 Mass. 354, 38 N. E. 973, 44 Am. St. Rep. 367, 26 L. R. A. 406; Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222. Whether such an attempt is a voluntary exposure to danger depends on the question whether, under the circumstances, an ordinarily prudent person would have made the attempt, Travelers' Protective Ass'n v. Small, 115 Ga. 455, 41 S. E. 628; but an attempt to board a train running eight or ten miles an hour is an exposure to obvious risk or injury, Small v. Travelers' Protective Ass'n, 118 Ga. 900, 45 S. E. 706, 63 L. R. A. 510. The act of the insured in jumping from a rapidly moving car without reasonable cause is an act of gross negligence. Shevlin v. American Mut. Acc. Ass'n, 68 N. W. 866, 94 Wis. 180, 36 L. R. A. 52.

Standing on the platform of a moving railway car does not, as a matter of law, show a voluntary exposure to unnecessary danger. Smith v. Ætna Life Ins. Co., 88 N. W. 368, 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153; Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305. Especially is this so where, by reason of the crowd on the train, there was no safer place to ride, Equitable Acc. Ins. Co. v. Sandifer, 12 Ky. Law Rep. 797; or because of illness the insured was required to leave the interior of the car, Preferred Acc. Ins. Co. v. Muir, 126 Fed. 928, 61 C. C. A. 456; Marx v. Travelers' Ins. Co. (C. C.) 39 Fed. 321. But if insured, when his train approached a station, voluntarily went out on the platform while the train was still moving, it was a voluntary ex-

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posure, within the policy. Overbeck v. Travelers' Ins. Co., 68 S. W. 236, 94 Mo. App. 453.

Going upon or crossing a railroad track, though done carelessly and without proper attention to the possibility of approaching trains, is not, as a matter of law, a voluntary exposure to unnecessary danger. Keene v. New England Mut. Acc. Ass'n, 161 Mass. 149, 36 N. E. 891; Duncan v. Preferred Mut. Acc. Ass'n (Super. N. Y.) 13 N. Y. Supp. 620, affirmed without opinion 29 N. E. 1029, 129 N. Y. 622; Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N. E. 769, 12 L. R. A. 263; Lehman v. Great Eastern Casualty & Indemnity Co., 53 N. E. 1127 (mem.) 158 N. Y. 689. This rule was applied where insured was stationed at a particular bridge to flag trains approaching the same, and apparently fell asleep on the track, Jamison v. Connecticut Casualty Co., 78 S. W. 812, 104 Mo. App. 306; and also where an employé of a railroad was sent to shovel snow from the crossings, Freeman v. Travelers' Ins. Co. of Hartford, 144 Mass. 572, 12 N. E. 372. So, where insured sat down on the track near a curve, with his back to the curve, and a train came suddenly around the curve, the act of the insured was not within the exception. Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432. On the other hand, it was held in Metropolitan Acc. Ass'n v. Taylor, 71 Ill. App. 132, that the insurer was not liable where the insured sat down on the track of a railroad in actual operation, and was run over and killed. So, in Willard v. Masonic Equitable Acc. Ass'n, 169 Mass. 288, 47 N. E. 1006, 61 Am. St. Rep. 285, it was held to be a voluntary exposure to danger where insured attempted to cross a railway between the cars of a freight train standing thereon. An attempt to cross a freight train by climbing over the drawheads and freight-car couplings is a voluntary exposure to danger. Bean v. Employers' Liability Assur. Corp., 50 Mo. App. 459. So, running along the track in front of a train at night, for the purpose of getting on a train approaching in an opposite direction on another track, is a voluntary exposure to danger. Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316. It is a voluntary exposure to danger to attempt on a dark night to walk across a railroad trestle where there was no railing, and nothing to walk on but ties 10 inches apart. Follis v. United States Mut. Acc. Ass'n, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408. Crossing railway tracks to take a train at a place other than the ordinary passageway, merely for convenience, is a voluntary exposure to danger, within the policy. Glass v. Masons' Fraternal Acc. Ass'n (C. C.) 112 Fed. 495.

Where the defense is that the insured voluntarily exposed himself to unnecessary danger, the answer must state the facts on which the contention is based (Voluntary Relief Department of Penn-

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sylvania Lines West of Pittsburg v. Spenger, 17 Ind. App. 123, 46 N. E. 477), and an answer alleging facts which in the absence of explanation show a voluntary exposure to danger is sufficient (Conboy v. Railway Officials' & Employés Acc. Ass'n [Ind. App.] 43 N. E. 1017).

In a suit on an accident policy containing a provision preventing recovery for injuries resulting from exposure to unnecessary danger, a defense under that clause goes to the entire right of recovery, and is waived by an offer to confess judgment for a certain sum.

Holiday v. American Mut. Acc. Ass'n, 72 N. W. 448, 103 Iowa, 178, 64 Am. St. Rep. 170; Wildey Casualty Co. v. Sheppard, 59 Pac. 651, 61 Kan. 351, 47 L. R. A. 650.

The burden of proving that the injury was due to voluntary exposure to unnecessary danger is on the insurer.

De Greayer v. Fidelity & Casualty Co. of New York, 126 Cal. xvii, 58 Pac. 390; Fidelity & Casualty Co. v. Sittig, 79 Ill. App. 245; Id., 54 N. E. 903, 181 Ill. 111, 48 L. R. A. 359; Follis v. United States Mut. Acc. Ass'n, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408; Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Hester v. Fidelity & Casualty Co., 69 Mo. App. 186; Jamison v. Continental Casualty Co., 78 S. W. 812, 104 Mo. App. 306.

What amounts to a voluntary exposure to unnecessary danger is necessarily largely a question of fact, for the determination of the jury, under all the circumstances of the case.

Travelers' & Travelers' Acc. Co. v. Wagley, 74 Fed. 457, 20 C. C. A. 588, 45 U. S. App. 39; Ashenfelter v. Employers' Liability Assur. Corp., 87 Fed. 682, 31 C. C. A. 193; Columbian Acc. Co. v. Sanford, 50 Ill. App. 424; Payne v. Fraternal Acc. Ass'n, 119 Iowa, 342, 93 N. W. 361; Travelers' Ins. Co. v. Snowden, 45 Neb. 249, 63 N. W. 392.

Where the policy insures against bodily injuries induced by accidental means, except death or disability happening in consequence of disease or bodily infirmity or by voluntary exposure to unnecessary danger, an alternative finding of fact that insured met his death in consequence of bodily disease or infirmity, or by reason of his voluntary exposure to unnecessary danger, is sufficient to support a judgment in favor of the company (Taylor v. Metropolitan Acc. Ass'n, 172 Ill. 511, 50 N. E. 115). Where, in an action on a policy containing a condition that it should not cover injuries

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received from a voluntary exposure to unnecessary danger, the jury found, in answer to interrogatories, that insured was injured by running into a wagon while riding a bicycle against a heavy wind, which he might have avoided if he had been looking ahead; that he was not conscious of danger, and did not knowingly and intentionally assume a risk, nor intentionally take chances of colliding with the wagon; and that he did not voluntarily expose himself to danger—such findings, taken together, show no irreconcilable conflict with the general verdict in plaintiff's favor (Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 55 N. E. 973, 23 Ind. App. 657).

4. SUICIDE AS AN EXCEPTED RISK IN LIFE AND ACCIDENT INSURANCE.

(a) In general.
(b) Validity of conditions declaring suicide an excepted risk.
(c) Effect of subsequent by-laws.
(d) Statutory provisions.
(e) Effect of clause declaring policy incontestable.
(f) What constitutes suicide in general.
(g) Involuntary self-destruction.
(h) Effect of insanity.
(i) Same—Under "sane or insane" clause.
(j) Same—Cause of mental derangement.
(k) Questions of practice—Pleading.
(l) Same—Presumptions.
(m) Same—Burden of proof.
(n) Same—Admissibility of evidence.
(o) Same—Weight and sufficiency of evidence.
(p) Same—Trial.

(a) In general.

Though recent forms of policies contain conditions intended to exempt the insurer from liability if the insured commit suicide, there are a number of cases based on earlier forms in which the question has been considered whether, in the absence of any provision in the policy excepting such a risk, death by suicide is a risk assumed by the insurer. That it is not included within other conditions in the nature of exceptions has been held in several cases. Thus, suicide is not a crime within the condition excepting death in violation of law (Darrow v. Family Fund Soc., 42 Hun, 245, affirmed in 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St.

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Rep. 430). Nor is it an "immoral practice," within a condition relieving the insurer if the death of the insured is due to any immoral practice (Northwestern Ben. & Mut. Aid Ass'n v. Wanner, 24 Ill. App. 357). It has, however, been held to fall within a provision exempting the insurer from liability if the insured die by his own illegal act (Shipman v. Protected Home Circle, 67 N. E. 83, 174 N. Y. 398, 63 L. R. A. 347, modifying 66 App. Div. 448, 73 N. Y. Supp. 594).

In several cases the rule has been laid down that **a condition excepting suicide while sane from the risks assumed is implied in all policies in which the insurance is payable to the insured, his estate, personal representatives, or assignees.** The leading case is 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,[1] where the decision was based on considerations of public policy, and on the presumption that suicide was intended when the policy was taken out. No particular stress was laid on the fact that the policy was payable to the personal representatives of the insured, but that this is an important feature of the case has been pointed out, not only in cases which have distinguished it for that reason, but even in cases which have followed it. Thus, in Hopkins v. Northwestern Life Assur. Co. (C. C.) 94 Fed. 729, the court pointed out that the policy in the Ritter Case was payable to the insured himself or his representatives, though it was held that the rule that the exception of suicide was implied would apply in any case. The principle that the exception will be implied, though the policy is payable to the insured or his personal representatives, has also been recognized in other cases prior and subsequent to the Ritter Case.

Reference may be made to Supreme Lodge Knights of Pythias v. Kutscher, 72 Ill. App. 462; Bank of Oil City v. Guardian Mut. Life Ins. Co., 6 Leg. Gaz. 348; Hall v. Mutual Reserve Fund Life Ass'n, 19 Pa. Super. Ct. 31.

Similarly, it has been held that **in the case of mutual benefit associations, where the insured has power to change the beneficiary, the exception will also be implied.**

Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Mooney v. Ancient Order of United Workmen, 114 Ky. 950, 72 S. W. 288, 24 Ky. Law Rep. 1787; Hunziker v. Supreme Lodge Knights of Pythias, 25 Ky. Law Rep. 1510, 78

[1] **For prior report, see (C. C.) 69 Fed. 505.**

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S. W. 201; Weber v. Supreme Tent of Knights of Maccabees, 65 N. E. 258, 172 N. Y. 490, 92 Am. St. Rep. 753; Reynolds v. Supreme Conclave Improved Order of Heptasophs, 24 Pa. Co. Ct. R. 638.

The theory on which these cases are decided is undoubtedly the principle laid down in Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, modifying 66 App. Div. 448, 73 N. Y. Supp. 594, where it was said that the beneficiary under a certificate issued by a mutual benefit association takes his rights through the insured, and subject to the terms of the contract entered into by him, and not in the same manner as the beneficiary in an ordinary life insurance policy, and therefore cannot benefit by the wrong of the insured in intentionally taking his life, while sane, any more than the legal representatives of the insured in an ordinary life insurance policy under the same conditions.

On the other hand, it has been pointed out in Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826, that since a beneficiary takes by contract, and not by inheritance, suicide by the insured does not avoid the policy, in the absence of a provision that such should be its effect, though insured had the right to change the beneficiary without the latter's consent.

Conceding that the rule is as stated in the Ritter Case, when the policy is payable to the insured or his personal representatives, it is nevertheless the settled rule that **where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true though the contract is that of a mutual benefit association under which the insured has the right to change the beneficiary.**

This rule is supported by Supreme Lodge Knights of Pythias v. Kutscher, 72 Ill. App. 462; Supreme Lodge Knights of Pythias v. Trebbe, 74 Ill. App. 545; Supreme Council Royal Arcanum v. Pels, 110 Ill. App. 409, affirmed in 70 N. E. 697, 209 Ill. 33; Seiler v. Economic Life Ass'n, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826; Supreme Conclave Improved Order of Heptasophs v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528; Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; Supreme Lodge of Sons and Daughters of Protection v. Underwood, 3 Neb. (Unof.) 798, 92 N. W. 1051;

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Campbell v. Supreme Conclave Improved Order of Heptasophs, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576; Fitch v. American Popular Life Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372; Patrick v. Excelsior Life Ins. Co., 67 Barb. (N. Y.) 202; Darrow v. Family Fund Soc., 22 N. E. 1093, 116 N. Y. 537, 6 L. R. A. 495, 15 Am. St. Rep. 430; Morris v. State Mut. Life Assur. Co., 39 Atl. 52, 183 Pa. 563; Hall v. Mutual Reserve Fund Life Ass'n, 19 Pa. Super. Ct. 31; Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

So, it was held in Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162, that as the constitution and by-laws of a mutual benefit association organized to secure the benefit of life insurance to the heirs of deceased members, which issues no policies, stand in place of a policy, if they contain no provision qualifying the right of recovery in cases of suicide, the heirs of a member are entitled to the amount stipulated, although he died by his own hand.

The rule that suicide must be regarded as an excepted risk when the beneficiary has no vested interest under the contract was questioned in Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259, but the court held that the insurer had itself so construed its contract as to render itself liable in case of suicide by providing that the company should not be liable for suicide within two years, and by thereafter passing by-laws declaring that, if insured committed suicide, his beneficiary should be entitled to only one-half of the face of the policy, and that in the face of this construction the insurer could not raise the defense that suicide avoided the policy on grounds of public welfare.

In view of the general principle that the procuring of a policy of insurance with intent to commit suicide is a fraud on the insurer,[2] it has been conceded, even in cases asserting the rule that suicide is not an excepted risk in the absence of a stipulation to that effect, that **if it can be shown that the policy was procured with intent to commit suicide there can be no recovery, notwithstanding the failure to incorporate the exception in the policy.**

Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826; Supreme Conclave Improved Order of Heptasophs v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528; Campbell v. Supreme Conclave Improved Order of Heptasophs, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576; Smith v. National Ben. Soc., 51 Hun, 575, 4 N. Y. Supp. 521, affirmed in 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

[2] See ante, vol. 1, p. 553.

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(b) Validity of conditions declaring suicide an excepted risk.

The provisions of a contract making suicide an excepted risk usually declare, in substance, that if the insured shall commit suicide, whether sane or insane, the policy shall be void. Such a provision is reasonable (Brunner v. Equitable Life Assur. Soc., 100 Ill. App. 22), and is not void for want of mutuality (Latimer v. Sovereign Camp Woodmen of the World, 62 S. C. 145, 40 S. E. 155). As was said in Northwestern Mut. Ins. Co. v. Churchill, 105 Ill. App. 159, there is nothing in the provision affecting public policy or morality, and it contravenes no rule of common or statute law.

The validity of the clause excepting suicide as a risk is asserted generally in Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Snyder v. Mutual Life Ins. Co., 22 Fed. Cas. 740, affirmed (1876) 93 U. S. 393, 23 L. Ed. 887; Chapman v. Republic Life Ins. Co., 5 Fed. Cas. 481; Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge K. P. v. Clarke, 88 Ill. App. 600; Supreme Court of Honor v. Peacock, 91 Ill. App. 632; Dickerson v. Northwestern Mut. Life Ins. Co., 102 Ill. App. 280, affirmed in 200 Ill. 270, 65 N. E. 694; Hart v. Modern Woodmen of America, 60 Kan. 678, 57 Pac. 936, 72 Am. St. Rep. 380; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232; Mauch v. Supreme Tribe of Ben Hur, 91 N. Y. Supp. 367, 100 App. Div. 49; Northwestern Mut. Life Ins. Co. v. Maguire, 19 Ohio Cir. Ct. R. 502, 10 O. C. D. 562; Tritschler v. Keystone Mut. Ben. Ass'n, 180 Pa. 205, 36 Atl. 734; Chambers v. Supreme Tent of Knights of the Maccabees, 49 Atl. 784, 200 Pa. 244, 86 Am. St. Rep. 716; Mutual Reserve Fund Life Ass'n v. Payne (Tex. Civ. App.) 32 S. W. 1036.

The provision will be given effect whether it is contained in the policy itself or is made the subject of warranty in the application (Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37). But if contained in the application, it must, of course, be properly made a part of the contract, and if the statute, as in Kentucky (Ky. St. § 679), provides that an application for insurance shall not be considered a part of the policy unless attached thereto, effect will not be given to a stipulation of the application excepting death by suicide if the application is not attached to the policy, though it is declared to be a part of the contract (Provident Sav. Life Assur. Soc. v. Puryear's Adm'r, 59 S. W. 15, 109 Ky. 381).

In case of mutual benefit associations the exception may be by a provision in the by-laws (Theobald v. Supreme Lodge K. P., 59 Mo. App. 87). Such a by-law will be effective if properly made a

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part of the contract (Clement v. Clement [Tenn.] 81 S. W. 1249), but not otherwise. So, where, after the adoption of a by-law excepting suicide, a certificate in the old form was issued, which did not contain the new by-law or refer thereto, the exception did not become a part of the contract (Sovereign Camp Woodmen of the World v. Fraley, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898). Similarly, under a statute (Ky. St. § 679) requiring the by-laws to be attached to the certificate in order to be considered a part thereof, a by-law declaring death by suicide an excepted risk, but not made a part of the certificate, is not operative, the certificate containing no stipulation as to suicide (Mooney v. Ancient Order of United Workmen, 114 Ky. 950, 24 Ky. Law Rep. 1787, 72 S. W. 288). If, however, a person who is a charter member of a benefit association has his attention called to the constitution and laws of the association, and especially to a section which declares that no benefits shall be paid upon the death of a member who shall commit suicide, and some weeks afterwards a certificate of insurance is issued to him upon condition that he comply with all the laws of the association, the said section as to suicide must be considered a part of the contract between him and the association (Sabin v. Senate of the National Union, 90 Mich. 177, 51 N. W. 202).

A mutual benefit association may, however, provide against its liability in the event of death resulting from suicide, notwithstanding such provision is not directly authorized by the constitution and by-laws of the organization (Blasingame v. Royal Circle, 111 Ill. App. 202); and if, under the terms of the application and certificate of membership, a mutual benefit association is not to be liable for the death of the insured by suicide, the association cannot be held liable for such death, though neither the by-laws nor other rules of the association authorize such limitation (McCoy v. Northwestern Mut. Relief Ass'n, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681).

In many of the more recent forms of policy the exception is limited in its operation to a certain period after the issuance of the policy; as, for instance, where the policy provides that it shall be void if within two years from the date thereof the insured shall commit suicide, whether sane or insane. This form of the condition is valid and reasonable, and operates to relieve the insurer from liability if the insured commits suicide within the specified time.

Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; National Union v. Thomas, 10 App. D. C. 277; Weld v. Mutual Life Ins. Co.,

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61 Ill. App. 187; Brunner v. Equitable Life Assur. Soc., 100 Ill. App. 22; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687, 56 L. R. A. 611; Spruill v. Northwestern Mut. Life Ins. Co., 120 N. C. 141, 27 S. E. 39; Northwestern Mut. Life Ins. Co. v. Maguire, 19 Ohio Cir. Ct. R. 502, 10 O. C. D. 562; Sargeant v. National Life Ins. Co., 189 Pa. 341, 41 Atl. 351.

But where the insured commits suicide after the time so limited, the provision is inoperative to relieve the insurer (Triple Link Mut. Indemnity Ass'n v. Froebe, 90 Ill. App. 299).

The exception sometimes takes the form of a limitation of the amount to be paid by the insurer in case insured dies by suicide. The amount may be limited to the assessments paid, to the legal reserve or equitable value of the policy, or to some proportionate part of the face of the policy. Such conditions are valid, and will be given effect according to the terms of the policy.

Somerville v. Knights Templars' & Masons' Life Indemnity Ass'n, 11 App. D. C. 417; Supreme Lodge K. P. v. Clarke, 88 Ill. App. 600; Frey v. Germania Life Ins. Co., 56 Mich. 29, 22 N. W. 100; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687, 56 L. R. A. 611; Clement v. Clement (Tenn.) 81 S. W. 1249.

Where the insured pays the first premium and receives his policy, in the absence of fraud or mistake, it will be presumed that the provision in reference to suicide was knowingly accepted by him (Brunner v. Equitable Life Assur. Soc., 100 Ill. App. 22). The exception is self-executing (Dickerson v. Northwestern Mut. Life Ins. Co., 102 Ill. App. 280, affirmed in 200 Ill. 270, 65 N. E. 694), and since the beneficiary named in the policy, by accepting it and asserting a claim thereunder, ratifies the acts of the insured as agent in procuring it, and adopts the contract subject to the conditions and limitations therein expressed or implied, and cannot repudiate promises made to the insurer as a consideration for its undertaking, nor enlarge the obligation beyond that undertaking, the condition, whether contained in the policy or in the by-laws, is binding on the beneficiary as well as the insured.

Snyder v. Mutual Life Ins. Co., 22 Fed. Cas. 740; Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; National Union v. Thomas, 10 App. D. C. 277; Treat v. Merchants' Life Ass'n, 64 N. E. 992, 198 Ill. 431; Dickerson v. Northwestern Mut. Life Ins. Co., 102 Ill. App. 280, affirmed in 200 Ill. 270, 65 N. E. 694; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; Supreme Lodge Knights of Honor v. Fletcher, 78 Miss. 377, 29 South. 523; Mauch v. Supreme Tribe of Ben Hur, 100 App. Div. 49, 91 N. Y. Supp. 367; United Moderns v. Colligan (Tex. Civ. App.) 77 S. W. 1032.

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(c) Effect of subsequent by-laws.

As the contract between a mutual benefit association and its members is contained, not in the certificate alone, but also in the constitution and by-laws of the association, an important phase of the question as to the extent to which suicide is an excepted risk arises when the association has, by the passage of a law after the insured became a member of the association, attempted to relieve itself from liability in the event of suicide. The general rules determining the extent to which members of such associations are bound by subsequent by-laws have already been discussed.[3] It is deemed sufficient at this time to refer to those principles only so far as they are illustrated in cases in which a subsequent law relating to suicide as an excepted risk is involved.

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. So, where the charter of a mutual benefit society empowered it to make its own constitution and exercise general legislative authority, and required authorized delegates from the head camps to meet every two years, which, when assembled, were called the "Sovereign Camp," and constituted the supreme legislative department of the order, with authority to make its laws, such delegates, when assembled as the sovereign camp, had power to adopt, in the manner required by the by-laws, an amendment to the constitution changing the conditions of the benefit certificate, rendering it null if the insured committed suicide while either sane or insane, instead of only while sane, as before prescribed (Sovereign Camp, Woodmen of the World, v. Fraley, 59 S. W. 879, 94 Tex. 200, 51 L. R. A. 898, affirming [Civ. App.] 59 S. W. 905).

It is obvious, however, that, independent of any other consideration, a member can be bound by a subsequent by-law relating to suicide only when the amendment or the new law is adopted in accordance with the law of the association. 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

[3] See ante, vol. 1, p. 703.

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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). Though 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. P. v. Kutscher, 53 N. E. 620, 179 Ill. 340, 70 Am. St. Rep. 115), yet a provision in the constitution in a benevolent association with a life insurance department, that its board of control shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may provide, confers executive and not legislative powers, and does not authorize the board of control to pass a regulation providing that no beneficiary of a member who commits suicide shall be entitled to benefits (Supreme Lodge K. P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838).

A special plea alleging that the insured had agreed to be bound by all the laws, rules, and regulations of the order governing the endowment rank thereafter enacted by the supreme lodge, and that the law making suicide an excepted risk was thereafter adopted by the board of control of said rank, having full power to enact laws for its government, is bad on demurrer. Supreme Lodge Knights of Pythias of the World v. McLennan, 49 N. E. 530, 171 Ill. 417, affirming 69 Ill. App. 599.

The burden of proving the enactment of a by-law declaring suicide an excepted risk is on the insurer. Herman v. Supreme Lodge K. P., 66 N. J. Law, 77, 48 Atl. 1000.

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,[4] an amendment relating to suicide as an excepted risk, 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) provided 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. P., 25 Ky. Law Rep. 1510, 78 S. W. 201).

Where the by-laws of a mutual benefit association provide that publication in the official organ of any notice required to be given the

[4] Comp. St. Neb. 1901, c. 43, § 112.

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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 such construction. Consequently, **amendments to the by-laws, or new by-laws, making suicide an excepted risk, will be construed as operating prospectively only, unless the intention to make them retroactive is clearly evidenced by clauses having that effect.**

Sovereign Camp Woodmen of the World v. Thornton, 115 Ga. 798, 42 S. E. 236; Northwestern Ben. & Mut. Aid Ass'n v. Wanner, 24 Ill. App. 357; Shipman v. Protected Home Circle, 66 App. Div. 448, 73 N. Y. Supp. 594; Bottjer v. Supreme Council American Legion of Honor, 78 App. Div. 546, 79 N. Y. Supp. 684.

Whether or not a member is otherwise bound by subsequent by-laws, he will, of course, be bound if he assents thereto. 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).

It is undoubtedly competent for parties to a mutual insurance association to make contracts with reference to the by-laws then existing, or which might thereafter be adopted; and, when such an agreement is contained in the contract, both the member and his beneficiary will be bound by laws of the association making suicide an excepted risk, adopted after the membership was acquired.

Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Tent Knights of Maccabees v. Hammers, 81 Ill. App. 560; 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. 348, 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

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Lodge Knights of Pythias, 75 Miss. 466, 23 South. 191; Protected Home Circle v. Tisch, 24 Ohio Cir. Ct. R. 489; Chambers v. Supreme Tent Knights of Maccabees, 200 Pa. 244, 49 Atl. 784, 86 Am. St. Rep. 716; Reynolds v. Supreme Conclave Improved Order of Heptasophs, 24 Pa. Co. Ct. R. 638; Supreme Lodge K. P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; Eversberg v. Supreme Tent Knights of Maccabees (Tex. Civ. App.) 77 S. W. 246; and Hughes v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 98 Wis. 292, 73 N. W. 1015.

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). In Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259, it was said that the agreement to be bound by subsequent by-laws refers only to such amendments or new laws as relate to the organization generally, its forms and methods of business, and the duties of members as such, and does not refer to matters of contract.

It is, however, elementary that, in order to bind a member of a mutual benefit association by a subsequent by-law under the agreement to be bound, the law must be reasonable. In Illinois (Supreme Tent Knights of Maccabees v. Hammers, 81 Ill. App. 560), and in Tennessee (Supreme Lodge K. P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838), by-laws declaring suicide, sane or insane, an excepted risk, were held to be reasonable. The contrary view was, however, taken in Bottjer v. Supreme Council American Legion of Honor, 79 N. Y. Supp. 684, 78 App. Div. 546, affirming 75 N. Y. Supp. 805, 78 App. Div. 546.

Another elementary principle that must be applied in determining the effect of subsequent by-laws is the rule that **the new law must be in harmony with the general policy of the association** (Bottjer v. Supreme Council American Legion of Honor, 78 App. Div. 546, 79 N. Y. Supp. 684, affirming 75 N. Y. Supp. 805, 78 App. Div. 546). Such a requirement is not filled when the new law makes a radical departure from the fundamental plan of insurance theretofore pursued, and imposes restrictions which did not exist even by implication when membership was acquired (Sovereign Camp Woodmen of the World v. Thornton, 115 Ga. 798, 42 S. E. 236). Thus, where a benefit certificate containing no restriction as to death by suicide had been in force for 18 years, an amendment of the by-laws then made, providing for a reduction of the amount

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payable if the insured committed suicide, was held not to be binding on the member, as it changed the scheme of the insurance (Smith v. Supreme Lodge Knights of Pythias, 83 Mo. App. 512). 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.

It is well established by the weight of authority that, **even under an agreement by the member to be bound by laws thereafter enacted, an association cannot, by the amendment or alteration of its laws, impair the obligation of its contracts or deprive a member of his vested rights.** 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 deny 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."

The general rule is also supported by Northwestern Ben. & Mut. Aid Ass'n v. Wanner, 24 Ill. App. 357; Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259; Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; Feierstein v. Supreme Lodge Knights of Honor, 69 App. Div. 53, 74 N. Y. Supp. 558.

The real issue is whether a particular by-law relating to suicide as an excepted risk impairs the obligation of the contract or the vested rights of the member. It must be conceded that, **as a general rule, a by-law making suicide, sane or insane, an excepted risk**

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does not impair any 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; Protected Home Circle v. Tisch, 24 Ohio Cir. Ct. R. 489.

This rule is also recognized in Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, with the qualification, however, that it applies only to by-laws declaring suicide while sane an excepted risk; it being 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. But it has been held in New York (Bottjer v. Supreme Council American Legion of Honor, 79 N. Y. Supp. 684, 78 App. Div. 546, affirming 37 Misc. Rep. 406, 75 N. Y. Supp. 805) that a by-law reducing the amount of the death benefit where the insured commits suicide is an impairment of the vested right, and the same view was taken in Missouri (Morton v. Supreme Council of Royal League, 73 S. W. 259; 100 Mo. App. 76). Similarly, where the contract excepted intentional self-destruction within one year (Weber v. Supreme Tent of Knights of Maccabees of the World, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753), a by-law extending the period to five years was regarded as impairing vested rights. For the same reason, where the contract contained the same limitation, a by-law making suicide an absolute exception was held to be inoperative (Fargo v. Supreme Tent of Knights of Maccabees, 96 App. Div. 491, 89 N. Y. Supp. 65). On the other hand, in Chambers v. Supreme Tent Knights of Maccabees of the World, 200 Pa. 244, 49 Atl. 784, 86 Am. St. Rep. 716, it was held that a by-law extending the time within which suicide was an excepted risk was operative, as the beneficiary acquired no vested rights until the death of the member.

(d) Statutory provisions.

The extent to which suicide is an excepted risk is, in Missouri, controlled by statute. A statute of that state declares that in actions on policies of insurance on life, "issued by any company doing business in this state, it shall be no defense that the insured committed suicide," unless it be shown that insured contemplated suicide when making his application, "and any stipulation in the policy

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to the contrary shall be void."[5] The words "committed suicide," as used in the statute, are to be understood as used in their popular sense as comprehending all cases where the insured took his own life, whether while sane or insane (Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139, affirming 104 Fed. 638, 44 C. C. A. 93). To relieve the insurance company from the operation of the statute it is not sufficient to show that the insured, at the time of his application, had considered the subject of suicide, but it must appear that he had entertained a definite purpose to commit suicide (Ætna Life Ins. Co. v. Florida, 69 Fed. 932, 16 C. C. A. 618, 32 U. S. App. 753, 30 L. R. A. 87). Under this statute, the insurer, in order to avoid liability when the insured commits suicide, must show that he contemplated suicide when procuring the insurance (McDonald v. Bankers' Life Ass'n, 154 Mo. 618, 55 S. W. 999); and a stipulation invalidating the policy if the insured shall commit suicide within a specified period (Elliott v. Safety & Fund Life Ass'n, 76 Mo. App. 562), or reducing the amount in the event of suicide (Keller v. Travelers' Ins. Co., 58 Mo. App. 557), is invalid.

The United States Circuit Court in Ticktin v. Fidelity & Casualty Co., 87 Fed. 543, held that the statute did not apply to accident policies, basing its decision largely on the fact that though Rev. St. 1889, § 5811, authorizes life insurance companies to engage in the business of accident insurance, it declares that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it." But the Supreme Court of Missouri in Logan v. Fidelity & Casualty Co. of New York, 146 Mo. 114, 47 S. W. 948, construed the statute as applying to policies which cover loss of life from external, violent, and accidental means alone, as well as those covering loss of life from usual or natural causes.

In view of the provisions of the statute (Rev. St. 1889, § 5869) excepting from the operation of the general insurance law associations doing business on the assessment plan, mutual benefit associations are not within the purview of the statute as to suicide, and consequently such associations may rely on the defense, irrespective of the intent of the insured.

Haynie v. Knights Templars' & Masons' Life Indemnity Co., 139 Mo. 416, 41 S. W. 461; Elliott v. Des Moines Life Ass'n, 63 S. W. 400,

[5] Rev. St. 1879, § 3982; Rev. St. 1889, § 5855; Rev. St. 1899, § 7896.

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163 Mo. 132; Theobald v. Supreme Lodge K. P., 59 Mo. App. 87; Sparks v. Knight Templars & Masonic Life Indemnity Co., 61 Mo. App. 109; Wallace v. Bankers' Life Ass'n, 80 Mo. App. 102; Morton v. Royal Tribe of Joseph, 93 Mo. App. 78.

The laws of Missouri define three classes of insurance organizations: First, regular or old-line insurance companies, where, for a fixed premium payable without condition at stated intervals, a sum certain is to be paid at death without condition (Rev. St. 1889, §§ 5811, 5812); second, insurance companies on the assessment plan, where the assessment is fixed, but the amount to be paid is dependent upon the collection of an assessment from persons holding similar contracts (Rev. St. 1889, § 5860); and, third, fraternal beneficial associations where the assessments are fixed by the association, and the amount to be paid in case of death is derived from the proceeds of the assessment upon the members of the association (Rev. St. 1889, § 2823). To be exempt from the operation of the statute relating to suicide, the association must fall within the second or third classes as so defined. Therefore, an association which has a fixed premium, payable without condition at stated intervals, or which does not provide for the collection of assessments from its policy holders, or which in its plan of organization otherwise differs from the definitions in the statute, is not exempt.

Elliott v. Safety Fund Life Ass'n, 76 Mo. App. 562; Toomey v. Supreme Lodge Knights of Pythias, 147 Mo. 129, 48 S. W. 936, affirming on certificate 74 Mo. App. 507; McDonald v. Bankers' Life Ass'n, 55 S. W. 999, 154 Mo. 618; Knights Templars' & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561, 4 U. S. App. 353, affirming (C. C.) 46 Fed. 439; National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89; Baltzell v. Modern Woodmen, 71 S. W. 1071, 98 Mo. App. 153.

On the other hand, where the association is conducted for the sole benefit of its members, and collects, by assessments, sums not regarded as premiums for insurance, but as a fund for the benefit of the designated beneficiaries of the members, it falls within the definition of assessment of fraternal benefit societies, and is exempt from the operation of the statute.

Morton v. Royal Tribe of Joseph, 93 Mo. App. 78; Haynie v. Knights Templars' & Masons' Life Indemnity Co., 139 Mo. 416, 41 S. W. 461.

Foreign benefit associations, to be exempt from the provisions of the statute, must have been duly authorized to transact business

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in the state, such authorization being necessary to place them on the same footing as domestic benefit associations.

Shotliff v. Modern Woodmen, 100 Mo. App. 138, 73 S. W. 326; Hudnall v. Modern Woodmen, 77 S. W. 84, 103 Mo. App. 356; Huff v. Sovereign Camp Woodmen of the World, 85 Mo. App. 96; Brasfield v. Modern Woodmen, 88 Mo. App. 208.

It is only as to policies issued after the association has been so authorized to do business as an assessment company that the exemption applies (Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 23 Sup. Ct. 108, 187 U. S. 197, 47 L. Ed. 139).

The Iowa Code, § 1782, amended by Laws 27th Gen. Assem. c. 46, taking effect July 4, 1898, provides that no life insurance company or association shall make any distinction between persons insured of the same class and equal expectancy of life in the amount of premiums or dividends or other benefits payable on policies, or in any other of the terms or conditions of the contract it makes. It was held that where a life insurance association organized and operating under the laws controlling stipulated premium associations inserted in a policy issued December 31, 1896, on the life of one who died by suicide April 21, 1898, a stipulation that death by suicide within two years should not be one of the risks assumed, and that in such case the amount of premiums actually paid, with 4 per cent. interest, should be the extent of liability, such stipulation was not forbidden by Code, § 1782, since, until the amendment, that section did not apply to stipulated premium associations (Beverly v. Northern Life Ass'n, 84 N. W. 933, 112 Iowa, 730).

(e) Effect of clause declaring policy incontestable.

The policy may contain a stipulation to the effect that after it has been in force for a certain number of years it shall be incontestable, except for fraud in procuring it. Where the policy also contains a provision declaring suicide an excepted risk, **the effect of the "incontestable clause" is substantially to convert the "suicide clause" into a limited exception, and to render the insurer liable where the death by suicide occurs after the time limited in the incontestable clause.**

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; Supreme Court of Honor v. Updegraff, 68 Kan. 474, 75 Pac. 477; Mutual Reserve Fund Life Ass'n v. Payne (Tex. Civ. App.) 32 S. W. 1063.

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The effect of the incontestable clause, when construed in connection with the other provisions of the policy, was considered at length in Royal Circle v. Achterrath, 68 N. E. 492, 204 Ill. 549, 63 L. R. A. 452, 98 Am. St. Rep. 224, affirming 106 Ill. App. 439, where the contract of a fraternal insurance association was involved. The laws of the association provided for forfeiture through loss of good standing, to be determined by trial and conviction, and in another clause for forfeiture by suicide. It was also provided that the contract of insurance should be incontestable after a certain date if the member continued in good standing. It was held that the clause forfeiting the certificate for suicide was entirely distinct from the clause providing for forfeiture for loss of good standing, and, as the phrase "continue in good standing" refers to such good standing as exists up to the time of death, suicide did not involve loss of good standing. Consequently, the incontestable clause rendered the defense of suicide unavailable to the association either under the suicide clause or under the clause relating to the good standing of the member.

The rule that the incontestable clause renders the suicide clause unavailable after the expiration of the time limited by the former clause will also apply where the policy declares that suicide is not one of the risks assumed, but that in the event of suicide by the insured the company will pay only the amount of premiums or assessments paid by the insured (Mareck v. Mutual Reserve Fund Life Ass'n, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613), or the net value of the policy (Simpson v. Life Ins. Co. of Virginia, 115 N. C. 393, 20 S. E. 517).

The courts of Pennsylvania have adopted the contrary rule as to the effect of the incontestable clause, and it has been held (Hall v. Mutual Reserve Fund Life Ass'n, 19 Pa. Super. Ct. 31) that if the policy excepts the risk of death by suicide, and stipulates that in the event of suicide there shall be payable only a sum equal to the premiums paid, with interest, the beneficiary can recover, if the insured committed suicide, only the premiums and interest, notwithstanding the incontestable clause. In Starck v. Union Cent. Life Ins. Co., 134 Pa. 45, 19 Atl. 703, 7 L. R. A. 576, 19 Am. St. Rep. 674, reversing 7 Pa. Co. Ct. R. 511, the court construed the Ohio statute[6] declaring that "all companies after having received three annual premiums on any policies * * * are estopped from de-

[6] Rev. St. § 3626.

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fending upon any other ground than fraud against any claim arising upon such policy by reason of any errors, omissions or misstatements of the insured in any application made by such insured on which the policy was issued, except as to age." It was held that this statute was not a limitation on the company's right to defend on the ground of suicide, but only on its right to defend on the ground of misstatements other than misstatements of age, and which did not amount to fraud.

It is obvious that if the insured commits suicide within the period limited by the incontestable clause the insurer is not liable, and the clause is not made available to avoid the defense because the period will expire before an action can be brought on the policy under the laws of the state (Kelley v. Mutual Life Ins. Co. [C. C.] 109 Fed. 56).

When the insured died by suicide, the fact that the beneficiary, before demand made for the payment of the policy, requested the company to accept payment of a past-due premium, and was informed that the policy had been canceled, and directed to negotiate with a local agent as to revival, is insufficient to sustain a claim of waiver of the suicide clause. Scherar v. Prudential Ins. Co., 88 N. W. 687, 63 Neb. 530, 56 L. R. A. 611.

(f) What constitutes suicide in general.

Suicide within the provision declaring that death by suicide is an excepted risk is the act of designedly destroying one's own life (Seitzinger v. Modern Woodmen, 68 N. E. 478, 204 Ill. 58, affirming 106 Ill. App. 449), and a provision declaring that the insurer shall not be liable if the insured die by his own hand is equivalent to the provision excepting suicide.

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Moore v. Connecticut Mut. Life Ins. Co., 17 Fed. Cas. 672; Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482; Hartman v. Keystone Ins. Co., 21 Pa. 466.

As said in Phillips v. Louisiana Equitable Life Ins. Co., 26 La. Ann. 404, 21 Am. Rep. 549, the words, "if the insured should die by his own hands," in a life policy, cannot be interpreted in their literal sense; for they would exempt the company from liability if the insured came to his death by the accidental discharge of a gun or pistol in his own hands, or if he took poison through a mistake, while they would not exempt the company were he to commit

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suicide by jumping over a precipice or into a river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words, and it is evident that intention is to exempt the insurer from liability from the voluntary destruction of the insured, by whatever means accomplished. So, too, "self-destruction of the insured in any form" as a risk excepted means suicide of the insured; the words "in any form" referring to the manner of killing (Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148).

The exception relieving the insurer if the insured shall commit suicide or die by his own hand is also to be construed as referring to felonious self-destruction; that is to say, the act must, in the absence of qualifying conditions, be intentional, and committed with full understanding of its nature and consequences. It is the criminal self-destruction that is excepted.

St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush (Ky.) 268; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623.

Though it was said in a leading case (Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332) that the exception refers to wrongful, deliberate self-destruction, this does not mean that the act must be deliberate in the sense that it was carefully considered and planned for any certain period. It may have been a hasty act, and yet self-destruction within the exception, if it was the conscious and voluntary act of the insured (Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277). All that is necessary is that there should be intent, which is the necessary element of suicide (Mauch v. Supreme Tribe of Ben Hur, 100 App. Div. 49, 91 N. Y. Supp. 367).

The time of death following the causative act does not affect the question, and it is suicide though the insured did not die until several days had elapsed after he had shot himself. Thommen v. Jewelers' & Tradesmen's Co., 37 N. Y. Supp. 222, 15 Misc. Rep. 473.

(g) Involuntary self-destruction.

In view of the principles discussed in the preceding subdivision it follows, as a matter of course, that **under a clause declaring suicide an excepted risk the insurer is not relieved from liability if the**

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death of the insured was accidental, though brought about by the hands of the insured or some dangerous instrument held in them.

Scarth v. Security Mut. Life Soc., 75 Iowa, 346, 39 N. W. 658; Northwestern Mut. Life Ins. Co. v. Maguire, 19 Ohio Cir. Ct. R. 502, 10 O. C. D. 562; Bank of Oil City v. Guardian Mut. Life Ins. Co., 6 Leg. Gaz. (Pa.) 348; Brown v. Sun Life Ins. Co. (Tenn. Ch. App.) 57 S. W. 415, 51 L. R. A. 252; Pierce v. Travelers' Life Ins. Co., 34 Wis. 389.

And since the clause declaring self-destruction an excepted risk, or exempting the insurer from liability if the insured dies by his own hand, is the same in effect as the clause declaring suicide an excepted risk, accidental self-killing by an instrument in the hands of the insured, such as accidental shooting or accidental poisoning, does not fall within the exception.

Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Latimer v. Sovereign Camp Woodmen of the World, 62 S. C. 145, 40 S. E. 155. In Gooding v. United States Life Ins. Co., 46 Ill. App. 307, the cause of death was accidental shooting. In Connecticut Mut. Life Ins. Co. v. Smith, 89 Ill. App. 569, Michigan Mut. Life Ins. Co. v. Naugle, 130 Ind. 79, 29 N. E. 393, Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258, and Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 South. 595, 66 L. R. A. 322, the insured by mistake took a fatal dose of poison.

As said in Grand Legion of Select Knights A. O. U. W. of Kansas v. Korneman, 10 Kan. App. 577, 63 Pac. 292, the act which resulted in death must have been done with the purpose and intent that it should result in death. So, it was held in Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535, that even if the insured drank to intoxication, and while in this condition by accident or mistake took an overdose of laudanum and died therefrom, this was not "dying by his own hand," in the sense of those words as used in the policy, though the mistake or accident was in some sense occasioned by the drunkenness.

Even where suicide or death by insured's own hand, "voluntary or involuntary," is excepted, the condition does not apply to accidental self-killing.

Edwards v. Travelers' Life Ins. Co. (C. C.) 20 Fed. 661 (accidental poisoning); Penfold v. Universal Life Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660 (overdose of medicine); Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648, judgment affirmed

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(1904) 209 Ill. 550, 70 N. E. 1066 (accidental shooting while cleaning gun); Keels v. Mutual Reserve Fund Life Ass'n (C. C.) 29 Fed. 198 (accidental tearing of bandage from wound). It was, however, intimated in Illinois that a different rule might be adopted if the insured was culpably negligent. Lawrence v. Mutual Life Ins. Co., 5 Ill. App. 280; Mutual Life Ins. Co. v. Laurence, 8 Ill. App. 488.

So, in Courtemanche v. Supreme Court L. O. F. (Mich.) 98 N. W. 749, 64 L. R. A. 668, it was held, rejecting the dictum of the Lawrence Cases, that, though insured's death was due to his voluntary taking of carbolic acid in order to frighten his wife into giving him money, recovery might be had on a policy which excepted self-destruction and suicide, as the poison was not taken with a real intent to cause death. Where the policy provided that the insurer should not be liable if the insured should take his own life by any unlawful act (Evans v. Phœnix Mut. Life Ass'n, 1 Pa. Dist. R. 27), it was held that the accidental death of the insured, who, while trespassing on a train, was thrown under the wheels and killed, was not within the exception.

(h) Effect of insanity.

It has already been pointed out that conditions excepting death by suicide, by self-destruction, or "by his own hand" are, in force and effect, equivalent. It has also been pointed out that the essential element in "suicide," construing the term in its legal and moral sense, is the intent. It is evident, therefore, that, **to constitute suicide, the act of the insured which brings about his death must have been done with the conscious intent of producing that result, and with a full appreciation of the nature and probable consequences of the act.** This leads us to the general rule that **when suicide is not expressly made an excepted risk, or when the exception is made in general terms only, without qualification, suicide while insane will not relieve the insurer from liability.**

The general principle is asserted in Mutual Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, affirming (C. C.) 27 Fed. 40; Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; Coverston v. Connecticut Mut. Life Ins. Co., 6 Fed. Cas. 654; Waters v. Connecticut Mut. Life Ins. Co. (C. C.) 2 Fed. 892; Edwards v. Travelers' Ins. Co. (C. C.) 20 Fed. 661; Jacobs v. National Life Ins. Co., 1 MacArthur (D. C.) 632; Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Life Ass'n v. Waller, 57 Ga. 533;

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Hammers v. Supreme Tent of the Maccabees of the World, 78 Ill. App. 162; Triple Link Mut. Indemnity Ass'n v. Froebe, 90 Ill. App. 299; Central Mut. Life Ins. Ass'n v. Anderson, 195 Ill. 135, 62 N. E. 838; Supreme Council Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697, affirming 110 Ill. App. 409; Michigan Mut. Life Ins. Co. v. Naugle, 130 Ind. 79, 29 N. E. 393; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268; Mooney v. Ancient Order of United Workmen, Grand Lodge of Kentucky, 72 S. W. 288, 24 Ky. Law Rep. 1787, 114 Ky. 950; Hunziker v. Supreme Lodge K. P., 78 S. W. 201, 25 Ky. Law Rep. 1510; Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224, 89 Am. Dec. 743; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Scheffer v. National Life Ins. Co., 25 Minn. 534; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; Breasted v. Farmers' Loan & Trust Co., 4 Hill (N. Y.) 73; Weed v. Mutual Ben. Life Ins. Co., 70 N. Y. 561, affirming 41 N. Y. Super. Ct. 476; Newton v. Mutual Ben. Life Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Mauch v. Supreme Tribe of Ben Hur, 91 N. Y. Supp. 367, 100 App. Div. 49; Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; American Life Ins. Co. v. Isett's Adm'r, 74 Pa. 176; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 689; Bank of Oil City v. Guardian Mut. Life Ins. Co., 6 Leg. Gaz. (Pa.) 348; Boileau v. Insurance Co., 1 Wkly. Notes Cas. (Pa.) 145; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623.

To be available as an excuse for suicide, the insanity must have existed at the time the act of self-destruction was committed, and it is insufficient to show that the insured was insane at other times.

Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Knickerbocker Life Ins. Co. of New York v. Peters, 42 Md. 414.

But it is not every degree of insanity that will exempt the person taking his own life from the consequences of the act. A person may from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life, be considered in a certain sense insane. Nevertheless, these alone are not enough to exempt him from the consequences of self-destruction, if he committed the act deliberately and intelligently. **In order to excuse the act of self-destruction, the mind of the insured must have been so far deranged as to have rendered him incapable of exercising a rational judgment in regard to the act he was committing.**

Mutual Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Coverston v. Connecticut Mut. Life Ins. Co., 6 Fed. Cas. 654; Gay v. Union

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Mut. Life Ins. Co., 10 Fed. Cas. 114; Moore v. Connecticut Mut. Life Ins. Co., 17 Fed. Cas. 672; Wolf v. Mutual Ben. Life Ins. Co., 30 Fed. Cas. 407; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37; Scheffer v. National Life Ins. Co., 25 Minn. 534; Fowler v. Mutual Life Ins. Co., 4 Lans. (N. Y.) 202; Weed v. Mutual Benefit Life Ins. Co., 70 N. Y. 561; Bank of Oil City v. Guardian Mut. Life Ins. Co., 6 Leg. Gaz. (Pa.) 348; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

The leading case is Mutual Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236, where, after a careful consideration of the question, the court arrived at the conclusion that **suicide by the insured is not within the exception if, at the time of taking his life, his reasoning faculties are so far impaired that he is not able to understand the moral character, general nature, consequences, and effect of his act, or when he is impelled thereto by an insane impulse which he has not the power to resist.**

The rule laid down in the Terry Case has been followed in Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Hiatt v. Mutual Life Ins. Co., 12 Fed. Cas. 94; Moore v. Connecticut Mut. Life Ins. Co., 17 Fed. Cas. 672; Waters v. Connecticut Mut. Ins. Co. (C. C.) 2 Fed. 892; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37; Wolf v. Mutual Ben. Life Ins. Co., 30 Fed. Cas. 407; Life Association of America v. Waller, 57 Ga. 533; New Home Life Ass'n v. Hagler, 29 Ill. App. 437; Grand Lodge Independent Order of Mutual Aid v. Wieting, 48 N. E. 59, 168 Ill. 408, affirming 68 Ill. App. 125; Central Mut. Life Ass'n v. Anderson, 62 N. E. 838, 195 Ill. 135; Supreme Council Royal Arcanum v. Pels, 70 N. E. 697, 209 Ill. 33; affirming 110 Ill. App. 409; Michigan Mut. Life Ins. Co. v. Naugle, 130 Ind. 79, 29 N. E. 393; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268; Knickerbocker Life Ins. Co. of New York v. Peters, 42 Md. 414; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Weed v. Mutual Ben. Life Ins. Co., 41 N. Y. Super. Ct. 476; Newton v. Mutual Ben. Life Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Meacham v. New York State Mut. Benefit Ass'n, 46 Hun (N. Y.) 363; Wolf v. Mutual Ben. Life Ins. Co., 30 Fed. Cas. 407; Connecticut Mutual Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 689; Bank of Oil City v. Guardian Mut. Life Ins. Co., 6 Leg. Gaz. (Pa.) 348; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623; Mutual Life Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

In Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335, the court, while approving the rule that irresistible insane impulse is sufficient to excuse the suicide, and that active, violent insanity is

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not necessary, regards it as insufficient that the insured is incapable of distinguishing between right and wrong. In some other cases the courts have gone further, and held that, if the insured was capable of understanding the physical consequences of his acts, it was immaterial that he did not understand the moral consequences.

Gay v. Union Mut. Life Ins. Co., 10 Fed. Cas. 114; Nimick v. Mutual Life Ins. Co., 18 Fed. Cas. 247; Dean v. American Mut. Life Ins. Co., 4 Allen (Mass.) 96; Cooper v. Massachusetts Mut. Life Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215.

On the other hand, the Supreme Court of the United States, following the Terry Case, has laid special stress on the inability of the insured to understand the moral consequences of his acts, regarding it as unnecessary that the mental aberration should be of such a character that he was also unable to understand the physical nature and consequences of the act.

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; 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.

A recent form of the condition provides that there shall be no recovery when the insured commits suicide, unless the person claiming under the policy shall prove that prior to the suicide the member had been judicially declared insane, or was under treatment for insanity at the time the act was committed, or was then in the delirium of other illness. This condition was construed in Supreme Council of Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697, where the court said: "The effect of the qualifying provisions of the by-law was to relieve the beneficiaries from the duty of producing proof to establish the degree of insanity with which the assured was affected in all cases where the assured had been judicially declared to be insane, or where at the time of his death he was under treatment for insanity, or was then in the delirium of other illness; but it had no effect to exclude such beneficiaries from participation in the benefit fund in cases where the assured had not been judicially declared insane or was not under treatment for insanity, but whose mental faculties at the time he committed the fatal act were impaired by insanity to such an extent that he was unable to understand the moral effect of the act and its general nature and character from a moral point of view, or was so weak-

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ened and unsound that he was unable to resist an insane impulse to take his own life."

It may, of course, be conceded that there can be no recovery if the insured had sufficient mind, reason, and judgment to rationally consider and determine whether he preferred to die or to live, and for any reason determined that he preferred to die, and, comprehending what he was doing, took his life in pursuance of such determination (Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335). So, if the insured, though sick or distressed in mind, formed the determination to take his own life because, in the exercise of his usual reasoning faculties, he preferred death to life, or desired thereby to make a provision for his family, the insurer is not liable (Coverston v. Connecticut Mut. Life Ins. Co., 6 Fed. Cas. 654).

(1) Same—Under "sane or insane" clause.

In order to evade the effect of the decisions holding that, under the general condition, suicide while insane is not an excepted risk, insurance companies have adopted a more specific condition, providing for exemption from liability if the insured should commit suicide, "sane or insane." This condition has been construed by the courts as covering self-destruction, irrespective of the mental condition of the insured at the time of the act causing death, and it has, therefore, been generally held that **when the condition excepts suicide, "sane or insane," there can be no recovery, though the insured was insane when the act of self-destruction was committed.**

This rule is illustrated in Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; Clarke v. Equitable Life Assur. Soc. of the United States, 118 Fed. 374, 55 C. C. A. 200; Supreme Court of Honor v. Peacock, 91 Ill. App. 632; Scarth v. Security Mut. Life Soc., 75 Iowa, 346, 39 N. W. 658; Sparks v. Knight Templars' & Masonic Life Indemnity Co., 61 Mo. App. 109; Haynie v. Knights Templars' & Masons' Life Indemnity Co., 139 Mo. 416, 41 S. W. 461; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687, 56 L. R. A. 611; De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232; Tritschler v. Keystone Mut. Ben. Ass'n, 36 Atl. 734, 180 Pa. 205; Billings v. Accident Ins. Co., 64 Vt. 78, 24 Atl. 656, 33 Am. St. Rep. 913, 17 L. R. A. 89.

So, too, when the policy provides that there can be no recovery if insured die as the result of any act which, had it been done by him while in the possession of all his faculties unimpaired, would be

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deemed self-destruction, such clause will be given the same effect as the sane or insane clause.

Cotter v. Royal Neighbors, 76 Minn. 518, 79 N. W. 542; Keefer v. Modern Woodmen, 52 Atl. 164, 203 Pa. 129.

In Zimmerman v. Masonic Aid Ass'n (C. C.) 75 Fed. 236, the application provided that, in case of death by suicide, the contract should be "null and void," but the by-laws of the association, which were made a part of the contract declared that in case of suicide, sane or insane, the certificate should be void, except that the beneficiary should be entitled to the amount paid in. It was held that the provision in the application was intended to apply to cases of "suicide," using the term in its strictly legal sense, and meaning thereby that, if the insured took his own life, having sufficient mental power to know, intend, and be responsible for the consequences of his act, the contract of insurance would be rendered wholly void, and the premiums paid would be forfeited to the company; that the provisions of the by-laws were intended to cover cases wherein the insured taking his own life was either clearly insane and irresponsible, or was at least so unbalanced in his mind as to render it doubtful whether he deliberately and intentionally took his own life or not, and that in such cases it would be optional with the company whether payment should be made or not, but, if payment in full was refused, the company must return a sum equal to the premiums received. But to fall within the rule the provision in the policy must be equivalent to the sane or insane clause. A condition that the policy is to become null and void in case the insured shall die by his own hand or act, voluntarily "or otherwise," is too vague, and will not be given the force of the sane or insane clause (Jacobs v. National Life Ins. Co., 1 MacArthur [D. C.] 632). So, it was held in Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676, that a condition declaring the policy void in case the insured "shall, under any circumstances, die by his own hand," was not equivalent to the sane or insane clause. On the other hand, it was held in Riley v. Hartford Life & Annuity Ins. Co. (C. C.) 25 Fed. 315, that where the policy provides that it shall be void in case the assured die by "self-destruction, felonious or otherwise," the proviso includes all cases of voluntary self-destruction, sane or insane.

Whether the degree of insanity will be taken into consideration in giving effect to the sane or insane clause is a question on which

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the authorities are not agreed. In Billings v. Accident Ins. Co., 64 Vt. 78, 24 Atl. 656, 33 Am. St. Rep. 913, 17 L. R. A. 89, it was said that a condition avoiding the policy if death result from suicide, sane or insane, covers self-destruction, irrespective of the insured's mental condition at the time of the act, and that the court, in an action on the policy, will not attempt to measure the degrees of insanity. So, it was held in Spruill v. Northwestern Mut. Life Ins. Co., 27 S. E. 39, 120 N. C. 141, that the word "insane" implies every degree of unsoundness of mind, and the liability of the insurer is not affected by the degree of insanity.

Reference may also be made to Chapman v. Republic Life Ins. Co., 5 Fed. Cas. 481; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687, 56 L. R. A. 611; De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232.

On the other hand, in the leading case of Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918, the court, though regarding it unnecessary to discuss the various phases of insanity in order to determine whether a state of circumstances might not possibly arise which would defeat the condition, said that the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, though at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing, thus differentiating the rule under the sane or insane clause from the rule under the general suicide clause discussed in subdivision (h). In accord with this opinion, it has been intimated in several well-considered cases that, **even under the sane or insane clause, suicide will not be regarded as an excepted risk if the insured is at the time unable to understand the physical nature and consequences of his act.**

This principle is illustrated in Jenkins v. National Union, 118 Ga. 587, 45 S. E. 449; Hart v. Modern Woodmen of America, 57 Pac. 936, 60 Kan. 678, 72 Am. St. Rep. 380; Same v. Knights of Maccabees, Id.; Streeter v. Western Union Mut. Life & Accident Soc., 65 Mich 199, 31 N. W. 779, 8 Am. St. Rep. 882; Sabin v. Senate of the National Union, 90 Mich. 177, 51 N. W. 202; Pagenhardt v. Metropolitan Ins. Co. (Com. Pl.) 6 Ohio Dec. 190, 4 Ohio N. P. 169; Latimer v. Sovereign Camp Woodmen of the World, 40 S. E. 155, 62 S. C. 145; Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 9 S. W. 812, 10 Ky. Law Rep. 577, 87 Ky. 541; Manhattan Life Ins. Co. v. Beard, 66 S. W. 35, 23 Ky. Law Rep. 1747, 112 Ky. 455; Supreme Council

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K. E. W. v. Heineman, 78 S. W. 406, 25 Ky. Law Rep. 1604. But see Mooney v. Ancient Order of United Workmen, 72 S. W. 288, 24 Ky. Law Rep. 1787, 114 Ky. 950.

This principle was also laid down in Adkins v. Columbia Life Ins. Co., 70 Mo. 27, 35 Am. Rep. 410, but in later cases the Missouri courts have adopted the rule that the degree of insanity is immaterial.

Brower v. Supreme Lodge Nat. Reserve Ass'n, 74 Mo. App. 490; Haynie v. Knights' Templars' & Masons' Life Indemnity Co., 139 Mo. 416, 41 S. W. 461.

The earlier cases in Illinois also support the doctrine that the insured must at least be able to understand the physical nature and consequences of his act to render the exception available.

Suppiger v. Covenant Mut. Ben. Ass'n, 20 Ill. App. 595; Nelson v. Equitable Life Assur. Soc., 73 Ill. App. 133; Supreme Lodge Order of Mutual Protection v. Zerulla, 99 Ill. App. 630; Supreme Lodge Mutual Protection v. Gelbke, 64 N. E. 1058, 198 Ill. 365.

In Seitzinger v. Modern Woodmen of America, 68 N. E. 478, 204 Ill. 58, affirming 106 Ill. App. 449, the Supreme Court adopted the extreme doctrine, and held that under the sane or insane clause the mental condition of the insured is wholly immaterial. The court distinguished the Gelbke Case, saying that it did not decide that the insurer might not insist upon its nonliability on proof that the insured came to his death by suicide, even though the degree of insanity was such that he was wholly insane, totally unconscious of the manner of his death, and totally incapable, by reason of such insanity, of forming an intention of taking his own life, and did not at the time comprehend or understand the physical nature and result of his act, and did not intend to take his life. But whether decided or not, the court in the Gelbke Case certainly approved the principle, for the language of the court is that the provisions of the certificate in that case rendered it void if the insured committed suicide, unless "he was in such a state of mind as to be unconscious of the physical nature of the act which caused his death. * * * Gelbke's agreement was that if his death should result from his own suicidal act, whether sane or insane, the defendant should not be liable; and if he took the poison voluntarily, understanding the physical nature and consequences of his act, with the purpose and

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intention to cause his death, it makes no difference whether he was sane or insane, or whether his intention was rational or irrational."

The rule laid down in the Seitzinger Case was followed in Supreme Court of Honor v. Buxton, 111 Ill. App. 187; Blasingame v. Royal Circle, 111 Ill. App. 202; Supreme Court Knights of Maccabees of the World v. Marshall, Id. 312.

(j) Same—Cause of mental derangement.

Ordinarily, the cause of the mental derangement of the insured is immaterial. Thus, where a policy provides that the insurer shall not be liable if the insured shall commit suicide, and also provides that the policy shall become void if the insured shall impair his health by intemperance, there can be no recovery where the insured commits suicide, though he committed the act at a time when he was deranged mentally, if it appears that his mental condition was produced by his intemperance (Jarvis v. Connecticut Mut. Life Ins. Co., 13 Fed. Cas. 373). A similar principle governed Stratton v. North American Mut. Life Ins. Co., 7 Leg. Gaz. (Pa.) 313. So, the death of one who kills himself while insane cannot be considered to be accidental, so as to be covered by an accident policy excepting the case of a person dying by his own hand, sane or insane, because his insanity was produced by a fall received in an accident (Streeter v. Western Union Mut. Life & Acc. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882). But in Travelers' Ins. Co. v. Melick, 65 Fed. 178, 12 C. C. A. 544, 27 U. S. App. 547, 27 L. R. A. 629, where the insured suffered an accidental injury followed by lockjaw, it was held that, if he committed suicide in the delirium caused by the lockjaw, the original injury must be regarded as the proximate cause of death.

It is, however, provided in many recent forms of policies that suicide, sane or insane, is not a risk assumed, "unless it be committed in delirium resulting from illness, or while the insured is under treatment for insanity, or has been judicially declared to be insane." Such a provision is reasonable, and is one which the insurer has the right to impose (Supreme Court of Honor v. Peacock, 91 Ill. App. 632). "Illness," within the terms of the condition, is not necessarily such a sickness as confines one in bed (Supreme Lodge Knights of Honor v. Lapp's Adm'x, 74 S. W. 656, 25 Ky. Law Rep. 74); and it was held in Connecticut Mut. Life Ins. Co.

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v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148, that it referred to disease of the mind as well as of the body.

(k) Questions of practice—Pleading.

It is not necessary for the plaintiff, in an action on a policy, to negative the exception of death by suicide, and, even if it were, a general allegation that all conditions had been performed would be sufficient (Modern Woodmen v. Noyes, 64 N. E. 21, 158 Ind. 503). So, under the rule that it is not necessary to state the facts constituting performance of a condition precedent, but it is sufficient to aver generally that it was duly performed (Code Civ. Proc. N. Y. § 533), in an action on a policy warranting that the insured will not die by his own hand, it is not necessary, in New York, for the plaintiff to allege that the insured died by suicide, and to aver that he was insane at the time (Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37). **The condition in the policy, being an exception, must be pleaded by the insurer if it intends to rely thereon.**

Modern Woodmen v. Noyes, 64 N. E. 21, 158 Ind. 503; Latimer v. Sovereign Camp Woodmen of the World, 40 S. E. 155, 62 S. C. 145.

In an action on an accident insurance policy, where the plea alleged that death resulted from disease or bodily infirmity, without alleging suicide, evidence offered for defendant tending to show that insured committed suicide was properly excluded (National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658).

A life insurance company is not required to return the premiums earned as a prerequisite to its right to contest its liability thereon, on the ground that the insured committed suicide, which was a risk it did not assume, where it admits the validity of the policy (Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154). And though the insured committed suicide before the expiration of the time for which a payment of premium has been made, the insurer, in order to rely on the defense of suicide, is not bound to declare the policy void and tender back the unearned premium (Dickerson v. Northwestern Mut. Life Ins. Co., 65 N. E. 694, 200 Ill. 270). The defense of suicide may be waived, but the intent to waive must clearly appear. So, where the officers of the company and the beneficiary met several times, and discussed the bene-

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ficiary's claim, with the expectation of adjusting it, the beneficiary expending money incidental to her attendance at such meetings, and the company received and retained proofs of loss, and afterwards paid the amount of the losses on two other policies issued to the same member the company did not waive the defense (Hughes v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 73 N. W. 1015, 98 Wis. 292). And where a mutual benefit association was liable for assessments paid in, whether insured committed suicide or not, the fact that a beneficiary furnished proofs of death and prosecuted an appeal before the appellate tribunal of the order at some expense, after her claim for the full amount had been rejected because of suicide, did not operate as a waiver by the company of the suicide clause (Voelkel v. Supreme Tent of Knights of Maccabees, 92 N. W. 1104, 116 Wis. 202; Id., 92 N. W. 1135).

Where a beneficiary certificate stipulates against payment of benefits to members committing suicide, unless it is done in delirium resulting from illness or while the member is under treatment for insanity, a special plea founded on such provision, to state a defense to an action on the certificate, must show that the suicide was committed under such circumstances as relieved the company from the payment of benefits (Supreme Court of Honor v. Barker, 96 Ill. App. 490). A plea which alleges that the assured did "immorally, wrongfully, and wickedly commit suicide" substantially alleges that he did it while sane (Northwestern Benev. & Mut. Aid Ass'n v. Bloom, 21 Ill. 159). And if the answer, relying upon the statement in the proofs of loss that the insured came to his death by his "own hand and act," fails to allege in terms that the insured in fact committed suicide, yet, if the reply denies that he did, the issue is complete (Prudential Ins. Co. v. Breustle's Adm'r, 41 S. W. 9, 19 Ky. Law Rep. 544). A plea merely setting up the fact that insured killed himself is sufficient, as the fact that insured was insane at the time is a matter of avoidance to be pleaded by plaintiff (Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332). Where the plea set up a violation of a condition declaring the policy void if the insured "die by reason of any act of self-destruction whatever, whether at the time of committing the same he be sane or insane, whether felonious or otherwise," a replication that at the time of the act he was of unsound mind and entirely unconscious of the physical and moral consequences of the act, and was the subject of an insane impulse which he had no power to resist, was demurrable for not denying the al-

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legation of the plea that the act was intentional (Suppiger v. Covenant Mut. Ben. Ass'n, 20 Ill. App. 595).

(l) Same—Presumptions.

Of course, where there is no evidence as to the cause of death, it will be presumed that it was from natural causes. But the principle may be carried still further, and it may be regarded as a settled rule that, **when the circumstances of death are such that it might have resulted from negligence, accident, or suicide, the presumption is against death by suicide.**

Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Keels v. Mutual Reserve Fund Life Ass'n (C. C.) 29 Fed. 198; Ingersoll v. Knights of Golden Rule (C. C.) 47 Fed. 272; Connecticut Mut. Life Ins. Co. v. McWhirter, 73 Fed. 444, 19 C. C. A. 519, 44 U. S. App. 492; Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Fidelity & Casualty Co. v. Love, 111 Fed. 773, 44 C. C. A. 602; Supreme Court of Honor v. Barker, 96 Ill. App. 490; Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550, affirming 110 Ill. App. 648; Carnes v. Iowa Traveling Men's Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; Stephenson v. Bankers' Life Ass'n of Des Moines, 108 Iowa, 637, 79 N. W. 459; Sovereign Camp Woodmen of the World v. Haller, 56 N. E. 255, 24 Ind. App. 108; Travelers' Ins. Co. v. Nitterhouse, 38 N. E. 1110, 11 Ind. App. 155; Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Couadeau v. American Acc. Co., 95 Ky. 280, 25 S. W. 6; Union Casualty & Surety Co. v. Goddard, 76 S. W. 832, 25 Ky. Law Rep. 1035; Supreme Council Royal Arcanum v. Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Burnham v. Interstate Casualty Co. of New York, 117 Mich. 142, 75 N. W. 445; Furbush v. Maryland Casualty Co., 95 N. W. 551, 133 Mich. 479; Sartell v. Royal Neighbors, 85 Minn. 369, 88 N. W. 985; Laessig v. Travelers' Protective Ass'n, 169 Mo. 272, 69 S. W. 469; Harms v. Metropolitan Life Ins. Co., 67 App. Div. 139, 73 N. Y. Supp. 513; Mitterwallner v. Supreme Lodge Knights & Ladies of the Golden Star, 76 N. Y. Supp. 1001, 37 Misc. Rep. 860; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Cox v. Royal Tribe of Joseph, 71 Pac. 73, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752; Brown v. Sun Life Ins. Co. (Tenn. Ch. App.) 57 S. W. 415, 51 L. R. A. 252; Mutual Life Ins. Co. v. Simpson (Tex. Civ. App.) 28 S. W. 837; Agen v. Metropolitan Life Ins. Co., 80 N. W. 1020, 105 Wis. 217, 76 Am. St. Rep. 905; Walcott v. Metropolitan Life Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923; Knickerbocker Casualty Co. v. Jordan, 7 Wkly. Law Bul. 71, 8 Ohio Dec. 313; Travelers' Ins. Co. v. Rosch, 23 Ohio Cir. Ct. R. 491; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685.

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It has, however, been held in some cases that, where it appears that the insured was insane at the time of death, the presumption is that he committed suicide.

Germain v. Brooklyn Life Ins. Co., 26 Hun (N. Y.) 604; Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812.

And especially will the presumption arise where the insured was suffering from a species of insanity usually attended with suicidal tendencies (Wasey v. Travelers' Ins. Co., 85 N. W. 459, 126 Mich. 119). On the other hand, it was held in Walcott v. Metropolitan Life Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923, that evidence showing that the cause of insured's death was insanity does not tend to prove that he committed suicide, insanity being a disease liable to cause natural death.

The presumption against suicide may, of course, be rebutted by substantial proof of self-destruction (Sackberger v. National Grand Lodge O. T. L., 73 Mo. App. 38); and, where the evidence is so clear as to exclude any other rational hypothesis than that of suicide as the cause of death, the ordinary presumption against the fact of suicide will not be allowed to destroy the rational conclusion deducible from such proof (Somerville v. Knights Templars' & Masons' Life Indemnity Ass'n, 11 App. D. C. 417). So, evidence that a person went to bed as usual, and in the morning was found drowned in a cistern, the opening to which was 15 by 20 inches, raises a presumption of suicide (Johns v. Northwestern Mut. Relief Ass'n, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587). But the mere fact that a person was found dead from a pistol-shot wound in his head, with no evidence of the attendant circumstances except conjectures of witnesses, will not overthrow the legal presumption that, where death is referable to either cause, he died from accident, and not from self-destruction (Travelers' Ins. Co. v. Nicklas, 41 Atl. 906, 88 Md. 470).

Insanity being an exceptional condition of mind, the legal presumption is that every one is of sound mind until the contrary is proved by sufficient affirmative evidence.

Coverston v. Connecticut Mut. Life Ins. Co., 6 Fed. Cas. 654; Nimick v. Mutual Life Ins. Co., 18 Fed. Cas. 247; Terry v. Mutual Life Ins. Co., 23 Fed. Cas. 856; Hopkins v. Northwestern Life Assur. Co. (C. C.) 94 Fed. 729; Dickerson v. Northwestern Mut. Life Ins. Co., 65 N. E. 694, 200 Ill. 270, affirming 102 Ill. App. 280; Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; Weed v. Mutual Benefit Life Ins. Co., 70 N. Y.

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561; Bank of Oil City v. Guardian Life Ins. Co., 6 Leg. Gaz. (Pa.) 348; Reynolds v. Supreme Conclave Improved Order of Heptasophs, 18 Lanc. Law Rev. 125, 24 Pa. Co. Ct. R. 638.

It has been contended in some cases that the fact that insured committed suicide itself raises the presumption that he was insane, but this contention has been rejected by the courts, and, though it is conceded that suicide may fairly be regarded as evidence of insanity, it is not sufficient to overthrow the presumption of sanity.

Ritter v. Mutual Life Ins. Co. (C. C.) 69 Fed. 505; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Coffey v. Home Ins. Co., 44 How. Prac. 481, 35 N. Y. Super. Ct. 314; Weed v. Mutual Ben. Life Ins. Co., 70 N. Y. 561, affirming 41 N. Y. Super. Ct. 476; Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. (Tex.) 160.

Even an adjudication of insanity, followed by the commitment of the patient to an asylum for the insane, does not create a conclusive presumption of the continuance of insanity several years after the discharge of the patient from such asylum. The presumption of continued insanity arising from adjudication may be overcome by evidence other than an adjudication of restoration. (Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.)

(m) Same—Burden of proof.

As a defense based on the condition making suicide an excepted risk is an affirmative one, the burden of proof that the insured committed suicide is on the insurer.

Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Coverston v. Connecticut Mut. Life Ins. Co., 6 Fed. Cas. 654; Rinker v. Manhattan Life Ins. Co., 20 Fed. Cas. 818; Snyder v. Mutual Life Ins. Co., 22 Fed. Cas. 740; Standard Life & Acc. Ins. Co., v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116; Fidelity & Casualty Co. v. Love, 111 Fed. 773, 49 C. C. A. 602; National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524; Dennis v. Union Mut. Life Ins. Co., 84 Cal. 570, 24 Pac. 120; Ross-Lewin v. Germania Life Ins. Co. (Colo. App.) 78 Pac. 305; Casey v. National Union, 3 App. D. C. 510; National Union v. Thomas, 10 App. D. C. 277; Gooding v. United States Life Ins. Co., 46 Ill. App. 307; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Ingram v. National Union, 72 N. W. 559, 103 Iowa, 395; Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Grand Legion of Select Knights A. O. U. W. v. Korneman (Kan. App.) 63 Pac. 292; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St.

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Rep. 348; Supreme Council of Royal Arcanum v. Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Sartell v. Royal Neighbors of America, 85 Minn. 369, 88 N. W. 985; Germain v. Brooklyn Life Ins. Co., 30 Hun (N. Y.) 535; Harms v. Metropolitan Life Ins. Co., 73 N. Y. Supp. 513, 67 App. Div. 139; Mitterwallner v. Supreme Lodge Knights & Ladies of the Golden Star, 76 N. Y. Supp. 1001, 37 Misc. Rep. 860; Seybold v. Supreme Tent of Knights of Maccabees of the World, 83 N. Y. Supp. 149, 86 App. Div. 195; Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; Cox v. Royal Tribe of Joseph, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; Fisher v. Fidelity Mut. Life Ass'n, 41 Atl. 467, 188 Pa. 1, 43 Wkly. Notes Cas. 95; Chambers v. Modern Woodmen (S. D.) 99 N. W. 1107; Mutual Life Ins. Co. v. Simpson (Tex. Civ. App.) 28 S. W. 837; Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36; Id., 34 S. W. 801; Equitable Life Assur. Soc. v. Liddell, 74 S. W. 87, 32 Tex. Civ. App. 252; Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485; Traphagen v. Fidelity & Casualty Co., 10 N. Y. St. Rep. 716; Whitlatch v. Fidelity & Casualty Co., 71 Hun, 146, 24 N. Y. Supp. 537.

This rule as to the burden of proof is not changed by the fact that the proofs of death or the verdict of the coroner's jury stated the cause of death as suicide.

Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Supreme Lodge Knights of Pythias v. Beck, 94 Fed. 751, 36 C. C. A. 467; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Supreme Tent of Knights of Maccabees of the World v. Stensland, 68 N. E. 1098, 206 Ill. 124, 99 Am. St. Rep. 137; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550; Metzradt v. Modern Brotherhood of America, 112 Iowa, 522, 84 N. W. 498; Goldschmidt v. Mutual Life Ins. Co., 102 N. Y. 486, 7 N. E. 408; Harms v. Metropolitan Life Ins. Co., 73 N. Y. Supp. 513, 67 App. Div. 139; Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36; Bachmeyer v. Mutual Reserve Fund Life Ass'n, 87 Wis. 325, 58 N. W. 399.

But see Keels v. Mutual Reserve Fund Life Ass'n (C. C.) 29 Fed. 198, where it was said that if the plaintiff, in an action on a life policy, has, in her proof of death, stated that the death was by suicide, it is incumbent on her to satisfy the jury that she was mistaken in this statement, and that the death was caused by accident. So, in Spruill v. Northwestern Mut. Life Ins. Co., 120 N. C. 141, 27 N. E. 39, where the proof of claim recited that the death of insured was caused by a "pistol shot from his own hand," it was held that the burden of proof was shifted to plaintiff.

But where a policy insuring against injuries sustained through "external, violent, and accidental means" provides that, in case

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of injury wantonly inflicted by assured, or inflicted while insane, the measure of liability is to be the premiums paid, the burden, on the issue of suicide, is on plaintiff to show that assured did not commit suicide, and is not shifted by the presumption that all men are sane, and naturally desire to avoid death (Fidelity & Casualty Co. of New York v. Weise, 55 N. E. 540, 182 Ill. 496).

If the fact that the insured committed suicide is pleaded in defense, and the plaintiff, to avoid the defense, relies on the insanity of the insured at the time the act of self-destruction was committed, the burden is on him to show that the insured was afflicted with such kind and degree of insanity as will excuse the act.

Terry v. Life Ins. Co., 23 Fed. Cas. 856, affirmed 15 Wall. 580, 21 L. Ed. 236; Gay v. Union Mut. Life Ins. Co., 10 Fed. Cas. 114; Hiatt v. Mutual Life Ins. Co., 12 Fed. Cas. 94; Coverston v. Connecticut Mut Life Ins. Co., 6 Fed. Cas. 654; Jarvis v. Connecticut Mut. Life Ins. Co., 13 Fed. Cas. 373; Moore v. Connecticut Mut. Life Ins. Co., 17 Fed. Cas. 672; Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Nelson v. Equitable Life Assur. Soc., 73 Ill. App. 133; Ætna Life Ins. Co. v. King, 84 Ill. App. 171; Dickerson v. Northwestern Mut. Life Ins. Co., 65 N. E. 694, 200 Ill. 270; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Weed v. Mutual Ben. Life Ins. Co., 70 N. Y. 561, affirming 41 N. Y. Super. Ct. 476; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623.

But see Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676, where it was held that if the company relies on a provision in the policy rendering it void if the insured "shall under any circumstances die by his own hand," the burden of showing the requisite capacity of the insured, as well as the act of self-destruction, to bring the case within the proviso, is on the company.

When the policy stipulates that, if insured should die by his own hand when insane, the company should be liable only for the premiums actually paid, with interest, the burden of showing the condition of mind of insured is on the defense (Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812).

(n) Same—Admissibility of evidence.

The courts are not in agreement on the question whether a coroner's inquisition is competent evidence to show that the cause of insured's death was suicide. That such evidence is admissible has been held in a few jurisdictions.

Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Gooding v. United States Life Ins. Co., 46 Ill. App. 307; Fein v. Covenant Mut. Ben. Ass'n, 60 Ill. App. 274; United States Life

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Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550; Fletcher v. Sovereign Camp Woodmen of the World, 32 South. 923, 81 Miss. 249. But a report made to the coroner as health officer is not admissible. National Union v. Thomas, 10 App. D. C. 277.

So, it was said in Grand Lodge I. O. M. A. v. Wieting, 68 Ill. App. 125, that a verdict of a coroner's jury that the insured "killed himself while temporarily insane" is admissible on behalf of plaintiff. On the other hand, in other jurisdictions it has been held that the verdict of the coroner's jury is inadmissible to show that the insured committed suicide.

United States Life Ins. Co. v. Kielgast, 26 Ill. App. 507; Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277; Ætna Life Ins. Co. v. Kaiser, 74 S. W. 203, 24 Ky. Law Rep. 2454, 115 Ky. 539; Supreme Council of Royal Arcanum v. Brashears, 43 Atl. 866, 89 Md. 624, 73 Am. St. Rep. 244; Wasey v. Travelers' Ins. Co., 85 N. W. 459, 126 Mich. 119; Insurance Co. v. Schmidt, 40 Ohio St. 112; Germania Life Ins. Co. v. Ross-Lewin, 51 Pac. 488, 24 Colo. 43, 65 Am. St. Rep. 215; Cox v. Royal Tribe of Joseph, 71 Pac. 73, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752; Fey v. I. O. O. F. Mut. Life Ins. Co., 98 N. W. 206, 120 Wis. 358.

But if the beneficiary voluntarily furnishes to the company the coroner's finding as to death and cause of death of the insured as a part of the proof of death required by the policy, such finding is admissible against him (Northwestern Mut. Life Ins. Co. v. Maguire, 19 Ohio Cir. Ct. R. 502, 10 O. C. D. 562). And generally the proofs of death furnished by the beneficiary, and any certificates made a part thereof, are admissible in evidence to show that the insured committed suicide.

Hassencamp v. Mutual Ben. Life Ins. Co., 120 Fed. 475, 56 C. C. A. 625; Supreme Lodge Knights of Honor v. Fletcher, 29 South. 523, 78 Miss. 377; Hart v. Trustees Supreme Lodge Fraternal Alliance, 84 N. W. 851, 108 Wis. 490; Voelkel v. Supreme Tent of Knights of Maccabees of the World, 92 N. W. 1104, 116 Wis. 202. But see Travelers' Ins. Co. of Hartford, Conn., v. Nicklas, 88 Md. 470, 41 Atl. 906, where it was held that proofs of death are admissible only to show compliance with the condition requiring the making of proof, and not to show that the cause of death was suicide.

A report made by a committee of a mutual benefit association upon the cause and circumstances of the death of insured is not admissible in evidence against a beneficiary. National Union v. Thomas, 10 App. D. C. 277.

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Evidence as to declarations made by the insured a long time prior to his death, tending to show a disposition to commit suicide, is not admissible.

Connecticut Mut. Life Ins. Co. v. McWhirter, 73 Fed. 444, 19 C. C. A. 519, 44 U. S. App. 492; Hale v. Life Indemnity & Investment Co., 65 Minn. 548, 68 N. W. 182; Jenkin v. Pacific Mut. Life Ins. Co., 63 Pac. 180, 131 Cal. 121.

But evidence as to declarations made immediately or a short time prior to insured's death are admissible to show a suicidal intent.

Kerr v. Modern Woodmen of America, 117 Fed. 593, 54 C. C. A. 655; Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335; Rens v. Northwestern Mut. Relief Ass'n, 100 Wis. 266, 75 N. W. 991.

Such declarations must, however, indicate clearly a suicidal purpose, and, if vague and uncertain, they are not admissible (Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 Pac. 305). It is not competent to show that insured was an atheist, on the theory that for that reason he might have been more likely to commit suicide (Gibson v. American Mut. Life Ins. Co., 37 N. Y. 580). Testimony that insured had been intemperate in his habits for four months prior to his death, and was in straitened financial circumstances, and had worried about his affairs, was admissible, on an issue whether he committed suicide or was murdered (Furbush v. Maryland Casualty Co., 91 N. W. 135, 131 Mich. 234, 100 Am. St. Rep. 605).

For the purpose of proving that insured contemplated suicide when the insurance was procured, it may be shown that he made application to numerous companies for insurance, and thereby secured insurance to a large amount.

Elliott v. Des Moines Life Ass'n, 63 S. W. 400, 163 Mo. 132; Smith v. National Ben. Soc., 51 Hun, 575, 4 N. Y. Supp. 521, judgment affirmed 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

So, too, evidence of the acts, conduct, and declarations of the insured from the time of making the applications to his death is admissible for the same purpose (Supreme Conclave Improved Order of Heptasophs v. Miles, 48 Atl. 845, 92 Md. 613, 84 Am. St. Rep. 528). On the other hand, his declarations are equally admissible to rebut evidence tending to show that the insurance was effected with a view of suicide (Hartman v. Keystone Ins. Co., 21 Pa. 466).

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A mere opinion as to whether the insured committed suicide is, of course, inadmissible.

National Union v. Thomas, 10 App. D. C. 277; Treat v. Merchants' Life Ass'n, 64 N. E. 992, 198 Ill. 431; Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36; Ætna Ins. Co. v. Kaiser, 74 S. W. 203, 115 Ky. 539.

To establish the fact of the insanity of the insured, his acts, conduct, and delusions, if any, including the act of self-destruction and the attending circumstances, are competent.

Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller, 92 Fed. 63, 34 C. C. A. 211; Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59.

Where the issue is as to the insanity of the insured at the time he took his own life, the opinion of a nonprofessional witness as to his mental condition, in connection with a statement of the facts and circumstances within his personal knowledge upon which that opinion is based, is competent evidence.

Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37; Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335.

But the opinion of unprofessional witnesses as to whether a person under a given state of facts and circumstances would have taken his own life is not competent evidence (St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush [Ky.] 268). So, the opinion of witnesses that the mental condition of an insured person, who shot himself while insane, was such that he could not control his physical actions, such opinion being based upon the witnesses' observation of the person's mental condition previous to the suicide, and not upon their knowledge of the circumstances of the suicide, has no tendency to prove that the killing was involuntary (Streeter v. Western Union Mut. Life & Accident Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882). And even where the witness is a physician, though his opinion based on facts known to him would be admissible (Koenig v. Globe Mut. Life Ins. Co., 10 Hun [N. Y.] 558), his opinion based on a hypothetical state of facts is not.

Hagadorn v. Connecticut Mut. Life Ins. Co., 22 Hun (N. Y.) 249; Manhattan Life Ins. Co. v. Beard, 66 S. W. 35, 112 Ky. 455.

A physician called to treat one who has attempted to commit suicide cannot testify as to facts learned by him in that connection, though

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the insured objected to the presence of the physician (Meyer v. Supreme Lodge K. P., 81 N. Y. Supp. 813, 82 App. Div. 359, affirmed in 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839). The privilege cannot be waived by the widow of the insured, as under Code Civ. Proc. N. Y. §§ 834, 836, the privilege can be waived only by the personal representative of the deceased (Bell v. Supreme Lodge Knights of Honor, 80 App. Div. 609, 80 N. Y. Supp. 751).

Matters connected with the admissibility of evidence are considered in Snyder v. Mutual Life Ins. Co., 22 Fed. Cas. 740, affirmed 93 U. S. 393, 23 L. Ed. 887; National Union v. Fitzpatrick, 66 C. C. A. 524, 133 Fed. 694; Mobile Life Ins. Co. v. Walker, 58 Ala. 290; Rogers v. Manhattan Life Ins. Co., 71 Pac. 348, 138 Cal. 285; Germania Life Ins. Co. v. Ross-Lewin, 51 Pac. 488, 24 Colo. 43, 65 Am. St. Rep. 215; Casey v. National Union, 3 App. D. C. 510; Ætna Life Ins. Co. v. Shoemaker, 59 Ill. App. 643; Weld v. Mutual Life Ins. Co., 61 Ill. App. 187; Treat v. Merchants' Life Ass'n, 198 Ill. 431, 64 N. E. 992; Supreme Lodge K. P. v. Foster, 59 N. E. 877, 26 Ind. App. 333; Sutcliffe v. Iowa State Traveling Men's Ass'n, 93 N. W. 90, 119 Iowa, 220, 97 Am. St. Rep. 298; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268, 278; Supreme Conclave Improved Order of Heptasophs v. Miles, 48 Atl. 845, 92 Md. 613; Delameter v. Prudential Ins. Co., 52 Hun, 615, 5 N. Y. Supp. 586; Washburn v. National Acc. Soc., 10 N. Y. Supp. 366, 57 Hun, 585; Continental Ins. Co. v. Delpeuch, 82 Pa. 225; Mutual Life Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294.

(c) Same—Weight and sufficiency of evidence.

Suicide as a defense in an action on a life policy may be established by circumstantial evidence so long as the proof is clear and satisfactory.

Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; Brignac v. Pacific Mut. Life Ins. Co., 36 South. 595, 112 La. 574, 66 L. R. A. 322.

It is not necessary that suicide should be proved beyond a reasonable doubt, but it is sufficient if the fact is shown by a fair preponderance of the evidence.

Kerr v. Modern Woodmen, 117 Fed. 593, 54 C. C. A. 655; Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Brown v. Sun Life Ins. Co. (Tenn. Ch. App.) 57 S. W. 415, 51 L. R. A. 252; Endowment Rank of Order of K. P. v. Steele, 63 S. W. 1126, 107 Tenn. 1; Bachmeyer v. Mutual Reserve Fund Life Ass'n, 87 Wis. 325, 58 N. W. 399.

The evidence should, however, be of such character as to exclude any reasonable hypothesis of accidental death.

Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; Boynton v. Equitable Life Assur.

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Soc., 29 South. 490, 105 La. 202, 52 L. R. A. 687; Sovereign Camp Woodmen of the World v. Haller, 56 N. E. 255, 24 Ind. App. 108.

The right of recovery cannot be defeated merely by proof that the attending physician of the deceased member, in an affidavit procured from him by the society, had declared that the decedent had died by his own hand (Supreme Lodge Knights of Honor v. Jaggers, 40 Atl. 783, 62 N. J. Law, 96, affirmed without opinion 45 Atl. 1092, 62 N. J. Law, 800). The verdict of a coroner's jury declaring suicide the cause of death is, at best, prima facie evidence of the fact.

Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Walther v. Mutual Ins. Co., 65 Cal. 417, 4 Pac. 413.

So, too, the proofs of death are merely prima facie evidence of the fact of suicide (Hassencamp v. Mut. Ben. Life Ins. Co., 120 Fed. 475, 56 C. C. A. 625). They are in no sense conclusive on the beneficiary, but may be explained by her if the insurer was put in no worse situation by the erroneous statement therein.

Pythias Knights Supreme Lodge v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Supreme Tent of Knights of Maccabees v. Stensland, 68 N. E. 1098, 206 Ill. 124, 99 Am. St. Rep. 137, affirming 105 Ill. App. 267; Leman v. Manhattan Life Ins. Co., 15 South. 388, 46 La. Ann. 1189, 24 L. R. A. 589, 49 Am. St. Rep. 348; Fisher v. Fidelity Mut. Life Ass'n, 41 Atl. 467, 188 Pa. 1; Bachmeyer v. Mutual Reserve Fund Life Ass'n, 52 N. W. 101, 82 Wis. 255. But some satisfactory explanation of the statement in the proofs must be given. Prudential Life Ins. Co. of America v. Breustle's Adm'r, 41 S. W. 9, 19 Ky. Law Rep. 544.

Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, the question should be decided by the trial court as one of law (Agen v. Metropolitan Life Ins. Co., 80 N. W. 1020, 105 Wis. 217, 76 Am. St. Rep. 905). Under such circumstances the court is justified in directing a verdict.

The evidence was regarded as sufficient to justify the court in directing a verdict for the defendant in Hassencamp v. Mutual Ben. Life Ins. Co., 120 Fed. 475, 56 C. C. A. 625; Mason v. Supreme Court of Honor, 109 Ill. App. 10; Supreme Lodge Knights of Honor v. Fletcher, 29 South. 523, 78 Miss. 377; Fletcher v. Sovereign Camp Woodmen of the World, 81 Miss. 249, 32 South. 923; Kornfeld v. Supreme Lodge Order of Mutual Protection, 72 Mo. App. 604; Par-

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ish v. Mutual Ben. Life Ins. Co., 19 Tex. Civ. App. 457, 49 S. W. 153; Agen v. Metropolitan Life Ins. Co., 80 N. W. 1020, 105 Wis. 217, 76 Am. St. Rep. 905; Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 84 N. W. 851, 108 Wis. 490; Voelkel v. Supreme Tent of Knights of Maccabees, 116 Wis. 202, 92 N. W. 1104; Id., 92 N. W. 1135.

The evidence was regarded as insufficient to warrant the direction of a verdict for defendant, or as sufficient to justify the direction of a verdict for plaintiff, in Casey v. National Union, 3 App. D. C. 510; National Union v. Thomas, 10 App. D. C. 277; Treat v. Merchants' Life Ass'n, 64 N. E. 992, 198 Ill. 431; Goldschmidt v. Mutual Life Ins. Co., 58 Hun, 611, 12 N. Y. Supp. 866; Mitterwallner v. Supreme Lodge Knights & Ladies of the Golden Star, 76 N. Y. Supp. 1001, 37 Misc. Rep. 860; Cox v. Royal Tribe of Joseph, 71 Pac. 73, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752; Dischner v. Piqua Mut. Aid & Accident Ass'n, 85 N. W. 998, 14 S. D. 436; Walcott v. Metropolitan Life Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923; Furbush v. Maryland Casualty Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605; Fidelity & Casualty Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Standard Life & Acc. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

On the other hand, where the evidence as to suicide is conflicting or is purely circumstantial, or so inconclusive that reasonable men might draw different inferences therefrom, it is insufficient to justify the court in directing a verdict, and should be submitted to the jury.

The rule is illustrated and applied in Supreme Lodge Knights of Pythias v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Rinker v. Manhattan Life Ins. Co., 20 Fed. Cas. 818; Casey v. National Union, 3 App. D. C. 510; Supreme Tent Knights of Maccabees v. Stensland, 68 N. E. 1098, 206 Ill. 124, 99 Am. St. Rep. 137; Ætna Life Ins. Co. v. Kaiser, 74 S. W. 203, 24 Ky. Law Rep. 2454, 115 Ky. 539; Burnham v. Interstate Casualty Co. of New York, 75 N. W. 445, 117 Mich. 142; Furbush v. Maryland Casualty Co., 95 N. W. 551, 133 Mich. 479; Hale v. Life Indemnity & Invest. Co., 61 Minn. 516, 63 N. W. 1108, 52 Am. St. Rep. 616; Sartell v. Royal Neighbors of America, 88 N. W. 985, 85 Minn. 369; Carpenter v. Supreme Council Legion of Honor, 79 Mo. App. 597; Washburn v. National Acc. Soc., 57 Hun, 585, 10 N. Y. Supp. 366; Harms v. Metropolitan Life Ins. Co., 73 N. Y. Supp. 513, 67 App. Div. 139; Seybold v. Supreme Tent of Knights of Maccabees, 86 App. Div. 195, 83 N. Y. Supp. 149; Shank v. United Brethren Mut. Aid Soc., 84 Pa. 385; Slattery v. Great Camp Knights of Maccabees, 19 Pa. Super. Ct. 111; De Van v. Commercial Travelers' Mut. Acc. Ass'n, 92 Hun, 256, 36 N. Y. Supp. 931, affirmed without opinion 157 N. Y. 690, 51 N. E. 1090.

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On an issue as to whether insured procured the policy with intent to commit suicide, the insurer introduced evidence to show that assured intended suicide at the time he applied for membership, but the facts shown were not sufficient to establish such intention as a matter of law, and it was held that an instruction that plaintiff was not entitled to recover if the jury found the facts set out and the fact of suicide was properly refused (Supreme Conclave Improved Order of Heptasophs v. Miles, 48 Atl. 845, 92 Md. 613, 84 Am. St. Rep. 528). The sufficiency of the evidence to establish the intent to commit suicide when the policy was procured was considered in Ritter v. Mutual Life Ins. Co., 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583.

The evidence was regarded as sufficient to establish the fact of suicide in Chicago Guaranty Fund Life Soc. v. Wilson, 55 Ill. App. 138; Supreme Court of Honor v. Schwartz, 96 Ill. App. 587; Sovereign Camp Woodmen of the World v. Haller, 24 Ind. App. 108, 56 N. E. 255; Inghram v. National Union, 72 N. W. 559, 103 Iowa, 395; Beverly v. Supreme Tent of Maccabees, 115 Iowa, 524, 88 N. W. 1054; Wolff v. Mutual Reserve Fund Life Ass'n, 26 South. 89, 51 La. Ann. 1260; Hunt v. Ancient Order of Pyramids, 105 Mo. App. 41, 78 S. W. 649; Sovereign Camp Woodmen of the World v. Hruby (Neb.) 96 N. W. 998; Sweezey v. Prudential Life Ins. Co. of America, 3 Misc. Rep. 608, 634, 22 N. Y. Supp. 1054; Pagett v. Connecticut Mut. Life Ins. Co., 66 N. Y. Supp. 804, 55 App. Div. 628; Feierstein v. Supreme Lodge Knights of Honor, 74 N. Y. Supp. 558, 69 App. Div. 53; Seybold v. Supreme Tent of Knights of Maccabees, 83 N. Y. Supp. 149, 86 App. Div. 195; Northwestern Mut. Life Ins. Co. v. Maguire, 19 Ohio Cir. Ct. R. 502, 10 O. C. D. 562; Clement v. Clement (Tenn.) 81 S. W. 1249; Supreme Lodge K. P. v. Same, Id.; Mutual Life Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294; Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36; Id., 12 Tex. Civ. App. 392, 34 S. W. 801; Rens v. Northwestern Mut. Relief Ass'n, 75 N. W. 991, 100 Wis. 266.

The evidence was regarded as insufficient to establish the fact of suicide in Cochran v. Mutual Life Ins. Co. (C. C.) 79 Fed. 46; Ross-Lewin v. Germania Life Ins. Co. (Colo. App.) 78 Pac. 305; National Union v. Bennet, 20 App. D. C. 527; Supreme Court of Honor v. Barker, 96 Ill. App. 490; Sovereign Camp Woodmen of the World v. Haller, 66 N. E. 186, 30 Ind. App. 450; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Stephenson v. Bankers' Life Ass'n, 79 N. W. 459, 108 Iowa, 637; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; Boynton v. Equitable Life Assur. Soc., 29 South. 490, 105 La. 202, 52 L. R. A. 687; Wasey v. Travelers' Ins. Co., 85 N. W. 459, 126 Mich. 119; Shotliff v. Modern

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Woodmen, 100 Mo. App. 138, 73 S. W. 326; Hunt v. Ancient Order of Pyramids, 78 S. W. 649, 105 Mo. App. 41; Modern Woodmen of America v. Kozak, 88 N. W. 248, 63 Neb. 146; Equitable Life Assur. Soc. v. Liddell, 32 Tex. Civ. App. 252, 74 S. W. 87; Fidelity & Casualty Co. v. Egbert, 84 Fed. 410, 28 C. C. A. 281; Union Casualty & Surety Co. v. Goddard, 76 S. W. 832, 25 Ky. Law Rep. 1035.

Insanity of the insured as an excuse for suicide must be shown by a preponderance of the evidence (Supreme Court of Honor v. Peacock, 91 Ill. App. 632). While the fact of suicide has a tendency to show insanity (Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335), it is by no means conclusive as to the existence of mental derangement (Wolff v. Connecticut Mut. Life Ins. Co., 30 Fed. Cas. 413).

The evidence was regarded as sufficient to show the insanity of the insured in Cotton States Life Ins. Co. v. Merritt, 59 Ga. 664; Central Mut. Life Ins. Ass'n v. Anderson, 62 N. E. 838, 195 Ill. 135; Supreme Council K. E. W. v. Heineman, 78 S. W. 406, 25 Ky. Law Rep. 1604; Meacham v. New York State Mut. Benefit Ass'n, 46 Hun (N. Y.) 363. The evidence was regarded as insufficient in Fowler v. Mutual Life Ins. Co., 4 Lans. (N. Y.) 202; McClure v. Mutual Life Ins. Co., 55 N. Y. 651; Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. (Tex.) 160.

In an action on an accident policy there was evidence that the insured was of a genial disposition, of good education, pleasantly situated, so far as his domestic relations were concerned, and in fair circumstances financially. Up to within a few weeks of his death he had been in full health and vigor, but about that time a change was noticed in him by his family. He was moody and nervous, desired to be alone, could not sleep nights, complained of a pain in his head, and looked haggard and sick. On going away from home on business, strangers remarked upon his appearance, and he kept aloof from other men, and could not concentrate his attention upon the business in hand. It was held that there was evidence to go to the jury on the question of his insanity. Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

(p) Same—Trial.

When suicide is interposed as a defense in an action on a life policy, it is proper to ask a juror, on his examination, his opinion as to the sanity of one who takes his own life.

Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. (Tex.) 160; Grand Lodge Independent Order of Mutual Aid v. Wieting, 68 Ill. App. 125.

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But a juror is not incompetent because he believes suicide to be evidence of insanity, if he also states that he would require other and additional evidence to establish it (Hagadorn v. Connecticut Mut. Life Ins. Co., 22 Hun [N. Y.] 249).

Whether insured was insane when he committed suicide is a question for the jury.

Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Mooney v. Ancient Order of United Workmen, Grand Lodge of Kentucky, 72 S. W. 288, 24 Ky. Law Rep. 1787, 114 Ky. 950; Supreme Lodge Knights of Honor v. Lapp's Adm'x, 74 S. W. 656, 25 Ky. Law Rep. 74; Arnold v. Connecticut Mut. Life Ins. Co., 49 Atl. 1103, 95 Me. 331; Meacham v. New York State Mut. Ben. Ass'n, 24 N. E. 283, 120 N. Y. 237.

So, too, whether he was insane to such a degree as to excuse the suicide is a question for the jury (Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812).

On the issue as to suicide, it is proper to instruct the jury that they may take into consideration the instinctive love of life which ordinarily exists (Supreme Lodge K. P. v. Foster, 59 N. E. 877, 26 Ind. App. 333). It is not proper, however, for the court in its instructions to give undue prominence to the weight of a verdict of a coroner's jury assigning suicide as the cause of death, or to intimate that the absence of evidence showing any other cause of death would raise a presumption in favor of suicide (Rumbold v. Supreme Council Royal League, 69 N. E. 590, 206 Ill. 513, reversing 103 Ill. App. 596). Where it is claimed that the insurance was procured in contemplation of suicide, an instruction that, unless the jury find from the evidence that at the time the insured applied for the insurance he intended to perpetrate the fraud, they must disregard all the testimony concerning such fraud, is not ambiguous and unintelligible (Christian v. Connecticut Mut. Life Ins. Co., 45 S. W. 268, 143 Mo. 460).

An insurer who has waived all defenses except suicide cannot require the submission to the jury of an issue whether death was due to the gross or culpable negligence of insured (Travelers' Ins. Co. of Hartford, Conn., v. Nicklas, 41 Atl. 906, 88 Md. 470). So, too, where the defense was suicide, a refusal to submit a special finding, "Do you find the deceased was killed by any other person?" was properly refused, as not presenting a controlling issue, as it did not follow that defendant would not be liable if the death was by accident (Inghram v. National Union, 72 N. W. 559, 103 Iowa, 395).

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Where the sole material question was whether the death of the insured was caused by suicide, sane or insane, an interrogatory submitted to the jury should have been framed, if not in those words, at least in such words as to clearly put the exact issue before the jury; and a question as to whether insured came to his death "as the result of an act which he voluntarily committed, with intent to produce death by his own hands," was not well framed (Fey v. I. O. O. F. Mutual Life Ins. Co., 98 N. W. 206, 120 Wis. 358). A refusal to submit a special interrogatory, "Do you find that the deceased committed suicide?" was proper, where the defense was suicide, as such finding was directly involved in the general verdict (Inghram v. National Union, 72 N. W. 559, 103 Iowa, 395). A finding of the jury on the issue of suicide, based on conflicting evidence, is conclusive (Union Cent. Life Ins. Co. v. Skipper, 115 Fed. 69, 52 C. C. A. 663).

Where the defense was suicide, and on an appeal from a judgment for plaintiff the Court of Civil Appeals reviewed the evidence as to suicide, and held that the verdict was contrary to the evidence, the judgment of the Court of Civil Appeals, reversing the judgment for plaintiff, was a decision on the facts of the case, within Act April 13, 1892, providing that the judgment of the Court of Civil Appeals shall be conclusive on the facts of a case. Mutual Life Ins. Co. v. Hayward, 31 S. W. 507, 88 Tex. 315.

If, however, there is but little evidence to justify a jury in deciding which one of a half dozen or more possible theories as to the cause of death is the correct one, but what evidence there is supports the theory of suicide rather than accidental death, a verdict for plaintiff must be set aside (Merrett v. Preferred Masonic Mut. Acc. Ass'n, 98 Mich. 338, 57 N. W. 169).

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XXIII. EXTENT OF LOSS AND LIABILITY OF INSURER —LIFE AND ACCIDENT INSURANCE.

1. EXTENT OF LIABILITY IN LIFE INSURANCE.

(a) Amount payable at death in general.

An ordinary life insurance policy is generally regarded as a valued policy, in which the sum insured must be taken as the agreed amount of the loss.

Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244; Rockhold v. Canton Masonic Mut. Ben. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. 419; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268.

Nevertheless, in some jurisdictions the extent of the insurer's liability in the case of policies issued to creditors, or assigned to third persons, has been held to be measured by the extent of the

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creditor's or assignee's interest. This question has, however, been discussed in connection with the general doctrine of insurable interest, and need not be again considered.[1] In determining the amount payable under the policy, the rights of the parties are regarded as fixed by the contract, and may not be varied by mathematical calculations, conducted by the insurer alone, or by other companies, particularly when knowledge of the custom is not brought home to the insured (Bracher v. Equitable Life Assur. Soc., 86 N. Y. Supp. 557, 42 Misc. Rep. 290). So, a clause in a policy of fraternal insurance which states that the beneficiary "shall be entitled, within 90 days after the receipt of satisfactory evidence of death, to the return of all premiums paid in cash to the society, and, in addition thereto, a sum not exceeding $3,000 from the mortuary fund of the society," will be construed as meaning that the beneficiary is entitled to the pro rata share of the policy, according to the mortuary fund, in addition to the premiums paid in cash to the company, and not merely to a share in the mortuary fund proportionate to the face of the certificate plus the premiums, as contended by the insurer (Fahey v. Empire Life Ins. Co., 5 Lack. Leg. N. [Pa.] 377). In any event, the amount of death benefits payable by a mutual benefit association cannot exceed that authorized by the charter, though the constitution and by-laws provide for a larger one (Nelligan v. New York Typographical Union No. 6, 2 City Ct. R. [N. Y.] 261). The amount of the policy may, however, by agreement of the parties, be scaled (Leonard v. Charter Oak Life Ins. Co., 33 Atl. 511, 65 Conn. 529). So, where, owing to a mistake, a certificate is issued for an amount greater than the rate of assessment would pay for, and it is agreed that the amount shall be reduced proportionately, the beneficiary cannot afterwards insist on payment of the whole amount stated in the certificate (Gray v. Supreme Lodge Knights of Honor, 118 Ind. 293, 20 N. E. 833). But, as has been already pointed out in treating of the construction of a contract, a mutual benefit association cannot, by the adoption of subsequent by-laws, arbitrarily reduce the amount of its benefit certificates, already issued.[2] So, it was held in Supreme Council American Legion of Honor v. Storey (Tex. Civ. App.) 75 S. W. 901, that the words "face value," in a by-law of a beneficial association, providing that $2,000 shall be the highest amount paid on a benefit certificate, provided that the amount paid shall not

[1] See ante, vol. 1, p. 298.

[2] See ante, vol. 1, pp. 703–719, 827.

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exceed the amount of a full assessment on each of the members, and provided "that the face value of the benefit certificate shall be paid, so long as the emergency fund * * * has not been exhausted," means the amount stated in the body of the certificate; and, the emergency fund not being exhausted at the death of a member whose certificate, issued before passage of the by-law, provided for payment of $5,000, all of it is payable.

An agreement by an endowment association that, upon surrender of a policy after it has been in force for 10 years, the association would pay to the holder "his full share of the endowment fund of said association, not exceeding $1,000, it being thereby 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 of the association, not exceeding $1,000. Congower v. Equitable Mut. Life & Endowment Ass'n, 94 Iowa, 499, 63 N. W. 192.

(b) Limitation of liability.

The insurer has, by various provisions of the policy or certificate, attempted to limit its liability. Such provisions are in accordance with the general rules, construed strictly. Thus, where a policy stipulated to pay one-third of the amount if death should occur after three and within six months, two-thirds if after six months and within a year, and the whole if after a year, it was held that, if the insured died within three months, the whole amount was payable (Metropolitan Life Ins. Co. v. Drach, 101 Pa. 278). The court said that it is by no means clear that the language used by the company exempts it from all liability in the event of death within the first three months. If it was intended that no liability whatever should be incurred unless the insured survive the first three months, it should have been expressed in language not calculated to mislead the insured. In Walker v. John Hancock Mut. Life Ins. Co., 167 Mass. 188, 45 N. E. 89, the policy provided that the full amount of the policy should be paid only in the event insured died "after one year from the date of the policy." As the policy took effect on the day of its date, the court held that in computing the year the day of the date of the policy should be excluded, on the ground that, in the absence of anything tending to show a contrary intent, the words "from the date" exclude the day of date.

The constitution of a benefit society provided that the association would pay $350 on the death of a member who had been such

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for at least 10 years, and $550 on the death of a member who had been such for 15 years. The association was consolidated with another, under an agreement providing that the members of the latter should be accepted in the same standing as they had in their own organization. It was held that on the death of a member of the consolidated association, and who had become such through the consolidation more than 10 years before his death, his beneficiary was not entitled to $550, though his membership in both associations had extended over 15 years. (Pfingsten v. Perkins [City Ct. N. Y.] 82 N. Y. Supp. 399.)

The limitation may make the amount payable dependent on the occupation of the insured at the time of death. Thus, in Northwestern National Life Ins. Co. v. Irwin, 103 Ill. App. 580, the contract was to indemnify the insured in a certain sum under the occupation of a farmer, with a stipulation that, if the insured was killed while engaged in the occupation of "coal mining," the company would not assume full liability, but would be liable only to a certain extent. Insured was engaged in sinking a coal shaft for the purpose of opening a coal mine, and while working at the bottom of the shaft was struck and killed by a falling car. The court said that the word "mining" could not be better defined than as "the act or business of opening mines or of working them," and that the company was liable only for the smaller amount. **But such a limitation refers only to the actual occupation at the time of death.** So, where the policy contained a stipulation that if the insured died during a violation of the condition against keeping a saloon, only the reserve value of the policy would be paid, and insured, who, though employed as a saloon keeper in December, was taken sick and confined to his room, and was not actively engaged in the business until his death in June of the following year, was entitled to a full recovery (Union Cent. Life Ins. Co. v. Hughes' Adm'r, 110 Ky. 26, 60 S. W. 850).

The constitution and by-laws of a mutual benefit insurance company provided that when a member, at his death, owes six months' dues, his representatives shall be entitled to only a portion of the amount for which he was insured. Another by-law provided that the financial secretary should at specified periods give each member in arrears a written notice of the amount due. It was held that the latter by-law was for the benefit of the company only, so that, when a member was six months in arrears at his death, his representatives were bound by the former provision, although no notice had been given him. Hanf v. Herrlich, 53 N. Y. Supp. 776, 24 Misc. Rep. 698.

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(c) Same—Amount dependent on cause of death.

In addition to the provisions declaring certain causes of death excepted risks, **policies of life insurance often contain stipulations limiting the amount to be paid if death is due to certain specified causes.** If the policy declares that a named cause—as intoxication—is an excepted risk, and also provides that a certain amount shall be paid if death results from such cause (Northwestern Mut. Life Ins. Co. v. Hazelett, 4 N. E. 582, 105 Ind. 212, 55 Am. Rep. 192), the latter provision must prevail, and the reduced amount must be paid. If the limitation is by a by-law passed after the certificate took effect, the reduction cannot be made if the disease became seated in an incurable and fatal form before the by-law took effect (Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654). In view of the rule of strict construction, a stipulation for a reduction if the death of the insured is caused by the use of opiates will not be given effect if insured dies from the effect of an overdose of morphine, taken medicinally to allay pain (Renn v. Supreme Lodge K. P., 83 Mo. App. 442).

Where the contract authorized a reduction of the amount if the insured's death resulted from the violation of any criminal law, there must be an actual violation of such law, to render the limitation applicable (Brown v. Supreme Lodge K. P., 83 Mo. App. 633); and where insured struck another with his hand in a well-lighted room, and the latter inflicted injuries from which insured died, such death was not in consequence of a violation of a criminal law, within the contemplation of the contracting parties.

> **Where the policy provided that, if the insured should die in consequence of his own criminal action, the company would not be liable for an amount greater than the premiums paid, and the company had tendered the amount of the premiums in its plea, a contention of the company, in seeking to avoid the payment of the premiums, that the policy was void because of false representations of the insured, was without merit. Haley v. Prudential Ins. Co., 59 N. E. 545, 189 Ill. 317.**

Where the policy provided that the insured might serve in the army of the United States in time of war by giving notice and paying an extra premium, otherwise the insurer to be liable for the reserve only, the court took judicial notice of the existence of war in the Philippines in May, 1900, and held that, as the insured was in the army and was killed, no extra premium being paid, his bene-

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ficiary could recover only the reserve (La Rue v. Kansas Mut. Life Ins. Co., 68 Kan. 539, 75 Pac. 494).

The policy may provide for a reduction of benefits if the insured dies from any pulmonary disease. The term "pulmonary disease," as so used, is construed as referring only to diseases of a chronic or permanent nature, and does not include pneumonia, which is an acute disease.

Metropolitan Life Ins. Co. v. Bergen, 64 Ill. App. 685; Carson v. Metropolitan Life Ins. Co., 1 Pa. Super. Ct. 572.

The limitation as to cause of death may be combined with the limitation as to time of death. Thus, in McAndiless v. Metropolitan Life Ins. Co., 45 Mo. App. 578, the policy provided that one-fourth of the amount should be payable if death occurred after three months and within six months from the date of the policy, one-half if death occurred after six months and within a year, except in case of consumption, where one-half of the amount which would otherwise be due would be payable if death occurred within the first year. It was held that if the insured died of consumption more than six months, and before a year, after the issuance of the policy, the recovery could not be more than one-half the amount named.

Though suicide by insured is usually an excepted risk, some policies contain provisions limiting the liability, in the event of suicide, to a certain portion of the amount of insurance, or to the amount of premiums or assessments paid, or to the reserve value of the policy. These provisions are reasonable and valid, and will be given effect according to the terms of the contract.

Salentine v. Mutual Ben. Life Ins. Co. (C. C.) 24 Fed. 159; Somerville v. Knights Templars' & Masons' Life Indemnity Ass'n, 11 App. D. C. 417; Supreme Lodge K. P. v. Clarke, 88 Ill. App. 600; Frey v. Germania Life Ins. Co., 56 Mich. 29, 22 N. W. 100; Haynie v. Knights Templars' & Masons' Life Indemnity Co., 139 Mo. 416, 41 S. W. 461; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687; Thommen v. Jewelers' & Tradesmen's Co., 15 Misc. Rep. 473, 37 N. Y. Supp. 222.

A provision reducing the amount of insurance in case of the suicide of the insured makes suicide a defense to the extent of such reduction, and is therefore rendered invalid by the Missouri statute (Rev. St. 1889, § 5855), providing that the suicide of the in-

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sured shall be no defense to an action on the policy, in absence of proof that the suicide was contemplated at the time the application for insurance was made (Keller v. Travelers' Ins. Co., 58 Mo. App. 557). On the other hand, it was held in Whitfield v. Ætna Life Ins. Co. (C. C.) 125 Fed. 269, where an accident policy was involved, that the statute does not prohibit a stipulation inducing the amount of the indemnity if the insured commits suicide.

A by-law of a mutual benefit association, embodying such a limitation, is part of the contract, and, as such, enforceable (Clement v. Clement [Tenn. Sup.] 81 S. W. 1249). But, as has been pointed out in discussing the effect of subsequent by-laws,[3] such a law cannot be made retroactive.

> Where the certificate provided that the beneficiary should not be entitled to any participation in the benefit fund if insured committed suicide, and further provided for payment from the benefit fund in the usual course of adjustment, the contention that the suicide clause referred only to payment from the benefit fund, and that the beneficiary was entitled to payment out of some other fund, even though insured committed suicide, was without merit. Dischner v. Piqua Mut. Aid & Accident Ass'n, 85 N. W. 998, 14 S. D. 436.

It was held in Simpson v. Life Ins. Co., 115 N. C. 393, 20 S. E. 517, that, where an insurer modifies a life policy by an agreement that the policy shall be incontestable, a provision in the original policy that, in case of death by suicide, the company shall be liable only for the net value of the policy, no longer remains in force (Simpson v. Life Ins. Co., 115 N. C. 393, 20 S. E. 517). On the other hand, in Childress v. Fraternal Union of America (Tenn. Sup.) 82 S. W. 832, a clause reducing the indemnity in case of suicide to one-third of the amount otherwise due, and the clause declaring the policy incontestable after the expiration of two years, were regarded as separate and independent, so that the beneficiary could recover no more than one-third of the amount of the policy in case of suicide, though the death occurred after the expiration of two years, and the policy had become incontestable under its terms.

The policy may provide that it shall be void in case the insured dies by his own hand, unless he is insane at the time of taking his life, in which event the insurer reserves the right to pay the amount insured, or only to refund the premiums paid, "according to the

[3] See ante, vol. 1, p. 703.

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equities of the case." Such provisions are not repugnant, and the insurer is entitled to a sufficient time to learn the facts controlling the equities of the case after proof of death.

Salentine v. Mutual Ben. Life Ins. Co. (C. C.) 24 Fed. 159; Salentine v. Mutual Ben. Life Ins. Co., 79 Wis. 580, 48 N. W. 855, 12 L. R. A. 690.

It was, however, intimated in Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 10 Ky. Law Rep. 577, 9 S. W. 812, 87 Ky. 541, that where insured committed suicide while insane, whether recovery was limited to the amount of the premium was dependent on the degree of insanity, and, if the insured was wholly unable to understand the physical consequences of his act, the full amount could be recovered.

Where the policy contained a clause that, if the death of the assured should be caused by suicide, the company should only be liable for the amount of premium paid on such insurance, and the defense set up was that the assured had committed suicide, it was competent for plaintiff to prove that the policy sued on was, in fact, a substitute for a former policy, and to prove the amount of premium paid on both policies (Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180). If, however, an action on a policy is tried by plaintiff on the theory that insured did not commit suicide —that being the defense interposed—and no suggestion is made that, under the terms of the policy, plaintiff would be entitled to the amount of premiums paid, even if the cause of death was suicide, and judgment is for the company, a new trial will not be granted, because of plaintiff's right to a verdict for the full amount of the premiums (Seybold v. Supreme Tent Knights of Maccabees, 83 N. Y. Supp. 149, 86 App. Div. 195).

A policy provided that the insurer would pay to the beneficiaries $5,000 if the insured died from any cause other than suicide, and also the assessments that the insured had paid under the policy. On the death of the insured the guardian of the beneficiaries furnished proofs of death. The insurer, claiming that the insured committed suicide, paid to the guardian the amount of the assessments which were payable, though the insured committed suicide. It was held that the guardian's release of further liability on receiving the amount of the assessments paid was without consideration, and did not prevent a collection of the face of the policy if the assured did not commit suicide. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 70 N. E. 1066, 209 Ill. 550, affirming 110 Ill. App. 648.

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(d) Amount of mortuary fund.

Where the policy provides that the amount due in the event of loss shall be payable out of the mortuary or other special fund, it is not necessary for the plaintiff to allege that there was a sufficient amount in such fund to pay the loss. If the fund designated is insufficient, it is a matter of defense, and the burden is on defendant to allege and prove the fact.

Triple Link Mut. Indemnity Ass'n v. Williams, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34; Grindle v. York Mut. Aid Ass'n, 87 Me. 177, 32 Atl. 868; Warner v. National Life Ass'n of Hartford, 100 Mich. 157, 58 N. W. 667; Cushman v. Family Fund Soc. (Com. Pl.) 13 N. Y. Supp. 428; Ellis v. National Provident Union, 63 N. Y. Supp. 1012, 50 App. Div. 255; Hollings v. Bankers' Union of the World, 63 S. C. 192, 41 S. E. 90.

So, too, the burden is on defendant to show that the failure of the association to realize the fund from which the benefit was payable was not due to any fault or negligence on its part (Kehrbaum v. Kegal [Sup.] 40 N. Y. Supp. 589, 17 Misc. Rep. 635).

Where the contract provided that the association would pay a certain sum from the mortuary fund, and that all claims on the fund arising at stated intervals of the assessment should be paid pro rata out of the next succeeding mortuary call, the association was liable only for a pro rata part of the mortuary fund where there was no reserve fund available (Gyllenhammer v. Home Ben. Soc. [Com. Pl.] 24 N. Y. Supp. 930). The contract may, however, provide that, if the death fund is insufficient to meet existing obligations, an assessment shall be made upon each member at the date of death, the net proceeds thereof to go into the death fund (Wadsworth v. Jewelers' & Tradesmen's Co., 132 N. Y. 540, 29 N. E. 1104, affirming 9 N. Y. Supp. 711). In such case a claim is not satisfied by paying the amount of the death fund on hand, but the proceeds of an assessment made to meet it should be appropriated to the full satisfaction of the claim. If the application of a special fund to the payment of the amount of the loss is made dependent on certain conditions, those conditions must, of course, exist, in order to entitle the beneficiary to share in such fund (Rambousek v. Supreme Council of Mystic Toilers, 119 Iowa, 263, 93 N. W. 277). In People v. Life & Reserve Ass'n of Buffalo, 45 N. E. 8, 150 N. Y. 94, the association issued both "life reserve" and "life" certificates. A reserve fund was created by assessment on the holders of reserve certificates only, and a death fund

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by assessment on all members. The constitution provided that no person holding a life certificate should in any manner derive any benefit from the reserve fund, but that such fund should be for the persons holding life reserve certificates only. It was therefore held that no portion of the reserve fund should be used for the payment of losses arising from the death of members holding life certificates.

(e) Limitation of liability to amount of assessment.

The contracts of mutual benefit or assessment associations usually contain provisions intended to limit the amount to be recovered to the amount realized from an assessment levied upon the surviving members. Thus, the by-laws of an association provided that, to make up the amount due the beneficiary, each member should pay one dollar, and that the beneficiary should be entitled to receive the amount collected. Under such provision it was held (In re La Solidarite Mut. Ben. Ass'n, 68 Cal. 392, 9 Pac. 453) that the amount actually collected was all that the beneficiary was entitled to, and not a sum equal to one dollar from each member. Usually, the certificate names some maximum amount as the limit of recovery, and it is obvious that under such a provision the beneficiary can recover only the maximum amount specified, though an assessment might produce a larger amount (Bailey v. Mutual Ben. Ass'n, 71 Iowa, 689, 27 N. W. 770).

The decisions in the cases in which there has been an attempt to limit the amount of recovery are classified with difficulty. The provisions of the contracts, though undoubtedly intended to secure the same result, differ in form and language, resulting in some confusion. They are often ambiguous, forcing the courts to apply the general rule, and to construe them as favorably to the plaintiff as possible (Laker v. Royal Fraternal Union, 75 S. W. 705, 95 Mo. App. 353). The decisions may, however, be divided into two general classes, and, for the purpose of this discussion, this general subdivision is deemed sufficient. To attempt to indicate all the different forms of provisions falling within the subdivisions would serve no useful purpose, but tend rather to confusion. It may be premised that no distinction is drawn between life contracts and contracts of accident insurance upon the assessment plan.

The first class of contracts are those which provide in effect that, **on the happening of the event insured against, the beneficiary**

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shall be entitled to the proceeds of one assessment, to be levied on surviving members, not to exceed a certain sum. Where such is the provision, the contract is not an absolute contract to pay the amount named, but only in the event that the assessment produces that amount. Otherwise, the amount recoverable is limited to the amount produced by the assessment.

Eggleston v. Centennial Mut. Life Ass'n (C. C.) 18 Fed. 14; Id., 19 Fed. 201; Deardorff v. Guaranty Mut. Acc. Ass'n, 89 Cal. 599, 27 Pac. 158; Curtis v. Mutual Ben. Life Co., 48 Conn. 98; Lawler v. Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480; Newman v. Covenant Mut. Ben. Ass'n, 83 N. W. 662, 72 Iowa, 242; Rainsbarger v. Union Mut. Aid Ass'n, 83 N. W. 626, 72 Iowa, 191; Tobin v. Western Mut. Aid Soc., 72 Iowa, 261, 33 N. W. 663; Moore v. Union Fraternal Acc. Ass'n, 103 Iowa, 424, 72 N. W. 645; Oriental Ins. Co. v. Glancey, 70 Md. 101, 16 Atl. 391; Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Lake v. Minnesota Masonic Relief Ass'n, 61 Minn. 96, 63 N. W. 261, 52 Am. St. Rep. 538; O'Brien v. Home Ben. Soc., 51 Hun, 495, 4 N. Y. Supp. 275, affirmed 117 N. Y. 310, 22 N. E. 954; McNeil v. Southern Tier Masonic Relief Ass'n, 58 N. Y. Supp. 119, 40 App. Div. 581.

If, however, there is no restriction as to the amount which may be assessed against such members, the rule does not apply (Great Western Mut. Aid Ass'n v. Colmar, 7 Colo. App. 275, 43 Pac. 159).

When the amount recoverable is limited to the amount of an assessment, such amount is to be computed on the basis of the membership at the time of death (Collins v. Bankers' Acc. Ins. Co., 96 Iowa, 216, 64 N. W. 778, 59 Am. St. Rep. 367). The money collected must be applied to the specific loss, and cannot be devoted to other liabilities (Sherman v. Harbin, 100 N. W. 622, 124 Iowa, 643). If one by-law limits the amount recoverable to the sum realized from an assessment on the members, and another by-law, adopted at the same time, provides that, if a stated number of assessments levied in any one year are insufficient to pay the death claims, the reserve fund may be drawn on (Supreme Lodge National Reserve Ass'n v. Mondrowski, 20 Tex. Civ. App. 322, 49 S. W. 919), more than one assessment may be made, and the reserve fund may also be drawn on, in order to pay the death claim.

Notices of assessments made upon the policy during the time of the membership of the insured, the last of which showed that the membership was then 1,183, had a tendency to show that at the date of the death there were as many as 1,000 members, and were properly

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submitted to the jury for that purpose. Fairchild v. Northeastern Mut. Life Ass'n, 51 Vt. 613. Evidence that the assessment levied to meet plaintiff's claim produced only $600 does not preclude a recovery for a larger sum, where the circulars issued by the company and the statement of its officers show that it had a large membership and reserve fund at or about the time plaintiff's claim matured. Wabash Valley Protective Union v. James, 8 Ind. App. 449, 35 N. E. 919.

The members of an association may be divided into classes, and the amount payable restricted to the amount collected by assessment on the members of the particular class to which the insured belongs. Under such a restriction the beneficiary is entitled to recover only the sum received from an assessment on the members of the insured's class (Kennedy v. Iowa Legion of Honor, 99 N. W. 137, 124 Iowa, 66); and this is true though, by transfer of members to other classes, the membership of insured's class has been reduced to a number so small that the assessment will not produce nearly the amount named in the policy (Supreme Lodge K. P. of the World v. Knight, 20 N. E. 479, 3 L. R. A. 409, 117 Ind. 489). The amount payable is to be determined by the number of persons who were members of insured's class at the time of his death, and not by the number who actually paid the assessment (Georgia Masonic Mut. Life Ins. Co. v. Whitman, 52 Ga. 419). The obligation of the company is to pay the amount of one assessment on each member of the class in good standing, and not merely the amount which it might collect by the assessment (Supreme Commandery Knights of the Golden Rule v. Barrett, 12 Ky. Law Rep. 94). And as the insurer owes it to the beneficiary to make reasonable efforts to collect the assessment, it will be presumed that it did collect it, unless it is alleged that the effort was made and failed. **The burden is on the insurer to show that there were not sufficient members in the class to produce the specified sum.**

Hall v. Scottish Life Aid Association, 6 Ohio Cir. Ct. R. 137, 3 O. C. D. 384; Supreme Commandery Knights of Golden Rule v. Everding, 20 Ohio Cir. Ct. R. 689, 11 O. C. D. 419.

Under these forms of limitation, the plaintiff, in an action on the policy, should allege that an assessment would produce the amount claimed.

Mutual Acc. Ass'n of the Northwest v. Tuggle, 138 Ill. 428, 28 N. E. 1066, reversing 39 Ill. App. 509; Supreme Lodge Order of Mutual Protection v. Meister, 78 Ill. App. 649; Brann v. Maine Ben. Life

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Ass'n, 92 Me. 341, 42 Atl. 500; Martin v. Equitable Acc. Ass'n, 55 Hun, 574, 9 N. Y. Supp. 16; Meyers v. United Life Ins. Ass'n (City Ct. N. Y.) 17 N. Y. Supp. 727.

If, by the terms of the contract, the association agreed to assess all its members, and pay the amount collected for mortuary purposes to the beneficiary, not to exceed $1,000, a petition which does not aver that defendant failed or refused to lay any such assessment, or that, having laid one and collected it, it failed and refused to pay the same to plaintiff, is demurrable. Taylor v. National Temperance Relief Union, 94 Mo. 35, 6 S. W. 71.

And it was held in O'Brien v. Home Ben. Soc., 46 Hun, 426, that the burden of showing what would have been realized from an assessment is on the plaintiff.

On the other hand, it has been held in other jurisdictions that the burden is on the defendant to allege and prove that an assessment would not produce the amount required to pay the certificate in full.

Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664, affirming 33 Ill. App. 178; Columbian Acc. Co. v. Sanford, 50 Ill. App. 424; People's Mut. Ben. Soc. v. McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910; Southwestern Mut. Ben. Ass'n of Marshalltown v. Swenson, 49 Kan. 449, 30 Pac. 405; Bentz v. Northwestern Aid Ass'n, 41 N. W. 1037, 40 Minn. 202, 2 L. R. A. 784; Modern Brotherhood v. Cummings (Neb.) 94 N. W. 144; Gnau v. Masons' Fraternal Acc. Ass'n of America, 109 Mich. 527, 67 N. W. 546; Neskern v. Northwestern Endowment & Legacy Ass'n, 30 Minn. 406, 15 N. W. 683; Brower v. Supreme Lodge & National Reserve Ass'n, 74 Mo. App. Rep'r, 490; Hall v. Scottish Rite K. T. & M. M. Aid Ass'n, 6 Ohio Cir. Ct. R. 137; Supreme Council of American Legion of Honor v. Anderson, 61 Tex. 296; International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Tex. Civ. App.) 48 S. W. 1108.

In the Neskern Case the theory of the court is that a provision in the policy to the effect that the beneficiary is entitled to a benefit "in the sum of $1 for each contributing member of said association, not exceeding the sum of $2,000," amounted on its face to an absolute undertaking to pay a sum of money, the amount of which was to be determined by the number of contributing members. This case is not referred to in the Kerr Case, and seems to be contrary to the doctrine of the later cases. Indeed, the cases placing on the insurer the burden of showing that the assessment would not produce the amount necessary to prove the principal sum named in the contract seem rather to fall within the second category of cases to

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be referred to hereafter. The same may be said of Freeman v. National Benefit Soc., 42 Hun (N. Y.) 252, where the provision was that the beneficiary should be paid "a sum equal to the amount received from a death assessment, but not to exceed" a certain sum, and the court held that the promise to pay was absolute, and not contingent on the procuring of the funds by assessment. The doctrine was also approved in the later case of Fitzgerald v. Equitable Reserve Fund Life Ins. Ass'n (City Ct. N. Y.) 3 N. Y. Supp. 214, affirmed (Com. Pl.) 5 N. Y. Supp. 837. So, too, in Lueders' Ex'r v. Hartford Life & Annuity Ins. Co. (C. C.) 12 Fed. 465, where the insurer agreed to make an assessment and pay the proceeds (less certain deductions) to the beneficiary, provided that in no case should the payment exceed $1,000, the insurer contended that the contract did not permit the recovery of any sum when loss occurs, except to the extent of an assessment to be made on the number of issued certificates, and that consequently plaintiff must aver and prove the number of outstanding certificates. But the court held that as it appeared that more than 22,000 certificates had been issued, the whereabouts of which was best known to the company, if plaintiff's right was to be limited to the number of certificates, defendant should plead the limit as to number.

This leads to the principle apparently governing cases belonging to the second category—cases in which the contract does not provide that an assessment shall be levied, and the proceeds paid to the beneficiary, but declares, in substance, that **the insurer, in case of loss within the terms of the contract, shall pay a definite and specified sum, not to exceed the amount of one assessment.** As said in United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, **under such a contract, payment is not contingent on an assessment, but the insured is prima facie, at least, entitled to recover the maximum amount specified in the contract.**

Metropolitan Safety Fund Acc. Ass'n v. Windover, 137 Ill. 417, 27 N E. 538, affirming 37 Ill. App. 170; People's Mut. Ben. Soc. v. McKay, 39 N. E. 231, 141 Ind. 415; Hart v. National Masonic Acc. Ass'n, 105 Iowa, 717, 75 N. W. 508; Matthes v. Imperial Acc. Ass'n, 110 Iowa, 222, 81 N. W. 484; Wood v. Farmers' Life Ass'n, 95 N. W. 226, 121 Iowa, 44; Thornburg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105; Silvers v. Michigan Mut. Ben. Ass'n, 53 N. W. 935, 94 Mich. 39; Frame v. Sovereign Camp, Woodmen of the World, 67 Mo. App. 127; McFarland v. United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436; Masons' Fraternal Acc. Ass'n v. Riley, 45 S. W. 684, 65 Ark. 261; Laker v. Royal Fraternal Union,

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95 Mo. App. 353, 75 S. W. 705; Modern Woodmen Acc. Ass'n v. Shryock, 74 N. W. 607, 54 Neb. 250, 39 L. R. A. 826; Fulmer v Union Mut. Ass'n, 12 N. Y. St. Rep. 347; Fitzgerald v. Equitable Reserve Fund Life Ass'n (Com. Pl.) 5 N. Y. Supp. 837, affirming (City Ct. N. Y.) 3 N. Y. Supp. 214; Darrow v. Family Fund Soc., 22 N. E. 1093, 116 N. Y. 537, 6 L. R. A. 495, 15 Am. St. Rep. 430, affirming 42 Hun, 245; La Manna v. National Security, Life & Accident Co., 56 Hun, 647, 10 N. Y. Supp. 221, affirmed in 128 N. Y. 613, 28 N. E. 253; Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, 67 N. E. 868, 184 Mass. 8, 100 Am. St. Rep. 540; Prudential Mut. Aid Soc. v. Cromleigh, 3 Walk. (Pa.) 332.

Under such a provision it is not necessary for the beneficiary to plead that an assessment would produce the amount necessary to pay the assessment (Ring v. United States Life & Acc. Ass'n, 33 Ill. App. 168). But if there is anything to excuse the company from payment, it is a matter of defense to be pleaded and proved by the insurer (National Acc. Soc. of New York v. Taylor, 42 Ill. App. 97). And it will be presumed, in the absence of proof to the contrary, that, had the assessment been made, it would have realized the full amount of the policy (Fitzgerald v. Equitable Reserve Fund Life Ass'n [Com. Pl.] 5 N. Y. Supp. 837, affirming judgment [City Ct. N. Y.] 3 N. Y. Supp. 214).

That the burden of proof is on the insurer is held, also, in Metropolitan Safety Fund Acc. Ass'n v. Windover, 37 Ill. App. 170, affirmed 137 Ill. 417, 27 N. E. 538; Wood v. Farmers' Life Ass'n, 121 Iowa, 44, 95 N. W. 226; Thornburg v. Farmers' Life Ass'n, 98 N. W. 105, 122 Iowa, 260; Southwestern Mut. Ben. Ass'n v. Swenson, 49 Kan. 449, 30 Pac. 405; Frame v. Sovereign Camp Woodmen of the World, 67 Mo. App. 127.

It has been held in some jurisdictions that where the contract does not fix on the insurer an absolute liability to pay a particular sum, but only a liability to pay the proceeds of an assessment, the remedy of the insurer is a proceeding in equity to compel the levy of an assessment.

Eggleston v. Centennial Mut. Life Ass'n (C. C.) 18 Fed. 14; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480; Bailey v. Mutual Ben. Ass'n, 71 Iowa, 689, 27 N. W. 770; Rainsbarger v. Union Mut. Aid Ass'n, 72 Iowa, 191, 33 N. W. 626; Rambousek v. Supreme Council of Mystic Toilers, 119 Iowa, 263, 93 N. W. 277; Sleight v. Supreme Council of Mystic Toilers, 121 Iowa, 724, 96 N. W. 1100.

It was, however, conceded in Newman v. Covenant Mut. Ben. Ass'n, 72 Iowa, 242, 33 N. W. 662; Id., 76 Iowa, 56, 40 N. W. 87,

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1 L. R. A. 659, 14 Am. St. Rep. 196—that, where equity cannot be resorted to, an action at law will lie. **The weight of authority is that the beneficiary may maintain an action at law on the promise, express or implied, of the insurer to levy an assessment.**

Great Western Mut. Aid Ass'n v. Colmar, 7 Colo. App. 275, 43 Pac. 159; Lawler v. Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; Earnshaw v. Sun Mut. Aid Soc., 68 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460; Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540; Burland v. Northwestern Mut. Ben. Ass'n, 11 N. W. 269, 47 Mich. 424; Bates v. Detroit Mut. Ben. Ass'n, 17 N. W. 67, 51 Mich. 587; Bentz v. Northwestern Aid Ass'n, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784; Reynolds v. Equitable Acc. Ass'n of Binghamton, 59 Hun, 13, 1 N. Y. Supp. 738; O'Brien v. Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954, affirming 51 Hun, 495, 4 N. Y. Supp. 275; Jackson v. Northwestern Mut. Relief Ass'n, 41 N. W. 708, 73 Wis. 507, 2 L. R. A. 786.

Mandamus is not a proper remedy. Great Western Mut. Aid Ass'n v. Colmar, 7 Colo. App. 275, 43 Pac. 159; Bates v. Detroit Mut. Ben. Ass'n, 17 N. W. 67, 51 Mich. 587; Burland v. Northwestern Mut. Ben. Ass'n, 11 N. W. 269, 47 Mich. 424.

It is not necessary that the beneficiary should show a demand on the association that it should make an assessment.

Great Western Mut. Aid Ass'n v. Colmar, 7 Colo. App. 275, 43 Pac. 159; Kansas Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607; Same v. Gardner, 41 Kan. 397, 21 Pac. 233.

Of course, where the contract falls within the second category—contracts promising to pay a definite sum not to exceed the proceeds of an assessment—the remedy of the beneficiary is an action at law on the contract for the recovery of the amount so specified.

Follis v. United States Mut. Acc. Ass'n, 94 Iowa, 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; Thornburg v. Farmers' Life Ass'n of Des Moines, 122 Iowa, 260, 98 N. W. 105; Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495, affirming 42 Hun, 245.

(f) Deductions and offsets.

If, by reason of a mutual mistake, insured's age is taken to be 29 instead of 39, and a less premium paid in consequence, the beneficiary may recover the sum for which such premiums would have insured at the age of 39 (Continental Life Ins. Co. v. Goodall, 5 Ohio Dec. 160, 3 Am. Law Rec. 338).

In Seymour v. Chicago Guaranty Fund Life Co., 54 Minn. 147, 55 N. W. 907, the defendant company agreed to continue the insurance

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taken by the N. Insurance Company, each holder of a policy in the latter surrendering it to defendant, and receiving in lieu thereof a policy from defendant for the same amount, based on the original application to the N. Company. The contract provided that the holder of such substituted policy, who should comply with the terms thereof, should be entitled to all the contracts and privileges that such holder would have had had he taken out a policy from defendant in the first instance. It was held that a condition in the substituted policy that, "if this policy shall be terminated by death before the first anniversary of the date hereof," a certain per cent. of its face value should be deducted for a reserve fund, did not refer to the date of the substitution, but to the date of the policy of which it was a continuation.

Policies usually provide for a deduction, from the amount payable in case of loss, of the amount of annual premiums, or premium notes. This refers to the unpaid balance of the premiums for the current year, which are considered earned and due, or notes given for such premiums.

O'Brien v. Union Mut. Life Ins. Co. (C. C.) 22 Fed. 586; Howard v. Continental Life Ins. Co., 48 Cal. 229; Leonard v. Charter Oak Life Ins. Co., 65 Conn. 529, 33 Atl. 511; Northwestern Life Assur. Co. v. Schulz, 94 Ill. App. 156; Union Cent. Life Ins. Co. v. Spinks, 27 Ky. Law Rep. 325, 84 S. W. 1160; Lawrence v. Penn Mut. Life Ins. Co., 36 South. 898, 113 La. 87.

Such a provision is not inconsistent with a provision that the policy shall no longer be in force or binding upon the company if a note for a premium, or any part thereof, is not fully paid when due (Imperial Life Ins. Co. v. Glass, 96 Ala. 568, 11 South. 671).

If the premium is payable in semiannual or quarterly installments, and insured dies after payment of the first installment, the insurer is entitled to deduct the remaining installments for the year following the anniversary of the policy.

Bracher v. Equitable Life Assur. Soc., 86 N. Y. Supp. 557, 42 Misc. Rep. 290; Hesterberg v. Equitable Life Ins. Co., 1 Cin. Super. Ct. Rep'r, 483, 13 Ohio Dec. 674.

Premiums neither due nor earned cannot, of course, be deducted (National Life Ass'n v. Berkeley, 97 Va. 571, 34 S. E. 469).

In addition to the provision for the deduction of premiums past due, the policy may provide for the deduction of all indebtedness due the company. Under such a provision a loan made to the insured may be deducted (Mutual Ben. Life Ins. Co. v. First Nat.

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Bank, 24 Ky. Law Rep. 580, 69 S. W. 1). Where, however, the insurance was for the benefit of the insured's wife, it was held in Union Cent. Life Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205, that a loan made by the husband was not an incumbrance on the policy as against the wife. Premiums neither due nor earned cannot be deducted as indebtedness (National Life Ass'n of Hartford v. Berkeley, 97 Va. 571, 34 S. E. 469).

An insurance agent, authorized to "settle" a policy of insurance on the life of a decedent, whose estate is insolvent, has power to retain the amount of a debt due from decedent to the company when the administrator offers to allow it. Life Ass'n of America v. Neville, 72 Ala. 517.

Under Pub. St. Mass. c. 168, § 1, providing that mutual debts and demands between the parties in an action may be set off one against the other, and section 12, providing that in an action by an administrator a demand against his intestate may be set off in the same manner as if the action had been brought by the deceased, demands against an insured, belonging to insurer at the time of the insured's death, must be set off against the amount due under the policy (Boyden v. Massachusetts Mut. Life Ins. Co., 153 Mass. 544, 27 N. E. 669).

2. EXTENT OF LIABILITY IN ACCIDENT AND HEALTH INSURANCE.

(a) Death resulting from accident.
(b) Total disability.
(c) Confinement to house.
(d) Continuing or permanent disability.
(e) Extent of liability in general.
(f) Liability for particular injuries.
(g) Extent of liability as dependent on cause of injury or death.
(h) Extent of liability as dependent on classification of risk.
(i) Questions of practice.

(a) Death resulting from accident.

There may be three kinds of loss under an accident policy—death by accident, total disability, or partial disability. Death by accident is not always covered by these policies, however. If the policy simply provides for indemnity in case of injury, and contains no express provision for payment of indemnity in case of

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death, the death of insured, though by accident, cannot be regarded as a loss under the policy.

Dawson v. Accident Ins. Co., 88 Mo. App. 355; Burnett v. Railway Officials' & Employés' Acc. Ins. Co., 64 S. W. 18, 107 Tenn. 185.

And though the policy contains blank spaces for insuring in a principal sum in case of death, if such blanks are not filled, the insurer is not liable for the death of the insured by accident.

Hall v. American Employers' Liability Ins. Co., 96 Ga. 413, 23 S. E. 310; Rosenberry v. Fidelity & Casualty Co., 14 Ind. App. 625, 43 N. E. 317.

The fact that the blank proofs sent to the insured on the occasion of a prior accident had a space for the amount claimed in case of death is irrelevant to show that the policy insured against death. Burnett v. Railway Officials' & Employés' Acc. Ins. Co., 64 S. W. 18, 107 Tenn. 185.

A claim for indemnity in case of death cannot be maintained under an agreement to pay a principal sum if the insured is "totally disabled" by accident. Death is not the kind of disability to which the policy refers.

Hall v. American Employers' Liability Ins. Co., 96 Ga. 413, 23 S. E. 310; Rosenberry v. Fidelity & Casualty Co., 14 Ind. App. 625, 43 N. E. 317; Shaw v. Equitable Mut. Acc. Ass'n (Neb.) 99 N. W. 672.

(b) Total disability.

Accident policies usually provide for the payment of a specific sum if, by an accident within the policy, insured becomes "totally disabled." Strictly analogous to accident policies in this respect are health policies, and the provisions of mutual benefit certificates allowing sick benefits in case a member becomes totally disabled by reason of illness. The extent of liability under health policies and the provisions of mutual benefit certificates referred to is therefore governed by the same rules as are applied in accident insurance, and the cases involving such contracts will be considered in connection with accident insurance cases.

In the absence of any restricting clause, the nature of the disability does not affect the question so long as the cause is one of the risks covered. The disability may be either mental or physical (McMahon v. Supreme Council Order of Chosen Friends, 54 Mo. App. 468). So, a lunatic, if the lunacy is due to a risk covered, is totally disabled within the policy (McCullough v. Expressman's

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Mut. Ben. Ass'n, 133 Pa. 142, 19 Atl. 355, 7 L. R. A. 210). An allegation of an injury to the hand, necessitating amputation and resulting in partial paralysis of the arm, shoulder, and side, producing total disability (Faulkner v. Grand Legion of Select Knights of A. O. U. W., 65 Pac. 653, 63 Kan. 400), states a cause of action under a policy allowing indemnity for total disability by accident or disease, or from disease or injury producing a local lesion amounting to total disability. On the other hand, the insurer was not liable under a policy of accident insurance for one day, by which the insurer agreed to indemnify the insured for loss of time from accident and injury which totally disabled from engaging in all kinds of business, where it appeared that after an accident on the day named the insured was, for a time, able to work, but became totally disabled some days after, on receiving additional injuries which aggravated the injury originally received; and it did not appear that the original injury would have produced total disability to labor. Rhodes v. Railway Passengers' Ins. Co., 5 Lans. (N. Y.) 71.

In order to constitute total disability it is not necessary that the insured should be absolutely helpless. He is so disabled if he is incapacitated for work or business, though he is able to leave his house, and even go to his physician's office (Mutual Ben. Ass'n v. Nancarrow, 71 Pac. 423, 18 Colo. App. 274). And where the policy insures against injuries "wholly or continuously disabling him from transacting any and every kind of business pertaining to his occupation of merchant," it is not necessary, to constitute total disability, that an injury should render the insured physically unable to transact any kind of business pertaining to his occupation; but it is sufficient if the injury is such that common care and prudence require him to desist from transacting such business in order to effect a cure (Lobdill v. Laboring Men's Mut. Aid Ass'n, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542).

The provision as to total disability usually declares that the insured must be disabled from prosecuting his usual employment or from prosecuting "any and every kind of business pertaining to his occupation." It is obvious that, under either of these conditions, one who is unable to do any work pertaining to his occupation is totally disabled, within the provision (Beach v. Supreme Tent of Knights of Maccabees of the World, 69 N. E. 281, 177 N. Y. 100). The extent of disability depends on the insured's ability to perform labor or to follow the business he has usually followed, and by which alone he can thereafter earn a livelihood (Hutchinson

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v. Supreme Tent of Knights of Maccabees of the World, 68 Hun, 355, 22 N. Y. Supp. 801). So, an accident to an illiterate middle-aged laborer, which prevents him from earning his living by manual labor, is a total disability (McMahon v. Supreme Council Order of Chosen Friends, 54 Mo. App. 468). Similarly, where the contract is payable in case the insured should become "totally incapacitated to perform manual labor," the total incapacity refers to inability to perform sustained manual labor, so as to enable insured to earn or assist in earning a livelihood (Grand Lodge Locomotive Firemen v. Orrell, 69 N. E. 68, 206 Ill. 208). The test is the extent to which the earning power of the insured is impaired (Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491), and, if he is earning substantially the same amount after as before the injury, the disability is not total (Gahagan v. Morrisey, 3 Lack. Leg. N. 168, 19 Pa. Co. Ct. R. 238, 6 Pa. Dist. R. 135).

This rule has been applied even where the policy provides that the insured must be disabled from following any occupation, and it has been held (Monahan v. Supreme Lodge of the Order of Columbian Knights, 92 N. W. 972, 88 Minn. 224) that it is not necessary, in order to entitle the insured to payment, that he should be disabled to such an extent as not to have sufficient physical power to follow some easy occupation or perform some slight labor; and if he was so injured as to be incapacitated from following his usual business, and unable to perform labor more than sufficient to pay his board, he was totally and permanently disabled, within the meaning of the provision. It is not sufficient, however, that the disability impairs the effectiveness of insured in a general and superficial way (Fidelity & Casualty Co. v. Getzendanner, 56 S. W. 326, 93 Tex. 487, affirming 53 S. W. 838, and reversing 55 S. W. 179), nor that it renders him unable to some extent to perform all the duties of his occupation (Saveland v. Fidelity & Casualty Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863). It must not, however, be inferred that to constitute total disability the insured must be unable to perform each and every act and duty connected with his occupation. On the contrary, the weight of authority supports the rule that **even under the clause providing for indemnity for disability preventing insured from prosecuting any and every kind of business pertaining to his occupation, it is sufficient if insured is disabled from performing the substantial and material acts connected with such occupation** (Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896). Thus, a physician who is confined to his bed

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by an accident is totally disabled if he is unable to go to his office and make calls upon his patients, though he occasionally examines and prescribes for patients who come to his bedside (Wolcott v. United Life & Accident Ins. Ass'n, 55 Hun, 98, 8 N. Y. Supp. 263). An insured may be able to do trivial things not requiring much time or physical labor, and, through others acting under his direction, to perform heavier duties requiring physical exertion, which, in the ordinary and proper performance of his duties, he had theretofore done personally. Yet, because of his inability to do these heavier and more material things personally, he is wholly disabled, within the terms of the policy, provided the things he is unable to do personally constitute substantially all of his said occupation. (Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 55 N. E. 973, 23 Ind. App. 657.) The mere fact that he is able to go to his place of business for a short time each day does not render the disability less than total, if in fact he could do no work there.

Turner v. Fidelity & Casualty Co., 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; Thayer v. Standard Life & Accident Ins. Co., 68 N. H. 577, 41 Atl. 182; Baldwin v. Fraternal Acc. Ass'n of America, 46 N. Y. Supp. 1016, 21 Misc. Rep. 124.

And if he usually performs actual physical labor, the fact that he is still able to exercise general supervision over the business, and give directions concerning it, does not render his disability less than total.

Neafie v. Manufacturers' Accident Indemnity Co., 55 Hun, 111, 8 N. Y. Supp. 202; Beach v. Supreme Tent Knights of Maccabees of the World, 77 N. Y. Supp. 770, 74 App. Div. 527.

If, however, an employé who has been performing manual labor is disabled, and in consequence is employed as an overseer or superintendent at substantially the same rate of pay, he is not totally disabled (Bylow v. Union Casualty & Surety Co., 47 Atl. 1066, 72 Vt. 325). So, one whose duties were generally those of a superintendent or manager is not totally disabled if he can still perform those duties, though he is unable to attend to every detail of the work as he had done before the injury (Spicer v. Commercial Mut. Acc. Co., 16 Pa. Co. Ct. R. 163, 4 Pa. Dist. R. 271). On the other hand, if he is obliged to employ another to manage the business, and can give personal attention to only a few of the details, devoting substantially all his time to obtaining relief for his injury, his disability must be regarded as total (United States Casualty Co. v.

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Hanson [Colo. App.] 79 Pac. 176). If the insured is able to perform the usual duties of his occupation, but only with great pain and inconvenience, his disability must be regarded as total (Hohn v. Interstate Casualty Co. of New York, 115 Mich. 79, 72 N. W. 1105). So, the fact that one suffering from hernia might pursue an occupation by wearing a truss will not make such disability the less a total one, if the use of the truss would subject him to intolerable discomfort and endanger his life (McMahon v. Supreme Council Order of Chosen Friends, 54 Mo. App. 468).

But see Potter v. Accident Ins. Co., 29 Ind. 210, where it was held that a hernia which did not incapacitate the insured if wearing a truss was not a total disability.

The converse of the principles heretofore discussed is obviously true. The inability of the insured to transact some kinds or branches of business pertaining to his occupation will not constitute total disability within the meaning of the policy, provided he is able to transact other kinds or branches of business pertaining substantially and to a material extent to such occupation (Lobdill v. Laboring Men's Mut. Aid Ass'n, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542). So, where the insured looked after his business in substantially all the important particulars, as he was accustomed to do before the injury, he was not totally disabled, though he suffered pain in so doing (Coad v. Travelers' Ins. Co. of Hartford, Conn., 85 N. W. 558, 61 Neb. 563). An attorney, insured against loss of time when wholly disabled from attending to his business, cannot recover where his injury did not prevent him from attending to his business, but only from using one of his hands (United States Mut. Acc. Ass'n v. Millard, 43 Ill. App. 148). Likewise, a pharmacist engaged in running a drug store is not totally disabled by the loss of a hand, though it prevents him from performing some of the duties connected with some of the business, if he is able to attend to the business substantially as before (Smith v. Supreme Lodge of Order of Select Friends, 62 Kan. 75, 61 Pac. 416). And where insured was described as a leather cutter and merchant, to entitle him to recover as for total disability the disability must have been total not only as to his business as a leather cutter, but also as to his business as a merchant (Ford v. United States Mut. Acc. Relief Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700). Where one who is insured as a "retired" gentleman, and has no actual occupation, his income being derived from investments, sus-

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tains an injury depriving him of the use of one hand, he is not totally disabled under a clause defining "total disability" as the inability to perform any and every kind of business pertaining to his occupation (Knapp v. Preferred Mut. Acc. Ass'n, 53 Hun, 84, 6 N. Y. Supp. 57). Where one is insured in a specific occupation, a provision for indemnity in case of injury causing total loss of "business time" refers to loss of time in his occupation (Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306).

The provision may limit total disability to the inability to carry on any and all kinds of business. Under such a clause the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation.

Supreme Tent of Knights of Maccabees of the World v. King, 79 Ill. App. 145; Lyon v. Railway Passenger Assur. Co., 46 Iowa, 631; Supreme Tent of Knights of Maccabees of the World v. Cox, 60 S. W. 971, 25 Tex. Civ. App. 366.

So, where the contract provided that the insured must be unable to follow "his usual or other occupation," one who, though unable to follow his own trade or profession, could perform the duties of another occupation, could not recover (Albert v. Order of Chosen Friends [C. C.] 34 Fed. 721). But the duties he can perform must belong to some recognized trade or occupation, and it is not sufficient that he can perform occasionally light duties not connected with any occupation.

Starling v. Supreme Council Royal Templars of Temperance, 66 N. W. 340, 108 Mich. 440, 62 Am. St. Rep. 709; Neill v. Order of United Friends, 149 N. Y. 430, 44 N. E. 145, 52 Am. St. Rep. 738, affirming 78 Hun, 255, 28 N. Y. Supp. 928.

(c) Confinement to house.

Policies promising indemnity for disability due to an injury, or disability due to ill health, sometimes require that the disability shall be such as to necessitate confinement to the house. Such a condition is valid, and in some cases has been construed as making confinement to the house the conclusive test of disability (Dunning v. Massachusetts Mut. Acc. Ass'n, 99 Me. 390, 59 Atl. 535). That is to say, the injury or disease must not only incapacitate the insured, but must confine him to the house (Bishop v. United States Casualty Co., 91 N. Y. Supp. 176, 99 App. Div. 530). It has, however, been held, in construing this condition in connection

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with the right to sick benefits under contracts of mutual benefit associations, that **the right of recovery depends on the disability of the insured, and not on his confinement to the house,** which is merely an evidentiary fact, and that insured is totally disabled though he remains much of the time in the open air under the direction of his physician (Scales v. Masonic Protective Ass'n, 70 N. H. 490, 48 Atl. 1084). So, it has been held that one is confined to the house, within the provisions of an accident policy, when by reason of sickness there is a complete and enforced withdrawal from business or work, though he is occasionally able to leave the house and take the car to his doctor's office (Mutual Ben. Ass'n v. Nancarrow, 71 Pac. 423, 18 Colo. App. 274). As was said in Hoffman v. Michigan Home & Hospital Ass'n, 128 Mich. 323, 87 N. W. 265, 54 L. R. A. 746, where the insured was confined to the house most of the time, leaving it only to go to his physician's office or under the direction of his physician, to constitute a compliance with the provision it is not necessary that the insured should remain in the house continuously during the entire time of disability, and to go out of doors now and then, or to occasionally visit the office of his physician, is not a violation of the condition. It may be that occasional airing is essential to a speedy recovery, and a rule which would make nugatory a contract having for its special object indemnity on account of sickness, because the insured took an occasional and necessary airing, would be unreasonable. On the other hand, the condition is not complied with if the insured goes to his place of business and remains there two or three hours each day, superintending the work of his employés (Shirts v. Phœnix Accident & Sick Benefit Ass'n [Mich.] 97 N. W. 966).

Under a policy covering total disability from sickness, and providing that such disability must be evidenced by actual confinement to bed, that seven full days shall constitute a week's sickness, and that no indemnity will be paid for a less period, no recovery can be had where insured, though suffering from malaria for several weeks, was confined to bed only one day (Gainor v. St. Lawrence Life Ass'n, 46 N. Y. Supp. 965, 21 Misc. Rep. 27). So, the insured could not recover for 22 weeks' sickness, where he was confined to his bed for only about 10 weeks, and after that occasionally returned to bed, and at times went out for air and recreation, and afterwards made a visit out of town for his health, all within the 22-weeks period (Liston v. New York Casualty Co., 58 N. Y. Supp. 1090, 28 Misc. Rep. 240).

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(d) Continuing or permanent disability.

When the insured suffers such total disability as prevents him from carrying on his regular business from the time of the injury until he brought action, several months later, and it appears that the disability is likely to continue, he may recover therefor under a policy providing against loss from injuries which are immediately, continuously, and wholly disabling (Gordon v. United States Casualty Co. [Tenn. Ch. App.] 54 S. W. 98). If, however, insured is able to attend to his business a portion of the time for which he claims indemnity, the disability is not continuous, within the requirement of the policy (McKinley v. Bankers' Acc. Ins. Co., 106 Iowa, 81, 75 N. W. 670). In Pacific Mut. Life Ins. Co. v. Branham (Ind. App.) 70 N. E. 174, it appeared that insured was injured, and some days thereafter underwent an operation which confined him to bed for four weeks, at the end of which time he was able to go to his office and perform a portion of his labor. This he did for nearly a month, when he again discontinued labor, and was treated for his injuries for over two months. He was then able to move about on crutches, with his injured limb in a plaster cast, but at the end of the month was compelled to remove this and take treatment for two months and a half, and after another period, during which he was able to use crutches and a cane, he took treatment steadily for several months, and was again operated upon. It was held that his disability was continuous, within the meaning of the policy.

Where the requirement is that the disability shall be "permanent," an instruction defining permanent incapacity as such an incapacity as would "exist through all time" is not objectionable (Grand Lodge Locomotive Firemen v. Orrell, 206 Ill. 208, 69 N. E. 68, affirming 97 Ill. App. 246).

A contract promising indemnity for total "or" permanent disability is not affected by a subsequent amendment of the laws of the insurer so as to require the disability to be total "and" permanent. Beach v. Supreme Tent Knights of Maccabees, 77 N. Y. Supp. 770, 74 App. Div. 527.

In Hollobaugh v. People's Mut. Acc. Ins. Ass'n, 138 Pa. 595, 22 Atl. 29, the contract provided for relief for accident resulting in "total permanent" or "partial permanent" disablement, and there was no provision in the certificate itself for the payment of any benefits for an injury which resulted in partial disablement unless it was also of a permanent character. It was held that the liability of the company was not enlarged so as to embrace cases of merely

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partial disablement of a temporary character by an indorsement on the certificate, which provided that if the member shall sustain bodily injuries, whether partially or totally disabling, "by means as provided for in this certificate," the payment of the weekly relief should exonerate the company from all further liability. The injuries referred to in the indorsement must be limited to the same classes as are mentioned in the body of the certificate—permanent injuries.

(e) Extent of liability in general.

If the policy makes no provision for indemnity in event of death, the beneficiary cannot, when the insured is killed by accident, recover the amount allowed for total disability.

Hall v. American Employers' Liability Ins. Co., 96 Ga. 413, 23 S. E. 310; Shaw v. Equitable Mut. Acc. Ass'n (Neb.) 99 N. W. 672.

If death does not follow the accident instantly, the beneficiary can recover only for the period for which disability continued before death (Rosenberry v. Fidelity & Casualty Co. of New York, 14 Ind. App. 625, 43 N. E. 317). Where the policy provided for indemnity for death resulting from injuries within 90 days after the accident, and the member died within the 90 days, the fact that before his death he ceased to be a member of the association because of default in paying assessments falling due after the accident did not relieve the association from liability, as the liability became fixed at the time of the accident (Burkheiser v. Mutual Acc. Ass'n, 61 Fed. 816, 10 C. C. A. 94, 26 L. R. A. 112). A provision that the policy must be in force 12 months prior to death before the insurer would be liable is not operative when the premium for the year has been paid and accepted (Summers v. Fidelity Mut. Aid Ass'n, 84 Mo. App. 605). A claim for death does not accrue until death actually occurs (Knowlton v. Equitable Acc. Ass'n, 175 Mass. 196, 55 N. E. 890). So, a certificate issued by a benefit association, providing for the payment of an indemnity in case of accidental death, gives to the beneficiary named therein a vested interest, not when the accident happens, but when death occurs in consequence thereof (Woodmen Acc. Ass'n v. Hamilton [Neb.] 96 N. W. 989, 97 N. W. 1017). In the case of ordinary injuries for which the insured is indemnified in a certain sum per week, he is entitled to weekly payments after satisfactory proof of the injuries, and is not required to wait until his disability has ceased or until the end

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of a year (Kentucky Life & Acc. Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709). Under a policy insuring in a certain sum against loss of life from accidental injuries occasioning death within 90 days from the accident, and in a smaller sum per week against personal injury "for any single accident by which the assured shall sustain any personal injury which shall not be fatal," the weekly sum is due for injury by an accident which does not occasion death within 90 days, although it is finally fatal (Perry v. Provident Life Ins. & Inv. Co., 103 Mass. 242).

The certificate may provide that no benefit shall be due until disability ceases or the right to benefits has terminated (Binder v. National Masonic Acc. Ass'n [Iowa] 102 N. W. 190). Such a provision, however, does not apply to a permanent total disability. It will not terminate an insured's right to weekly indemnity on his accident policy if after an accident to his knee, resulting in complete disability, he prematurely went upon the street, thereby prolonging his disability (Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 54 Atl. 678.

Though a mutual benefit certificate, in form a life policy, contained no reference to a section of the society's by-laws providing that, if a member in good standing became disabled by reason of accident or disease, he might at his option be paid one-half the amount of his certificate in full satisfaction of all claims against the order, such section of the by-laws was, notwithstanding, a part of the insurance contract, and the certificate holder was entitled to the benefit thereof (Monahan v. Supreme Lodge of the Order of Columbian Knights, 88 Minn. 224, 92 N. W. 972). So, where the association failed to comply with a statute requiring a copy of any portion of the constitution and laws referred to in the contract to be attached thereto, the constitution may be looked to for the purpose of ascertaining the amount of the benefits recoverable, since the provision fixing such amount adds no new element to the contract, and the association will not be permitted to avoid the contract by its own wrong, in failing to comply with the statute (Corley v. Travelers' Protective Ass'n, 105 Fed. 854, 46 C. C. A. 278). The association cannot, by amendments to its laws reducing the amount to be paid to the insured, affect the rights of one whose certificate was issued prior to the passage of such amendment (Beach v. Supreme Tent Knights of Maccabees, 177 N. Y. 100, 69 N. E. 281).

In Cook v. Benefit League of Minnesota, 76 Minn. 382, 79 N. W. 320, where the policy provided for indemnity for permanent dis-

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ability, causing loss of time, and also for indemnity at the same rate for loss of time caused by temporary total disability, a further provision that benefits would be allowed only when the insured was under the care of a physician or surgeon, or, in the case of amputations, until they heal, was construed as applying only to cases of temporary total disability, and not to a case where the insured was obliged to have the fingers of both hands amputated, though the amputations healed before the end of the time for which indemnity was allowed.

> **The contract between a railroad company, conducting a relief department, and an employé, provided for the payment for each day of disability by reason of accident, and the regulations in connection with the relief department of such railroad provided that the word "disability" should be held to mean physical inability to work. It was held that the decision of a medical examiner of such department that plaintiff, who had suffered amputation of a leg by reason of injury, was "able to work," will not be construed to mean that plaintiff had recovered from his disability, when the evidence shows that the examiner at the same time declared plaintiff "able to do light work at present, * * * but he is still disabled." Chicago, B. & Q. R. Co. v. Olson (Neb.) 97 N. W. 831.**

If the contract provides for the payment of a specified sum as weekly indemnity, but that the amount shall not in any case exceed insured's weekly salary, insured is entitled to the full amount, in the absence of evidence as to the amount of his salary (Crenshaw v. Pacific Mut. Life Ins. Co., 71 Mo. App. 42). But a clause in an application for accident indemnity, agreeing that the benefits to which the applicant shall become entitled shall be paid in the same ratio that his income shall bear to the amount of indemnity insured, is binding on the insured, though the agent, by false statements as to his income, has put him in a higher class, paying larger premiums (Howe v. Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830). The provision does not apply where one is insured as a retired farmer, who has ceased to have any regular occupation (Denison v. Masons' Fraternal Acc. Ass'n of America, 69 N. Y. Supp. 291, 59 App. Div. 294). If the indemnity promised is a sum certain, with a proviso that the insured shall "recover no more than the money value of his time," the indemnity covers all loss by the injury insured against, including the value of insured's time outside of his regular employment (Bean v. Travelers' Ins. Co., 94 Cal. 581, 29 Pac. 1113). And where an accident insurance ticket which was issued to a woman pursuant to an oral contract to insure her against

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loss of time, and paid for at the rate of such insurance, stipulated for indemnity both for loss of time and for death, the company was bound for the indemnity for loss of time by accident, though the contract also stipulated that it insured females against death only (Travelers' Ins. Co. of Hartford v. Ebert [Ky.] 47 S. W. 865). Under a clause insuring "against the loss of the money value of his time," a recovery may be had for time actually lost, within the limits prescribed, though the employer of the insured continued his pay during his disability (Globe Acc. Ins. Co. v. Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247).

The policy may provide that in case of total disability the insurer may, at its option, pay one-half the amount payable at death in full satisfaction of the contract. This is not an absolute agreement, but such a commutation is wholly at the option of the insurer.

Knowlton v. Bay State Beneficiary Ass'n, 171 Mass. 455, 50 N. E. 929; Worthen v. Massachusetts Ben. Life Ass'n, 53 N. Y. Supp. 685, 24 Misc. Rep. 437.

An interesting question is presented where indemnity is claimed for successive injuries. In Martin v. Manufacturers' Accident Indemnity Co., 60 Hun, 535, 15 N. Y. Supp. 309, it appeared that the insured received a slight injury to his thumb on April 8th. On April 13th he agreed to a commutation of his weekly indemnity payments, and executed a receipt for $25, "being in full satisfaction and final settlement of any and all claims I now have or may have against said company for loss resulting from injuries received on the 8th day of April, 1889, under my policy No. 12,157, which is hereby surrendered." The policy was not actually surrendered, but was retained by the insured. On April 27th he received another injury, from the effects of which he died on May 10th. On May 9th he received an official notice of the maturity of premium dues, having previously, on May 2d, notified defendant of the second accident. There was evidence that defendant's agent had said, at the time of settlement for the accident of April 8th, "that it was for the weekly indemnity," and that nothing was then said about canceling the policy. It was held that the evidence warranted the inference that the $25 was paid in satisfaction only of the injuries of April 8th, and that there was no intent to surrender or cancel the policy.

If a policy provides for separate and different indemnities for different disabilities, as for loss of sight and total disability, the fact

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that the insured made a claim for total disability, and, on receiving payment, signed a release discharging the policy, will not preclude him from subsequently claiming indemnity for loss of sight due to the same injury (Cunningham v. Union Casualty & Surety Co., 82 Mo. App. 607). The loss of sight was a specific disability occurring after the claim for total disability was made, and its existence was unknown when the release was signed. **If, however, the disability for which claim is subsequently made is merely a continuance of the original disability, the insured is precluded from recovering for the continued disability.**

Clanton v. Travelers' Protective Ass'n, 74 S. W. 510, 101 Mo. App. 312; Bickford v. Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230; Travelers' Ins. Co. v. Thornton, 46 S. E. 678, 119 Ga. 455.

So, where the insured, after he had apparently recovered from an injury, and after his physician had pronounced him recovered, signed and delivered a receipt for indemnity received, whereby he released and discharged the company in full from all claims which he had or might have on account of the personal injuries sustained, he cannot, on suffering further consequences of the same injury, recover therefor (Wood v. Massachusetts Mut. Acc. Ass'n, 174 Mass. 217, 54 N. E. 541). On the other hand, it was held in Pacific Mut. Ins. Co. v. Branham (Ind. App.) 70 N. E. 174, that if the insured made proof of disability and loss of time to a certain date, under the advice of his physician that he would soon be well, he was not thereby precluded from claiming the amount due for disability continuing after that date. And it has been held that, an allegation of settlement of all claims which a certificate holder in an accident association had or might have against the association, without reference to the beneficiary or to future claims, in a suit by the beneficiary for the death of the insured from the same accident, refers only to the then accrued claims for disability, and not to the subsequent death of the insured, and states no defense to the death claim beyond the amount of the payment alleged (Woodmen Acc. Ass'n v. Hamilton [Neb.] 96 N. W. 989).

Where the company sets up a contract to accept a weekly payment for a certain number of weeks in discharge of the claim, parol evidence is admissible to show that plaintiff could not read or write, and placed his mark on the proofs of loss without knowledge that they contained such contract, and that he afterwards refused to sign a receipt in full when the sum of such weekly payments was paid to him. Lord v. American Mut. Acc. Ass'n, 61 N. W. 293, 89 Wis. 19, 26 L. R. A. 741, 46 Am. St. Rep. 815.

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If the policy provides that no indemnity shall be paid for disability, except for such time as insured is under the care of a physician, the allowance of indemnity for time during which the insured was disabled preceding the employment of a physician is not justified (Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135).

(f) Liability for particular injuries.

One of the interesting questions arising in connection with accident policies is whether, in order to recover under a clause providing for indemnity for a loss of a hand or foot, there must be an actual physical loss of the member. Though it was held in Pennsylvania (Stever v. People's Mut. Acc. Ins. Ass'n, 150 Pa. 132, 24 Atl. 662, 16 L. R. A. 446) that one cannot, under an accident policy, recover as for the loss of a foot, if by reason of an injury he is merely deprived of the use of his leg, the principle on which the case rests has been rejected in other jurisdictions. Thus, in Sheanon v. Pacific Mut. Life Ins. Co., 77 Wis. 618, 46 N. W. 799, 20 Am. St. Rep. 151, 9 L. R. A. 685; Id., 83 Wis. 507, 53 N. W. 878—it was held that actual physical loss of the member is not necessary, and, if an injury causes complete paralysis of the feet and legs, there is a loss of those members, within the policy. The principle laid down in the Sheanon Case has also been applied in cases where the injury resulted in the amputation of a portion of the hand of the insured, and it has been held that, if the insured had thereby lost all use of the member, it was a loss of the entire hand, within the terms of the policy.

> Supreme Court of Honor v. Turner, 99 Ill. App. 310; Sisson v. Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Sneck v. Travelers' Ins. Co., 88 Hun, 94, 34 N. Y. Supp. 545, reversing (1894) 81 Hun, 331, 30 N. Y. Supp. 881; Lord v. American Mut. Acc. Ass'n, 80 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L. R. A. 741.

Similarly, under a policy insuring for the "loss of an arm" by accident, the policy holder is entitled to his insurance on the loss of his arm a little below the elbow (Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540). If, however, the contract is that the insured shall receive the full amount of the policy for an injury which shall "cause amputation of a limb (whole hand or foot)," no recovery can be had for an injury which results in the amputation of merely a part of the foot (Fuller v. Locomotive Engineers' Mut. Life & Acc.

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Ass'n, 122 Mich. 548, 81 N. W. 326, 48 L. R. A. 86, 80 Am. St. Rep. 598).

Where the policy provides an indemnity for the loss of "one entire hand and one entire foot, or two entire hands or two entire feet," the word "and" cannot be read "or," and therefore the loss of a single hand alone does not entitle the insured to the indemnity. Gentry v. Standard Life & Accident Ins. Co., 6 Ohio Dec. 114.

A policy entitling the insured to a certain benefit in case of the breaking of a leg, and defining the breaking of a leg as "the breaking of the shaft of the thigh bone between the hip and knee joints, or the breaking of the shafts of both bones between the knee and ankle joints," does not cover what is known to the medical profession as a "Pott's fracture," which is defined as the breaking of one bone between the knee and ankle joints, and the dislocation of the other (Peterson v. Modern Brotherhood of America, 101 N. W. 289, 125 Iowa, 562, 67 L. R. A. 631). If the contract does not define a broken leg, a by-law, passed after the issuance of the certificate, defining the breaking of a leg as the breaking of the shaft of the thigh bone between the hip and knee joints, or the breaking of the shafts of both bones between the knee and ankle joints, is binding on the insured (Ross v. Modern Brotherhood of America, 95 N. W. 207, 120 Iowa, 692).

Where the policy provides for the payment of a specified mortuary benefit, a weekly benefit, and a certain sum for loss of a limb, the total amount to be paid in any one year not to exceed the total amount of the mortuary benefit, one suffering the loss of a limb may recover both the weekly benefit and indemnity for loss of the limb, up to the amount of the mortuary benefit (Hart v. National Masonic Acc. Ass'n, 105 Iowa, 717, 75 N. W. 508). In Humphreys v. National Ben. Ass'n, 139 Pa. 214, 20 Atl. 1047, 11 L. R. A. 564, the policy provided for the payment of the whole of the principal sum named therein in the event of the total and permanent loss of the sight of both eyes. Before the insurance was taken out, insured had lost the sight of one eye, this fact being known to the agent of the company. It was held that he was entitled to recover the full amount of the policy on subsequently sustaining a loss of the remaining eye.

In Maynard v. Locomotive Engineers' Mutual Loan & Acc. Ins. Ass'n, 14 Utah, 458, 47 Pac. 1030, it was held that a by-law of a beneficial association providing that a member receiving bodily injuries which alone cause the total and permanent loss of one or

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both eyes shall receive the whole amount of his policy does not include an injury causing the loss of a member's eyesight prior to its passage. The only question involved was the right to recover under the amended by-law, and it was held that no recovery thereunder could be had, because the amendment was not retroactive. On retrial, recovery was sought and had under the original by-law, and in affirming the judgment (16 Utah, 145, 51 Pac. 259, 67 Am. St. Rep. 602) the court said that "The right of recovery * * * appears to be within the fair intendment of its provisions, and the amendment simply makes their true meaning more apparent. The by-law does not provide that the insured will not receive the amount of his policy unless the injuries are such as to cause the loss of the sight of both eyes. There is no express provision * * * limiting the insurance to a total and permanent loss of the sight of both eyes. * * * The total and permanent loss of one eye disables the insured from pursuing his usual and accustomed occupation. It would be a rigid construction that would limit a recovery to cases of total blindness to both eyes, and thus effectuate by implication what the association failed to provide for in express terms. Where a person has become permanently blind in one eye, he may, with strict propriety, be said to have sustained 'total and permanent loss of eyesight.'"

(g) Extent of liability as dependent on cause of injury or death.

In addition to the exceptions of risks found in accident policies, there may be provisions limiting the amount of the indemnity if the disability or death is caused by certain injuries. Thus, it may be provided that for injuries received while walking or being on a roadbed of any railway the insured or his beneficiary shall be entitled only to the indemnity provided in the classification for railway employés (Keene v. New England Mut. Acc. Ass'n, 164 Mass. 170, 41 N. E. 203); and such condition becomes operative if the insured is killed in an attempt to cross railroad tracks near a station, where, with the permission of the company, they were commonly crossed by the public. So, in a clause providing that in case of injuries intentionally inflicted on insured by another person the measure of liability shall be a sum equal to the premium paid (Grimes v. Fidelity & Casualty Co. [Tex. Civ. App.] 76 S. W. 811), the beneficiary could recover only the amount of the premiums paid, where the insured, who was a policeman, was intentionally shot by a person whom he was attempting to arrest in the performance

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of his duty. If, however, the policy insures against death or injury by external means, leaving a visible mark on the body, and in an independent paragraph limits the indemnity to one-tenth of the face of the policy if the injury causing death left no visible mark, or is the result of the intentional acts of another person (Stephens v. Railway Officials' & Employés' Acc. Ass'n, 21 South. 710, 75 Miss. 84), the beneficiary was entitled to recover the whole amount of the policy if death resulted from such intentional act which left its visible mark on the body.

A common condition in all forms of policies is that limiting the amount of recovery in case of suicide. In Van Slooten v. Fidelity & Casualty Co. of New York, 79 N. Y. Supp. 608, 78 App. Div. 527, the policy provided for the payment of $5,000 in case of accidental death, or $10,000 if the fatal injuries should be received in certain specified circumstances. It also provided that in case of suicide the company should be liable for one-twentieth of the "amount otherwise payable." The insured committed suicide in a manner and place in no way connected with the particular circumstances which would render the company liable for $10,000. It was held that the "amount otherwise payable" referred to the amount payable had the death been accidental, and not by suicide, and that the beneficiary was entitled to recover only one-twentieth of $5,000. In Keller v. Travelers' Ins. Co., 58 Mo. App. 557, the court held that a clause limiting liability in case of suicide was in effect a defense to the policy, and consequently within the purview of the Missouri statute (Rev. St. 1889, § 5855), declaring that suicide shall not be a defense to the policy unless it appears that the insured contemplated suicide when making application for the insurance, and that all stipulations to the contrary shall be void. It was, however, held in Whitfield v. Ætna Life Ins. Co. (C. C.) 125 Fed. 269, that the statute does not prohibit the parties from contracting that a smaller amount shall be payable in case of death from suicide; the court saying that, as the statute is in derogation of the common law, it is not to be extended beyond its strict terms, and consequently should not be construed so as to make invalid a stipulation limiting the amount to be paid.

Recent forms of accident policies usually contain provisions for the payment of double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. The paymaster of a railroad company, traveling on business of the company from station to station, and stop-

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ping between them to pay off employés, wherever that may be, is not, while so doing, a passenger, within this clause (Travelers' Ins. Co. v. Austin, 42 S. E. 522, 116 Ga. 264, 59 L. R. A. 107, 94 Am. St. Rep. 125). One injured while attempting to alight from a moving electric street car is to be regarded as having been injured "while riding as a passenger in" the car, within the terms of a policy (King v. Travelers' Ins. Co., 28 S. E. 661, 101 Ga. 64, 65 Am. St. Rep. 288). The stipulation may, however, be conditioned that the injury does not result from an attempt to enter or leave such a conveyance, in which case it must appear that the injury was not received under the excepted circumstances (Lilly v. Preferred Acc. Ins. Co., 83 N. Y. Supp. 585, 41 Misc. Rep. 8, affirmed in 87 N. Y. Supp. 1139, 92 App. Div. 614).

In Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, 51 C. C. A. 424, it appeared that insured, with others, formed a party for the purpose of ascending an Alaskan river and prospecting for gold in its vicinity. A steamship company contracted to furnish them with transportation to the coast of Alaska in one of its steamships, and from there in a river steamer, which they were to use as a base of supplies during their explorations, the company to receive as compensation one-half the profits of the expedition. After leaving the steamship, and while passing up the bay at the mouth of the river, the river steamer was wrecked, and the insured was drowned. It was held that he was a passenger, so as to entitle the beneficiary to recover double indemnity.

If the stipulation is for double indemnity for injuries received while riding as a passenger "in a passenger conveyance," an injury received while riding on the platform of a car is not within the condition.

Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 30 C. C. A. 48; Van Bokkelen v. Travelers' Ins. Co., 54 N. Y. Supp. 307, 34 App. Div. 399, affirmed without opinion 167 N. Y. 590, 60 N. E. 1121.

On the other hand, in Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49, the court regarded as the important feature that insured should be a "passenger," and therefore held that the beneficiary could recover for the death of insured, who, on invitation of the railroad superintendent, left a railway passenger coach in which he was a passenger, and rode on the engine, and, while so riding, was injured, and died, since he did not thereby lose the character of a passenger. Ob-

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viously, if the policy provided for double indemnity in case insured should be injured while riding as a passenger in or on a public conveyance, it could not be limited to a case of injury while insured was riding "inside" of a railroad car, so as to preclude a recovery thereunder for death occasioned from insured's being thrown from the platform of such car (Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456).

Insured's arm was slightly injured while driving, and more than two weeks afterwards, while boarding a street car, he received an additional injury. On examination it appeared that his arm was broken, and the physician testified that from the condition of the arm it must have been broken at the time of the second injury. It was held that the accident on the street car was the cause of the injury, so as to entitle the insured to recover at the rate allowed for injuries received while a passenger on a public conveyance. (Gordon v. United States Casualty Co. [Tenn. Ch. App.] 54 S. W. 98.)

(h) Extent of liability as dependent on classification of risk.

One of the most important limitations in accident policies is that making the extent of liability dependent on the occupation of the insured. The condition usually provides that, if the insured is injured while engaged in an occupation more hazardous than that specified in the policy, he shall be indemnified only at the rate provided for the class in which he receives the injury, or that the amount of insurance shall be such as the premium paid will purchase at the rate fixed for the increased hazard. It is obvious that **the question whether there has been a change in occupation within the condition depends primarily upon the original classification of insured's occupation. As this classification is fixed by the company, it is bound thereby, though the classification was erroneous.**

Schmidt v. American Mut. Acc. Ass'n, 96 Wis. 304, 71 N. W. 601; Hoffman v. Standard Life & Accident Co., 37 S. E. 466, 127 N. C. 337.

If the occupation in which insured is engaged when injured is different from that in which he was insured, but is not classified by the insurer as a more hazardous risk, the insured cannot, after the injury, so classify the risk (Bushaw v. Women's Mut. Ins. & Acc. Co., 55 Hun, 607, 8 N. Y. Supp. 423). But if the policy does not classify the risk, it is for the jury to say whether there has been a change of risk, and whether the risk has been increased (Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105). So, if the face of the policy describes insured's occupation,

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and classifies the risk as "medium," the classification will control, though the occupation is not so classified in the general classification of risks on the back of the policy (Ford v. United States Mut. Acc. Relief Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700). The clause will not, however, entitle insured to recover as for the increased hazard if the risk is absolutely excepted. So, where the policy provided that it did not cover injuries resulting from walking or being on any railway roadbed (railroad employés excepted), and that, if the insured was injured in any occupation or exposure classed as more hazardous, the amount of indemnity should be only such as the premium paid would purchase at the rate fixed for the increased hazard, one, not a railway employé, who was injured by walking on a railway roadbed, could not recover under the latter clause, as the words "occupation or exposure" are not inconsistent with what is contained in the exception; that is to say, if the first clause entirely defeats liability, no indemnity can be received under the latter clause (Yancey v. Ætna Life Ins. Co., 108 Ga. 349, 33 S. E. 979).

The clause providing for reduced indemnity if insured is injured in a more hazardous occupation must be regarded as a special contract contemplating a future change of occupation (Standard Life & Accident Ins. Co. v. Carroll, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194). The policy is not, therefore, rendered void by the change, but recovery under the policy is limited to the reduced amount (National Masonic Acc. Ass'n v. Seed, 95 Ill. App. 43). The important question arising on this clause is whether there has been a change in occupation, or whether the insured can fairly be said to have been engaged in another occupation when injured, although he had not actually changed his usual occupation. It is obvious that **if insured's occupation is specifically described, and at the time of injury he is engaged in the performance of duty in no way connected with such occupation, and constituting a wholly different employment, the clause will take effect** (Railway Officials' & Employés' Acc. Ass'n v. Bradley, 97 Ill. App. 355).

This principle governed the following cases: Employers' Liability Assur. Corp. v. Back, 102 Fed. 229, 42 C. C. A. 286, where the insured was described as a dealer in Chinese merchandise, and was actually a foreman of Chinese labor; Metropolitan Acc. Ass'n v. Hilton, 61 Ill. App. 100, where insured was classified as a "proprietor of livery," "office duty," and was injured while driving a cab; Standard Life & Accident Ins. Co. v. Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781, where one was insured as a blacksmith,

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and was killed while acting as car coupler; Brock v. Brotherhood Acc. Co., 54 Atl. 176, 75 Vt. 249, where one insured as "cattle shipper and tender in transit" was injured while acting as a tender of horses in transit; Loesch v. Union Casualty & Surety Co., 176 Mo. 654, 75 S. W. 621, where one insured as a "stock dealer, not working or tending in transit," was injured while attempting to get an animal out of the stock car.

In Standard Life & Accident Ins. Co. v. Koen, 11 Tex. Civ. App. 273, 33 S. W. 133, the application stated that the insured was employed as an extra conductor. It appeared that an extra conductor not engaged in running trains may perform any other services required of him, and it was therefore held that such an extra conductor could act as brakeman without losing his classification. On the other hand, in Aldrich v. Mercantile Mut. Acc. Ass'n, 149 Mass. 457, 21 N. E. 873, the Massachusetts court arrived at the opposite conclusion, but laid special stress on the fact that the association had no notice of the custom of spare conductors acting as brakemen.

If the acts are fairly within the occupation as described, or are not necessarily excluded by the description, there will be no reduction. So, where one is insured as "an iceman, proprietor," the indemnity will not be reduced because he was injured while actually delivering ice (Neafie v. Manufacturers' Accident Indemnity Co., 55 Hun, 111, 8 N. Y. Supp. 202).

Where the clause provides for reducing indemnity if the insured is injured by any occupation or exposure classified as more hazardous than that in which he is insured, where "acts" and "exposures" are not classified, but only "occupations," a particular exposure, though not part of the occupation mentioned in the contract, is not material to affect the liability of the insurer (Fox v. Masons' Fraternal Acc. Ass'n of America, 96 Wis. 390, 71 N. W. 363). So, the indemnity will not be reduced where one insured as a mining expert is injured while casually riding on a locomotive (Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49). Generally, it may be said that **to engage in an occasional act connected with some other occupation is not within the purview of the condition, and no reduction will be made if the injury occurs while so engaged.** Thus, in Hall v. American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366, it was said that one could not be regarded as a "grocer delivering goods by occupa-

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tion," so as to reduce his indemnity, though he occasionally delivered goods, if another person delivered the principal part of such goods.

One insured as a farmer is not engaged in another occupation while driving posts or piles for a private bridge (National Acc. Soc. of City of New York v. Taylor, 42 Ill. App. 97), or while temporarily acting as superintendent of police at a state fair (Travelers' Preferred Acc. Ass'n v. Kelsey, 46 Ill. App. 371). A teacher is not engaged in another occupation while superintending the building of a dwelling house on his own account (Stone's Adm'rs v. United States Casualty Co., 34 N. J. Law, 371). Where one is engaged as a "freight flagman, not coupling or switching by occupation," occasional acts of coupling will not place him in a more hazardous occupation, so as to reduce the indemnity (Hoffman v. Standard Life & Accident Co., 127 N. C. 337, 37 S. E. 466). A banker who, while in a sawmill to get lumber for a cabinet to be used in the bank, operates a saw to cut off some pieces for handles, is not engaged in sawing as a business, within the limitation (Hess v. Preferred Masonic Mut. Acc. Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444).

As a further development of the foregoing principles, it has been generally held that acts of the insured merely incidental to daily life, or for the purpose of recreation, cannot be regarded as acts in the way of occupation, so as to fall within the limitation. So, one injured while hunting for recreation is not injured while engaged in a more hazardous occupation within the purview of the condition, although the occupation of "hunter" is classified as a hazardous risk.

Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664, affirming (1889) 33 Ill. App. 178; Star Acc. Co. v. Sibley, 57 Ill. App. 315; Holliday v. American Mut. Acc. Ass'n, 72 N. W. 448, 103 Iowa, 178, 64 Am. St. Rep. 170; Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Kentucky Life & Accident Ins. Co. v. Franklin, 102 Ky. 512, 43 S. W. 709; Union Casualty & Surety Co. v. Goddard, 25 Ky. Law Rep. 1035, 76 S. W. 832.

But see Thomas v. Masons' Fraternal Acc. Ass'n, 71 N. Y. Supp. 692, 64 App. Div. 22, where it was held that under a policy stipulating that for any injury received in any occupation or exposure, temporary or otherwise, classified as more hazardous than that of insured, he shall receive only such amount for the particular accident as could be drawn by a member insured in such occupation, if one classified as a lawyer is accidentally killed while engaged in hunting for pleasure, being exposed to the risks incident to that

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employment, his beneficiary is entitled to recover only so much as would be paid to one engaged in that occupation.

In this connection reference may be made to Doody v. National Masonic Acc. Ass'n, 92 N. W. 613, 66 Neb. 493, 60 L. R. A. 424, where the condition provided for a reduced indemnity for injuries received while hunting or in any way using or handling firearms, and it was held that insured, who was injured by the discharge of a gun while he was removing it from one room of his house, where it had been left by a boarder, to another room, could recover only the reduced amount.

This phase of the question has arisen in several cases where the insured was injured while riding a bicycle. In Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 22, it appeared that the classification manual of the insurer stated that merely riding a bicycle occasionally for pleasure was not an "occupation," and it was, therefore, held that one insured as a proprietor of a factory does not change his status by incidentally riding a bicycle, so that, if injured while so doing, he would be entitled only to the reduced indemnity. And where the policy recited that "members of a higher classification accidentally injured while engaged in bicycling" will receive only a certain indemnity, the word "bicycling" will be construed as referring only to professional riders, and not to the riding of a bicycle for recreation (Baldwin v. Fraternal Acc. Ass'n of America [Sup.] 46 N. Y. Supp. 1016, 21 Misc. Rep. 124). But where the policy provides, "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling," the indemnity will be reduced, such reduced benefit only will be paid if the insured, after attending a funeral, returns home on his bicycle by a circuitous route, as this must be regarded as riding for recreation (Eaton v. Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048).

Where one carrying an accident policy notifies the insurer of a change of occupation, and the insurer, in a written reply thereto, states that under such occupation his indemnity will be $2,000, and no notice of dissatisfaction is given to the insurer as to the classification mentioned in such communication, the contract is as effectually modified as if the change had been actually written on the certificate which was then in possession of the insured. Fox v. Masons' Fraternal Acc. Ass'n of America, 96 Wis. 390, 71 N. W. 363.

(i) Questions of practice.

An allegation that the insured is or will continue to be totally disabled is not objectionable as pleading a legal conclusion, but is

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to be regarded as an allegation of fact (Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412). If the insured, in his claim for indemnity, assigns an adequate cause for his disability, he is not thereby precluded from alleging and proving, in an action brought on the policy, other causes omitted through mistake or ignorance (Jarvis v. Northwestern Mut. Relief Ass'n, 102 Wis. 546, 78 N. W. 1089, 72 Am. St. Rep. 895). If the policy provides that the beneficiary shall be entitled only to the reduced sum if the insured is killed in a more hazardous occupation, a plaintiff who sues for the entire amount must allege and prove that the insured was not killed under the specified circumstances (American Acc. Co. of Louisville v. Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. Rep. 473, 34 L. R. A. 301). So, where the policy insured against death from injuries caused through external, violent, or accidental means, but limited the recovery in case of death resulting from intentional injuries, and the complaint alleged that the insured died from external, violent, and accidental means, and that his injuries were not intentionally inflicted, while the answer, besides a general denial, pleaded as a separate defense that the insured died from intentional injuries, the burden is on the plaintiff to prove by a preponderance of evidence that the insured died from external, violent, and accidental means, in order to recover the full amount (Whitlatch v. Fidelity & Casualty Co., 149 N. Y. 45, 43 N. E. 405, reversing [1894] 78 Hun, 262, 28 N. Y. Supp. 951). If, however, there is a provision for limited indemnity in case of injury from unnecessary exposure to danger, the burden is on the defendant to show that the insured met death under such circumstances as to bring the clause into operation (Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812).

Where the policy provides that, if the accident is caused by shooting, the insurer shall be liable for a reduced amount if the facts and circumstances of the accident are not established by the testimony of an actual eyewitness (National Acc. Soc. v. Ralstin, 101 Ill. App. 192), the insured is a competent witness to establish the facts and circumstances of the accident. For the purpose of showing the extent of disability, the testimony of the insured as to his ability to labor after the accident is competent (Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631). Evidence as to insured's suffering, and how he slept during the disability, if not an element of damages, is admissible for the purpose of showing how far the discomfort may have interfered with his capacity to perform his

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work (Globe Acc. Ins. Co. v. Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247). The insured cannot, however, show the value of his time unless it is pleaded (Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678). Likewise, where the insured was a physician, evidence that a number of prescriptions made by him during his alleged disability were given without charge was inadmissible, as the issue is not what he charged for services, but whether he was able to perform them (Preferred Acc. Ins. Co. of New York v. Gray, 123 Ala. 482, 26 South. 517).

If, in an action on a policy fixing the maximum limit of the company's liability if the accident or death results from unnecessary or negligent exposure to obvious danger, it appears that the deceased, in crossing railroad tracks to reach the platform for the purpose of taking passage on a train, was killed by another train approaching in an opposite direction, in the absence of affirmative proof of negligence it cannot be assumed that the insured exposed himself necessarily or negligently to an obvious danger (North American Acc. Ins. Co. v. Gulick, 25 Ohio Cir. Ct. R. 395).

Whether the insured is totally and permanently incapacitated from performing manual labor is a question of fact for the jury (Grand Lodge Brotherhood of Locomotive Firemen v. Orrell, 109 Ill. App. 422). So, too, whether insured, when injured, was engaged in a more hazardous occupation than that in which he was insured, is a question for the jury (Fox v. Masons' Fraternal Acc. Ass'n of America, 96 Wis. 390, 71 N. W. 363).

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XXIV. CAUSE OF LOSS AND EXTENT OF LIABILITY—GUARANTY AND INDEMNITY INSURANCE.

1. RISK AND CAUSE OF LOSS.

(a) Employers' liability insurance.

The questions presented in relation to risk and cause of loss in employers' liability insurance are very similar to those arising in accident insurance. **The cause of injury or death must usually be accidental, and the person injured must have been engaged in work connected with the occupation or business of the employer as described in the policy.** In addition to these, however, there are special forms of these policies which cover liabilities for injuries to persons not employés. As to these, the limitations as to occupation cannot be said to apply in the strict sense, though the injury must be caused by some one in the employ of the insured, or by some structure or apparatus connected with the insured's business.

The cause of injury must, of course, be one of the risks assumed in the policy. Thus, under a clause insuring against "personal injury and loss of human life," for which the insured is liable in damages, and "which shall be caused by said boilers, or any ma-

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chinery of whatever kind connected therewith and operated thereby," the insured cannot recover the amount it has paid out for loss of life and injuries caused by the explosion in a starch kiln, caused by fire, though the kilns were heated by steam pipes connected with the boilers (American Steam-Boiler Ins. Co. v. Chicago Sugar Refining Co., 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572, reversing 48 Fed. 198). It has, however, been held that kidney disease produced in a servant by handling infected rags in the discharge of her duties was within a policy insuring against loss from liability on account of bodily injuries accidentally suffered (Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York, 78 S. W. 320, 104 Mo. App. 157).

In analogy to the rule in accident insurance, a policy insuring against loss from liability to any person accidentally sustaining bodily injuries while traveling on a railroad under circumstances which would impose on the insured a common-law or statutory liability for such injuries does not indemnify the insured against a loss sustained by reason of a person being instantly killed without conscious suffering (Worcester & S. St. Ry. Co. v. Travelers' Ins. Co., 62 N. E. 364, 180 Mass. 263, 57 L. R. A. 629, 91 Am. St. Rep. 275).

In Fuller Bros. Toll Lumber & Box Co. v. Fidelity & Casualty Co., 94 Mo. App. 490, 68 S. W. 222, the schedule annexed to the policy contained blanks to be filled in with the number and description of the elevators in the employer's factory, and the policy provided that it should cover no loss from injuries from elevators unless enumerated. The application was filled out by insurer's general agent, who knew of the existence of the elevators, and he was told by the insured that he wanted everything covered save injuries to teamsters. The policy was written "on all employés in the factory." It was held that, as the insurer had treated a previous accident caused by an elevator as covered, this was the construction of the policy by the parties, rendering the insurer liable for all injuries caused by the elevators.

An employé brought an action against his employer to recover for injuries received November 22, 1892, and for other injuries received January 20, 1893, asking in each paragraph for $5,000 damages, and recovered a judgment for $5,000 on a verdict in his favor, not designating the injury for which the damages were awarded. An indemnity insurance company had insured such employer against liability for injuries to an employé after the time of the first injury, but before the second. It was held, in an action on such

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policy, that the judgment was insufficient to show that it was rendered on the injury covered by such policy. Reigler v. Sherlock, 49 S. W. 1080, 66 Ark. 215.

Where the insurance is to cover injuries to employés, the employé injured must have been engaged in work connected with the described business, in order to render the insurer liable. Thus, in Wallman v. Fidelity & Casualty Co., 87 Mo. App. 677, the policy described the employer's business and the machinery used therein as that usual in buildings occupied for wholesaling dry goods and general merchandise. Afterwards the insured put in machinery for polishing rusted cutlery, and hired an adept polisher, who was injured in running said machinery, and had recovered damages therefor of the plaintiff. It was held that the risk was not included in the policy, and the company was not liable to indemnify the insured for his liability to the employé. In Fidelity & Casualty Co. v. Phœnix Mfg. Co., 100 Fed. 604, 40 C. C. A. 614, the policy provided for indemnity against loss from liability for damages on account of injuries to employés whose wages were included in its pay roll, the premium being based on the total amount of the pay roll for the year. The application, which was filled up by the general agent, described insured's business as "manufacturers and erectors of machinery, showcases, and office fixtures, and general woodwork." Certain carpenters employed by the insured, whose wages were included in the general pay roll, were injured while engaged in tearing down an old building preparatory to the erection of a new one on the site. It was held that it was proper to submit to the jury the question whether the term "general woodwork," as commonly understood, or as agreed upon by the parties, covered the work in which the men were engaged when injured. In Kelley v. London Guarantee & Accident Co., 97 Mo. App. 623, 71 S. W. 711, the insurer agreed to indemnify a partnership against any judgment that might be rendered against it because of its liability for injuries to an employé. An employé and one of the partners were experimenting with a machine belonging to the firm, when the employé was injured. A verdict in favor of the employé, and against the firm, was obtained, but was set aside as to one of the partners. The court took the position that while the negligent act of the individual member may become the act of the partnership, when committed in due prosecution of the partnership business, in order to render the insurer liable it must be made to appear that the neg-

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ligent act of the individual member was such an act as made it the act of the partnership.

A phase of this question has arisen in several cases where the employé was injured while making alterations or repairs in the building of the employer, or while engaged in constructing a new building. In People's Ice Co. v. Employers' Liability Assur. Corp., 161 Mass. 122, 36 N. E. 754, the application by an ice company for a policy of insurance against loss to it from injuries to its employés stated that its business was ice dealer at a particular place named, where it was cutting ice; that "the operations carried on by the work people are cutting and hauling ice." The application was made a part of the policy which was issued. It provided that the sum to be paid the employer should be for injuries to any employé in its service, "while employed in the employer's work, in any of the occupations, or in any of the places, mentioned on the schedule hereto." The schedule gave such occupations as "all operations connected with the business of ice dealers." It was held that the insurer was not liable for losses paid the employés for injuries received while erecting a new icehouse at the place stated in such application, though it was customary for ice dealers to erect their own icehouses. On the other hand, in Hoven v. Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, it was held that a policy indemnifying an employer from liability for claims for personal injuries to its employés while engaged in "operations connected with the business of iron and steel works" covers injuries received by an employé by reason of the construction of a building by the employer for the use of his business. In Fidelity & Casualty Co. v. Lone Oak Cotton Oil & Gin Co. (Tex. Civ. App.) 80 S. W. 541, the policy covered a loss from liability for damages on account of injuries suffered by any employé of the insured while on duty within the factory, shop, or yards mentioned in the schedule, in and during the operation of the trade or business described in the schedule. The schedule described the kind of business the insured was engaged in, and provided that the insurer should not be liable for any injury to any person unless he was "on duty at the time of the accident in an occupation described" at the place mentioned. The policy excluded from its scope additions to or alterations in any building, but permitted ordinary repairs. A carpenter who had been employed in the construction of the plant and in installing the machinery, which had been fully completed, had been placed on the insured's roll of operators, his

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services being necessary in the operation of the plant. His duties were to assist the superintendent in regulating the machinery, and to make such changes or repairs as should be necessary during the operation. While he was employed in taking down a scaffolding in the water tower, which had been put in during the installation of the machinery, the tower collapsed, causing his death. It was held that the employé was pursuing an operation or business covered by the policy at the time of his death, so as to render the insurer liable therefor. A somewhat similar question was presented in Andrus v. Maryland Casualty Co., 98 N. W. 200, 91 Minn. 358. The insured, owning a four-story brick structure, engaged contractors to replace the building with a new one. The new building was nine and ten stories high, and was in no sense a mere remodeling of the old building. The policy provided that it should not cover loss from liability for injuries suffered by any person before the premises were fully completed and ready for occupancy. At the time of the injury for which recovery was sought, the building was not fully completed in all its parts, but it was about two-thirds completed, and was occupied to that extent by tenants. The court held that, though the expression "fully completed ready for occupancy" is somewhat ambiguous, it should be construed liberally in the light of the conditions known to the agent to exist at the time the policy was issued. It was known at that time that the building was only half completed, and, if the insurer's theory of the construction should be adopted, the policy would not indemnify the insured for a full year, as its terms expressly provide, but only for such portion of the year as should elapse after its full completion, thus rendering inoperative in part that portion of the policy fixing its period of duration. It was held, therefore, that the insurer was liable for an injury to the employé that had occurred in a portion of the building not yet completed.

Similar to the foregoing are cases in which the question has been raised whether the structure or apparatus, defects in which caused the injury, was used in the business of the employer. A policy indemnifying a horse car company for damages on account of injuries to persons not employés, resulting from "accident to, or caused by, the horses, cars, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application," does not insure against injuries caused by the use of omnibus sleighs, not described in the application, though customary in the neighborhood when the tracks are obstructed

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by snow and ice (Phillipsburg Horse Car Co. v. Fidelity & Casualty Co., 160 Pa. 350, 28 Atl. 823). In Gray v. Standard Life & Accident Ins. Co., 170 Mass. 558, 49 N. E. 921, where the policy insured against injuries caused by horses or vehicles used by the insured, it was said that the use of a vehicle by the insured in going to his store or from his store to the bank was not necessarily a use of the vehicle in his business. In Cashman v. London Guarantee & Accident Ins. Co., 187 Mass. 188, 72 N. E. 957, the occupation of the insured was described in the schedule as that of "stevedores and contractors." An employé suffered an injury due to a defect in a runway owned by a third person, with whom the insured had contracted to keep the runway in repair as long as they used it. It was held that this contract was not, as a matter of law, so improper or unreasonable as to take the liability of the insured to their employés, on account of it, out of the general provisions of the policy, so as to make the liability not the liability of a stevedore, within the policy, but a separate and independent liability.

A man employed as a laborer by a "contracting carpenter" in constructing a building is a laborer in the employ of such contractor, within the meaning of an indemnity policy, though the man is employed upon a hoisting apparatus leased and operated jointly by such contracting carpenter and another contractor, if it appears that he continues to receive his wages from his employer only, and that such a hoisting apparatus is a necessary and usual part of the business of a contracting carpenter (Travelers' Ins. Co. v. Bright, 24 Ohio Cir. Ct. R. 441). In Dives v. Fidelity & Casualty Co., 206 Pa. 199, 55 Atl. 950, the policy provided that it should cover no losses for injuries to any person unless his wages were included in the estimate of wages set forth, and he was on duty at the time of the accident in an occupation at the place mentioned in the schedule. The application for the policy stated that the estimated pay roll did not include the wages paid by subcontractors. Before the application was signed, the word "not" in such item was stricken out, and the answer was written "Yes." In the schedule attached to the policy the word "not" was not stricken out, but the answer "Yes" was written after the item, as in the application. It was held that, if the insured was compelled to pay the damages for an injury to an employé of a subcontractor, the company was liable therefor, as the employé's wages were included in the estimated wages. If the policy indemnifies the insured against liability for injuries to his employés or the public by the insured or

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by his workmen, but excepts those caused by a subcontractor or a subcontractor's workmen, it is necessary for insured to prove, in an action on the policy, that the liability on which the action was based did not arise from any act of a subcontractor or a subcontractor's servant (Tolmie v. Fidelity & Casualty Co. of New York, 88 N. Y. Supp. 717, 95 App. Div. 352, modifying 41 Misc. Rep. 451, 84 N. Y. Supp. 1020).

Indemnity policies usually provide that the insurer shall not be liable for any loss or liability for injuries occasioned by the failure of insured to observe any statute affecting the safety of persons, and such a provision is not repugnant to a preceding general statement of the policy that insurer agrees to indemnify insured against loss from common-law or statutory liability to servants (Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. [C. C.] 130 Fed. 957). If the insurer agreed to defend actions for injuries to employés brought against insured, providing the insured maintained its premises in conformity to law, the insurer could not withdraw from the defense of such an action before trial, on the ground that insured had not maintained its premises in conformity with law, where the violation of law was not established, but was a question of fact for determination at the trial (Glens Falls Portland Cement Co. v. Travelers' Ins. Co., 56 N. E. 897, 162 N. Y. 399, affirming 11 App. Div. 411, 42 N. Y. Supp. 285). An exception of liability for injuries to any child illegally employed relieves the insurer of liability to reimburse the insured for damages recovered for injuries sustained by a child under 12 years old, employed by them in violation of Rev. St. § 1728a, prohibiting the employment of a child under the age of 12 years in a factory (Goodwillie v. London Guarantee & Accident Co., 84 N. W. 164, 108 Wis. 207).

Though a policy of employers' indemnity insurance provided that the employés should be over 12 years of age, the petition in an action on the policy need not allege that the injured employé was over that age. Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. Law Rep. 653. 85 S. W. 1090.

(b) Fidelity insurance.

If the policy of fidelity insurance provides for indemnity against any loss arising from the fraud or dishonesty of the employé, it must appear, in order to entitle the insured to recover under the policy, that the loss was due to the fraud or dishonesty of the employé (Clifton Mfg. Co. v. United States Fidelity & Guaranty Co.,

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60 S. C. 128, 38 S. E. 790). Where, however, the bond promises indemnity against loss "sustained by the employer by or through the dishonesty or any act of fraud of the employé amounting to larceny or embezzlement," the phrase "amounting to larceny or embezzlement" does not qualify the word "dishonesty"; but the bond promises indemnity against any financial loss sustained through the dishonesty of the employé, and also for any loss sustained through an act of fraud amounting to larceny or embezzlement (City Trust, Safe Deposit & Surety Co. v. Lee, 107 Ill. App. 263, affirmed 68 N. E. 485, 204 Ill. 69). But in order that liability may attach on a bond conditioned to insure an employer against larceny or embezzlement it is not necessary for the insured to introduce such proof as would convict the employé of larceny or embezzlement, as defined by the laws of the state (Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 75 S. W. 197, 115 Ky. 863). Where the risk assumed is fraud or dishonesty of the employé, mere proof that on a settlement of accounts there was an indebtedness from the employé to the employer is not sufficient to authorize a recovery by the insured, as such indebtedness may have been authorized by agreement, and may have been incurred without any fraud or dishonesty on the part of the employé (Monongahela Coal Co. v. Fidelity & Deposit Co., 94 Fed. 732, 36 C. C. A. 444). So, too, where goods were shipped to an agent whose fidelity was insured (Reed v. Fidelity & Casualty Co. of New York, 189 Pa. 596, 42 Atl. 294), in the absence of evidence that he actually received the goods, or that, if he did get them, he did not deliver them to customers on credit and has never received any of the price, it cannot be said that there is a loss, within a bond insuring against any pecuniary loss from the fraudulent or dishonest acts of the employé, amounting to embezzlement or larceny.

Where the bond covered the acts of a president of a mutual life association, a receiver of the association was not entitled to recover for funds wrongfully paid by the president to one beneficiary, which in fact belonged to another, if such other beneficiary was subsequently paid in full from funds subsequently accruing (Sherman v. Harbin, 124 Iowa, 643, 100 N. W. 622).

The acts constituting fraud or dishonesty must have been committed in the performance of the duties in connection with which the risk was assumed. However, where the official position of the employé is named, and certain of his duties described, the risk is not limited to the specific duties, but covers any duties naturally

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belonging to the office (Sherman v. Harbin, 124 Iowa, 643, 100 N. W. 622). If the policy covers the acts of a designated employé in the performance of his duties as bookkeeper, or in such other position as he might be called on to fill, it will cover a loss sustained by the fraudulent act of the employé in raising the amounts of checks which it was his duty to fill out, whether such duty pertained to his office as bookkeeper, or to any other capacity in his employer's service (Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. Law Rep. 239, 75 S. W. 197, 115 Ky. 853). So, too, a contract by which the insurer agreed to indemnify a bank for such pecuniary loss as it might sustain by reason of dishonesty of a named employé in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned" the insurer will be liable for the fraudulent acts of such employé committed in connection with the office of assistant cashier to which he was appointed (Fidelity & Casualty Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440). In Rice v. Fidelity & Deposit Co. of Maryland, 103 Fed. 427, 43 C. C. A. 270, it was stated in the application for the bond that the employé would be authorized to draw checks to which the countersignature of the bookkeeper would be invariably required. It was held that no recovery could be had for losses occasioned by the drawing of checks to which the signature of the bookkeeper was not required. However, where the bond covers an executive officer, as the president of a mutual life association, the insurer cannot be held liable for losses caused by the delinquency of a subordinate officer of which the president, in his capacity as executive officer, had no knowledge (Sherman v. Harbin [Iowa] 100 N. W. 629).

The time of defalcation and the discovery thereof are important elements in determining whether the loss is within the policy. Ordinarily, a bond does not cover a loss occurring from a default made before the bond is executed, though the defaulting employé, at the termination of his employment, during the continuance in force of the bond, refuses to pay the employer the damages which the latter has sustained because of such prior default (Dorsey v. Fidelity & Casualty Co. of New York, 98 Ga. 456, 25 S. E. 521). And if the employé has turned over to the insured all sums collected by him after the execution of the bond, the insurer cannot be held liable, though the employé has credited said sums on the wrong accounts in order to cover up previous defaults (Model Mill Co. v.

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Fidelity & Deposit Co. of Maryland, 1 Tenn. Ch. App. 365). The policy may, however, be made to cover precedent losses, as was the case in Union Cent. Life Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.

A provision in a fidelity insurance bond executed to a bank, indemnifying it from loss by the dishonesty of an employé, limiting the risk to a loss sustained "and discovered during the continuance of this bond and within six months from the employé ceasing to be in said service," does not bind the company for any loss discovered more than six months after the expiration of the bond, whether the employé had then quitted the service of teller or not (Guarantee Company of North America v. Mechanics' Savings Bank & Trust Co., 80 Fed. 766, 26 C. C. A. 146). Where a bond provided that an insurer would be liable for a loss on discovery within six months from "the dismissal or retirement of the employé from the service of the employer," the mere suspension of a bank, and the taking possession thereof by an examiner did not effect the retirement of the cashier, within the terms of the policy (American Surety Co. of New York v. Pauly, 18 Sup. Ct. 552, 563, 170 U. S. 133, 160, 42 L. Ed. 977, 987), and if he actually continued to render service he must be deemed to have remained in the service of his employer, at least until the appointment of a receiver. In Proctor Coal Co. v. United States Fidelity & Guaranty Co. (C. C.) 124 Fed. 424, the bond provided that the insurer would make good and reimburse to the employer any pecuniary loss sustained, occurring during the continuance of the bond or any renewal thereof, and discovered during such continuance or within six months thereafter. Another provision declared that, on the issuance of a subsequent bond of renewal, responsibility on any other bond should cease, it being the intention that only the last bond should be in force at any one time. Such provision must be construed merely to prevent a double responsibility of the insurer, and does not affect the employer's rights under a provision authorizing a recovery for any defalcation discovered within six months after the termination of the bond. In this case the original bond was renewed for the period from December 1, 1899, to December 1, 1900, subject to the conditions of the original. Subsequently a second renewal was issued, reciting that the insurer "continued in force" the bond numbered, etc. (referring to the original bond). It was held that such a renewal did not operate as a continuing contract, but that each renewal was a separate and distinct obligation, and that recovery

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could be had only for losses sustained and discovered at any time after December 1, 1900, and during the continuance of the last renewal.

If the obligor in an indemnity bond is only obligated to pay for losses discovered within a specified period after the death, dismissal, or retirement of the employé named in the bond, the complaint must allege that the loss sued for was discovered within that period. California Sav. Bank v. American Surety Co. (C. C.) 82 Fed. 866.

Where a person, against whose dishonesty his employer is insured, is alone charged with the duty in his employment of receiving and disbursing funds, and of keeping the books of account, and the books show the receipt of funds of which there is no account of disbursement, the presumption arises that he in fact received the funds, and, in the absence of explanation, that he dishonestly appropriated them to his own use. Guarantee Co. of North America v. Mutual Building & Loan Ass'n, 57 Ill. App. 254.

(c) Credit insurance.

Policies insuring against loss by the insolvency of debtors usually limit the risks to such claims as are based on sales made to customers rated as to capital and credit by one of the principal mercantile agencies. In a leading case (Shakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920) the requirement was that the customer should be rated by Dun's Agency, but subsequently the contract was modified so as to cover customers rated by Bradstreet's. A customer was rated in Dun's as to credit, but was given no capital rating. In Bradstreet's he was rated with capital. It was held that, in view of the modification of the contract, a loss on such customer was covered by the policy, as he was properly rated in Bradstreet's, though he was not so rated by Dun's Agency. A provision that the policy should cover only losses incurred on sales to persons whose capital as well as credit was rated in Bradstreet's is in the nature of an exception of risk as to all customers that are not so rated. Consequently, as Bradstreet's Agency does not rate capital of corporations, a corporation was not such a customer as was covered by the policy. (Robertson v. United States Credit System Co., 57 N. J. Law, 12, 29 Atl. 421.) In Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 91 Md. 244, where the policy provided that the customer should be rated in Dun's Rating Book, it appeared that under the head of "Baltimore" a certain customer was given a rating within the policy. Branch houses of the customer in other cities, who were listed in the rat-

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ing book, were given no rating, but there was a reference to "Baltimore, Md." It was held that the reference to Baltimore was in effect a repetition of the rating given the Baltimore house, and consequently sales to the branch houses were within the purview of the policy.

Policies insuring against loss through the insolvency of debtors usually provide that general assignments, absconding, executions returned nulla bona, etc., shall constitute insolvency. Such a provision cannot be construed as excluding other evidences of insolvency (Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 91 Md. 244); and **inability to pay debts in the ordinary course of business will be regarded as insolvency, within the meaning of the policy.** However, a conveyance of part of the debtor's property to a trustee for distribution of the proceeds among specified creditors is not a general assignment, within the meaning of the provision (Goodman v. Mercantile Credit Guarantee Co., 45 N. Y. Supp. 508, 17 App. Div. 474). But if the debtor conveys all his property to pay or secure his debts, and at once ceases to do business and the property is delivered, this constitutes a general assignment for the benefit of creditors, within the meaning of a policy (People v. Mercantile Credit Guarantee Co. of New York, 60 N. E. 24, 166 N. Y. 416, reversing 67 N. Y. Supp. 447, 55 App. Div. 594). In the same case it was held that, if the policy limits liability to cases where an execution has been returned unsatisfied, a failure to return an execution until three days after the expiration of the policy will not relieve the insurer from liability if the other requirements of the policy are complied with.

Credit policies usually provide, in effect, that though no loss can be proved after the expiration of the policy, yet, if the policy is renewed, loss resulting after such date of expiration on shipments made during the term of the policy may be proved during the term of the renewal immediately succeeding. It was held in American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581, 34 C. C. A. 161, that, in view of the language of the original and the renewal, the question as to what constitutes insolvency is governed by the terms of the original policy, and not by those of the renewal, under which insolvency occurred, and the loss was proved. And, generally, losses arising from sales and shipments made during the term of the original policy, and proved during the term of the renewal, are to be governed by the terms and conditions of the original, rather than those of the renewal, as to matters in which

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the two differ (American Credit Indemnity Co. v. Champion Coated Paper Co., 103 Fed. 609, 43 C. C. A. 340).

In Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258, 70 N. W. 886, the policy insured against loss by the insolvency of debtors owing for "merchandise sold between April 1, 1893, and March 31, 1894," and provided that the policy should "expire on March 31, 1894." It further provided that final proofs of loss must be presented within 90 days after the expiration of the policy, and that no loss should be payable unless included in such proofs, except that, should the policy be renewed on expiration, losses occurring after such expiration on sales made during its existence were payable. It was held that losses occurring after the expiration of the policy on sales made during its existence were payable, though the policy was not renewed, if final proof of loss was made as required. In Hogg v. American Credit Indemnity Co., 172 Mass. 127, 51 N. E. 517, the policy provided for an indemnity on total gross sales made between June 15, 1896, and June 14, 1897, inclusive, and was to expire June 14, 1897. By a rider attached, it covered losses occurring, after payment of premium, on sales and shipments made from April 1, 1896, to June 15, 1896. The bond also provided that claims should be barred unless notice thereof was given within 10 days after the indemnified was informed of a debtor's insolvency during the term of the bond, and a final statement of claims filed in accordance with this condition was made and received at the indemnifier's office within 30 days after the bond expired. An adjustment was to be made within 60 days after its receipt, and the amount found due was payable at once. In case the bond was renewed, losses on sales covered, resulting after its expiration, on shipments made during the term of the bond, could be proved in accordance with the terms of the renewal. It was held that the policy did not authorize a claim for indemnity for a loss resulting from an insolvency occurring after the date of expiration. Similarly, in Talcott v. National Credit Ins. Co., 9 App. Div. 433, 41 N. Y. Supp. 281, affirmed 163 N. Y. 577, 57 N. E. 1125, the policy was conditioned to indemnify plaintiff against losses on sales during a certain period by reason of the insolvency by legal process of any buyer to whom goods should have been "sold and delivered during the period of the bond, * * * or by reason of any judgment or decree of court obtained for goods so delivered within the said period of the bond upon which execution should

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have been returned unsatisfied," and it was held that the indemnity did not cover losses on sales made during the specified period, where judgment for the price was not recovered until afterwards.

In a suit on a bond given to indemnify a merchant against losses arising from the insolvency of debtors, the evidence showed that orders for goods were taken by plaintiff's salesman, and forwarded to plaintiff's stock department, where they were entered in the order book, and that they were then sent to the shipping clerk, who shipped the goods, and charged them up in the shipping book, and also entered them in the sales book. The shipping clerk saw to the packing of the goods, and made out bills of lading, and mailed them to the customers after their signature by the carrier. The bills of lading were mailed in envelopes having on them plaintiff's return card, but none were ever returned. All shipments were made by common carriers, and some debtors made payments on such shipments, while others returned some of the articles shipped. It was held that these circumstances were competent evidence on the issue of the indebtedness of the customers to plaintiff, as tending to prove sales, shipments, deliveries, and acceptances. Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 91 Md. 244.

(d) Title insurance.

Under policies of title insurance specifying the damages against which the insured is to be protected, it must, of course, appear that the loss suffered by the insured was caused in one or more of the modes specified (Taylor v. New Jersey Title Guarantee & Trust Co., 68 N. J. Law, 74, 52 Atl. 281). A mere eviction is not a loss under the policy unless it is by a title paramount and superior to that of the insured (Barton v. West Jersey Title & Guaranty Co., 64 N. J. Law, 24, 44 Atl. 871).

"Tenancy of the present occupants," stated in a title insurance policy as a defect in the title not insured against, will be construed to mean tenancy arising through occupation or temporary possession by a "tenant," in the ordinary sense of that word, and does not include a claim of one asserting ownership in fee as against the insured title, and in actual adverse possession when the policy was issued (Place v. St. Paul Title Insurance & Trust Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404). Where the purchaser of a house and lot is insured against defects of title or incumbrances, the use of the party wall by an adjoining owner, who refuses to make compensation, does not create a liability on the policy (Thomas v. Tradesmen's Trust & Saving Fund Co., 7 Pa. Dist. R. 375).

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In Wheeler v. Equitable Trust Co., 206 Pa. 428, 55 Atl. 1065, a policy agreed to indemnify the insured against any loss sustained by reason of defects or unmarketability of the title to the property, which was the subject of a mortgage. The policy excepted, however, defects, liens, and incumbrances specified in a certain schedule in which there were listed accuracy of description, taxes of 1898, water rent, building restrictions, and mechanics' liens not of record. This was followed by a clause which guarantied the completion of seventeen buildings free from liens from municipal improvements. The court held that the plainly expressed intent was to indemnify against loss from certain defects and incumbrances except those named in the schedule, and that the additional clause made an exception to the exceptions; that is to say, notwithstanding the exceptions, the general indemnity contract should extend to and cover any loss which arose under the guaranty in the additional clause. Similarly, in Fidelity Insurance, Trust & Safe Deposit Co. v. Earle, 23 Pa. Co. Ct. R. 449, the insurer agreed to indemnify the owner of certain property described for loss sustained by reason of certain liens or incumbrances, saving such liens or incumbrances as are excepted in a schedule annexed to the policy. That schedule enumerated specific liens, charges, or incumbrances "which do or may now exist, and against which the company does not agree to insure or indemnify." According to the construction of this clause adopted by the court, the schedule does not profess to set out all the incumbrances or liens which exist against the property, but only specifies those liens or incumbrances which it stipulates shall not be within the protection of the policy. Consequently, if any lien or incumbrance is omitted intentionally from the list, it is not to be inferred that such lien is apparently nonexistent. The inference goes no further than that the insurer, for reasons not disclosed, but sufficient to itself, is willing to assume the risk of any loss resulting to the insured because of the existence of such omitted lien or incumbrance.

A policy issued to a mortgagee insuring against loss by defects or unmarketableness of the title or mortgage interest, or because of liens or incumbrances charging the same at date of policy, "saving defects" or objections to title "which do or may now exist," including "unmarketability by reason of the possibility of mechanics' liens and municipal liens," but not "actual losses by reason of such liens," insures only against liens the rights to which are already inchoate at the date of the policy (Wheeler v. Real Estate Title In-

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surance & Trust Co., 160 Pa. 408, 28 Atl. 849). So, where the policy insured plaintiff corporation against loss or damage by reason of defects of title affecting certain premises purchased by it, or by reason of liens or incumbrances charging the premises at the date of the policy, except that defects or incumbrances arising after date of the policy, or created or suffered by the insured, and assessments not confirmed at the date of the policy, were not covered by it, an assessment confirmed at the date of the policy was covered by it, since the policy was to be construed as covering incumbrances existing at its date, and not as a covenant of warranty broken before its date, when plaintiff took deeds and possession of the premises (Trenton Potteries Co. v. Title Guarantee & Trust Co., 64 N. Y. Supp. 116, 50 App. Div. 490). But the insurer was not liable for an assessment for a street opening which became a lien on one of the parcels three months after the insured had taken title thereto, it being the intent of the parties that the policy should only cover incumbrances existing at the time of the taking of the title (Trenton Potteries Co. v. Title Guarantee & Trust Co., 68 N. E. 132, 176 N. Y. 65).

The stipulation in a title insurance policy that no right of action shall accrue thereon unless the assured has contracted to sell the land or the interest insured, and a court of last resort has declared the existence of a defect or incumbrance upon the title for which the company would be liable under the policy, does not apply where the land is held adversely, and the insured has lost it by reason of a defect in the insured title (Place v. St. Paul Title Insurance & Trust Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404). Under a contract agreeing to indemnify plaintiff if there should be a final judgment on a lien not excepted from the guaranty, the confirmation of an assessment by a municipal body, legally necessary to render the assessment a lien, is not a final judgment or decree on the lien (Taylor v. New Jersey Title Guarantee & Trust Co., 56 Atl. 152, 70 N. J. Law, 24).

A policy of title insurance, insuring also against liens, provided that payment or discharge of the mortgage owned by the insured, except through foreclosure, should annul the policy. Thereafter, mechanics' liens in existence at the issuance of the policy were established, and the property sold under them, and subsequently the mortgagee foreclosed, and bought in the property for the amount due on his mortgage. It was held that the purchase at foreclosure sale was not a satisfaction of the mortgage, annulling the pol-

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icy, and that the insurer was liable for the amount of the liens. (Minnesota Title Insurance & Trust Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56, 36 U. S. App. 50.)

The statutory permission to plead performance of conditions generally does not, in its application to contracts of indemnity, extend to matters which constitute the very loss for which the insurer is to be answerable (Taylor v. New Jersey Title Guarantee & Trust Co., 56 Atl. 152, 70 N. J. Law, 24). The declaration must state facts showing specifically that loss had befallen the insured in one or more of the modes designated in the policy (Taylor v. New Jersey Title Guarantee & Trust Co., 52 Atl. 281, 68 N. J. Law, 74). So, an averment in a declaration that A. purchased land at a tax sale, and ever since has lawfully held the land against insured, is not legally equivalent to an averment that insured was evicted under the title conveyed by such sale (Taylor v. New Jersey Title Guarantee & Trust Co., 56 Atl. 152, 70 N. J. Law, 24).

A statement of claim that has the policy annexed, but not the application therefor, is defective where the policy refers to the application for the description of the land. Hankey v. Real Estate Title Co., 11 Pa. Co. Ct. R. 320.

(e) Other forms of guaranty insurance.

A policy by which the insurer undertook to protect insured against loss by reason of mechanics' liens for work or material furnished K. "in and about the erection of the buildings" which he had contracted to erect for insured, and to "guaranty the completion of the buildings to be erected on the said lots under said contract," covers a loss by reason of an advance payment made by insured in accordance with the contract, K. having, after receiving it, abandoned the work (Union Trust Co. v. Citizens' Trust & Surety Co., 39 Atl. 886, 185 Pa. 217).

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2. EXTENT OF LIABILITY.

(a) Employers' liability insurance.
(b) Same—When liability accrues.
(c) Same—Liability to person injured.
(d) Fidelity insurance.
(e) Credit insurance.
(f) Title insurance.
(g) Other forms of guaranty insurance.

(a) Employers' liability insurance.

The extent of the insurer's liability is, of course, commensurate with the liability of the insured. So, where the policy recited that it indemnified an employer against loss of life or injury to the person, whether to the insured, his employés, or any other person or persons, resulting from the explosion of boilers, "payable to the insured for the benefit of the injured person or persons or to their legal representatives in case of death" (Embler v. Hartford Steam Boiler Inspection & Insurance Co., 53 N. E. 212, 158 N. Y. 431, 44 L. R. A. 512), it was held that but one recovery could be permitted, and therefore, if the insured had paid a claim to the representatives of an employé based on negligence, no further right of action against the insurer existed. The company may limit its liability in respect of any one injury or its gross liability. Thus, in Rumford Falls Paper Co. v. Fidelity & Casualty Co., 92 Me. 574, 43 Atl. 503, a policy provided that the company's liability for an accident resulting in injury to or death of a person should be limited to $1,500, and subject to the same limit for each person, its gross liability for a casualty resulting in injuries to or death of several persons should be limited to $25,000. It was held that this policy did not relieve the insured from all responsibility for damages resulting from injuries to its employés, but it was devised with a view to apportion the responsibility between the insurer and the insured, and that consequently the insurer for any one accident was liable only to the extent of $1,500, though the judgment against the insured exceeded that sum. Nor did it affect the liability of the insurer that the injured employé had offered to compromise his claim for $1,000, which offer was refused by the insurer.

The same principle as to the effect of an offer to compromise was asserted in New Orleans & C. R. Co. v. Maryland Casualty Co. (La.) 38 South. 89.

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In view of the provision relating to the settlement of claims and the right of the insurer to defend, if the insured notified the insurer that a liability had been incurred by reason of the injury, and the insurer did not avail itself of the provision in the policy allowing it to conduct the defense of the action, it was nevertheless the duty of the insured to make the loss as small as it reasonably could (Southern Ry. News Co. v. Fidelity & Casualty Co., 83 S. W. 620, 26 Ky. Law Rep. 1217); but, if the insured compromised the claim in good faith and with reasonable prudence, the insurer was bound to pay the loss actually sustained, and the compromise could be taken into consideration as evidence of such loss. In New Orleans & C. R. Co. v. Maryland Casualty Co. (La.) 38 South. 89, a loss was compromised by the insurance company ex parte, the receipt and release being signed by the widow of the employé on her own behalf and also as tutrix of her minor child. As a matter of fact, she had not yet been appointed tutrix, and her release as to the child was unauthorized. It was held that the insurer was liable for the full amount of a judgment obtained by the tutrix against the employer, and could not deduct therefrom the amount so paid on the settlement with the widow.

If the insurer fails to defend the action against the insured under the stipulation of the policy, and the insured is obliged to defend it, the insurer is liable for the cost or expenses incurred by the insured in that behalf.

Southern Ry. News Co. v. Fidelity & Casualty Co. of New York, 83 S. W. 620, 26 Ky. Law Rep. 1217; Travelers' Ins. Co. v. Henderson Cotton Mills (Ky.) 85 S. W. 1090; New Orleans & C. R. Co. v. Maryland Casualty Co. (La.) 38 South. 89; Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291.

If the insurer unsuccessfully defends the action, it cannot deduct the expenses of the suit from the amount for which it becomes liable under the policy (Cudahy Packing Co. v. New Amsterdam Casualty Co. [C. C.] 132 Fed. 623). Liability policies usually agree to indemnify the insured against any common-law or statutory liability incurred by reason of injuries sustained by employés or other persons under such circumstances as to create a liability on the part of the insured to the person so injured. Such a policy stipulates for indemnity against actual legal liability, and does not cover groundless or fictitious claims made against insured. Consequently, it was held in Cornell v. Travelers' Ins. Co., 175 N. Y. 239,

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67 N. E. 578, that the insurer was not liable for the expenses incurred by the insured in the defense of negligence suits which had no legal basis, brought by persons not employés.

The owner of a tug was insured against loss arising from the liability of the tug for injuries to other vessels. The policy stipulated that the liability of the tug should first be determined in such manner as the insurer should elect. On the claim being made against the tug, the insurer requested that the insured should defend the suit. This amounted to a mere election to adopt that method of determining the liability, and did not impose on the insured any liability for the expenses of such suit.

McWilliams v. Home Ins. Co., 57 N. Y. Supp. 1100, 40 App. Div. 400; Fernald v. Providence Washington Ins. Co., 50 N. Y. Supp. 838, 27 App. Div. 137.

Where the policy stipulates that insured may provide immediate surgical relief, if necessary, the insured is constituted the agent of the insurer for the purpose of calling medical attendance in case of emergency, and the liability so incurred is independent of the other obligations of the policy (Kelly v. Maryland Casualty Co., 89 Minn. 337, 94 N. W. 889). The liability, moreover, becomes fixed as soon as the surgical relief is provided (Fenton v. Fidelity & Casualty Co. of New York, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770). The liability extends to medical attention rendered within and for a reasonable time after the accident, such time in no event extending beyond the period within which the notice of the accident was or should have been forwarded to the insurer, and such further interval as might be necessary to enable the insurer to act in the matter (Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 63 N. E. 54, 28 Ind. App. 437); and, morever, it could in no case extend to and include the living expenses of the injured employé during his sickness.

(b) Same—When liability accrues.

One of the most important questions arising in relation to the liability of the insurer is whether the liability attaches at the time of the accident, or when the liability of the employer is fixed by judgment, or not until the claim is actually paid by the insured. In some of the earlier cases it was held that the liability of the insurer became fixed on the happening of the accident, though the

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amount of liability was contingent, in that the amount of damages had not been ascertained.

American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Ross v. American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22; Fenton v. Fidelity & Casualty Co., 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770.

It is obvious, however, that the liability of the insured, and consequently of the insurer, is, at the time the accident happens, contingent in fact as well as in amount. It may be that the theory of the foregoing cases is that, as soon as liability is fastened on the insured by a judgment, it relates back to the time of the accident, so that, in a sense, the liability of the insurer attaches at the time of the accident. However that may be, the more frequent phase of the question is whether the actual payment of the amount of damages to the injured person is necessary to fix the liability of the insurer. Clearly, this depends on the provisions of the policy. **Where the insurer agrees to indemnify the insured against liability incurred for injuries to employés or others, and stipulates that the insurer shall have control of the defense of any legal proceedings against the insured for accidents covered by the contract, the contract is one to indemnify against liability, and the liability of the insurer is fixed on the rendition of a final judgment against the insured, though the judgment has not been paid.**

American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420; Stephens v. Pennsylvania Casualty Co. (Mich.) 97 N. W. 686; Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; Fritchie v. Miller's Pennsylvania Extract Co., 197 Pa. 401, 47 Atl. 351; Pickett v. Fidelity & Casualty Co., 60 S. C. 477, 39 S. E. 160; Hoven v. Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

As the liability is determined by the final judgment against the insured, the **liability of the insurer is not fixed while an appeal from a judgment against the insured is pending, but only by the judgment of the court on appeal.**

Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420; Stephens v. Pennsylvania Casualty Co. (Mich.) 97 N. W. 686.

If the policy insured against liability for injuries to employés for one year, the insurer was liable where an employé was injured

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during that year, though insured's liability to the employé for the injury was not fixed by judgment within such period (Southern Ry. News Co. v. Fidelity & Casualty Co., 83 S. W. 620, 26 Ky. Law Rep. 1217). Though the policy provides that the insured shall not settle any claim with an injured employé without the insurer's consent, a settlement of a judgment recovered by the employé is not forbidden by the policy, and an agreement between the employé and the insured, pending a suit for injuries, that the amount recovered in excess of the policy shall be settled for a certain amount, is not a violation of the condition (Pickett v. Fidelity & Casualty Co., 60 S. C. 477, 38 S. E. 160, 629).

In consequence of the construction of the ordinary form of liability policies, underwriters have adopted a form of policy intended to limit the liability of the insurer to the damages actually paid. In these policies the agreement of the insurer is to indemnify the insured against "loss actually sustained and paid in satisfaction of a judgment." Under such a provision the insurer is not liable to the insured until the amount of the loss, as fixed by the judgment, is actually paid.

Cushman v. Carbondale Fuel Co., 98 N. W. 509, 122 Iowa, 656; Frye v. Bath Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; O'Connell v. New York, N. H. & H. R. Co., 187 Mass. 272, 72 N. E. 979; Sanders v. Frankfort Marine Accident & Plate Glass Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688; Beacon Lamp Co. v. Travelers' Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579; Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663.

An understanding among all the parties interested that insurer would indemnify its policy holder against a particular loss did not constitute a waiver on the part of the insurer of a provision of the policy requiring the payment of a judgment by the policy holder as a condition precedent to its liability. O'Connell v. New York, N. H. & H. R. Co., 72 N. E. 979, 187 Mass. 272.

The transfer of the employer's property to a trustee in bankruptcy by operation of the United States bankrupt act was payment, and perfected the liability of the insurer for so much as the employé was entitled to receive out of the bankrupt's estate (Travelers' Ins. Co. v. Moses, 49 Atl. 720, 63 N. J. Eq. 260, 92 Am. St. Rep. 663); and the amount for which the insurer is liable will be determined by ascertaining what percentage all the assets of the bankrupt, outside of the policy, will pay on all the debts proved against the estate, outside of the employé's judgment.

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(c) Same—Liability to person injured.

An important question arising in this connection is whether the injured person can maintain an action against the insurer to enforce the liability when once ascertained. The right of the injured employé to proceed by garnishment against the insurer, when the insured was insolvent, was recognized and enforced in Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. The right was also recognized in Pennsylvania (Fritchie v. Miller's Pennsylvania Extract Co., 197 Pa. 401, 47 Atl. 351). On the other hand, it was held in Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, that merely obtaining a judgment against the insured for personal injuries does not give the employé a cause of action against the insurer. But it was said, further, that, even if an employé has any right to enforce the judgment against the insurer, his remedy is to attach the debt due from the insurer to the employer by trustee process, rather than by a direct action against the insurer. The right of the injured person to proceed against the insurer is also denied in Maine (Frye v. Bath Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500), and in Iowa (Cushman v. Carbondale Fuel Co., 98 N. W. 509, 122 Iowa, 656) though in the latter state a provision of the Code (section 4087) authorizes a judgment creditor to institute equitable proceedings to subject any rights and credits belonging to the debtor to the satisfaction of the judgment.

It has, however, been held in New Jersey (Beacon Lamp Co. v. Travelers' Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579) that an employé who has recovered judgment may sue the insurer in equity, the theory of the court being that in equity the insurer becomes the principal debtor to the injured employé, and the insured the surety, so that a bill will lie by the latter to establish the principal's liability and compel it to perform its contract of indemnity. This view of the case cannot be said to have been repudiated by the Court of Errors and Appeals in Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663 (which was the same suit on appeal). That equity has jurisdiction to compel the insurer to pay the amount in satisfaction of a judgment is also upheld in New Hampshire (Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688) the court basing its decision largely on the clause giving the insurer the right to take control of and defend an action brought by the injured person against the insured.

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(d) Fidelity insurance.

In First Nat. Bank v. National Surety Co., 130 Fed. 401, 64 C. C. A. 601, 66 L. R. A. 777, a surety company executed a bond to a bank by which it undertook, for the term of one year, to indemnify the bank against loss sustained by the dishonesty of employés. A bookkeeper falsified the accounts of a depositor so as to increase his apparent credit balance, by which he was enabled to and did overdraw his account to a large amount. Such false entries and overdrafts continued through several years, but the bond covered only about three months of the last portion of the bookkeeper's employment, there having been bonds issued by other companies covering a portion at least of the previous time. The depositor's account was the ordinary running account, subject to check, and continuous during all the time. No application of deposits to any particular item of debit was made by either party, nor by implication, there having at no time been an overdraft as shown by the books. The false entries and overdrafts continued for a part of the time after the bond went into effect, but deposits made subsequent to that time and prior to the time the bookkeeper's employment terminated exceeded the checks paid during that period in an amount greater than the overdrafts. It was therefore held that the ordinary rule in such cases between debtor and creditor, that payments should be appropriated to the oldest item of indebtedness, would not be applied as against the insurer, whose application covered a distinct portion of the time during which the account was running, and that all deposits made during the currency of the bond should be applied to the debit items made during the same time, so as to relieve the insurer of any liability.

In the case of Sherman v. Harbin, 124 Iowa, 643, 100 N. W. 622, to which reference has already been made, the bond covered the president of a mutual life association. Certain assessments were levied on members to pay losses under various policies, some of which entitled the beneficiaries to full payment, others to the net proceeds of an assessment, and still others to a certain proportion of the assessment, together with portions of the reserved and mortality funds of the association. The assessments being insufficient to pay the policies in full, the president made excessive payments thereon from other assessments. After the insolvency of the association three benefit claims were filed, which were not paid by the association. It was held that as the association, in the collection of assessments for the benefit of such beneficiaries, acted as

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trustee only, the liability of the president's bond was confined to such sum as the unpaid beneficiaries were entitled to receive.

Analogous to the principle discussed in connection with employers' liability insurance, as to the fixing of liability, is the principle announced in Fidelity & Deposit Co. of Maryland v. Schleper (Tex. Civ. App.) 83 S. W. 871, where the bond involved covered the acts of a guardian, and it was said that the failure of the guardian to make proper settlement did not fix the liability on the bond, but that it was only when the court had judicially ascertained the liability of the guardian, either from failure to settle or because of an improper settlement, that the liability attached.

The general agent of a life insurance company in April, 1884, delivered to it a bond for the faithful performance of his duties so long as he should continue in that office. In June, 1884, he procured and handed over to the company another bond of similar purport, for one year, which the company accepted with the understanding that the liability thereunder was limited to defalcations committed during that time. The old bond was, however, retained. One provision of the new bond was to the effect that, if the company should hold concurrently with it any other bond, the loss, if any, should be apportioned. It was held (Ætna Life Ins. Co. v. American Surety Co. [C. C.] 34 Fed. 291) that as to any loss resulting between June, 1884, and June, 1885, the two bonds were not concurrent, but that the last bond should be proceeded against for the whole amount.

Fidelity policies usually provide that the insurer shall have recourse against the defaulting employé. A stipulation, in accordance with such provision, that a voucher or other evidence of payment by the company to the employer shall be conclusive evidence against the employer as to the fact and extent of his liability to the insurer, is void as against public policy, in so far as it makes such voucher conclusive evidence.

Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531.

The complaint in an action on a policy against loss by dishonesty of an employé to the extent of $5,000, providing that, if there be other insurance, defendant should be liable for any loss only ratably, alleged a loss of over $10,000, and that plaintiff had insurance against the loss to the extent of $5,000 with another company, and on "demand of the plaintiff the full sum of $5,000 was paid" by such other company. It was held that the allegation as to the

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other insurance was not irrelevant, but, to prevent influence on the jury, in place of the words "and on demand of the plaintiff the full sum of $5,000 was paid" there should be substituted the words "which has been paid." Bank of Timmonsville v. Fidelity & Casualty Co. (C. C.) 121 Fed. 934.

The sufficiency of the evidence to show the amount of the defalcation, and consequently the liability of the insurer, is considered in Union Pacific Tea Co. v. Union Surety & Guaranty Co., 86 N. Y. Supp. 466, 43 Misc. Rep. 50.

(e) Credit insurance.

Policies of credit insurance provide that in determining the extent of insurer's liability a certain percentage of the yearly sales shall be deducted from the total losses as an initial loss to be borne by the insured (Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258, 70 N. W. 886). In Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511, the yearly sales were estimated as not less than $90,000. The policy had run ten months when the insurer became insolvent. Up to that time the total sales amounted to $75,000, and it was held that in determining the initial loss the percentage must be computed on this amount, and not on the estimated sales. In Goodman v. Mercantile Credit Guarantee Co., 17 App. Div. 474, 45 N. Y. Supp. 508, the policy covered loss sustained by reason of the insolvency of debtors owing the insured for merchandise sold between September 1, 1892, and September 1, 1893, in excess of 1¾ per cent. on the total gross sales made during said period, "subject to the terms and conditions provided below and attached hereto." A rider attached to the policy provided that it should cover all losses on sales made within one year preceding August 31, 1892, except such losses as the insured had notice of before August 31, 1892, or where an extension had been granted to the debtor, but it provided for no deduction from the gross sales made during such year. It was held that in computing the amount of loss there was to be deducted 1¾ per cent. only of the amount of sales made in the year beginning September 1, 1892. A policy indemnified insured against losses by sales in excess of one-fourth of 1 per cent. of the annual sales, to an amount not exceeding $10,000. It was provided that in computing losses claims of loss should not exceed $7,500 in any one firm, and that in computing indemnity for which the insurer was liable 12 per cent. should be deducted from the total gross losses as calculated under the provisions of the bond, and the said one-fourth of

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1 per cent. should also be deducted from said total losses, the remainder being the amount of indemnity to be paid by the insured, not to exceed said $10,000. It was held in Rice v. National Credit Ins. Co., 164 Mass. 285, 41 N. E. 276, that in view of these provisions, if the insured had a loss with a single firm of over $20,000, the total gross loss from which the 12 per cent. and the one-fourth of 1 per cent. was to be deducted was $7,500, and the balance was the indemnity to be paid.

The policy may provide, however, that a definite sum shall be the initial loss to be borne by the insured. The contract in Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 1063, 91 Md. 244, insured a merchant against loss through the insolvency of debtors to the extent of $20,000 over and above an initial gross loss of $10,000 to be borne by the insured. The policy provided that all claims making up the initial loss should remain the property of the insured; that a first proof of loss should be made 20 days after knowledge of the insolvency of the debtor, and final proof within 20 days from the expiration of the policy; the amount due from the insurer under final proof to be adjusted and paid within 61 days after receipt of the final proof. As the company's liability was referable to the final proof of loss, it was held that the initial loss to be borne by the insured was to be ascertained as of the same period, and consequently that a debt due from an insolvent debtor within the terms of the policy, but paid before the policy expired, was not to be reckoned as a part of the initial loss. In Brierre v. American Indemnity Co., 67 Mo. App. 384, the policy required that the insured should first bear an initial loss of $500, and that no account against any one debtor should be proved for more than $1,000. It was held that, in case of a single loss which exceeded this limit, the deductions provided for, including the initial loss, could be made, not from the actual amount of the loss, but from the limit, and that the insurer was liable only for the difference. A policy promised indemnity against loss not exceeding $20,000 resulting from the insolvency of debtors over and above a loss of $2,000 first to be borne by the insured. It contained further provisions that "claims provable under this bond include only the amount to be first borne by the indemnified and the amount of this bond," and that "no amount against any one such insolvent debtor shall be covered for more than $10,000." This policy was construed in American Credit Indemnity Co. v. Champion Coated Paper Co., 103 Fed. 609, 43 C. C. A. 340, and it was held that, under

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the provisions, the initial loss to be borne by the insured must be deducted from the amount of covered or provable loss, which would require the aggregate amount of such loss to be $22,000 in order to authorize a recovery of the full amount of the bond.

Talcott v. Gray, 59 N. J. Eq. 595, 42 Atl. 603, involved a certificate of guaranty against loss from insolvent debtors, and provided that the guarantor should not be liable, in whole or in part, for any loss wholly or partially covered in a certain bond given by another company which provided for an initial loss to be borne by the insured. This certificate included only sales after February, 1893, sales during 1892 being covered by the bond. It was held that, as against the guaranty company, the insured had the right to have the initial loss and the indemnity under the first bond applied to losses prior to February, 1893.

In addition to the deduction of an initial loss, it is provided that, in determining the loss to be borne by the insurer, all sums paid, settled, or secured, and the value of any securities or collateral, shall be deducted. The extent of the insurer's liability under such a clause is, of course, the amount remaining due after deducting from the indebtedness any payments made by the debtor. (Mercantile Credit Guarantee Co. of New York v. Wood, 68 Fed. 529, 15 C. C. A. 563, 35 U. S. App. 381.) So, the insurer is entitled to have credited an amount paid to the insured by a third person in settlement of a suit to charge him with the liability for a debt as partner (American Credit Indemnity Co. v. Champion Coated Paper Co., 103 Fed. 609, 43 C. C. A. 340). If the policy provides that, if only a part of the loss is covered by the policy, "a proportionate part of everything realized or secured by the indemnified shall be credited to so much of the loss as is covered," and also that "all payments and securities shall be deducted before determining the insurer's percentage of loss" (Goodman v. Mercantile Credit Guarantee Co., 45 N. Y. Supp. 508, 17 App. Div. 474), the provision for apportionment is not affected by the second clause, such clause merely providing for the deductions of payments and securities without specifying the method thereof. Neither the lands of the debtor nor mortgages thereon are securities of the debtor within the meaning of the policy (People v. Mercantile Credit Guaranty Co., 72 N. Y. Supp. 373, 35 Misc. Rep. 755). The proceeds of other policies in other companies cannot be deducted under the provision (American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264, 38 U. S. App. 583). Before applying the pro-

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ceeds of property of the debtor under the provisions as deductions, the insured is entitled to deduct his commission for selling such property (Talcott v. National Credit Ins. Co., 51 N. Y. Supp. 84, 28 App. Div. 75). If the policy provides that final proofs of loss shall be forwarded, and the amount due thereunder adjusted and paid, within 60 days after the receipt thereof, there can be no deduction of a payment on account by an insolvent debtor within the 60 days, especially if the policy limits the benefits the insured may receive by a provision that no loss can be proved after the expiration of the policy (Jaeckel v. American Credit Indemnity Co. of New York, 54 N. Y. Supp. 505, 34 App. Div. 565, affirmed in 164 N. Y. 598, 59 N. E. 1124). Where the contract provided that, in calculating losses, no credit that may have been given should be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in certain mercantile reports, if the insured gave debtors a larger credit than 30 per cent. of their lowest capital rating, the insured was entitled to be allowed 30 per cent. of such rating, and the excess, only, should be disallowed (Shakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920). If no provision of the policy forbids a compromise of the insured debts, and it is not shown that the insurer was in any way injured by such compromises, nor that more money could have been secured from the debtors than was obtained by compromising, the insurer cannot insist that he is relieved of responsibility because some of the insured debts were compromised (Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 91 Md. 244).

Where a bond given to insure a merchant against losses arising from the insolvency of debtors provided that losses on claims under extension at the time of the payment of the premium should not be included in the calculation of losses, the mere taking of notes as evidence of antecedent debts was not an extension, within the meaning of the bond, though such notes matured at a later date than the open accounts for which they were substituted. Strouse v. American Credit Indemnity Co. of New York, 46 Atl. 328, 91 Md. 244.

(f) Title insurance.

Where, by a policy of title insurance on a mortgage, the insurer agrees to indemnify the insured for all loss or damage, not exceeding $1,500, which the insured shall sustain by reason of defects or unmarketability of the title of the insured to the estate, mortgage,

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or interest described in a schedule annexed, or because of any liens on it, or incumbrances, "charging the same at the date of this policy," and there is a total loss to the insured by reason of the sale of the property mortgaged under a prior mortgage in existence at the date of the policy, the insurance company is liable only for the actual value of the land, and not for the amount of the mortgage insured (Whiteman v. Merion Title & Trust Co., 25 Pa. Super. Ct. 320). If the insurer agrees to indemnify a mortgagee against loss not exceeding $2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the $2,200 (Quigley v. St. Paul Title Insurance & Trust Co., 60 Minn. 275, 62 N. W. 287).

One who had agreed to purchase a certain house and lot employed a corporation engaged in the business of examining and guarantying titles to examine the title and to draw the conveyance. Through the negligence of the corporation's agent, an adjoining lot was described in the deed. The purchaser made the agreed cash payment, and moved into the premises intended to be conveyed. Upon the mistake being discovered, a proper deed was executed, but it was discovered that there was a mortgage on the property, and, this mortgage being subsequently foreclosed, the property sold for less than the mortgage debt. The vendor was insolvent. It was held in Ehmer v. Title Guarantee & Trust Co., 50 N. E. 420, 156 N. Y. 10, that the company guarantying the title was liable to the purchaser for the part of the price paid by the purchaser, and that the purchaser was under no obligation to have sold the premises for the purpose of mitigating the damages.

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defense, it was necessary for it to give insured another such notice. Quigley v. St. Paul Title Insurance & Trust Co., 64 Minn. 149, 66 N. W. 364.

(g) Other forms of guaranty insurance.

The measure of damages to the grantee of ground rents, under a contract insuring the completion of buildings agreed to be built thereon within a certain time after the sale of the ground rents,

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for the noncompletion of such buildings, is the difference in the market value of the ground rents if the buildings had been completed according to the agreement, and their value with the buildings in the uncompleted state in which they were left, not to exceed the amount of the insurance (German-American Title & Trust Co. v. Citizens' Trust & Surety Co., 42 Atl. 682, 190 Pa. 247).

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XXV. NOTICE AND PROOFS OF LOSS.

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6. Fraud and false swearing in proofs of loss.
   (a) Nature and effect of condition in general.
   (b) Persons affected by fraud or false swearing of insured.
   (c) Materiality of false statement.
   (d) Fraudulent intent—Statements made through ignorance or negligence of insured.
   (e) Same—Possibility of injury to insurer.
   (f) Same—"Fraud" as an element of "false swearing."
   (g) Statements as to cause and circumstances of loss.
   (h) Statements regarding property not covered by policy or not destroyed.
   (i) Statements as to value of property destroyed.
   (j) Statements as to title and interest—Incumbrances.
   (k) Miscellaneous instances of fraud or false swearing.
   (l) Forfeiture of entire policy.
   (m) Questions of practice.
7. Effect of proofs of loss.
   (a) Proofs of loss as admissions by insured—Corrections and explanations.
   (b) Conclusiveness of proofs—Effect of mistake.
   (c) Same—Mistake misleading insurer.
   (d) Same—Fraud of company or agent.
   (e) Proofs as evidence against the insurer.
8. Necessity and sufficiency of notice and proofs of death or injury.
   (a) Necessity of notice and proofs.
   (b) Person by whom proofs may be furnished.
   (c) Service of notice and proofs.
   (d) Sufficiency of proofs—Facts to be proved.
   (e) Same—Amount and kind of proof.
   (f) Same—Certificate and affidavits.
   (g) Examination of body.
   (h) Matters peculiar to mutual benefit associations.
   (i) Questions of practice.
9. Time within which notice and proofs of death or injury must be furnished.
   (a) Necessity of furnishing notice and proofs within time stipulated.
   (b) "Immediate" notice and "reasonable" time.
   (c) Same—Questions for court and jury.
   (d) Specific time—Impossibility of performance.
   (e) Computation of time in accident insurance.
10. Effect of notice and proofs of death or injury.
   (a) Effect of proofs as against company—Admissions by company.
   (b) Admissibility of proofs against plaintiff.
   (c) Same—Physician's certificate and verdict of coroner's jury.
   (d) Conclusiveness of proofs.
   (e) Same—Necessity of notice of error.
   (f) Statements not required by the policy.
   (g) Burden of proof and weight of evidence.

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17. Notice and proofs of marine losses.
    (a) Notice of loss.
    (b) Necessity and sufficiency of proofs of loss.
    (c) Effect of proofs—Protest.
    (d) Estoppel and waiver as to proofs of loss.
    (e) Questions of practice.
18. Notice and proofs of loss in guaranty and indemnity insurance.
    (a) Employers' liability insurance—Nature and necessity of notice of accident or claim.
    (b) Same—Sufficiency of notice.
    (c) Same—Time of notice.
    (d) Same—Waiver of notice.
    (e) Fidelity insurance.
    (f) Credit insurance.

1. NECESSITY OF NOTICE AND PROOF OF LOSS.

(a) Notice and proof of loss as condition precedent to recovery—General rule.
(b) Special circumstances affecting application of rule.
(c) Policy covering mortgagee's interest.
(d) Demand for proofs.

(a) Notice and proof of loss as condition precedent to recovery—General rule.

Where, by the terms of a policy of insurance on property, the payment of the loss is to occur after the furnishing of notice and certain proofs thereof, the furnishing of such notice and proofs constitutes a condition precedent, which, in the absence of special rules of pleading, must be pleaded and proved by one seeking to recover under the policy.

Reference to the following cases is deemed sufficient: Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512; Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; McCormack v. North British Ins. Co., 78 Cal. 468, 21 Pac. 14; Harris v. Phœnix Ins. Co., 35 Conn. 310; Jackson v. Southern Mut. Life Ins. Co., 36 Ga. 429; Home Ins. Co. v. Duke, 43 Ind. 418; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285; Mitchell v. Home Ins. Co., 32 Iowa, 421; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; American Cent. Ins. Co. v. Hathaway, 43 Kan. 399, 23 Pac. 428; Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; State Ins. Co. v. Belford, 2 Kan. App. 280, 42 Pac. 409; Cornell v. Hope Ins. Co., 3 Mart. N. S. (La.) 223; Battaille v. Merchants' Ins. Co., 3 Rob. (La.) 384; Leadbetter v. Etna Ins. Co., 13 Me. 265, 29 Am. Dec. 505; Davis v. Davis, 49 Me. 282; Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14

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Am. Dec. 289; Farmers' Fire Ins. Co. v. Mispelhorn, 50 Md. 180; Wellcome v. People's Mut. Fire Ins. Co., 2 Gray (Mass.) 480; Shawmut Sugar Refining Co. v. People's Mut. Fire Ins. Co., 12 Gray (Mass.) 535; Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420; Johnson v. Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Boruszweski v. Middlesex Mut. Ins. Co., 186 Mass. 589, 72 N. E. 250; McCullough v. Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Lombard Investment Co. v. Dwelling House Ins. Co., 62 Mo. App. 315; McCann v. Ætna Ins. Co., 3 Neb. 198; Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108; Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; Jube v. Brooklyn Fire Ins. Co., 28 Barb. (N. Y.) 412; Furlong v. Agricultural Ins. Co., 64 Hun, 632, 18 N. Y. Supp. 844, 28 Abb. N. C. 444; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630; Scottish Union & National Ins. Co. v. Clancy, 83 Tex. 113, 18 S. W. 439; St. Paul Fire & Marine Ins. Co. v. Hodge, 30 Tex. Civ. App. 257, 70 S. W. 574; Sun Mut. Ins. Co. v. Holland, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 446; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Flanaghan v. Phenix Ins. Co., 42 W. Va. 426, 26 S. E. 513; Dowling v. Lancashire Ins. Co., 89 Wis. 96, 61 N. W. 76; Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

Reference may also be made to Code W. Va. c. 125, § 64, providing that, where the defense is failure to perform a condition, defendant must plead the condition not performed, and Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. W. 194, intimating that thereunder insured need not plead or prove the furnishing of proofs of loss unless defendant brings the matter into the case by his pleadings. See, also, Rosenthal, etc., Co. v. Scottish Union & National Ins. Co. (W. Va.) 46 S. E. 1021 (a forfeiture case), overruling Schwarzbach v. Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

In Phœnix Ins. Co. v. Deavenport, 16 Tex. Civ. App. 283, 41 S. W. 399, the court asserted a contrary doctrine. The policy provided that the loss should not be payable until 60 days after furnishing the proofs, but the court treated the case as one of forfeiture, holding that the defendant must specially set up its provisions in the answer and allege a breach. The case of Continental Ins. Co. v. Chase, 89 Tex. 212, 34 S. W. 93, cited in support of the holding, deals merely with a failure to furnish the proof within the specified time.[1]

[1] As to failure to furnish notice or proofs within the specified time, see post, p. 3356.

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Ordinarily, under such provision, no question is raised as to whether the condition is precedent to liability of the company, or merely to the right of action on the policy, but, though payment by the company is made dependent on the furnishing of the proofs, it has been held that the proofs are but conditions precedent to the bringing of an action.

Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8; German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586; Sun Mut. Ins. Co. v. Holland, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 446.

The furnishing of notice and proofs as required by the policy has been frequently held a condition precedent in cases in which the provision of the policy, if any, making the liability of the company dependent on fulfilling such requirements, did not clearly appear.

Such was the fact in Lovejoy v. Hartford Fire Ins. Co. (C. C.) 11 Fed. 63; Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; Rockford Ins. Co. v. Seyferth, 29 Ill. App. 513; Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73; Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373; Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; Westchester Fire Ins. Co. v. Coverdale, 9 Kan. App. 651, 58 Pac. 1029; Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880; Wellcome v. People's Mut. Fire Ins. Co., 2 Gray (Mass.) 480; McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927; Gies v. Bechtner, 12 Minn. 279 [Gil. 183]; Noonan v. Hartford Fire Ins. Co., 21 Mo. 81; Hubbard v. North British & Mercantile Ins. Co., 57 Mo. App. 1; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Inman v. Western Fire Ins. Co., 12 Wend. (N. Y.) 452; Blossom v. Lycoming Fire Ins. Co., 64 N. Y. 162; Inland Insurance & Deposit Co. v. Stauffer, 33 Pa. 397; Texas Home Mut. Fire Ins. Co. v. Bowlin (Tex. Civ. App.) 70 S. W. 797; Fire Ins. Ass'n v. Miller Bros., 2 Willson, Civ. Cas. Ct. App. (Tex.) § 334; Ward v. National Fire Ins. Co., 10 Wash. 361, 38 Pac. 1127; Munson v. German-American Fire Ins. Co. (W. Va.) 47 S. E. 160; Blakeley v. Phœnix Ins. Co., 20 Wis. 205, 91 Am. Dec. 388.

It has been held under the same principle that a provision in a policy that it shall not cover loss happening during the existence of a riot, unless proof be made that such loss was due to independent causes, entitles the company to demand such proof before being sued. (Royal Ins. Co. v. Martin, 24 Sup. Ct. 247, 192 U. S. 149, 48 L. Ed. 385).

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Of course, a provision for forfeiture in case of noncompliance with the requirement as to proofs will also be enforced.

Gross v. St. Paul Fire & Marine Ins. Co. (C. C.) 22 Fed. 74; Alston v. Northwestern Live-Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784.

The policy sometimes expressly provides that no action thereon shall be maintained until there has been a compliance by the insured with the provisions as to notice and proofs. In such cases it is, of course, incumbent on one seeking to recover under the policy, to show that the condition has been fulfilled.

Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554; Firemen's Fund Ins. Co. v. Sims, 42 S. E. 269, 115 Ga. 939; Kenton Ins. Co. v. Wiggenton, 10 Ky. Law Rep. 587; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197.

But in Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45, it was held that a policy containing a clause requiring the assured to produce account books and vouchers was not avoided by failure or refusal to produce them, in the absence of an express provision for such forfeiture. And in Scottish Union & Nat. Ins. Co. v. Strain, 70 S. W. 274, 24 Ky. Law Rep. 958, where the provision as to the effect of a failure to comply with the policy requirement was not given, it was directly stated that the provision that in case of loss the insured should submit to an examination under oath by any person named by the company was not a condition precedent to an action on the policy. So, also, in Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.) 139, an affidavit and certificate required by the terms of the policy were said by the court not to have been intended as a condition precedent to the liability of the insurers.

(b) Special circumstances affecting application of rule.

The provision of the policy as to proofs was held not applicable in an action brought under a statute (Code 1886, § 1206) providing that any person acting as agent for a foreign company not properly licensed should be liable personally to the holder of any policy of insurance in respect to which he so acted (Noble v. Mitchell, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238). Nor did a provision in a fire and tornado policy that, "if fire occurs, the insured shall give immediate notice of loss," require notice of loss by a cyclone (Epiphany Roman Catholic Church v. German Ins. Co., 91 N. W.

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332, 16 S. D. 17). Likewise, the duty of furnishing proofs is not imposed by a policy requiring that "——— shall give immediate notice in writing of loss, and furnish proofs," etc., omitting the name of the assured from the blank intended therefor (Prendergast v. Dwelling House Ins. Co., 67 Mo. App. 426).

Where a policy of reinsurance provided that it should be subject to the same conditions and mode of settlement as the original policy, it was held that the reinsurer was not entitled to the same notice as was contracted to be given the original company. The court was of the opinion that the condition was introduced into the policy only to give the reinsurers the right to take advantage of any want of compliance with the contract between the original parties, so that, if the company reinsured failed to set up any defense in connection with the proofs, the reinsurer might defend on the ground of such failure.

North Pennsylvania Fire Ins. Co. v. Susquehanna Fire Ins. Co., 2 Pears. (Pa.) 291. And see, also, Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 50.

New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359, is very similar. In that case the contract was one of reinsurance, and the provisions as to proof were those of the ordinary policy. The court held that the condition was met when the original insured gave the usual proofs, and they were forwarded to the reinsurer.

Where, as in Woodfin v. Asheville Mut. Ins. Co., 51 N. C. 558, the insured becomes a member of a mutual company by taking out a policy, he thereby becomes bound by a by-law requiring, as a condition precedent to action on the policy, that a particular account on oath of the circumstances shall be given forthwith to the company, and no action can be sustained without a compliance with such by-law, although the provision was not embodied in the policy. But where it was provided by statute (St. 1864, c. 196) that the conditions of the insurance should be stated in the body of the policy, and that the by-laws should not be considered a part of the contract, except so far as they were incorporated into the policy, a provision that the policy was made and accepted with reference to the conditions therein contained and thereto annexed, which were declared to be a part of the contract, did not render binding on the insured a condition as to proofs, printed on the back of the policy. This, however, was accomplished by the promise to pay

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the loss within 60 days after notice and proof, "in conformity to the conditions annexed to this policy." (Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420.)

In Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373, it was decided that, the proofs not having been waived by the failure of the company to issue a policy in accordance with its contract, it was necessary, in an action on such contract, to show the furnishing of the notice and proofs required by the company's usual policy.[2]

(c) Policy covering mortgagee's interest.

There is a conflict of authority as to how far the provisions of the policy as to notice and proofs of loss are applicable to a mortgage interest existing under the policy. In Illinois it has been decided that where the policy provided that, if there should exist in the policy any interest in favor of a mortgagee, the conditions thereinbefore contained should apply in the manner expressed in such provisions and conditions of insurance relating to such interest as it should be written upon, attached, or appended thereto, and where the mortgage clause itself contained no provision as to proofs, the provisions of the policy in relation thereto were not applicable.

> Queen Ins. Co. v. Dearborn Savings, Loan & Building Ass'n, 175 Ill. 115, 51 N. E. 717, affirming 75 Ill. App. 371; Northern Assur. Co. v. Chicago Mutual Bldg. & Loan Ass'n, 98 Ill. App. 152, affirmed without reference to this point 64 N. E. 979, 198 Ill. 474.

In each of the above cases the mortgage clause contained a provision to the effect that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor. The decision, however, in neither case was based upon this clause. It has, indeed, been directly decided that the presence of such a clause does not render the furnishing of at least such proofs as the mortgagee himself can furnish any less a condition precedent to the liability of the company to him. If the mortgagor does not furnish the proofs, the mortgagee should do so. The clause in question refers only to acts or neglect in connection with the property while the risk is subsisting, and which, under the terms of the policy, would invalidate the insurance and not

[2] As to waiver of proofs by failure to deliver policy, see post, p. 3516.

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to the omission to comply with provisions designed to secure evidence as to the nature and extent of the loss.

Southern Home Building & Loan Ass'n v. Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147; Id., 24 S. E. 396, 99 Ga. 65; Lombard Investment Co. v. Dwelling House Ins. Co., 62 Mo. App. 315; Graham v. Firemen's Ins. Co., 8 Daly (N. Y.) 421.

Such a clause has, however, been regarded as sufficient to relieve the mortgagee from the effect of an entire failure to furnish proofs.

Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473, and Dwelling House Ins. Co. v. Kansas Loan & Trust Co., 5 Kan. App. 137, 48 Pac. 891.

The argument is that under this provision the mortgagee, in the absence of an express clause to the contrary, is not required to furnish proofs of loss as a condition precedent to his right of action, and that the failure of the mortgagor or owner to furnish proofs, either wholly or within the time stipulated, constitutes one of the neglects from the invalidating consequences of which the mortgage was exempted.

It is the doctrine of Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58, and State Ins. Co. v. Ketcham, 9 Kan. App. 552, 58 Pac. 229, that where the mortgage clause merely reads "Loss, if any, payable to," etc., the mortgagee cannot recover unless the required proofs have been made. And in Queen Ins. Co. v. Dearborn Savings, Loan & Building Ass'n, 75 Ill. App. 371, the court felt impelled to the opposite conclusion solely on account of the peculiar arrangement of the clauses of the policy; the phrase that "the conditions hereinbefore contained shall apply," in case of any mortgage interest, occurring before the provisions as to notice and proofs.

(d) Demand for proofs.

Where the proofs, or some particular portion of them, are only required by the policy to be furnished on demand, there is no obligation resting on the insured to furnish such proofs until the demand has been duly made.

This doctrine is either stated or implied in the following cases: Harris v. Phœnix Ins. Co., 35 Conn. 310; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442; Mueller v. Putnam Fire Ins. Co., 45 Mo. 84; Bur-

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nett v. American Cent. Ins. Co., 68 Mo. App. 343; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 43 App. Div. 550, 60 N. Y. Supp. 1143; Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690; Wells Whip Co. v. Tanners' Mut. Fire Ins. Co., 209 Pa. 488, 58 Atl. 894; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154; Ætna Ins. Co. v. Shacklett (Tex. Civ. App.) 57 S. W. 583.

This rule has been held inapplicable where the by-laws required a certain certificate without reference to any demand, the policy itself providing that proof of loss should be made by declaration of the insured, and such other evidence "as the directors * * * may reasonably require" (McBryde v. South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769).

The demand must, of course, be made by an agent of the company (Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315). And in general a strict compliance with the provisions of the policy is required of the insurer. Thus, the demand must be for the specific form of proof mentioned in the policy.

McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927; Dougherty v. German-American Ins. Co., 67 Mo. App. 526; Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

Where the demand is for an examination of the insured or of his books and papers, it must be specific, both as to time and place.

The demand was held insufficient in these respects in the following cases: Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Ætna Ins. Co. v. Simmons, 69 N. W. 125, 49 Neb. 811; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154.

In Fleisch v. Insurance Co. of North America, 58 Mo. App. 596, it was held that a demand was not untimely, though made after the time within which the company had by the policy promised to pay the loss, where it appeared that the delay was caused by a refusal of the insured to himself fix the time.

That a rejection of proofs because they do not contain a certain certificate amounts to demand for such certificate is the doctrine of Sullivan v. Germania Fire Ins. Co., 89 Mo. App. 106. And it has been held that, where an uncalled-for certificate is furnished, an

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objection to the sufficiency of such certificate will amount to a demand for the one specified in the policy.

Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554; Williams v. Queens Ins. Co. (C. C.) 39 Fed. 167.

The New York and Missouri courts have adopted the contrary doctrine, holding that the furnishing of the uncalled-for certificate was a superfluity, and that the objection thereto did not necessarily amount to a demand for a different one.

Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Swearinger v. Pacific Fire Ins. Co., 66 Mo. App. 90.

Where the insured voluntarily absents himself, so that he cannot be found for the purpose of examination in accordance with the conditions of the policy, his absence will be equivalent to a demand and refusal.

Harris v. Phœnix Ins. Co., 35 Conn. 310; Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, 42 S. E. 269; Sims v. Union Assur. Soc. (C. C.) 129 Fed. 804.

The same doctrine is implied, though not stated, in Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58, and is involved in Robinson v. Ætna Fire Ins. Co., 135 Ala. 650, 34 South. 18, where the court held that no demand need be made for the production of books which had been destroyed owing to insured's breach of contract.

The primary obligation being on the insurer under such a provision, it necessarily follows that the company must allege and prove the demand.

Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Mueller v. Putnam Fire Ins. Co., 45 Mo. 84; McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 43 App. Div. 550, 60 N. Y. Supp. 1143.

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2. TIME AND MANNER OF SERVICE OF NOTICE AND PROOFS OF LOSS.

(a) Time of giving notice of loss.
(b) Time of furnishing proofs of loss.
(c) Reasonableness of time of furnishing notice and proofs a question for the jury.
(d) Special provisions as to time of furnishing notice and proofs.
(e) Same—Statutory provisions.
(f) Service by mail.
(g) Same—Time of actual delivery.
(h) Effect of delay.
(i) Burglary insurance.

(a) Time of giving notice of loss.

A requirement of the policy for "immediate" notice, or notice "forthwith" or "at once," will not receive a literal interpretation. Due diligence by the insured, resulting in notice within a reasonable time, under all the circumstances of the case, is all that can be required.

Reference may be made to Brown v. Mechanics' & Merchants' Ins. Co., 4 Fed. Cas. 411; Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.) 176; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Continental Ins. Co. v. Lippold, 3 Neb. 391; Kirk v. Ohio Val. Ins. Co., 8 Ohio Dec. 182, 6 Wkly. Law Bul. 200; Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8; Wooddy v. Old Dominion Ins. Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732.

This principle is also approved, in the other cases cited in this paragraph, though the courts have differed as to what constitutes a reasonable time. In general, a notice served within 10 days after the loss has been regarded as served within a reasonable time.

The notice was given within 10 days in the following cases: Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252 (2 days); Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553 (2 days); St. Louis Ins. Co. v. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74 (4 days); Schenck v. Mercer County Mut. Ins. Co., 24 N. J. Law, 447 (1 day); New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468 (5 days); Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1 (3 days); Brink v. Hanover Fire Ins. Co., 70 N.

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Y. 593 (2 days); McNally v. Phenix Ins. Co., 137 N. Y. 389, 33 N. E. 475 (10 days); Rodee v. Detroit Fire & Marine Ins. Co., 74 Hun, 146, 26 N. Y. Supp. 242 (3 days); Argall v. Old North State Ins. Co., 84 N. C. 355 (1 day); West Branch Ins. Co. v. Helfenstein, 40 Pa. 289, 80 Am. Dec. 573 (5 days); Oakland Home Ins. Co. v. Davis (Tex. Civ. App.) 33 S. W. 587 (1 day).

But in Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110, a notice given within 5 days was held to be insufficient, the company's office being only 6 miles from the place of loss. In the Helfenstein Case, cited above, where notice within 5 days was regarded as sufficient, the office of the company was 70 miles from the place of loss. In Capitol Ins. Co. v. Wallace, 48 Kan. 400, 29 Pac. 755, affirmed on rehearing 50 Kan. 453, 31 Pac. 1070, notice given 12 days after the fire was held sufficient. The case, however, contains some elements of waiver which may have influenced the court. In Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374, a notice given 22 days after the fire was said to be on debatable ground, necessitating a submission of the question to a jury. The statement, however, was made in reversing the lower court for assuming the notice to have been given in time.

On the other hand, it has generally been held that **a notice not served until more than 10 days after the loss is not given within a reasonable time.**

The notice was given at various periods from 11 days to several months after the loss in the following cases: Cook v. North British & Mercantile Ins. Co., 181 Mass. 101, 62 N. E. 1049; Cook v. North British & Mercantile Ins. Co., 183 Mass. 50, 66 N. E. 597; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; Burnham v. Royal Ins. Co., 75 Mo. App. 394; Inman v. Western Fire Ins. Co., 12 Wend. (N. Y.) 452; Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394, 31 N. E. 231; McEvers v. Lawrence, 1 Hoff. Ch. (N. Y.) 172; Sherwood v. Agricultural Ins. Co., 10 Hun (N. Y.) 593; Brown v. London Assur. Corp., 40 Hun (N. Y.) 101; Lake Geneva Ice Co. v. Selvage, 73 N. Y. Supp. 193, 36 Misc. Rep. 212; Whitehurst v. North Carolina Mut. Ins. Co., 52 N. C. 433, 78 Am. Dec. 246; Trask v. State Fire & Marine Ins. Co., 29 Pa. 198, 72 Am. Dec. 622; Edwards v. Lycoming County Mut. Ins. Co., 75 Pa. 378; Sparrow v. Universal Fire Ins. Co., 17 Phila. (Pa.) 329.

The Massachusetts court in Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. 393, seems to distinguish between "reasonable" or "due" notice, and notice "forthwith," holding that a rea-

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sonable notice would be sufficient, though not rendered forthwith, as the company claimed it was required to be.

The special circumstances of each case must, of course, enter very largely into the decision as to what will be a reasonable notice. Thus, the great Chicago fire was held in Knickerbocker Ins. Co. v. McGinnis, 87 Ill. 70, and Knickerbocker Ins. Co. v. Gould, 80 Ill. 388, to excuse a delay of over 30 days. So, in Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644, and Partridge v. Milwaukee Mechanics' Ins. Co., 43 N. Y. Supp. 632, 13 App. Div. 519, sickness by the insured was taken into account. But the poor health of insured and his family, will not avail as an excuse where advantage is not taken of intervals in which the notice might have been sent (Parker v. Farmers' Fire Ins. Co., 179 Mass. 528, 61 N. E. 215). Notice given several months after the fire cannot be considered as given "forthwith," though the insured was under arrest charged with the burning of the building. He should have thought, in vindication of his innocence, to have formally asserted that sentiment by notifying the company of the fire. (McCall v. Merchants' Ins. Co., 33 La. Ann. 142.)

A delay of 26 days has been held reasonable where the insured, through no fault of his own, did not have possession of the policy (Bennett v. Lycoming County Mut. Ins. Co., 67 N. Y. 274). Likewise, notice served more than 50 days after the fire has been considered "immediate," the policy having been accidentally lost during all such time.

Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707, affirming 50 N. Y. Supp. 922, 28 App. Div. 213, and 32 N. Y. Supp. 759, 11 Misc. Rep. 513.

(b) Time of furnishing proofs of loss.

It is directly decided in Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644, and intimated in O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160, that where the policy provides that in case of loss the insured "shall give immediate notice thereof, and shall render to the company a particular account of said loss," etc., the word "immediate" does not qualify anything but the notice. The doctrine of the Scammon Case would seem to be opposed to that of Knickerbocker Ins. Co. v. Gould, 80 Ill. 388, where the two clauses were construed together. But whether an "immediate" delivery of proofs is required is not, at first blush at least, and under the general rules stated by the courts, very important, as in either event

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the policy would be construed to mean only a delivery within a reasonable time, as it would, also, if the proof were required to be delivered "as soon as possible." Generally, provisions requiring an "immediate" delivery of proofs, or that proofs shall be furnished "forthwith," mean only that proofs must be furnished within a reasonable time.

Reference may be made to Cashau v. Northwestern Nat. Ins. Co., 5 Fed. Cas. 270, 5 Biss. 476; Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Rokes v. Amazon Ins. Co., 5 Md. 512, 34 Am. Rep. 323; Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; Rines v. German Ins. Co., 78 Minn. 46, 80 N. W. 839; Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; Kirk v. Ohio Valley Ins. Co., 8 Ohio Dec. 182, 6 Wkly. Law Bul. 200; Carey v. Farmers' Ins. Co., 27 Or. 146, 40 Pac. 91.

Where it is required that proofs shall be furnished "as soon as possible," the question whether there has been a compliance therewith involves the further question whether due diligence has been exercised to furnish proofs within a reasonable time under the circumstances.

This principle is illustrated in Tayloe v. Merchants' Fire Ins. Co., 50 U. S. 390, 13 L. Ed. 187; Scammon v. Germania Ins. Co., 101 Ill. 621; Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138; Baker v. German Fire Ins. Co., 124 Ind. 490, 24 N. E. 1041; Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.) 176; McPike v. Western Assur. Co., 61 Miss. 37; O'Brien v. Phœnix Ins. Co., 76 N. Y. 459; Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57; Home Ins. Co. v. Davis, 98 Pa. 280; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627; American Fire Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605; Palmer v. St. Paul Fire & Marine Ins. Co., 44 Wis. 201.

The principle will also be applied where nothing is said as to the time of furnishing proofs.

Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; Carpenter v. German-American Ins. Co., 52 Hun, 249, 4 N. Y. Supp. 925, affirmed as to this point in 135 N. Y. 298, 31 N. E. 1015; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506.

If the policy provides that any loss thereunder shall become payable on a given day, and that no loss shall be paid until the required proofs are furnished, but fixes no time for furnishing them, such proofs must be made on or before the day on which it is pro-

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vided the loss shall be payable (Johnson v. Dakota Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799).

Though the general rule is undoubtedly as stated in cases where no time is fixed for the furnishing of proofs, the Illinois Supreme Court has pointed out that some effect should be given to the words "as soon as possible," and therefore it distinguished Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644, and Scammon v. Germania Ins. Co., 101 Ill. 621. In the former case proofs were required "as soon as possible," and the court held that a delay of 9 months was too long. In the latter case, under similar circumstances, but where the policy contained no provision as to time except that suit must be brought within a year, and that the loss was not payable until 60 days after proofs were furnished, proofs furnished within 10 months were held sufficient.

In Columbia Ins. Co. v. Lawrence, 35 U. S. 507, 9 L. Ed. 512, the court held that the words "as soon as possible" were not applicable to the certificate, and that therefore it was sufficient if furnished within a reasonable time.

It is obvious that, in determining what will be a reasonable time within which proofs may be furnished, account must be taken of the time needed to prepare the detailed statement, which will necessarily be greater than would be required to prepare a mere notice. This time will, of course, vary with the extent of the loss, the derangement of business, etc.

Such cause of delay was given special emphasis in the following cases, either holding the proofs to have been served in time, or that the question properly submitted to the jury: Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138 (2 months); Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442 (19 days); Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467 (2 months); Rines v. German Ins. Co., 78 Minn. 46, 80 N. W. 839 (18 days); O'Brien v. Phœnix Ins. Co., 76 N. Y. 459 (1 month); Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015, reversing in this particular 52 Hun, 249, 4 N. Y. Supp. 925.

Very similar in principle are those cases taking account of delay caused by correspondence and negotiations between the insurers and insured in regard to the proofs.

Reference may be made to Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; Marthinson v. North British Mercantile Ins. Co., 64 Mich. 372, 31 N. W. 291; Fletcher v. German-American Ins. Co.,

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79 Minn. 337, 82 N. W. 647; McNally v. Phenix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Home Ins. Co. v. Davis, 98 Pa. 280 (8 months).

The sickness of the insured may be taken into account in determining whether he has acted within a reasonable time.

Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; American Fire Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605.

In Cashau v. Northwestern National Ins. Co., 5 Fed. Cas. 270, 5 Biss. 476, which was a case of reinsurance, the original insurer became insolvent, and it was held that a delay of over 3 months was not unreasonable.

Where there has been an exceptional delay, the circumstances justifying it must be shown by plaintiff, and they cannot be shown unless they are pleaded.

Coryeon v. Providence Washington Ins. Co., 79 Mich. 187, 44 N. W. 431; Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57.

In cases not disclosing the special circumstances excusing delay, if any there were, the decisions have varied from holding a delay of 4 months to have presented a question for the jury, to determining that proofs served 2 months after the loss were too late.

The delay was held not to have been so unreasonable as to demand the rejection of the proofs, as a matter of law, in Carey v. Farmers' Ins. Co., 27 Or. 146, 40 Pac. 91 (4 months), and Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627 (1 month). See, also, in this connection, Swan v. Liverpool & London & Globe Ins. Co., 52 Miss. 704, where the court held that a delay of 6 months might be explained by special circumstances, and that the question should have been submitted to the jury.

In the following, unexplained delay was held fatal: Tayloe v. Merchants' Fire Ins. Co., 50 U. S. 390, 13 L. Ed. 187 (11 months); Baker v. German Fire Ins. Co., 124 Ind. 490, 24 N. E. 1041 (4 months); McPike v. Western Assur. Co., 61 Miss. 37 (2 months); Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57 (3½ months).

(c) Reasonableness of time of furnishing notice and proofs a question for the jury.

Primarily and ordinarily the question as to whether, under all the circumstances, the notice or proofs of loss were delivered within a reasonable time, is one for the jury.

Reference may be made to Brown v. Mechanics' & Merchants' Ins. Co., 4 Fed. Cas. 411; Lockwood v. Middlesex Mut. Assur. Co., 47 Conn.

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553; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 23 N. E. 1138; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.) 176; Franklin Fire Ins. Co. v. Hamill, 6 Gill (Md.) 87; Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; Swan v. Liverpool & London & Globe Ins. Co., 52 Miss. 704; O'Brien v. Phœnix Ins. Co., 76 N. Y. 459; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; McNally v. Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Solomon v. Continental Fire Ins. Co., 55 N. E. 279, 160 N. Y. 595, 46 L. R. A. 682, 73 Am. St. Rep. 707; Kirk v. Ohio Val. Ins. Co., 8 Ohio Dec. 182, 6 Wkly. Law Bul. 200; Carey v. Farmers' Ins. Co., 27 Or. 146, 40 Pac. 91; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627; Springfield Fire & Marine Ins. Co. v. Brown, 128 Pa. 392, 18 Atl. 396; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374.

The cases already cited, holding notice or proof to have been unreasonably delayed as a matter of law, would seem to involve a further holding that in extreme cases the question is one for the court, or at least that the court may in such cases take the matter from the jury as for lack of evidence; and that there is no inconsistency between such a position and the rule that the matter is generally for the jury, has been pointed out.

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Parker v. Farmers' Fire Ins. Co., 179 Mass. 528, 61 N. E. 215; Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374.

It seems, however, to be established in Indiana and Pennsylvania that, where the facts are undisputed, the question is for the court.

Such was the decision in Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; American Fire Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605; Fisher v. Crescent Ins. Co. (C. C.) 33 Fed. 544.

(d) Special provisions as to time of furnishing notice and proofs.

Modern policies ordinarily fix a definite time, as 30 or 60 days, within which the proofs are required to be furnished, thus leaving no room for interpretation as to what time is meant. A few cases have, however, arisen. Thus, in National Wall Paper Co. v. Associated Manufacturers' Mut. Fire Ins. Corp., 67 N. E. 440, 175 N. Y. 226, it was determined that a requirement for service within

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60 days after the fire meant after the termination of the fire, so that a careful inspection could be had. Likewise, a provision that notice shall be given within 6 days after a loss, and proof within 30 days "thereafter," means, that proof shall be given within 30 days after the notice of loss (Phenix Ins. Co. v. Mechanics' & Traders' Savings, Loan & Building Ass'n, 51 Ill. App. 479).

Though a requirement for a notice of loss, "accompanied by an affidavit stating," etc., does not require the notice and affidavit to be delivered at the same instant (Russell v. Fidelity Fire Ins. Co., 84 Iowa, 93, 50 N. W. 546), yet, where the requirement is that the proofs must be furnished within 60 days, "accompanied" by a certificate of a magistrate, if required, the certificate, if seasonable demand is made, must be furnished within the 60 days (Gottlieb v. Dutchess County Mut. Ins. Co., 89 Hun, 36, 35 N. Y. Supp. 71).

Where it is provided that within a definite time, or as soon as possible, "the insured shall furnish" an itemized account, etc., "and shall also procure a certificate," the limitation as to time will not be drawn down so as to apply to the certificate.

Columbia Ins. Co. v. Lawrence, 35 U. S. 507, 9 L. Ed. 512; Summerfield v. Phœnix Assur. Co. (C. C.) 65 Fed. 292; Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

A desire by the insured to consult his attorney before signing his examination, which was to form part of the proofs, will not excuse a failure to deliver the proofs in 6 months, as provided by the policy, the examination having taken place 3 months before the expiration of the period (Grigsby v. German Ins. Co., 40 Mo. App. 276). Nor will a delay of over 2 years beyond the 60 days allowed be excused on the ground of the death of the insured, though there was a contest over the will which prevented the issuance of letters to the executor. A representative of the insured should have been appointed for the purpose of making the proofs. (Matthews v. American Cent. Ins. Co., 41 N. Y. Supp. 304, 9 App. Div. 339.) But in Kirk v. Ohio Valley Ins. Co., 8 Ohio Dec. 182, 6 Wkly. Law Bul. 200, where the insured did not know of his policy until 7 years after the Chicago fire, which destroyed the property, such circumstances were held to excuse the delay, though the policy required proofs to be served in 60 days.

Where a railroad company is insured against loss by fires caused by its engines, it must furnish proofs of loss within the required 60 days, though the amount of its liability has not been ascertained.

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It is not its liability, but the property in which it has a contingent interest, which is insured, and it is not, therefore, impossible for the company to furnish the proof of the loss. (Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420.)

(e) Same—Statutory provisions.

Under Rev. St. Ind. 1894, § 4923 (Rev. St. 1881, § 3770), prohibiting the insertion in policies of conditions requiring notice in less than 5 days, a provision in violation of such statute will be construed to require the notice to be given in a reasonable time.

Such was the rule adopted in Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Germania Fire Ins. Co. v. Columbia Encaustic Tile Co., 11 Ind. App. 385, 39 N. E. 304.

The Pennsylvania act of June 27, 1883, providing that conditions of policies in relation to notice and proofs should be deemed complied with by notice within 10 days and proofs within 20, has been construed under a similar principle. The statute does not require notice within 10 days under all circumstances, and, where the policy is silent in relation to time, notice within a reasonable time will be sufficient (Springfield Fire & Marine Ins. Co. v. Brown, 128 Pa. 392, 18 Atl. 396). The Iowa Code 1897 (paragraph 23, § 48), providing that in computing time, if the last day falls on Sunday, the prescribed time shall be extended so as to include the whole of the following Monday, applies to stipulations as to proofs of loss. (McKibban v. Des Moines Ins. Co., 114 Iowa, 41, 86 N. W. 38). Gen. Laws N. Y. c. 38 (Laws 1892, c. 690, § 121), declaring that fire underwriters shall write only the standard policy on property in the state, which policy shall contain a provision requiring immediate notice of the fire, and that proofs of such loss shall be submitted within 60 days, does not confine such underwriters to the standard policy as to property in another state; and hence, in the absence of proof that the policy contains such a provision, defendant is liable, though proof was not made till after the 60 days expired (Loomis v. Lewis, 71 N. Y. Supp. 62, 62 App. Div. 433).

(f) Service by mail.

As a general rule, notice and proof of loss may be delivered through the mail.

German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698, and Munson v. German-American Fire Ins. Co. (W. Va.) 47 S. E. 160.

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But service in this manner is, of course, at the risk of the insured.

Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; American Cent. Ins. Co. v. Hathaway, 43 Kan. 399, 23 Pac. 428; Munson v. German-American Fire Ins. Co. (W. Va.) 47 S. E. 160.

This rule has been regarded as applicable, though the policy providing that the insured should "deliver in an account" also directed that "all communications and notices to the company must be postpaid, and directed to the secretary at C." (Hodgkins v. Montgomery County Mut. Ins. Co., 34 Barb. [N. Y.] 213).

In Ohio Farmers' Ins. Co. v. Burget, 17 Ohio Cir. Ct. R. 619, 9 O. C. D. 369, where the proofs had never been received, the court held that mailing the proofs was sufficient, but it is to be noted that there was a waiver of proofs in the case.

Generally, where it has been proved that the documents have been duly mailed, and there is no evidence of their nondelivery, the ordinary presumption of delivery will arise.

This presumption was recognized in Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432; Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Bell v. Lycoming Fire Ins. Co., 19 Hun (N. Y.) 238; Whitmore v. Dwelling House Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Munson v. German-American Fire Ins. Co. (W. Va.) 47 S. E. 160; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506.[1]

In Iowa (Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236), Pennsylvania (Whitmore v. Dwelling House Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838), and Nebraska (German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698), the effect of a denial of the receipt of the documents, by the officers of the company having charge of the mail, is held to be for the jury; but in West Virginia such evidence was said to "repel" the claim of notice (Munson v. German-American Fire Ins. Co., 47 S. E. 160). Where a registry receipt is relied on as proof of delivery of the mailed notice and proofs, proof must be given that the person signing the same, without designation of his authority, had actual authority so to do (Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072).

[1] As to presumption of delivery of mail in general, see 20 Cent. Dig. "Evidence," col. 148, § 92; cols. 192, 197, §§ 109, 111; col. 3601, § 2445.

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(g) Same—Time of actual delivery.

A requirement that proofs be furnished within a certain time is not met by the mailing of proofs within that time unless they are also received within such time.

Maddox v. Dwelling House Ins. Co., 56 Mo. App. 343; Peabody v. Satterlee, 59 N. E. 818, 166 N. Y. 174, 52 L. R. A. 956, reversing 55 N. Y. Supp. 363, 36 App. Div. 426; Lake Geneva Ice Co. v. Selvage, 73 N. Y. Supp. 193, 36 Misc. Rep. 212; Huse & Loomis Ice & Transportation Co. v. Wielar (Sup.) 86 N. Y. Supp. 24.

An opposite conclusion was reached in Manufacturers' & Merchants' Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105, the requirement being that the insured should render a statement, and the court placing emphasis on the word "render." So, also, in Caldwell v. Dwelling House Ins. Co., 61 Mo. App. 4, it was held that, where the proofs arrived at the post office on the last day, the fact that the company did not receive them until the next day would not make them too late. And proof of the immediate mailing of a notice of loss, admitted to have been received, will put the company to proof as to the time it was received (Schenck v. Mercer County Mut. Fire Ins. Co., 24 N. J. Law, 447).

(h) Effect of delay.

As appears from the foregoing discussion, the main question as to the time of service of notice and proofs, where an indefinite or reasonable time has been given, is whether the documents were in fact furnished in a "reasonable" time, it being assumed that the provision constituted a condition precedent, both as to time and contents. But with the introduction of provisions definitely fixing the time within which the proofs must be furnished, has grown up a doctrine that, **in the absence of an express stipulation forfeiting the policy for a delay beyond the fixed period, the only effect of such delay will be to postpone the liability of the company.** The decisions are, however, far from uniform, and the various conditions of the policies have also tended to confuse the subject. Thus, it is held in Kansas, Minnesota, West Virginia, and Wisconsin, that where there is a specified time within which the proofs are required to be furnished, and no stipulation as to the effect of a failure to furnish them within such time, beyond a provision that the loss shall be payable a certain number of days after such proofs

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are furnished, a delay in the furnishing of the proofs will only be effectual to postpone the time within which the loss must be paid. The argument under such provisions, as under similar ones to be noticed presently, is that, numerous causes of forfeiture having been noted in the policy, the company would, had it been intended that the delay should cause a forfeiture, have introduced a provision to that effect in the policy.

Reference may be made to St. Paul Fire & Marine Ins. Co. v. Owens, 69 Kan. 602, 77 Pac. 544; Mason v. St. Paul Fire & Marine Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; Peninsular Land Transfer & Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Flatley v. Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828; Welch v. Fire Ass'n, 98 N. W. 227, 120 Wis. 456. The last case further decides that where this rule obtains at the adoption of the standard policy, and it contains a similar clause, the rule will be considered as adopted with the policy.

These cases state the later doctrine of the courts represented. There is, however, an earlier Wisconsin case (Cornell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 387), of which the cases cited make no mention, in which a delay beyond the stipulated time was held, under a similar provision, to be an unsurmountable obstacle to recovery. In the Minnesota case an attempt is made to distinguish earlier conflicting cases, it being stated that they contained other and different clauses not found in the case at bar. In Bowlin v. Insurance Co., 36 Minn. 433, 31 N. W. 859, and Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St Rep. 481, however, though the decisions are directly contrary to the later case, no such distinguishing clauses appear in the Reports, unless a declaration in the Bowlin policy that the rights of the parties are to be determined by a certain stipulation of the contract can be considered as giving such stipulation added force.

In Massachusetts the stricter rule seems to obtain, it having been held in Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen 297, 79 Am. Dec. 733, that a delay was fatal under a promise to pay according to the meaning of the by-laws, by which the insured agreed to be bound, the by-laws providing for the service of proofs within 30 days.

Though, as said above, the Minnesota decisions are not uniform, the Mason Case may be distinguished from the cases of Shapiro

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v. Western Home Ins. Co., 51 Minn. 239, 53 N. W. 463, and Shapiro v. St. Paul Fire & Marine Ins. Co., 61 Minn. 135, 63 N. W. 614, holding a delay beyond the stipulated time fatal, in that it was stipulated in the policies upon which the Shapiro Cases were based that no suit should be sustainable thereon until all the conditions of the policies had been fulfilled. The doctrine that the time of service is essential under such a provision, or one providing that the loss shall not be payable until the service of the stipulated proofs, is probably contrary to the weight of authority, but is supported also by the courts of Arkansas, California, Illinois, Ohio, and New York.

Reference may be made to Teutonia Ins. Co. v. Johnson (Ark.) 82 S. W. 840; White v. Home Mut. Ins. Co., 128 Cal. 131, 60 Pac. 666; Scammon v. Germania Ins Co, 101 Ill. 621, where the requirement was for proofs "as soon as possible." See, also, Dwelling House Ins. Co. v. Jones, 47 Ill. App. 261, in which the provisions of the policy do not clearly appear; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466, reversing 2 Wkly. Law Bul. 16, 7 Ohio Dec. 247; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, affirming 61 Hun, 618, 15 N. Y. Supp. 317; Heilner v. China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177; Sergent v. London & Liverpool & Globe Ins. Co., 85 Hun, 31, 32 N. Y. Supp. 594.

In connection with the New York cases, see, also, Carpenter v. German-American Insurance Co., 52 Hun, 249, 4 N. Y. Supp. 925, affirmed 135 N. Y. 298, 31 N. E. 1015. The policy did not distinctly make the liability of the company dependent on the timely furnishing of proofs, and the Supreme Court held that while proofs within a reasonable time were required, yet the provision that the policy was accepted "on the above conditions" referred only to the forfeiting clauses just preceding, not including the provision as to proofs, and that therefore an unreasonable delay in furnishing the proofs was not ground for forfeiture. The Court of Appeals held that the performance of the stipulation as to proofs, while not a condition precedent to liability, was a condition precedent to the right of recovery. In the opinion of the higher court the delay was not unreasonable.

As to the Ohio doctrine, see, also, the later circuit court decision of an opposite character (Eureka Fire & Marine Ins. Co. v. Gray, 24 Ohio Cir. Ct. R. 268).

Since the Missouri standard policy contains such a provision, and since the New York policy also containing such provision is in common use in states having no special standard form, it may not

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be going too far to add, to the states so holding, Maryland, Missouri, and Indiana, though the cases cited in support thereof do not clearly show the stipulation under which they were decided.

Hanover Fire Ins. Co. v. Johnson, 26 Ind. App. 122, 57 N. E. 277; Leftwich v. Royal Ins. Co., 91 Md. 596, 46 Atl. 1010; Burnham v. Royal Ins. Co., 75 Mo. App. 394.

In Pennsylvania it has been held that while a provision that no action should be brought in case the notice was not furnished within a reasonable time makes the time of service essential, yet a mere provision that the insured might bring action "after the association is duly notified of such loss," would not have that effect, since the right to bring action was in no manner dependent on the permission of the company (Coventry Mutual Live Stock Ins. Ass'n v. Evans, 102 Pa. 281).

The weight of authority, however, as already stated, seems to support the rule that **neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor the provision that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions, by their phraseology, indicate an intention that the payment or loss shall be merely postponed until the proofs are furnished.**

The rule has been applied where the provision was that the loss should not be payable until after proofs were furnished: Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; Phœnix Ins. Co. v. Creason, 14 Ky. Law Rep. 573; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296; Hall v. Concordia Fire Ins. Co., 90 Mich. 403, 51 N. W. 524; Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016 (in this case the requirement was for proofs "as soon as possible"). See, also, Kahnweiler v. Phenix Ins. Co. (C. C.) 57 Fed. 562, which seems to depend on the same principle, though all the stipulations do not appear.

It has also been applied when the policy contained a stipulation that no action should be maintainable until after a compliance by the insured with the "requirements" of the policy. Indian River State Bank v. Hartford Fire Ins. Co. (Fla. 1903) 35 South. 228; Hartford Fire Ins. Co. v. Redding (Fla. 1904) 37 South. 62, 67 L. R. A. 518; Merchants' & Mechanics' Ins. Co. v. Vining, 67 Ga. 661; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Dwell-

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ing House Ins. Co. v. Freeman, 12 Ky. Law Rep. 894; Phœnix Ins. Co. v. Coomes, 13 Ky. Law Rep. 238; German Ins. Co. v. Brown, 16 Ky. Law Rep. 601, 29 S. W. 313; Orient Ins. Co. v. Clark, 22 Ky. Law Rep. 1066, 59 S. W. 863; Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Rynalski v. Insurance Co. of State of Pennsylvania, 96 Mich. 395, 55 N. W. 981; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Continental Fire Ins. Co. v. Whitaker (Tenn.) 79 S. W. 119, 64 L. R. A. 451; Continental Ins. Co. v. Chase, 89 Tex. 212, 34 S. W. 93, affirming 33 S. W. 602; Rheims v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670; Munson v. German-American Fire Ins. Co. (W. Va.) 47 S. E. 160; Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97.

See, also, German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698, where express provision was made for a forfeiture.

Under the same general rule that a forfeiture will not be implied, it has been held that where a policy provides that proofs shall be furnished within 30 days after a fire, and contains another provision that, if the proofs are not made within 60 days, the policy shall be of no effect, no forfeiture for failure to furnish proofs will accrue until 60 days have elapsed (Shell v. German Ins. Co., 60 Mo. App. 644). Likewise, where the policy provided for a particular account of the loss, in one clause, and for invoices and an examination in another, followed by a provision that "a refusal to comply with the above requirement shall work a forfeiture," it was held that, the provision for forfeiture applying only to the requirements in the second clause, a delay in furnishing the "particular account" was not fatal (American Cent. Ins. Co. v. Heaverin [Ky.] 35 S. W. 922, affirming 16 Ky. Law Rep. 95).

In Michigan a distinction has been drawn between a condition that no action should be brought "until after" full compliance, etc., and a phrase that no action should be maintainable "unless" there had been a full compliance. Under the first stipulation, the proofs need not be rendered within the stipulated time; under the second, a compliance with the requirement as to time is required. The holding as to the word "unless" has been followed in one Missouri case.

Gould v. Dwelling House Ins. Co., 90 Mich. 302, 51 N. W. 455, affirmed on rehearing 90 Mich. 308, 52 N. W. 754; Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Maddox v. Dwelling House Ins. Co., 56 Mo. App. 343.

It would seem to follow, as a necessary corollary from the doctrine that delay beyond a stipulated time will only postpone the

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liability of the company or the enforcement of the claim, that it will be sufficient in such cases that the proofs are given before the bringing of the action, or, if a specified time must elapse between the giving of proofs and the commencement of action, that they are so given that such time has elapsed. Such inference has especially appealed to the courts where there has been a short contractual period of limitation.

Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Dwelling House Ins. Co. v. Freeman, 12 Ky. Law Rep. 894; Phœnix Ins. Co. v. Coomes, 13 Ky. Law Rep. 238; Phœnix Ins. Co. v. Creason, 14 Ky. Law Rep. 573; German Ins. Co. v. Brown, 16 Ky. Law Rep. 601, 29 S. W. 313; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296; Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Rynalski v. Insurance Co. of Pennsylvania, 96 Mich. 395, 55 N. W. 981; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Continental Fire Ins. Co. v. Whitaker & Dillard (Tenn. 1903) 79 S. W. 119, 64 L. R. A. 451; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29.

It has, however, been held in Kentucky that where the loss was to be paid 60 days after notice, not only is the notice a condition precedent, but it must be served in a reasonable time after the loss. It is true that no notice appears to have been served, but the court's statement would seem to indicate that the "postponement" could not proceed to unreasonable lengths. (Fallon v. Farmers' Home Mut. Aid Ass'n, 66 S. W. 1029, 23 Ky. Law Rep. 2207.) In Southern Fire Ins. Co. v. Knight, 36 S. E. 821, 111 Ga. 622, 52 L. R. A. 70, 78 Am. St. Rep. 216, also, it is squarely held that though a failure to furnish the proofs in the stipulated time only operated to postpone the company's liability, yet it was necessary that the proof be furnished in a reasonable time. The practical result of this and the other cases seems to be much the same, since the court considers the contractual period of limitation to be an important element in determining what will constitute the reasonable time allowed.

(i) Burglary insurance.

A stipulation in a policy of burglary insurance that the insured, on the occurrence of a burglary, should give immediate notice both to the company and to the police officers, and should forthwith make claim in writing, coupled with a provision that no suit should be brought on the policy until after a compliance therewith,

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renders a compliance with such requirement a condition precedent to recovery on the policy. And though, under Burns' Rev. St. 1901, § 4923, prohibiting a foreign insurance company from requiring notice within less than five days, such stipulation only requires notice within a reasonable time, yet an allegation that the burglary occurred May 24, 1901, and that "afterwards" notice was given, does not show a compliance with the policy, action not having been commenced until February 27, 1902 (Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167).

3. PERSONS BY WHOM AND TO WHOM NOTICE MAY BE GIVEN AND PROOFS FURNISHED.

(a) Person by whom notice of loss may be given.
(b) Person to whom notice of loss must be given.
(c) Person by whom proofs may be furnished.
(d) Same—Proof by agent.
(e) Person on whom proofs may be served.

(a) Person by whom notice of loss may be given.

Where the policy provides that in case of loss the "assured" shall give notice, a notice by a mortgagee, to whom the loss is made payable, will inure to the benefit of all interested parties (Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146). Where the policy provides that notice shall be given by "all persons sustaining loss or damage," notice by an assignee of the policy is sufficient.

Cornell v. Le Roy, 9 Wend. (N. Y.) 163; McEvers v. Laurence, 1 Hoff. Ch. (N. Y.) 172.

A provision that an assignee shall have all the rights of the original party was considered in Barnes v. Union Mut. Fire Ins. Co., 45 N. H. 21, to make a notice by an assignee as effectual as one by the assignor. Under a similar principle, a requirement that "any member" of a mutual company suffering loss shall give notice was deemed met by a notice given by a purchaser of the property at an orphans' court sale, the property having been destroyed between the time of the sale and its confirmation (Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. 17).

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Though there is some question whether notice to a local agent of the insurer is sufficient, it is well established that such an agent may act for the insured in giving the company notice of the loss, and where the notice so passes from the insured, through the agent, to the company, it is sufficient.

This principle is stated in Fisher v. Crescent Ins. Co. (C. C.) 33 Fed. 544; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Watertown Fire Ins. Co. v. Sewing Machine Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146; State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; Brink v. Hanover Fire Ins. Co., 70 N. Y. 593; Partridge v. Milwaukee Mechanics' Ins. Co., 43 N. Y. Supp. 632, 13 App. Div. 519; Argall v. Old North State Ins. Co., 84 N. C. 355; West Branch Ins. Co. v. Helfenstein, 40 Pa. 289, 80 Am. Dec. 573; Beatty v. Lycoming County Mut. Ins. Co., 66 Pa. 9, 5 Am. Rep. 318; Oakland Home Ins. Co. v. Davis (Tex. Civ. App.) 33 S. W. 587. See, also, Bennett v. Maryland Fire Ins. Co., 3 Fed. Cas. 229, where the agency had terminated.

It need not appear in the notice sent by the agent that he is acting for the insured. It is sufficient if, in fact, he is so acting.

Stimpson v. Monmouth Ins. Co., 47 Me. 379, and Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331.

Even where the notice is sent by the agent without any communication with the insured, his act may afterwards be adopted by the insured, so as to render the notice sufficient.

Loeb v. American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Anthony v. German-American Ins. Co., 48 Mo. App. 65.

(b) Person to whom notice of loss must be given.

Where the requirement is for notice to the secretary, it is met by notice sent to the company direct (Lewis v. Burlington Ins. Co., 80 Iowa, 259, 45 N. W. 749), or received at its place of business, though not by the secretary in person (Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272). But notice to a director is not sufficient, under a provision requiring notice to the secretary, "or other authorized officer" (Inland Ins. & Deposit Co. v. Stauffer, 33 Pa. 397). Notice to a local agent is not compliance with a provision requiring notice to be given to the secretary.

Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197; Sparrow v. Universal Fire Ins. Co., 17 Phila. (Pa.) 329; Cornell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 387.

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A Pennsylvania statute (Act June 27, 1883, P. L. 165) provides that notice to the agent countersigning the policy shall be sufficient.

The effect of the statute has been considered in Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786, and Jacoby v. North British & Mercantile Ins. Co., 10 Pa. Super. Ct. 366.

Generally, in the absence of any stipulation to the contrary, a notice to the local agent is notice to the company, though there is no statute so providing.

Bernero v. South British & N. Ins. Co., 65 Cal. 386, 4 Pac. 382; Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kan. App. 527, 51 Pac. 567; Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506.

So, too, it has been said that notice given to one whom the insured rightfully believes to be the local agent is sufficient (Kendall v. Holland Purchase Ins. Co., 2 Thomp. & C. [N. Y.] 375). Under a policy issued by two companies making themselves severally liable, notice of loss addressed to but one company, but delivered to the agent of both, is sufficient to bind both (Bernero v. South British & N. Ins. Co., 65 Cal. 386, 4 Pac. 382).

On the other hand, it was held in Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481, that notice to a local agent is not sufficient. The case proceeds on the assumption that the authority of such agent is exhausted when the policy is issued, and pays no regard to the fact pointed out by Canty, J., who dissented, that it is the common practice of such agents to notify the company of any loss. The cases cited by the majority all deal with the authority of the agent to waive proofs of loss. It seems obvious that the authority of an agent as to proofs and settlement of a loss may be very different from his authority as to notice.

(c) Person by whom proofs may be furnished.

A policy usually requires the insured or the person sustaining loss or damage to furnish the proofs of loss. The insured is, of course, a proper person to make proofs, though the policy is made payable to another person (Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 [Gil. 98]); as, for instance, a mortgagee (State Ins. Co. v. Ketcham, 9 Kan. App. 552, 58 Pac. 229). **If, however, the mortgagor fails to comply with such provision, proofs**

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executed and delivered by the mortgagee will be sufficient. Under such circumstances the mortgagee may be considered as the person described, and may furnish the proofs.

The principle is stated in Southern Home Building & Loan Ass'n v. Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147; Id., 24 S. E. 396, 99 Ga. 65; State Ins. Co. v. Ketcham, 9 Kan. App. 552, 58 Pac. 229; Lombard Investment Co. v. Dwelling House Ins. Co., 62 Mo. App. 315; Graham v. Firemen's Ins. Co., 8 Daly (N. Y.) 421; Armstrong v. Agricultural Ins. Co., 56 Hun, 399, 9 N. Y. Supp. 873, judgment reversed on other grounds 130 N. Y. 560, 29 N. E. 991; Moore v. Hanover Fire Ins. Co., 71 Hun, 199, 24 N. Y. Supp. 507. Contra: Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58. In the same connection, see Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634, where a statement to the mortgagee that he need not furnish proofs was considered a waiver of proofs, apparently on the ground that he was in fact the proper person to furnish them; also, Graham v. Phœnix Ins. Co., 77 N. Y. 171, seems to support the same doctrine, holding that the mortgagee could not maintain an action to compel the mortgagor to furnish the proofs.

In Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880, it was held that where it was evidently the legislative intent that any mortgagee, after notice to the company, should have the right to collect the money, it must have been also intended that such mortgagee should have the right to furnish the necessary proofs. Under the same principle, where it was held that a claim under a policy could be garnished before it has been rendered payable by service of proof, it was also held that the garnishing creditor could effect a substantial compliance with the policy by taking the testimony of insured and others and presenting it to the company (Northwestern Ins. Co. v. Atkins, 3 Bush [Ky.] 328, 96 Am. Dec. 239). But a judgment creditor for whose payment provision was made in the policy cannot furnish proofs of loss (Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553).

In case a bankrupt absconds, a receiver, ordered by the court so to do, may furnish a sufficient statement of the loss, though he cannot substitute himself as the person to be examined (Sims v. Union Assur. Soc. [C. C.] 129 Fed. 804). And it would seem that the trustee in an ordinary bankruptcy case is also empowered to furnish the proofs (Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879).

In accord with the foregoing principles it has been held that where a contractor building a house for another takes out insurance

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in the name of the owner, but for his own benefit, he is a proper person to make proof of loss (Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 Pac. 35).

Under a policy requiring that "if the policy is made payable to a third party, or is held as collateral security, the proof of loss shall be made by the party originally insured," the proofs are required to be made by and in the name of the assured, though the whole insurance money is due the person to whom the loss is made payable (State Ins. Co. v. Maackens, 38 N. J. Law, 564). But under a similar provision, where the insured was the receiver for an insolvent corporation owning the property destroyed by fire, it was held that, as the officers of such corporation could speak with better knowledge, proofs by them were sufficient (Phœnix Mut. Fire Ins. Co. v. Bowersox, 6 Ohio Cir. Ct. R. 1).

In Stainer v. Royal Ins. Co., 13 Pa. Super. Ct. 25, effect is given to a Pennsylvania statute (Act June 27, 1883, P. L. 165), providing that, in case the policy is held as collateral, proofs may be made by either the original insured or the assignee.

Where the policy was issued to a husband on a building constituting his homestead, and before any loss occurred he abandoned his wife, she, and a married woman to whom the loss was made payable, and her husband, might make proof of loss, though the policy provided that, if it should be made payable in case of loss to a third party, or held as collateral security, proofs of loss should be made by the party originally insured (Warren v. Springfield Fire & Marine Ins. Co., 13 Tex. Civ. App. 466, 35 S. W. 810).

Where partners are insured, proofs of loss supported by the affidavit of one of them is sufficient under a condition that a particular statement of the loss shall be "signed and sworn to by the assured" (Myers v. Council Bluffs Ins. Co., 72 Iowa, 176, 33 N. W. 453). So, where insurance is issued to a copartnership in the firm name, proof of loss in such name is sufficient, though it does not give the name of any of the partners, except one who signed the proof with the firm name, and added thereto his individual signature, with the words "Treas." following it (Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. 921, affirming 48 Hun, 621, 1 N. Y. Supp. 387). In Keeler v. Niagara Fire Ins. Co., 16 Wis. 523, 84 Am. Dec. 714, where there had been a forfeiture by the sale by one partner to another of an interest in the property, and a waiver thereof by the company, it was held that proofs furnished by the

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remaining partner were sufficient. In accord with the foregoing principles is the further principle that, where there is a joint insurance of two separate interests in the same policy, the rendering of proof by one will be considered as the act of both (Graham v. Phœnix Ins. Co., 17 Hun [N. Y.] 156). So, when the policy covers the property "of the assured or any member of the household," a provision that proofs of loss shall be "signed by said insured" does not require a signed schedule of his individual property by each member of the household.

McManus v. Western Assur. Co., 22 Misc. Rep. 269, 48 N. Y. Supp. 820, affirmed without opinion 43 App. Div. 550, 60 N. Y. Supp. 1143.

(d) Same—Proof by agent.

It is a general rule that where it is impossible for the insured to make the required proofs, it may be done by his agent who is qualified.

Reference may be made to German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927; Swan v. Liverpool, London & Globe Ins. Co., 52 Miss. 704; Burns v. Michigan Manufacturers' Mut. Fire Ins. Co., 130 Mich. 561, 90 N. W. 411; Sims v. State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; People v. Liverpool, London & Globe Ins. Co., 2 Thomp. & C. (N. Y.) 268; Konicz v. Teutonia Ins. Co., 22 Pa. Co. Ct. R. 249, 8 Pa. Dist. R. 575.

Thus, nonresidence or such absence from the state as makes it impossible for the insured to furnish the proofs will justify the making of proofs by an agent.

German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927; Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4; O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160.

Insanity of the insured will justify proof by another (McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927); but, if the proofs are otherwise sufficient, they will not be vitiated by the insanity of the insured, who swore to the affidavit (Germania Fire Ins. Co. v. Boykin, 12 Wall. 433, 20 L. Ed. 442).

After the death of the insured, the personal representative may furnish the proofs (Meyerson v. Hartford Fire Ins. Co., 16 Misc. Rep. 286, 38 N. Y. Supp. 112). And this is certainly true where

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the policy provides that the word "insured" shall include the personal representatives (Matthews v. American Central Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627, affirming 41 N. Y. Supp. 304, 9 App. Div. 339). The latter case, indeed, intimates that the legatee or heirs might furnish proofs.

Though it has been held in Texas (Citizens' Ins. Co. v. Shrader [Civ. App.] 33 S. W. 584) and in Vermont (Spooner v. Vermont Mut. Fire Ins. Co., 53 Vt. 156) that ordinarily proofs of loss cannot be made by a husband for his wife, yet if she has no knowledge in relation to the property, and he manages it and acts as her agent in procuring the insurance, he may execute the proofs as her agent.

Findelsen v. Metropole Fire Ins. Co., 57 Vt. 520; Roberts v. Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048.

So, the wife may execute proofs for her husband when she is in charge of the property (O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160).

The agency of the person furnishing the proofs may be shown by the fact that throughout he has had the charge of the insurance (Swan v. Liverpool, London & Globe Ins. Co., 52 Miss. 704). And where the cashier of a bank, who had taken a deed to secure a debt due the bank, secures a policy on the property in his own name, and afterwards makes a quitclaim deed to his successor, proofs made by the new cashier are sufficient (Wolcott v. Sprague [C. C.] 55 Fed. 545).

(e) Person on whom proofs may be served.

Where a policy provides that proof of a loss shall be delivered at the office of the company, a delivery of such proof to any officer or agent at such office, and apparently in charge of it, is sufficient (Edgerly v. Farmers' Ins. Co., 48 Iowa, 644). And a condition that the insured shall submit his books and papers to the company for examination is sufficiently complied with when the insured leaves his books at the company's office (McKee v. Susquehanna Mut. Fire Ins. Co., 135 Pa. 544, 19 Atl. 1067). Proofs forwarded to the president of the company will be sufficient, if he has charge of the loss department (Minnock v. Eureka Fire & Marine Ins. Co. of Cincinnati, 90 Mich. 236, 51 N. W. 367). It has, too, been held sufficient if the proofs were delivered to an adjuster of the company.

Merchants' & Mechanics' Ins. Co. v. Vining, 67 Ga. 661; Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132.

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Service on a general agent having charge of the business of the company in the state will be a sufficient compliance with a provision requiring service on the company (Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991); and, in the absence of any provision to the contrary, the delivery of the proofs to the local agent will be taken and considered as a delivery to the company, so that, if the local agent fails to forward them to the home office or to the office of the general agent, negligence cannot be charged to the insured.

Insurance Co. of North America v. Hope, 58 Ill. 75, 11 Am. Rep. 48; Greenlee v. Hanover Ins. Co., 104 Iowa, 481, 73 N. W. 1050; Vesey v. Commercial Union Assur. Co. (S. D.) 101 N. W. 1074. See, also, in this connection, Sexton v. Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191, where the court apparently approves a finding by the jury to the effect that supplementary affidavits taken by the company and delivered to its agent had been delivered to the company.

In view of the provisions of the Pennsylvania act of June 27, 1883 (P. L. 165), service on the agent countersigning the policy is sufficient.

Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Jacoby v. North British & Mercantile Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226.

Under the Indiana statute requiring an agent, before commencing business, to procure a certificate of authority "to take risks or transact any business of insurance" in the state, it has been held (North British & Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458) that proofs of loss may be served on the countersigning agent, who, so far as it appeared, was the only agent of the company in the state. Nor was the rule affected by a provision that the person procuring the insurance should be deemed the agent of the insured; such provision, as applied to the agent of the company, being regarded as absolutely void.

Where a Lloyd's policy requires the proofs to be served on "attorneys in fact, to wit, B. & Co.," service may be made on the agents succeeding B. & Co., and who are the attorneys in fact at the time of the loss (Walker v. Beecher, 15 Misc. Rep. 149, 36 N. Y. Supp. 470). The irregularity of the appointment of the attorneys in fact will not affect the validity of the service if they have been held out as such agents.

Ralli v. White, 47 N. Y. Supp. 197, 21 Misc. Rep. 285, affirming 46 N. Y. Supp. 376, 20 Misc. Rep. 635.

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So, also, persons withdrawing without notice from such a company are affected with notice and proofs served on the attorneys in fact.

Walker v. Beecher, 36 N. Y. Supp. 470, 15 Misc. Rep. 149; Ralli v. White, 47 N. Y. Supp. 197, 21 Misc. Rep. 285, affirming 46 N. Y. Supp. 376, 20 Misc. Rep. 635.

Where the insurance company enters into an agreement with another company by which the second company virtually takes the place of the original company, agreeing to pay all its losses, the proofs may be served on the second company (Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897; Id., 56 Pac. 50).

4. FORM AND SUFFICIENCY OF NOTICE AND PROOFS OF LOSS.

(a) Form and sufficiency of notice of loss.
(b) Form and sufficiency of proofs of loss in general.
(c) Statutory provisions.
(d) Statement as to cause of loss.
(e) Statement of interest and occupancy—Incumbrances on property.
(f) Statement of value and amount of loss
(g) Same—Under valued policies.
(h) Same—Detailed statement and plans and specifications.
(i) Production of books and inventory.
(j) Statement as to other insurance.
(k) Examination of insured—Examination of property.
(l) Certificate of magistrate, notary, or other person.
(m) Same—Excuses for failure to furnish certificate.

(a) Form and sufficiency of notice of loss.

In the absence of a special provision in the policy, the notice of loss need not be in writing.

State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110; Argall v. Old North State Ins. Co., 84 N. C. 355; O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160.

Even where the policy provides that the notice shall be in writing, it is not necessary that it shall be in any special form.

Hartford Fire Ins. Co. v. Redding (Fla.) 37 South. 62, 67 L. R. A. 518; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Rix v. Mutual Ins. Co., 20 N. H. 198; West Branch Ins. Co. v. Helfenstein, 40 Pa. 280, 80 Am. Dec. 573.

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A requirement that the notice shall state the number of the policy and the name of the agent must be complied with (Dolbier v. Agricultural Ins. Co., 67 Me. 180), though a statement as to nature and duration of the risk may be regarded as surplusage (Walker v. Metropolitan Ins. Co., 56 Me. 371). It has been stated that, where the company has received notice from other sources, the contract should not be so technically construed as to compel the insured also to furnish information which the insurer already has (Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740). Such a rule seems implied in Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237, where notice given by the local agent to the secretary, apparently without communication with the insured, was held sufficient. So, also, in Phœnix Ins. Co. of Brooklyn v. Perry, 131 Ind. 572, 30 N. E. 637, where it was not stated by or to whom the notice should be given, it was held sufficient that the company's local agent immediately notified it of the loss, and that it thereupon sent an adjuster, who investigated the loss, and made an estimate of the same.

(b) Form and sufficiency of proofs of loss in general.

Though the conditions relating to the furnishing of proofs of loss in the various policies differ in form, they are substantially the same as to the extent of the requirements. In general, the condition provides that within a specified time after the loss the insured "shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly

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sustained loss to the amount that such magistrate or notary public shall certify."

Generally, a strict and technical compliance with these requirements will not be insisted on. The courts proceed on the theory that, though the furnishing of proofs may be a condition precedent, their only object is to determine the amount of the loss and whether it was in good faith. **If the proofs furnished substantially comply with the requirements of the policy, it is sufficient.**

It is deemed sufficient to refer to Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Williams v. Niagara Fire Ins. Co., 50 Iowa. 561; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411: Germania Fire Ins. Co. v. Curran, 8 Kan. 9; Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.) 328, 96 Am. Dec. 239; Sun Mut. Ins. Co. v. Crist, 19 Ky. Law Rep. 305, 39 S. W. 837; Bartlett v. Union Ins. Co., 46 Me. 500; Scottish Union & National Ins. Co. v. Keene, 85 Md. 263, 37 Atl. 33; Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145; Swofford Bros. Dry Goods Co. v. American Cent. Ins. Co., 76 Mo. App. 27; Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; Robinson v. Palatine Ins. Co. (N. M.) 66 Pac. 535; Norton v. Rensselaer & Saratoga Ins. Co., 7 Cow. (N. Y.) 645; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424; Boyle v. Hamburg-Bremen Fire Ins. Co., 169 Pa. 349, 32 Atl. 553; Home Ins. Co. v. Cohen, 20 Grat. (Va.) 312; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366.

It is also a general rule that, though the proofs furnished do not entirely comply with the requirements of the policy, they will be deemed sufficient in the absence of any objection thereto by the company.[1]

Proofs of loss, if otherwise sufficient, need not be in any particular form. Thus, they need not be upon the blanks furnished by the company (Cushing v. Williamsburg City Fire Ins. Co., 4 Wash. 538, 30 Pac. 736). If properly furnished to the company, they need not contain a formal address (Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640, 77 N. W. 275). A letter giving additional information asked for by the insurer will be considered as supplementary to the proofs already furnished (Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297). Under the same principle it was held in Breckinridge v. American Cent. Ins. Co., 87 Mo. 62,

[1] See post, p. 3544.

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that insured's signature, affixed by another in the presence of insured, might be adopted by him; and a requirement that the proofs be under oath, and accompanied by the certificate of a magistrate, does not render it necessary that the oath of insured be taken before the magistrate (Phœnix Ins. Co. v. Creason, 14 Ky. Law Rep. 573). So, also, while a requirement that the proofs shall be signed and sworn to by the insured means that the oath or certificate thereof shall be in writing, yet it does not require that the certificate of the oath shall be signed by the insured.

McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 60 N. Y. Supp. 1143, 43 App. Div. 550.

But it is no excuse, for a failure to furnish proofs, that the policy has been lost and its requirements forgotten (Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160).

(c) Statutory provisions.

Where there is a statute in relation to the proofs of loss, it is generally assumed that a compliance with the statute will be sufficient, the contention being as to whether the requirements of the statute have been met. The point has been, however, expressly decided.

Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237; Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. 717; Bailey v. Hope Ins. Co., 56 Me. 474. See, also, Vorous v. Phenix Ins. Co., 102 Wis. 76, 78 N. W. 162, where the standard policy was held to be controlled by contrary provision in an unrepealed special statute.

But where there has been a compliance with the requirements of the policy, it will be sufficient, though the statute contains other provisions. It is not the purpose of such statutes to put additional stumbling blocks in the way of the insured. (Campbell v. Monmouth Mut. Fire Ins. Co., 59 Me. 430.)

In the same connection, see Dolbier v. Agricultural Ins. Co., 67 Me. 180, and Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64 N. W. 685, where the proofs were held insufficient to meet either the statute or the policy.

The law of the place where the contract is finally completed by the issuance of the policy will govern as to the proofs required,

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though the property is situated in another state. At least, this is true where the action is also brought in the state where the policy issued (Bailey v. Hope Ins. Co., 56 Me. 474).

(d) Statement as to cause of loss.

A statement in the proof of loss that the origin of the fire was unknown is a sufficient compliance with a requirement that the proof must show when and how the fire originated (Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578). And of course an allegation of ignorance as to the cause of a fire is a sufficient compliance with a requirement that the facts as to how the loss occurred be stated, so far as they are within insured's knowledge.

Hartford Fire Ins. Co. v. Redding (Fla.) 37 South. 62, 67 L. R. A. 518; Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237; Parks v. Anchor Mut. Fire Ins. Co., 106 Iowa, 402, 76 N. W. 743. See, also, Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64 N. W. 685, where silence under a similar requirement was held fatal.

So, a statement that the fire occurred without any act, procurement, or fraud of the insured has been held a sufficient statement of its origin.

McNally v. Phœnix Ins. Co. of Brooklyn, 137 N. Y. 389, 33 N. E. 475; Howard Ins. Co. v. Hocking, 115 Pa. 415, 8 Atl. 592.

A provision requiring a particular account of the loss or damage does not necessitate a statement as to the cause of the fire. Particularly does this appear to be true where the "particular account" is to include books of account, etc., which manifestly have nothing to do with the cause of the loss (Catlin v. Springfield Fire Ins. Co., 5 Fed. Cas. 310).

(e) Statement of interest and occupancy—Incumbrances on property.

The provision that the insured shall state his interest in the property is substantially complied with by the statement that it belonged to the insured (Field v. Insurance Co. of North America, 9 Fed. Cas. 16). And a statement in the present tense is not objectionable as failing to show that insured was the sole owner of the property at the time of the fire (Wicking v. Citizens' Mut. Fire Ins. Co., 77 N. W. 275, 118 Mich. 640). Where the policy calls for a statement of the "nature and value" of insured's interest, it is not sufficient to state the value of the property, and that it

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was totally destroyed (Wellcome v. People's Mut. Fire Ins. Co., 2 Gray [Mass.] 480). If the requirement is only for a "particular account" of the "loss," the insured need not include in the proofs a statement of his ownership and interest (Gilbert v. North American Fire Ins. Co., 23 Wend. [N. Y.] 43, 35 Am. Dec. 543).

Where, with the company's knowledge, the loss was to be paid to another than the insured, and the proofs were duly made by insured, it was not necessary that there be also a declaration of the interest of the third person. Of the fact of the claim the company already had notice, and the amount of his recovery was in no manner dependent on the company's knowledge in that regard. (Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 [Gil. 98].) So, too, proof of loss given by an assignee will not be rendered ineffectual by the omission to mention that his debt as mortgagee was also secured on other property (Barnes v. Union Mut. Fire Ins. Co., 45 N. H. 21). Neither is it necessary for the proofs to disclose an interest in the policy or property acquired after the loss (Mauck v. Merchants' & Manufacturers' Fire Ins. Co., 54 Atl. 952, 4 Pennewill [Del.] 325), nor that there was a change of interest after loss (Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578).

In Force v. St. Paul Fire & Marine Ins. Co., 80 N. Y. Supp. 708, 81 App. Div. 633, where a carrier was insured, it was considered that proofs containing the names of the owners of the goods destroyed, the value of such goods, and the damages sustained by each owner, was a sufficient compliance with the clause requiring a statement of the interest of the insured and all others in the property.

A plea which attacks proofs on the ground that they do not state the title must definitely allege either that there was no statement of title, or set out the statement, thus showing its insufficiency (Phœnix Ins. Co. v. Hedrick, 178 Ill. 212, 52 N. E. 1034, affirming 73 Ill. App. 601).

Though a statement as to incumbrances on the property is not required under the clause calling for a statement as to the "value and ownership of the property insured" (Taylor v. Ætna Ins. Co., 120 Mass. 254), the condition in the policy relating to proofs of loss usually calls for a disclosure of incumbrances, and, when such clause exists, the requirement must be complied with (Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384). A statement that the property belonged to the insured, and that

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no other person had any interest therein, was, however, equivalent to a statement that there were no incumbrances thereon.

Davis v. Grand Rapids Fire Ins. Co., 157 N. Y. 685, 51 N. E. 1090, affirming 36 N. Y. Supp. 792, 15 Misc. Rep. 263.

A proof of loss is sufficient though it does not give the name of the occupant of the building, where it made it apparent that insured occupied the building himself, and the fact of occupancy was not relied on for any purpose (Georgia Home Ins. Co. v. Goode, 30 S. E. 366, 95 Va. 751). It has, indeed, been held that, though proofs of loss are defective in omitting the name of the occupant of the building, if such defect is not shown to be material or to injure the company, it will not defeat a recovery (Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93). It is, however, difficult to tell whether this case proceeds on the ground of the sufficiency of the proofs, of waiver of defects, or of the effect of the valued policy law. All the grounds are touched upon, but no definite stand is taken on any.

(f) Statement of value and amount of loss.

The provision calling for a statement of the value of the property lost and of that saved is sufficiently complied with by a claim for a total loss of the property, stating its value, though some of the property is saved without insured's knowledge (Harkins v. Quincy Mut. Fire Ins. Co., 16 Gray [Mass.] 591).[2] So, also, in National Ins. Co. v. Strong, 25 Ohio Cir. Ct. R. 101, a statement of the amount of the loss, and that it was total, was held sufficient, though a blank for a statement of the value of the property was left unfilled. Likewise, a requirement for a statement of the "extent of the loss" is met by an allegation that the loss on the building was total (Parks v. Anchor Mut. Fire Ins. Co., 76 N. W. 743, 106 Iowa, 402), or by figures giving the amount of lumber used in the building (Dyer v. Des Moines Ins. Co., 72 N. W. 681, 103 Iowa, 524). But bills rendered by carpenters, showing the cost of rebuilding, are not sufficient statements of the loss (Heusinkveld v. St. Paul Fire & Marine Ins. Co., 96 Iowa, 224, 64 N. W. 769).

A requirement for a statement of the value of the property does not necessitate an allegation in the proofs as to the amount of damage (De Raiche v. Liverpool & L. & G. Ins. Co., 86 N. W. 425, 83 Minn. 398). And though there is such a requirement it does

[2] **Effect of fraudulent misstatement, see post, p. 3412.**

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not follow that, in case the insured property is a building and is totally destroyed, the value of the débris need be given.

Wyman v. People's Equity Ins. Co., 1 Allen (Mass.) 301, 79 Am. Dec. 737; **Thomas** v. Western Ins. Co. of Pittsburg, 5 Pa. Super. Ct. 383.

If property in two buildings is insured in the same policy, but made distinct subjects of insurance, the damage to the property in each should be distinctly given (Towne v. Springfield Fire & Marine Ins. Co., 145 Mass. 582, 15 N. E. 112). And a statement of the amount of an inventory with subsequent sales and purchases is not a sufficient statement of the actual cash value of the property (Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64 N. W. 685). If, however, the proof sufficiently states a particular sum as the actual cash value of the property destroyed, such statement is not objectionable as contradictory because, by following the method in which the estimate was declared to have been made, a result somewhat different from the amount so stated is obtained (Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578).

Since the retention of proofs by the company will not constitute an admission as to the truth of their statements, the company will not be justified in rejecting them, though they contain a false statement that the loss was estimated by appraisers selected by the company and insured.

Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; Same v. Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 961; **Same v. Liverpool** & London & Globe Ins. Co., 10 Mont. 368, 25 Pac. 962.

The requirement of a policy of insurance against loss to growing corn by hail, that in case of partial loss a true account of the remaining portion shall be kept, is sufficiently complied with, where only part of the tract has been harvested at the time it is desirable to know the amount, by averaging the remainder with that already gathered (Barry v. Farmers' Mut. Hail Ins. Ass'n, 81 N. W. 690, 110 Iowa, 433).

(g) Same—Under valued policies.

In Pennsylvania there is a line of cases holding that where there is a valued policy on a single subject of insurance, and it is totally destroyed, notice of loss will be sufficient proof, excusing a compliance with the requirements of the policy for formal proofs. The argument is that the insurer, under such circumstances, is bound

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to pay the full amount of the policy, that the proofs are therefore of no importance, and that the law will not require the doing of a vain thing.

Such was the doctrine applied in Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. 259; Farmers' Mut. Fire Ins. Co. v. Moyer, 97 Pa. 441; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; American Cent. Ins. Co. v. Haws (Pa.) 11 Atl. 107; Weiss v. American Fire Ins. Co., 148 Pa. 349, 23 Atl. 991; Roe v. Dwelling House Ins. Co., 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595; Powell v. Agricultural Ins. Co., 2 Pa. Super. Ct. 151, 38 Wkly. Notes Cas. 469; Dennis v. Citizens' Ins. Co., 4 Pa. Super. Ct. 225; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261. See, also, Universal Mut. Fire Ins. Co. v. Weiss Bros., 106 Pa. 20, where the rule was held not applicable to a policy upon the contents of a building. Such a policy was not a "valued policy," in the technical meaning of the term.

Though some of the cases above cited may contain expressions justifying a broader interpretation, yet it seems logical that this rule should be applied only to the proofs having to do with the value of the insured property. Where proof of other things than value are required, it is difficult to see how such requirement can be affected by the fact that the amount payable is fixed. Such a limitation on the rule is, indeed, directly recognized, not only in Pennsylvania, but elsewhere.

Reference may be made to German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 563; Howard Ins. Co. v. Hocking, 115 Pa. 415, 8 Atl. 592; McCollum v. Hartford Fire Ins. Co., 67 Mo. App. 76; Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark. 1904) 80 S. W. 576; Murphy v. New York Bowery Fire Ins. Co., 62 Mo. App. 495; and Milwaukee Mechanics' Ins. Co. v. Russell, 62 N. E. 338, 65 Ohio St. 230, 56 L. R. A. 159.

It has, however, been held that, in the absence of evidence that specific proofs as to other matters would have been necessary or useful in aiding the company to determine its liability, it was not incumbent on the insured to do more than show that notice of the total destruction had been given (Powell v. Agricultural Ins. Co., 2 Pa. Super. Ct. 151, 38 Wkly. Notes Cas. 469). The court cites in support of its position Roe v. Insurance Co., 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595, in which, it says, as shown by the paper book, specific proof as to various matters was required.

In Texas the Court of Civil Appeals has held that Rev. St. art. 2971, making a policy on a building which has been totally de-

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stroyed a "liquidated demand" against the company, does away with all necessity for proofs. The theory is that a "liquidated demand" means one fixed and settled, and that, therefore, the policy holder need only present it for payment.

Continental Ins. Co. v. Chase (Tex. Civ. App.) 33 S. W. 602; Phœnix Assur. Co. v. Deavenport, 16 Tex. Civ. App. 283, 41 S. W. 399; Hamburg-Bremen Fire Ins. Co. v. Ruddell (Tex. Civ. App.) 82 S. W. 826.

The Supreme Court, however, while not absolutely dissenting from the doctrine, has withheld its approval, affirming the case before it on another ground (Continental Ins. Co. v. Chase, 89 Tex. 212, 34 S. W. 93).

(h) Same—Detailed statement and plans and specifications.

The policy sometimes requires the insured to furnish a detailed and itemized statement of the property insured and destroyed. This clause may be in the form of a special condition or a part of the general provisions relating to proofs of loss. It is, however, to be liberally construed. Thus, a mere requirement for a statement of the value of the property insured does not render it necessary to give the quantities or items of the goods destroyed in detail.

Clement v. British America Assur. Co., 141 Mass. 298, 5 N. E. 847; Towne v. Springfield Fire & Marine Ins. Co., 145 Mass. 582, 15 N. E. 112.

A requirement for a "particular account of the loss" has reference to the articles lost or damaged (Catlin v. Springfield Fire Ins. Co., 5 Fed. Cas. 310), **and requires an effort to enumerate the articles and give itemized information.**

Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Beatty v. Lycoming County Mut. Ins. Co., 66 Pa. 9, 5 Am. Rep. 318; The words are also held in Lycoming County Ins. Co. v. Updegraff, 40 Pa. 311, to require that the loss be stated to have been upon the goods insured.

While a requirement for a statement of the cash value of each item cannot be ignored (Gottlieb v. Dutchess County Mut. Ins. Co., 89 Hun, 36, 35 N. Y. Supp. 71), yet a failure to itemize personalty will not defeat a recovery as to realty covered by the same policy (Thomas v. Western Ins. Co. of Pittsburg, 5 Pa. Super. Ct. 383). Nor does such a requirement justify a demand for a state-

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ment of the cost price (McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 43 App. Div. 550, 60 N. Y. Supp. 1143). **Where the requirement as to an itemized statement of value is confined to damaged and undamaged goods, it will not be extended to articles totally destroyed.**

Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5; McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 43 App. Div. 550, 60 N. Y. Supp. 1143. See, also, Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554, where a statement giving the size, number, and aggregate value of bales of cotton was held sufficient, and Smith v. Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804, where a description of a single organ, as such, was held sufficient.

The failure to make a detailed statement will be excused when there has been a total destruction of the goods.

Schilansky v. Merchants' & Manufacturers' Fire Ins. Co. (Del. Super. 1903) 55 Atl. 1014, 4 Pennewill, 293; People's Fire Ins. Co. v. Pulver, 127 Ill. 246, 20 N. E. 18; Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, 51 N. W. 123; Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145; Davis v. Grand Rapids Fire Ins. Co., 36 N. Y. Supp. 792, 15 Misc. Rep. 263, affirmed without opinion 157 N. Y. 685, 51 N. E. 1090; Peet v. Dakota Fire & Marine Ins. Co., 1 S. D. 462, 47 N. W. 532.

Where a policy requires, as part of the proofs of loss, a verified certificate of a builder, as to the value of the building destroyed, an itemized estimate of the cost of rebuilding, signed by a firm of builders as such, is a sufficient compliance (Summerfield v. Phœnix Assur. Co. [C. C.] 65 Fed. 292).

In Missouri, under the act of 1895, throwing the burden of furnishing blanks for proofs on the company, it is essential, if the company desires the requirements as to plans and specifications to be met, that it furnish blanks therefor (Brownfield v. Mercantile Town Mut. Ins. Co., 84 Mo. App. 134).

(i) Production of books and inventory.

When the insurance is on a stock of merchandise, the policy usually provides, by a clause known as the "iron-safe clause," for the keeping of proper accounts and inventories, which shall be preserved in an iron safe, and produced in case of loss as part of the proofs. The failure to keep proper accounts and preserve them

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in a safe is usually regarded as a ground for forfeiture, and this phase of the question has been discussed elsewhere.[3] **The failure to comply with the requirements as to the production of books and inventories is, however, usually regarded as a failure to make sufficient proof of loss.** Often, also, an independent clause provides for the production of books, invoices, and vouchers. In accordance with general rules, these provisions are usually construed liberally. Thus, the fact that the clause calls for the production of the "last" inventory does not necessitate the production of the last copy, but the requirement is met by the production of the last original inventory, though it was afterwards copied into another book, containing also an inventory of goods not insured. (Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722.) Nor can invoices be demanded under the requirement of the iron-safe clause that an inventory be taken, kept, and produced (Home Ins. Co. v. Delta Bank, 71 Miss. 608, 15 South. 932). In the last mentioned case the insured, apparently, was not in default for failure to take an inventory, and therefore was not obliged to produce his invoices in lieu thereof. Conversely, the furnishing of invoices will not be a compliance with such requirement (Fire Ass'n v. Masterson, 25 Tex. Civ. App. 518, 61 S. W. 962).

Where owing to the destruction of books and invoices, and the refusal of the vendors of the property to furnish duplicate invoices, the requirements of the policy in regard thereto cannot be met, such failure will be excused on the ground that the condition was not meant to meet such circumstances (Liverpool & London & Globe Ins. Co. v. Kearney, 21 Sup. Ct. 326, 180 U. S. 132, 45 L. Ed. 460, affirming 94 Fed. 314, 36 C. C. A. 265). The court took the position that the failure to produce the books, in the event of which there could be no action on the policy, meant a failure to produce them if they were in existence when called for, or if they had been lost or destroyed by the fault, negligence, or design of the insured. The policy provided for certain precautions against the destruction of the books, and the court pointed out that under any other interpretation such precautionary requirements might be fully met, and yet the insurance be lost owing to unavoidable accident.

A similar conclusion was reached in Sneed v. British America Ins. Co., 73 Miss. 279, 18 South. 928, and Brookshier v. Mutual Fire Ins. Co., 91 Mo. App. 599.

[3] See ante, vol. 2, p. 1813.

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It follows that, where the inability of the insured to produce the books is due to a failure to comply with a provision requiring them to be kept, his failure to furnish them is not excused (Niagara Fire Ins. Co. v. Forehand, 48 N. E. 830, 169 Ill. 626); but, where one of the books was destroyed owing to an unintentional breach of the requirements relating to its safety, the court held that the insured met the requirements as to its production by proving the facts of which it was a record (Niagara Fire Ins. Co. v. Heflin, 22 Ky. Law Rep. 1212, 60 S. W. 393).

But however the rule may be affected by clauses requiring safekeeping, it is not confined to cases where such clauses were in the policies. It is, indeed, a general rule that **if the insured has made reasonable effort to procure the required books, invoices, or duplicate invoices, and has failed through no fault of his own, such substantial compliance will be sufficient.**

The rule was recognized in the following cases: Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308, 21 N. W. 652; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; Farmers' Fire Ins. Co. v. Mispelhorn, 50 Md. 180; Nichols v. Mechanic's Fire Ins. Co., 16 N. J. Law, 410; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Norton v. Rensselaer & Saratoga Ins. Co., 7 Cow. (N. Y.) 645; McLaughlin v. Washington County Mut. Ins. Co., 23 Wend. (N. Y.) 525; Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81; O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108; Jube v. Brooklyn Fire Ins. Co., 28 Barb. (N. Y.) 412; Coleman v. New York Bowery Fire Ins. Co. (Pa. Sup.) 177 Pa. 239, 35 Atl. 729; Ward v. National Fire Ins. Co., 10 Wash. 361, 38 Pac. 1127. Nor need the insured in such case notify the company of his inability to comply with the requirement (Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411.)

It is, however, necessary for the insured to comply with the provisions of the policy as far as possible. **Inability to furnish all the required documents will not excuse a failure to furnish such as could have been produced.**

This rule is supported in Farmers' Fire Ins. Co. v. Mispelhorn, 50 Md. 180; Mispelhorn v. Farmers' Fire Ins. Co., 53 Md. 473; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Jube v. Brooklyn Fire Ins. Co., 28 Barb. (N. Y.) 412; O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108, reversing 38 N. Y. Super. Ct. 517; Langan v. Royal Ins. Co., 162 Pa. 357, 29 Atl. 710; Ward v. National Fire Ins. Co., 10 Wash. 361, 38 Pac. 1127. But see Franklin Ins. Co. v. Culver, 6 Ind. 137, where it appeared that owing

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to the fire an itemized inventory showing cost could not be furnished, and the court held that the insurance was not lost by a refusal of the insured to request those from whom the goods were purchased to furnish duplicate invoices, the company not having shown a refusal by such sellers to furnish the duplicates, based on the absence of a request therefor by the insured.

The inability of the insured to procure the required documents cannot be assumed, but must be proved by him; the question whether he was in fact unable to procure them being for the jury.

Farmers' Fire Ins. Co. v. Mispelhorn, 50 Md. 180; Mispelhorn v. Farmers' Fire Ins. Co., 53 Md. 473; O'Brien v. Commercial Fire Ins. Co., 63 N. Y. 108, reversing (1875) 38 N. Y. Super. Ct. 517.

(J) Statement as to other insurance.

Under the clause requiring a statement as to the existence of other insurance on the property, an exact copy of a policy evidencing such other insurance need not be furnished unless expressly called for (Georgia Home Ins. Co. v. Goode, 30 S. E. 366, 95 Va. 751). And a provision that the insured shall furnish a statement of other insurance, and copies of all policies upon the property, does not require the insured to furnish a copy of the policy sued upon (Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411). So, also, where four policies were issued on the same property, identical except as to dates and amounts, a proof of loss was sufficient which was furnished under one policy; it being stated therein that, in addition to the amount covered by such policy, there was by the same company other insurance, as specified in an accompanying schedule (Dakin v. Liverpool & L. & G. Ins. Co., 13 Hun [N. Y.] 122).

Even where a copy of some portion of another policy has been called for, the courts have been very liberal in determining what will amount thereto. Thus, a statement that the other policy covered the same goods and was "concurrent" with the policy under which the proofs were given was sufficient.

Swofford Bros. Dry Goods Co. v. American Cent. Ins. Co., 76 Mo. App. 27, and Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578.

So, also, a statement that the written portion of the other policies were annexed to the proofs, or would be furnished on demand, has been considered a substantial compliance with a provision requiring a copy of the description and schedules of the other policies

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(Scottish Union & National Ins. Co. v. Keene, 85 Md. 263, 37 Atl. 33). Nor will the fact that the copy furnished contains a mistake affect the validity of the proofs (Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411).

A provision calling for a "statement of other insurance," with copies of the descriptive portions of the policies, does not necessarily include the addresses of the other insurers (Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640, 77 N. W. 275). An exact copy of the descriptions of the property in the other policy was held a compliance with a requirement for a statement of the other insurance "in detail" (Towne v. Springfield Fire & Marine Ins. Co., 145 Mass. 582, 15 N. E. 112). In Fuller v. Detroit Fire & Marine Ins. Co. (C. C.) 36 Fed. 469, 1 L. R. A. 801, proofs were deemed sufficient, though they did not apportion among the several companies the amount due from each. It is, however, necessary that data as to the location of the property, etc., be given, from which such a computation can be made.

Towne v. Springfield Fire & Marine Ins. Co., 145 Mass. 582, 15 N. E. 112; Lycoming County Ins. Co. v. Updegraff, 40 Pa. 311.

A declaration to the effect that there was no other insurance was deemed a sufficient compliance with a requirement for a statement thereof.

Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686, and Schilansky v. Merchants' & Manufacturers' Fire Ins. Co. (Del. Super.) 55 Atl. 1014, 4 Pennewill, 293.

It is, indeed, a general rule that, **where there is no other insurance, no mention need be made of the subject in the proofs, under a requirement for a statement of such other insurance.**

Phœnix Ins. Co. v. Perkey, 92 Ill. 164; Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374. Very similar is the case of Partridge v. Milwaukee Mechanics' Ins. Co., 162 N. Y. 597, 57 N. E. 1119, affirming 43 N. Y. Supp. 632, 13 App. Div. 519, where it was held that no mention need be made of policies offered the insured in lieu of the one in suit, but not accepted by him.

The loss of another policy on the same property will not excuse the furnishing of a copy thereof in the proofs of loss furnished under the policy in suit (Blakeley v. Phœnix Ins. Co., 20 Wis. 205, 91 Am. Dec. 388). It should, however, be noted that in such case

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the court further held that the detailed information given was not even a substantial compliance with the requirement.

(k) Examination of insured—Examination of property.

In connection with the other requirements as to proofs of loss, the policy usually provides that the insured shall, as often as required, exhibit to any person designated by the company the remains of any property insured, and submit to an examination under oath in relation to the loss, and that he shall produce his books and vouchers or copies thereof for examination. The requirement that the insured shall submit himself to an examination is not met by an offer of the trustee in bankruptcy of the insured, who has absconded, to submit himself, though the policy expressly provides that the word "insured" should include the legal representative (Sims v. Union Assur. Soc. [C. C.] 129 Fed. 804). However, an attempt of the husband of the insured to have himself substituted for her, on the ground that she was ignorant of the circumstances, cannot be introduced to show a refusal by the insured to submit herself to the examination (Western Assur. Co. v. Ackerman, 2 Penny. [Pa.] 144, 145).

While the requirement that the insured shall submit to "an examination" does not necessitate the submission by the insured to more than one (Moore v. Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514), yet, if he consents to a continuance, he is bound thereby (Bonner v. Home Ins. Co., 13 Wis. 677).

Unreasonable demands in relation to the examination, in addition to those fixed by the policy, have been held to entirely excuse compliance. Thus, it seems never to have been doubted that the time and place fixed for an examination, either of the insured or of his books and papers, must be reasonable, in order to hold him to compliance, though, of course, the determination as to whether they were in fact reasonable has varied with the various circumstances of the different cases.

> Reference may be made to American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98; Fleisch v. Insurance Co. of North America, 58 Mo. App. 596; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. Law Rev. 356; Seibel v. Lebanon Mut. Ins. Co., 197 Pa. 106, 46 Atl. 851; Ætna Ins. Co. v. Shacklett (Tex. Civ. App.) 57 S. W. 583.

The stipulation was held to have been satisfied where the insured called at the company's office several times for the purpose of

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examination, and the company used the proofs of loss furnished by the insured for the purpose of collecting from another insurance company, with whom they had reinsured the risk (McKee v. Susquehanna Mut. Fire Ins. Co., 135 Pa. 544, 19 Atl. 1067).

Since his examination must be reasonably conducted, he is not bound to answer immaterial questions.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. C. 315; Porter v. Traders' Ins. Co., 58 N. E. 641, 164 N. Y. 504, 52 L. R. A. 424; Enos v. St. Paul Fire & Marine Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796. Furthermore, the burden is on the insurer to show that the unanswered question was material (Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424); and it is for the court to determine the propriety of the question (Fleischner v. Beaver, 21 Wash. 6, 56 Pac. 840).

When the insured appears at the office of the insurer for an examination, he is entitled to have his attorney present, and, if he is denied such right, he may refuse to submit to the examination (American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98). It has also been held that the insured may make it a condition of submitting to the examination in private, that he be furnished with a copy thereof (Thomas v. Burlington Ins. Co., 47 Mo. App. 169). In McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927, the court indeed expressed doubt as to the validity of a provision requiring an examination apart from all others, but did not find it necessary to pass on the question.

The fact that the insured has fled, and cannot be found, will not do away with the necessity for his examination in order that he himself (Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4), his mortgagee (Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58), trustee in bankruptcy (Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, 42 S. E. 269; Sims v. Union Assur. Soc. [C. C.] 129 Fed. 804), or factorizing creditor (Harris v. Phœnix Ins. Co., 35 Conn. 310), may recover. The court in the Connecticut case, indeed, said that if, for any cause, whether by his fault or otherwise, the insured could not be notified, that might be his misfortune, or the misfortune of those claiming through him, but that it was no reason for treating as inoperative an important stipulation which the insured saw fit to give as a condition precedent. On the other hand, it has been held that a failure of the insured to appear may be excused by showing that he was necessarily engaged in saving his family from an epidemic, and that it was for the jury to say whether

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the refusal to submit to the examination was in good faith, and for the purpose of rescuing his family and himself from the danger.

Phillips v. Protection Ins. Co., 14 Mo. 220. See, in connection, Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4, where it was said that "practical impossibility" not arising from the fault of insured would excuse.

Where the policy contains a provision that the insurer shall be permitted, as often as required, to examine the property left after the fire, a sale of the property, either before the company has had an opportunity to exercise its right (Oshkosh Match Works v. Manchester Fire Assur. Co., 92 Wis. 510, 66 N. W. 525), or with knowledge that a further examination is required (Astrich v. German-American Ins. Co., 131 Fed. 13, 65 C. C. A. 251, affirming [C. C.] 128 Fed. 477), will prevent a recovery. In New York Fire Ins. Co. v. Delavan, 8 Paige (N. Y.) 419, it was held that a court of chancery could not restrain the insured from disposing of the property. The case does not, however, give the provision of the policy in relation to the right of the company to examine the goods, further than that it appears that the company had the right of substitution, and that the court said that, in case the insured refused an examination, the insurers would have the benefit on a trial of the presumption of fraud arising therefrom.[4]

(I) Certificate of magistrate, notary, or other person.

The condition relating to proofs of loss usually contains a clause providing that the insured shall if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The condition is not contained in the standard form of policy adopted in Maine, Massachusetts, Minnesota, and New Hampshire.

Though the validity of the condition has been questioned in Kentucky (German-American Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324) and Nebraska (Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883), in neither case was

[4] **Care and preservation** of the property after the fire, see ante, p. 3076. Sale of the property as affecting appraisal, see post, p. 3625.

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a determination of the question necessary to the decision. On the other hand, it has been directly decided in Pennsylvania that the condition is a reasonable one, which must be complied with, if possible.

Kelly v. Sun Fire Office, 141 Pa. 10, 21 Atl. 447, 23 Am. St. Rep. 254, overruling Universal Fire Ins. Co. v. Block, 109 Pa. 535, 1 Atl. 523, and Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. 73, 20 Atl. 838, 21 Am. St. Rep. 904. See, also, Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; Noonan v. Hartford Fire Ins. Co., 21 Mo. 81; and Hubbard v. North British & Mercantile Ins. Co., 57 Mo. App. 1.

It is obvious that if the provision contains the clause, "if required," a demand for the certificate is necessary to put the insured in default.

Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

Though a general notice that the terms of the policy must be strictly complied with is not sufficient as a demand for the certificate (Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690), yet if proofs containing a certificate, furnished without demand, are objected to on the ground that the certificate is insufficient, this amounts to such a demand as will bind the insured.

Williams v. Queen's Ins. Co. (C. C.) 39 Fed. 167; Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554.

The certificate of a magistrate, which the company has the right under its policy to demand, constitutes no part of the proof of loss, which marks the commencement of the period which must run before the company is liable.

Merchants' Ins. Co. v. Gibbs, 56 N. J. Law, 679, 29 Atl. 485, 44 Am. St. Rep. 413, and McNally v. Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 473.

And though, in general, the certificate called for by the policy need not be furnished within the time limited for making proof of loss (Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845), yet, if demand is made therefor within such time, the certificate must be furnished within the period limited (Gottlieb v. Dutchess Co. Mut. Ins. Co., 89 Hun, 36, 35 N. Y. Supp. 71).

The clause calling for the certificate is generally construed as liberally as other conditions of the policy (Turley v. North American Fire Ins. Co., 25 Wend. [N. Y.] 374), though in some particulars the construction has perhaps been more strict. Thus, under

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a requirement for a certificate from a "magistrate or notary public nearest to the place of the fire," the certificate of the nearest officer of the classes named, whether magistrate or notary, was necessary (Williams v. Queen's Ins. Co. [C. C.] 39 Fed. 167); and a notary public will not be considered a magistrate, within the meaning of a requirement for a "magistrate's" certificate (Cayon v. Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. 540).

In determining what magistrate "lives" nearest the place of loss, it is not merely the actual residence of the magistrate that is considered, but his place of business, to which, by some public sign he invites those who do business with him.

Turley v. North American Fire Ins. Co., 25 Wend. (N. Y.) 374; Paltrovitch v. Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198, affirming 68 Hun, 304, 23 N. Y. Supp. 38; Smith v. Home Ins. Co., 47 Hun, 30. A similar principle seems involved in Oswalt v. Hartford Fire Ins. Co., 175 Pa. 427, 34 Atl. 735, where it was held that the fact that an officer lived nearer the fire than the one whose certificate was procured made no difference, it appearing that insured was unaware that the other person was a notary public, and also that such notary's place of business was in another locality, and that he was commissioned as residing in such other locality. But see Gilligan v. Commercial Fire Ins. Co., 20 Hun (N. Y.) 93, where the Supreme Court failed to recognize the distinction as to place of business which had been drawn by the lower court.

So, too, in the determination of distances, regard will not be taken of small differences, as of a few yards.

Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466; American Cent. Ins. Co. v. Rothchild, 82 Ill. 166; Williams v. Niagara Fire Ins. Co., 50 Iowa, 561; Turley v. North American Fire Ins. Co., 25 Wend. (N. Y.) 374.

If, however, the difference amounts to several rods, it will be regarded as material (Gilligan v. Commercial Fire Ins. Co., 20 Hun [N. Y.] 93). So, it was said in Protection Ins. Co. v. Pherson, 5 Ind. 417, that any difference would be material, but it should be noted that there was in that case an actual difference of 450 rods.

The purpose of the qualifying clause, "not interested in the claim as a creditor or otherwise, nor related to the insured," is to secure an impartial arbiter; and therefore one whose house, not insured, was burned by the fire communicated from the house of insured, and before whom complaint had been entered charging insured with

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setting the fire, was not a proper magistrate to make the certificate (Wright v. Hartford Fire Ins. Co., 36 Wis. 522). Nor could a certificate be required by the company from one whose debt was secured by the insured property.

Dolliver v. St. Joseph Fire & Marine Ins. Co., 131 Mass. 39; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30.

It was, however, conceded in the Dolliver Case that a magistrate who is merely a general creditor of the insured is not disqualified. The contrary doctrine is asserted in Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.) 139.

One related to the insured by affinity is disqualified under the clause excepting officers related to the insured.

Ætna Ins. Co. v. People's Bank, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554; People's Bank of Greenville v. Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81.

While the certificate should contain a venue, in order that it may be determined whether the magistrate was the "nearest" (McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 60 N. Y. Supp. 1143, 43 App. Div. 550), yet it need not negative the disqualification of interest or relationship (Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145), nor show that a nearer officer was disqualified (Noone v. Transatlantic Ins. Co., 88 Cal. 152, 26 Pac. 103). The California case points out that the rule holds, though Civ. Code, § 2637, provides that insured must inform the company of an unjustifiable refusal of an officer to furnish the certificate. Similarly, while the insured must allege in his declaration the kind of an officer executing the certificate (Simmons v. West Virginia Ins. Co., 8 W. Va. 474), yet the interest or relationship of the officer is a matter of defense.

Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; Phœnix Ins. Co. v. Perkey, 92 Ill. 164; Cornell v. Le Roy, 9 Wend. (N. Y.) 163.

As to the contents of the certificate, it is usually sufficient if there is a substantial compliance with provisions of the policy.

The sufficiency of a substantial compliance was alleged generally in Ætna Fire Ins. Co. v. Tyler, 16 Wend. 385, 30 Am. Dec. 90. It was applied in National Ins. Co. v. Strong, 25 Ohio Cir. Ct. R. 101, where an allegation of knowledge of the building was held equiv-

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alent to an allegation of the circumstances of the loss. So, also, in Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553, and Brown v. Hartford Fire Ins. Co., 5 N. Y. Supp. 230, 52 Hun, 260, affirmed without opinion 132 N. Y. 539, 30 N. E. 68, an affidavit that insured had sustained the loss claimed was held a sufficient allegation of belief in the truth of insured's statements. Where the insured dies before the fire, an affidavit that his estate sustained the loss is sufficient (Germania Fire Ins. Co. v. Curran, 8 Kan. 9). There must, however, be some statement as to the required examination or its equivalent (Gottlieb v. Dutchess County Mut. Ins. Co., 35 N. Y. Supp. 71, 89 Hun, 36). And the naming of the wrong person as owner (Welsh v. Des Moines Ins. Co., 71 Iowa, 337, 32 N. W. 369), or as sustaining the loss (Great Western Ins. Co. v. Staaden, 26 Ill. 360), will be fatal.

(m) Same—Excuses for failure to furnish certificate.

The rule that impossibility of performance amounts to an excuse does not seem to prevail as to a required certificate. Though the designated person refuses, without justification, to furnish the certificate, the insured, according to the weight of authority, will not be excused. The courts apply the rule that one who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party is no excuse. **The inability of the insured to procure the certificate because of refusal of the designated person to make it does not render the condition impossible in the legal sense, so as to excuse the party from performing his contract.**

Such was the principle announced in Leadbetter v. Etna Ins. Co., 13 Me. 265, 29 Am. Dec. 505; Johnson v. Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110; Kelly v. Sun Fire Office, 141 Pa. 10, 21 Atl. 447, 23 Am. St. Rep. 254, overruling Universal Fire Ins. Co. v. Block, 109 Pa. 535, 1 Atl. 523, and Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. 73, 20 Atl. 838, 21 Am. St. Rep. 904, in which it was held that the condition was not enforceable, since the company had no right to require a certificate from an officer in no way connected with the contract.

And it was considered in the Lane Case and in Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883, that the rule requiring strict compliance with the condition, notwithstanding the impossibility of securing the certificate, is especially applicable where the clause is embodied in a standard policy.

The harshness of the prevailing rule has, however, caused some

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courts to reject it, and decide that a requirement for the certificate of the nearest magistrate, etc., may, in case he unjustifiably refuses to act, be met by the certificate of the next nearest.

Reference may be made to Agricultural Ins. Co. v. Bemiller, 70 Md. 400, 17 Atl. 380; Walker v. Phœnix Ins. Co., 62 Mo. App. 209; De Land v. Ætna Ins. Co., 68 Mo. App. 277; Lang v. Eagle Fire Co., 42 N. Y. Supp. 539, 12 App. Div. 39. The same doctrine is impliedly approved in McNally v. Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475.

In Noonan v. Hartford Fire Ins. Co., 21 Mo. 81, a distinction is drawn between an absolute refusal of the officer to act, and his furnishing a certificate, but alleging therein his inability to come to any conclusion as to the fairness or amount of the loss. Had he refused without reason to act at all, the insured might have been justified in securing the certificate of some other officer, but not when he acts, and certifies his inability to give the required information.

Where a statute forbids the provision altogether,[5] or declares the certificate of any officer of the class designated sufficient,[6] or provides that an unjustifiable refusal of the person designated shall constitute an excuse for nonperformance,[7] a different rule will prevail.

Noone v. Transatlantic Ins. Co., 88 Cal. 152, 26 Pac. 103; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Bailey v. Hope Ins. Co., 56 Me. 474; Vorous v. Phenix Ins. Co., 102 Wis. 76, 78 N. W. 162.

5. PLEADING AND PRACTICE RELATING TO NECESSITY AND SUFFICIENCY OF NOTICE AND PROOFS OF LOSS.

(a) Declaration or complaint.
(b) Plea or answer.
(c) Evidence—Admissibility.
(d) Same—Sufficiency.
(e) Questions for jury.
(f) Trial and review.

(a) Declaration or complaint.

It is pointed out in Benedix v. German Ins. Co., 78 Wis. 77, 47 N. W. 176, that, where the failure to furnish proofs is made a cause of forfeiture, such failure is a matter of defense, to be taken ad-

[5] Horner's Ann. St. Ind. 1901, § 3770; Burns' Ann. St. Ind. 1901, § 4923.

[6] Pub. Laws Me. 1861, c. 34, § 5; Rev. St. Wis. 1898, § 1941-55.

[7] Civ. Code Cal. § 2637.

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vantage of by way of answer, so that a complaint would be sufficient without any allegations in relation thereto. But the universal holding is that, where the production of notice and proofs is a condition precedent, plaintiff must allege and prove such production. This rule has, indeed, been rather assumed than held, the decision of the substantive question being treated also as a determination of the manner of pleading. The questions which have arisen have thus been as to the sufficiency of the allegation and denial of the performance of the condition.

Where, as in many of the states, it is provided by statute that a compliance with conditions precedent may be pleaded generally, and that defendant must set up the condition which he alleges was not performed, an allegation of performance, drawn in accordance with the statute, will be sufficient.

Reference may be made to Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925; American Century Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159; Indiana Ins. Co. v. Pringle, 52 N. E. 821, 21 Ind. App. 559; Hanover Fire Ins. Co. v. Johnson, 26 Ind. App. 122, 57 N. E. 277; Okey v. State Ins. Co., 29 Mo. App. 105; Richardson v. North Missouri Ins. Co., 57 Mo. 413; Rieger v. Mechanics' Ins. Co., 69 Mo. App. 674; Farmers' Bank v. Manchester Assur. Co., 80 S. W. 299, 106 Mo. App. 114; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Schobacher v. Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Bank of River Falls v. German-American Ins. Co., 72 Wis. 535, 40 N. W. 506; Benedix v. German Ins. Co., 78 Wis. 77, 47 N. W. 176.

But in the absence of statute, or where the statutory method is not followed, the performance must be clearly stated.

Royal Ins. Co. v. Smith, 8 Ky. Law Rep. 521; Home Ins. Co. of New York v. Duke, 43 Ind. 418; Fidelity & Casualty Co. of New York v. Sanders, 70 N. E. 167, 32 Ind. App. 448.

An allegation that plaintiff "performed all the conditions" will not cure defects in an attempted specific allegation, though the statute permits a general allegation that plaintiff "duly performed all the conditions" (Clemens v. American Fire Ins. Co., 75 N. Y. Supp. 484, 70 App. Div. 435).

Likewise, it has been held that a general allegation of compliance with the conditions of the policy will not avail against an express allegation showing that the proofs had not been delivered within the stipulated time (Baker v. German Fire Ins. Co., 124

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Ind. 490, 24 N. E. 1041). In California, however, it was held that such conflict only rendered the complaint ambiguous, and that the objection must be taken on such ground (Emery v. Svea Fire Ins. Co., 88 Cal. 300, 26 Pac. 88). And even under the Indiana doctrine the conflict must be evident and necessary.

Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Hanover Fire Ins. Co. v. Johnson, 26 Ind. App. 122, 57 N. E. 277.

The principle that the conflict must be necessary controlled, also, the cases of District Tp. of Sidney v. Des Moines Ins. Co., 75 Iowa, 647, 36 N. W. 902, and National Wall Paper Co. v. Associated Mfrs.' Mut. Fire Ins. Corp., 70 N. Y. Supp. 124, 60 App. Div. 222, where the allegation that proofs were furnished within a certain time was held not to be contradicted by another allegation that they were furnished "on or about" a certain date following, just outside the specified time. Likewise, an allegation that "as soon as possible, * * * that is to say, on the 24th of May" (which was the fourth day after the fire), notice was given, has been held not to preclude evidence that the notice was in fact given on the first day after the loss (Hovey v. American Mut. Ins. Co., 9 N. Y. Super. Ct. 554). And an averment that plaintiff gave notice of loss "within ——— days," and as soon as he discovered it, when construed in connection with an averment that plaintiff performed all conditions to be performed by him, shows a giving of the notice within a reasonable time (Phenix Ins. Co. v. Rogers, 11 Ind. App. 72, 38 N. E. 865).

In Young v. Phœnix Ins. Co., 61 N. Y. 650, the policy did not appear in the complaint, nor did the complaint state what the effect would be of a failure to give notice within a specified time. The court held that it could not determine, upon demurrer, that the condition as to proofs, if not complied with, operated to forfeit the policy. Likewise, a declaration alleging that due notice and proof of loss were given according to the conditions of the policy is sufficient to support a judgment, though it is not alleged that the company had due notice and proof according to the requirements of Pub. Laws 1861, c. 34, § 5, where it does not appear that the notice and proof required by statute are materially different from those required by the policy (Conway Fire Ins. Co. v. Sewall, 54 Me. 352). Nevertheless, where it first appeared that the furnishing of the proofs was a condition precedent when plaintiff introduced in evidence the policy as the contract sued upon, defendant at once had

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the right to take the position that the allegations of the complaint did not authorize a recovery upon such a contract (Furlong v. Agricultural Ins. Co., 64 Hun, 632, 18 N. Y. Supp. 844). An inartistic complaint has, however, been held sufficient, after verdict, to show that proper proofs of loss were given. If the allegation was not sufficiently specific, the remedy was by motion in the trial court. (Phenix Ins. Co. v. Wilson, 132 Ind. 449, 25 N. E. 592.)

(b) Plea or answer.

In the absence of statute, a general denial is sufficient to put in issue the rendition of proofs of loss.

Cornell v. Hope Ins. Co., 3 Mart. N. S. (La.) 223; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374.

In Indiana, also, though there is a statute (Horner's Ann. St. § 370) providing that performance of conditions precedent may be pleaded generally, and that, "if the allegation be denied, the facts showing a performance must be proved," it has been held that a general denial of a complaint containing such general allegation is sufficient to put the service of proofs in issue. The cases so holding, however, make no mention of the statute.

Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285, and Manchester Fire Assur. Co. v. Glenn, 13 Ind. App. 365, 40 N. E. 926, 55 Am. St. Rep. 225.

In New York an answer setting out the condition requiring proofs of loss within a specified time, and averring that plaintiff failed to perform such condition has been held a sufficient specification of a particular breach of the condition to meet a general allegation that the plaintiff had fulfilled all the conditions of the policy (Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. 595). The Pennsylvania rule, on the other hand, is that the specifications of defense must state wherein the proofs furnished were defective (Moore v. Susquehanna Mut. Fire Ins. Co., 46 Atl. 266, 196 Pa. 30). In Maine this matter has been governed by the rule of court providing that parties filing specification of the grounds of defense should be confined to such grounds, and that all matters set forth in the writ and declaration, which were not specifically denied, should be regarded as admitted.

Fox v. Conway Fire Ins. Co., 53 Me. 107; Caston v. Monmouth M. F. Ins. Co., 54 Me. 170.

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If plaintiff, ignoring his statutory rights to general allegations and defendant's duty to specially plead nonperformance, himself specifically alleges performance, and defendant denies, this will put the matter in issue (Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64 N. W. 685). And if plaintiff alleges the mailing of notice as required by the policy, and defendant denies, not only the fact of the mailing, but the sufficiency of the notice, will be in issue (Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696). So, also, where, without necessity, plaintiff attempts to make proof of compliance with the condition, and fails, the situation will be the same as if defendant had pleaded such nonperformance (Adkins v. Globe Fire Ins. Co., 32 S. E. 194, 45 W. Va. 384).

A denial of compliance with the terms of the policy, as stated in the complaint (Schaetzel v. Germantown Farmers' Mut. Fire Ins. Co., 22 Wis. 412), or that plaintiff furnished a sufficient proof (Germania Ins. Co. v. Ashby, 23 Ky. Law Rep. 1564, 65 S. W. 611, 112 Ky. 303, 99 Am. St. Rep. 295), may be held to amount to an admission of compliance otherwise than as stated. So, also, in Rieger v. Mechanics' Ins. Co., 69 Mo. App. 674, an allegation of an election by the company to repair, only open to it after proofs had been furnished, was considered an admission that due proofs had been received. Somewhat similar is the case of Loomis v. Lewis, 71 N. Y. Supp. 62, 62 App. Div. 433. The complaint mentioned no time within which the notice must be furnished. The answer set up that the notice was to be furnished within a certain time, which had not been done, and suggested a reference to the policy for greater certainty as to the conditions. On the trial no reference was made to the policy, and the court held that this amounted to an admission of the contract as alleged by the plaintiff.

Where the allegation of nonperformance was treated as a plea in abatement, it was held that it could not be pleaded with a plea of forfeiture for fraud.

Weide v. Germania Ins. Co., 29 Fed. Cas. 594; Wiede v. Insurance Co. of North America, Id. 1149. But see, also, in this connection, Gross v. St. Paul Fire & Marine Ins. Co. (C. C.) 22 Fed. 74, and Home Fire Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 841, where a defense that the fire was of an incendiary character, and plaintiff implicated therein, was held not inconsistent with a plea setting up breach of the condition as to proofs.

It is pointed out in Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12, that no special plea in abatement need be filed. The

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issue is raised by a denial of the necessary allegation of the furnishing of the proofs. If time is essential, and the period within which they might have been furnished has elapsed, the issue is one in bar. If there is no reason why proofs furnished, even after the trial, would not be sufficient, the issue is one in abatement. The latter part of this doctrine, at least, is also supported by Weide v. Germania Ins. Co., 29 Fed. Cas. 594, and Wiede v. Insurance Co. of North America, Id. 1149. An abstract of the case of Kenton Ins. Co. v. Wiggenton, reported in 10 Ky. Law Rep. 587, states, however, that it was there decided that, where the policy provides that no action can be maintained without preliminary proof, an objection to the absence thereof is in the nature of a plea in bar, whether raised by demurrer or answer.

(c) Evidence—Admissibility.

The proofs of loss furnished the company are admissible in evidence to show that such proofs were made and delivered as required by the terms of the policy.[1]

Such was the ruling in Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Menk v. Home Mut. Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Lewis v. Burlington Ins. Co., 80 Iowa, 259, 45 N. W. 749; Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371; Breckinridge v. American Cent. Ins. Co., 87 Mo. 62; Summers v. Home Ins. Co., 53 Mo. App. 521; Sexton v. Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191; American Ins. Co. v. Francia, 9 Pa. 390; Fleming v. Ins. Co. of Pennsylvania, 12 Pa. 391; Klein v. Franklin Ins. Co., 13 Pa. 247; Continental Ins. Co. v. Pruitt, 65 Tex. 125; Hennessy v. Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

A letter supplementing the proofs is admissible (Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297); and also a letter from the company pointing out defects (Cummins v. German-American Ins. Co., 192 Pa. 359, 43 Atl. 1016).

It is decided in Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712, and Hibernia Ins. Co. v. Starr (Tex. Sup.) 13 S. W. 1017, that it is no objection to the admission of proofs in evidence that they contain untrue statements and do not conform to the policy.

[1] As to the effect of the proofs as evidence of the truth of statements therein contained, see post, p. 3433.

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But proofs signed by others than the insured are not admissible under an allegation of proofs signed by the insured in accordance with the requirements of the policy.

Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100; Citizens' Ins. Co. v. Shrader (Tex. Civ. App.) 33 S. W. 584.

Neither parol evidence, copies, or other secondary evidence can be admitted to prove the contents of the notice or proofs, unless due notice has first been given the company to produce the originals, or other proper foundation laid.

Such rule may be deduced from Hartford Fire Ins. Co. v. Enoch (Ark.) 77 S. W. 899; American Ins. Co. v. Walston, 111 Ill. App. 133; American Century Ins. Co. v. Hathaway, 43 Kan. 399, 23 Pac. 428; State Ins. Co. v. Belford, 2 Kan. App. 280, 42 Pac. 409; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 30; Dade v. Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48; Insurance Co. v. Wilkerson, 53 Ark. 353, 13 S. W. 1103; Coffman v. Niagara Fire Ins. Co., 57 Mo. App. 647; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Underwriters' Fire Ass'n v. Henry (Tex. Civ. App.) 79 S. W. 1072; Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112.

It was further held in Dade v. Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48, that a mere verbal notice to defendant's attorneys at the trial, to produce the original, was not a proper foundation.

On the other hand, it has been held in Indiana that plaintiff may read a copy of the notice retained by him at the time he forwarded the original to defendant's secretary, without having notified the defendant to produce the original (Commonwealth's Ins. Co. v. Monninger, 18 Ind. 352).

Though the fact that the company, when notified so to do, fails to produce on trial the proofs furnished, raises no presumption that the proofs were sufficient, but only authorizes the introduction of secondary evidence as to their contents (Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 30), yet where defendant, after notice to produce the original proofs, fails to do so without assigning any reason therefor, evidence by defendant's agent as to defects therein is properly excluded (Northern Assur Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239).

(d) Same—Sufficiency.

Though, as just shown, secondary evidence of the contents of the proofs can only be given under certain circumstances, never-

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theless proof of the fact that due and sufficient notice and proofs have been given may be made by proof that the company proceeded to an adjustment.[2]

Reference may be made to Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153; Townsend v. Merchants' Ins. Co., 36 N. Y. Super. Ct. 172, 45 How. Prac. 501; Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771.

The production at the trial, by the company, of the notice and proofs served by the insured, is sufficient evidence of their service.

Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712; Westlake v. St. Lawrence Mut. Ins. Co., 14 Barb. (N. Y.) 206; Continental Ins. Co. v. Pruitt, 65 Tex. 125.

But as to the mere fact that notice and proof were delivered, or that they were delivered at a specified time, the insured is not confined to such testimony. He may prove such facts by parol testimony without laying any foundation, as for the introduction of secondary proof.

Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 South. 34; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Bish v. Hawkeye Ins. Co., 69 Iowa, 184, 28 N. W. 553; Hagan v. Merchants' & Bankers' Ins. Co., 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Dade v. Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48; Pelzer Mfg. Co. v. Sun Fire Office of London, 36 S. C. 213, 15 S. E. 562; Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

And the rendition of proofs may be inferred under direct evidence of their delivery, though the company's agent has no recollection of the transaction (Oakland Home Ins. Co. v. Davis [Tex. Civ. App.] 33 S. W. 587).

(e) Questions for jury.

Though the proofs as shown are admissible, it is ordinarily for the court to determine their sufficiency, leaving to the jury only the question of identification or whether they were actually furnished.

Reference may be made to Gauche v. London & L. Ins. Co. (C. C.) 10 Fed. 347; Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124; Thomas v. Burlington Ins. Co., 47 Mo. App.

[2] Adjustment as a waiver of notice and proofs, see post, p. 3510.

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169; Klein v. Franklin Ins. Co., 13 Pa. 247; Commonwealth Ins. Co. v. Sennett, 41 Pa. 161; Cole v. Assurance Co., 188 Pa. 345, 41 Atl. 593; Humboldt Fire Ins. Co. v. Mears, 29 Pittsb. Leg. J. O. S. (Pa.) 365, 1 Penny. 513; Hibernia Ins. Co. v. Starr (Tex. Sup.) 13 S. W. 1017.

In People's Fire Ins. Co. v. Pulver, 127 Ill. 246, 20 N. E. 18, and Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350, however, where there were exceptional circumstances excusing a full compliance with the policy requirements, it was held that it was for the jury to determine what degree of particularity was required under the circumstances.

In Fleming v. Insurance Co. of Pennsylvania, 12 Pa. 391, the Pennsylvania Supreme Court failed to discover any error in a holding that the proofs might be read in evidence, to show a compliance with the rule as to proofs. It was afterwards held by the same court, however, that, since only the identification of the proofs was for the jury, the proofs should not be submitted nor read to them further than necessary for that purpose.

The rule is laid down in Klein v. Franklin Ins. Co., 13 Pa. 247; Commonwealth Ins. Co. v. Sennett, 41 Pa. 161; Kittanning Ins. Co. v. O'Neill, 110 Pa. 548, 1 Atl. 592; Cummins v. German-American Ins. Co., 192 Pa. 359, 43 Atl. 1016; Rosenberg v. Fireman's Fund Ins. Co., 209 Pa. 336, 58 Atl. 671.

The Washington court, in Hennessy v. Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892, seems to intimate the same doctrine. The California court, on the other hand, held that it was not prejudicial error to permit plaintiff to read in evidence his affidavit, making proof of the loss, when he has testified fully as to the facts within his knowledge, and when the effect of such evidence was expressly limited by the court to showing that he had made the affidavit (Menk v. Home Mut. Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158).

The materiality of a question asked insured on his examination by the company, as to how much was paid for the insured property, has been held so dependent on other circumstances as to constitute a question of fact rather than of law, and therefore one as to which the Court of Appeals would not disturb the finding of the trial court (Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424, affirming 53 N. Y. Supp. 1112, 33 App. Div. 628).

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(f) Trial and review.

An instruction that to find for plaintiff there must be a finding that he gave defendant notice of the fire and of the loss thereunder, as required by the terms of the policy, is not objectionable as disregarding the necessity of proof accompanying the notice, as required by the policy (Eiseman v. Hawkeye Ins. Co., 74 Iowa, 11, 36 N. W. 780).

While a finding in special interrogatories that no proofs were delivered, has been held not fatal to a verdict in favor of plaintiff, on the ground that there may have been a waiver (Phœnix Ins. Co. v. Rowe, 117 Ind. 202, 20 N. E. 122); yet it has also been held that special findings upon which the verdict is based must contain a finding of the giving of notice as required by the policy, and not mere evidence thereof (Germania Fire Ins. Co. v. Columbia Encaustic Tile Co., 11 Ind. App. 385, 39 N. E. 304). And where the pleadings raised the issue whether proper proofs of loss were made, the fact that proof may have been waived by a plea that the value of the property destroyed had never been ascertained in the proper manner did not justify the court in taking the issue from the jury (Wilson v. Commercial Union Ins. Co., 89 N. W. 649, 15 S. D. 322).

Though evidence offered proves more in relation to the notice and proofs of loss than is needed to sustain plaintiff's action, yet, if it is not harmful to defendant, its introduction will not constitute reversible error.

Hagan v. Merchants' & Bankers' Ins. Co., 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696.

Nor will an instruction in relation to an excuse for failure to furnish proofs justify reversal, where the proofs were in fact sufficient (Humboldt Fire Ins. Co. v. Mears, 1 Penny. [Pa.] 513).

Objections to the sufficiency of the proofs (Graves v. Washington Marine Ins. Co., 12 Allen [Mass.] 391), or to the form of pleadings in relation thereto (Hartford Fire Ins. Co. v. Enoch [Ark.] 77 S. W. 899), should be taken in the trial court, or they will not be available on appeal.

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6. FRAUD AND FALSE SWEARING IN PROOFS OF LOSS.

(a) Nature and effect of condition in general.
(b) Persons affected by fraud or false swearing of insured.
(c) Materiality of false statement.
(d) Fraudulent intent—Statements made through ignorance or negligence of insured.
(e) Same—Possibility of injury to insurer.
(f) Same—"Fraud" as an element of "false swearing."
(g) Statements as to cause and circumstances of loss.
(h) Statements regarding property not covered by policy or not destroyed.
(i) Statements as to value of property destroyed.
(j) Statements as to title and interest—Incumbrances.
(k) Miscellaneous instances of fraud or false swearing.
(l) Forfeiture of entire policy.
(m) Questions of practice.

(a) Nature and effect of condition in general.

Modern fire policies all contain a provision looking to the forfeiture of all claims under the policy, in case of fraud by the insured, whether such fraud occur before or after the destruction of the property. In the standard policies of Connecticut, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin, this provision reads: "This entire policy shall be void * * * in case of any fraud or false swearing by the insured, touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Practically the same result is reached by the standard policies of Maine, Massachusetts, Minnesota, and New Hampshire, which provide: "This policy shall be void * * * if the insured shall make any attempt to defraud the company, either before or after the loss." **Under such a provision the ordinary rule that fraud occurring after the fixing of liability will not affect the rights of the parties does not apply, and the policy may therefore be avoided for fraud or false swearing occurring in the proofs of loss.**

Ferriss v. North American Fire Ins. Co., 1 Hill (N. Y.) 71; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Gies v. Bechtner, 12 Minn. 279 (Gil. 183).

Nor can it be successfully argued that there is any difference between a provision avoiding the policy for fraud, and one forfeiting

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all claims thereunder, and that the former provision would not reach a claim matured at the time of the fraud. Such a distinction would be entirely inconsistent with the plain meaning of the contract. (F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69.)

In connection with these cases, attention might also be called to Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31, where it said that, in the absence of such a clause, an overestimate in making the proof would not forfeit the policy.

Though the operation of such a clause as to fraud is not affected by the fixing of the liability by loss, it will not operate to forfeit the claim of the insured on account of false statements made after the commencement of action on the policy. In such a case the rights of the parties must be determined by their status at the commencement of the action (Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.)

(b) Persons affected by fraud or false swearing of insured.

The interests of persons who have jointly taken out a policy of insurance are not severed by the occurrence of a loss; and any subsequent failure upon the part of one of them to comply with the conditions imposed by the policy, as to notice or proof of loss, will defeat any action that may be brought upon it (Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 S. W. 797). But in Henderson v. Western Marine & Fire Ins. Co., 10 Rob. (La.) 165, 43 Am. Dec. 176, it appeared that two policies had been taken out by the same person, one in his own right, and the other as agent, and that in making proofs under his own policy he was guilty of false swearing. The court held that such fraud was clearly irrelevant in an action on the other policy. Not only did the fraud occur under another policy, but as to such fraudulent statements, made in his own behalf, no agency existed. And in Metzger v. Manchester Fire Assur. Co., 102 Mich. 334, 63 N. W. 650, it was held (Grant, J., dissenting) that a provision avoiding a policy in case of any fraud or false swearing by the assured or his "legal representative" did not include the assured's agent, but only his executor, administrator, or assignee, and that, therefore, false statements made by the insured's husband, who had complete charge of the business, were not effective to forfeit the policy. False swearing by the insured will, however, defeat recovery by a payee of the

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policy or an assignee of the claim for loss, as such claimants are in no better position than the insured.

Merchants' Nat. Bank v. Insurance Co. of North America, 4 Ohio Dec. 340, 1 Cleve. Law Rep. 339; Pupke v. Resolute Fire Ins. Co., 17 Wis. 378, 84 Am. Dec. 754.

(c) Materiality of false statement.

A misrepresentation by the insured of matters not relevant to the insurance will not forfeit the policy under the clause dealing with fraud and false swearing.

The following cases support such doctrine: Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540; Forehand v. Niagara Ins. Co., 58 Ill. App. 161; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 South. 253; Cochran v. Amazon Ins. Co., 7 Ohio Dec. 276.

And false statements contained in the proofs as to matters not required to be set forth therein will not forfeit the policy.

Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712; Chamberlain v. Insurance Co. of North America, 3 N. Y. Supp. 701, 51 Hun, 636.

And in Daul v. Firemen's Ins. Co., 35 La. Ann. 98, and Chamberlain v. Insurance Co. of North America, 51 Hun, 636, 3 N. Y. Supp. 701, it seems to be implied that, since proofs furnished after a waiver thereof by the company were a superfluity, any false statement therein contained would not be effective to vitiate the policy. The Daul Case, however, went off rather on the theory that there was no fraudulent intent in the misstatement, and the Chamberlain Case on the theory that the error, in any event, was immaterial, since the proofs specified by the policy did not include any statement as to incumbrances.

Apparently governed by the same principle in relation to immaterial statements are the cases holding that, **where the amount of recovery is by statute made dependent on the amount of insurance rather than the value of the property, misrepresentations in relation to such value will not forfeit the insurance.**

This is asserted in Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200; Barnard v. People's Fire Ins. Co., 66 N. H. 401, 29 Atl. 1033; Sullivan v. Hartford Fire Ins. Co., 89 Tex. 665, 36 S. W. 73; German Ins. Co. v. Jansen, 18 Tex. Civ. App. 190, 45 S. W. 220; Cayon v. Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. 540.

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It is, however, pointed out in Walker v. Phœnix Ins. Co., 62 Mo. App. 209, that where, by the statute, the insurer has the option of paying the full amount of insurance, or restoring the building, the value of the building may become important and material, so that a false statement in relation thereto would forfeit the policy.

It has been held that a claim will not be forfeited by an exaggeration of the loss so small as to be immaterial.

Clark v. Phœnix Ins. Co., 36 Cal. 168; Hamberg v. St. Paul Fire & Marine Ins. Co., 68 Minn. 335, 71 N. W. 388.

In Hansen v. American Ins. Co., 57 Iowa, 741, 11 N. W. 670, it was said that knowledge by an agent of the insurer of the purpose for which a certain building was used did not excuse the insured in knowingly making false statements in reference thereto. But a statement that the goods were destroyed by fire, when in fact the destruction was caused by smoke and water, has been held not to amount to fraud, particularly where the company had already informed itself as to all the circumstances of the fire (Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47).

(d) Fraudulent intent—Statements made through ignorance or negligence of insured.

It is a general rule that a misstatement in the proofs of loss, to forfeit the policy, must be not only false, but willfully false. A mere innocent mistake will not amount to fraud or false swearing within the provisions of the policy.

Reference to the following cases is deemed sufficient: Republic Fire Ins. Co. v. Weide, 81 U. S. 375, 20 L. Ed. 894; Betts v. Franklin Fire Ins. Co., 3 Fed. Cas. 318; Tubb v. Liverpool & L. & G. Ins. Co., 106 Ala. 651, 17 South. 615; American Cent. Ins. Co. v. Ware, 65 Ark. 336, 46 S. W. 129; Clark v. Phœnix Ins. Co., 36 Cal. 168; West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 33 Pac. 258; Watertown Fire Ins. Co. v. Grehan, 74 Ga. 642; Erman v. Sun Mut. Ins. Co., 35 La. Ann. 1095; Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; Franklin Ins. Co. v. Culver, 6 Ind. 137; Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712; Petty v. Mutual Fire Ins. Co., 111 Iowa, 358, 82 N. W. 767; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Atherton v. British America Assur. Co., 91 Me. 289, 39 Atl. 1006; Planters' Mut. Ins. Co. v. Deford, 38 Md. 382; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Walsh v. Philadelphia Fire Ass'n, 127 Mass. 383; Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5; Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 South. 253; Marion v. Great

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Republic Ins. Co., 35 Mo. 148; Star Union Lumber Co. v. Finney, 85 Neb. 214, 52 N. W. 1113; Gerhauser v. North British Mercantile Ins. Co., 7 Nev. 174; Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; Jones v. Merchants' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Rohrbach v. Ætna Ins. Co., 62 N. Y. 613; Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. C. 315; Mortimer v. New York Fire Ins. Co., 2 U. S. Month. Law Mag. 452; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389; Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350; Thierolf v. Universal Fire Ins. Co., 110 Pa. 37, 20 Atl. 412; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45; Insurance Co. of North America v. Wicker, 93 Tex. 390, 55 S. W. 740; Mosley v. Vermont Mut. Fire Ins. Co., 55 Vt. 142; Medley v. German Alliance Ins. Co. (W. Va. 1904) 47 S. E. 101; Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889; Beyer v. St. Paul Fire & Marine Ins. Co., 112 Wis. 138, 88 N. W. 57.

The authorities are not harmonious as to whether a false statement by the insured, not known by him to be false, but recklessly made, and without any reasonable ground for a belief in its truth, will come within the prohibition of the policy. In some cases it is said that such a false statement will amount to a fraud.

Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700; Atherton v. British America Assur. Co., 91 Me. 289, 39 Atl. 1006; Marion v. Great Republican Ins. Co., 35 Mo. 148; Leach v. Republic Fire Ins. Co., 58 N. H. 245.

Other cases broadly assert that the statement must be knowingly false, and that mere negligence will not forfeit the policy.

Merchants' Nat. Bank v. Insurance Co. of North America, 4 Ohio Dec. 340, 1 Cleve. Law Rep. 339; Beyer v. St. Paul Fire & Marine Ins. Co., 112 Wis. 138, 88 N. W. 57.

In line with the last-mentioned authorities it has been held that a failure to exercise due diligence in ascertaining the legal effect of a purchase-money debt did not necessarily render fraudulent a false statement as to incumbrances (Phœnix Ins. Co. v. Swann [Tex. Civ. App.] 41 S. W. 519). So, also, in Knop v. National Fire Ins. Co., 107 Mich. 323, 65 N. W. 228, the majority of the court approved the refusal of peremptory instruction for defendant based on a false statement that a certain machine had been destroyed, and that castings therefrom had been found in the fire, the only explanation given by insured having been that at the time he

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made the statement he believed the machine had been destroyed. Grant, J., however, strongly expressed his opinion that a recklessly false statement would be fraudulent, though made in ignorance of the facts, and that the instruction should have been given. The majority neither deny nor affirm the general doctrine, holding only that the requested instruction was properly refused.

The adoption by a husband, without investigation, of a gross overestimate of loss of household goods, the original statement having been prepared by the wife, and the husband having been in a position to have discovered the overestimate, was held in Mullin v. Insurance Co., 58 Vt. 113, 4 Atl. 817, to have amounted to a fraud by the husband. But where the property is business property under the charge and control of a husband as agent of his wife, a fraudulent statement in the proofs by the husband, afterwards adopted by the wife, without knowledge of the facts, and without investigation, will not amount to fraud on her part (Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743).

(e) Same—Possibility of injury to insurer.

In Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76, it was held that the insured cannot make a knowingly false statement, and then say that he did not expect to be believed, and did not intend to deceive the company. And this, as a general principle, is so self-evident that the opposite contention does not appear to have been elsewhere ever made. Wherever, under ordinary circumstances, there has clearly appeared a willfully false statement, the intent to deceive thereby has been assumed, apparently without question. The nearest approach to an opposite conclusion is found in Marion v. Great Republic Ins. Co., 35 Mo. 148, where the court disapproved a requested instruction on the ground, among others, that it did not require an intent to deceive, as well as a statement willfully made in ignorance of the facts. The case, however, went off on another phase of the question.

But where the company has already been fully informed by the insured as to the facts of the case, a false statement in the proofs will not forfeit the policy, and it would seem that the absence of the intent to defraud, alleged by the courts to exist in such cases, can amount to but little more than the absence of an intent to deceive.

Daul v. Firemen's Ins. Co., 35 La. Ann. 98; Maher v. Hibernia Ins. Co., 67 N. Y. 283; Gough v. Davis, 52 N. Y. Supp. 947, 24 Misc.

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Rep. 245, affirmed without opinion by 39 App. Div. 639, 57 N. Y. Supp. 1139; Westchester Fire Ins. Co. v. Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876.

The evidence to support such a contention should, of course, be clear and explicit (Hanover Fire Ins. Co. v. Mannasson, 29 Mich. 316).

But as is pointed out in Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754, and Fowler v. Phœnix Ins. Co., 35 Or. 559, 57 Pac. 421, the falsehood, if as to a material fact, need not accomplish its purpose of deceiving the insurer in order to forfeit the policy.

It was further contended by the company in the Claflin Case that the policy had been obtained by misrepresentations as to the value thereof, and that the plaintiff, an assignee of the property and policy, had no real interest in the property. The alleged false statements in the proofs were in relation to the value and ownership of the property. Plaintiff, however, claimed that the false statements were not made for the purpose of defrauding the company, but for another and personal reason, and that, therefore, he was guilty of no fraud as against the company. The court, having pointed out that the facts misrepresented were vital to the issues in the case, held that it did not detract from the fraud involved in making willfully false statements as to such a matter; that the purpose of the insured was not to defraud the company, but to further other personal ends. The doctrine thus announced by the court, as well as the one in relation to the intent to deceive, is one as to which there is but little direct authority, it having been rarely contended that, if the false statement was one which could affect the company, and willful, the purpose was other than to defraud. It was, however, held in Ellis v. Agricultural Ins. Co., 7 Pa. Super. Ct. 264, 42 Wkly. Notes Cas. 374, that false statements as to the property lost were equally effective to forfeit the policy, whether made for the purpose of defrauding the company or saving the insured's husband from a conviction for arson. And in Linscott v. Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435, the word "fraud," as used in the clause "fraud or false swearing," was held to mean no more than a willful false statement, and therefore to be included in the term "false swearing." A contrary doctrine seems to have governed Phœnix Ins. Co. v. McAtee (Ind. App.) 70 N. E. 947, where an answer alleging false swearing in relation to a material matter and for the purpose of defrauding the company

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was held defective for failing to aver facts showing fraud. So, also, in Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 19 N. W. 9, though nothing appears in the reported decision to show that the false swearing might not have injured the insurer, it was held necessary to show an intent to defraud the company in addition to a willfully false statement.

But in many cases a question has arisen as to whether a willfully false statement in relation to a matter having to do with the insurance, but made under such circumstances that its truth or falsity could not prejudice the company, would amount to fraud. Though many of these cases seem to depend on the Claflin Case, and though they speak of the necessity of a purpose to defraud as distinguished from an intentional false statement, it is not clear that they should be governed by the same principle; for in the Claflin Case, as already pointed out, and as emphasized by the court, the misrepresentation was one calculated to mislead the company in a matter upon which its defense was based, and it is evident that a false statement might well be held to have been fraudulent where the liability of the company was dependent on its truth, while it would not have been held fraudulent had it been evident that its truth or falsity could not have prejudiced the insurer. An extreme example of the distinction is found in Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712, where no question was raised as to the materiality of the statement, but where, if true, it precluded any recovery by the insured. Manifestly, as pointed out, no fraud could be imputed to the insured on account of falsehood in such a statement.

But in most of such cases it has only appeared that the company, even though it relied on the statement, could not have been thereby induced to do anything which it was not bound by its contract to do. The most frequent illustration of the difficulty arises from willful overestimate of a loss, which in fact exceeded the amount of insurance. Some of the courts have held that under such circumstances no fraud could be imputed to insured, though his action might be immoral.

Such doctrine was announced in the following: Shaw v. Scottish Commercial Ins. Co. (C. C.) 1 Fed. 761; Home Ins. Co. v. Lowenthal (Miss. 1904) 36 South. 1042; Springfield Fire & Marine Ins. Co. v. Winn, 27 Neb. 649, 43 N. W. 401, 5 L. R. A. 481; Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575; Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38, 71 N. W. 69. See, also, Commercial Bank v. Fire-

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men's Ins. Co., 87 Wis. 297, 58 N. W. 391, where the question was as to the validity of an adjustment reached after a harmless concealment of an inventory.

In Knop v. National Fire Ins. Co. of Hartford, 101 Mich. 359, 59 N. W. 653, and Huston v. State Ins. Co., 100 Iowa, 402, 69 N. W. 674, the same doctrine was applied to a false statement as to title, made under such circumstances that the exact title was immaterial. Reference should also be made in this connection to Marion v. Great Republic Ins. Co., 35 Mo. 148, where it was held that a statement, though made recklessly and in ignorance of the facts, would not amount to fraud or false swearing, within the meaning of the policy, if the statement was in fact true, so that the defendant could not be injured thereby.

Other courts have taken a contrary view, holding that the amount of the loss was a material matter, and that, therefore, the falsity of the statement was material to the insurer and fraudulent, though in fact the loss was greater than the insurance.

This principle is asserted in Dolloff v. Phœnix Ins. Co., 82 Me. 266, 19 Atl. 396, 17 Am. St. Rep. 482; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Sleeper v. New Hampshire Fire Ins. Co., 56 N. H. 401; Capital Fire Ins. Co. v. Beverly, 14 Ohio Cir. Ct. R. 468, 8 Ohio Dec. 37; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754; Vaughan & Co. v. Virginia Fire & Marine Ins. Co., 46 S. E. 692, 102 Va. 541. See, also, Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 South. 253, and Fowler v. Phœnix Ins. Co., 35 Or. 559, 57 Pac. 421, where the same doctrine seems to be approved, though in neither case does it definitely appear that the actual loss exceeded the insurance.

But even though it be held that fraud may arise from an overestimate under such circumstances, yet the fact that the loss exceeded the insurance may be considered in determining whether the statement was willfully false.

Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Phœnix Ins. Co. v. Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930.

(f) Same—"Fraud" as an element of "false swearing."

As a rule, no attempt has been made to draw any distinction as to the meaning of the various phrases used, such as "fraud or false swearing," "fraud and false swearing," and "fraud by false swear-

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ing." Whatever the particular phrase, the holding has almost without exception been, as already pointed out, that **the element of fraud must be present.** That there might, however, be such a distinction, has been intimated in a few cases. Thus, in Linscott v. Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435, the decision already noted, that the term "fraud" did not require a definite purpose to defraud the company, in addition to the willfully false oath, and that, therefore, it was included in the term "false swearing," would seem to indicate that, if such purpose were required by the word "fraud," it would be more than was required by the term "false swearing." And in Dolloff v. Phœnix Ins. Co., 82 Me. 266, 19 Atl. 396, 17 Am. St. Rep. 482, the same court, without, however, approving the doctrine that, under a contract specifying "fraud," the false swearing must be injurious, says that, even were this true, it would not apply to a policy forfeiting the claims for "any fraud * * * or false swearing." So, also, in Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358, where the policy provided for a forfeiture for false swearing, the court drew a distinction, as to the necessity of an intent to defraud the company, between such a case and one where no such provision occurred.

The cases, however, which have actually held willfully false statements not sufficient to forfeit the policy on account of the absence either of an intent to deceive or of a purpose to defraud, have rarely been based on any distinction between the two terms. Thus, in Gough v. Davis, 52 N. Y. Supp. 947, 24 Misc. Rep. 245, and Westchester Fire Ins. Co. v. Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876, where a statement known to be false was held not to forfeit the policy on account of the absence of an intent to deceive, the policy provided against "fraud or false swearing." And in Daul v. Insurance Co., 35 La. Ann. 98, where exactly the same principle was involved, no notice whatever was taken of the fact that the policy required "fraud and false swearing" in order to forfeit claims thereunder.

Nor has the distinction been generally drawn where the absence of a specific purpose to defraud, or of the ability so to do, was insisted on as preventing a forfeiture by statements willfully false or made with known ignorance. Some of them, as Phœnix Ins. Co. v. McAtee (Ind. App.) 70 N. E. 947, Runkle v. Hartford Ins. Co., 99 Iowa, 414, 68 N. W. 712, and Marion v. Republic Ins.

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Co., 35 Mo. 148, contained the provision as to fraud or false swearing in its disjunctive form, so as to preclude the basing of the decision on any distinction between the two terms. And in the Marion Case it was distinctly stated that a statement would not necessarily forfeit the policy because it would support an indictment for perjury. In Knop v. National Fire Ins. Co., 101 Mich. 359, 59 N. W. 653, and Huston v. State Ins. Co., 100 Iowa, 402, 69 N. W. 674, belonging to the same class of cases, the condition of the policy in relation to fraud did not even appear. And in Springfield Fire & Marine Ins. Co. v. Winn, 27 Neb. 649, 43 N. W. 401, 5 L. R. A. 481, approved in Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575, though the provision was that the policy should be forfeited by "fraud by false swearing," no suggestion was made that the policy would have been declared forfeited for the willful exaggeration of the loss, had the policy decreed a forfeiture in case of "fraud or false swearing."

The case of Shaw v. Scottish Commercial Ins. Co. (C. C.) 1 Fed. 761, does, however, make such suggestion, and seems to recognize a distinction between the two terms as used in the clause under consideration. And in Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 19 N. W. 9, where, also, emphasis was placed on the absence of a specific intent to defraud, the court, in quoting the phrase contained in the policy, italicized the words "false swearing with fraudulent intent."

(g) Statements as to cause and circumstances of loss.

The rule that an innocent mistake will not forfeit the policy applies to mistakes in stating the cause of the loss or the situation of the property. Thus, in White v. Merchants' Ins. Co., 93 Mo. App. 282, where it appeared that a false statement by an assignee as to the origin of the fire was occasioned by his misunderstanding, the insured was held not to have forfeited the claim. Conversely, the insured need not state information as to the condition of the property, communicated by another, but as to the truth of which he has no personal knowledge (Merrill v. Insurance Co. of North America [C. C.] 23 Fed. 245). In Pencil v. Home Ins. Co., 3 Wash. St. 485, 28 Pac. 1031, where the insured was a feeble-minded old man, an attempt by him, acting under threats by others, to suppress alleged evidence that he set the fire, was held not to have constituted fraud or false swearing.

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(h) Statements regarding property not covered by policy or not destroyed.

An attempt to collect from the company for property believed in good faith to be covered by the policy will not forfeit such policy, though in fact the company is not liable therefor.

Rafel v. Nashville Co., 7 La. Ann. 244; Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 954; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296; Dolan v. Ætna Ins. Co., 22 Hun (N. Y.) 396; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Under the same principle, an inclusion of articles as destroyed by the fire, under a mistaken belief that they were so destroyed, will not amount to fraud or false swearing in the proofs of loss.

Reference may be made to Runkle v. Hartford Ins. Co., 68 N. W. 712, 99 Iowa, 414; Garner v. Mutual Fire Ins. Co. (Iowa) 86 N. W. 289; German Ins. Co. v. Reed, 13 Ky. Law Rep. 207; Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; Planters' Mut. Ins. Co. v. Deford, 38 Md. 382.

But an attempt to collect for property known not to have been destroyed will, of course, amount to fraud and forfeit the policy.

The following cases illustrate this rule: Regnier v. Louisiana State Marine & Fire Ins. Co., 12 La. 336; Wunderlich v. Palatine Ins. Co., 80 N. W. 467, 104 Wis. 382; Huchberger v. Home Fire Ins. Co., 12 Fed. Cas. 793; Weide v. Germania Ins. Co., 29 Fed. Cas. 594; German Ins. Co. v. Reed, 9 Ky. Law Rep. 929; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754; Vaughan & Co. v. Virginia Fire & Marine Ins. Co., 102 Va. 541, 46 S. E. 692.

And such fraud may take the form of a removal of the property after the fire.

Schmidt v. Philadelphia Underwriters, 109 La. 884, 33 South. 907. And see, also, Cheever v. British-American Ins. Co., 83 N. Y. Supp. 728, 86 App. Div. 333.

In an action on a policy covering merchandise stock, where the insurer alleged that the proofs of loss overstated the quantity of a particular article on hand, evidence of the amount of it usually kept in stock by several other merchants in the same line of trade, and that the insured made purchases of the same kind of goods at the time when he claimed to have such goods on hand, is inadmissible to discredit his testimony (Townsend v. Merchants' Ins. Co.,

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36 N. Y. Super. Ct. 172). Nor is it competent for the insurers to prove the amount of stock of the largest dealer in the trade to which the assured belonged, for the purpose of raising the presumption of fraud in the account of loss furnished by the assured (Phœnix Fire Ins. Co. v. Philip, 13 Wend. [N. Y.] 81). Likewise, in Morley v. Liverpool, L. & G. Ins. Co., 92 Mich. 590, 52 N. W. 939, evidence that the insured was doing a losing business was held too remote to be used to establish fraud on his part in making false statements as to the amount of goods on hand. On the other hand, the Wisconsin court, in Rickeman v. Williamsburg City Fire Ins. Co., 120 Wis. 655, 98 N. W. 960, decided that, where the insured claimed that a large amount of goods readily convertible into money had been destroyed, it was competent to show that she was at the time in pressing need of money, and compelled to overdraw her bank account. While an affidavit made by the plaintiff at the time of his application for a trader's license is admissible to show that he has exaggerated his loss (Mispelhorn v. Farmers' Fire Ins. Co., 53 Md. 473), yet a discrepancy between the amount of loss claimed and the amount of stock covered by a license tax has been held not fatal where the business had not commenced at the time of the fire, and where, therefore, no license was required (Home Ins. Co. v. Lowenthal [Miss. 1904] 36 South. 1042).

(i) Statements as to value of property destroyed.

The question as to fraud and false swearing in the proofs has arisen most frequently where the value of the property destroyed, as estimated by the insured in the proofs, was greater than the actual value. The rule as to innocent mistake has been held particularly applicable to this class of cases. Value is necessarily a matter of judgment, and, furthermore, a matter of judgment in which each person is prone to err by overestimating his own. Of course, an overvaluation is an evidence of fraud, but it does not amount to fraud where it expresses the bona fide opinion of the insured.

The following cases are illustrative of such principles: Mack v. Lancashire Ins. Co. (C. C.) 4 Fed. 59; Putnam v. Commonwealth Ins. Co. (C. C.) 4 Fed. 753; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200; Huchberger v. Providence Washington Ins. Co., 12 Fed. Cas. 795, affirmed 79 U. S. 164, 20 L. Ed. 364; Huchberger v. Merchants' Fire Ins. Co., 12 Fed. Cas. 794, affirmed 79 U. S. 164, 20 L. Ed. 364; Howell v. Hartford Fire Ins.

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Co., 12 Fed. Cas. 700; American Cent. Ins. Co. v. Ware, 65 Ark. 336, 46 S. W. 129; Clark v. Phœnix Ins. Co., 36 Cal. 168; Franklin Ins. Co. v. Culver, 6 Ind. 137; Stone v. Hawkeye Ins. Co., 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870; Erb v. German-American Ins. Co., 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; Petty v. Mutual Fire Ins. Co., 111 Iowa, 358, 82 N. W. 767; Goldstein v. St. Paul Fire & Marine Ins. Co., 124 Iowa, 143, 99 N. W. 696; Marchesseau v. Merchants' Ins. Co., 1 Rob. (La.) 438; Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216; Guma v. Hope Ins. Co., 16 La. Ann. 415; Beck v. Germania Ins. Co., 23 La. Ann. 510; Erman v. Sun Mut. Ins. Co., 35 La. Ann. 1095; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Hilton v. Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412; Goldstein v. Franklin Mut. Fire Ins. Co., 170 Mass. 243, 49 N. E. 115; Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5; Walker v. Phœnix Ins. Co., 62 Mo. App. 209; Gerhauser v. North British Mercantile Ins. Co., 7 Nev. 174; Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Owens v. Holland Purchase Ins. Co., 1 Thomp. & C. (N. Y.) 285, affirmed (1874) 56 N. Y. 565; Hickman v. Long Island Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 374; Dolan v. Ætna Ins. Co., 22 Hun (N. Y.) 396; Storm v. Phenix Ins. Co., 61 Hun, 618, 15 N. Y. Supp. 281, judgment affirmed in memorandum opinion (1892) 133 N. Y. 656, 31 N. E. 625; Cheever v. Scottish Union & National Ins. Co., 86 App. Div. 328, 83 N. Y. Supp. 730; Insurance Co. of North America v. Melvin, 1 Walk. (Pa.) 362; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Pelican Ins. Co. v. Schwartz (Tex. Sup.) 19 S. W. 374; Phœnix Ins. Co. v. Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930; Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889; Beyer v. St. Paul Fire & Marine Ins. Co., 88 N. W. 57, 112 Wis. 138.

Where, however, the overvaluation is knowingly made for the purpose of securing that to which the insured is not entitled, it will forfeit the policy under the clause as to fraud and false swearing.

Reference may be made to the following: Geib v. International Ins. Co., 10 Fed. Cas. 157; Howell v. Hartford Fire Ins. Co., 12 Fed. Cas. 700; Huchberger v. Merchants' Fire Ins. Co., 12 Fed. Cas. 794, affirmed 79 U. S. 164, 20 L. Ed. 364; Huchberger v. Providence Washington Ins. Co., 12 Fed. Cas. 795, affirmed in 79 U. S. 164, 20 L. Ed. 364; Shaw v. Scottish Commercial Ins. Co., 21 Fed. Cas. 1197; Sibley v. St. Paul Fire & Marine Ins. Co., 22 Fed. Cas. 60; Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 South. 253; Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575; Hickman v. Long Island Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 374; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; F. Dohmen Co. v. Niagara Fire Ins. Co. of City of New York, 96 Wis. 38, 71 N. W. 69.

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And the overvaluation may be so great as to preclude any other conclusion than that it was intentional.

Gerhauser v. North British Mercantile Ins. Co., 7 Nev. 174; Sternfield v. Park Fire Ins. Co., 50 Hun, 262, 2 N. Y. Supp. 766; Anibal v. Insurance Co. of North America, 84 App. Div. 634, 82 N. Y. Supp. 600.

It is not essential that the truth of the affidavit as to value be established by direct evidence (Marchesseau v. Merchants' Ins. Co., 1 Rob. [La.] 438). But where there is a discrepancy between the alleged and the real value, it is incumbent on the insured to show that such discrepancy was the result of an innocent mistake.

Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216; Israel v. Teutonia Ins. Co., 28 La. Ann. 689.

While it is held in Probst v. American Cent. Ins. Co., 64 Mo. App. 408, and Burge Bros. v. Greenwich Ins. Co., 80 S. W. 342, 106 Mo. App. 244, that the tax lists given by the insured, fixing the value of the property at a much smaller sum than that stated in the proofs of loss, are a proper subject of inquiry in determining the question of fraud, yet it is also held in the Burge Bros. Case that such a discrepancy is not conclusive, but subject to explanation, and the value of a building in which the insured goods were situated is not only inconclusive, but entirely incompetent to prove a fraudulent overestimate of the insured property, though the building, also, was insured (Ward v. Washington Ins. Co., 19 N. Y. Super. Ct. 229).

(j) Statements as to title and interest—Incumbrances.

A mistaken statement in the proofs as to interest or title will not forfeit the policy for fraud or false swearing where the insured is innocently ignorant that the proofs contain such statement.

This rule is illustrated by Hilton v. Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412, where the insured was illiterate, and the mistake was made by the scrivener; also, by Home Ins. Co. v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 32 L. R. A. 374, affirming 64 Ill. App. 30, where there was evidence tending to show that the insured was misled by the agent as to the contents of the affidavit. In Parker v. Amazon Ins. Co., 34 Wis. 363, the haste of the insured in preparing the affidavit was held to excuse his ignorance of a mistake therein; and in Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113, there seem to have been no special circumstances ex-

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cusing the failure of the insured to read the affidavit, except that it was prepared by the adjuster.

On the other hand, it was held in Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358, that the failure of the insured to read an affidavit prepared by a representative of the company would not change the effect of a false statement therein as to the title.

So, also, where the statement as to ownership is practically correct, or where the insured believes that the statement made correctly gives the information requested, no fraud or false swearing can be imputed, though it may not be technically accurate.

Reference may be made to the following: West Coast Lumber Co. v. State Investment & Ins. Co., 98 Cal. 502, 33 Pac. 258; Carey v. Home Ins. Co., 97 Iowa, 619, 66 N. W. 920; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Walsh v. Philadelphia Fire Ass'n, 127 Mass. 383; Clement v. British America Assur. Co., 141 Mass. 298, 5 N. E. 847; Rohrbach v. Ætna Ins. Co., 62 N. Y. 613; Insurance Co. of North America v. Wicker, 55 S. W. 740, 93 Tex. 390; Medley v. German Alliance Ins. Co. (W. Va.) 47 S. E. 101.

Where, however, the insured knowingly, and with no excuse appearing, makes a false statement in the proofs as to the title, his claim will be forfeited (Gettleman v. Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627).

The same principles govern a failure of the proofs to mention incumbrances. If, as in Security Ins. Co. v. Bronger, 6 Bush (Ky.) 146, and Fitzgerald v. Atlanta Home Ins. Co., 70 N. Y. Supp. 552, 61 App. Div. 350, affirmed without opinion 175 N. Y. 494, 67 N. E. 1082, the omission is knowing and willful, no recovery can be had, but, where it is not of such character, the claim will not be forfeited (Jacoby v. North British & Mercantile Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226). Under this principle a mistaken belief by the insured that a certain claim does not constitute a lien against the property will excuse a failure to mention such claim in the proofs.

Dresser v. United Farmers' Ins. Co., 45 Hun (N. Y.) 298; Thierolf v. Universal Fire Ins. Co., 110 Pa. 37, 20 Atl. 412; Phœnix Ins. Co. v. Swann (Tex. Civ. App.) 41 S. W. 519.

(k) Miscellaneous instances of fraud or false swearing.

Where a subsequent policy never effects any actual insurance on account of the existence of the first policy, there is no fraud in stat-

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ing, in proofs under the first policy, that there is no other insurance (Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625). On the other hand, it was held in Weide v. Germania Ins. Co., 29 Fed. Cas. 594, and Wiede v. Ins. Co. of North America, 29 Fed. Cas. 1149, that false statements made with intent to deceive the company, relative to the terms of settlement with other companies having risks on the property, constituted fraud, so as to defeat any recovery.

Fraud will not be imputed on account of erroneous statements in an examination of the insured under oath after a loss, where it appears that it was made before a special agent of the company at a late hour of the night and during the illness of the insured (Shaw v. Scottish Commercial Ins. Co., 21 Fed. Cas. 1197). So, also, in Beyer v. St. Paul Fire & Marine Ins. Co., 88 N. W. 57, 112 Wis. 138, account was taken of the fact that the insured was an uneducated woman, and that the examination by the company after the loss was very rigid.

Where the insured in his proofs simply stated the amount claimed, without designating any payee, and named himself as sole owner, which was true, it was held that he did not commit any fraud, though a portion of the claim had been transferred to another (Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 30 N. W. 497). But an actual demand by the insured for the whole sum, when a portion thereof was payable to others, forfeited all claims under a policy providing that fraud should have such an effect (Lewis v. Council Bluffs Ins. Co., 63 Iowa, 193, 18 N. W. 888). In Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600, 31 N. W. 948, it was held that one who had insured in a company which was insolvent, and had subsequently insured the same property in another company, with notice to such company of the prior insurance, and whose claim had been disputed by the second company, might claim the entire loss from each company without being guilty of fraud. Under such circumstances it would be doubtful whether the insured could recover from either, or with whom he would have the best chance.

Where the contract is as yet merely oral, the payment of the premium after a loss, and without notifying the company thereof, will not amount to a fraud. The insured in such case owes no duty in the matter, and his silence is neither to his advantage or disadvantage.

Firemen Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540; Worth v. German Ins. Co., 64 Mo. App. 583.

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(I) Forfeiture of entire policy.

Where there is a provision that the policy, or all claims under it, shall be forfeited in case of fraud or false swearing, any violation of such provision will result in the complete forfeiture of the policy and all claims thereunder, though the fraud related only to one of several subjects of insurance, insured in separate amounts.[1] The contract of insurance especially demands good faith, and it is reasonable to assume that the insured, having been proved guilty of fraud in one instance, has been guilty of it in others which the company has not been able to prove.

In the following cases the provision was for the forfeiture of the policy, or the entire policy: German Ins. Co. v. Reed, 13 Ky. Law Rep. 207; Hamberg v. St. Paul Fire & Marine Ins. Co., 68 Minn. 335, 71 N. W. 388; Hall v. Western Underwriters' Ass'n (Mo. App. 1904) 81 S. W. 227, 106 Mo. App. 476; Fowler v. Phœnix Ins. Co. of Hartford, Conn., 35 Or. 559, 57 Pac. 421; Home Ins. Co. v. Connelly, 56 S. W. 828, 104 Tenn. 93.

In the following it was provided that "all claims" should be forfeited: Dolloff v. Phœnix Ins. Co., 82 Me. 266, 19 Atl. 396, 17 Am. St. Rep. 482; Moore v. Virginia Fire & Marine Ins. Co., 28 Grat. (Va.) 508, 26 Am. Rep. 373; Moore v. Firemen's Fund Ins. Co., 28 Grat. (Va.) 524; Woraçhek v. New Denmark Mut. Home Fire Ins. Co., 102 Wis. 88, 78 N. W. 411.

A contrary doctrine is stated in Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180, where the court held that there was in fact no issue raised as to fraud or false swearing, but that, if there had been, the refusal of the lower court to recognize it was harmless, since the evidence in relation thereto pertained solely to a portion of the goods made a separate subject of insurance, and for which no recovery was had.

In Sullivan v. Hartford Fire Ins. Co., 89 Tex. 665, 36 S. W. 73, it was held that under Rev. St. Tex. 1895, art. 3089, providing that a policy upon realty should be a "liquidated demand" for the amount named after loss, a fraudulent overestimate of personalty insured with realty would not affect the insurance as to the realty. Since, under the statute, fraud as to the house could not be permitted to forfeit the insurance, therefore it followed, in the opinion of the court, that the clause was not in any manner applicable to the insurance of the realty. In Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200, an opposite conclusion was reached as to the effect of the Wisconsin statute providing that

[1] As to entire and severable contracts, see ante, vol. 2, p. 1894.

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the amount for which realty was insured should be conclusive evidence of the amount of loss. Though the statute would not permit a forfeiture as to the realty, based on an overestimate by the insured as to the value thereof, yet, in the opinion of the court, such fact did not prevent a forfeiture of the insurance of the realty by fraud in overestimating the value of the personalty, and the overestimate of the value of the realty might be considered in determining the intent in the overestimate of the personalty.

(m) Questions of practice.

Since, in the absence of an express stipulation, fraud or false swearing in the proofs will not forfeit the policy, it is incumbent on defendant to allege the existence of such a clause.

Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Ganser v. Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584.

And in the code states of Indiana and New York it has been further held that fraud and false swearing were not sufficiently pleaded by a general denial.

Phœnix Ins. Co. v. McAtee (Ind. App. 1904) 70 N. E. 947; Cheever v. British America Ins. Co., 86 App. Div. 333, 83 N. Y. Supp. 728.

In other cases in code states, answers attempting to specifically allege fraud have been held subject to demurrer for failing to contain allegations of all the necessary elements of the fraud.

Greiss v. State Inv. & Ins. Co., 98 Cal. 241, 33 Pac. 195; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315.

In New York, even prior to the adoption of the Code, a plea was held insufficient for failing to specifically state that the fraud was in the proofs of loss, and committed by the insured (Ferriss v. North American Fire Ins. Co., 1 Hill, 71). So, also, it has been held in Alabama that a plea setting up false swearing in the proofs must specifically allege that the false swearing was willful (Tubb v. Liverpool & L. & G. Ins. Co., 106 Ala. 651, 17 South. 615).

On the other hand, it has been held in Illinois that proof of fraud may be given under the general issue, when the action is in assumpsit (Home Ins. Co. v. Field, 42 Ill. App. 392); and in Tennessee that the proof may be given under a plea of nil debet in an action of debt (Phœnix Ins. Co. v. Munday, 5 Cold. 547).

Under the Civil Code of Kentucky a failure of plaintiff to reply to allegations of willfully false statements in the proofs of loss

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amounts to an admission of the charge (Johnson v. Connecticut Fire Ins. Co., 84 Ky. 470, 2 S. W. 151). But in Texas, if the insurer seeks to avoid liability by reason of false swearing of the insured, it is not necessary for the insured to plead that the false statement was unintentional, to enable him to introduce evidence to that effect (Phœnix Ins. Co. v. Swann [Tex. Civ. App.] 41 S. W. 519).

Where the pleadings fail to raise any issue as to fraud or false swearing, evidence properly admitted as bearing on the amount of loss cannot be considered as establishing fraud.

Greiss v. State Inv. & Ins. Co., 98 Cal. 241, 33 Pac. 195; Cheever v. British America Ins. Co., 86 App. Div. 333, 83 N. Y. Supp. 728.

But in Hamberg v. St. Paul Fire & Marine Ins. Co., 68 Minn. 335, 71 N. W. 388, it was held that, where the question was litigated without objection, an error in submitting the issue was not rendered harmless by the fact that no defense was pleaded as to fraud or false swearing.

Primarily, and as a general rule, it is for the jury to say whether there has been any fraud or false swearing.

The following cases declare such to be the rule: Republic Fire Ins. Co. v. Weide, 81 U. S. 375, 20 L. Ed. 894; Tubbs v. Liverpool & London & Globe Ins. Co., 106 Ala. 651, 17 South. 615; Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; Stone v. Hawkeye Ins. Co., 68 Iowa, 737, 28 N. W 47, 56 Am. Rep. 870; Petty v. Mutual Fire Ins. Co. of Des Moines, 111 Iowa, 358, 82 N. W. 767; Garner v. Mutual Fire Ins. Co. (Iowa) 86 N. W. 289; Goldstein v. St. Paul Fire & Marine Ins. Co., 124 Iowa, 143, 99 N. W. 696; Western Assur. Co. v. Ray, 105 Ky. 523, 49 S. W. 326; Israel v. Teutonia Ins. Co., 28 La. Ann. 689; Williams v. Phœnix Fire Ins. Co., 61 Me. 67; Schulter v. Merchants' Mut. Ins. Co., 62 Mo. 236; Fink v. Lancashire Ins. Co., 66 Mo. App. 513; Dolan v. Ætna Ins. Co., 22 Hun (N. Y.) 396.

Attention should, however, in this connection, be called to the numerous cases already cited in which the policies have been held forfeited by the fraud of insured, and which plainly assume that here, as in other cases involving a fraudulent intent, there is a point where the question of fraud or false swearing becomes one of law, and beyond which the insured cannot be heard to say that his intent was innocent. Most of the questions involved are, indeed, but varying forms of the question as to whether the fraud has been conclusively shown.

The proofs of loss are, of course, relevant to a defense that plaintiff swore falsely therein (Hennessy v. Niagara Fire Ins. Co., 8

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Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892). Likewise, a trial balance taken by the bookkeeper of insured shortly before the fire is admissible to show the data on which insured made up his proofs (Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013). But a memorandum was held to have been properly rejected which was in effect an argument in writing, alleged to have been made by an expert bookkeeper, and which was offered by the insurer as "documentary evidence" to prove that the proofs of loss submitted by the insured were incorrect (Morris v. Imperial Ins. Co. of London, 106 Ga. 461, 32 S. E. 595). Evidence of drunkenness and idleness on the part of insured after the fire is inadmissible to show that he misrepresented the amount of the loss (Phœnix Ins. Co. v. Padgitt [Tex. Civ. App.] 42 S. W. 800).

The authorities are unanimous in holding that **the burden of proving the fraud is on the company.**

> **Reference may be made to Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.) 31 Fed. 200; Huchberger v. Merchants' Fire Ins. Co., 12 Fed. Cas. 794; Huchberger v. Home Fire Ins. Co., 12 Fed. Cas. 793; Sibley v. St. Paul Fire & Marine Ins. Co., 22 Fed. Cas. 60; Whittle v. Farmville Ins. Co., 29 Fed. Cas. 1126; Wiede v. Insurance Company of North America, 29 Fed. Cas. 1149; Tubb v. Liverpool & L. & G. Ins. Co., 106 Ala. 651, 17 South. 615; Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; Garner v. Mutual Fire Ins. Co. (Iowa) 86 N. W. 289; Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 South. 253; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.**

But as to the amount of proof required to establish the fraud, there is not the same unanimity. In one case it has been held that the evidence must be either direct and positive, or the circumstances must be convincing, and admitting no other natural conclusion (Huchberger v. Home Fire Ins. Co., 12 Fed. Cas. 793); in another, that, since the defense imputes a crime, it must be proved beyond a reasonable doubt (Cochran v. Amazon Ins. Co., 7 Ohio Dec. 276, 2 Wkly. Law Bul. 54). The Supreme Court of Michigan, on the other hand, expressly decided that an instruction that "proof of fraud should be of such a character as to be inconsistent with any other view than that the insured was guilty of fraud" was erroneous, since it required fraud to be established beyond a rea-

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sonable doubt (Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502).

The instructions are sufficient if they substantially lay down the law, and they need not draw fine and subtle distinctions as to the amount of evidence required to establish the fraud (Moyers v. Columbus Banking & Ins. Co., 64 Miss. 48, 8 South. 205), or as to what will constitute fraud or attempt to defraud (Siltz v. Hawkeye Ins. Co., 71 Iowa, 710, 29 N. W. 605). But in Gerhauser v. North British Mercantile Ins. Co., 6 Nev. 15, an instruction merely stating that the policy could be forfeited for fraud was held to be too weak.

Where fraudulent overvaluation of plaintiff's stock was claimed, and it appeared that the stock had been shipped from one town to another on removal by plaintiff, a special interrogatory which sought to have the jury find whether all the goods claimed to have been destroyed by plaintiff were placed in his stock at the place to which he removed was held not objectionable as being equivalent to a general finding for plaintiff or defendant on the issue. Nevertheless, it was proper to refuse to submit to the jury interrogatories having reference chiefly to the size of the boxes in which plaintiff's goods were shipped, the net weight of the goods, and other items of that nature, where those facts were not issues in the case. (Goldstein v. St. Paul Fire & Marine Ins. Co., 99 N. W. 696, 124 Iowa, 143.)

7. EFFECT OF PROOFS OF LOSS.

(a) Proofs of loss as admissions by insured—Corrections and explanations.
(b) Conclusiveness of proofs—Effect of mistake.
(c) Same—Mistake misleading insurer.
(d) Same—Fraud of company or agent.
(e) Proofs as evidence against the insurer.

(a) Proofs of loss as admissions by insured—Corrections and explanations.

Statements contained in the notice and proofs furnished by the insured to the company are considered as admissions by the insured, and admissible against him as evidence of the facts therein recited. The question as to the admissibility of such statements

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has not been often questioned, the contentions having arisen as to the conclusiveness of such statements.

The rule has, however, been directly stated in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398, affirming (C. C.) 26 Fed. 596; North American Fire Ins. Co. v. Zaenger, 63 Ill. 464; Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; New York Cent. Ins. Co. v. Watson, 23 Mich. 486; New Orleans Ins. Co. v. O'Brian, 8 Ky. Law Rep. 785; Cumberland Mut. Fire Ins. Co. v. Giltinan, 48 N. J. Law, 495, 7 Atl. 424, 57 Am. Rep. 586; Miaghan v. Hartford Fire Ins. Co., 24 Hun (N. Y.) 58.

Where, prior to action on the policy, the insured notifies the company that there has been a mistake, and that the proofs furnished were incorrect, he may introduce evidence to show the mistake, and will not be conclusively bound by the statements in the proofs originally furnished.

Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South, 297; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Waldeck v. Springfield F. & M. Ins. Co., 53 Wis. 129, 10 N. W. 88.

No presumptions as to the meaning of the proofs will be indulged as against the insured. So long as the evidence which he seeks to introduce is not directly contradictory to the proofs, no objection can be made by the company on the ground of estoppel.

Hanover Fire Ins. Co. v. Parrotte, 47 Neb. 576, 66 N. W. 636; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111, referring to McMaster v. Insurance Co. of North America, 55 N. Y. 229, 14 Am. Rep. 239; White v. Royal Ins. Co., 149 N. Y. 485, 44 N. E. 77, affirming (City Ct. Brook. 1894) 8 Misc. Rep. 613, 29 N. Y. Supp. 823.

In McMaster v. Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239, affirming 64 Barb. 536, it was even held that since a statement in the proofs that there was other insurance did not include a statement that such other insurance was taken by plaintiff, and did not, therefore, constitute a complete defense, plaintiff might contradict the assumption that the other insurance was taken by him, by showing that in fact no other insurance was taken at all. So, also, in Mickey v. Burlington Ins. Co., 35 Iowa, 174, 14 Am. Rep. 494, it was held that the insured could explain the sense in which the words were used and the meaning intended to be conveyed thereby, at least where the company had not acted upon the admissions thus explained.

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(b) Conclusiveness of proofs—Effect of mistake.

Are the statements in the proofs of loss conclusive on the insured, so as to estop him from showing that they are erroneous? The weight of authority undoubtedly supports the principle that, **if the insurer has not been misled by the mistake to his detriment, the insured will not be estopped to show the truth, and that the erroneous statement was made by mistake.** This is true, though there has been no fraud on the part of the company, and it does not affect the rule whether the mistake is as to the value and amount of the property destroyed, or as to the existence of some alleged circumstance which, if true, would have vitiated the policy.

The rule is supported by numerous cases. In the following the company was not injured by the mistake, as it had not accepted the value first stated and paid the loss: Ætna Ins. Co. v. Stevens, 48 Ill. 31; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; Corkery v. Security Fire Ins. Co., 99 Iowa, 382, 68 N. W. 792; Schmidt v. Mutual City & Village Fire Ins. Co., 55 Mich. 432, 21 N. W. 875; Sibley v. Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473; American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Charlotte Schild v. Phœnix Ins. Co., 6 Ohio N. P. 134.

In the following cases stress was not placed so much on the fact of nonpayment under the first proofs as upon the clause making the actual loss the measure of the company's liability: Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598, affirming 27 Ill. App. 17; Names v. Union Ins. Co., 74 N. W. 14, 104 Iowa, 612; New Orleans Ins. Co. v. O'Brian, 8 Ky. Law Rep. 785; Miaghan v. Hartford Fire Ins. Co., 24 Hun (N. Y.) 58; Rockey v. Firemen's Ins. Co., 83 App. Div. 638, 82 N. Y. Supp. 120; Hoffman v. Ætna Fire Ins. Co., 24 N. Y. Super. Ct. 501; Lebanon Ins. Co. v. Kepler, 106 Pa. 28; Brumbaugh v. Home Mut. Fire Ins. Co., 20 Pa. Super. Ct. 144; Bentley v. Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. 584; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. In this connection, see, also, Platt v. Continental Fire Ins. Co., 62 Vt. 166, 19 Atl. 637, where it was held that, whatever the rule might be as to the insured, an assignee for the benefit of creditors would not be bound by a compromise entered into by the insured, and forming part of the proofs of loss, already furnished by the insured, but that he might both rely on such proofs as a compliance with the policy, and recover the full amount of the loss.

In the following cases the erroneous statement would, if true, have vitiated the policy: Germania Fire Ins. Co. v. Curran, 8 Kan. 9 (in this case the erroneous statement was made in the preliminary examination of insured by the company); Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 130; Mead v. American Fire Ins. Co., 43 N. Y. Supp. 834, 13 App. Div. 476; Parmelee v. Hoffman Fire Ins. Co., 54 N.

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Y. 193; Smiley v. Citizens' Fire, Marine & Life Ins. Co., 14 W. Va. 33. See, also, in this connection, Schulter v. American Cent. Ins. Co., 1 Mo. App. 285, in which it was held that the trial judge was not even bound to charge that the statement in the proofs was prima facie true as against the insured.

It seems scarcely necessary to add, as was done in McMaster v. Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239, that the proofs do not become such a part of the contract that evidence differing therefrom can only be given in an action for their reformation. And of course, if the proofs sworn to by the insured are not binding on him, the certificate of a magistrate furnished with them will not be (Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598, affirming 27 Ill. App. 17); nor will the proofs furnished to another company (Brumbaugh v. Home Mut. Fire Ins. Co., 20 Pa. Super. Ct. 144).

(c) Same—Mistake misleading insurer.

If the company has been induced to change its position by the mistake, the insured will be bound thereby. Thus, in Case v. Manufacturers' Fire & Marine Ins. Co., 82 Cal. 263, 21 Pac. 843, where the company, acting under a statement as to the amount of loss, had let pass the time within which it might demand arbitration in relation thereto, the insured was held estopped at the trial to claim a larger loss. And where the statement as to value consisted of a deliberate adoption of one of two appraisals made of the property, and no other evidence as to value except such appraisals was introduced, the insured was bound by the choice made by him and supported by his oath (Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502). The case of Innes v. Alliance Mut. Ins. Co., 3 N. Y. Super. Ct. 310, seems also to proceed on the theory that the insured is bound, to a certain extent at least, by his proofs. In that case it was decided that the regularity of a survey introduced as part of the proofs of loss could not be questioned by the insured.

In Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124, and Smiley v. Citizens' Fire, Marine & Life Ins. Co., 14 W. Va. 33, directly opposite conclusions were reached as to whether the insured could fix the company's liability by proof that the loss was really caused by a different risk than the one stated in the proofs originally furnished the company. In the former it was held, without much discussion, that the evidence was not admissible

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without prior notice served on the company. In the latter the evidence was admitted on the ground that the liability of the company was fixed by the loss, and not by the proofs, which only determined when the loss was payable.

But aside from any special circumstances, or questions as to cause of loss, it has been directly held in Campbell v. Charter Oak Fire & Marine Ins. Co., 10 Allen (Mass.) 213, and Irving v. Excelsior Fire Ins. Co., 14 N. Y. Super. Ct. 507, that the insured cannot, on the trial, introduce evidence to contradict a statement in the proofs which, if true, would forfeit the policy. The statement of the Irving Case was, however, expressly disapproved as dictum in McMaster v. Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239, and the Campbell Case proceeds on the theory that a false statement in the proofs renders them insufficient as such. The insured was thus, in the opinion of the court, placed between the horns of a dilemma. If the proofs were true, he could not recover on account of the other insurance. If they were not true, he could not recover on account of insufficient proofs. No other case, however, seems to have taken just this position.

(d) Same—Fraud of company or agent.

Of course, where the mistake in the proofs has been induced by the fraud or misconduct of the company, the insured will not be bound my such mistake.

> Cook v. Lion Fire Ins. Co., 67 Cal. 368, 7 Pac. 784; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273, 15 N. W. 452; Zielke v. London Assur. Corp., 64 Wis. 442, 25 N. W. 436.

And this is doubly true as to an assignee representing creditors of the insured, the insured having, in connivance with the company, included a fraudulent compromise in the proofs (Platt v. Continental Fire Ins. Co., 62 Vt. 166, 19 Atl. 637). Under the same principle it has been held that, where the proofs were in reality prepared by the company's agent, the statements contained therein were not conclusive on the insured (Crittenden v. Springfield Fire & Marine Ins. Co., 85 Iowa, 652, 52 N. W. 548, 39 Am. St. Rep. 321).

(e) Proofs as evidence against the insurer.

It may be stated, as a general rule, that the proofs of loss, as such, are not admissible, as against the company, to prove the

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statements therein contained. Thus, it has been held that they are not admissible to prove the amount of the loss.

Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Schilansky v. Merchants' & Manufacturers' Fire Ins. Co. (Del. Super.) 55 Atl. 1014, 4 Pennewill, 293; German Ins. Co. v. Bear, 63 Ill. App. 118; Edgerly v. Farmers' Ins. Co., 48 Iowa, 644; Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Citizens' Fire Ins., Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Newmark v. Liverpool & L. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371; Bowne v. Hartford Fire Ins. Co., 46 Mo. App. 473; Summers v. Home Ins. Co., 53 Mo. App. 521; Sexton v. Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191; Klein v. Franklin Ins. Co., 13 Pa. 247; Lycoming Ins. Co. v. Schreffler, 42 Pa. 188, 82 Am. Dec. 501; Kittanning Ins. Co. v. O'Neill, 110 Pa. 548, 1 Atl. 592; Farrell v. Ætna Fire Ins. Co., 7 Baxt. (Tenn.) 542; Cascade Fire & Marine Ins. Co. v. Journal Pub. Co., 1 Wash. St. 452, 25 Pac. 331.

It has even been asserted that the proofs are not admissible to prove the fact of loss.

Schilansky v. Merchants' & Manufacturers' Fire Ins. Co. (Del. Super.) 55 Atl. 1014, 4 Pennewill, 293; Neese v. Farmers' Ins. Co., 55 Iowa, 604, 8 N. W. 450; Citizens' Fire Ins., Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Breckinridge v. American Cent. Ins. Co., 87 Mo. 62; Thurston v. Murray, 3 Bin. (Pa.) 326.

Nor does the introduction of the proofs in evidence by the company, for the purpose of showing fraud therein, render them evidence against the company as to the truth of the statements therein contained.

Browne v. Clay Fire & Marine Ins. Co., 68 Mo. 133; Howard v. City Fire Ins. Co., 4 Denio (N. Y.) 502.

The fact that proofs were received is, however, sufficient to negative a denial of sufficient knowledge or information to form a belief as to the alleged loss (Schaetzel v. Germantown Farmers' Mut. Fire Ins. Co., 22 Wis. 412).

A separate report of the loss, made out by the company's agent for the purpose of testing the fairness of the insured's claim, is not admissible against the company, though it is also accompanied by the affidavit of the insured (Lycoming County Mut. Ins. Co. v. Schreffler, 44 Pa. 269). And in Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499, it is held that, if it is

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sought to bind the company by the amount of loss stated in proofs prepared by its agent, it must at least be shown that the agent had authority from the company to prepare the proofs in place of the insured.

The retention of proofs by the insurer without objection may, however, be considered as evidence of acquiescence in the amount of loss stated therein.

Theodore v. New Orleans Ins. Ass'n, 28 La. Ann. 917; Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

But the failure of the company to object specifically save upon one ground, when proofs were made, merely prevented the company from objecting to the sufficiency of such proof upon other grounds, and the company did not, therefore, by such action, confess the full amount of loss as set forth in the proofs (Kuznik v. Orient Ins. Co., 73 Ill. App. 201).

Though the proofs as such are not admissible in behalf of the insured, they may, after proper testimony has been given as to their accuracy, be admitted as a schedule of the property destroyed.

Names v. Union Ins. Co., 74 N. W. 14, 104 Iowa, 612; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 206; Allegheny Ins. Co. v. O'Hanlon, 1 Walk. (Pa.) 359. See, also, in this connection, Bini v. Smith, 55 N. Y. Supp. 842, 36 App. Div. 463, and Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47, where the proofs were held competent to refresh the memory of the witness as to the amount of the loss.

It was held in Bini v. Smith, 55 N. Y. Supp. 842, 36 App. Div. 463, and Sutton v. American Fire Ins. Co., 188 Pa. 380, 41 Atl. 537, that in the absence of an objection to the admission of the proofs as evidence of the amount of loss, or a request that they be disregarded in that connection, a verdict might be founded thereon. On the other hand, it was stated in Hiles v. Hanover Fire Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637, that such a doctrine was most unjust, since very few lawyers would suspect that, because no objection was made to the admission of evidence competent for some purposes, it could be used to prove other matters as to which it was clearly incompetent. It has also been held that the omission to charge that the proofs were not evidence of value, although requested by the defendant, did not constitute an error, where they never were referred to on the trial as evidence, and the value was elaborately argued on both sides on wholly different

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grounds (Shaw v. Scottish Commercial Ins. Co. [C. C.] 1 Fed. 761). It was, however, intimated in Healy v. Insurance Co. of State of Pennsylvania, 63 N. Y. Supp. 1055, 50 App. Div. 327, that the distinction between the proofs as evidence of their having been furnished, and as evidence of the truth of the statements therein contained, should properly be drawn by instructions. It was not, therefore, error, in the opinion of that court, for the judge, when the proofs were admitted, to refuse to rule as to the purposes for which they might be used.

8. NECESSITY AND SUFFICIENCY OF NOTICE AND PROOFS OF DEATH OR INJURY.

(a) Necessity of notice and proofs.
(b) Person by whom proofs may be furnished.
(c) Service of notice and proofs.
(d) Sufficiency of proofs—Facts to be proved.
(e) Same—Amount and kind of proof.
(f) Same—Certificate and affidavits.
(g) Examination of body.
(h) Matters peculiar to mutual benefit associations.
(i) Questions of practice.

(a) Necessity of notice and proofs.

In the absence of some express provision, no preliminary proofs of the death or injury of an insured person need be furnished the company in order to render the insurance of effect.

Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460; Pennsylvania Mut. Aid Soc. v. Corley, 2 Penny. (Pa.) 398, 39 Leg. Int. 139.

But, as a rule, life and accident policies require notice and proof of the death or injury and the cause thereof. This provision assumes various forms, and its effect, of course, varies with the wording of the stipulation. **Where it is provided that no claim shall be paid under the policy until the required notice and proofs have been provided, the furnishing of such notice and proofs constitutes a condition precedent to any liability by the company.**

Independent Order of Mutual Aid v. Paine, 17 Ill. App. 572; Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631; Supreme Lodge of Order of Select Friends v. Raymond, 57 Kan. 647, 47 Pac. 533; Clanton v. Travelers' Protective Ass'n, 101 Mo. App. 312, 74 S. W. 510.

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A provision making the loss payable a certain time after the furnishing of proofs of death also renders their production a condition precedent to liability by the company.

National Ben. Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233; Life Assur. Co. of America v. Haughton, 31 Ind. App. 626, 67 N. E. 950; Harrison v. Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

And where a policy containing such a provision has been suspended but not abrogated by war, during which the insured died, the notice of death must be given upon the termination of the war (Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r, 28 Grat. [Va.] 630).

Where, however, it was stipulated that the insurance should be paid "immediately upon receipt and approval of proofs of the death and cause of death," and also that the "proofs of death" should be furnished at a particular time and place and in particular form, without further mention of proof of the cause of death, and where the policy covered death from any cause, it was held that the failure to mention proof of the cause of death with the specifications as to proof of death amounted to a modification of the first requirement, and that proof of the cause of death was not a condition precedent (Life Assur. Co. of America v. Haughton, 67 N. E. 950, 31 Ind. App. 626).

In Hincken v. Mutual Benefit Life Ins. Co., 6 Lans. (N. Y.) 21, the court stated that the agreement to pay within a certain time after due notice and proof of death did not impose a condition precedent upon the owner of the policy, and that evidence of the notice and proof was necessary only as establishing that the time of payment had elapsed. It did not, however, appear that the distinction was essential, the point at issue being whether the introduction by defendant of evidence showing the furnishing of the proofs was sufficient to cure the error of the court in refusing a prior motion for nonsuit, based on plaintiff's failure to introduce any such evidence. And the Court of Appeals, in affirming the case (50 N. Y. 657), made no mention of the distinction.

The courts have even held the furnishing of the designated proofs to be a condition precedent, though the policy only provided that, in case of failure in that regard on the part of insured or his beneficiary, the claim should be "invalidated" (Fidelity & Casualty Company v. Brown [Ind. T.] 69 S. W. 915), or "forfeited" (Thornton v.

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Travelers' Ins. Co., 42 S. E. 287, 116 Ga. 121, 94 Am. St. Rep. 99; Travelers' Ins. Co. v. Thornton [Ga. 1904] 46 S. E. 678, 119 Ga. 455). But in Massachusetts, under a provision that all claims should be forfeited in case the proofs were not furnished, a failure to furnish such proofs was held to be a mere matter of defense (Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604). And in Utah, also, the court said that, under a provision forfeiting the certificate for a failure to furnish proofs, the delivery of such proofs was only a "condition subsequent" (Brown v. Fraternal Acc. Ass'n of America, 55 Pac. 63, 18 Utah, 265).

Where a company issues two policies upon the life of the same person, both calling for the same mode of proof of death, and satisfactory proof of death is furnished under one policy, it is not necessary, in the absence of a special contract to that effect, to furnish further proofs of loss under the second policy (Girard Life Ins., Annuity & Trust Co. v. Mutual Life Ins. Co. of New York, 97 Pa. 15). And a notice of the death may refer, for proof thereof, to affidavits filed with the company by the holder of another policy issued by the same company (Loomis v. Eagle Life & Health Ins. Co., 6 Gray [Mass.] 396).

A provision that "no claim shall be made * * * in respect to any injury, unless the same shall be caused by some outward or visible means, of which proof satisfactory can be furnished," does not require the insured to furnish proofs of the character and extent of the injury before bringing suit, but refers to the proof necessary to be made on the trial of the cause (Railway Pass. Assur. Co. of Hartford v. Burwell, 44 Ind. 460).

(b) Person by whom proofs may be furnished.

Though the claimant is a proper person to furnish the proofs, and one whose competency for that purpose is not affected by the code provisions excluding the testimony of a party to an action upon the trial thereof as to any transaction with a deceased person (Cannon v. Northwestern Mut. Life Ins. Co., 29 Hun [N. Y.] 470), yet, where a life or an accident policy does not require that the proofs be furnished by the insured or beneficiary, it is not necessary that they be so furnished, or that the person furnishing them should have been specifically requested so to do. It is sufficient that they be furnished to the company by some one on behalf of the claimant (Brown v. Fraternal Acc. Ass'n, 18 Utah, 265, 55 Pac. 63). And proofs sent even by the local agent, and on his own initiative,

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have been held sufficient (Van Eman v. Fidelity & Casualty Co., 201 Pa. 537, 51 Atl. 177). In Kelly v. Metropolitan Life Ins. Co., 44 N. Y. Supp. 179, 15 App. Div. 220, proofs furnished by a third person, who described herself therein as beneficiary, but who, it appeared, was not in fact a rival claimant, were held sufficient, in the absence of any provision to the contrary. The same case also decided that a provision that the proofs should contain answers to each and every question propounded to the claimant did not require the claimant to furnish the proofs. But in Hoffman v. Manufacturers' Accident Indemnity Co., 56 Mo. App. 301, it was decided that where an accident policy required immediate notice of accident to be given by insured or his attending physician, or, in case of death, immediate notice by the beneficiary, and provided that failure to give such notice within 10 days "of the happening of such accident" should invalidate the policy, and where the insured died 40 days after the accident, a notice given by the insured within the 10 days from the accident would not have availed the beneficiary even had it been given.

Proof may be given by the claimant through the local agent of the company.

Wright v. Vermont Life Ins. Co., 164 Mass. 302, 41 N. E. 303; American Acc. Ins. v. Norment, 91 Tenn. 1, 18 S. W. 395.

One nominally acting as guardian of infant beneficiaries, though with no authority to collect the insurance, may give the required notice and proof of death, and the availability of such proof to the beneficiaries is not affected by their repudiation of the subsequent collection of the insurance by the guardian (Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580, 14 N. E. 811, reversing 52 N. Y. Super. Ct. 208).

Where the claimant has requested a third person to deliver a notice of the accident to the company, and such third person fails so to do, such request will not shield the claimant from the consequences of the want of notice (Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460).

In two cases it has been held that proofs made by one subsequently appointed administrator are sufficient in an action brought by such administrator. In one (Delameter v. Prudential Ins. Co., 5 N. Y. Supp. 586, 52 Hun, 615) it was said that the proofs might be adopted by the administrator, though in them he had claimed as husband of the insured; in the other (Globe Acc. Ins. Co. v.

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Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486), that the grant of letters of administration related back, so that the administrator became "claimant" by relation from the time the proofs were furnished. The Gerisch Case also decided that a clause in the accident policy requiring notice of the injury by the "claimant" within seven days therefrom did not apply to a case of a claim by an administrator for an injury resulting in death on the seventh day, since in such case there could be no "claimant" within the specified time.

(c) Service of notice and proofs.

Where the policy stipulates that proofs of death shall be furnished to the secretary of the association, a complaint alleging that proofs were furnished to the association will be sufficient (Excelsior Mut. Aid Ass'n v. Riddle, 91 Ind. 84). And in Supreme Lodge of Bohemian Slavonian K. & L. v. Matejowsky, 60 N. E. 101, 190 Ill. 142, it was held that it was not necessary to prove the election to the office of secretary of one who issued the policy in that capacity, receipted for the proofs as such, and as such acted at all times during the life of the policy. But the fact that the local agent who has taken the insurance hears of the death of the insured is not sufficient under a provision requiring notice to the secretary (American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154). Nor will notice of an accident given to the insurer's surgeon constitute notice to the insurer (Crenshaw v. Pacific Mut. Life Ins. Co., 63 Mo. App. 678). But where the company has treated the agent as having authority to receive the proofs, their delivery to him will be sufficient, though the policy requires notice at the home office, and a delivery of proofs to the company (Travelers' Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178).

Evidence of the mailing of a notice properly addressed and stamped is evidence of its receipt, and constitutes a proper method of service, particularly where it is required that the notice be given "addressed to the secretary" in a distant city (McFarland v. Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436). Therefore, where there is evidence both that the notice was properly mailed and that it was not received, a conflict of evidence is presented which should be submitted to the jury (Brown v. Fraternal Acc. Ass'n, 18 Utah, 265, 55 Pac. 63). And where notice and proofs have been duly furnished and further proofs demanded, the preparation and mailing

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by the claimant of such further proofs is all that can be required of him, and a delay in their delivery, caused by a mistake in the transmission of the mails, will not affect his rights (Western Travelers' Acc. Ass'n v. Holbrook, 91 N. W. 276, 65 Neb. 469). So, also, in Dean v. Ætna Life Ins. Co., 2 Hun (N. Y.) 358, 4 Thomp. & C. 497, a sending of the proofs by mail to the president of the company at the request of the general agent, who testified that it was a common method of procedure, was held sufficient. But testimony was also admitted of an acknowledgment by the general agent of their receipt by the company, and the Court of Appeals, finding error in this, reversed the case (Dean v. Ætna Ins. Co., 62 N. Y. 642).

A requirement that "immediate notice shall be given in writing to the company at Hartford, stating," etc., and "proof shall be furnished within seven months from the happening of the accident," does not require proof of the injury to be sent to Hartford (Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618). Nor does a stipulation that the policy shall be paid at a certain place amount to a requirement that the notice and proofs shall be there made (Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306).

(d) Sufficiency of proofs—Facts to be proved.

A mere requirement for "proof of death" does not entitle the company to demand information as to the cause of the death.

Wood v. Farmers' Life Ass'n, 121 Iowa, 44, 95 N. W. 226; Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templars' & Masons' Mut. Aid Ass'n, 126 N. W. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303; Braker v. Connecticut Indemnity Ass'n, 50 N. Y. Supp. 547, 27 App. Div. 234; Van Eman v. Fidelity & Casualty Co., 30 Pittsb. Leg. J. N. S. (Pa.) 270. An implication of a contrary doctrine is found in Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. In that case the policy was conditioned to be void in case of suicide. The claimant was also required to make satisfactory proof of death, and the court, in deciding that the proofs given were sufficient, said that the insurer was entitled to demand only reasonable proof as to the cause of death.

Nor does a requirement for proof of the "justness of the claim" require proof that the death was not by suicide (Fisher v. Fidelity Mut. Life Ass'n, 41 Atl. 467, 188 Pa. 1).

Where, however, in an accident policy, notice of the accident is

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required within a certain time, notice must be given not only of the injury or death, but of the cause thereof.

Standard Life & Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604; Simons v. Iowa State Traveling Men's Ass'n, 102 Iowa, 267, 71 N. W. 254.

And under a policy requiring immediate notice of any accidental injury, each new injury covered by the policy, and aggravating an injury previously received, requires a new notice (Spicer v. Commercial Mut. Acc. Co. [Com. Pl.] 16 Pa. Co. Ct. R. 163, 4 Pa. Dist. R. 271). And additional proof must also be made in case of an additional claim for an aggravation or continuation of a disability concerning which proof has already been made (Clanton v. Travelers' Protective Ass'n, 101 Mo. App. 312, 74 S. W. 510), though, where the claim was for a continuance of disability, and the proofs first furnished showed the insured's injury and disability, it was only necessary for him, in furnishing additional proof, to show the continuation of such disability during the remaining life of the policy (Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090).

Where the only requirement is for proof of "accidental" death, without any specification as to particulars, it is sufficient that the proofs show in general the manner of the death, without entering into details (American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154). And a requirement in an accident policy that notice of total disability shall be given "in writing, addressed to the secretary," giving full particulars, and that in case of death notice shall be given "in like manner," does not require full particulars in case the accident causes death without prior total disability, since the words "in like manner" refer only to manner of giving notice (McFarland v. United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436). Where, however, there is a plain requirement for "full particulars" of the accident or death, it cannot be entirely ignored.

Standard & Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604; Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 459.

But such a provision does not require notice of an injury of which the insured was ignorant when the notice was given (Root v. London Guarantee & Accident Co., 86 N. Y. Supp. 1055, 92 App. Div. 578). And in Rhodes v. Railway Pass. Ins. Co., 5 Lans. (N. Y.) 71, a requirement for full particulars of the accident, without sup-

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pression of any material fact, was deemed to refer only to the accident insured against, and not to require notice of an accident which was not covered by the policy, though it happened subsequently to and aggravated the injury for which the claim was made.

A requirement for proof of the justness of the claim refers to proof of the title or interest of the claimant.

Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Fisher v. Fidelity Mut. Life Ass'n, 188 Pa. 1, 41 Atl. 467.

But in the absence of any requirement as to proof of interest, no proof of an assignment of the policy can be demanded of one claiming as an assignee (Braker v. Connecticut Indemnity Ass'n, 50 N. Y. Supp. 547, 27 App. Div. 234).

Neither an erroneous statement as to the date of the accident (Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896), nor as to the person entitled to the benefits (Bowen v. National Life Ass'n, 63 Conn. 460, 27 Atl. 1059), will, in the absence of a special requirement for a statement of such facts, render the proofs so insufficient as such that a recovery cannot be had thereunder, and, at least where there is no requirement for a statement as to the cause of death, the sufficiency of the proofs is not affected by a statement that the insured met his death by a cause which would exempt the company from liability.

Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Connecticut Mut. Life Ins. Co. v. Siegel, 9 Bush (Ky.) 450; Bentz v. Northwestern Aid Ass'n, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

(e) Same—Amount and kind of proof.

While a requirement for "due notice and proof" of the death is not satisfied by mere notice, but requires such reasonable evidence as will give assurance that the event has happened (O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169, 19 Am. Rep. 151, reversing [1874] 1 Hun, 460, 3 Thomp. & C. 487), yet, where it was impossible to obtain the full particulars of the murder of the insured, it was held sufficient, in making a claim under the policy, to notify the company that the death by murder occurred at a specified time.

Potter v. Union Cent. Life Ins. Co., 195 Pa. 557, 46 Atl. 111. See, also, in this connection, Mueller v. Grand Grove United Ancient Order of Druids, 69 Minn. 236, 72 N. W. 48.

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And even where the policy required "affirmative proof of death," it was held sufficient that the company had been duly notified of the death from injury on a train, and had by its surgeon taken part in the post mortem examination (Van Eman v. Fidelity & Casualty Co., 51 Atl. 177, 201 Pa. 537). A specification, indeed, for "direct" or "affirmative" proof of the happening of the contingency on which the liability of the company depends, does not require that the proof be by eyewitnesses. Better proof cannot be demanded than can be required in the trial of the case, and circumstantial evidence of a satisfactory nature is therefore sufficient.

Preferred Acc. Ins. Co. v. Barker, 93 Fed. 158, 35 C. C. A. 250; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Ætna Life Ins. Co. v. Milward, 26 Ky. Law Rep. 589, 82 S. W. 364, 68 L. R. A. 285.

A provision requiring "satisfactory" proofs does not mean that the insurer must necessarily be satisfied. It is sufficient that reasonable proof be given of those matters specified or implied in the policy.

Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; Wood v. Farmers' Life Ass'n, 121 Iowa, 44, 95 N. W. 226; Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303.

Likewise, if proofs have been furnished on the company's blanks, as required by the policy, it is immaterial that the company subsequently demanded other and additional proofs (Metropolitan Life Ins. Co. v. Mitchell, 51 N. E. 637, 175 Ill. 322).

(f) Same—Certificates and affidavits.

In the absence of an express stipulation it is not necessary that the proofs of death should contain a certificate of the attending physician.

Sun Acc. Ass'n v. Olson, 59 Ill. App. 217; Taylor v. Ætna Life Ins. Co., 13 Gray (Mass.) 434; Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 56 Hun, 303, 9 N. Y. Supp. 346.

And in order that a usage of the company to require such a certificate should be of any effect, it must at least have been known

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to the other party to the contract prior to the issuance of the policy.

Taylor v. Ætna Life Ins. Co., 13 Gray (Mass.) 434; Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303.

But where the policy stipulates that a certified copy of the evidence of any inquest on the death of insured shall be furnished, the provision is valid, and must be complied with by the claimant (Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 108 Wis. 490, 84 N. W. 851); and a statement by a physician, furnished in compliance with the company's demand, and supplemental to a prior statement made by him, becomes a part of the proofs of death (Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275).

A physician, not in practice, who is present as a friend and neighbor at the death of the insured, and examines and prescribes for him, is not necessarily an "attending physician," within the meaning of that phrase as employed in the condition of the policy requiring an affidavit of the medical attendant as part of the proofs of death (Gibson v. American Mut. Life Ins. Co., 37 N. Y. 580). And in Flynn v. Massachusetts Ben. Ass'n, 152 Mass. 288, 25 N. E. 716, the phrase, as used in that connection, was held not to include a physician who had not attended the insured for several years.

Where the requirement is for an affidavit by the beneficiary, it is not met by an affidavit of the undertaker who buried the insured (Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 459). But where the stipulation was for a certificate authenticated by the "legal authorities," a certificate signed by the mayor of a foreign city and a doctor therein was sufficient without a further authentication by the American consul (Mutual Aid & Instruction Soc. v. Monti, 59 N. J. Law, 341, 36 Atl. 666).

(g) Examination of body.

Where the policy contains a provision that an examination shall be allowed of the body of the insured after his death, a demand for such examination must be made within a reasonable time after the death.

American Employers' Liability Ins. Co. v. Barr, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444; Wehle v. United States Mut. Acc. Ass'n, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598, affirming 31 N. Y. Supp. 865, 11 Misc. Rep. 36; Ewing v. Commercial Travelers' Mut.

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Acc. Ass'n, 66 N. Y. Supp. 1056, 55 App. Div. 241, affirmed without opinion 170 N. Y. 590, 63 N. E. 1116; Root v. London Guarantee & Accident Co., 86 N. Y. Supp. 1055, 92 App. Div. 578.

In determining whether the demand has been made within a reasonable time, special emphasis has been placed on the propriety of making such a request prior, at least, to the burial of the body.

Wehle v. United States Mut. Acc. Ass'n, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598, affirming 31 N. Y. Supp. 865, 11 Misc. Rep. 36; Ewing v. Commercial Travelers' Mut. Acc. Ass'n, 66 N. Y. Supp. 1056, 55 App. Div. 241, affirmed in memorandum decision 170 N. Y. 590, 63 N. E. 1116; Root v. London Guarantee & Accident Co., 85 N. Y. Supp. 1055, 92 App. Div. 578. See, also, Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277, and Grangers' Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446, in each of which the court refused an application for the exhumation of the insured's body on the ground that such a proceeding was abhorrent to the sensibilities, and should be allowed only as a last resort, and in case due diligence had already been exercised by the company.

Another cogent reason why the demand should be made before burial is that after the burial it may be beyond the power of the beneficiary to grant the request.

American Employés' Liability Ins. Co. v. Barr, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444; Ewing v. Commercial Travelers' Mut. Acc. Ass'n, 66 N. Y. Supp. 1056, 55 App. Div. 241, affirmed in memorandum decision 170 N. Y. 590, 63 N. E. 1116. And see Root v. London Guarantee & Accident Co., 86 N. Y. Supp. 1055, 92 App. Div. 578, where it is intimated that after burial the application should be made to the relatives of the deceased rather than to the beneficiary.

The New York Court of Appeals, however, has refused to follow the superior court in holding that a provision authorizing an examination "when and as often as may be desired" would not, under any circumstances, authorize an exhumation (Wehle v. United States Mut. Acc. Ass'n, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598, reversing as to such point 31 N. Y. Supp. 865, 11 Misc. Rep. 36).

The refusal of the beneficiary, under a policy insuring against external accidental injuries, to permit a dissection of the body of insured, will not forfeit the policy under a provision requiring only that an "examination" be permitted (Sudduth v. Travelers' Ins. Co. [C. C.] 106 Fed. 822). And a notice to the company's agent of an intended autopsy is a sufficient compliance with a requirement that in case of an autopsy the company should have an opportunity

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for its medical examiner to participate (Legnard v. Standard Life & Accident Ins. Co., 81 N. Y. Supp. 516, 81 App. Div. 320). In Loesch v. Union Casualty & Surety Co., 75 S. W. 621, 176 Mo. 654, it was held, under a similar provision, that where an autopsy was held without notice to the company, but where, immediately thereafter, notice was given the company, with a suggestion that a re-examination be held, and it did not appear that such a re-examination would not have disclosed everything shown by the first examination, no forfeiture would ensue. In that case, it is true, it also appeared that the beneficiary did not understand that there was to be an autopsy, and did not knowingly consent thereto, but the decision does not seem to be based on that phase of the question.

(h) Matters peculiar to mutual benefit associations.

As a rule, the same principles which govern the furnishing of proofs to an ordinary life or accident company establish the rules for their production to a mutual benefit association. Thus, McClain's Code 1888, § 1734, providing that the assured shall give the company or association notice in writing of the loss, accompanied by an affidavit stating the facts as to how the loss occurred, applies to mutual benefit associations (Parsons v. Grand Lodge A. O. U. W. of Iowa, 78 N. W. 676, 108 Iowa, 6). And the issuance of a certificate of such an association upon condition that the insured and beneficiaries shall comply with the by-laws renders the furnishing of the proofs of death required by the by-laws a condition precedent (Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 108 Wis. 490, 84 N. W. 851). But in some particulars the organization of these associations is so peculiar that slightly varied rules have obtained. Thus, **where, by the rules of an association, it is made the duty of the local lodge or council to submit to the governing body certain specified proofs of the death of a member and the cause thereof, the rights of the beneficiary will not be affected by a failure of the local lodge to act, though there are also provisions making the payment of the claim dependent on the furnishing of the proofs.**

Millard v. Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864; National Union v. Thomas, 10 App. D. C. 277; Anderson v. Supreme Council of Order of Chosen Friends, 135 N. Y. 107, 31 N. E. 1092.

The following additional cases may be cited, though in them the provision of the contract as to the effect of a failure of proofs does

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not appear: Supreme Council of Catholic Benev. Legion v. Boyle, 10 Ind. App. 301, 37 N. E. 1105; Murphy v. Independent Order of Sons & Daughters of Jacob of America, 77 Miss. 830, 27 South. 624, 50 L. R. A. 111; Doggett v. United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26; Supreme Council American Legion of Honor v. Landers, 23 Tex. Civ. App. 625, 57 S. W. 307.

And where no testimony either way has been given, it will be presumed that the requisite proofs were furnished by the local council (Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316, 40 N. W. 545, 2 L. R. A. 206.)

It has been intimated that under such provisions it might be incumbent on the beneficiary to notify the subordinate lodge of the death (Anderson v. Supreme Council of Order of Chosen Friends, 135 N. Y. 107, 31 N. E. 1092), and possibly, if demanded, of the particulars in relation thereto (National Union v. Thomas, 10 App. D. C. 277). But in Doggett v. United Order of Golden Cross, 36 S. E. 26, 126 N. C. 477, it was decided that no more was needed than a demand for the sum due under the certificate.

Following this principle even further, it has been held that where the grand lodge failed to assess and collect a death benefit, because the subordinate lodge wrongfully refused to furnish a certificate that the deceased was one of its members in good standing, the beneficiary might collect from the subordinate lodge the full amount of the death benefit (Woelfer v. Heyneman, 2 City Ct. R. [N. Y.] 15).

Closely allied to the above cases is Young v. Grand Council of Ancient Aztecs, 63 Minn. 506, 65 N. W. 933, where it was held that a failure of the insured to present in his proofs of sickness a required certificate of the company's physician would not prevent his recovery where it appeared that the physician was unable to make the certificate, either on account of his own negligence in failing to visit the members, or on account of the negligence of the commander in failing to notify him of the illness. The insured had performed his full duty when he gave notice of his disability, and the neglect of the physician, resulting in his inability to give the certificate, could not affect the rights of the insured.

Where the laws of a benefit society provide that "further proof may be required if deemed necessary by the supreme commander," the society cannot demand further proofs, after the usual proof has been made, unless the supreme commander personally "deems" it necessary. A reference of the matter to another officer, and a demand by him for further proofs will not put the insured in default.

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(Tessmann v. Supreme Commandery of United Friends, 103 Mich. 185, 61 N. W. 261.)

(I) Questions of practice.

Where the furnishing of notice and proofs of the death or injury is made a condition precedent to recovery under the policy, the complaint must contain allegations showing a compliance with such requirement.

Independent Order of Mutual Aid v. Paine, 17 Ill. App. 572; National Benefit Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227, as modified by Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co. (W. Va.) 46 S. E. 1021.

Under statutory provisions, however, providing that a performance of conditions precedent may be pleaded by alleging generally that the party performed all the conditions on his part, the specific facts constituting performance need not be set out, but a general allegation will be sufficient.

Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Hart v. National Masonic Acc. Ass'n, 105 Iowa, 717, 75 N. W. 508; Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.[1]

And under the West Virginia statute[2] plaintiff need make no mention of the condition, even in a general way, it being incumbent on defendant to set up the breach of any condition in his notice of defense.

Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co. (W. Va.) 46 S. E. 1021 (a forfeiture case), overruling Schwarzbach v. Protective Union, 25 W. Va. 622, 25 Am. Rep. 227. And see, also, the fire case of Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

Where the policy requires "satisfactory" proofs, an allegation of performance following the words of the policy will be considered as equivalent to the allegation of "due performance" declared sufficient under the statute (Ohlsen v. Equitable Life Assur. Soc., 55 N. Y. Supp. 73, 25 Misc. Rep. 230 [Code Civ. Proc. § 533]). And an allegation of performance which, standing by itself, might be

[1] See Code Civ. Proc. Cal. § 457; Code Iowa 1897, § 3626; Rev. St. Wis. § 2674.

[2] Code W. Va. 1899, c. 125, §§ 61, 64.

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insufficient, may be helped by the further averment that the defendant, by refusing to pay, failed to comply with the terms of the certificate on its part (National Ben. Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233). But under an allegation that the proofs were waived it cannot be shown that the proofs were actually furnished, nor can a recovery under such pleadings be based on such a showing (Wallace v. Metropolitan Life Ins. Co., 14 Pa. Super. Ct. 617).

Where a failure to furnish notice and proofs of the injury or death is made a cause of forfeiture of the policy, it is incumbent on defendant to allege the breach of such condition (Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604). So, also, if the complaint states a good cause of action without showing that there was in the policy any condition as to proofs, the defendant must allege the existence of such a condition, and the facts constituting the breach thereof (Mutual Ben. Ass'n v. Nancarrow, 18 Colo. App. 274, 71 Pac. 423). In Knickerbocker Life Ins. Co. v. Schneider, 131 U. S. Append. clxxii, 25 L. Ed. 694, it was held that, where plaintiff alleged the giving of sufficient notice and proofs, and the answer contained a general denial of the allegations of the petition so far as they might give plaintiff any cause of action, followed by allegations of a special defense without any attempt at a separate pleading thereof, the denial must be understood as a denial only of the allegations of the petition inconsistent with the special defense, and that, therefore, there was no issue raised as to notice or proofs. Likewise, in Woodmen of the World v. Grace (Miss.) 28 South. 832, where plaintiff failed to allege that proofs were furnished and defendant pleaded only the general issue, it was held that, no issue as to proofs having been raised, plaintiff's failure did not justify a peremptory instruction for defendant. It is difficult, however, to determine the exact bearing of the Grace Case, since the nature of the condition as to proofs does not appear, nor whether its existence was shown by the declaration.

Under a statute stating the rule that a denial of the statutory allegation of "due performance" of conditions precedent cannot be in the terms of the allegation,[3] the facts relied on as showing the failure to give notice must be specifically set out (Hart v. National Masonic Acc. Ass'n, 105 Iowa, 717, 75 N. W. 508). But this will not be true where plaintiff has attempted to set out the facts constituting performance (Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64

[3] Code of Iowa 1873, §§ 2715, 2717 (Code 1897, §§ 3626, 3628).

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N. W. 685). Where an answer set out a condition requiring both notice and proofs, and then alleged that the condition was not complied with, it was insufficient in not specifying which condition (Evarts v. United States Mut. Acc. Ass'n, 61 Hun, 624, 16 N. Y. Supp. 27).

The proofs of loss are admissible to show a compliance by plaintiff with the requirements of the policy in regard thereto.

Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687, 65 N. W. 552; Pickett v. Metropolitan Life Ins. Co., 46 N. Y. Supp. 693, 20 App. Div. 114.

And they may be admitted though the defendant has admitted their sufficiency (John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41). Plaintiff need not, however, in proving compliance, introduce all the papers served. He may offer such as he chooses (Heaffer v. New Erie Life Ins. Co., 101 Pa. 178), or he may offer only the indorsements on the papers (Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227). Secondary evidence of the proofs may be introduced; and an averment in the declaration of the condition of the policy, and of the giving of due notice and proof, has been held to operate as a notice to defendant to produce the originals, sufficient to justify the introduction of such evidence in relation thereto (Continental Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810, affirming 19 Ill. App. 580). But the receipt of the proofs cannot be proved by an admission of a general agent, made as a casual statement and unconnected with any act of agency (Dean v. Ætna Life Ins. Co., 62 N. Y. 642, reversing 2 Hun, 358, 4 Thomp. & C. 497).

That the proofs were duly furnished is sufficiently proved by evidence of their having been forwarded to the company, and by their subsequent production by the company at the trial.

Ætna Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86; Wright v. Vermont Life Ins. Co., 164 Mass. 302, 41 N. E. 303.

And where it is shown that proofs have been served, and nothing appears to the contrary, it will not be presumed that they were defective (Hincken v. Mutual Ben. Life Ins. Co., 6 Lans. 21, affirmed 50 N. Y. 657). Nor will the mere fact that the beneficiary cannot remember what was in them justify a presumption that they

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were not sufficient (Lampkin v. Travelers' Ins. Co., 52 Pac. 1040, 11 Colo. App. 249).

Though, as seen, the proofs are admissible in evidence to show a compliance by plaintiff with the requirements of the policy, yet the question as to the sufficiency of the proofs is for the court.

Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Cook v. Standard Life & Acc. Ins. Co., 84 Mich. 12, 47 N. W. 568; Hermany v. Fidelity Mut. Life Ass'n, 151 Pa. 17, 24 Atl. 1064.

Where the company litigates the case on its merits, and the evidence that proofs were duly furnished is undisputed, an instruction stating the elements essential to plaintiff's recovery will not be held erroneous for omitting to mention the necessity of filing such proofs (Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144).

9. TIME WITHIN WHICH NOTICE AND PROOFS OF DEATH OR INJURY MUST BE FURNISHED.

(a) Necessity of furnishing notice and proofs within time stipulated.
(b) "Immediate" notice and "reasonable" time.
(c) Same—Question for court and jury.
(d) Specific time—Impossibility of performance.
(e) Computation of time in accident insurance.

(a) Necessity of furnishing notice and proofs within time stipulated.

Where it is expressly stipulated that the giving of notice within a certain time shall constitute a condition precedent to recovery (United Benev. Soc. of America v. Freeman, 36 S. E. 764, 111 Ga. 355), or that there shall be no liability on the part of the company unless the proofs are furnished within the specified time (Clanton v. Travelers' Protective Ass'n, 101 Mo. App. 312, 74 S. W. 510), or where there is a promise to pay "provided that in the event of bodily injury or death * * * by reason of which claim may be made under this contract, immediate notice shall be given" (Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631), a compliance with such condition is, unless excused, an essential prerequisite to recovery. But in Hurt v. Employers' Liability Assur. Corp. (C. C.) 122 Fed. 828, it was held that though it was provided that certain provisions should be "conditions precedent," yet the failure to give notice, required by one of such provisions, did not defeat plaintiff's recovery, it further appearing that many of the provisions

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merely limited liability and could not be "precedent" to anything, and that the penalty of forfeiture was specifically attached to a failure to furnish the proofs, required in the same clause dealing with notice, and omitted from the failure to give notice. And in Odd Fellows' Fraternal Acc. Ass'n of America v. Earl, 70 Fed. 16, 16 C. C. A. 596, 34 U. S. App. 285, a stipulation that the certificate should not entitle any one to recover death benefits "unless death results from the accident within 90 days, * * * of which accident the association shall have had notice within * * * 10 days," was held not to render the 10-days notice essential to recovery. The clause in relation to time did not, as it stood, necessarily express a condition precedent, but might be considered as identifying the condition as to death within 90 days. And since the contract should be most strongly construed against the company, and since the clause, if construed as a condition precedent, would defeat liability in all cases where the injury was not at once of a serious nature, no such meaning should be implied.

A condition in a policy that, if notice and proofs of the death or injury are not furnished within a specified time, all claims therefor shall be forfeited to the company, has been frequently held to render the production of such notice and proofs within the specified time a condition precedent to any recovery by insured.

Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678; Meech v. National Acc. Soc., 63 N. Y. Supp. 1008, 50 App. Div. 144; Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833. See, also, Woodmen's Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777, which says that such a provision is usually regarded as a condition precedent to recovery.

In only two of these cases—the Thornton Case and the Meech Case—was it material whether the failure to furnish the notice and proofs amounted to a cause of forfeiture or a breach of condition precedent. But in the Thornton Case an amendment to the declaration setting up a further claim was held defective for failing to allege timely notice of the additional injury, and in the Meech Case plaintiff was held to have failed in his case on account of a failure of the evidence to establish notice within the specified time, neither of which holdings seem justifiable on any other theory than that of a condition precedent. In Maine, however, the holding under similar provisions has merely been that plaintiff could not

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recover where it appeared that the notice had not been given within the required time.

Heywood v. Maine Mut. Acc. Ass'n, 85 Me. 289, 27 Atl. 154; Whalen v. Equitable Acc. Co. (Me.) 58 Atl. 1057.

And in Martin v. Equitable Acc. Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279, where, also, the policy contained such a provision, it was said that a failure to give the notice within the time would work a forfeiture.

A provision that payment of the benefit shall be made within 90 days after satisfactory proof of death does not mean that a failure to make proof within 90 days after death will prevent recovery (Fraternal Aid Ass'n v. Powers, 73 Pac. 65, 67 Kan. 420). But the proof must nevertheless be furnished within a reasonable time after the death (Harrison v. Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893).

An act [1] declaring void any stipulation in a contract, fixing the time within which notice of a claim for damages must be given at a less period than 90 days, renders of no effect a provision in an accident policy requiring "immediate" notice of accident or injury, and the policy must be construed as though no time were specified (Maryland Casualty Co. v. Hudgins [Tex. Civ. App. 1903] 72 S. W. 1047). But such an act [2] does not apply to a contract made prior to its passage (Kimball v. Masons' Fraternal Acc. Ass'n, 38 Atl. 102, 90 Me. 183). And where the statute, in its terms, extends only to notice of accident, injury, or death, it cannot be extended by the courts to cover a case of health insurance (Whalen v. Equitable Acc. Co. [Me.] 58 Atl. 1057).

(b) "Immediate" notice and "reasonable" time.

Where "immediate" notice or proof of the death or injury has been required, the word "immediate" has not been literally construed, but it has been held sufficient if the required documents were furnished within a reasonable time under the circumstances of each particular case.

Reference may be made to Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985; Sun Acc. Ass'n v. Olson, 59 Ill. App. 217; Fidelity & Casualty Co. v. Weise, 80 Ill. App. 499; Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460; Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631; Konrad v. Union Casualty & Surety Co., 49 La. Ann. 636, 21 South. 721;

[1] Rev. St. Tex. art. 3379.

[2] Act Me. March 17, 1893.

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McFarland v. United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436; Ewing v. Commercial Travelers' Mut. Acc. Ass'n, 66 N. Y. Supp. 1056, 55 App. Div. 241, affirmed without opinion 170 N. Y. 590, 63 N. E. 1116; Crane v. Standard Life & Acc. Ins. Co. (Super. Ct. Cin.) 3 Ohio N. P. 318, 6 Ohio Dec. 118; Manufacturers' Accident Indemnity Co. v. Fletcher, 5 Ohio Cir. Ct. R. 633, 3 O. C. D. 308; American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154, 7 O. C. D. 504; People's Acc. Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870; American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395; Horsfall v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; Kentzler v. American Mut. Acc. Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934; Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

And the same interpretation has been given to a requirement for notice "as soon as possible" (Provident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236).

The doctrine that the notice and proofs must be furnished in a "reasonable" time has, of course, left the subject somewhat a matter of particular cases. Thus, an unexcused delay of 4 months (Dunshee v. Travelers' Ins. Co., 25 Pa. Super. Ct. 559), of 29 days (Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833), and even of 6 days (Railway Pass. Assur. Co. of Hartford v. Burwell, 44 Ind. 460), has been held fatal. On the other hand, in McFarland v. United States Mut. Acc. Ass'n of City of New York, 124 Mo. 204, 27 S. W. 436, a delay of 10 days in giving notice of death was held not unreasonable, and in Horsfall v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846, it was held that a similar delay of 12 days was not necessarily fatal.

Generally, however, in cases of this character, there have been special circumstances by which the claimant has sought to excuse the delay. Thus, **where the serious results of an accident do not make themselves apparent until some time thereafter, account may be taken of such fact in determining whether the notice given was "immediate."**

People's Acc. Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870 (delay of a month); American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395.

Very similar in principle is Kentzler v. American Mut. Acc. Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934, where the

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policy did not cover disappearances, and where the body was not found for several months after the death. And the same doctrine has been invoked to excuse a delay of two weeks in furnishing a notice "with full particulars," the delay having been caused by the necessity of an autopsy and chemical examination to determine whether the insured came to his death by accidental means, within the terms of the policy.

Ewing v. Commercial Travelers' Mut. Acc. Ass'n, 66 N. Y. Supp. 1056, 55 App. Div. 241, affirmed without opinion 170 N. Y. 590, 63 N. E. 1116.

But, on the other hand, it was held in Coldham v. Pacific Mut. Life Ins. Co., 2 Ohio Dec. 314, that where a beneficiary knew of the death and of a fall upon the street, a delay of 13 months in giving notice was not excused, though not until that time was the beneficiary able to determine that the fall was accidental. If it was suspected that the fall was accidental, notice should have been given, so that the company also could have investigated the case. Furthermore, the limitation of one year within which action might be brought seemed to indicate a time beyond which the notice might not be given. This element of the effect of limitations was emphasized in Harrison v. Masonic Mut. Ben. Soc., 51 Pac. 893, 59 Kan. 29, where it was held that notice and proof not given until more than ten years after a disappearance was unreasonably delayed. Plaintiff claimed that the proof of the death could not be made complete until the expiration of the seven years after the disappearance, but no excuse appeared for the intervening three years.

Where the beneficiary is ignorant of the existence of the policy, a delay will not be considered as necessarily unreasonable, though without such excuse it would have been fatal.

Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985 (delay of 66 days); Konrad v. Union Casualty & Surety Co., 49 La. Ann. 636, 21 South. 721 (delay of 2 months); American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154, 7 O. C. D. 504 (delay of 4 months).

So, also, in Provident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236, though it did not appear that the beneficiary was ignorant of the policy, it was held that the fact that he had never seen the policy and was ignorant of its conditions might be considered in determining whether he had exercised due diligence by giving notice in eight days. The beneficiary is not bound to make an immediate search

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of the effects of the insured (Nax v. Travelers' Ins. Co. [C. C.] 130 Fed. 985); nor does the failure of the insured to notify any one of the policy, so that immediate notice might be given, constitute such negligence as will discharge the company (American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154, 7 O. C. D. 504).

Where the insured in an accident policy has been disabled by the accident from attending to his affairs, such fact may be considered in determining whether the notice subsequently given was "immediate."

(Manufacturers' Acc. Indemnity Co. v. Fletcher, 5 Ohio Cir. Ct. R. 633, 3 O. C. D. 308 [delay of 35 days]). And see, also, Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631, where a delay of four weeks by one under medical treatment was held to present a question for the jury.

Apparently based on the same theory is the statement that where the insured, a citizen of Virginia, died during the war, the notice should be given to the company, a Connecticut corporation, within a reasonable time after the termination of the war (Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r, 28 Grat. 630). And where, under an accident policy requiring notice of an accident by the claimant, the beneficiary cannot become a claimant until the death of the insured, the time elapsing between the accident and the death should not be taken into account as a delay (Horsfall v. Pacific Mut. Life Ins. Co., 72 Pac. 1028, 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846.)

(c) Same—Question for court and jury.

Primarily, the question as to whether notice has been given or proof furnished within a reasonable time is for the jury.

Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985; Fidelity & Casualty Co. v. Weise, 80 Ill. App. 499; Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631; American Acc. Co. v. Card, 13 Ohio Cir. Ct. R. 154, 7 O. C. D. 504; Crane v. Standard Life & Acc. Ins. Co. (Super. Ct. Cin.) 3 Ohio N. P. 318, 6 Ohio Dec. 118; People's Acc. Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870; American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395; Horsfall v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846.

But in Standard Life & Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604, it was held that a finding that "immediate written notice of the death * * * was given" was but a mere conclu-

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sion of the jury rather than a finding of fact. The finding should have given the date of the notice, or something near the date when the same was served.

While the general rule is as stated, it is evident that in this, as in other mixed questions of law and fact, there must come a point where the matter becomes one for the decision of the court. Where a delay, by reason of its duration, and lack of attendant excusing circumstances, is clearly unreasonable, it is the duty of the court so to declare it.

Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985; People's Acc. Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870. And see, also, in this connection, Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460; Harrison v. Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893; Coldham v. Pacific Mut. Life Ins. Co., 2 Ohio Dec. 314; Dunshee v. Travelers' Ins. Co., 25 Pa. Super. Ct. 559.

The slightly variant doctrine that, where the facts and inferences bearing upon the question of due diligence are in dispute, the question is one for the jury, and, where they are not in dispute, for the court, has been announced in Missouri and Wisconsin.

McFarland v. United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436; Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

(d) Specific time—Impossibility of performance.

The doctrine that the impossibility of giving prompt notice will excuse a delay has been applied even in cases in which a specified time for the giving of the notice has been fixed by the contract. One of the most frequent illustrations occurs where one insured in an accident policy has been disabled by the accident from giving the notice within the specified time. The theory of these cases is that it could not have been in the contemplation of the parties that if the insured, who was required to give the notice, was unable to do so by reason of the very accident against which indemnity was given, he should therefore lose such indemnity through no fault of his own.

Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135; Woodmen's Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; Manufacturers' Accident Indemnity Co. v. Fletcher, 5 Ohio Cir. Ct. R. 633, 3 O. C. D. 308. In Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 22, the court, without accepting altogether the reasoning on which the doctrine is found, follows it as the settled law.

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And if the insured is incapacitated from even requesting his physician to send the notice, the same rule and the same reason will apply, though the policy required the notice to be sent by either the insured or the physician (Manufacturers' Accident Indemnity Co. v. Fletcher, 5 Ohio Cir. Ct. R. 633, 3 O. C. D. 308). But in United Benev. Soc. of America v. Freeman, 36 S. E. 764, 111 Ga. 355, it was pointed out that the excuse would not avail the insured where he might have requested another to send the notice for him.

The provision requiring proof of death within a certain time thereafter does not apply where the beneficiary had no knowledge of the existence of the policy until after the time had elapsed.

McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Munz v. Standard Life & Acc. Ins. Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. Rep. 830.

But even equity will not relieve against a failure to submit proofs of death within a time limited by statute [8] in a proviso making such submission a condition precedent to the statutory temporary continuance in force of a policy after the nonpayment of a premium (Winchell v. John Hancock Mut. Life Ins. Co., 30 Fed. Cas. 285), though, of course, the company may, by the policy, grant a longer time for the furnishing of the proofs under such circumstances (Ellis v. Massachusetts Mut. Life Ins. Co., 45 Pac. 988, 113 Cal. 612, 54 Am. St. Rep. 373).

In the case of Munz v. Standard Life & Acc. Ins. Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. Rep. 830, it was said that a requirement for proofs of death within a limited time should never be held applicable where the insurer has agreed to pay the legal representative. It is sufficient if the officer acts with reasonable diligence in securing his appointment and giving the proofs. And in Globe Acc. Ins. Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486, a provision in an accident policy requiring "claimant" to give notice within seven days was held to apply only to the insured, and not to have reference to a death benefit payable to his legal representative, for, letters not having been taken out at once, there was no "claimant" at the time specified.

The theory that a requirement for notice or proof within a specified time could not have been intended to apply under impossible conditions, has been invoked also where proof or notice, with full particulars of the injury, was required, and it could not be known

[8] Acts Mass. 1861, c. 186.

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until after the expiration of the time whether or not the injury or death fell within the provisions of the policy.

United States Casualty Co. v. Hanson (Colo. App.) 79 Pac. 176; Peele v. Provident Fund Soc., 147 Ind. 543, 44 N. E. 661, affirmed on rehearing 46 N. E. 990, 147 Ind. 543; Phillips v. United States Ben. Soc., 120 Mich. 142, 79 N. W. 1; Kentzler v. American Mut. Acc. Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934.

And where a policy provided that, "in the event of an accident * * * for which any claim may be made, * * * notice shall be given, * * * signed, * * * in case of death, by the beneficiary," and that failure to give such notice "within ten days of the happening of such accident" should forfeit the policy, a failure to give any notice until after the death, which occurred 40 days after the accident, did not forfeit the policy; for, if the notice required was one of the death, it would be manifestly unreasonable and void to require it to be given before the death, and, if it was of the accident, the beneficiary, prior to the death, had only an inchoate right, and could not have been recognized by the insurer as having any interest therein (Hoffman v. Manufacturers' Accident Indemnity Co., 56 Mo. App. 301). In Trippe v. Providence Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432, affirming 3 Misc. Rep. 445, 23 N. Y. Supp. 173, the doctrine was carried further, and, though the body was discovered under a building in three days after the accident, it was held that since, under similar circumstances, the giving of notice within the specified ten days might be impossible, therefore the time should not commence to run at all until the discovery of the body. But a failure of the beneficiary to take timely steps to ascertain whether the death was caused by accidental means will not excuse a failure to furnish proof of the death within the specified time (Legnard v. Standard Life & Acc. Ins. Co., 81 N. Y. Supp. 516, 81 App. Div. 320).

The authorities are not harmonious as to how soon after it has become possible, the notice or proofs must be given. Some take the position that the specified time does not commence to run until it has become possible to furnish the required documents, and that notice given within such specified time, counting from the removal of the disability, will be sufficient.

Hoffman v. Accident Indemnity Co., 56 Mo. App. 301; Trippe v. Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432, affirming 23 N. Y. Supp. 173, 3 Misc. Rep. 445; Kentzler v. American Mut. Acc. Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934.

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Another holds that it will be sufficient if, under all the circumstances, the notice has been furnished within a reasonable time (Munz v. Standard Life & Acc. Ins. Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. Rep. 830). And still another states that they may be furnished either within a reasonable time or within the time limited, counting from the removal of the obstacle (Woodmen Acc. Ass'n v. Pratt, 87 N. W. 546, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777).

(c) Computation of time in accident insurance.

Decided under a separate theory, though closely related in practice with the cases dealing with the meaning of the word "immediate," and with the effect of the impossibility of furnishing notice or proofs within a specific time, are those cases dealing with accident policies containing any ambiguity as to whether the time within which the notice or proof must be given should be computed from the accident or from the death or disability resulting therefrom. In cases where the disability or death did not at once follow, so that no notice would naturally have been given at the time of the accident, the courts have been astute in finding support for the construction that the time should be computed from the disability or death. Of course, where this is the direct provision of the policy, no difficulty arises (Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650). But the holding has been the same in cases of ambiguity. Thus, where a policy insured only against accidents "resulting in disability or death," and provided for notice of the "accident causing the disability or death * * * within 15 days from the date of the accident causing the disability or death," the 15 days were held not to commence to run until disability resulted from the accident (Rorick v. Railway Officials' and Employé's Acc. Ass'n, 119 Fed. 63, 55 C. C. A. 369 [Gilbert, C. J., dissenting]). The same principle was applied in Grant v. North American Casualty Co., 93 N. W. 312, 88 Minn. 397, a case of insurance against illness causing disability, though in that case it did not appear that it was notice of an "illness causing disability" which was required.

An accident policy providing that in case of "any accident or injury for which any claim shall be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given," was held, in Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, to require two notices—

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one immediately after the accident when it did not result in death; the other immediately after any death which might follow an accident. In McFarland v. United States Mut. Acc. Ass'n of City of New York, 124 Mo. 204, 27 S. W. 436, the policy provided that, in case of an injury causing total disability, notice should be given, and that, in case "such" injury should cause death, "immediate" notice should be given "in like manner," and proof made within six months after the accident. The court held that the word "such" referred only to accidents causing total disability, and that, since the accident had not caused "total disability," though subsequently resulting in death, no notice was needed except one immediately after death, and that proofs within six months of the death were sufficient. It is, however, difficult to see why, if the word "such" limited the requirement for notice and proof to cases of "total disability," any notice or proof was required, the accident not having produced such a result.

10. EFFECT OF NOTICE AND PROOFS OF DEATH OR INJURY.

(a) Effect of proofs as against company—Admissions by company.
(b) Admissibility of proofs against plaintiff.
(c) Same—Physician's certificate and verdict of coroner's jury.
(d) Conclusiveness of proofs.
(e) Same—Necessity of notice of error.
(f) Statements not required by the policy.
(g) Burden of proof and weight of evidence.

(a) Effect of proofs as against company—Admissions by company.

The proofs of death or injury are not competent evidence as against the insurer to show the truth of any statement therein contained.

Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Cook v. Standard Life & Acc. Ins. Co., 84 Mich. 12, 47 N. W. 568; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

And a provision that "all the contents of such proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the company," is valid.

Howard v. Metropolitan Life Ins. Co., 41 N. Y. Supp. 33, 18 Misc. Rep. 74; Donnelly v. Metropolitan Life Ins. Co., 86 N. Y. Supp. 790, 43 Misc. Rep. 87.

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Even though the company admits the sufficiency of the proofs, as such, the admission will not be construed as extending to the truth of the statements therein contained (Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, distinguishing Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672, 21 L. Ed. 698). But it has been held that, if the company has made no objection to the proofs offered, it cannot, in an action on the policy, object that plaintiff was not entitled to recover because of her failure to offer other proof than the proofs of death, as to an insurable interest in the life of insured (Globe Mut. Life Ins. Ass'n v. Wagner, 90 Ill. App. 444, judgment affirmed without reference to this point 58 N. E. 970, 188 Ill. 133, 52 L. R. A. 649, 80 Am. St. Rep. 169). It did not, however, appear in such case that defendant had introduced any evidence to the contrary. If the admission of the sufficiency of the proofs is coupled with a claim that they show the death to have been brought about by a cause not within the policy, advantage can only be taken of the admission by conceding, also, the claim as to the cause of death (Mutual Ben. Life Ins. Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793). This decision seems, however, to have been based on the theory that the admission was received to prove not only the sufficiency of the proofs, but the fact of death alleged therein, and that, if it was sufficient to establish the death, it was sufficient also to establish the cause of death.

(b) Admissibility of proofs against plaintiff.

It may be stated as a general rule that **proofs of injury or death, furnished by a beneficiary to the company, are admissible in evidence against such beneficiary as admissions by him of the truth of the statements therein contained.** The reason of this rule is evident where the statement was made directly by the beneficiary.

Reference may be made to Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Keels v. Mutual Fund Life Ass'n (C. C.) 29 Fed. 198; Mutual Acc. Ass'n v. Simons, 69 Ill. App. 94; Modern Woodmen of America v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; Schmitt v. National Life Ass'n, 32 N. Y. Supp. 513, 84 Hun, 128; Spruill v. Northwestern Mut. Life Ins. Co., 120 N. C. 141, 27 S. E. 39; Wall v. Royal Soc. of Good Fellows, 179 Pa. 355, 36 Atl. 748; Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275; Bachmeyer v. Mut. Reserve Fund Life Ass'n, 82 Wis. 255, 52 N. W. 101.

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The rule is not, however, confined to such cases, but has been extended to statements by others contained in the proofs furnished by the beneficiary. Having been furnished to the company by the beneficiary, they may be used against him.

Mutual Ben. Life Ins. Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793, reversing 18 Fed. Cas. 133; Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294; De Camp v. New Jersey Mut. Life Ins. Co., 7 Fed. Cas. 313; Walther v. Mutual Ins. Co., 65 Cal. 417, 4 Pac. 413; Dennis v. Union Mut. Life Ins. Co., 84 Cal. 570, 24 Pac. 120; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; Modern Woodmen of America v. Davis, 184 Ill. 236, 56 N. E. 300, affirming 84 Ill. App. 439; Helwig v. Mutual Life Ins. Co., 132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578, reversing 58 Hun, 366, 12 N. Y. Supp. 172; Redmond v. Industrial Benefit Ass'n, 150 N. Y. 167, 44 N. E. 769, affirming 28 N. Y. Supp. 1075, 78 Hun, 104; Hanna v. Connecticut Mut. Life Ins. Co., 150 N. Y. 526, 44 N. E. 1099; Lund v. Masonic Ass'n, 30 N. Y. Supp. 775, 81 Hun, 287; Proppe v. Metropolitan Life Ins. Co., 34 N. Y. Supp. 172, 13 Misc. Rep. 266; Howard v. Metropolitan Life Ins. Co., 41 N. Y. Supp. 33, 18 Misc. Rep. 74; Chinnery v. United States Industrial Ins. Co., 44 N. Y. Supp. 581, 15 App. Div. 515; Kipp v. Metropolitan Life Ins. Co., 58 N. Y. Supp. 494, 41 App. Div. 298; Donnelly v. Metropolitan Life Ins. Co., 86 N. Y. Supp. 790, 43 Misc. Rep. 87; Bondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293.

Where the only proofs furnished were those made by one of the beneficiaries on behalf of all, such proofs were held admissible against any one of the beneficiaries suing on the policy (Fey v. I. O. O. F. Mut. Life Ins. Co., 120 Wis. 358, 98 N. W. 206).

Of course, affidavits taken by the company prior to the death of the insured, and without knowledge by the beneficiary, cannot be considered against the beneficiary in connection with the proofs furnished by him (Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94, 65 N. W. 611). And where the only duty of the beneficiary is to give the notice of the death, and the proofs are made out and furnished by others, the beneficiary cannot be charged with the statements contained in the proofs.

National Union v. Thomas, 10 App. D. C. 277; Neudeck v. Grand Lodge A. O. U. W., 61 Mo. App. 97; Supreme Lodge K. of H. v. Jaggers, 62 N. J. Law, 96, 40 Atl. 783.

A guardian has no power to bind his infant wards by his admissions against interest, and therefore an admission contained in

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proofs submitted by a guardian are not admissible as against the infants.

Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066, affirming 110 Ill. App. 648; Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templar & Masonic Mutual Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303.

Nor will a deposition by an infant, submitted with the proofs by the guardian, be competent as an admission by such infant (Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066, affirming 110 Ill. App. 648).

Where the proofs have been made by another, and not verified by the beneficiary, it is incumbent on the company to prove the circumstances as to the production of the proofs, so as to render them competent as an admission by the beneficiary (Barnett v. Prudential Ins. Co., 86 N. Y. Supp. 842, 91 App. Div. 435). But where the proofs purport to have been executed by the beneficiary, and have been treated and discussed by all parties as genuine, they may be introduced in evidence by the company without proof of their execution (Wall v. Royal Soc. of Good Fellows, 36 Atl. 748, 179 Pa. 355).

If the proofs contain statements by third persons tending to show that the beneficiary cannot recover, and also allegations by the beneficiary tending to disprove the statements of the third person, due effect should be given to both parts of the proof. The allegation of the beneficiary shows that the certificate of the third person was not intended as an admission.

Howard v. Metropolitan Life Ins. Co., 41 N. Y. Supp. 33, 18 Misc. Rep. 74; Fisher v. Fidelity Mut. Life Ass'n, 188 Pa. 1, 41 Atl. 467.

But if it is provided that the contents of the proofs shall be evidence in behalf of, but not against, the company, the declarations of the beneficiary will not have such effect (Howard v. Metropolitan Life Ins. Co., 41 N. Y. Supp. 33, 18 Misc. Rep. 74).

In Maryland the whole doctrine as to the admissibility of the proofs as against the beneficiary seems to be in some doubt. In Mutual Life Ins. Co. v. Stibbe, 46 Md. 302, 312, it was directly stated that the proofs were only admissible to show a compliance by the beneficiary with the requirements of the policy as to proofs. Nevertheless, it was further held in that case that the statement

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of the beneficiary in the proofs as to the cause of death could be considered by the jury as an admission by her, and that it should be considered in connection with the statements of the physician's certificate which formed a part of the proofs and of her declaration. In Fidelity Mut. Life Ass'n v. Ficklin, 74 Md. 173, 21 Atl. 680, it was decided that though the certificates contained in the proofs were inadmissible to show anything except a compliance with the requirements of the policy, yet, even had they been admissible, they would not have established defendant's contention. Travelers' Ins. Co. v. Nicklas, 88 Md. 470, 41 Atl. 906, contained the same statement as to the inadmissibility of the proofs. It was also said in that case that the admission of the affidavits in the Stibbe Case was only on the ground that they were declarations of the plaintiff, while in the case at bar proofs relied on by the company were made without the knowledge or authority of the plaintiff, and were not, therefore, available as prima facie evidence of the truth of the statements contained therein. The original doctrine as qualified by the decisions would thus seem to be not very different from the rule prevailing elsewhere.

(c) Same—Physician's certificate and verdict of coroner's jury.

It has been held that statements in the physician's certificate which are purely hearsay should be disregarded by the jury (Insurance Co. v. Schmidt, 40 Ohio St. 112). And in Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648, it was held that a statement of the physician in regard to anything not a matter of expert opinion was not admissible against the beneficiary. The Supreme Court, however, in affirming the judgment (209 Ill. 550, 70 N. E. 1066), did not pass on this specific question.

In New York, also, an attempt has been made to limit the effect of physician's certificates contained in the proofs, by the statute relating to privileged communications.[1] That this statute does not apply to a certificate as to the cause of death was definitely decided in Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templars' & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303. But in Redmond v. Industrial Ben. Ass'n, 28 N. Y. Supp. 1075, 78 Hun, 104, affirmed 150 N. Y. 167, 44 N. E. 769, it was said that while the statement in the certificate as the cause of death was admissible,

[1] Code Civ. Proc. § 834.

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since the cause of death was a pertinent inquiry, yet the statements as to medical attendance on the insured prior to the issuance of the policy might have been excluded under the statutory provision. The Court of Appeals, however, did not find it necessary to pass on this question. And in Proppe v. Metropolitan Life Ins. Co., 34 N. Y. Supp. 172, 13 Misc. Rep. 266, the whole certificate, though it included events prior to the issuance of the policy, was held admissible under a stipulation that statements in the proofs should be admissible in evidence against the beneficiary.

A certified copy of the finding of a coroner's jury, furnished with the proofs, is also, if uncontradicted, considered as an admission by the beneficiary.

Mutual Ben. Life Ins. Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793, reversing 18 Fed. Cas. 133; Supreme Lodge Knights of Pythias of the World v. Beck, 94 Fed. 751, 36 C. C. A. 467; Walther v. Mut. Ins. Co., 65 Cal. 417, 4 Pac. 413; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348.

In Illinois it has been held that the testimony taken before the coroner's jury cannot be considered, but that only the verdict is admissible; the verdict being regarded, apparently, as admissible on account of its semijudicial character, rather than as an admission of the beneficiary.

Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066, affirming 110 Ill. App. 648. See, also, Grand Lodge of Illinois I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123, and United States Life Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65, where the Supreme Court did not decide whether the Appellate Court (United States Life Ins. Co. v. Kielgast, 26 Ill. App. 567) was right or wrong in holding that no part of the proceedings at the inquest was competent as an admission by the beneficiary, but merely held that the coroner's verdict was admissible as a judicial record. See, also, Dougherty v. Pacific Mut. Life Ins. Co., 154 Pa. 385, 25 Atl. 739, where, no opinion being reported, it is difficult to determine whether the decision was that the coroner's verdict, which formed part of the proofs, to be of effect as evidence of the cause of death should have been introduced by defendant for that purpose, or that, to have such effect as evidence, the verdict should have been introduced as such, and not merely as part of the proofs.

(d) Conclusiveness of proofs.

It is a general rule that the beneficiary will not be estopped by erroneous statements in the notice or proofs of death unless the

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company has been misled thereby to its injury. This rule applies whether the mistaken statements were directly made by the beneficiary, or were only submitted by him as a part of the proofs, having been originally made by some one else.

The misstatements were made by the beneficiary directly in Supreme Lodge Knights of Pythias of the World v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; affirming 94 Fed. 751, 36 C. C. A. 467; Keels v. Mutual Reserve Fund Life Ass'n (C. C.) 29 Fed. 198; Travelers' Ins. Co. v. Melick, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Denver Life Ins. Co. v. Price, 18 Colo. App. 30, 69 Pac. 313; Supreme Tent Knights of Maccabees of the World v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137, affirming 105 Ill. App. 267; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Hogan v. Metropolitan Life Ins. Co., 164 Mass. 448, 41 N. E. 663; Abraham v. Mutual Reserve Fund Life Ass'n, 183 Mass. 116, 66 N. E. 605; John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; Phillips v. United States Ben. Soc., of Saginaw, 120 Mich. 142, 79 N. W. 1; Spencer v. Citizens' Mut. Life Ins. Ass'n, 142 N. Y. 505, 37 N. E. 617, affirming 23 N. Y. Supp. 179, 3 Misc. Rep. 458; Neill v. American Popular Life Ins. Co., 42 N. Y. Super. Ct. 259; Tuthill v. United Life Ass'n, 66 Hun, 632, 21 N. Y. Supp. 191; National Life Ass'n v. Sturtevant, 29 N. Y. Supp. 529, 78 Hun. 572; Schmitt v. National Life Ass'n, 32 N. Y. Supp. 513, 84 Hun, 128; Wells v. Metropolitan Life Ins. Co., 46 N. Y. Supp. 80, 19 App. Div. 18, affirmed in memorandum decision 163 N. Y. 572, 57 N. E. 1128; Bowen v. Preferred Acc. Ins. Co., 82 App. Div. 458, 81 N. Y. Supp. 840; Baldi v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 275; Bachmeyer v. Mutual Reserve Fund Life Ass'n, 82 Wis. 255, 52 N. W. 101; Id., 87 Wis. 325, 58 N. W. 399.

In the following the attending physician originally made the statements: Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294; Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371, affirming (C. C.) 38 Fed. 650; Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, affirming (C. C.) 35 Fed. 711; De Camp v. New Jersey Mut. Life Ins. Co., 7 Fed. Cas. 313; Walther v. Mut. Ins. Co., 65 Cal. 417, 4 Pac. 413; Day v. Mutual Ben. Life Ins. Co., 1 MacArthur (D. C.) 598; Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Modern Woodmen of America v. Davis, 184 Ill. 236, 56 N. E. 300, affirming 84 Ill. App. 439; Wildey Casualty Co. v. Sheppard, 59 Pac. 651, 61 Kan. 351, 47 L. R. A. 650; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; Bentz v. Northwestern Aid Ass'n, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784; Redmond v. Industrial Ben. Ass'n, 150 N. Y. 167, 44 N. E. 769, affirming 28 N. Y. Supp. 1075, 78 Hun, 104; Boland v.

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Industrial Ben. Ass'n, 74 Hun, 385, 26 N. Y. Supp. 433; Boylan v. Prudential Ins. Co., 42 N. Y. Supp. 52, 18 Misc. Rep. 444.

And in the following they were contained in a coroner's verdict: Zimmerman v. Masonic Aid Ass'n (C. C.) 75 Fed. 236; Supreme Lodge Knights of Pythias of the World v. Beck, 21 Sup. Ct. 532, 181 U. S. 49, 45 L. Ed. 741; Id., 94 Fed. 751, 36 C. C. A. 467; Walther v. Mutual Ins. Co., 65 Cal. 417, 4 Pac. 413; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Employers' Liability Assur. Corp. v. Anderson, 5 Kan. App. 18, 47 Pac. 331; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348.

(e) Same—Necessity of notice of error.

Though the general rule, as stated, is that the beneficiary will not be estopped by erroneous statements in the proofs unless it appears that the company has been misled to its prejudice by such statements, yet certain early fire insurance cases,[2] holding that an estoppel will arise unless a notice of the error has been given prior to the trial, have had an effect in the trial of life cases. This doctrine, it is true, appears never to have been expressly followed in a life case, and has, indeed, in cases where no prejudice was shown to have resulted to the company from the failure to give prior notice, been both seriously doubted and expressly repudiated.

The doctrine was questioned under such circumstances in Insurance Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793; Hogan v. Metropolitan Life Ins. Co., 164 Mass. 448, 41 N. E. 663; Abraham v. Mut. Reserve Fund Life Ass'n, 183 Mass. 116, 66 N. E. 605; and repudiated in Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Keels v. Mutual Reserve Fund Life Ass'n (C. C.) 29 Fed. 198; Employers' Liability Assur. Corp. v. Anderson, 5 Kan. App. 18, 47 Pac. 331; Neill v. American Popular Life Ins. Co., 42 N. Y. Super. Ct. 259.

And the rule will not in any event be applicable unless the facts stated in the proofs make a clear defense for the company.

Hogan v. Metropolitan Life Ins. Co., 164 Mass. 448, 41 N. E. 663; Abraham v. Mutual Reserve Fund Life Ass'n, 183 Mass. 116, 66 N. E. 605.

Nor can the question be raised under an answer merely alleging that the proofs furnished showed that the policy was not valid, and that no further statement had been received. Had the facts

[2] See Campbell v. Charter Oak Ins. Co., 10 Allen (Mass.) 213; Irving v. Excelsior Fire Ins. Co., 14 N. Y. Super. Ct. 507.

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stated in the proofs been pleaded as a defense, the proofs might have been admitted as plaintiff's admission, and the further question as to their conclusiveness been raised. But the statement in the proofs did not, in and of itself, constitute a defense. (Connecticut Mut. Life Ins. Co. v. Siegel, 9 Bush [Ky.] 450.)

The statement in Travelers' Ins. Co. v. Melick, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629, that notice of the mistake must be given either by pleadings or otherwise, would seem to be dictum, since, as a matter of fact, it appeared in that case that ample notice was given. Nevertheless, it has been sometimes thought necessary to point out particular reasons why the rule should not apply, and to distinguish the case from the early cases holding that the notice was essential. Thus, in Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294, the rule was held not applicable because the statement in which the error occurred was not a condition precedent to plaintiff's recovery. And in other cases special emphasis has been placed on the fact that notice of the mistake had in fact been given.

Denver Life Ins. Co. v. Price, 18 Colo. App. 30, 69 Pac. 313; Supreme Tent of Knights of Maccabees of the World v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; Tuthill v. United Life Ass'n, 21 N. Y. Supp. 191, 66 Hun, 632.

(f) Statements not required by the policy.

Some of the cases place great emphasis upon the circumstance that the policy did not require a statement as to the cause of the death, holding that the beneficiary cannot be bound by a statement furnished rather through courtesy than because required under the policy.

Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294; De Camp v. New Jersey Mut. Life Ins. Co., 7 Fed. Cas. 313; Day v. Mutual Ben. Life Ins. Co., 1 MacArthur (D. C.) 598; Beckett v. Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923. See, also, Cluff v. Mutual Ben. Ins. Co., 99 Mass. 317; Cushman v. United States Life Ins. Co., 70 N. Y. 72.

None of these cases, however, go so far as to hold that for such reason alone the proofs will not be admissible as against the plaintiff to prove matters touched on by them, and two of such cases (the Schwenk Case and the De Camp Case) expressly state that the proofs were admissible for such purpose. Likewise, in Chinnery v. United States Industrial Ins. Co., 44 N. Y. Supp. 581, 15 App.

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Div. 515, though the proofs first furnished were held prima facie sufficient, yet, the beneficiary having referred the company to the attending physician for further information, his certificate, furnished at the request of the company, was held admissible against the beneficiary. Of course, the statements relied on must have been furnished as a part of the proofs of loss, and not entirely as a matter of courtesy.

Railway Pass. & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168; Louis v. Connecticut Mut. Life Ins. Co., 68 N. Y. Supp. 683, 58 App. Div. 137.

And even where the statement relied on by the company has been considered as a part of the proof, yet the circumstance that the policy did not require such statement has been several times deemed sufficient, when taken in connection with other circumstances, to take away from the proofs their character as evidence against plaintiff.

Thus, in Goldschmidt v. Mutual Life Ins. Co., 102 N. Y. 486, 7 N. E. 408, reversing 33 Hun, 441, the fact that the company had no right to demand a copy of the coroner's inquest, taken in connection with the fact that plaintiff, when sending in the copy, denied that there had been in fact any inquest, verdict, or evidence, was held to render the proofs inadmissible to establish cause of death. In Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templars' & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirming 9 N. Y. Supp. 346, 56 Hun, 303, an admission in the proofs by a guardian of infants, as to a matter concerning which she might have been silent, was held not admissible as against the infants. And in Neudeck v. Grand Lodge A. O. U. W., 61 Mo. App. 97, an unnecessary statement by a physician of a local lodge, included as part of the proofs required to be furnished by such local lodge, and over which the beneficiary had no control, was held not to constitute evidence as against the beneficiary.

A doctrine the reverse of that just considered was announced in Helwig v. Mutual Life Ins. Co., 58 Hun, 366, 12 N. Y. Supp. 172. In that case the Supreme Court insisted that since the physician's certificate was made, by the company's contract, a necessary part of the proofs, and a condition precedent to recovery, therefore the statements contained in it could not be considered as a voluntary admission by the beneficiary, and were not admissible in evidence against her. The Court of Appeals (132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578), without dissenting from this doctrine, pointed out that the policy only required proof of death, and not proof as

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to his medical treatment preceding death, and that the proofs were introduced by the plaintiff without qualification. Therefore, in the opinion of that court, the statements in the certificate bearing on the question of medical treatment constituted voluntary admissions by the beneficiary.

(g) Burden of proof and weight of evidence.

Though the proofs are not conclusive, yet, if they contain a statement of facts under which plaintiff cannot recover, and are unexplained and uncontradicted, a verdict must be directed for defendant.

The above rule is supported by Mutual Ben. **Life Ins. Co. v. Newton,** 22 Wall. 32, 22 L. Ed. 793, reversing 18 **Fed. Cas. 133; Keels v.** Mutual Reserve Fund Life Ass'n (C. C.) 29 **Fed. 198; Supreme Lodge** Knights of Pythias of the World v. Beck, **21 Sup. Ct. 532, 181 U.** S. 49, 45 L. Ed. 741, affirming 94 Fed. 751, **36 C. C. A. 467; Union** Mut. Life Ins. Co. v. Payne, 105 Fed. 172, **45 C. C. A. 193; Walther** v. Mutual Ins. Co., 65 Cal. 417, 4 Pac. 413; **Dennis v. Union Mut.** Life Ins. Co., 84 Cal. 570, 24 Pac. 120; Mutual **Acc. Ass'n v. Simons,** 69 Ill. App. 94; Prudential Ins. Co. v. **Breustle's Adm'r, 19 Ky.** Law Rep. 544, 41 S. W. 9; Hanna v. **Connecticut Mut. Life** Ins. Co., 150 N. Y. 526, 44 N. E. 1099, affirming **28 N. Y. Supp. 661, 8** Misc. Rep. 431; Schmitt v. National Life **Ass'n, 32 N. Y. Supp. 513,** 84 Hun, 128; Howard v. Metropolitan Life **Ins. Co., 41 N. Y. Supp.** 33, 18 Misc. Rep. 74; Kipp v. Metropolitan **Life Ins. Co., 58 N. Y.** Supp. 494, 41 App. Div. 298; Spruill v. **Northwestern Mut. Life Ins.** Co., 120 N. C. 141, 27 S. E. 39.

In this sense the burden may be, and sometimes is, said to have been shifted to the plaintiff.

Keels v. Mutual Reserve Fund Life Ass'n (C. **C.) 29 Fed. 198; Spruill** v. Northwestern Mut. Life Ins. Co., 120 N. **C. 141, 27 S. E. 39.**

But in the true and technical sense of the term this result does not follow from the introduction of the proofs. The burden of proof remains on defendant to establish his defense, though he may have introduced evidence which, uncontradicted, would be sufficient to meet such burden.

The doctrine is laid down in Ætna Life Ins. **Co. v. Ward, 140 U. S. 76,** 11 Sup. Ct. 720, 35 L. Ed. 371, affirming (**C. C.) 38 Fed. 650;** Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 **Sup. Ct. 332, 35 L. Ed. 1160,** affirming (C. C.) 35 Fed. 711; Supreme **Lodge Knights of Pythias** of the World v. Beck, 94 Fed. 751, 36 C. C. **A. 467, judgment affirmed**

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21 Sup. Ct. 532, 181 U. S. 49, 45 L. Ed. 741; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Spencer v. Citizens' Mut. Life Ins. Ass'n, 23 N. Y. Supp. 179, 3 Misc. Rep. 458.

That evidence of this nature has no special probative force is implied, also, in Modern Woodmen of America v. Davis, 184 Ill. 236, 56 N. E. 300, affirming 84 Ill. App. 439, where an error in not admitting a physician's certificate contained in the proofs was held cured by the subsequent admission of the testimony of the physician to the same effect as the rejected certificate.

11. WAIVER OF NOTICE AND PROOF OF LOSS, DEATH, OR INJURY—GENERAL RULES.

(a) What may be waived.
(b) Nature of waiver—Waiver by estoppel.
(c) Same—Waiver by election or intention.
(d) Time of waiver.
(e) Effect of waiver.
(f) Who may take advantage of waiver.

(a) What may be waived.

Provisions in the policy as to notice and proofs of loss are inserted for the benefit of the company, and the production of such documents, or any defects therein, may be waived by the company. This principle is elementary, is never disputed, and is implied in all cases dealing with the subject. The following cases may, however, be useful as containing a direct statement of the rule:

Perry v. Faneuil Hall Ins. Co. (C. C.) 11 Fed. 482; Bennett v. Maryland Fire Ins. Co., 3 Fed. Cas. 229; Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Mickey v. Burlington Ins. Co., 35 Iowa, 174, 14 Am. Rep. 494; Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308, 21 N. W. 652; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Phillips v. Protection Ins. Co., 14 Mo. 220; Noonan v. Hartford Fire Ins. Co., 21 Mo. 81; Taylor v. Roger Williams Ins. Co., 51 N. H. 50; Commonwealth Ins. Co. v. Sennett, 41 Pa. 161; Insurance Co. v. O'Hanlon, 1 Wkly. Notes Cas. (Pa.) 33; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547.

A fire company may waive the proofs required to be furnished under affidavit of insured, by Iowa Code 1897, §§ 1742–1744 (Nicholas v. Iowa Merchants' Mut. Ins. Co., 101 N. W. 115).

Reference may also be made to the following life and accident insurance cases: Hurt v. Employers' Liability Assur. Corp. (C. C.) 122 Fed.

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828; Berry v. Mobile Life Ins. Co., 3 Fed. Cas. 288; National Masonic Acc. Ass'n v. McBride, 162 Ind. 379, 70 N. E. 483; Greenfield v. Massachusetts Mut. Life Ins. Co., 47 N. Y. 430.

Though there may be a question as to the power of mutual companies to waive conditions and provisions going to the validity of the contract, they can certainly waive those provisions the object of which is to establish the amount of the loss after it has occurred.

Priest v. Citizens' Mut. Fire Ins. Co., 3 Allen (Mass.) 602; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492.

(b) Nature of waiver—Waiver by estoppel.

The question as to the exact nature of waiver of notice or proofs of loss has been the subject of much discussion. That the waiver may arise from and be founded upon an estoppel is so elementary as to need no citation of authorities. But as to whether or not an implied waiver must either be supported by a consideration or based upon estoppel, the authorities are in hopeless confusion. No case seems ever to have arisen in which the necessity of a consideration to support an express waiver has been fairly raised and decided. But in numerous cases the question has arisen as to whether an implied waiver must be founded upon an estoppel. Generally, this question has arisen from, or is a part of, the further question as to whether a waiver can be founded upon acts of the company, occurring after the expiration of the time stipulated for furnishing proofs, but indicating an intention not to object to the failure of notice or proofs, or to defects therein. Obviously, under such circumstances, the insured cannot claim to have been misled into not complying with the policy, for his opportunity to do so had already passed. And accordingly, in Kansas, Maine, Minnesota, Mississippi, New Hampshire, Oregon, Pennsylvania, and Wisconsin it has been held, in effect, that there can be no waiver under such or similar circumstances.

Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; State Ins. Co. v. School Dist. No. 19, 66 Kan. 77, 71 Pac. 272; Westchester Fire Ins. Co. v. Coverdale, 58 Pac. 1029, 9 Kan. App. 651; Robinson v. Pennsylvania Fire Ins. Co., 90 Me. 385, 38 Atl. 320; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; McPike v. Western Assur. Co., 61 Miss. 37; New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62; Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec.

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197; Weidert v. State Ins. Co., 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809; Trask v. State Fire & Marine Ins. Co., 29 Pa. 198, 72 Am. Dec. 622; Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Carey v. Allemania Fire Ins. Co., 171 Pa. 204, 33 Atl. 185; Sparrow v. Universal Fire Ins. Co., 17 Phila. (Pa.) 329; Cornell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 387; Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301, 17 N. W. 5; Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 108 Wis. 490, 84 N. W. 851.

But in connection with the Pennsylvania cases cited see Weiss v. American Fire Ins. Co., 148 Pa. 349, 23 Atl. 991, Fritz v. Quaker City Mut. Fire Ins. Co. (Pa.) 26 Atl. 14, and Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261, in which it would seem that the waiver was founded on the intention of the company, rather than on estoppel, but in which no particular attention is called to the distinction.

And in connection with the Wisconsin cases see O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160, Palmer v. St. Paul Fire & Marine Ins. Co., 44 Wis. 201, and Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845, where the rule is stated in a much broader form.

These cases, as best exemplified, perhaps, in Robinson v. Pennsylvania Fire Ins. Co., 90 Me. 385, 38 Atl. 320, or Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717, do not expressly deny that waiver may arise from the intention of the company to waive, but proceed on the theory that, unless the insured has been misled to his injury by acts indicating such an intention, no waiver will arise therefrom; in other words, that the waiver must either be express or founded on estoppel. This doctrine seems, also, to prevail in Georgia, Illinois, Iowa, Nebraska, Ohio, Texas, Vermont, and in some of the federal circuit courts.

Williams v. Queen's Ins. Co. (C. C.) 39 Fed. 167; Unthank v. Travelers' Ins. Co., 28 Fed. Cas. 824 (an accident insurance case); Ex parte Norwood, 18 Fed. Cas. 452; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Dwelling House Ins. Co. v. Jones, 47 Ill. App. 261; Smith v. State Ins. Co., 64 Iowa, 716, 21 N. W. 145; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Coldham v. Pacific Mut. Life Ins. Co., 2 Ohio S. & C. P. Dec. 314 (a life insurance case); Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Employers' Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869 (a life case); Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374; Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520.

In the cases cited from Georgia, Illinois, Nebraska, Ohio, and Vermont, however, the discussion is so meager that it is difficult to definitely state the ground of the decision. In the Sun Mutual Case, cited

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from the Supreme Court of Texas, the decision was made by way of dictum, and in the Employers' Liability Case, from the Court of Civil Appeals, the decision does not seem conclusive of the question. In the Iowa case the decision was tentative, rather than absolute. And in the Unthank and Norwood Cases (28 Fed. Cas. 824, and 18 Fed. Cas. 452), though lack of good faith was stated to be the ground of waiver, yet the insured could not have been injured by the act of the company relied on, since in the one the time for furnishing the notice had already elapsed, and in the other the objection was that the proofs, already furnished when the alleged estoppel occurred, were too late.

In connection with the Nebraska case should be noted the doctrine obtaining in that state as to waiver of proofs by a denial of liability on other grounds on the trial of the case. Obviously, this doctrine is not founded upon estoppel, but for a fuller discussion reference is made to the brief treating of denial of liability.[1] And see, also, Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597.

In Massachusetts the question seems never to have been squarely raised, but it is believed that there is no case in which that court has held the notice or proofs waived, in which there has not also been present in some form the elements of estoppel.

Reference may be made to Blake v. Mutual Ins. Co., 12 Gray (Mass.) 265; Priest v. Citizens' Ins. Co., 3 Allen (Mass.) 602; Eastern R. Co. v. Relief Ins. Co., 105 Mass. 570; Butterworth v. Western Assur. Co., 132 Mass. 489.

(c) Same—Waiver by election or intention.

On the other hand, it has been held in Indiana, Maryland, and New York that estoppel is not a necessary element of waiver.

Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518; Craighton v. Agricutural Ins. Co., 39 Hun (N. Y.) 319; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Evah Bros. v. California Ins. Co., 50 Hun, 604, 3 N. Y. Supp. 89; Moore v. Hanover Fire Ins. Co., 71 Hun, 199, 24 N. Y. Supp. 507, judgment reversed on other grounds 141 N. Y. 219, 36 N. E. 191; Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456, 86 App. Div. 115, affirmed without opinion 71 N. E. 1130, 179 N. Y. 557; Dohn v. Farmers' Joint Stock Ins. Co., 5 Lans. (N. Y.) 275.

Reference may also be made to the following life insurance cases: Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480 (opin-

[1] See post, p. 3531.

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ion of Miller, J.); Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651, affirming 43 N. Y. Super. Ct. 352; Brink v. Guaranty Mut. Acc. Ass'n, 55 Hun, 606, 7 N. Y. Supp. 847, affirmed without opinion 29 N. E. 1035, 130 N. Y. 675; Reynolds v. Equitable Acc. Ass'n, 1 N. Y. Supp. 738, 59 Hun, 13; McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

In connection with the Indiana cases cited, see the accident case of Standard Life & Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604, and the burglary insurance case of Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167. Reference should also be made to Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.) 176. In connection with the New York cases, see Blossom v. Lycoming Fire Ins. Co., 64 N. Y. 162, expressing doubt as to the doctrine, and the opinion of Earl, J., in Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500. See, also, Bennett v. Lycoming County Mut. Ins. Co., 67 N. Y. 274; Brink v. Hanover Fire Ins. Co., 70 N. Y. 593; Bell v. Lycoming Fire Ins. Co., 19 Hun (N. Y.) 238; Brown v. London Assur. Corp., 40 Hun (N. Y.) 101; McDermott v. Lycoming Fire Ins. Co., 44 N. Y. Super. Ct. 221.

While New York has undoubtedly been the leading state in the pronouncement of this doctrine, yet the case of Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, best illustrates the argument on which it is founded. In that case a question arose as to a waiver by a denial of liability by the company, occurring after the time for furnishing the proof had expired. The court, after pointing out that no estoppel would arise in such a case, nevertheless decided that the jury might infer a waiver. Implied waiver, the court said, may be founded either on the intention of the company as shown by its acts, or on estoppel. Reliance is largely placed on Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, where the doctrine of election was held applicable to a forfeiture for failure to pay premiums. The company, having knowledge of a forfeiture, must elect, before it acts, whether or not it will insist thereon, and, having once acted in such a manner as to show that it does not intend to insist on the forfeiture, it cannot afterwards be heard to say that the policy had been rendered void; and this, though its acts had not resulted in an estoppel.

Such, also, seems to be the doctrine in the Circuit Court of Appeals for the Eighth Circuit, in Alabama, California, Louisiana, Missouri, New Jersey, North Carolina, North Dakota, Tennessee, and possibly Michigan.

Schenck v. Mercer County Mut. Fire Ins. Co., 24 N. J. Law, 447; State Ins. Co. v. Maackens, 38 N. J. Law, 564; Ex parte Norwood, 18 Fed.

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Cas. 452; Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355; Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691; Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; Phillips v. Protection Ins. Co., 14 Mo. 220, distinguishing St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; Fink v. Lancashire Ins. Co., 66 Mo. App. 513; Reid, Murdock & Co. v. Mercurio, 91 Mo. App. 673; Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Equitable Life Assur. Soc. v. Winning, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173 (a life insurance case); Crenshaw v. Pacific Mut. Life Ins. Co., 71 Mo. App. 42 (a life insurance case); American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395 (an accident insurance case); Doggett v. United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26.

But in the Alabama, California, Louisiana, New Jersey, and Tennessee cases cited, the doctrine is rather assumed than decided. In the North Carolina case it is expressly stated that the doctrine stated was not necessary to the decision of the case; and this would seem to be true, also, as to the federal and the North Dakota cases, for in each of them the elements of an estoppel were in fact considered to have been present. And in connection with the Michigan case see Allen v. Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. 15.

The Missouri cases cited do not stand alone or uncontradicted. The Court of Appeals cases cited were decided by the St. Louis court, and in numerous decisions the Kansas City Court of Appeals has maintained the opposite doctrine. Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145; Gale v. State Ins. Co., 33 Mo. App. 664; Bolan v. Fire Ass'n of Philadelphia, 58 Mo. App. 225; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Albers v. Phœnix Ins. Co., 68 Mo. App. 543. And see Leigh v. Springfield Fire & Marine Ins. Co., 37 Mo. App. 542, decided by the St. Louis court. The Supreme Court, also, in Loeb v. American Cent. Ins. Co., 12 S. W. 374, 99 Mo. 50, while it quotes with apparent approval from Brink v. Insurance Co., 80 N. Y. 112, where it is said that delay may be waived by failure to object, yet says that such cases need not be particularly examined, as though the question were still open in Missouri. And reference might also be made to Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102, where, in discussing waiver of proofs by a denial of liability on the trial, Marshall, J., in writing the minority opinion, refers with approval to the New York cases, but Valiant, J., who wrote the prevailing opinion, only mentions that there is a doctrine of implied waiver by intention, without either approving it or dissenting therefrom.

(d) Time of waiver.

As already noted, the decision as to the time within which a waiver of notice or proofs can be effectuated is generally bound up

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with the question as to the nature of such waiver. A full discussion of the correlation between these two questions, however, is possible only in connection with a consideration of the particular acts which will constitute a waiver of notice and proofs; and to the succeeding briefs discussing this question reference is made, not only for a fuller treatment of this question, but also for a more particular discussion of the nature of waiver, as appearing in the particular acts which may constitute it. But it should be here noted that the theory that estoppel cannot arise after the expiration of the stipulated time, from a misleading of the insured into believing that correct proofs will not be required, has no application where it is also held that the effect of delay is not forfeiture, but only a delay in the time within which action may be commenced. Obviously, under such a holding, if at any time before the commencement of the action the insured were misled into failing to furnish correct proofs, it would be taking an unfair advantage of him to afterwards insist on the failure of proofs or defects therein.

Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016. See, also. Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252, and Rheims v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670.

(e) Effect of waiver.

The determination of the question as to whether a waiver is conclusive, or may be rescinded by the company, would seem to be largely dependent on the theory of the court as to the nature of the waiver; for, if the acts evidencing an intention to dispense with correct proof be considered, in and of themselves, as proving a waiver under the doctrine of election, it would seem that any subsequent act by the company of a contrary nature would be of no avail; while, if the waiver be considered as arising from the insured having been misled by such acts into failing to furnish the proofs, no reason is readily apparent why the company might not ordinarily, at any time before the commencement of action, demand a compliance with the terms of the contract. And most of the cases seem to proceed on this theory, though the connection between the two holdings is rarely indicated in the opinion. Thus, in New York, Maryland, and Missouri, where the courts hold, in effect, that no estoppel is necessary to constitute waiver by acts showing the intention of the company to waive, it has also been held that the waiver, once established, cannot be rescinded.

In the New York cases the two holdings were made in the same case. Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Dobson v. Hartford

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Fire Ins. Co., 83 N. Y. Supp. 457, 86 App. Div. 115, affirmed without opinion, 71 N. E. 1130, 179 N. Y. 557; Smith v. Home Ins. Co., 47 Hun, 30. And see, also, Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469, and Roberts v. Insurance Co. of America, 94 Mo. App. 142, 72 S. W. 144 (St. Louis Court of Appeals), announcing the same doctrine as to the conclusiveness of waiver.

On the other hand, in Oregon, Illinois, and Texas, where it is necessary that the acts showing intention should also have been such as might have misled the insured into his default, and in a Michigan case tried on the same theory, subsequent acts of the company indicating a willingness to accept correct proofs have been given full force as doing away with any prior waiver. The decision in such cases is not so much that a prior waiver has been rescinded, as that no waiver at all has been shown, unless, perhaps, as to the delay occasioned by the acts of the company.

Hahn v. Guardian Assur. Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; Forest City Ins. Co. v. School Directors, Dist. No. 1, 4 Ill. App. 145; Allibone v. Fidelity & Casualty Co. (Tex. Civ. App.) 32 S. W. 569; Allen v. Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. 15.

The cases are not uniform, however, in supporting the theory that, where waiver is dependent on intention and election, it cannot be rescinded, having once been established; and that, where it is dependent on a misleading of the insured into failing to comply with the policy requirements, it can be rescinded at any time before suit by a request for the stipulated proofs. Thus, in the Missouri case of Noonan v. Hartford Fire Ins. Co., 21 Mo. 81, a delayed objection to the proofs was held to prevent a waiver from arising, at least as a matter of law, out of the prior acquiescence and recognition of liability by the company. And in the early New York case of Gilligan v. Commercial Fire Ins. Co., 20 Hun, 93, a specific objection at the close of a 15-days silence was deemed sufficient to do away with any claim of waiver.

Conversely, the Kansas City Court of Appeals, at a time when it was announcing the necessity of estoppel, decided in three cases that a waiver arising from the insured having been misled into failing to furnish the proper proofs could not subsequently be rescinded by the company.

Porter v. German-American Ins. Co., 62 Mo. App. 520; Probst v. American Ins. Co., 64 Mo. App. 408; Brownfield v. Mercantile Town Mut. Ins. Co., 84 Mo. App. 134. In the Porter Case, however, it

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did not appear that the statement was essential to the decision of the case; and in the other two cases the demand for the proofs was not made until the stipulated time for furnishing them had expired.

Of course, **there can be no rescission of a waiver where it would operate to put the insured to more trouble or expense than would have been the case had the company, in the first place, followed the provisions of the policy and insisted on a strict compliance therewith.**

Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578. See, also, Pretzfelder v. Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424, where the court held that a failure of the insured to furnish proof after a waiver by an attempted appraisal, was rather a technical defense than a meritorious one.

Nor can the company rescind a waiver where the delay between the time the company should have spoken and the time it does speak would operate to the detriment of the insured.

Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Atlantic Ins. Co. v. Wright, 22 Ill. 462. Such, also, appears to have been the basis of the decision in Fillmore v. Great Camp of the Maccabees, 109 Mich. 13, 66 N. W. 675, a life insurance case, though the exact application of the doctrine does not clearly appear.

An attempt to comply with the policy will not do away with a prior waiver.

Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237; Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. But in connection with the Building & Loan Association Case see Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384.

(f) Who may take advantage of waiver.

Where there is a waiver of proof of loss by the company, it inures to the mortgagee, where the policy is payable to him as his interest may appear (State Ins. Co. v. Ketcham, 58 Pac. 229, 9 Kan. App. 552). Conversely, it has been held that a payment to a mortgagee having no greater claims on the company than the mortgagor named as insured will inure to the benefit of the mortgagor, though at the time the mortgagor was in default for failure to furnish proofs. But where the payment is made under the full mortgage clause, such result does not follow (Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445). There is authority for saying that what-

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ever would be a waiver in an action by the policy holder obtains likewise in favor of a creditor of the insured, pursuing the company by garnishment (Reid, Murdock & Co. v. Mercurio, 91 Mo. App. 673). But in Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880, a similar decision was based solely on a statute [2] giving a mortgagee a lien upon the policy insuring the mortgaged property after notice to the company. The statute gave such mortgagee a right to collect his mortgage debt by trustee process commenced within 60 days after loss, and the court held that, inasmuch as trustee process would not be good as against the company until the proofs were furnished, it must have been the legislative intent that the mortgagee should be entitled to himself furnish the preliminary proofs, or take advantage of a waiver thereof.

A waiver of defects in proofs of death, arising from the representations of the company to the beneficiary, will inure to the benefit of the personal representative of the insured who institutes suit on the policy (Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601).

12. POWERS OF OFFICERS AND AGENTS TO WAIVE NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY.

(a) In general.
(b) Powers of officers.
(c) Powers of adjusters.
(d) Powers of general agents.
(e) Powers of local agents.
(f) Effect of statutory provisions.
(g) Delegation of authority.
(h) Provisions of policy limiting powers of agents and methods of waiver.
(i) Same—Special provisions.
(j) Waiver of limitation on power of agent.
(k) Same—By whom waived.

(a) In general.

It is a well-settled rule that any officer or agent of an insurance company, who has power to accept proofs of loss, and to deal with the insured in the settlement of the claim, will have power to waive

[2] Rev. St. Me. c. 49, § 52.

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the notice or proofs, or any defect therein, either expressly or by acts within the scope of such authority, which the law will construe as indicating such waiver. The authority to waive the proofs is necessarily implied in the power to accept them, or to settle the loss, and, in the absence of a known limitation upon the power of such an agent, the insured may safely rely upon his words and conduct.

This rule is general in application, but is especially well illustrated by the following cases: Perry v. Faneuil Hall Ins. Co. (C. C.) 11 Fed. 482; Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Liverpool & L. & G. Ins. Co. v. Tillis, 110 Ala. 201, 17 South. 672; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355, affirming 99 Ill. App. 469; Ætna Ins. Co. v. Shryer, 85 Ind. 362; Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, rehearing denied 66 N. E. 1003; Prussian Nat. Ins. Co. v. Peterson, 30 Ind. App. 289, 64 N. E. 102; Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769; Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128; Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Lake v. Farmers' Ins. Co., 110 Iowa, 473, 81 N. W. 710; Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; Priest v. Citizens' Mut. Fire Ins. Co., 3 Allen (Mass.) 602; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Searle v. Dwelling House Ins. Co., 152 Mass. 263, 25 N. E. 290; Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Nickell v. Phœnix Ins. Co., 144 Mo. 420, 46 S. W. 435; Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500; Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456, 86 App. Div. 115; Van Allen v. Farmers' Joint Stock Ins. Co., 10 Hun (N. Y.) 397; Solomon v. Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22; Mix v. Royal Ins. Co., 169 Pa. 639, 32 Atl. 460: Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

The same rule has been applied under life policies. Travelers' Life Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming (C. C.) 20 Fed. 661; United Brotherhood of Carpenters & Joiners v. Fortin, 107 Ill. App. 306; Alexander v. Grand Lodge A. O. U. W., 119 Iowa, 519, 93 N. W. 508; Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. W. 601; Winter v. Supreme Lodge K. P., 96 Mo. App. 1, 69 S. W. 662; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

Conversely, it has frequently been held that no waiver of notice or proofs can arise from acts or speech in relation thereto, unless

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the agent so acting is one having authority to deal with the proofs and settlement of the loss.

Burlington Ins. Co. v. Kennerly, 60 Ark. 532, 31 S. W. 155; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531, reversing 2 Thomp. & C. 629; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.

This converse rule, however, in some jurisdictions is subject to what, at first sight, appear to be exceptions. Agents of various kinds have been held competent to waive notice and proofs of loss, though it did not clearly appear that they were either the proper recipients of the proofs, or authorized to adjust and settle the loss. As these exceptions are apparently dependent on the powers of the specific classes of agents, they can be considered to better advantage in connection with the discussion of the powers of the various kinds of agents.

(b) Powers of officers.

Where the policy requires the proofs to be delivered at the company's home office, a waiver by the person in charge of the office will be binding on the insurer.

Edgerly v. Farmers' Ins. Co., 48 Iowa, 644; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683.

And an allegation of delivery of notice at the company's home office, and its acceptance as adequate, is a sufficient allegation of waiver of defects in such notice, though the policy provided that the notice should be delivered to the secretary at the company's home office (Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 23 Ind. App. 657, 55 N. E. 973). So, also, letters written from the home office have been held admissible to show waiver where they were in answer to letters to the company, and were written on paper containing its letterheads, and part of them purported to have been signed by the general officers (Bloom v. State Ins. Co., 94 Iowa, 359, 62 N. W. 810).

The secretary of an insurance company, being the officer through whom the company makes its wishes known, can bind the company by a waiver of notice and proofs.

Scott v. Security Fire Ins. Co., 98 Iowa, 67, 66 N. W. 1054; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110

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Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311; State Ins. Co. v. Todd, 83 Pa. 272; Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331.

And this is especially true where the secretary has been held out as representing the company in case of loss (Solomon v. Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22), or where it is expressly provided that the proofs must be delivered to the secretary.

Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. 529; Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

But in Trask v. State Fire & Marine Ins. Co., 29 Pa. 198, 72 Am. Dec. 622, where the company was discharged from liability by the failure to give timely notice of the loss, it was held that an alleged waiver of such failure could not be relied on to show a re-establishment of liability, in the absence of proof that the secretary had power to thus revive the contract.

The general manager of a company has power to waive the requirements of the policy as to notice and proofs of loss (Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574); and the same principle has been applied to a superintendent of a life company (Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398). But in Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601, there having been direct testimony that the superintendent had such authority, the question in relation thereto was held to be for the jury.

Whatever may be the power of the officers of a purely mutual company to waive those provisions of the policy which go to the essence of the contract, they certainly have power to waive the stipulations as to the nature and amount of the proof of the loss.

This rule has been applied to the president and secretary of the company, acting together: Priest v. Citizens' Mut. Fire Ins. Co., 3 Allen (Mass.) 602; Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.) 265. And see, also, Universal Mut. Fire Ins. Co. v. Weiss, 106 Pa. 20, which seems to have been an action on such a contract, where the court says that, had the evidence showed insured to have been misled by the president, as claimed, a waiver would have arisen. In Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492, the letters of a secretary, charged with the duty of receiving notice, and recording the doings of the directors, was held admissible to prove waiver, so far as they admitted the receipt of the notice, and the action of the directors thereon. It being the province of the directors to pass on the proofs, they were, of course, competent to waive them.

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But a president of a mutual company, who has no power in relation to the proof or settlement of a loss, cannot waive the provisions of the policy as to proofs (Dawes v. North River Ins. Co., 7 Cow. [N. Y.] 462). And it has been held that, as a receiver of a company cannot abandon a defense, he cannot be bound by any implied waiver of notice (McEvers v. Lawrence, 1 Hoff. Ch. [N. Y.] 172).

Secretaries of mutual benefit associations have been held to have authority to waive notice and proofs of death.

Alexander v. Grand Lodge A. O. U. W., 119 Iowa, 519, 93 N. W. 508; Baker v. New York State Mut. Ben. Ass'n, 9 N. Y. St. Rep. 653.

(c) Powers of adjusters.

An agent authorized to adjust the loss, either by the general nature of his duties or by special appointment, should also have authority to waive the notice and proofs of loss required by the policy. This is but an exemplification of the rule already noted. It is a natural method of adjustment that the representative of the company should either by direct statement specify what proofs he will deem sufficient, or by directions as to the preparation of certain proofs, or other actions, indicate to the insured just what will be expected of him. Whatever the adjuster may do in these particulars is binding on the company.

Reference to the following cases is deemed sufficient: Perry v. Faneuil Hall Ins. Co. (C. C.) 11 Fed. 482; Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Indiana Ins. Co. v. Capehart, 108 Ins. 270, 8 N. E. 285; Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432; Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769; Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Lake v. Farmers' Ins. Co., 110 Iowa, 473, 81 N. W. 710; Searle v. Dwelling House Ins. Co., 152 Mass. 263, 25 N. E. 290; Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Id., 87 Mich. 428, 49 N. W. 634; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; McCollum v. Liverpool, L. & G. Ins. Co., 67 Mo. App. 66; Tertl v. American Ins. Co., 76 Mo. App. 42; Perry v. Dwelling House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; Bishop v. Agricultural Ins. Co., 9 N. Y. Supp. 350, 56 Hun, 642; McGuire v. Hartford Fire Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300; Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256; Carey v. Allemania Fire Ins. Co., 171 Pa. 204, 33 Atl. 185; Davidson v. Guardian Assur.

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Co., 176 Pa. 525, 35 Atl. 220; Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634; East Texas Fire Ins. Co. v. Dyches, 56 Tex. 565; German Ins. Co. v. Norris, 11 Tex. Civ. App. 250, 32 S. W. 727; Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.) 78 S. W. 378; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

The company will also be bound by a denial or recognition of liability by the adjuster.

Reference may be made to Liverpool & L. & G. Ins. Co. v. Tillis, 110 Ala. 201, 17 South. 672; California Ins. Co. v. Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376; Ætna Ins. Co. v. Shryer, 85 Ind. 362; Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, rehearing denied 66 N. E. 1003; Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265; Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285; German Fire Ins. Co. v. Seibert, 24 Ind. App. 279, 56 N. E. 686; Prussian Nat. Ins. Co. v. Peterson, 30 Ind. App. 289, 64 N. E. 102; Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Dwelling House Ins. Co. v. Osborn, 1 Kan. App. 197, 40 Pac. 1099; Home Ins. Co. v. Koob, 24 Ky. Law Rep. 223, 68 S. W. 453, 113 Ky. 360, 58 L. R. A. 58, 101 Am. St. Rep. 354; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Fulton v. Phœnix Ins. Co., 51 Mo. App. 460; Siegel v. Phœnix Ins. Co., 107 Mo. App. 456, 81 S. W. 637; Smaldone v. President, etc., of Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168, affirming 48 N. Y. Supp. 1115, 22 App. Div. 633; Flaherty v. Continental Ins. Co., 46 N. Y. Supp. 934, 20 App. Div. 275; Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456, 86 App. Div. 115; Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518, noted in 10 Abb. Prac. (N. S.) 166; Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; Mix v. Royal Ins. Co., 169 Pa. 639, 32 Atl. 460; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.

And the same rule obtains as to an adjuster of a life company seeking to obtain a settlement with the beneficiary: Willison v. Jewelers' & Tradesmen's Co., 68 N. Y. Supp. 1129, 34 Misc. Rep. 216; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

It is, however, pointed out in Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507, that an adjuster may have authority to waive defects in proofs, though he might not have been the proper person to waive proofs altogether. And a distinction between the authority to waive defects by accept-

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ing the proofs furnished, and authority to waive proofs altogether by denial of liability, seems to have been in the mind of the Massachusetts court when, in Searle v. Dwelling House Ins. Co., 152 Mass. 263, 25 N. E. 290, it pointed out that the insured might be justified in relying on the statements of adjuster as to the proofs, though he had no authority to finally settle the loss.

The statement that an adjuster has authority to waive proof of loss does not mean that mere proof that a person is called an "adjuster" will be sufficient proof of his authority. Some testimony must be given showing the nature of his duties.

Hollis v. State Ins. Co., 65 Iowa, 454, 21 N. W. 774; Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373, as distinguished in Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

Proof of the authority of one assuming to act as an adjuster cannot be made by his own declarations (Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696). Where, however, the company has promised to send an adjuster, it is a natural inference that a person answering the description and purporting to have been sent by the company has authority to adjust the loss and to waive the formal proofs.

Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; Roe v. Dwelling House Ins. Co., 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595.

Likewise, it has been held that the company was bound by the acts of one representing himself as adjuster who had in his possession a policy which had been returned to the company (Morgan v. Illinois Ins. Co., 130 Mich. 427, 90 N. W. 40); or who had acted for the company in adjusting with plaintiff prior losses on the same property (Lowry v. Lancashire Ins. Co., 32 Hun [N. Y.] 329), or losses on the contents of the building for the destruction of which recovery was sought (Slater v. Capital Ins. Co., 89 Iowa, 628, 57 N. W. 422, 23 L. R. A. 181). As to whether a recognition of a person as adjuster by the company's local agent will tend to establish his authority to act in that capacity, the cases are not in harmony. In Michigan and Pennsylvania, both of which hold that the local agent himself can act in adjusting losses, evidence of such recognition has been admitted. In Iowa, where it appears that the local

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agent has no such authority, his recognition of the adjuster has been held ineffectual to bind the company.

Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Fritz v. Lebanon Mut. Ins. Co., 154 Pa. 384, 26 Atl. 7; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696.

Somewhat similar in principle to a waiver effected by an adjuster whom the company has impliedly recognized is one brought about by an adjustment or statement which the company has not repudiated as beyond the authority of the agent.

Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Enos v. St. Paul Fire & Marine Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796. And see, also, Atlantic Ins. Co. v. Carlin, 58 Md. 336, where the principle is recognized, but held not applicable to the facts of the case.

The insured will not be bound by an undisclosed limitation on the adjuster's authority (California Ins. Co. v. Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376). And it has been held that a letter to the insured, stating that the adjuster had been sent to investigate the loss and advise the company, in order that the proper officer might decide on further steps, did not charge the insured with notice of a limitation on the adjuster's authority, so as to prevent a waiver of proofs through the insured's reliance on the adjuster's conduct, showing that his examination was deemed a sufficient proof of the loss (Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Id., 87 Mich. 428, 49 N. W. 634).

The testimony of one who claims to have had authority to adjust the loss is admissible to prove such authority, at least where it has not been shown that his authority was in writing (O'Leary v. German-American Ins. Co., 100 Iowa, 390, 69 N. W. 686). So, also, is the testimony of a third person admissible, though somewhat in the nature of a legal conclusion. And if it afterwards develops that such testimony was based on hearsay, objection must be made on the ground of the incompetency of the witness, or the evidence will be permitted to stand (Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696).

(d) Powers of general agents.

The term "general agent," as used in relation to insurance contracts, has so many different meanings that decisions laying down the general principle that such agents have power to waive notice

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and proofs are of little practical value unless the status of the agent is defined with some degree of exactness.

The rule is asserted without further explanation in American Acc. Co. v. Fidler's Adm'x (Ky.) 35 S. W. 905, and American Cent. Ins. Co. v. Heaverin (Ky.) 35 S. W. 922.

In Smaldone v. President, etc., of Insurance Co. of North America, 44 N. Y. Supp. 201, 15 App. Div. 232, it was held that a "special agent" who "had charge of" the agency by which the insurance was written, and other agencies, might waive proofs of loss. On the second trial of the case, however, it directly appeared that such agent had power to adjust the loss (Smaldone v. President, etc., of Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168, affirming 48 N. Y. Supp. 1115, 22 App. Div. 633). The "general agent" whose acts were held to amount to a waiver in McCoubray v. St. Paul Fire & Marine Ins. Co., 64 N. Y. Supp. 112, 50 App. Div. 416, judgment affirmed 169 N. Y. 590, 62 N. E. 1097, seems, also, to have been one having charge of a given district. In Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683, though the court holds that under the circumstances the acts of the agent as an adjuster would have been sufficient to effect a waiver, yet attention is called to the fact that the agent had authority to appoint local agents. Such, also, seems to have been the meaning of the term "general agent" as used in Renier v. Dwelling House Ins. Co., 74 Wis. 89, 42 N. W. 208, where the court held that a general agent had power to waive the time for filing proofs, though special provisions of the policy restricted the authority of local agents in that regard. Authority "to transact the business of insurance" carries with it power to waive the conditions as to notice and proofs (Phenix Ins. Co. v. Bowdre, 67 Miss 620, 7 South. 596, 19 Am. St. Rep. 326). But it has been held that, in the absence of some showing as to authority, it will not be presumed that a traveling agent has power to waive the necessity of notice (Boyle v. North Carolina Mut. Ins. Co., 52 N. C. 373).

(e) Powers of local agents.

In many jurisdictions it has been held that a local agent, having authority to issue policies, has also authority to waive the notice or proofs. In some of the cases this is rather assumed than directly held, and not all the cases making it a direct holding give the reasons of the court. Apparently, the doctrine is based on the theory that the discretionary power vested in an issuing agent renders

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him a general agent in such a sense that an authority in relation to settlement and proofs may be assumed unless the absence of such authority has been brought to the notice of the insured.

Ide v. Phœnix Ins. Co., 12 Fed. Cas. 1168; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 South. 46; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; German Ins. Co. v. Ward, 90 Ill. 550; German Ins. Co. v. Gibe, 59 Ill. App. 614; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Phenix Ins. Co. v. Munger, 49 Kan. 178, 30 Pac. 120, 33 Am. St. Rep. 360; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670; Snyder v. Dwelling House Ins. Co., 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625. See, also, Imperial Fire Ins. Co. v. Murray, 73 Pa. 13, and Queen Ins. Co. v. Straughan (Kan.) 78 Pac. 447.

In Missouri the St. Louis Court of Appeals originally held that, where the local agent had no express authority to adjust or settle the loss, he could not waive the proofs, but, where it did not appear that the local agent did not have such authority, the company would be bound by his actions.

McCollum v. North British & Mercantile Ins. Co., 65 Mo. App. 304; McCollum v. Hartford Fire Ins. Co., 67 Mo. App. 76.

The Supreme Court, however, decided that prima facie a local issuing agent had authority to waive the proofs, and quoted with approval a statement that the power of the agent was not to be limited by restrictions unknown to the other party to the contract.

Nickell v. Phœnix Ins. Co., 144 Mo. 420, 46 S. W. 435. This decision has been followed in Harness v. National Fire Ins. Co., 76 Mo. App. 410; Burge Bros. v. Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342.

But it has been decided in other jurisdictions that the authority of a local agent carries with it no power in relation to the proofs or the settlement of the loss, and that, therefore, such agents have no power, as such, to waive the notice or proofs.

Harrison v. Hartford Fire Ins. Co. (C. C.) 59 Fed. 732; Burlington Ins. Co. v. Kennerly, 60 Ark. 532, 31 S. W. 155; Lohnes v. Insurance Co. of North America, 121 Mass. 439; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954.

So, in Minnesota, after an early case (Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 [Gil. 98]) assuming the opposite

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doctrine, but decided under a statute [1] now superseded,[2] it seems now settled that a local issuing agent, as such, has no authority to waive proofs of loss.

Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859; Shapiro v. St. Paul Fire & Marine Ins. Co., 61 Minn. 135, 63 N. W. 614; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481.

In New York there has been a conflict more apparent than real. In Bush v. Westchester Fire Ins. Co., 63 N. Y. 531, reversing 2 Thomp. & C. 629, it was squarely held that the power of a local agent to issue policies did not imply any authority as to adjusting losses or waiving the stipulated proofs. But in Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480, Miller, J., who wrote the opinion, stated that a local agent of a life insurance company, who issued renewal receipts, kept a register of deaths, informed the company thereof, and furnished blanks for proofs, might, by his statements as to the invalidity of the policy for nonpayment of premium, waive the presentation of proofs within the stipulated time. The statements made were directly connected with the agent's duties. Two other judges concurred with the writer of the opinion, and four refused to pass any opinion on the question. The distinction indicated by the facts of the Goodwin Case is also apparent in the case of O'Brien v. Prescott Ins. Co., 57 Hun, 589, 11 N. Y. Supp. 125, where the company was held bound by the acts and statements of the local agent in reference to the proofs, but where it also appeared that such local agent had power to adjust losses.

The doctrine that a local issuing agent does not, as such, have authority either to adjust the loss or waive proofs, seems also to have been established in Iowa. In Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373, it was decided that neither the local agent nor the adjuster, as such, had authority to waive the proofs. The exact authority of the local agent does not appear in the report further than that he had blank policies furnished him, and made the contract sued on, which was one to issue a policy. The Barre Case, in so far as it deals with adjusters, was explained in Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128, to mean only that the mere title of adjuster would not imply authority either to adjust or waive. But this explanation cannot be applied to the local

[1] Laws 1868, c. 22, § 7.
[2] Laws 1872, c. 1, § 8, as interpreted in Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.

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agent, since his authority to bind the company appeared in the case, and could not have been considered as dependent on a mere title. Reference may also be made to Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696, where the question of waiver by the local agent was decided under a special provision, but where it was said that such an agent had no power to adjust a loss.

In a recent Florida case (Indian River State Bank v. Hartford Fire Ins. Co., 35 South. 228) a distinction was drawn between the authority necessary to waive by acts directly relating to the proof of loss, and that necessary to a denial of liability from which a waiver might arise. A local issuing agent, it was pointed out, might have authority to deny the company's liability, though not to adjust the loss or accept proofs.

In cases holding that there is no implied authority in a local issuing agent to adjust a loss, it has also been held that the insured cannot rely on the assumption of such authority by the local agent.

Bush v. Westchester Fire Ins. Co., 63 N. Y. 531, reversing 2 Thomp. & C. 629; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.

But if any evidence is given tending to show such authority, and the company, having the facts in its exclusive possession, makes no effort to rebut such evidence, it cannot urge the insufficiency of the evidence introduced by plaintiff.

McGuire v. Hartford Fire Ins. Co., 40 N. Y. Supp. 300, 7 App. Div. 575, affirmed without opinion 158 N. Y. 680, 52 N. E. 1124. See, also, McCullough v. Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207, where the authority of the agent who issued the policy was presumed, in the absence of other evidence by the company, to continue to the time of the delivery of the proofs.

Emphasis has also been placed upon the fact that the company was a foreign one, and had given the insured no notice that there was any other agent in the country (Stacy v. Norwich Union Fire Ins. Soc., 25 Ohio Cir. Ct. R. 67), and upon the fact that the company had ceased to do business and had no general office (Pennell v. Chandler, 7 Chi. Leg. N. [Ill.] 227).

The local agent may be made a mere instrument by the company for the performance of acts amounting to a waiver of proofs. Such a case cannot be said to present any real question as to agency.

Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384.

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Likewise, if the local agent is given special authority in relation to any matter, his acts in performance of his commission will be binding on the company, and a waiver may arise therefrom.

Phœnix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355, affirming 99 Ill. App. 469; Bolan v. Fire Ass'n, 58 Mo. App. 225; Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. 259.

Whether or not the local agent, as such, has power to bind the insurer by a waiver of proofs, the company certainly may estop itself to deny his authority by failing to object to his acts.

Western Assur. Co. v. White (Miss.) 25 South. 494; Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500.

So, also, he can effect a waiver where by custom he has an apparent authority in relation to the settlement of claims.

Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; Van Allen v. Farmers' Joint Stock Ins. Co., 10 Hun (N. Y.) 397.

In Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98), it was pointed out that the company's acts in treating a firm or a member thereof as a local agent might establish an agency sufficient to support a waiver, though there was no direct evidence of any agency except in another member of the firm.

An agent whose authority is limited to soliciting insurance cannot waive notice or proofs of loss.

Forest City Ins. Co. v. School Directors, 4 Ill. App. 145; American Cent. Ins. Co. v. Birds Building & Loan Ass'n, 81 Ill. App. 258.

The question as to the authority of the local agents of life insurance companies to waive notice and proof of death has not very frequently arisen, since ordinarily the local agent is recognized as a mere soliciting agent, and the correspondence is had directly with the company. It has, however, been held that where a local agent undertook to give notice of the death, and did so, and was intrusted by the company with the blank proofs of death, to be delivered to the beneficiary, he was thereby vested with such authority in relation to the proofs that the company was bound by his acts in relation thereto.

Travelers' Life Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming Edwards v. Ins. Co. (C. C.) 20 Fed. 661.

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And the local financial secretary of a fraternal association, charged with the duty of receiving and forwarding proofs of death (United Brotherhood of Carpenters & Joiners of America v. Fortin, 107 Ill. App. 306), or delivering blanks to the beneficiary (Winter v. Supreme Lodge K. P. of the World, 96 Mo. App. 1, 69 S. W. 662), can prima facie waive proofs of death.

(f) Effect of statutory provisions.

In North British Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458, a foreign company was held bound by the refusal of the local agent to accept proofs, he having issued the policy, and being described therein as the "duly authorized agent" of the company. Under such circumstances it might be inferred, the court said, that the agent had complied with the statute,[3] and obtained from the auditor the proper certificate of authority "to take risks or transact any business of insurance" in the state. Also, in Massachusetts a person appointed by a foreign company under a statute [4] as "general agent" upon whom process might be served, and who was authorized by the company to issue policies and superintend a local branch of the company's business, was held competent to waive the manner of proof (Eastern R. Co. v. Relief Fire Ins. Co., 105 Mass. 570).

In Wisconsin it has been held that a statute [5] providing that "whoever" does one of several things therein mentioned, "shall be held an agent of such corporation to all intents and purposes" does not mean that he shall be deemed the agent of the company in the doing of anything not implied in the specific act authorized. Therefore, the authority of one merely authorized to make contracts of insurance was not extended by such statute so as to authorize him to waive the proofs of loss.

> **Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954, following Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34.**

In Minnesota, on the other hand, it was held that a member of a firm who drew up an assignment on the policy, which assignment was signed by the other partner, who was recognized as agent, came within a statute [6] providing that any one who in any wise, directly or indirectly, should make, or cause to be made, any con-

[3] Rev. St. Ind. 1881, § 3765.
[4] Gen. St. Mass. 1860, c. 58, §§ 66–78.
[5] Rev. St. Wis. § 1977.
[6] Laws Minn. 1868, c. 22, § 7.

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tract of insurance for any foreign company, should be deemed, to all intents and purposes, the agent of such company. Therefore a waiver by such first-mentioned partner was deemed effective, though he was not the regularly appointed agent. (Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 [Gil. 98]). Such statute has, however, been superseded [7] (Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859).

In Maine a statute [8] providing that agents of insurance companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them has been held to apply not merely to the agent issuing the policy, but to extend to an agent sent to adjust the loss, so that a waiver by him of the time allowed for furnishing the proofs was binding (Day v. Dwelling House Ins. Co., 81 Me. 244, 16 Atl. 894).

(g) Delegation of authority.

The business of adjusting losses is one requiring special skill and fitness, and therefore one authorized to act in that capacity cannot, by virtue of his position, delegate his powers to another, so that the acts of such other in the adjustment of the loss will be binding on the company as a waiver.

Ruthven v. American Fire Ins. Co., 92 Iowa, 316, 60 N. W. 663; McCollum v. North British & Mercantile Ins. Co., 65 Mo. App. 304; Albers v. Phœnix Ins. Co., 68 Mo. App. 543.

But the general agent or manager of a company within a certain district may authorize one sent to adjust the loss to delegate such authority to still a third person, and in such cases a waiver by the third person will be binding (Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574). Similarly, it has been held that one sent by a general adjuster to "see about" a loss had sufficient authority to proceed in the adjustment, so that his acts, whereby the insured was put to trouble, would amount to a waiver of formal proofs (Swain v. Agricultural Ins. Co., 37 Minn. 390, 34 N. W. 738). And an employé in the office of the general manager of an accident company for a given district, who has been put in charge of a claim by the manager, and recognized by the company, may bind the company by communicating to the insured's agent a denial of liability expressed by the company to him (Sheanon v. Pacific Mut. Life Ins. Co., 83 Wis. 507, 53 N. W. 878).

[7] Laws Minn. 1872, c. 1, § 8.

[8] Rev. St. Me. c. 49, § 21.

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(h) Provisions of policy limiting powers of agents and methods of waiver.

In almost all modern policies there are stipulations designed to limit the power of agents to waive the conditions of the policy. These stipulations, while they vary somewhat in form, provide, in effect, that no agent shall have power to waive any provision or condition of the policy, except in writing indorsed on the policy; and it is sometimes provided, in addition, that the waiver must be signed by the president or secretary.

> **The standard policies of New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin provide that "no officer, agent or other representative shall have power to waive any provision or condition of this policy * * * unless such waiver if any shall be written upon or attached thereto." The standard policies of Massachusetts, Maine, Minnesota, and New Hampshire contain no provision of this character.**

It is evident that such a provision, if given a literal and sweeping interpretation, would restrict all waiver to express written waiver, and wipe out entirely the doctrine of implied waiver, or waiver by estoppel in pais. The courts have, however, been loath to adopt such an interpretation, though as to the exact effect which such a stipulation should have on a waiver of the notice and proofs specified in the policy they are not agreed.

The case of Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.) 265, is one of the leading cases on the subject. In that case the policy provided that no "condition, stipulation, covenant or clause" in the policy should be "altered, annulled or waived," except by indorsement signed by the president or secretary. The alleged waiver was by a failure of the officers of the company to point out defects in the proofs of loss, and by a denial of liability on other grounds. The court refused to decide how far the provisions as to the notice and proofs could be regarded as conditions of the contract itself, and hence subject to waiver only by indorsement. The question was not "as to the provisions of the contract, but as to the performance of the provisions. The question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made,

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they never can be made. The law does not say the procedure was perfect, but that the question is not open."

This doctrine, that though the provision itself may not be subject to oral waiver by the officer or agent, yet the company may, through such officer, put itself in such a position that it cannot be heard to deny that proper notice and proof have been given, has also been recognized in Nebraska, Oregon, Pennsylvania, and Texas.

Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb. 21, 59 N. W. 752; Weidert v. State Ins. Co., 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809 (in this case, however, the court was of opinion that the alleged waiver was not in the nature of a fraud, and that, therefore, the condition was effective); Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; McFarland v. Kittanning Ins. Co., 134 Pa. 590, 19 Atl. 796, 19 Am. St. Rep. 723; Mix v. Royal Ins. Co., 169 Pa. 639, 32 Atl. 460; Fire Ass'n v. Jones (Tex. Civ. App.) 40 S. W. 44.

In connection with the Pennsylvania cases cited see State Ins. Co. v. Todd, 83 Pa. 272, and Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. 529, where similar provisions contained in the policies were not mentioned by the court. And in connection with the Texas case see Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955, where it was said that the condition did not apply at all to a waiver after the destruction of the property, and Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.) 78 S. W. 398, where it was said that a waiver of proofs of death was not governed by a clause in the policy attempting to retain the power to waive forfeitures in the hands of the general officers.

The Supreme Court of Ohio, also in a case involving a waiver of proofs of loss, refers with approval to the doctrine of agency laid down in an earlier case, in which effect was given to the provision as prohibiting an oral change in the time of payment of premiums, but in which the court nevertheless refused to say that the company might not be estopped by conduct in spite of the provision.

Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57, referring to Union Cent. Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906. But see the recent circuit court case of Stacy v. Norwich Union Fire Ins. Soc., 25 Ohio Cir. Ct. R. 67, in which the court quotes with approval from Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355, where it was said that the stipulation did apply to provisions dealing with proofs of loss.

In other states the courts have gone further, and, while often citing the Blake Case, have held what it expressly refused to pass upon—that such limitations upon the powers of agents were meant

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to apply only to a waiver of those conditions and provisions in the policy relating to the formation and continuance of the contract, and to have no bearing upon a waiver of the notice and proofs of loss. Such is the doctrine in California, Florida, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, New Jersey, North Carolina, and Wisconsin.

Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Indian River State Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228; Dwelling House Ins. Co. v. Dowdall 159 Ill. 179, 42 N. E. 606; Citizens' Ins. Co. v. Stoddard, 64 N. E. 355, 197 Ill. 330, affirming 99 Ill. App. 469; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285; American Fire Ins. Co. v. Sisk, 9 Ind. App. 305, 36 N. E. 659; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311; Lake v. Farmers' Ins. Co., 110 Iowa, 473, 81 N. W. 710; Franklin Fire Ins. Co. v. Chicago Ice Ass'n, 36 Md. 102, 11 Am. Rep. 469; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62; Phenix Ins. Co. v. Bowdre, 67 Miss. 620, 7 South. 596, 19 Am. Rep. 326; Loeb v. American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Okey v. State Ins. Co., 29 Mo. App. 105; Titsworth v. American Central Ins. Co., 62 Mo. App. 310; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Snyder v. Dwelling House Ins. Co., 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625, reversing 59 N. J. Law, 18, 34 Atl. 931; Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256; Matthews v. Capital Fire Ins. Co., 115 Wis. 272, 91 N. W. 675. See, also, in connection with this case, Faust v. American Fire Ins. Co., 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876, where no mention was made of the condition of the policy. Illinois cases should probably be considered as reversing a contrary intimation in American Cent. Ins. Co. v. Birds Building & Loan Ass'n, 81 Ill. App. 258.

The Arkansas and Kentucky courts seem to have adopted the same doctrine, though from the brevity of the discussions of the question it is impossible to determine the exact basis of the holdings.

Burlington Ins. Co. v. Kennerly, 60 Ark. 532, 31 S. W. 155; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; American Cent. Ins. Co. v. Heaverin (Ky.) 35 S. W. 922, affirming 16 Ky. Law Rep. 95; Citizens' Ins. Co. v. Bland (Ky.) 39 S. W. 825; American Fire Ins. Co. v. Bland (Ky.) 40 S. W. 670.

The doctrine as to the effect of such stipulations has also been recognized as applicable to life insurance contracts.

Berry v. Mobile Life Ins. Co., 3 Fed. Cas. 288; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

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Very similar in principle are those cases holding a waiver of proofs of death to have been effected by statements of an agent who, under the policy, was not authorized to waive a "forfeiture."

Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601; Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.) 78 S. W. 398.

Likewise, a provision that no stipulation of the policy could be changed except in a certain manner was held not to prevent a waiver as to the sufficiency of the proofs required by statute,[9] it not appearing that the policy itself contained any stipulation as to the form of the proofs (Pringle v. Des Moines Ins. Co., 107 Iowa, 742, 77 N. W. 521). Nor does a provision against extending the time of service of proofs except in a certain manner have any effect upon an absolute waiver of their service (Bishop v. Agricultural Ins. Co., 56 Hun, 642, 9 N. Y. Supp. 350).

(i) Same—Special provisions.

In Iowa, a distinction has been drawn between a provision that "no officer, agent or other representative * * * shall be held to have waived," etc., except in a writing, and one that no "officer, agent or representative shall have such power [to waive] or be deemed or held to have waived," unless the waiver should be in writing. The former was considered as a mere requirement for a written waiver, which could be waived by any one who could waive the proofs. The latter went to the power of agents.

O'Leary v. German-American Ins. Co., 100 Iowa, 390, 69 N. W. 686. See, also, Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769, where an express waiver by an adjuster was held binding, though the policy provided that the company should not "be bound" by any act or statement made to or by any agent, which was not contained in the policy.

In Atlantic Ins. Co. v. Carlin, 58 Md. 336, under the peculiar circumstances of the case, weight was given to a provision that any person other than the insured, who might have procured the insurance to be taken by the company, should be deemed to be the agent of the insured, and not of the company, in any transaction relating to the insurance. But in North British Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458, it was held that such a stipulation was absolutely of no effect as to the local agent,

[9] Acts 18th Gen. Assem. Iowa, c. 211, § 3.

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who might be justly assumed to have complied with the provisions of the statute, and obtained a certificate of authority "to * * * transact any business of insurance" in the state.

A stipulation that no act of any agent other than secretary or president shall be construed as a waiver of a full compliance with the provisions of the policy will not prevent a waiver by an agent falling within the provisions of a statute [10] providing that agents of insurance companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them (Day v. Dwelling House Ins. Co., 81 Me. 244, 16 Atl. 894).

(j) Waiver of limitation on power of agent.

Another doctrine with relation to such provisions in the policy is that the stipulation is no more sacred than any other part of the policy, and that the company may either waive such provision or be estopped from enforcing it. Such is the doctrine in Michigan, New York, Vermont, and Wyoming.

Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Sergent v. Liverpool & L. & G. Ins. Co., 155 N. Y. 349, 49 N. E. 935; McGuire v. Hartford Fire Ins. Co., 158 N. Y. 680, 52 N. E. 1124, affirming 40 N. Y. Supp. 300, 7 App. Div. 575; Smaldone v. President, etc., of Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168, affirming 48 N. Y. Supp. 1115, 22 App. Div. 633; Flaherty v. Continental Ins. Co., 46 N. Y. Supp. 934, 20 App. Div. 275; Van Allen v. Farmers' Joint Stock Ins. Co., 10 Hun (N. Y.) 397; Lowry v. Lancashire Ins. Co., 32 Hun (N. Y.) 329; Baumgartel v. Providence Washington Ins. Co., 61 Hun, 118, 15 N. Y. Supp. 573; Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

In connection with the Michigan case, see the earlier case of Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Id., 87 Mich. 428, 49 N. W. 634—where the majority opinion fails to mention the existence of such a provision.

The case of Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595, where it was said that the acts of the secretary of the company would not amount to a waiver, on account of the limitation in the policy, must, it would seem, be considered as overruled by the later New York cases.

Such was also the doctrine of California, Illinois, Iowa, and Wisconsin prior to the adoption in those states of the rule that such

[10] Rev. St. Me. c. 49, §§ 21, 90.

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provisions are not applicable to the stipulations of the policy dealing with notice and proofs of loss.

Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769; Ruthven v. American Fire Ins. Co., 92 Iowa, 316, 60 N. W. 663; O'Leary v. German-American Ins. Co., 100 Iowa, 390, 69 N. W. 686; Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Renier v. Dwelling House Ins. Co., 74 Wis. 89, 42 N. W. 208.

In Kansas the court has gone a step further, and held, not only that the provision itself may be waived, but that, since neither that provision nor any other can deprive the parties of power of changing their contract, therefore, if it is so sweeping as to have that effect if literally enforced, it will be entirely void (Phenix Ins. Co. v. Munger, 49 Kan. 178, 30 Pac. 120, 33 Am. St. Rep. 360).

(k) Same—By whom waived.

Those courts holding that the clause limiting the power of agents to waive except in writing may itself be waived are at once confronted with the question as to what "agent, officer, or other representative" will have power to waive such provision. This question, however, is never separated from the question of the waiver of the proofs themselves. The same acts or statements relied on as waiving the proofs are also insisted upon as evidence of the waiver of the clause taking away the power of waiver except by indorsement. But when the waiver of the proofs has been express, and has contained little or no element of estoppel, effect has been given to the limiting provision, though the waiver was by an adjuster, an officer who is almost universally held competent to waive the proofs.

Kirkman v. Farmers' Ins. Co., 90 Iowa, 457, 57 N. W. 952, 48 Am. St. Rep. 454; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216.

But in Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331, it was held that the secretary, acting as "the company," might expressly waive the proofs, though "no officer, agent, or other representative" was empowered to do so.

It is, however, almost always the case that the so-called waiver

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of the proofs and of the stipulation as to agency is more in the nature of an estoppel, either by denial or acknowledgment of liability or by the acceptance of the proofs offered as sufficient. And in no state, with the possible exception of Iowa, has the rule been followed that under such circumstances the waiver of the proofs and of the limitation must be by the company, as distinguished from its field force. No general rule has, indeed, been announced, but all, or nearly all, the cases are believed to be reconcilable under the general law of agency—that the company will be bound by the legal consequences of any act which the agent was authorized to do. If the agent is authorized to perform the act which may be justly taken to show the intention of the company, and which misleads the insured, it would seem that such act should be sufficient to waive not only the proofs, but the clause by which the company seeks to prevent a waiver from arising from the deception involved in the authorized act. Of course, the company itself can waive the provision by acts misleading the insured.

Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126.

But so can a general manager, by letting the insured suppose that the proof furnished was sufficient (Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574); or a general agent by an offer to pay (McCoubray v. St. Paul Fire & Marine Ins. Co., 169 N. Y. 590, 62 N. E. 1097, affirming 64 N. Y. Supp. 112, 50 App. Div. 416), or by conduct inconsistent with an enforcement of the limitation as to the time of furnishing proof (Renier v. Dwelling House Ins. Co., 74 Wis. 89, 42 N. W. 208).

So, also, any act of an adjuster within the general scope of his employment, which, aside from the limiting provision, would amount to a waiver or estoppel, will bind the company, though the policy contains the limiting provision.

This principle has been applied to a denial of liability in Smaldone v. President, etc., of Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168, affirming 48 N. Y. Supp. 1115, 22 App. Div. 633; Flaherty v. Continental Ins. Co., 46 N. Y. Supp. 934, 20 App. Div. 275; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454.

And as to an acceptance of proofs offered as sufficient in Sergent v. Liverpool & L. & G. Ins. Co., 155 N. Y. 349, 49 N. E. 935, reversing 32 N. Y. Supp. 594, 85 Hun, 31, and Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. See, also, Gristock

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v. Royal Ins. Co., 84 Mich. 161, 147 N. W. 549, and Id., 87 Mich. 428, 49 N. W. 634, where the majority opinion makes no mention of the limiting provision, and McGuire v. Hartford Fire Ins. Co., 40 N. Y. Supp. 300, 7 App. Div. 575, judgment affirmed without opinion 158 N. Y. 680, 52 N. E. 1124, where the exact nature of the waiver does not appear.

In Iowa the Supreme Court, after first deciding that under the provision the acts of an adjuster could not amount to a waiver, changed its position to an admission of waiver by the implied knowledge in the company of the acts of the adjuster, and of the settlement by him. The distinction, however, between an estoppel by the acts of an adjuster and an estoppel by the implied knowledge in the company of such acts, is at once seen to be rather academic than practical.

Ruthven v. American Fire Ins. Co., 92 Iowa, 316, 60 N. W. 663; Id., 102 Iowa, 550, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa, 80, 75 N. W. 683; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126.

On the other hand, acts of local agents in the adjustment and settlement of the loss have been held not to estop the company from insisting on the stipulated proofs, the policy providing either that no agent or representative should have power to waive at all, or that he should not have power to waive except in writing.

This is the rule in New York and Michigan. Gould v. Dwelling House Ins. Co., 90 Mich. 302, 51 N. W. 455, affirmed on rehearing 90 Mich. 308, 52 N. W. 754; Wadhams v. Western Assur. Co., 117 Mich. 514, 76 N. W. 6; Van Allen v. Farmers' Joint Stock Ins. Co., 64 N. Y. 469, reversing 4 Hun, 413, 6 Thomp. & C. 591; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, reversing 43 N. Y. Supp. 623, 13 App. Div. 444; Legnard v. Standard Life & Acc. Co., 81 N. Y. Supp. 516, 81 App. Div. 320 (a denial of liability by the agent who had countersigned a life policy). And it was the rule in Iowa and Wisconson prior to the adoption of the rule that the limiting provision does not apply to proofs of loss. Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954; Oshkosh Match Works v. Manchester Fire Assur. Co., 92 Wis. 510, 66 N. W. 525.

While the cases are not as clear as might be desired in explaining why a limiting provision, applicable in terms to all kinds of agents,

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should be given full effect where the alleged estoppel has arisen by the acts of a local agent, and considered waived when the acts are those of a general agent or adjuster, yet it may be noted that in New York, Iowa, and Wisconsin it has been held, entirely aside from such provision, that a local agent does not have power in relation to the settlement or adjustment of the loss, and cannot, therefore, waive the proofs. The decision that the local agent is bound by the provision, and that his acts in the adjustment cannot estop the company to insist on it, is thus, in those states, rather cumulative in its nature. This explanation does not, however, apply to Michigan, where it has been held that, in the absence of restriction, the proofs may be waived by the local agent. Nor do the opinions in the Gould Case (90 Mich. 302, 51 N. W. 455), holding that the provision is applicable to a local agent, and the Young Case (92 Mich. 68, 52 N. W. 454), holding that the provision did not prevent an estoppel by the acts of an adjuster, offer any reason for the difference in the results beyond a showing that the adjuster represented the company.

Of course, if the local agent, in denying liability, is only executing the orders of the company, it will amount to a denial by the company, and estop it to insist either on the proofs or on the requirement for written waiver (Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569).

The doctrines considered—that of the nonapplicability of the limiting provision to the condition as to proofs, or to an estoppel to insist thereon, and the doctrine that the limiting condition may, under proper circumstances, be itself waived—seem to include all the cases save one. That case is Missouri Pac. Ry. Co. v. Western Assur. Co. (C. C.) 129 Fed. 610, purporting to be governed by Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. The policy in the railway case contained the usual standard policy provision, that "no officer, agent, or other representative * * * shall have power," etc. The court, under this stipulation, sustained a demurrer to a complaint which alleged that full proof was waived "by said defendant by the acknowledgment of notice * * * and the commencement and continuance of negotiations, * * * whereby said plaintiff was led to believe," etc. In support of this the court quotes from the building association case, which had to do with the effect of the standard policy provision upon the issuance of a policy by an agent with knowledge of facts which would render it void. The

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Supreme Court, in deciding the case, said that where a limitation on the power of the agent to waive, except in writing "is expressed in the policy, executed and accepted, the insured is presumed as matter of law, to be aware of such limitation"; that the company may waive forfeitures, but that it must be shown that "the company," with knowledge of the forfeiture, dispensed with the observance of the condition; and that, "where the waiver relied on is the act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

It would thus seem that, even though the building association case be considered as applicable to a waiver of proofs of loss, it does not go the length of the decision in the railway case; for the building association case distinctly recognizes that "the company," even under the limiting provision, may waive, either primarily or by the ratification of its agent's acts, while the natural construction of the complaint held insufficient in the railway case would seem to be that the negotiations for settlement were carried on under the direct supervision of the "defendant." The doctrine of the building association case, indeed, as applied to a waiver of proofs, would seem to be merely that a local agent is bound by the provision, leaving open the question as to who would represent the company in effecting a waiver, or in ratifying the acts of a local agent.

13. ACTS AND CONDUCT CONSTITUTING WAIVER AND ESTOPPEL AS TO NOTICE AND PROOFS—IN GENERAL.

(a) Waiver by direct statement.
(b) Acts or conduct in general.
(c) Refusal to furnish blanks or deliver policy.
(d) Putting insured to trouble and expense.
(e) Acceptance of premiums and assessments.
(f) Recognition of liability in general.
(g) Investigation of circumstances of loss.
(h) Submission to arbitration.

(a) Waiver by direct statement.

The question as to the effect of statements by an agent is largely one of agency. If a statement that no proofs or notice will be required, or that they need not be furnished within the specified time,

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is made by a duly authorized agent, the company will be bound, and a waiver of the policy requirements will arise.

Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355, affirming 99 Ill. App. 469; Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432; Prussian Nat. Ins. Co. v. Peterson, 30 Ind. App. 289, 64 N. E. 102; Scott v. Security Fire Ins. Co., 98 Iowa, 67, 66 N. W. 1054; Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574; American Cent. Ins. Co. v. Heaverin, 18 Ky. Law Rep. 190, 35 S. W. 922, affirming 16 Ky. Law Rep. 95; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Eastern R. Co. v. Relief Fire Ins. Co., 105 Mass. 570; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Phœnix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393); Loeb v. American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; McCollum v. Hartford Fire Ins. Co., 67 Mo. App. 76; Harness v. National Fire Ins. Co., 76 Mo. App. 410; Snyder v. Dwelling House Ins. Co., 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625, reversing, on the question of agency, 59 N. J. Law, 18, 34 Atl. 931; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844, affirming (1890) 56 Hun, 642, 9 N. Y. Supp. 350; Sergent v. Liverpool & L. & G. Ins. Co., 155 N. Y. 349, 49 N. E. 935, reversing judgment 32 N. Y. Supp. 594, 85 Hun, 31; McCoubray v. St. Paul Fire & Marine Ins. Co., 64 N. Y. Supp. 112, 50 App. Div. 416, affirmed without opinion 169 N. Y. 590, 62 N. E. 1097; Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518; Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256; Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634.

The rule is also supported by the accident case of American Acc. Co. v. Fidler's Adm'x, 18 Ky. Law Rep. 161, 35 S. W. 905.

Nor is the force of such a waiver affected by a stipulation, in a subsequent agreement for arbitration, that the agreement to arbitrate should be subject to the terms and conditions of the policy (Perry v. Mechanics' Mut. Ins. Co. [C. C.] 11 Fed. 478).

A request by the company for certain proofs and evidence as to the loss, accompanied by statements or intimations that such proof will be sufficient, will also excuse a compliance by the insured with any further requirements in the policy.

Perry v. Faneuil Hall Ins. Co. (C. C.) 11 Fed. 482; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696; Lake v. Farmers' Ins. Co., 110 Iowa, 473, 81 N. W 710; Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500; Burge Bros. v. Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342; Carey v. Allemania Fire Ins. Co., 171 Pa. 204, 33 Atl. 185; German Ins. Co. v. Norris, 11 Tex. Civ. App. 250, 32 S. W. 727.

And where the insured was told that he need only present certain proof as to the amount of the loss, the waiver of other proof was

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not affected by a subsequent letter demanding a substantial showing of loss and damage. He might well suppose that the letter referred to the proofs which he had been directed to furnish. (Landrum v. American Cent. Ins. Co., 68 Mo. App. 339.) But a memorandum as to what would be required, only making more plain the stipulation of the policy for a particular account, cannot be construed as a waiver of the policy stipulation (Lycoming County Ins. Co. v. Updegraff, 40 Pa. 311).

An acceptance by the company of proofs offered, with a statement that they are sufficient, and that no others will be required, waives any defects in such proofs.

Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Manchester Fire Assur. Co. v. Ellis, 85 Ill. App. 634; Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507; German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880; Priest v. Citizens' Mut. Fire Ins. Co., 3 Allen (Mass.) 602; Wright v. Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Perry v. Dwelling House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; Van Deusen v. Charter Oak Fire & Marine Ins. Co., 24 N. Y. Super. Ct. 55; Merchants' Ins. Co. v. Reichman (Tex. Civ. App.) 40 S. W. 831; Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.) 78 S. W. 378, reversed in (Sup.) 81 S. W. 705, on ground that all the material facts were not known to the company at the time of the waiver. See, also, Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. 683.

The same rule is followed in the following life insurance cases: Metropolitan Safety Fund Acc. Ass'n v. Windover, 137 Ill. 417, 27 N. E. 538, affirming 37 Ill. App. 170; Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 23 Ind. App. 657, 55 N. E. 973; Wilson v. Northwestern Mut. Acc. Ass'n, 53 Minn. 470, 55 N. W. 626; Brink v. Guaranty Mut. Acc. Ass'n, 55 Hun, 606, 7 N. Y. Supp. 847, affirmed without opinion 29 N. E. 1035, 130 N. Y. 675.

And in Heidenreich v. Ætna Ins. Co., 26 Or. 70, 37 Pac. 64, it was held that a plea in abatement that the action was brought less than 60 days after due notice and proof had been received was a direct acknowledgment that due proof had been given, and that the company, not having before objected to the proofs, could not plead any defects therein in bar in its answer.

But, of course, a statement as to the sufficiency of the notice given will not include the proofs (Desilver v. State Mut. Ins. Co., 38 Pa. 130). And a dispute as to whether the company's assent was ob-

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tained by misrepresentations as to the difficulty of complying with the policy should be left to the jury (Taylor v. Roger Williams Ins. Co., 51 N. H. 50).

As to such cases it is often difficult to draw the line between a compliance with the requirements of the policy and a waiver thereof. Thus, in Phenix Ins. Co. of Brooklyn v. Rad Bila Hora, C. S. P. S., 41 Neb. 21, 59 N. W. 752, it was held that the provision of a policy prohibiting agents from waiving any of its conditions did not prevent insured from showing that the company, through its agents, accepted acts of insured as a sufficient compliance with the policy. So, also, an expression by the company of satisfaction with the proofs received has been held admissible under an allegation that due proofs had been furnished. The question was rather one of compliance to the satisfaction of the company, than of waiver. (Zielke v. London Assur. Corp., 64 Wis. 442, 25 N. W. 436.)

In a Pennsylvania case it was held that an allegation of waiver of proofs of death was not supported by a showing that the beneficiary was informed that the proofs of death furnished by a third person were satisfactory (Wallace v. Metropolitan Life Ins. Co., 14 Pa. Super. Ct. 617). But in Illinois the Supreme Court refused to review a finding that the proof of death required by the policy had been shown to be "satisfactory," by a letter of the company stating that it had been informed of "all the facts," and that it denied liability. Such letter was in reality evidence of a waiver, as to which the Supreme Court refused to review the finding of the Appellate Court. (Metropolitan Safety Fund Acc. As'n v. Windover, 137 Ill. 417, 27 N. E. 538, affirming 37 Ill. App. 170.)

The question as to whether a waiver by direct statement must either have a consideration or be in the nature of an estoppel seems to have been raised only in Missouri and New York.

Loeb v. American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Brink v. Guaranty Mut. Acc. Ass'n, 55 Hun. 606, 7 N. Y. Supp. 847, affirmed without opinion 29 N. E. 1035, 130 N. Y. 675.

In each case there was evidence of an express waiver of the proofs (in the former case, proofs of loss; in the latter, proofs of death) after the expiration of the time for furnishing them had expired, and in each the waiver was sustained. In the Loeb Case, however, there was also evidence of an express waiver prior to the expiration of the time, and the court refused to decide whether

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the waiver could arise alone from the statements made after the expiration of the time. But in Bolan v. Fire Ass'n, 58 Mo. App. 225, it not appearing in what the waiver consisted, it was held that it must have occurred, while the insured yet had an opportunity to comply with the requirements of the policy.

(b) Acts or conduct in general.

Any acts by or conduct of the company which directly prevent the insured from complying with the conditions of his policy as to notice and proofs of loss will operate as a waiver of any default resulting from such acts or conduct.

The following cases illustrate the various applications of the rule: Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; Pennell v. Chandler, 7 Chi. Leg. N. 227; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 11 Ky Law Rep. 539, 12 S. W. 668, 7 L. R. A. 81; Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; Mathinson v. North British & Mercantile Ins. Co., 64 Mich. 372, 31 N. W. 291; Erwin v. Springfield Fire & Marine Ins. Co., 24 Mo. App. 145; De Land v. Ætna Ins. Co., 68 Mo. App. 277; Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375; Craighton v. Agricultural Ins. Co., 39 Hun (N. Y.) 319; Dohn v. Farmers' Joint Stock Ins. Co., 5 Lans. (N. Y.) 275; Cornell v. Leroy, 9 Wend. (N. Y.) 163; Hobson v. Queen Ins. Co., 2 Ohio N. P. 296, 2 Ohio S. & C. P. Dec. 475; State Ins. Co. v. Todd, 83 Pa. 272; Georgia Home Ins. Co. v. Kinnier's Adm'x, 28 Grat. (Va.) 88.

The same rule obtains in life insurance cases. Travelers' Life Ins. Co v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming (C. C.) 20 Fed. 661; Railway Officials' & Employés' Acc. Ass'n v Armstrong, 22 Ind. App. 406, 53 N. E. 1037; Young v. Grand Council of Ancient Order of Aztecs, 63 Minn. 506, 65 N. W. 933.

A striking illustration of this rule is furnished by a refusal of the company to accept the proofs, especially where the refusal is put on the ground that the company is not liable.

Akin v. Liverpool & L. & G. Ins. Co., 1 Fed. Cas. 264; German Ins. Co. v. Ward, 90 Ill. 550; North British & Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458; Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kan. App. 527, 51 Pac. 567; Smaldone v. President, etc., of Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168, affirming 48 N. Y. Supp. 1115, 22 App. Div. 633; Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

The rule is also illustrated by life insurance cases. O'Rourke v. John Hancock Mut. Life Ins. Co., 10 Misc. Rep. 405, 31 N. Y. Supp. 130; Woodall v. Pacific Mut. Life Ins. Co. (Tex. Civ. App.) 79 S. W. 1090.

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Under the same principle, a refusal to return the proofs for correction will operate as a waiver of any defects therein.

Turley v. North American Ins. Co., 25 Wend. (N. Y.) 374; German-American Ins. Co. v. Paul (Ind. T.) 83 S. W. 60; Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520.

Likewise, a demand for more than the policy required has been considered as equivalent to a refusal to accept the proofs specified, and therefore as a waiver of such proofs.

McManus v. Western Assur. Co., 48 N. Y. Supp. 820, 22 Misc. Rep. 269, affirmed without opinion 60 N. Y. Supp. 1143, 43 App. Div. 550.

Proofs prepared by the company itself, cannot, of course, be objected to as insufficient.

Jamison v. State Ins. Co., 85 Iowa, 229, 52 N. W. 185; Warner v. Peoria Marine & Fire Ins. Co., 14 Wis. 318. See, also, Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896 (a life case).

A defense that the insured had failed to submit to an examination, as required by the policy, was waived where no notice was given to the insured, but notice was given her husband, and as her agent he appeared and was examined (Western Assur. Co. of Toronto v. McGlathery, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26). The mere preparation of proof, however, by the company's agent, has been held not to amount to a waiver of the policy requirements. It must be adopted by the insured as his statement (Southern Home Bldg. & Loan Ass'n v. Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147; Id., 24 S. E. 396, 99 Ga. 65).

An instruction by the company to do some act entirely inconsistent with a requirement of the policy as to proofs will waive such requirement.

Planters' Mut. Ins. Co. v. Engle, 52 Md. 468; Terti v. American Ins. Co., 76 Mo. App. 42; Van Allen v. Farmers' Joint Stock Ins. Co., 4 Hun (N. Y.) 413, 6 Thomp. & C. 591, reversed on the question of agency 64 N. Y. 469; Badger v. Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848. See, also, Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654, 83 S. W. 534.

A waiver also occurs where the company agrees to send the proofs to the insured for his signature, and neglects to do so.

Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707; Davidson v. Guardian Assur. Co., 176

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Pa. 525; 35 Atl. 220; Searle v. Dwelling House Ins. Co., 152 Mass. 263, 25 N. E. 290.

But acts of the company which go no further than to induce a delay will not excuse an entire failure to furnish the proofs.

Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 589, 72 N. E. 250; Warner v. Insurance Co. of North America, 35 Leg. Int. (Pa.) 293.

(c) Refusal to furnish blanks or deliver policy.

A delay in the furnishing of proofs of death will be waived where the company, either by the terms of the policy or otherwise, has led the beneficiary to believe that he would be provided with blanks, and then has failed to deliver them until too late for their preparation within the stipulated time.

Standard Life & Acc. Ins. Co. v. Schmaltz, 53 S. W. 49, 66 Ark. 588, 74 Am. St. Rep. 112; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677; National Masonic Acc. Ass'n v. McBride, 162 Ind. 379, 70 N. E. 483; Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 379, 100 N. W. 226; Western Travelers' Acc. Ass'n v. Holbrook, 65 Neb. 469, 94 N. W. 816, affirming on rehearing 65 Neb. 469, 91 N. W. 276. See, also, Sharp v. Milwaukee Mechanics' Ins. Co., 158 N. Y. 696, 53 N. E. 1132, affirming on opinion of lower court 40 N. Y. Supp. 817, 8 App. Div. 354.

Where blank proofs of death were sent by mail, it was held that the company was chargeable with any delay in their transmission (Robinson v. Northwestern Nat. Ins. Co., 100 N. W. 226, 92 Minn. 379). The same case also holds that it is for the jury to say whether the delay in the receipt of the blanks prevented the beneficiary from furnishing the proofs within the stipulated time.

It is frequently stipulated in life policies and mutual benefit certificates that the proofs shall be made upon blanks to be furnished by the company. Under such a stipulation, a refusal of the company to furnish the blanks to the beneficiary constitutes a waiver of the necessity of furnishing the proofs.

Winter v. Supreme Lodge K. P. of the World, 69 S. W. 662, 96 Mo. App. 1; Manufacturers' Acc. Indemnity Co. v. Fletcher, 5 Ohio Cir. Ct. R. 633; Supreme Lodge, and Chicago Lodge 932, Knights of Honor, v. Goldberger, 72 Ill. App. 320; National Masonic Acc. Ass'n v. Seed, 95 Ill. App. 43; McClure v. Supreme Lodge Knights of Honor, 59 N. Y. Supp. 764, 41 App. Div. 131; Ancient Order of the Pyramids v. Drake, 66 Kan. 538, 72 Pac. 239; Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74; Evarts v. United States Mut. Acc. Ass'n, 61 Hun, 624, 16 N. Y. Supp. 27.

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And of course a failure to furnish blanks will justify the preparation of proofs without them, and without any other formality required only in connection with the blanks (Gellatly v. Minnesota Odd Fellows' Mut. Ben. Soc., 27 Minn. 215, 6 N. W. 627).

In Missouri it is provided by statute [1] that a failure of the company to furnish blanks shall estop it to complain of insured's failure to furnish the proofs.

Warren v. Bankers' & Merchants' Town Mut. Co. of Liberty, 72 Mo. App. 188; Meyer v. Insurance Co. of North America, 73 Mo. App. 166; Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

Under this statute the proof will be waived where the company, instead of trying in good faith to comply therewith, unreasonably delays sending the blanks, and throughout adopts a shuffling, tricky course of conduct (St. John v. German-American Ins. Co., 107 Mo. App. 700, 82 N. W. 543).

But in the absence of statute the company will not be estopped by a failure to deliver blanks, unless the insured had some reason under the policy, or on account of the company's promises, to expect it to furnish the blanks.

Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213; Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595. The rule has been applied, also, to proofs of death in Standard Life & Acc. Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604; Coldham v. American Casualty & Security Co., 8 Ohio Cir. Ct. R. 620.

'In Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 589, 72 N. E. 250, under a policy making a sworn statement a condition precedent to liability, it was held that a custom to pay the full amount of the policy within 60 days after an unsworn notice, unless a blank was furnished for the sworn statement, was bad, as contradictory of the policy.

And where proof of injury under an accident policy had been made and rejected, and the company was not informed of an additional claim for injuries resulting from the accident, no estoppel can arise from a failure of the company to furnish blanks for proof of such additional injuries (Babcock v. Pacific Mut. Life Ins. Co., 73 N. Y. Supp. 453, 36 Misc. Rep. 306).

Under the same principle governing a refusal to furnish blanks, it has been held that a refusal of the company to deliver the policy, by which the insured may become acquainted with his duties, will

[1] Rev. St. Mo. 1899, §§ 7977, 7978.

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prevent the company from taking advantage of the insured's default in furnishing the proofs.

Springfield Fire & Marine Ins. Co. v. Jenkins, 9 Ky. Law Rep. 932; Agricultural Ins. Co. v. Yates, 10 Ky. Law Rep. 984; Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371; Thompson v. Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889; Wooddy v. Old Dominion Ins. Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732.

But see McCann v. Ætna Ins. Co., 3 Neb. 198, announcing the doctrine that the insured cannot be supposed to be ignorant of the usages of the office to which he applied for insurance. And in connection with such case see, also, the distinguishing case of Nebraska & I. Ins. Co. v. Sewers, 27 Neb. 541, 43 N. W. 351.

There seems to be some conflict as to whether it is incumbent on the insured, relying on the oral contract after a refusal of the company to issue a policy, to request a blank form or copy of the policy which would have been issued. In Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371, no mention is made of such phase of the question, though it is pointed out that the insured could not know the conditions of an unissued policy. In Springfield Fire & Marine Ins. Co. v. Jenkins, 9 Ky. Law Rep. 932, it was said that after a refusal of the company, prior to the fire, to deliver the policy, the insured could not reasonably have supposed that either it or a duplicate would be delivered to him on request, after the fire. But in Smith v. State Ins. Co., 64 Iowa, 716, 21 N. W. 145, it was held that no fault could be imputed to the company on which to base a waiver, unless there had been a request for a blank policy.

(d) Putting insured to trouble and expense.

If the company, with knowledge that the notice or proofs have not been furnished within the stipulated time, or are for any reason defective, puts the insured to trouble or expense in connection with the loss, such act will constitute a waiver of the default or defect.

German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Hollis v. State Ins. Co., 65 Iowa, 454, 21 N. W. 774; German-American Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Bolan v. Fire Ass'n of Philadelphia, 58 Mo. App. 225; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; Merchants' Ins. Co. v. Gibbs, 56 N. J. Law, 679, 29 Atl. 485, 44 Am. St. Rep. 413; Bumstead v. Dividend Mut. Ins.

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Co., 12 N. Y. 81; Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394, 31 N. E. 231, affirming 15 N. Y. Supp. 429, 61 Hun, 110; Bear v. Atlanta Home Ins. Co., 70 N. Y. Supp. 581, 34 Misc. Rep. 613; Lycoming Ins. Co. v. Schreffler, 42 Pa. 188, 82 Am. Dec. 501; German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586; Burlington Ins. Co. v. Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111; Phœnix Ins. Co. v. Center, 10 Tex. Civ. App. 535, 31 S. W. 446; Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955. See, also, Hicks v. Empire Ins. Co., 6 Mo. App. 254, where a request for corrections to the proofs, with knowledge that it would be impossible to have this done within the stipulated 30 days, was held a waiver of the limitation as to time.

The same general rule obtains in life insurance cases. Travelers' Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming Edwards v. Travelers' Ins. Co. (C. C.) 20 Fed. 661; Hurt v. Employers' Liability Assur. Corp. (C. C.) 122 Fed. 828; Pacific Mutual Life Ins. Co. v. Branham (Ind. App.) 70 N. E. 174; Standard Life & Accident Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Peabody v. Fraternal Acc. Ass'n of America, 89 Me. 96, 35 Atl. 1020; McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Moore v. Wildey Casualty Co., 176 Mass. 418, 57 N. E. 673; Hohn v. Interstate Casualty Co., 115 Mich. 79, 72 N. W. 1105; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Trippe v. Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432.

Waiver by putting the insured to trouble or expense may take the form of an examination of the insured.

People's Fire Ins. Co. v. Pulver, 127 Ill. 246, 20 N. E. 18; Purves v. Germania Ins. Co., 44 La. Ann. 123, 10 South. 495; Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640, 77 N. W. 275; Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Enos v. St. Paul Fire & Marine Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

In Fidelity & Casualty Co. v. Brown (Ind. T.) 69 S. W. 915, the examination of the insured after an accident was mentioned as one of the grounds for holding an objection as to failure of notice to have come too late. But in Heywood v. Maine Mut. Acc. Ass'n, 85 Me. 289, 27 Atl. 154, it was held that no waiver of prompt notice had been shown, though at the company's request the insured submitted to an examination by the company's physician.

The mere furnishing of blanks for making out proofs of death (Crenshaw v. Pacific Mut. Ins. Co., 63 Mo. App. 678), or the furnishing of a copy of the policy, which had been burned (Kirkman v. Farmers' Ins. Co., 90 Iowa, 457, 57 N. W. 952, 48 Am. St. Rep.

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454), will not necessarily amount to a waiver of a forfeiture already incurred by a failure to furnish notice or proofs. But if the beneficiary, under the circumstances, is justifiably led into a belief by such conduct that the forfeiture will not be insisted upon, and in reliance thereon goes to the trouble and expense of making out the proofs, a waiver will arise.

Peabody v. Fraternal Acc. Ass'n, 89 Me. 96, 35 Atl. 1020; Crenshaw v. Pacific Mut. Life Ins. Co., 63 Mo. App. 678; Id., 71 Mo. App. 42. See, also, Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196.

The company may estop itself from demanding the proofs specified in the policy by requesting and receiving from the insured other proof of the circumstances. It would be unjust to require the expense incident to furnishing the proofs not specified, if at a later time demand was to be made for a compliance with the requirements of the policy.

Ligon's Adm'rs v. Equitable Fire Ins. Co., 87 Tenn. 341, 10 S. W. 768; Sagers v. Hawkeye Ins. Co., 94 Iowa, 519, 63 N. W. 194. See, also, Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654, 83 S. W. 534.

Where, by the policy or otherwise, the insured is informed, at the time the demand is made, that a full compliance with the policy will be required, and that the demand shall not be considered as a waiver of any forfeiture, no waiver will arise, though the insured complies with the request.

Gauche v. London & L. Ins. Co. (C. C.) 10 Fed. 347; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; American Cent. Ins. Co. v. Nunn (Tex. Sup.) 82 S. W. 497, 68 L. R. A. 83; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954. See, also, Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.) 297, 79 Am. Dec. 733, where, after a 17-months delay, a statement was demanded of the insured, and furnished, but where the court, without mention of the statement, held that the circumstances showed that the company intended to stand on its rights.

The same principle applies to demands for proof of death or accident: Loesch v. Union Casualty & Surety Co., 176 Mo. 654, 75 S. W. 621; Meech v. National Acc. Soc., 63 N. Y. Supp. 1008, 50 App. Div. 144; Hagadorn v. Masonic Equitable Acc. Ass'n of the World, 69 N. Y. Supp. 831, 59 App. Div. 321.

An agreement, however, that an examination should not be taken as a waiver of any defense by reason of the breach of the iron-safe

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clause, "we having lost our detailed inventory," did not prevent a waiver of a defense arising from a failure to produce other books than the detailed inventory, particularly as other demands were made aside from the examination proper (Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955). So, also, in Trask v. State Fire & Marine Ins. Co., 29 Pa. 198, 72 Am. Dec. 622, a request as to proofs and examination, made after an excuse which was not subsequently established had been given the company as to a delay in the notice, was held not to amount to a waiver of the delay. The company may have supposed that this excuse would be established.

Acts inducing action by the beneficiary, which might otherwise amount to a waiver of a forfeiture already incurred for failure to furnish notice or proofs, will not do so where the company, at the time of making the demand, was ignorant of the facts from which the forfeiture arose.

United Benev. Soc. of America v. Freeman, 111 Ga. 355, 36 S. E. 764; Whalen v. Equitable Acc. Co. (Me.) 58 Atl. 1057; Hagadorn v. Masonic Equitable Acc. Ass'n, 69 N. Y. Supp. 831, 59 App. Div. 321.

Since the estoppel involved in putting the insured to trouble or expense after knowledge of a default or defect in notice or proofs of loss is not dependent on the possibility of the insured correcting the defect, it makes no difference that the time given for the production of the papers specified has elapsed. The rule is as effective, and is, indeed, most frequently invoked, after all possibility for an exact compliance with the policy requirement has gone by.

Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Hicks v. Empire Ins. Co., 6 Mo. App. 254; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Merchants' Ins. Co. v. Gibbs, 56 N. J. Law, 679, 29 Atl. 485, 44 Am. St. Rep. 413; Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394, 31 N. E. 231, affirming 15 N. Y. Supp. 429, 61 Hun, 110; Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Lycoming Ins. Co. v. Schreffler, 42 Pa. 188, 82 Am. Dec. 501; German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586; Burlington Ins. Co. v. Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111.

The rule is also supported by the following life and accident cases: Travelers' Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming (C. C.) 20 Fed. 661; Hurt v. Employers' Liability Assur. Corp. (C. C.) 122 Fed. 828; Pacific Mut. Life Ins. Co.

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v. Branham (Ind. App.) 70 N. E. 174; Standard Life & Acc. Ins. Co. v. Davis, 39 Kan. 521, 53 Pac. 856; Peabody v. Fraternal Acc. Ass'n, 89 Me. 96, 35 Atl. 1020; McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Moore v. Wildey Casualty Co., 176 Mass. 418, 57 N. E. 673; Hohn v. Interstate Casualty Co., 115 Mich. 79, 72 N. W. 1105; Crenshaw v. Pacific Mut. Life Ins. Co., 63 Mo. App. 678; Id., 71 Mo. App. 42; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Trippe v. Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432.

(e) Acceptance of premiums and assessments.

In Emery v. Svea Fire Ins. Co., 88 Cal. 300, 26 Pac. 88, it was held, without discussion, that the company, having received, with knowledge of the loss, the premium for which credit had been given, could not assert that, because of the failure of insured to give the required notice, the policy was not then in full force. If, however, an assessment on an accident policy is due, whether the company is liable for an accident which has happened or not, the receipt of such assessment by the company will not amount to a waiver of the notice required by the policy.

Meech v. National Acc. Soc., 63 N. Y. Supp. 1008, 50 App. Div. 144; Hagadorn v. Masonic Acc. Ass'n of the World, 69 N. Y. Supp. 831, 59 App. Div. 321.

And in Rundell & Hough v. Anchor Fire Ins. Co. (Iowa) 101 N. W. 517, it was held that a failure to produce an inventory was not waived by the fact that, after the loss, notice was sent the insured to pay an installment on a premium note given at the issuance of the policy.

(f) Recognition of liability in general.

A distinct recognition of liability by the company, made under such circumstances as reasonably to show that it is satisfied as to the loss, will amount to a waiver of formal notice and proofs, or of defects therein.

Reference may be made to Ide v. Phœnix Ins. Co., 12 Fed. Cas. 1168; West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 33 Pac. 258; Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128; National Fire Ins. Co. v. United States Bldg. & Loan Ass'n's Assignee, 21 Ky. Law Rep. 1207, 54 S. W. 714; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; Fulton v. Phœnix Ins. Co., 51 Mo. App. 460; Fink v. Lancashire Ins. Co., 66 Mo. App. 513; Reid, Murdock & Co. v. Mercurio, 91 Mo. App.

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673; Storm v. Phenix Ins. Co., 15 N. Y. Supp. 281, 61 Hun, 618, affirmed without opinion 133 N. Y. 656, 31 N. E. 625; Inland Ins. & Deposit Co. v. Stauffer, 33 Pa. 397; Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331; Mason v. Citizens' Fire, Marine & Life Ins. Co., 10 W. Va. 572. See, also, Glazer v. Home Ins. Co. (Sup.) 90 N. Y. Supp. 426.

The following life insurance cases illustrate the same doctrine: Berry v. Mobile Life Ins. Co., 3 Fed. Cas. 288; Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601; Greenfield v. Massachusetts Mut. Life Ins. Co., 47 N. Y. 430.

Statements, however, that the loss was all right, and that it would be paid in a few days (Engebretson v. Helka Fire Ins. Co., 58 Wis. 301, 17 N. W. 5), and that "the matter would be all right with the company" (Boyle v. North Carolina Mut. Ins. Co., 52 N. C. 373), have been held not to amount to a waiver. The reason given in the Engebretson Case was that the statement was consistent with an expectation on the part of the company that the proofs would be duly furnished. Even stronger statements were held ineffective in Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.) 297, 79 Am. Dec. 733, where the company was mutual, and 17 months had elapsed before any demand was made. The court pointed out that the membership of the company had changed in that time, and that very strong evidence would be required to show an admission of liability on the part of the company. Sending an agent to examine the premises after loss is not sufficient proof of the waiver of notice of loss (Busch v. Insurance Co., 6 Phila. [Pa.] 252). And in Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331, it was intimated that a waiver by recognition of liability would not be good as against a subsequent demand.

The rule as to a recognition of liability will hold, though the acknowledgment of liability is accompanied by a reservation or requirement as to some matter other than the proofs of loss.

Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Indiana Ins. Co. v. Pringle, 21 Ind. App. 559, 52 N. E. 821; Solomon v. Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22; State Ins. Co. v. Ketcham, 9 Kan. App. 552, 58 Pac. 229 (a life insurance case).

A recognition of liability for only a portion of the loss will have the same effect. For if the objection to payment of the balance were based on any defect or failure as to the proofs, it would be equally applicable to the whole loss. Therefore, the denial of liability is practically a denial of liability on some other ground

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than the default as to notice or proofs, leaving the recognition of liability as to a portion of the loss unimpaired as an indication that the company was satisfied with the proofs furnished.

Caledonian Fire Ins. Co. v. Traub, 86 Md. 86, 37 Atl. 782; Pentz v. Pennsylvania Fire Ins. Co., 92 Md. 444, 48 Atl. 139; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202; White v. Dwelling House Ins. Co., 12 Ky. Law Rep. 191; Mitchell v. Orient Ins. Co., 40 Ill. App. 111; Lewis v. Monmouth Mut. Fire Ins. Co., 52 Me. 492; Summers v. Western Home Ins. Co., 45 Mo. App. 46; Murphy v. Insurance Co., 70 Mo. App. 78; Westlake v. St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206; Willison v. Jewelers' & Tradesmen's Co. of New York, 68 N. Y. Supp. 1129, 34 Misc. Rep. 216; Flanaghan v. Phœnix Ins. Co., 42 W. Va. 426, 26 S. E. 513. See, also, Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654, 83 S. W. 534.

But see Thompson v. Farmers' Mut. Ins. Co., 10 Ky. Law Rep. 282, where it was held that an acknowledgment of liability as to a building would not amount to a waiver of proofs as to the contents, the building and contents having been separately valued in the policy.

Those cases holding that an offer to compromise will not amount to a waiver of proofs may, perhaps, be reconciled with the general rule, on the theory that they have to do not so much with a recognition of liability as to a portion of the loss, as with a mere compromise offer, unconnected with either a distinct recognition or denial of liability. The discussion, however, is not full enough to warrant a positive assertion of the distinction.

Reference may be made to Sims v. Union Assur. Soc. (C. C.) 129 Fed. 804; Maddox v. German Ins. Co., 39 Mo. App. 198; Warner v. Insurance Co. of North America, 1 Walk. (Pa.) 315. But see Berry v. Mobile Life Ins. Co., 3 Fed. Cas. 288, in which the statement is made that an offer to compromise is a waiver of proofs.

That the compromise offer does not amount to a recognition of liability or to a waiver more plainly appears where, at the time of the offer, the insured is notified that a full compliance with the policy is required.

Reid, Murdock & Co. v. Mercurio, 91 Mo. App. 673; Flanaghan v. Phœnix Ins. Co., 42 W. Va. 426, 26 S. E. 513; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954.

But in Summers v. Western Home Ins. Co., 45 Mo. App. 46, it was held that a statement that the company neither admitted nor denied liability, nor waived any condition of the policy, made with

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an offer to pay what the company considered the property worth, did not necessarily settle the question of waiver. If all the acts and statements of the company, including the one as to waiver, were sufficient to induce in insured's mind the belief entertained by him, that proofs would not be required, a waiver as to proofs would nevertheless arise.

Where the company informed the mortgagees, who were interested in the insurance, that a check would be sent to them and the owner jointly, and the insured, in reliance on such promise, neglected to furnish the proofs, it amounted to a waiver (Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499). And in Wolcott v. Sprague (C. C.) 55 Fed. 545, it was held that a payment to a mortgagee, accompanied by an assignment to the insurer of the mortgage and policy, amounted to a recognition of a validity of the policy. But in Sims v. Union Assur. Soc. (C. C.) 129 Fed. 804, it was doubted whether payment to a purchase-money creditor would amount to recognition of liability. And in Hare v. Headley, 35 Atl. 445, 54 N. J. Eq. 545, it was distinctly held that payment to a mortgagee, accompanied by a claim of subrogation and of no liability to the mortgagor, would not amount to a waiver of the proofs.

Those courts holding that a waiver of proofs can arise from the mere intent of the company, unsupported by any estoppel, do not, of course, draw any distinction as to the time of the recognition of liability. If it is not necessary that the insured be misled to his injury, it makes no difference that at the time the company recognizes its liability he is not in a position in any event to comply with the policy.

Fink v. Lancashire Ins. Co., 66 Mo. App. 513; Reid, Murdock & Co. v. Mercurio, 91 Mo. App. 673; Inland Ins. & Deposit Co. v. Stauffer, 33 Pa. 397.

But where it was held that an estoppel was necessary, it was also held that a recognition of liability after the time for furnishing proofs had expired would not be effective. Under such circumstances the insured could not claim he was misled. (Leigh v. Springfield Fire & Marine Ins. Co., 37 Mo. App. 542.) In Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799, it was, however, held that there would be an element of estoppel, even though the time had elapsed, if, in reliance on the statement of the company that it would pay unless it should find itself discharged for

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another reason, the insured incurred the expense incident to a prosecution of a suit.

(g) Investigation of circumstances of loss.

If the company investigates the loss on its own account, and so conducts itself with relation thereto as to show a satisfaction with the knowledge thus obtained, or to induce reasonable belief in insured that it is so satisfied, and does not desire formal notice or proofs, it will amount to a waiver of such formalities.

Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355; Condon v. Des Moines Mut. Hail Ass'n, 120 Iowa, 80, 94 N. W. 477; Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670; Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Id., 87 Mich. 428, 49 N. W. 634; McCollum v. Niagara Fire Ins. Co., 61 Mo. App. 352; McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691; Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883; O'Brien v. Prescott Ins. Co., 57 Hun, 589, 11 N. Y. Supp. 125; Argall v. Old North State Ins. Co., 84 N. C. 355; Susquehanna Mut. Fire Ins. Co. v. Hallock (Pa.) 14 Atl. 167; Fritz v. Quaker City Mut. Fire Ins. Co. (Pa.) 26 Atl. 14; Drake v. Farmers' Union Ins. Co., 3 Grant, Cas. (Pa.) 325; American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395 (a life insurance case).

An examination of the insured may be so conducted as to show that no further proof is desired.

McPike v. Western Assur. Co., 61 Miss. 37; Cushing v. Williamsburg City Fire Ins. Co., 4 Wash. St. 538, 30 Pac. 736; Badger v. Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848.

And even the sending of an adjuster has been held to amount to a waiver.

Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Robinson v. Palatine Ins. Co. (N. M.) 66 Pac. 535; Hower v. Susquehanna Mut. Fire Ins. Co., 9 Pa. Super. Ct. 153.

An agreement with the insured as to the amount of the loss may amount to a waiver of proofs (Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. 529). And the presumption that the company is satisfied with its own investigation is, of course, greatly increased when it is followed by a recognition of liability.

Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Green v. Des Moines Fire Ins. Co., 84 Iowa, 135, 50 N. W. 558; Phœnix Ins. Co. v. Gibbons, 23 Ky. Law Rep. 1130,

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64 S. W. 909; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286; New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62; Phillips v. Protection Ins. Co., 14 Mo. 220; Hitchcock v. State Ins. Co., 10 S. D. 271, 72 N. W. 898; Thierolf v. Universal Fire Ins. Co., 110 Pa. 37, 20 Atl. 412; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261; Levy v. Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598; Zielke v. London Assur. Corp., 64 Wis. 442, 25 N. W. 436.

It has, however, been held that an investigation into the circumstances of the loss, and an effort to agree as to the amount thereof, coupled with an offer to pay less than the sum due, will not, of itself, amount to waiver of the proofs. "Waiver cannot be predicated of mere performance of duty or exercise of right or offer or promise by the insurer."

Liverpool, L. & G. Ins. Co. v. Sarsby, 60 Miss. 302; New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62.

And where it is expressly stipulated by the parties that no waiver shall arise from any proceedings attendant upon an investigation of the loss, no waiver of proofs can be based upon an investigation by the company, though followed by a recognition of liability or a compromise offer.

Ruthven v. American Fire Ins. Co., 92 Iowa, 316, 60 N. W. 663. See, also, Sun Mut. Ins. Co. v. Dudley, 65 Ark. 240, 45 S. W. 539, where a similar provision was held admissible to show that there had been no waiver.

Of course, no waiver by an independent investigation can arise if the company continues to insist on a compliance with the policy.

Williams v. Queens Ins. Co. (C. C.) 39 Fed. 167; Lycoming County Ins. Co. v. Updegraff, 40 Pa. 311; Scottish Union & Nat. Ins. Co. v. Clancy, 83 Tex. 113, 18 S. W. 439.

And where the adjusters were furnished a list of property on which to base their investigation, a notification by the adjusters that there were things in the list which they did not understand was held sufficient to put insured on his guard (Riker v. President, etc., of Fire Ins. Co. of North America, 90 App. Div. 391, 85 N. Y. Supp. 546). So, also, an investigation by the company, made under circumstances indicating that there would in any event be litigation, has been held not to amount to a waiver of the policy requirements as to proofs (People's Bank of Greenville v. Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81). Nor did

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any waiver arise from an investigation and offer by the company, where the offer was rejected, and where the company called attention to the defects in the proofs subsequently furnished (Liverpool, L. & G. Ins. Co. v. Sorsby, 60 Miss. 302). An investigation by an agent of the company, but made without its authority and without the knowledge of the insured, cannot, of course, amount to a waiver of the policy requirements (Blossom v. Lycoming Fire Ins. Co., 64 N. Y. 162).

Under the theory that implied waiver must be based upon estoppel, it is, of course, necessary that the investigation by the company take place prior to the expiration of the time within which correct notice or proofs might have been furnished.

Weidert v. State Ins. Co., 19 Or. 261, 24 Pac. 242, **20 Am. St. Rep. 809;** opinion of Earl, C. J., in Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500. See, also, German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

But that an "immediate notice" could be waived by a statement, when the notice was subsequently delivered, that it could not be immediately attended to, and by interviews and examinations in regard to the loss, was distinctly decided in Phillips v. Protection Ins. Co., 14 Mo. 220. Ordinarily, however, there is no mention of this phase of the question, the court merely holding the notice waived by the subsequent investigation by the company.

Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691; Fritz v. Quaker City Mut. Fire Ins. Co. (Pa.) 26 Atl. 14; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261; American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395 (a life insurance case).

(h) Submission to arbitration.

Waiver of notice or proofs by a submission of the question of loss to appraisers partakes of the nature both of a waiver by a recognition by the company of the sufficiency of other than the specified proofs, and of a waiver by a putting of the insured to trouble or expense. It is evident that a submission of the question as to the amount of damages to appraisers may be considered as an indication from the company that it will be satisfied with that method of proof, and does not expect the insured to do anything more in the line of furnishing the proofs specified in the policy.

Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559; Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Southern Mut.

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Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975; Home Ins. & Banking Co. v. Myer, 93 Ill. 271; Harrison v. Hartford Fire Ins. Co. (Iowa) 80 N. W. 309; George Dee & Sons Co. v. Key City Fire Ins. Co., 104 Iowa, 167, 73 N. W. 594; Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597; Smith v. Herd, 110 Ky. 56, 60 S. W. 841; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Gale v. State Ins. Co., 33 Mo. App. 664; Gerhart Realty Co. v. Northern Assur. Co., 86 Mo. App. 596; Branigan v. Jefferson Mut. Fire Ins. Co., 102 Mo. App. 70, 76 S. W. 643; Home Fire Ins. Co. v. Bean, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; Robertson v. New Hampshire Ins. Co. (Super. Buff.) 16 N. Y. Supp. 842, affirmed without opinion 137 N. Y. 530, 33 N. E. 336; Pretzfelder v. Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424.

The force of a submission to arbitration as effecting a waiver of the formal proofs is, of course, greatly enhanced when there is also an express agreement to pay the amount of the award. Liability and the amount thereof being both determined, the proofs could serve no useful purpose.

Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Branigan v. Jefferson Mut. Fire Ins. Co., 76 S. W. 643, 102 Mo. App. 70; Snyder v. Dwelling House Ins. Co., 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625; McGonigle v. Susquehanna Mut. Fire Ins. Co., 168 Pa. 1, 31 Atl. 868; Snowden v. Kittanning Ins. Co., 122 Pa. 502, 16 Atl. 22.

Under the same principle, emphasis has been placed on the fact that the plans and specifications demanded by the company after an award would have been entirely useless, the amount of damage having been fixed by the award, and the company having exercised its option not to rebuild (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559).

It has, indeed, been held, where it did not appear that the question of liability had been settled, that a submission to arbitration of the amount of loss could not be considered as a substitute for proofs, which should include many other things.

Fournier v. German-American Ins. Co., 23 R. I. 36, 49 Atl. 98. See, also, Pettengill v. Hinks, 9 Gray (Mass.) 169, where, the company denying an intent to waive, the court refused to hold that there had been a waiver by the owner's submission of the amount of loss to arbitration.

If the appraisal is demanded and held after a default by the insured as to notice or proofs, or after defective notice and proofs have been served, the appraisal may amount to a waiver of the de-

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fault or defect, on the ground that the insured is thereby put to trouble or expense, justifiable only in case the company does not intend to insist on insured's failure as to the specified documents.

Jacobs v. St. Paul Fire & Marine Ins. Co., 86 Iowa, 145, 53 N. W. 101; McCollum v. Liverpool, L. & G. Ins. Co., 67 Mo. App. 66; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844, affirming 56 Hun, 642, 9 N. Y. Supp. 350; Bear v. Atlanta Home Ins. Co., 70 N. Y. Supp. 581, 34 Misc. Rep. 613. See, also, Porter v. German-American Ins. Co., 62 Mo. App. 520.

No waiver will arise if the company at all times insists on the production of the proofs specified in the policy (Hanna v. American Cent. Ins. Co., 36 Mo. App. 538). But the fact that the reference to appraisers, without the fault of insured, fails of its purpose, does not render it necessary for insured to thereupon furnish the proofs specified in the policy.

Pretzfelder v. Merchants' Ins. Co., 31 S. E. 470, 123 N. C. 164, 44 L. R. A. 424. See, also, McCollum v. Liverpool, L. & G. Ins. Co., 67 Mo. App. 66.

Provisions to the effect that the submission to arbitration should be without reference to questions within the "terms and conditions" of the policy, or should not effect a waiver of the terms and conditions of the policy, have been designated as "crafty," if intended to reserve the right to object on account of the notice and proofs, until the time for furnishing them had expired.

Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Gale v. State Ins. Co., 33 Mo. App. 664.

The Carroll Case, however, was decided rather on the theory that the "conditions" referred to were not those superseded by the appointment of arbitrators, and that at any rate the proviso related only to the "appointment" of arbitrators, and did not extend to the subsequent proceedings. In the Gale Case, also, the waiver was founded rather on the reliance placed by the company in the award, than on the mere appointment of the arbitrators. In Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844, affirming 56 Hun, 642, 9 N. Y. Supp. 350, it was held that the company might be estopped from asserting the provision, just as it may be from asserting one requiring a written waiver. In other cases the submission to arbitration has been treated as a waiver of the proofs, without any particular discussion as to the effect of a clause seeking

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to limit the effect of the appraisal to a mere determination of the amount of loss.

Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559; Smith v. Herd, 110 Ky. 56, 60 S. W. 841.

But a provision that the company shall not be held to have waived any provision of the policy or forfeiture thereof by any act relating to appraisal has been held effective to prevent a waiver of notice or proofs from following the submission.

Fournier v. German-American Ins. Co., 23 R. I. 36, 49 Atl. 98; Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640, 77 N. W. 275.

And in Cook v. North British & Mercantile Ins. Co., 181 Mass. 101, 62 N. E. 1049, a provision that the submission should not "in any way affect any other question" than that of loss or damage was held to prevent a waiver of insured's neglect to file a sworn statement "forthwith."

14. WAIVER OF NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY BY DENIAL OF LIABILITY.

(a) The general rule.
(b) What constitutes such a denial of liability as will operate as waiver.
(c) Denial of liability without assigning reason or with reservation.
(d) Waiver by denial of liability as dependent on time of denial.
(e) Same—Denial of liability in the answer.

(a) The general rule.

A failure to give notice or furnish proofs of loss, or defects in the notice and proofs, are waived by a denial of liability on other grounds. This rule is fundamental, and scarcely needs to be supported by the citation of authorities.

Reference to the following cases is deemed sufficient: Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512, modifying on second appeal Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 7 L. Ed. 335 (see, also, in connection with this case, Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187); Royal Ins. Co. v. Martin, 24 Sup. Ct. 247, 192 U. S. 149, 48 L. Ed. 385; German Ins. Co. v. Frederick, 58 Fed. 144, 7 C. C. A. 122, 19 U. S. App. 24; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302; Norwich Union Fire Ins. Soc. v. Girton, 124 Ind. 217, 24 N. E. 984; Bloom v. State

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Ins. Co., 94 Iowa, 359, 62 N. W. 810; Phenix Ins. Co. v. Weeks, 45 Kan. 751, 26 Pac. 410; Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 Atl. 904; Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.) 265; Lum v. United States Fire Ins. Co., 104 Mich. 397, 62 N. W. 562; Dwelling House Ins. Co. v. Brewster, 43 Neb. 528, 61 N. W. 746; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Globe Ins. Co. v. Boyle, 21 Ohio St. 119; Weiss v. American Fire Ins. Co., 148 Pa. 349, 23 Atl. 991; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Mosley v. Vermont Mut. Fire Ins. Co., 55 Vt. 142; West Rockingham Mut. Fire Ins. Co. v. Sheets, 26 Grat. (Va.) 854; Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691; Gross v. Milwaukee Mechanics' Ins. Co., 92 Wis. 656, 66 N. W. 712.

The same rule obtains under life and accident policies. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; Id., 115 U. S. 339, 6 Sup. Ct. 74, 29 L. Ed. 432, affirming on this point Pendleton v. Insurance Co., (C. C.) 5 Fed. 238; Millard v. Supreme Council A. L. H., 81 Cal. 340, 22 Pac. 864; Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 706, 52 Am. St. Rep. 359, affirming 59 Ill. App. 522; Standard Life & Acc. Ins. Co. v. Thomas, 17 S. W. 275, 13 Ky. Law Rep. 593; Prudential Ins. Co. v. Devoe, 98 Md. 584, 56 Atl. 809; McComas v. Covenant Mut. Life Ins. Co., 56 Mo. 573; American Life Ins. Co. v. Mahone, 56 Miss. 180; Marston v. Massachusetts Life Ins. Co., 59 N. H. 92; Stepp v. National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134; Standard Loan & Acc. Ins. Co. v. Thornton, 40 S. W. 136, 97 Tenn. 1; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.[1]

(b) What constitutes such a denial of liability as will operate as waiver.

The denial of liability which will operate as a waiver of notice or proofs or of defects therein may assume various forms. Sometimes it consists in a statement that the policy has never been in force or has been forfeited.

Phenix Ins. Co. v. Kerr, 64 C. C. A. 251, 129 Fed. 723, 66 L. R. A. 569; Carlwitz v. Germania Fire Ins. Co., 5 Fed. Cas. 87; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Carson v. German Ins. Co., 62 Iowa, 433, 17 N. W. 650; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Soorholtz v. Marshall County Farmers' Mut. Fire Ins. Co., 109 Iowa, 522, 80 N. W. 542; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311; Nicholas v. Iowa Merchants' Mut. Ins. Co. (Iowa) 101 N. W. 115; Morgan v. Illinois Ins. Co., 130 Mich. 427, 90 N. W. 40; Im

[1] See, also, Cent. Dig. vol. 28, "Insurance," col. 2276, § 1391.

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proved Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256, 80 N. W. 1088; Maddox v. German Ins. Co., 89 Mo. App. 198; Bini v. Smith, 55 N. Y. Supp. 842, 36 App. Div. 463; Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8; Stickley v. Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838; Fire Ass'n of Philadelphia v. Jones (Tex. Civ. App.) 40 S. W. 44.

See, also, the following life cases: Equitable Life Assur. Soc. v. Winning, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173; Alexander v. Grand Lodge A. O. U. W., 119 Iowa, 519, 93 N. W. 508; Girard Life Ins., Annuity & Trust Co. v. Mutual Life Ins. Co., 97 Pa. 15.

A refusal to issue a policy, after a verbal contract, will also amount to such a denial of liability as will dispense with the formal requisites of the policy in relation to proof.

Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187; Weeks v. Lycoming Fire Ins. Co., 29 Fed. Cas. 581; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; Hicks v. British-American Assur. Co., 43 N. Y. Supp. 623, 13 App. Div. 444; Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371. See, also, Gold v. Sun Ins. Co., 73 Cal. 216, 14 Pac. 786, where the company repudiated its contract to renew, and Norwich Union Fire Ins. Soc. v. Girton, 124 Ind. 217, 24 N. E. 984, where the company obtained and held possession of the policy and refused to adjust the loss.

Sometimes, and particularly under life or accident policies, the denial of liability is partially expressed by a refusal to furnish blanks for making proofs.

Covenant Mut. Ben. Ass'n v. Spies, 114 Ill. 463, 2 N. E. 482; Pray v. Life Indemnity & Security Co., 104 Iowa, 114, 73 N. W. 485; Parsons v. Grand Lodge A. O. U. W. of Iowa, 108 Iowa, 6, 78 N. W. 676; Stephenson v. Bankers' Life Ass'n of Des Moines, 108 Iowa, 637, 79 N. W. 459; Kansas Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607; Mueller v. Grand Grove, State of Minnesota United Ancient Order of Druids, 69 Minn. 236, 72 N. W. 48; McDonald v. Bankers' Life Ass'n of Des Moines, 154 Mo. 618, 55 S. W. 999; Seely v. Manhattan Life Ins. Co., 72 N. H. 49, 55 Atl. 425; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Dean v. Ætna Life Ins. Co., 2 Hun, 358, 4 Thomp. & C. 497, reversed on practice point 62 N. Y. 642; Meagher v. Life Union, 20 N. Y. Supp. 247, 65 Hun, 354; Hutchinson v. Supreme Tent of Knights of Maccabees of the World, 22 N. Y. Supp. 801, 68 Hun, 355; Payn v. Mutual Relief Soc., 2 How. Prac. (N. S.) 220, 6 N. Y. St. Rep. 365; Baker v. New York State Mut. Ben. Ass'n, 9 N. Y. St. Rep. 653; White v. Metropolitan Life Ins. Co., 22 Pa. Super. Ct. 501; Dial v. Valley Mut. Life Ass'n, 29 S. C. 560, 8 S. E. 27; Stepp v. National Life & Maturity Ass'n, 37 S. C. 417, 16

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S. E. 134; Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.) 78 S. W. 398; Daniher v. Grand Lodge A. O. U. W., 10 Utah. 110, 37 Pac. 245; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

The fact that the refusal was made to one who had not at the time been appointed administrator, and who was not, therefore, authorized to receive payment, has been held not to prevent a waiver from arising from the refusal to furnish blanks (Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398).

A denial of liability on a life policy, made before the death of the insured, will relieve the beneficiary from the necessity of making proofs.

Supreme Lodge Knights of Honor v. Davis, 26 Colo. 252, 58 Pac. 595; Equitable Life Assur. Soc. v. Winning, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173.

So, a statement by a local lodge, in a circular letter soliciting aid for the widow of insured, that she could not recover on the certificate on account of the insured's failure to pay premiums, has been held to amount to a waiver of proofs (Supreme Lodge Order of Mutual Protection v. Meister, 68 N. E. 454, 204 Ill. 527, affirming 105 Ill. App. 471). A denial, however, by a third person, made merely in the presence of the agent, will not amount to a waiver (East Texas Fire Ins. Co. v. Coffee, 61 Tex. 287). And the mere fact that the insurer has been informed by a person of the highest respectability that it was impossible that all the property insured could have been in the building at the time of the fire does not so irresistibly lead to the conclusion that the company will resist the claim as to absolve the insured from making proofs of loss (People's Bank of Greenville v. Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81).

Where the policy covered both real and personal property, separately valued, and the company denied liability as to the real property on account of a transfer thereof, but admitted its liability as to the personalty, and requested proofs, it was held that there was only a waiver as to the realty (Gillon v. Northern Assur. Co., 127 Cal. 480, 59 Pac. 901). So, also, where the policy covered a stock of goods, a denial of liability as to a portion of the inventory first submitted did not waive the proofs of loss required by the policy (Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kan. App. 527, 51 Pac. 567). Under the same principle it has been held that a refusal to pay a claim for total disability under an accident policy

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will not excuse a failure to make proof of an additional claim for partial disability (Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99). But where a dispute as to the amount of the company's liability was of such a nature that the difficulty could not be solved by the production of plans and specifications, the refusal of the company to recede from its position after the furnishing of the other proofs was held to amount to a waiver of the requirement as to the plans (Monteleone v. Royal Ins. Co. of Liverpool & London, 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 784).

(c) Denial of liability without assigning reason or with reservation.

A mere refusal to pay without assigning any reason therefor has been held to amount to a waiver of the notice and proofs.

Firemen's Ins. Co. v. Crandall, 33 Ala. 9; Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408. 14 Am. Dec. 289; Merchants' Ins. Co. v. Dwyer, 1 Posey, Unrep. Cas. (Tex.) 441; Virginia Fire & Marine Ins. Co. v. Goode, 95 Va. 762, 30 S. E. 370. See, also, Siegle v. Phœnix Ins. Co., 107 Mo. App. 456, 81 S. W. 637, where a statement of an adjuster that it would be a long time before insured would get a cent was held to constitute a denial of liability and a waiver of proofs; and Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366, where waiver was based upon a failure of insurer to answer a letter requesting a statement of intention as to payment.

This holding as to waiver, as stated in Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289, proceeds on the theory that, if the company intends to reject the claim because of a defect in the proofs, it should notify the insured that he may correct the defect. Furthermore, the unexplained denial is a notification that the claim will not be adjusted, and gives insured to understand that preliminary proofs would be useless. Elsewhere, however, it has been held that such a denial will not amount to a waiver, at least as a matter of law.

Crescent Ins. Co. v. Camp, 64 Tex. 521; Spooner v. Vermont Mut. Fire Ins. Co., 53 Vt. 156. And see the dissenting opinion in Firemen's Ins. Co. v. Crandall, 33 Ala. 9.

A refusal to pay the full amount of the policy does not waive a provision requiring insured to keep and produce an inventory (Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469).

In the burglary insurance case of Fidelity & Casualty Co. v. Sanders, 70 N. E. 167, 32 Ind. App. 448, also, it was held that an allega-

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tion in a complaint that an adjuster refused to pay the loss could not be aided by a presumption that the denial was on some other ground than the failure to furnish notice.

As to the effect of a denial of liability, coupled with a statement that the proofs furnished are not sufficient, or that the insurer waives no provision, the authorities are not harmonious. In some courts it has been held that an insistence on the policy requirements, or a demand for correct proofs will prevent a waiver from arising out of a denial of liability on other grounds.

Phœnix Ins. Co. v. Minner, 64 Ark. 590, 44 S. W. 75; Kimball v. Hamilton Fire Ins. Co., 21 N. Y. Super. Ct. 495. See, also, Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 589, 72 N. E. 250.

This position is, of course, greatly strengthened when it appears that the request for proofs has special reference to the matter on account of which liability is denied.

Cornett v. Phenix Ins. Co., 67 Iowa, 388, 25 N. W. 673; Welsh v. Des Moines Ins. Co., 77 Iowa, 376, 42 N. W. 324.

So, also, an express reservation by the company of its rights under the policy, and a statement that it waives no rights, has been deemed sufficient to do away with any waiver involved in a contemporaneous denial of liability.

Citizens' Fire Ins., Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Farmers' Fire Ins. Co. v. Mispelhorn, 50 Md. 180.

On the other hand, it has been held that, since proofs would be useless if the company would not pay in any event, a notification that those furnished were insufficient would not prevent a waiver from following a denial of liability on other grounds.

Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

And for the same reason waivers have been held established by an absolute denial of liability, though it was also expressly stipulated that the company waived none of its rights.

Phillips v. Protection Ins. Co., 14 Mo. 220; Karelsen v. Sun Fire Office of London, 45 Hun, 144, 9 N. Y. St. Rep. 831; Cooper v. Insurance Co. of State of Pennsylvania, 96 Wis. 362, 71 N. W. 606.

In Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187, a denial of liability was held to effect a waiver, though subsequently the company stated that it did not waive any ground of

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defense whatever. And a denial of liability has been held effective as a waiver, though there was a subsequent statement that if the company had been misled it would entertain proof to that effect, it further appearing that the denial was never in fact withdrawn, so as to render it of any use for insured to furnish the proofs (Phœnix Ins. Co. v. Spiers, 10 Ky. Law Rep. 254, 8 S. W. 453, 87 Ky. 285). But in Insurance Co. of N. A. v. Caruthers (Miss.) 16 South. 911, a subsequent agreement between the parties that the company "will not be held to have waived" any of the terms of the contract by the acts of its agent was held to have done away with the effect of a previous denial of liability by the agent.

(d) Waiver by denial of liability as dependent on time of denial.

It is evident that, under the principle that an implied waiver of notice or proofs must be based on estoppel, the denial must take place while it is yet possible for the insured to fulfill the conditions of the policy. When the denial of liability relied on as a declaration that the proofs would be useless, or that any defect therein would not be noted, occurred after the time for furnishing proofs had elapsed, it cannot be maintained that the proofs would have been furnished or corrected had not such declaration been made. Accordingly, many courts have held that a denial of liability, occurring after the stipulated time has elapsed, will not amount to a waiver of notice or proofs.

Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; Dwelling House Ins. Co. v. Jones, 47 Ill. App. 261; Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; State Ins. Co. v. School Dist. No. 19, 66 Kan. 77, 71 Pac. 272; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; McPike v. Western Assur. Co., 61 Miss. 37; Gale v. State Ins. Co., 33 Mo. App. 664; Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197; Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Donahue v. Windsor Co. Mut. Fire Ins. Co., 56 Vt. 374; Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301, 17 N. W. 5. See, also, Brown v. London Assur. Corp., 40 Hun (N. Y.) 101, and the opinions in Bennett v. Lycoming Co. Mut. Ins. Co., 67 N. Y. 274, and Brink v. Hanover Fire Ins. Co., 70 N. Y. 593. But note that in each of these latter cases the decision is as to a different matter; in the Bennett Case that the notice was in fact given in time, and in the Brink Case that the waiver was not established as a matter of law.

The same decision has also been made as to a denial of liability under life or accident policies. Coldham v. Pacific Mut. Life Ins. Co. (Com. Pl.) 2 Ohio S. & C. P. Dec. 314; Western Travelers' Acc. Ass'n

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v. Tomson (Neb.) 101 N. W. 341; Employers' Liability Assur. Corp v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869; Hart v. Trustees of Supreme Lodge of Fraternal Alliance, 108 Wis. 490, 84 N. W. 851.

In other cases, where the denial was made before the time had elapsed, special attention was called to the fact that had the misleading statement not been made, the default or defect might have been corrected.

Weaks v. Lycoming Fire Ins. Co., 29 Fed. Cas. 581; Phenix Ins. Co. v. Belt Ry. Co., 82 Ill. App. 265; Phenix Ins. Co. v. Rogers, 11 Ind. App. 72, 38 N. E. 865; Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991; German-American Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324; Continental Ins. Co. v. Daniel, 25 Ky. Law Rep. 1501, 78 S. W. 866; Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.) 265; Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Stacy v. Norwich Union Fire Ins. Soc., 25 Ohio Cir. Ct. R. 67; Medley v. German Alliance Ins. Co. (W. Va.) 47 S. E. 101.

Emphasis has been placed on this point, also, in life and accident cases. Railway Officials' & Employés' Acc. Ass'n v. Armstrong, 22 Ind. App. 406, 53 N. E. 1037; Hohn v. Interstate Casualty Co., 115 Mich. 79, 72 N. W. 1105.

In Orient Ins. Co. v. Clark, 22 Ky. Law Rep. 1066, 59 S. W. 863, the denial did not occur until after the expiration of the time prescribed by the policy, but the court called attention to the Kentucky rule, under which proofs may be furnished at any time before bringing the action.

Under the principle that an implied waiver depends on estoppel, it is also held that the insured must have been misled by the denial of liability.

Robinson v. Pennsylvania Fire Ins. Co., 90 Me. 385, 38 Atl. 320; Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520. But see, contra, Indian River State Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228, where a denial of liability was held an absolute waiver as matter of law, and entirely aside from the question as to whether the insured was misled. For a further development of this idea, see post, in this paragraph, the discussion as to waiver by a denial of liability in the answer.

And of course the denial must have come to his knowledge.

Merchants' Ins. Co. v. Nowlin (Tex. Civ. App.) 56 S. W. 198; Employers' Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869 (a life insurance case).

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In connection with this theory, attention should also be called to Butterworth v. Western Assur. Co., 132 Mass. 489, where the acts of the defendant were said not to be so much in the nature of an excuse for not complying with the policy, as to constitute an estoppel of the company to deny that proper proofs were furnished. Therefore, evidence of the waiver might be given under allegations of performance.

Not all cases, however, proceed on the theory that an implied waiver of proofs must be founded on estoppel. In some, though all the elements of an estoppel are not present, a waiver is held to arise from acts of the company indicating an intention to waive. Under this theory a denial of liability on other grounds than failure or defect of notice or proofs may amount to a waiver, though the time has elapsed within which such documents might have been furnished. As a rule, however, such decisions are either cumulative in their nature, following a decision that the proof given was correct or had been waived by other means, or else such elements of an estoppel are present that it would be manifestly unjust to enforce the provision against the insured.

McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Schenck v. Mercer County Mut. Fire Ins. Co., 24 N. J. Law, 447; Brink v. Hanover Fire Ins. Co., 80 N. Y. 108; Dohn v. Farmers' Joint Stock Ins. Co., 5 Lans. (N. Y.) 275; Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. (N. Y.) 518; Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456, 86 App. Div. 115; Rheims v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670.

The same rule has been announced in similar life and accident cases. Equitable Life Assur. Soc. of U. S. v. Winning, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Doggett v. United Order of Golden Cross, 126 N. C. 477, 36 S. E. 26.

In Brink v. Hanover Fire Ins. Co., 80 N. Y. 108, an element of estoppel is pointed out which it would seem would rarely be absent in cases where the denial was made before action was commenced, and was not accompanied by any intimation that correct proofs would be required. Had the objection to the proofs been timely, the court says, plaintiff might have acquiesced therein, and not been put to the expense and trouble of commencing the litigation.

But there are cases in which, if there was any estoppel (aside, possibly, from the one pointed out in the Brink Case), it does not

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appear, and in which the court, with but little, if any, discussion, decided that a denial of liability, though occurring after the stipulated time for filing the notice or proof had elapsed, worked a waiver.

Bennett v. Maryland Fire Ins. Co., 3 Fed. Cas. 229; Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 926 (but in connection with this case see the burglary insurance case of Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167); Weiss v. American Fire Ins. Co., 148 Pa. 349, 23 Atl. 991.

See, also, the following life and accident insurance cases: Unthank v. Travelers' Ins. Co., 28 Fed. Cas. 824; Crenshaw v. Pacific Mut. Life Ins. Co., 71 Mo. App. 42; Reynolds v. Equitable Acc. Ass'n, 1 N. Y. Supp. 738, 59 Hun, 13.

Hilton v. Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412, should, perhaps, be classed here, since the denial apparently occurred after the time limited by the policy (30 days) had expired. But it should be noted that there was in force a statute [2] requiring proof within a "reasonable time."

Whatever the rule may be as to the effect of a denial of liability on other grounds than failure of proof, coupled with a reservation of rights as to the proofs, occurring before the expiration of the specified time, it would seem that neither under the theory of waiver by estoppel nor of waiver by intention could a waiver be grounded upon such a double denial occurring after the expiration of the time; for the intention in such a case is expressly negatived by the company, and it cannot be said that the subsequent denial of liability misled the insured into thinking that the proof would be useless.

Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.) 176; Western Travelers' Acc. Ass'n v. Tomson (Neb.) 101 N. W. 341; Blossom v. Lycoming Fire Ins. Co., 64 N. Y. 162; Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237. And see Boruszweski v. Middlesex Mut. Assur. Co., 186 Mass. 589, 72 N. E. 250.

But see Franklin Fire Ins. Co. v. Chicago Ice Ass'n, 36 Md. 102, 11 Am. Rep. 469. In that case the proofs which were required to be furnished "as soon as possible" were furnished in about a month. Two months later objections were made to payment on other grounds than defects in the proofs, and, still later, objections were made to the proofs. Held, that the company at the trial could not object to the insufficiency of the proofs. There is no discussion of this point, however, and it is probably best explained under the doctrine that a waiver, once established, cannot be revoked.

[2] Rev. St. Me. 1883, c. 49, § 21.

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(c) Same—Denial of liability in the answer.

An interesting phase of this question arises when the denial of liability is in the answer filed by the insurer after action is brought on the policy. In Nebraska, Kentucky, South Carolina, and Colorado it has been held that a denial of liability on other grounds in the trial of the case will amount to a waiver of the notice and proofs, and render the question of their production entirely immaterial.

Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740; Id., 43 Neb. 569, 61 N. W. 745; Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883; Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Omaha Fire Ins. Co. v. Hildebrand, 54 Neb. 306, 74 N. W. 589; Lansing v. Commercial Union Assur. Co. (Neb.) 93 N. W. 756; Modern Brotherhood of America v. Cummings (Neb.) 94 N. W. 144 (a life insurance case); Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434; Home Ins. Co. v. Gaddis, 3 Ky. Law Rep. 159; Kenton Ins. Co. v. Wiggenton, 10 Ky. Law Rep. 587; Home Ins. Co. v. Koob, 24 Ky. Law Rep. 223, 68 S. W. 453, 113 Ky. 360, 58 L. R. A. 58, 101 Am. St. Rep. 354; Pennsylvania Fire Ins. Co. v. C. D. Young & Co., 25 Ky. Law Rep. 1350, 78 S. W. 127; McBryde v. South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769; Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 53 Pac. 242, 11 Colo. App. 264.

In Nebraska the leading cases (the Dierks Cases) seem to proceed on the theory that a defense on the ground that the policy was not in force when the loss occurred is inconsistent with one alleging failure of notice and proofs. The court said that a defense based on an incumbrance on the property "was, in effect, a plea of confession and avoidance. It, in effect, admitted the execution and delivery of the policy, the receipt of the premium, the destruction of the insured property by fire, and the receipt by it of notice of the fire. This defense that the policy was not in force at the time the loss occurred is utterly inconsistent with the defense of want of notice of the loss." And again, in illustrating its position, the court said that if the maker of a note "answer, denying the execution and delivery of the note, and allege as a defense to the action that he had paid the note, then its execution and delivery would become immaterial issues in the case." This phase of the Dierks Case was also emphasized in Western Travelers' Acc. Ass'n v. Tomson (Neb.) 101 N. W. 341, which was distinguished from the earlier case in that the defense interposed (injury arising from other cause than accident) was not inconsistent with a reliance on the policy

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requirements as to proofs of injury. Had the defense been based on a forfeiture of the policy, the court said, it would have been inconsistent to have relied on a clause in the policy, and the Dierks Case would have governed. In Home Fire Ins. Co. v. Decker, 75 N. W. 841, 55 Neb. 346, also, it was held, that a defense based on incendiarism was not inconsistent with a defense that sufficient proofs were not furnished, and that the action was commenced too soon after the service of what purported to be proofs. And in Omaha Fire Ins. Co. v. Hildebrand, 54 Neb. 306, 74 N. W. 589, the decision that there was a waiver seems rather based on the idea that the law will not require a useless thing; the court pointing out that, if the policy was not in force when the loss occurred, the proofs would have been useless. It might be noted in passing that the Nebraska cases considered seem to leave out of account McCann v. Ætna Ins. Co., 3 Neb. 198, where the court said: "It is true the defendants plead other defenses [than failure to produce proofs] in their answer, but that does not relieve the plaintiffs from the performance of the conditions precedent."

In Kentucky, also, the reason for the holding, as expressed in Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434, and Kenton Ins. Co. v. Wiggenton, 10 Ky. Law Rep. 587, seems to have been the futility of a compliance if the policy was not in force. But in Home Ins. Co. v. Gaddis, 3 Ky. Law Rep. 159, the reason given was that the company had violated its contract by refusing to pay, and that this was true though the refusal was in the answer. The company having violated its contract, plaintiff could not be held to a compliance with his.

In Colorado the decision is based upon the Dierks Case, and in South Carolina it was merely a cumulative remark, supported neither by discussion nor citation of authority.

Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; McBryde v. South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769.

In connection with the cases holding that a waiver will arise from a denial of liability in the answer, the able, though unavailing, argument of Marshall, J., in Dezell v. Fidelity & Casualty Co., 75 S. W. 1102, 176 Mo. 253, should also be noted. In that case he took the position, not only that waiver of proofs might be founded on the doctrine that the law will not require a useless thing, but that the whole theory of waiver by denial of liability, at least when the denial is coupled with a demand for proofs, rested on that doctrine

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alone. Obviously, in such case, it could not rest on intention nor on estoppel. The insured could not have been misled into a belief that proofs would not be required, when he was expressly informed that they were expected. The contention that though the proofs would have been useless, yet the company had a contractual right thereto, is not available in view of the fact that the courts had based a waiver of the right on its mere uselessness without regard to either intention or estoppel.

It is evident that the doctrine of waiver by a denial of liability on other grounds in the pleadings is entirely at variance with the theory that the action of the company must have been such as might fairly have misled the insured. Accordingly, in Kansas, Minnesota, and Ohio, where the courts adhere to the latter theory, the claim of a waiver by a denial in the answer has been rather briefly dismissed.

> Westchester Fire Ins. Co. v. Coverdale, 9 Kan. App. 651, 58 Pac. 1029; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466, reversing (sub silentio) Merchants' Ins. Co. v. Frick, 2 Am. Law Rec. 336, 5 Ohio Dec. (reprint) 47.

In Iowa, also, the rule is said to be that acts or omissions relied on as a waiver of proofs should take place before action is brought, if not before the time has expired within which the insured has a right, under the terms of the contract, to supply the proofs (Smith v. State Ins. Co., 64 Iowa, 716, 21 N. W. 145). And in New York, though, as already noted, the courts admit waiver by denial of liability after the stipulated time, it has been held that, "if the plaintiff had not a complete cause of action against the defendant when the summons was served, no obstacles have been removed from her path by the denials in defendant's answer of the allegations of her complaint."

> Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, reversing 43 N. Y. Supp. 623, 13 App. Div. 444.

The prevailing opinion in Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102, also proceeds on the theory that waiver of proofs by denial of liability has always been founded either on estoppel or intention, and that on neither ground can a waiver arise from a denial of liability in an answer, in connection with which there is also a claim that the proofs were not furnished in time.

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15. WAIVER OF DEFECTS IN NOTICE OR PROOFS BY FAILURE TO OBJECT.

(a) Failure to object in general.
(b) Failure to make specific objection.
(c) Nature of waiver by failure to object as related to waiver of delay in furnishing proofs.
(d) Effect of failure to object as dependent on duration of silence.

(a) Failure to object in general.

Receiving and retaining notice or proofs of loss, without objecting to any defects therein, is a waiver of the objection.

Reference to the following cases is deemed sufficient: Petit v. German Ins. Co. (C. C.) 98 Fed. 800; Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; North British Mercantile Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; McIlrath v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 244, 86 N. W. 310 (but see the early case of Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126, not mentioned in the later decisions); Eliot Five-Cent Sav. Bank v. Commercial Union Assur. Co., 142 Mass. 142, 7 N. E. 550; First Nat. Bank v. American Century Ins. Co., 58 Minn. 492, 60 N. W. 345; Swan v. Liverpool & L. & G. Ins. Co., 52 Miss. 704; McCullough v. Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883; Taylor v. Roger Williams Ins. Co., 51 N. H. 50; Hibernia Mut. Fire Ins. Co. v. Meyer, 39 N. J. Law, 482; Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Phœnix Mut. Fire Ins. Co. v. Bowersox, 6 Ohio Cir. Ct. R. 1, 3 Ohio Dec. 321; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Vesey v. Commercial Union Assur. Co. (S. D.) 101 N. W. 1074; London & L. Fire Ins. Co. v. Schwulst (Tex. Civ. App.) 46 S. W. 89; Morotock Ins. Co. v. Cheek, 93 Va. 8, 24 S. E. 464, 57 Am. St. Rep. 782; Rheims v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670; Vergeront v. German Ins. Co., 86 Wis. 425, 56 N. W. 1096.

Reference may also be made to the following life and accident cases: Manhattan Life Ins. Co. v. Francisco, 84 U. S. 672, 21 L. Ed. 698; Grand Lodge Brotherhood of Locomotive Firemen v. Orrell, 206 Ill. 208, 69 N. E. 68, affirming 97 Ill. App. 246; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Railway Officials' & Employés' Ass'n v. Beddow, 65 S. W. 362, 23 Ky. Law Rep. 1438, 112 Ky. 184; American Life Ins. Co. v. Ma-

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hone, 56 Miss. 180; Peacock v. New York Life Ins. Co., 14 N. Y. Super. Ct. 338; Braymer v. Commercial Mut. Acc. Co., 199 Pa. 259, 48 Atl. 972.[1]

The same principle applies to the failure of a reinsurer to object to the proofs furnished by the reinsured.

Cashau v. Northwestern Nat. Ins. Co., 5 Fed. Cas. 270; Ex parte Norwood, 18 Fed. Cas. 452.

It is obvious that the company's silence will not waive any defect of which it was ignorant.

People's Bank v. Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81; American Exp. Co. v. Triumph Ins. Co. (D. C.) 1 Wkly. Law Bul. 85, 7 Ohio Dec. 51.

The contention of the company in Winnesheik Ins. Co. v. Schueller, 60 Ill. 465, seems to have been based on this principle. The policy provided for proofs, and also for a personal examination at the option of the insurer. The company contended that this examination was such a part of the proofs that a waiver of defects in the written proof, by failure to object, extended only to matters not to be covered by the examination. This contention is apparently based on the theory that the company could not be said to have waived defects which it had a right to expect to be elsewhere covered. The court, however, held that the proofs and the examination were not so connected, and that, if the company desired the information to be derived from an examination, it should have demanded it within the time limited.

It is evident that the rule as to waiver by acquiescence is in many instances nearly allied to the doctrine involved in cases holding the notice or proof furnished to have been sufficient. The difference between a holding that any defect in proofs was waived by their acceptance and retention by the company, and a holding that the proofs furnished were sufficient, as shown by their acceptance and retention, must often be very slight.

Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67; Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; Merrill v. Colonial Mut. Fire Ins. Co., 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268; Young v. Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Universal Fire Ins. Co. v. Morin, 13 Wkly. Notes Cas.

[1] See, also, Cent. Dig. vol. 28, "Insurance," col. 2285, § 1393.

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(Pa.) 345; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506. See, also, Northwestern Benev. Soc. v. Dudley, 27 Ind. App. 327, 61 N. E. 207 (a life insurance case).

Especially is this true where the requirements of the policy as to notice and proofs are indefinite.

Casbau v. Northwestern Nat. Ins. Co., 5 Fed. Cas. 270; Heath v. Insurance Co., 1 Cush. (Mass.) 257; Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb. 21, 59 N. W. 752; O'Brien v. Phœnix Ins. Co., 76 N. Y. 459; Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

Where the requirement of the policy is for "satisfactory" proofs, no distinction between the two principles can be traced.

Phenix Ins. Co. v. Lewis, 63 Ill. App. 228. The same rule holds as to "satisfactory" proofs of death. Bushaw v. Women's Mut. Ins. & Acc. Co., 55 Hun, 607, 8 N. Y. Supp. 423; Railway Officials' & Employés' Acc. Ass'n v. Armstrong, 53 N. E. 1037, 22 Ind. App. 406.

The rule as to a waiver of defects in the notice or proofs, by a failure of the company to object thereto, does not extend to an entire failure to furnish proofs.

Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Ervay v. Fire Ass'n of Philadelphia, 119 Iowa, 304, 93 N. W. 290.

And this will be true though it is provided by statute [2] that a mere delay in the presentation of proofs "shall be waived if the insurer omitted to make objection promptly" thereto (Johnson v. Dakota Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799).

Nor will the failure of the company to notify the insured that a mere notice of loss will not be accepted as a compliance with a requirement for particular proofs amount to a waiver of such proofs.

Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; Kirkman v. Farmers' Ins. Co., 90 Iowa, 457, 57 N. W. 952, 48 Am. St. Rep. 454, as explained in Pringle v. Des Moines Ins. Co., 107 Iowa, 742, 77 N. W. 521; Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. 9, 5 Am. Rep. 318, as explained and affirmed in Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717.

But the fact that a document containing all the particulars of the loss was labeled a "notice" of loss will not prevent a waiver as to

[2] Comp. Laws N. D. § 4179.

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any defects therein from arising from a failure of the insurer to object thereto.

Greene v. Ins. Co., 84 Iowa, 135, 50 N. W. 558; Pringle v. Des Moines Ins. Co., 107 Iowa, 742, 77 N. W. 521; Bromberg v. Minnesota Fire Ass'n, 45 Minn. 318, 47 N. W. 975.

As to whether a failure to require more specific proofs than a notice of death or loss will amount to a waiver of a requirement for "due" or "satisfactory" proofs, the authorities are not agreed.

For the affirmative of this proposition, reference may be made to Phenix Ins. Co. v. Lewis, 63 Ill. App. 228, and Heath v. Insurance Co., 1 Cush. (Mass.) 257. The only provisions appearing in the latter case, however, as to notice and proof, were that the loss should be paid in 90 days "after proof thereof," and that the company might rebuild at any time within 90 days "after notice of the loss."

The negative of the proposition is supported by the life insurance case of O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169, 19 Am. Rep. 151, reversing 1 Hun, 460, 3 Thomp. & C. 487, where the policy required "due notice and proof."

The principle that waiver of an entire failure to furnish proofs cannot be inferred from silence alone has also operated to prevent a waiver of a failure to produce the certificate of a magistrate, where the production of such document was considered as a condition precedent, standing by itself, and not as a mode of verification, or as a part of the proofs.

Daniels v. Equitable Fire Ins. Co., 50 Conn. 551; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197.

Such, also, is probably the true effect of the decision in Mueller v. South Side Fire Ins. Co., 87 Pa. 399; for while some of the language might justify an inference that mere silence could not in its nature amount to a waiver, yet the case referred to as authority (Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. 9, 5 Am. Rep. 318), proceeds on the theory that silence on the receipt of a notice not on its face purporting to be proofs will not amount to a waiver of the proofs.

But where the certificate is considered as a part of the proofs, a failure to object to its absence will be a waiver of the defect.[3]

Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Haggard v. German Ins. Co., 53 Mo. App. 98; Taylor v. Roger Williams Ins.

[3] As to the necessity of a demand for appraisement, see post, p. 3615.

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Co., 51 N. H. 50; Bilbrough v. Metropolis Ins. Co., 12 N. Y. Super. Ct. 587; Van Deusen v. Charter Oak Fire & Marine Ins. Co., 24 N. Y. Super. Ct. 55; Cayon v. Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. 540.

(b) Failure to make specific objection.

Under the principle that those defects upon which the company intends to rely must be pointed out, an objection to certain defects in the proofs will amount to a waiver of all those not mentioned.

Thompson v. Liverpool & L. & G. Ins. Co., 23 Fed. Cas. 1060; Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; Williams v. Niagara Fire Ins. Co., 50 Iowa, 561; Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507; Bailey v. Hope Ins. Co., 56 Me. 474; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Travis v. Continental Ins. Co., 32 Mo. App. 198; Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Craighton v. Agricultural Ins. Co., 39 Hun, 319; Moore v. Hanover Fire Ins. Co., 24 N. Y. Supp. 507, 71 Hun, 199, reversed on another ground 141 N. Y. 219, 36 N. E. 191; Schmurr v. State Ins. Co., 30 Or. 29, 46 Pac. 363; Universal Fire Ins. Co. v. Block, 109 Pa. 535, 1 Atl. 523; Enos v. St. Paul Fire & Marine Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; Home Ins. Co. v. Cohen, 20 Grat. (Va.) 312; Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

And the same rule applies as to proof of death or disability. Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Braymer v. Commercial Mut. Acc. Co., 199 Pa. 259, 48 Atl. 972.

This is also true where it is provided by statute[4] that all defects which might be remedied are waived if the insurer fails to make timely objection thereto (Peet v. Dakota Fire & Marine Ins. Co., 1 S. D. 462, 47 N. W. 532). Under a similar principle, also, a retention of proof for 23 days, and an objection on the ground that the certificate was not furnished by the nearest magistrate, without, however, giving information as to who was the nearest notary, has been held to amount to a waiver of such requirement (Paltrovitch v. Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198, affirming 68 Hun, 304, 23 N. Y. Supp. 38). But the specification of certain objections to proofs is not a waiver of proof altogether; and, if any of the objections made are valid and true, they will defeat the proof (Sheehan v. Southern Ins. Co., 53 Mo. App. 351).

[4] Comp. Laws S. D. §§ 4177, 4178.

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It is difficult to deduce an unquestioned rule as to the effect of general objection to the proofs furnished. The weight of authority, however, supports the proposition that it is incumbent on the insurer to point out the specific defects in the proofs, and that a general objection will amount to a waiver thereof.

Timayenis v. Union Mut. Life Ins. Co. (C. C.) 21 Fed. 223; Insurance Co. of North America v. Hope, 58 Ill. 75, 11 Am. Rep. 48; American Cent. Ins. Co. v. Brown, 29 Ill. App. 602; Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; Myers v. Council Bluffs Ins. Co., 72 Iowa, 176, 33 N. W. 453; Bodle v. Chenango County Mut. Ins. Co., 2 N. Y. 53; Graham v. Firemen's Ins. Co., 8 Daly (N. Y.) 421; Sutton v. American Fire Ins. Co., 188 Pa. 380, 41 Atl. 537; Madsden v. Phœnix Fire Ins. Co., 1 S. C. 24; Merchants' Ins. Co. v. Reichman (Tex. Civ. App.) 40 S. W. 831; Virginia Fire & Marine Ins. Co. v. Goode, 95 Va. 762, 30 S. E. 370.

This rule has been applied, though the objection was coupled with a reference to the requirements of the policy.

Schmurr v. State Ins. Co., 30 Or. 29, 46 Pac. 363; Dyer v. Des Moines Ins. Co., 103 Iowa, 524, 72 N. W. 681; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

On the other hand, it has been frequently held that a general objection, coupled with a declaration that the company intended to insist on a strict compliance with the stipulations of the policy, would not amount to a waiver of any defects in the proof furnished.

Gauche v. London & L. Ins. Co. (C. C.) 10 Fed. 347; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 30; Grigsby v. German Ins. Co., 40 Mo. App. 276; Kimball v. Hamilton Fire Ins. Co., 21 N. Y. Super. Ct. 495.

(c) Nature of waiver by failure to object as related to waiver of delay in furnishing proofs.

The theory most frequently advanced as a basis for the rule as to waiver of defects in the notice or proofs by failure of the company to object thereto, is that, if the company is not satisfied with the proofs furnished, it is incumbent on it to give the insured notice thereof, in order that they may be corrected. If the proofs furnished give the company all the information desired, they have fulfilled their purpose, and the insured should not be defeated by reason of any formal defect which he might have remedied. If they do not give the information, the company should not be per-

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mitted to defeat the claim, when it could have secured what it desired by merely pointing out what was lacking.

Williams v. Queens Ins. Co. (C. C.) 39 Fed. 167; Great Western Ins. Co. v. Staaden, 26 Ill. 365; Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Butterworth v. Western Assur. Co., 132 Mass. 489; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Hibernia Mut. Fire Ins. Co. v. Meyer, 39 N. J. Law, 482; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428; Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. C. 315; Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394, 31 N. E. 231, affirming 15 N. Y. Supp. 429, 61 Hun, 110; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627; Universal Fire Ins. Co. v. Block, 109 Pa. 535, 1 Atl. 523; German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586; Thomas v. Western Ins. Co., 5 Pa. Super. Ct. 383; Yuengling v. Jennings, 6 Pa. Super. Ct. 614; Jacoby v. North British & Mercantile Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226; Hall v. Ins. Co., 3 Phila. (Pa.) 331.

Reference may also be made to the following life insurance cases: Martin v. Manufacturers' Accident Indemnity Co., 151 N. Y. 94, 45 N. E. 377; De Van v. Commercial Travelers' Mut. Acc. Ass'n, 36 N. Y. Supp. 931, 92 Hun, 256; Peacock v. New York Life Ins. Co., 14 N. Y. Super. Ct. 338.

Under this theory of waiver by estoppel it would seem that a failure to furnish proofs in time could not ordinarily be waived by silence; for, even though the insured were at once notified of the default, it would be too late to remedy it. And such has been the holding in Illinois, Missouri, Pennsylvania, and Indiana.

Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Albers v. Phœnix Ins. Co., 68 Mo. App. 543; Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Carey v. Allemania Fire Ins. Co., 171 Pa. 204, 33 Atl. 185; Carpenter v. Allemannia Fire Ins. Co., 156 Pa. 37, 26 Atl. 781; Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690; Standard Life & Acc. Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604 (a life insurance case). See, however, in Pennsylvania, the earlier case of Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562.

In other jurisdictions it has been held that a delay in furnishing proofs as well as any other defect may be waived by the failure of the insurer to object.

Smith v. Home Ins. Co., 47 Hun (N. Y.) 30; Brothers v. California Ins. Co., 3 N. Y. Supp. 89, 50 Hun, 604; Moore v. Hanover Fire Ins. Co.,

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24 N. Y. Supp. 507, 71 Hun, 199, reversed on another ground 141 N. Y. 219, 36 N. E. 191; Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456, 86 App. Div. 115, affirmed without opinion 71 N. E. 1130, 179 N. Y. 557; Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Wheaton v. North British & Mercantile Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; State Ins. Co. v. Maackens, 38 N. J. Law, 564; O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160; Palmer v. St. Paul Fire & Marine Ins. Co., 44 Wis. 201; Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845. But in connection with the New York cases see the earlier cases of Bell v. Lycoming Fire Ins. Co., 19 Hun, 238; McDermott v. Lycoming Fire Ins. Co., 44 N. Y. Super. Ct. 221. And in connection with the Wisconsin cases see Cornell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 387. See, also, Ex parte Norwood, 18 Fed. Cas. 452; and the life insurance case of Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651, affirming 43 N. Y. Super. Ct. 352.

The same rule is established under a statute [5] in North Dakota (Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799). And the converse doctrine that a waiver of other defects will arise from an objection to proofs on the ground that they were not furnished in time has been announced in Nebraska and New York.

Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Crighton v. Agricultural Ins. Co., 39 Hun (N. Y.) 319.

Most of such cases, however, make the decision as to waiver without noting at all any possible distinction between a waiver of defects of proofs furnished in time and a waiver of delay, or of defects in proofs tardily furnished. But in Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483, 33 Am. Rep. 656, affirming 43 N. Y. Super. Ct. 352, and Smith v. Home Ins. Co., 47 Hun (N. Y.) 30, it is expressly decided that an estoppel is not needed to support the waiver, and that it may arise from an act or failure to act showing an intention not to insist on the breach of condition. The doctrine of estoppel is, however, invoked in support of a waiver of delay by silence in Hibernia Mut. Fire Ins. Co. v. Meyer, 39 N. J. Law, 482; the argument being that, had timely objection been made by the company, the delay might have been explained.

These cases in which a delay has been held waived by the silence of the company should not be confused with cases in which the original defective proofs were shown to have been furnished in time, but the company was held to have waived a delay in furnish-

[5] Comp. Laws, § 4179.

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ing corrected proofs, by having failed to make timely objection and requests for corrected proofs. Obviously, in such a case, the element of estoppel is as fully present as in the waiver of any other defect.

Travelers' Life Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178, affirming Edwards v. Ins. Co. (C. C.) 20 Fed. 661; McCarvel v. Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367; Cummins v. German-American Ins. Co., 192 Pa. 359, 43 Atl. 1016. See, also, Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81, where a finding of a referee that corrected proofs furnished after the expiration of the time were "in full compliance with the requirements of the defendant" was held to necessarily establish the fact that the demand for correction was not made until after the expiration of the time.

(d) Effect of failure to object as dependent on duration of silence.

The effect of failure to object as a waiver of defects in notice or proofs is often dependent on the duration of the silence of the insurer. Of course, if the silence continues up to the time of the trial, the waiver will be established, whether it be considered a question of intention or of estoppel.

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Byrne v. Rising Sun Ins. Co., 20 Ind. 103; Works v. Farmers' Mut. Fire Ins. Co., 57 Me. 281; Patterson v. Triumph Ins. Co., 64 Me. 500; Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139, 1 Am. Rep. 398; Butterworth v. Western Assur. Co., 132 Mass. 489; Breckinridge v. American Cent. Ins. Co., 87 Mo. 62; Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428; Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188; Van Deusen v. Charter Oak Fire & Marine Ins. Co., 24 N. Y. Super. Ct. 55; Bilbrough v. Metropolis Ins. Co., 12 N. Y. Super. Ct. 587; German-American Ins. Co., v. Hocking, 115 Pa. 398, 8 Atl. 586; Cummins v. German-American Ins. Co., 197 Pa. 61, 46 Atl. 902; Jacoby v. North British & Mercantile Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226; Vangindertaelin v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 32 Am. St. Rep. 29.

Reference may also be made to the following life insurance cases: Grand Lodge Illinois Independent Order of Mutual Aid v. Besterfield, 37 Ill. App. 522; Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 459; Grogan v. United States Industrial Ins. Co., 90 Hun, 521, 36 N. Y. Supp. 687; Stambler v. Order of Pente, 159 Pa. 492, 28 Atl. 301.

In other cases it has appeared that the policy contained a requirement that action against the company should not be commenced until a certain number of days after the proofs had been

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furnished. Under such circumstances any unnecessary delay by the company in making objections would also delay plaintiff's right of action, thus furnishing the basis of an estoppel.

Capitol Ins. Co. v. Wallace, 48 Kan. 400, 29 Pac. 755, affirmed on rehearing 50 Kan. 453, 31 Pac. 1070; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29, 13 Am. Rep. 405; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Jones v. Howard Ins. Co., 10 N. Y. St. Rep. 120; Ehlers v. Aurora Fire Ins. Co. (Com. Pl.) 19 Pa. Co. Ct. R. 165, 6 Pa. Dist. R. 441. This principle was apparently the basis of the decision in Williams v. Queens Ins. Co. (C. C.) 39 Fed. 167, where it was held that a delay of 37 days in making an objection would not amount to a waiver, since it did not appear that plaintiff was in any manner delayed thereby in commencing his action.

And where it further appears that the limitations of the policy will expire before the insured can make the corrections and bring his action, the principle of estoppel is still more obvious.

Mercantile Ins. Co. v. Holthaus, 43 Mich. 423, 5 N. W. 642; Hibernia Mut. Fire Ins. Co. v. Meyer, 39 N. J. Law, 482.

But in many of the cases the stipulated time within which proofs might be furnished has been considered as marking the limit beyond which silence might not continue without waiver resulting; this holding being based apparently on the theory that no correction could be made after the expiration of the stipulated time, and that, therefore, the insured had been misled to his injury by the delay.

In re Republic Ins. Co., 20 Fed. Cas. 548; Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69; Bartlett v. Union Mut. Fire Ins. Co., 46 Me. 500; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Haggard v. German Ins. Co., 53 Mo. App. 98; Arnold v. Hartford Fire Ins. Co., 55 Mo. App. 149; Probst v. American Ins. Co., 64 Mo. App. 408; Dautel v. Pennsylvania Fire Ins. Co., 65 Mo. App. 44; De Land v. Ætna Ins. Co., 68 Mo. App. 277; Messmer v. Niagara Fire Ins. Co., 48 N. Y. Supp. 478, 24 App. Div. 241; Smith v. Exchange Fire Ins. Co., 46 N. Y. Super. Ct. 543; Fritz v. Lebanon Mut. Ins. Co., 154 Pa. 384, 26 Atl. 7; Sutton v. American Fire Ins. Co., 188 Pa. 380, 41 Atl. 537.

In none of these cases, however, was the question directly raised as to the effect of a demand for corrected proofs, made after the expiration of the stipulated time, but before the commencement of

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the action, and not followed by the production of such proof. In three of them it appeared that the company made such a delayed demand for proofs under the policy, but failed to specify the particular defect.

Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz (Ark.) 80 S. W. 576; Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; Sutton v. American Fire Ins. Co., 188 Pa. 380, 41 Atl. 537. In Probst v. American Ins. Co., 64 Mo. App. 408, it appeared that the demand was specific, but no attention was paid by the court to the possible effect thereof.

In some cases it is stated that a delay of an "unreasonable" length of time in making objection will amount to a waiver of defects.

Fire Ins. Co. v. Feirath, 77 Ala. 194, 54 Am. Rep. 58; Alston v. Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981; Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; Ft. Wayne Ins. Co. v. Irwin, 54 N. E. 817, 23 Ind. App. 53; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Mispelhorn v. Farmers' Fire Ins. Co., 53 Md. 473; Union Ins. Co. v. Barwick, 36 Neb. 223, 54 N. W. 519; Bush v. Westchester Fire Ins. Co., 2 Thomp. & C. (N. Y.) 629, reversed on other grounds 63 N. Y. 531; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Nease v. Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506. In South Dakota the rule is established by statute [6] (Angier v. Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685).

Other cases announce that the objection must be made "promptly" or "at once."

Biddeford Sav. Bank v. Dwelling House Ins. Co., 81 Me. 566, 18 Atl. 298; Walker v. Metropolitan Ins. Co., 56 Me. 371; Whitmore v. Dwelling House Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Frankle v. Pennsylvania Fire Ins. Co., 9 Fed. Cas. 706; Atlantic Ins. Co. v. Wright, 22 Ill. 462. See, also, the life insurance case of American Life Ins. Co. v. Mahone, 56 Miss. 180.

But under the rule requiring objections to be made promptly, or within a reasonable time, as under the rule requiring them to be made within the stipulated time for furnishing proofs, there is a scarcity of cases in which there was no element of estoppel beyond the mere silence of the company, and in which there was also a specific objection and request for correction, made and refused after the time indicated by the court had expired. Generally, as a mat-

[6] Comp. Laws S. D. § 4178.

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ter of fact, in cases so stating the rule, it did not appear that any objection was made until after the action had been commenced.

Frankle v. Pennsylvania Fire Ins. Co., 9 Fed. Cas. 706; Alston v. Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981; Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; Walker v. Metropolitan Ins. Co., 56 Me. 371; Biddeford Sav. Bank v. Dwelling House Ins. Co., 81 Me. 566, 18 Atl. 298; Union Ins. Co. v. Barwick, 36 Neb. 223, 54 N. W. 519; Whitmore v. Dwelling House Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Nease v. Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233; Killips v. Putnam Fire Ins. Co., 28 Wis. 472, 9 Am. Rep. 506. See, also, American Life Ins. Co. v. Mahone, 56 Miss. 180.

In other cases there was in the policy a stipulation delaying the insured's right to commence action, which, of course, introduced a new element of estoppel.

Atlantic Ins. Co. v. Wright, 22 Ill. 462; Young v. Hartford Fire Ins. Co., 45 Iowa, 377, 24 Am. Rep. 784; Mispelhorn v. Farmers' Fire Ins. Co., 53 Md. 473.

In Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58, however, there appears to have been a subsequent request by the company for corrected proofs, since the court holds that the reasonableness of the time at which it was made should have been submitted to the jury. But even in that case the court points out that the rule is founded on the idea that an unreasonable delay may injure the insured by causing him to lose means and opportunity of correcting the defect. And in Bush v. Westchester Fire Ins. Co., 2 Thomp. & C. (N. Y.) 629, reversed on another point 63 N. Y. 531, though it was held that a subsequent demand by the company was a nullity, yet it should be noted that the property had been sold by the defendant's adjuster when the demand was made, thus possibly preventing the correction from being made.

In connection with these cases, and as further indicating that the rule requiring the objection to be made promptly or within a reasonable time should not be taken without reference to the circumstances, or any question of estoppel, should be considered two cases in which the objection, if not unreasonably delayed, was at least not made at once, but in which a subsequent demand was held effective.

Noonan v. Hartford Fire Ins. Co., 21 Mo. 81 (objection made after close of negotiations); Gilligan v. Commercial Fire Ins. Co., 20 Hun (N. Y.) 93 (a delay of 15 days).

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16. QUESTIONS OF PRACTICE RELATING TO WAIVER OF NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY.

(a) Necessity of allegation of waiver by plaintiff.
(b) Sufficiency of allegation of waiver.
(c) Province of court and jury.
(d) Evidence, trial, and review.

(a) Necessity of allegation of waiver by plaintiff.

The weight of authority favors the doctrine that, if the insured intends to rely on a waiver of notice or proofs of loss, he must plead the same.

McCormack v. North British Ins. Co., 78 Cal. 468, 21 Pac. 14; Gillon v. Northern Assur. Co., 127 Cal. 480, 59 Pac. 901; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Smith v. State Ins. Co., 64 Iowa, 716, 21 N. W. 145; Welsh v. Des Moines Ins. Co., 71 Iowa, 337, 32 N. W. 369; Heusinkveld v. Capital Ins. Co., 95 Iowa, 504, 64 S. W. 594; Brock v. Des Moines Ins. Co., 96 Iowa, 39, 64 N. W. 685; Heusinkveld v. St. Paul Fire & Marine Ins. Co., 96 Iowa, 224, 64 N. W. 769; Parsons v. Grand Lodge A. O. U. W. of Iowa, 108 Iowa, 6, 78 N. W. 676 (a life insurance case); Dwelling House Ins. Co. v. Johnson, 47 Kan. 1, 27 Pac. 100; Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; Westchester Fire Ins. Co. v. Coverdale, 9 Kan. App. 651, 58 Pac. 1029; Fayerweather v. Phenix Ins. Co., 7 N. Y. St. Rep. 25; Id., 54 N. Y. Super. Ct. 545; Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57, reversing 17 Ohio Cir. Ct. R. 143, 9 O. C. D. 118; Long Creek Bldg. Ass'n v. State Ins. Co., 29 Or. 569, 46 Pac. 366; St. Paul Fire & Marine Ins. Co. v. Hodge, 30 Tex. Civ. App. 257, 70 S. W. 574, 71 S. W. 386.

And see, also, Hanover Fire Ins. Co. v. Johnson, 26 Ind. App. 122, 57 N. E. 277. In that case plaintiff sought to recover as an assignee, alleging compliance with the policy requirements by his assignor. The proof showed a denial of liability on other grounds by the company to plaintiff in his capacity of one who had liquidated a mortgage on the property. The court held that plaintiff could not rely on this waiver, since his complaint was based on a different theory.

It has been pointed out that waiver of defects by an acceptance, as sufficient, of proofs offered, is based upon an estoppel of the company to dispute their sufficiency, and that, therefore, evidence of such a waiver should be admitted under allegations of performance.

Long Creek Bldg. Ass'n v. State Ins. Co., 29 Or. 569, 46 Pac. 366; Spratley v. Hartford Ins. Co., 22 Fed. Cas. 973; American Life

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Ins. Co. v. Mahone, 56 Miss. 180; Robinson v. Palatine Ins. Co. (N. M.) 66 Pac. 535.

Zielke v. London Assur. Corp., 64 Wis. 442, 25 N. W. 436, followed in Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833 (an accident case), may also be distinguished on this ground, though the argument goes somewhat further; and it should be further noted that under St. Wis. § 2667, new matter in an answer not amounting to a counterclaim is deemed controverted by denial or avoidance, as the case may require.

But see, also, St. Paul Fire & Marine Ins. Co. v. Hodge, 30 Tex. Civ. App. 257, 70 S. W. 574, where the doctrine was expressly rejected.

Aside, however, from any distinguishing feature, it has been held in some of the states that a waiver of notice and proofs of loss need not be pleaded by plaintiff.

Reference may be made to Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; Levy v. Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Russell v. State Ins. Co., 55 Mo. 585; Nickell v. Phœnix Ins. Co., 144 Mo. 420, 46 S. W. 435; Okey v. State Ins. Co., 29 Mo. App. 105; Travis v. Continental Ins. Co., 32 Mo. App. 198; McCollum v. Niagara Fire Ins. Co., 61 Mo. App. 352; McCollum v. North British & Mercantile Ins. Co., 65 Mo. App. 304; Murphy v. Insurance Co., 70 Mo. App. 78. See, also, Hooker v. Phœnix Ins. Co., 69 Mo. App. 141.

The Pennsylvania case decided that, since evidence of waiver introduced under an allegation of performance showed that the condition had been in fact waived, therefore the allegation of performance was surplusage, and there was no variance. Furthermore, if there was any variance, it was immaterial. The West Virginia case held that the general allegation of performance must be understood as meaning those conditions which had not been waived, and that special allegations of performance might be sustained by proof of waiver.[1] The Illinois case was based on the theory that waiver is founded on estoppel in pais, which at common law need not be pleaded. Though the Missouri doctrine seems well established, see, in connection with the cases cited, Mueller v. Putnam Fire Ins. Co., 45 Mo. 84.

In Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597, an allegation in the answer, showing waiver, was held to obviate the necessity of plaintiff pleading such waiver.

[1] As to present rules of pleading in West Virginia, see Code 1899, c. 125, §§ 61–66.

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(b) Sufficiency of allegation of waiver.

An allegation that there was a waiver by certain acts which would be sufficient to constitute waiver if occurring within the stipulated time for furnishing proofs will be a sufficient allegation of waiver, since the allegation that the waiver occurred at all necessarily carries with it an inference that the acts occurred within the stipulated time.

Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432; Sun Mut. Ins. Co. v. Holland, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 446. Reference may also be made to United Firemen's Ins. Co. v. Kukral, 7 Ohio Cir. Ct. R. 356, 4 O. C. D. 636, where it was held that it was not necessary, in pleading waiver, to state the particular circumstances of the waiver, the circumstances being considered as evidential facts.

And where the proof of waiver is admissible under the general allegations of the complaint, allegations of special acts constituting waiver may be rejected as surplusage.

Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568.

But where there is a special pleading, setting up particular facts as constituting a waiver of proof, the facts must be proved as alleged (Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540).

Reference may also be made to People's Bank of Greenville v. Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540.

And where plaintiff in his reply set up that the company had waived the proofs, a motion to require him to state whether such waiver was made verbally or in writing, and by what agent of the company, should have been granted (Webster v. Continental Ins. Co., 67 Iowa, 393, 25 N. W. 675).

Evidence tending to prove the allegations of the complaint may be introduced to show a waiver of the proofs, though it does not appear that there was in the complaint any explicit allegation of waiver.

Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 459; Capitol Ins. Co. v. Bank of Pleasanton, 48 Kan. 397, 29 Pac. 578; Stephens v. Union Assur. Soc., 16 Utah, 22, 50 Pac. 626, 67 Am. St. Rep. 595.

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But in Crescent Ins. Co. v. Camp, 64 Tex. 521, it was held that the complaint must contain a direct allegation of waiver, unless the facts alleged will admit of no other explanation.

Plaintiff may plead both performance and waiver, and rely upon whichever the evidence may establish.

Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa, 221, 67 N. W. 237; Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 459; Indian River State Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228.

And though he has first alleged performance, he may afterwards allege waiver, either by amendment or reply.

Sun Fire Office of London, England, v. Fraser, 5 Kan. App. 63, 47 Pac. 327; North British & Mercantile Ins. Co. v. Rudy, 26 Ind. App. 472, 60 N. E. 9.[2]

(c) Province of court and jury.

It is a general rule that the question as to whether there has been a waiver of the notice or proofs of loss is for the jury under proper instructions by the court.

It is deemed sufficient to cite the following cases: Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606, affirming 55 Ill. App. 622; Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921; Bach v. State Ins. Co., 64 Iowa, 595, 21 N. W. 99; Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880; Robinson v. Pennsylvania Fire Ins. Co., 90 Me. 385, 38 Atl. 320; Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 Atl. 904; Pentz v. Pennsylvania Fire Ins. Co., 92 Md. 444, 48 Atl. 139; Gristock v. Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Id., 87 Mich. 428, 49 N. W. 634; Butterworth v. Western Assur. Co., 132 Mass. 489; McPike v. Western Assur. Co., 61 Miss. 37; New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62; Summers v. Western Home Ins. Co., 45 Mo. App. 46; McCollum v. Niagara Fire Ins. Co., 61 Mo. App. 352; Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500; Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350; Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. 73, 20 Atl. 838, 21 Am. St. Rep. 904; Drake v. Farmers' Union Ins. Co., 3 Grant, Cas. (Pa.) 325; Neve v. Charleston Ins. & Trust Co., 2 McMul. (S. C.) 237; Madsden v. Phœnix Fire Ins. Co., 1 S. C. 24; Phœnix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Mosley v. Vermont Mut. Fire Ins. Co., 55 Vt. 142; Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374.

The rule is also illustrated by the following life and accident insurance cases: Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985; Shelden v.

[2] Decided under Burns' Rev. St. 1894, § 390, relating to amendments.

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National Masonic Acc. Ass'n, 122 Mich. 403, 81 N. W. 266; Reynolds v. Equitable Acc. Ass'n, 1 N. Y. Supp. 738, 59 Hun, 13; Delameter v. Prudential Ins. Co., 52 Hun, 615, 5 N. Y. Supp. 586; Dial v. Valley Mut. Life Ass'n, 29 S. C. 560, 8 S. E. 27.

But it is for the court to determine whether the evidence introduced is sufficient to take the case to the jury. Many, if not a majority, of the cases bearing on the question of waiver, have been determined by the court in the exercise of this authority, the following cases being cited merely on account of the rather particular emphasis placed by them on the authority of the court.

New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301, 4 South. 62; Summers v. Western Home Ins. Co., 45 Mo. App. 46; Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350.

Though the general rule is as stated, yet there are numerous cases in which the question has been determined as one of law. The decisions, and particularly the statements made in some of the opinions, are not easy to reconcile, but most of them seem to be based on the doctrine that the facts established may show an estoppel so plainly that the court will be justified in declaring a waiver based thereon.

Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921; Indian River State Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228; Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 Atl. 904; Noonan v. Hartford Fire Ins. Co., 21 Mo. 81; Medley v. German Alliance Ins. Co. (W. Va.) 47 S. E. 101. See, also, Mosley v. Vermont Mut. Fire Ins. Co., 55 Vt. 142, and Butterworth v. Western Assur. Co., 132 Mass. 489.

But in some of the cases the question is stated to be for the court, in case there is no conflict in the evidence.

Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Dwelling House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 30; Pretzfelder v. Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424.

Attention has already been called to the rule that the authority of an agent to waive the notice or proofs is usually dependent on, and solely inferable from, the express authority given him in relation to some other related duty.[8] Therefore, questions arising in relation to such authority have been for the most part treated as

[8] See ante, p. 3486.

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matters of law. But where the question becomes one of disputed fact or a question in relation to the express authority on which the authority to waive is based, it is for the jury.

Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 South. 46. And see, also, Bolan v. Fire Ass'n, 58 Mo. App. 225, and Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. 259, in which the evidence introduced, and which it was held should have taken the question to the jury, went to prove rather express authority to adjust, than to waive.

(d) Evidence, trial, and review.

The whole question of what constitutes waiver is in its last analysis a question of the admissibility and sufficiency of evidence to show waiver. Therefore, the discussion in the preceding briefs may be regarded as involving the consideration of the rules of evidence in their special application to particular facts. Reference is here made only to a few cases asserting general principles, as to which special discussion is not considered necessary.

The burden of proving waiver of the conditions of the policy as to notice and proofs of loss is, of course, on the insured: Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Harris v. Phœnix Ins. Co., 85 Iowa, 238, 52 N. W. 128; Flanaghan v. Phenix Ins. Co., 42 W. Va. 426, 26 S. E. 513.

The admissibility of evidence to prove waiver of notice or proofs was considered in the following cases: The admission of letters admitting liability (Ætna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370), denying liability (Prudential Ins. Co. v. Devoe, 98 Md. 584, 56 Atl. 809), and showing the course of negotiation between the parties (Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574), was considered in the cases indicated. In Manchester Fire Ins. Co. v. Feibelman, 118 Ala. 308, 23 South. 759, it was held that testimony going to prove the allegations of the replication was admissible, there having been no assignment of error to the overruling of the demurrer to the replication. If there was error at all, it went back to the overruling of the demurrer. Defective proofs were held admissible in London & L. Fire Ins. Co. v. Schwulst (Tex. Civ. App.) 46 S. W. 89, under an allegation of a waiver of such defects. Though it was admitted in Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa, 229, 76 N. W. 696, that direct testimony that a certain person was the agent of another was in the nature of a legal conclusion, yet it was held not error to allow it to stand, subject to a subsequent objection to the competency of the witness.

The sufficiency of contradictory evidence to support a finding of waiver was considered in Bruce v. Phœnix Ins. Co., 24 Or. 486, 34 Pac. 16; Shimp v. Cedar Rapids Ins. Co., 26 Ill. App. 254.

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Though there may be evidence to justify the sending of a waiver point to the jury, yet, if no request is made for such action, objection cannot afterwards be made that the matter was treated by the court as one of law.

Martin v. Equitable Acc. Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; Van Allen v. Farmers' Joint Stock Ins. Co., 10 Hun, 397.

In the following cases other minor points as to instructions were considered: Instruction outside the issues (Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540); unnecessary but nonprejudicial instruction (Rieger v. Mechanics' Ins. Co., 69 Mo. App. 674); unimportant and nonprejudicial mistake (German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113).

Findings of fact upon which a verdict is based should contain finding of waiver of notice as required by the policy, and not evidence from which a waiver might or might not have been found (Germania Fire Ins. Co. v. Columbia Encaustic Tile Co., 11 Ind. App. 385, 39 N. E. 304). But a special finding that no proofs were served is not necessarily in conflict with a general verdict for plaintiff, since the proofs may have been waived (Phœnix Ins. Co. v. Rowe, 117 Ind. 202, 20 N. E. 122). In Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991, it was held that the Supreme Court could entertain no presumption of waiver on an appeal from a judgment on a verdict in favor of plaintiff, there being no allegation of waiver in the complaint, and the jury having found that there was no substantial compliance with the requirements of the policy as to proofs.

No advantage can be taken of a failure to furnish notice of loss where the question is not raised either by demurrer, or by an answer setting out the default (Phœnix Ins. Co. v. Coomes, 14 Ky. Law Rep. 603, 20 S. W. 900). The Supreme Court of Illinois will not review the finding of the Appellate Court in the matter of waiver of notice or proofs of loss, the question being considered as one of fact, and therefore not reviewable in the Supreme Court.

Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598, affirming 27 Ill. App. 17; Metropolitan Safety Fund Acc. Ass'n v. Windover, 137 Ill. 417, 27 N. E. 538; Phenix Ins. Co. v. Belt Ry. Co., 182 Ill. 33, 54 N. E. 1046.

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17. NOTICE AND PROOFS OF MARINE LOSSES.

(a) Notice of loss.
(b) Necessity and sufficiency of proofs of loss.
(c) Effect of proofs—Protest.
(d) Estoppel and waiver as to proofs of loss.
(e) Questions of practice.

(a) Notice of loss.

Owing to nature of the risk, it is obvious that the rules governing the production of notice and proofs of marine losses cannot be as strict in their requirements as those governing the notice and proof of fire losses. Knowledge of a marine loss may not come to the insured for months after the loss has happened. Indeed, the insured may never have actual knowledge of the loss. Thus, in Child v. Sun Mut. Ins. Co., 5 N. Y. Super. Ct. 26, the only knowledge possessed by the insured was that the vessel was overdue 15 months, and had not been heard from for 20 months. In the case of a lake policy, which provided that, in case of loss or damage to the cargo insured, the company should have "early notice of the same," and it was impossible to determine the nature and extent of the damage until the cargo was discharged, it was held that, though the cargo was discharged on Saturday, a notice given the following Monday or Tuesday was within the terms of the policy (Rodee v. Detroit Fire & Marine Ins. Co., 74 Hun, 146, 26 N. Y. Supp. 242).

Generally, the notice of loss takes the form of preliminary proofs, and the sufficiency of the notice may be considered as a question of the sufficiency of the preliminary proofs hereafter discussed. In the case of an abandonment, the notice of abandonment is, of course, a notice of loss. Reference to the discussion of the sufficiency of the notice of abandonment should be made for further authorities on this phase of the question.[1]

(b) Necessity and sufficiency of proofs of loss.

Marine policies do not contain a specific condition calling for proofs of loss in definite form. The condition is usually a general one, providing that the loss shall be payable within a specified period after furnishing proofs of loss. Under this clause it has been held that the furnishing of proofs is a condition precedent to the

[1] See ante, p. 2952.

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bringing of an action on the policy (Allegre v. Maryland Ins. Co., 6 Har. & J. [Md.] 408, 14 Am. Dec. 289). In a comparatively recent case, where the policy insured a tug against liability for loss or damage due to collision, and provided that the insurer should not be liable unless the liability of the tug was established by suit, and that loss should be payable 60 days after proof of such loss or damage and of the amount thereof (Rogers v. Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396), it was held that the provisions must be construed together, so that proofs of loss need not be made until after a judicial determination of the liability of the vessel, the limitation beginning to run 60 days after such proofs were furnished.

The proofs referred to in the condition are what are termed "preliminary proofs." It is not proof in the strictly legal or technical sense—proof sufficient to support an action on the policy—that is required. **The clause is liberally construed to require only the best proof obtainable at the time,** and it is sufficient if it furnishes reasonably accurate information to the insurer, so that he may form some estimate of his rights and obligations before he is obliged to pay the loss.

Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; Lovering v. Mercantile Marine Ins. Co., 12 Pick. (Mass.) 348; Lenox v. United States Ins. Co., 3 Johns. Cas. (N. Y.) 224; Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 130; Johnston v. Columbian Ins. Co., 7 Johns. (N. Y.) 315; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Child v. Sun Mut. Ins. Co., 5 N. Y. Super. Ct. 26; Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427, affirming 26 N. Y. Super. Ct. 202; Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, affirming 53 N. Y. Supp. 1112, 33 App. Div. 628; American Ins. Co. v. Francia, 9 Pa. 390.

The proof need not be under oath (Munson v. New England Marine Ins. Co., 4 Mass. 88), or so authenticated as to be entitled to be read in evidence of the facts certified (Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1).

The fact and cause of the loss is ordinarily properly and sufficiently proved by the protest.

Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; Johnston v. Columbian Ins. Co., 7 Johns. (N. Y.) 315; Lenox v. United Ins. Co., 3 Johns. Cas. (N. Y.) 224.

That a protest, to be admissible as part of the proofs, need not be made

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within 24 hours after landing, is the doctrine of American Ins. Co. v. Francia, 9 Pa. 390.

A survey also is a proper form of proof to be submitted as to the cause of the loss (Johnston v. Columbian Ins. Co., 7 Johns. [N. Y.] 315). And where it is properly ordered, even though not by a court of admiralty, the company must bear the expense (Potter v. Ocean Ins. Co., 19 Fed. Cas. 1173). Where the policy contains a "rotten clause," and there has been a survey, it becomes, indeed, an essential part of the proof, and must be either produced or accounted for (Haff v. Marine Ins. Co., 4 Johns. [N. Y.] 132, affirming Anth. N. P. 14). Where, however, the provision is that the insured must produce all the documentary evidence of loss in his possession, the mere fact that there has been a survey will not justify the presumption that the report thereof is in the possession of insured (Foster v. Jackson Marine Ins. Co., 1 Edm. Sel. Cas. [N. Y.] 290).

Letters from the master have been regarded as sufficient preliminary proof of the capture and condemnation of the vessel.

Lovering v. Mercantile Ins. Co., 12 Pick. (Mass.) 348; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Craig v. United Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222.

So, also, the affidavit of the agent, who was also one of the owners, has been held sufficient preliminary proof of the fact that the vessel was overdue and had not been heard from for 20 months (Child v. Sun Mut. Ins. Co., 5 N. Y. Super. Ct. 26).

Proof of interest may be made by the part owner and agent in whose name the policy was taken out (Child v. Sun Mut. Ins. Co., 5 N. Y. Super. Ct. 26). And where the policy is taken out in the name of an agent "for benefit of whom it may concern," a failure of the agent to state in his proofs a transfer of a part interest, is not fatal (Walsh v. Washington Marine Ins. Co., 32 N. Y. 427, affirming 26 N. Y. Super. Ct. 202). If any preliminary proof of interest is required by a policy agreeing to pay the loss "thirty days after proof thereof," it is supplied by the bill of lading and invoice (Lenox v. United Ins. Co., 3 Johns. Cas. [N. Y.] 224). And it may be proved that such documents form a part of the proof of loss customarily demanded and furnished in case of insurance on goods; and, when this has been proved, it devolves on insured to show that they have been furnished (Allegre v. Maryland Ins. Co., 6 Har. & J. [Md.] 408, 14 Am. Dec. 289). But in Talcot v. Ma-

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rine Ins. Co., 2 Johns. (N. Y.) 130, it was held that such a provision, at least in a policy on a vessel, did not require preliminary proof of interest.

In Johnston v. Columbian Ins. Co., 7 Johns. (N. Y.) 315, where there was a claim for a technical total loss, the survey, invoice, original bills of parcels, and an authenticated account of the sale of the goods at auction, were considered sufficient proof of the amount of damage. It is sufficient to furnish, in case of a partial loss, the protest, bill of lading, and invoice, or such equivalent proof as the nature of the loss admits of, the papers named being the kind of proof usually required (Allegre v. Maryland Ins. Co., 6 Har. & J. [Md.] 408, 14 Am. Dec. 289). And it was held in Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1, that, where the insurance is on a cargo, a passbook in which the cargo is duly entered, the bills of lading, and the protest of the master are sufficient proof of the loss and interest to require the insurer to specify defects if any, and call for further evidence if desired. Where the proofs were in proper form for proof of a constructive total loss, they were not insufficient for failing to state the loss also as a partial loss, though the policy provided that there should be no abandonment for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured. The requirement in relation to "adjustment as of a partial loss" did not require a statement of the loss inconsistent with the insured's claim. All the insured could do was to present a proper statement, which, if assented to by the insured, might become an adjustment. (Taber v. China Mut. Ins. Co., 131 Mass. 239.) Where there is a claim against several insurance companies for the same loss on different policies, it is not necessary, in their preliminary proofs, for the insured to apportion, or attempt to apportion, the loss among the different insurers (Fuller v. Detroit Fire & Marine Ins. Co. [C. C.] 36 Fed. 469, 1 L. R. A. 801).

(c) Effect of proofs—Protest.

It is a doctrine of the Pennsylvania and South Carolina courts that a regularly executed protest is admissible as evidence of the truth of the statements therein contained. This doctrine seems, however, to be rather based on the peculiar nature of a protest, than on the fact that it forms part of the proof of a marine loss. It is

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also stated, even by the courts holding the doctrine, that it is exceptional, and it has been maintained in the latter, apparently rather on the ground of res adjudicata than because the courts believed it to be a logical part of the law.

Reference may be made to Boyce v. Moore, 2 Dall. (Pa.) 196, 1 L. Ed. 346, 1 Am. Dec. 277; Brown v. Girard, 1 Bin. (Pa.) 40, 2 Am. Dec. 400; Brown v. Girard, 4 Yeates (Pa.) 115, 2 Am. Dec. 400; Gordon v. Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Fleming v. Marine Ins. Co., 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747; American Ins. Co. v. Francia, 9 Pa. 390; Campbell v. Williamson, 2 Bay (S. C.) 237; Miller v. South Carolina Ins. Co., 2 McCord (S. C.) 336, 13 Am. Dec. 734; Smith v. Logan, 1 Spears (S. C.) 274; Cudworth v. South Carolina Ins. Co., 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692. See, also, Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

But a paper purporting to be a copy of a decree of a Court of Appeals in admiralty, not certified under seal, though exhibited as part of the preliminary proofs, cannot be read in evidence (Thurston v. Murray, 3 Bin. [Pa.] 326).

A very strict interpretation of the rule has, however, been enforced. Many of the cases, while recognizing the rule, have refused to apply it, because the protest was slightly irregular. Thus, in American Ins. Co. v. Francia, 9 Pa. 390, protests were refused as evidence for the jury as to the truth of their statements, because not made within 24 hours after reaching a port of safety. In Boyce v. Moore, 2 Dall. (Pa.) 196, 1 L. Ed. 346, 1 Am. Dec. 277, it was held that the protest must be made at the first practicable port, and in Gordon v. Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632, that a protest as to the loss of an inland vessel did not fall within the rule. Under the same strict interpretation the protest was held inadmissible in Cudworth v. South Carolina Ins. Co., 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692, because the master was also the owner of the vessel. That the protest was made at the place of residence of the insurer and insured was, however, held immaterial in Brown v. Girard, 1 Bin. (Pa.) 40, 2 Am. Dec. 400.

Aside from these two states, the question seems to have rarely arisen, though, where it has, the decision has been against the admissibility of the protest to prove, as against the company, anything further than that it was served as a part of the proofs.

Thus, in Ruan v. Gardner, 20 Fed. Cas. 1295, it was said that, though a protest made by one of the sailors at the first port after

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his return to the United States is admissible as a preliminary proof, the facts stated in such protest are not evidence of the fact of loss.

The principle is also stated in Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568; Patterson v. Maryland Ins. Co., 3 Har. & J. (Md.) 71, 5 Am. Dec. 419; Berwind v. Greenwich Ins. Co., 53 N. Y. Super. Ct. 102; McIntyre v. Bowne, 1 Johns. (N. Y.) 229; and in Haff v. Marine Ins. Co., 8 Johns. (N. Y.) 163, it was said that a survey which does not proceed upon the single ground that the ship is unsound or rotten, cannot be received as conclusive.

In Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408, the court refused to decide the question as applied to a regular protest in a foreign port, but held that a protest made on the return home, another port having been touched prior thereto, was not admissible to prove the cause of a deviation.

(d) Estoppel and waiver as to proofs of loss.

An insurer, by denying liability for the loss on other grounds, is estopped to object to the want of preliminary proofs of loss.

Steamship Samana Co. v. Hall (D. C.) 55 Fed. 663; Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404; Boice v. Thames & M. Marine Ins. Co., 38 Hun (N. Y.) 246; Heilner v. China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177.

So, too, when proofs have been furnished and the insurer denies liability generally or on some other ground than defects in the proofs, he is estopped to object that the proofs are insufficient.

Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Vos v. Robinson, 9 Johns. (N. Y.) 192.

Thus, an objection that the proofs of loss were not authenticated by the company's agent, as required by a marine insurance policy, is waived by a failure of the company to object to them on this ground when served on it, and by disputing its liability on the ground that the vessel was not a constructive total loss (Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414). So, if the company, after receipt of reasonable preliminary proofs of loss and of interest, retains them three or four days, and then refuses to pay the loss, without any intimation that the proofs are unsatisfactory, it should not be permitted to make that objection after the time allowed for payment by the policy has expired, and an action

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has been brought (Savage v. Corn Exchange Fire & Inland Nav. Ins. Co., 17 N. Y. Super. Ct. 1). An admission of liability by payment of the money into court after the amount has been determined by the adjuster from an examination of the proofs is a waiver of the right to object to the proofs for insufficiency (Johnston v. Columbian Ins. Co., 7 Johns. [N. Y.] 315).

If the insurer deems the proofs defective in any respect, a failure to make seasonable demand for additional proofs is a waiver of the objection.

Foster v. Jackson Marine Ins. Co., 1 Edm. Sel. Cas. 290; Child v. Sun Mut. Ins. Co., 5 N. Y. Super. Ct. 26; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427, affirming 26 N. Y. Super. Ct. 202.

Subsequent negotiations for the settlement of the loss without objection to the form of the preliminary proof are a waiver of the objections (Graves v. Washington Marine Ins. Co., 12 Allen [Mass.] 391).

Where a marine policy requires that, in case of disaster, the master and crew shall repair to the nearest convenient notary, and there make a protest setting forth the cause of the disaster, etc., the simple direction by an agent of the insurer to one of the crew, after loss, to go before an officer and make a protest, etc., is not a waiver of the insurer's right to a legal protest in the case (Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73).

(e) Questions of practice.

Where the policy provides that the loss shall be payable within a specified time after proofs are furnished, the fact that the required proofs were furnished must be pleaded in an action on the policy (Heilner v. China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177). If the insurer puts in evidence certain portions of the preliminary proofs without objecting to them on the ground of insufficiency, he cannot raise the objection for the first time on appeal (Graves v. Washington Marine Ins. Co., 12 Allen [Mass.] 391). Generally, the question whether the company has denied its liability on grounds not connected with the proofs of loss, so as to waive the want of or defects in the proofs, is for the jury.

Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Enterprise Ins. Co., v. Parisot, 35 Ohio St. 35, 35 Am. Rep. 589.

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18. NOTICE AND PROOFS OF LOSS IN GUARANTY AND INDEMNITY INSURANCE.

(a) Employers' liability insurance—Nature and necessity of notice of accident or claim.
(b) Same—Sufficiency of notice.
(c) Same—Time of notice.
(d) Same—Waiver of notice.
(e) Fidelity insurance.
(f) Credit insurance.

(a) Employers' liability insurance—Nature and necessity of notice of accident or claim.

Employers' liability policies very generally contain a requirement that the insured shall furnish immediate notice, both of any accident by which the insured may be rendered liable, and of any claim against the insured arising therefrom. These provisions are valid and of the essence of the contract, being designed to enable the insurer to investigate the circumstances of the accident while the matter is yet fresh in the minds of all, and to make timely defense against any claim filed. They are, therefore, usually given a more liberal construction in favor of the company than the requirement for notice and proof of loss under an ordinary fire policy, which can only become effective after the company's liability has been already fixed.

Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54; London Guarantee & Accident Co. v. Siwy (Ind. App.) 66 N. E. 481; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York, 104 Mo. App. 157, 78 S. W. 320. But see, in this connection, Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291, where a distinction is drawn between the requirement for notice in an employer's liability policy, and one for notice to a company insuring an animal, of the sickness of the animal insured.

The courts have not been much concerned in determining whether these requirements constitute conditions precedent or causes of forfeiture. Nevertheless, in Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996, a stipulation that the policy was issued subject to the agreement in regard to notice was said to constitute a "condition precedent." And the same name was given to the provision in London Guarantee & Accident

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Co. v. Siwy (Ind. App.) 66 N. E. 481. But in that case it was further stated that the failure to give the notice involved an "absolute forfeiture." But whether the condition be considered as a condition precedent or as one looking to forfeiture, the courts have at least been united in holding that **no recovery can be had without a compliance with such condition.**

Reference to the following additional cases are deemed sufficient: Smith & Dove Mfg. Co. v. Travelers' Ins. Co., 171 Mass. 357, 50 N. E. 516; National Const. Co. v. Travelers' Ins. Co., 176 Mass. 121, 57 N. E. 350; Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882; Northwestern Telephone Exch. Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110; Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275.

(b) Same—Sufficiency of notice.

A requirement for written notice of the accident is not satisfied by oral notice to the agent who countersigned the policy (Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882). But if written notice is sent to such agent, and he forwards it to the company, it will be a sufficient compliance with the policy (Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291).

Under a clause requiring the insured, "upon the occurrence of any accident and upon notice of any claim on account of any accident," to give immediate notice, only one notice need be given, covering both the accident and the claim.

Grand Rapids Electric Light & Power Co. v. Fidelity & Casualty Co., 111 Mich. 148, 69 N. W. 249; Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

But where it was provided that the insured should give immediate notice of any accident, and should "give like notice of any claim" that might be made on account of such accident, the requirement was not satisfied by a notice of the accident and claim given immediately after the claim was filed, which, however, was about a year after the occurrence of the accident (Northwestern Telephone Exch. Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110). And in Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996, the same rule was held to obtain under a requirement that the insured should give immediate notice of the accident, "and also" of any claim arising thereunder. But where there was a good excuse for delay in notice of the accident until the claim had been filed, it was held that the same notice

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would do for both, though the policy required immediate notice of the accident "and also" of the claim thereunder (Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291).

A provision that in case of accident "full particulars" thereof should be given the insurer was deemed in Ward v. Maryland Casualty Co., 71 N. E. 262, 51 Atl. 900, 93 Am. St. Rep. 514, to require such details as would enable the insurer to determine whether a claim was likely to be made on account thereof, and not to require insured to make an exhaustive investigation of the circumstances or to decide what the facts were on conflicting evidence. Nor would the failure of the insured employers to forward to counsel of the insurer, in compliance with his demand, the summons served on them in suit by the employé, end the insurer's liability, the policy not making such failure a cause of forfeiture. And this was true, though, had the question been raised, the circumstance might have been evidence on the question whether the employers aided the insurer in obtaining information as required by the policy.[1] And the same case also decided that the question as to whether the notice was sufficiently full was for the jury.

(c) Same—Time of notice.

The theory that the right of recovery will not be impaired by delay in furnishing notice or proofs in the absence of a special forfeiting clause, though governing many of the ordinary property insurance cases,[2] has not, apparently, been often advanced, even by counsel in employers' liability cases. In Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996, it was, however, held, apparently in response to such a contention, that, the policy having been made subject to the condition in regard to immediate notice, no recovery could be had where the notice was not so given; and this, though there was no special forfeiting clause.

The condition requiring "immediate notice" or "notice forthwith" of injury to employés means written notice within a reasonable time under the circumstances of the case.

London Guarantee & Accident Co. v. Siwy (Ind. App.) 66 N. E. 481; Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64

[1] As to the effect of the failure of the insured to aid the company in the defense of the claim, see ante, vol. 3, p. 2454.

[2] See ante, p. 3366.

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Am. St. Rep. 291; Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York, 104 Mo. App. 157, 78 S. W. 320; Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275.

The courts, without regard to the question whether the reasonableness of the time is a matter for the court or the jury, have held unexcused delays of varying length unreasonable per se.

London Guarantee & Accident Co. v. Siwy (Ind. App.) 66 N. E. 481 (three months); Smith & Dove Mfg. Co. v. Travelers' Ins. Co., 171 Mass. 357, 50 N. E. 516 (one month); National Const. Co. v. Travelers' Ins. Co., 176 Mass. 121, 57 N. E. 350 (seven months); Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882 (three weeks); Northwestern Telephone Exch. Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110 (one year); Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760 (nine months); Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275 (eight months); Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996 (nine months).

On the other hand, in Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514, a finding that notice of beginning of suit by employé against employers, given eighteen days after service of the writ on one of the employers, and two days after service on the other, was "immediate" was held not unsupported by the evidence.

The purpose of the notice of the accident and claim has been deemed a proper element to be considered in determining what will or will not be a reasonable time for its production. Thus, the fact that the insurer must rely upon the notice in order to secure evidence as to the actual facts upon which to base its action in paying or contesting the claim of the injured person has been considered as a potent reason for requiring a prompter notice than would otherwise have been necessary.

Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54; London Guarantee & Accident Co. v. Siwy (Ind. App.) 66 N. E. 481; Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514. And see, also, Northwestern Telephone Exch. Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110.

On the other hand, it was stated in Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291, that the reason

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for prompt notice was not so great as in the case of notice to a company insuring animals, of the sickness of the animal insured.

The ignorance of the insured of the accident or claim is a circumstance on which emphasis has been frequently placed as excusing a delay in the presentation of the notice. The insured cannot be said to be in default for failing to give a notice of that of which he himself was in ignorance.

Mandell v. Fidelity & Casualty Co., 49 N. E. 110, 170 Mass. 173, 64 Am. St. Rep. 291 (distinguishing Swain v. Insurance Co., 165 Mass. 321, 43 N. E. 105); Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 78 S. W. 320; Woolverton v. Fidelity & Casualty Co., 96 App. Div. 275, 89 N. Y. Supp. 292, affirming 62 N. Y. Supp. 1044, 48 App. Div. 439.

But it is incumbent on him to exercise ordinary care in acquiring knowledge of the accident in order that he may promptly notify the company.

Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; Woolverton v. Fidelity & Casualty Co. of New York, 89 N. Y. Supp. 292, 96 App. Div. 275.

And where the policy insured two employers of the same labor, the failure to give prompt notice was not excused by the fact that the employer who took out the policy was ignorant of the accident, while the one who knew of the accident did not know of the policy. Under such circumstances the delay was chargeable to the negligence of the employer who took out the policy, in failing to notify his co-employer of the policy and its conditions. (Deer Trial Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275.) But this rule in regard to the care required in acquiring knowledge is satisfied by the adoption and promulgation of a rule providing that servants shall immediately make full report of any accident, together with the names of witnesses (Woolverton v. Fidelity & Casualty Co., 89 N. Y. Supp. 292, 96 App. Div. 275). And on a former appeal of the same case (Woolverton v. Fidelity & Casualty Co., 62 N. Y. Supp. 1044, 48 App. Div. 439) it was pointed out that the insured's superintendent might take into account circumstances tending to show that the accident was not, in fact, one for which the insured was liable.

The knowledge of the servant, or even of a foreman or superintendent, who is not the agent of the insured for the purpose of giving the notice to the company, will not be imputed to the insured,

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so as to charge him with negligence in not sooner sending the notice.

Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; Woolverton v. Fidelity & Casualty Co. of New York, 89 N. Y. Supp. 292, 96 App. Div. 275.

In Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 78 S. W. 320, it was also held that knowledge of a forewoman was not imputable to the insured; but in that case the emphasis was placed rather on the fact that the forewoman had no authority to employ or discharge servants. On the other hand, it has been held in Minnesota (Northwestern Telephone Exch. Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110) that, the insured having agreed to give the notice, the knowledge of its foreman who had charge of the work was imputable to it. The mere fact that the manager of the insured (a corporation) was so occupied with the strike of the employés that he forgot to give the notice was held to constitute no excuse for the delay in Smith & Dove Mfg. Co. v. Travelers' Ins. Co., 171 Mass. 357, 50 N. E. 516.

The question as to what would be a reasonable time under the varying circumstances of each particular case would seem primarily to be a question for the jury under proper instructions by the court.

Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514; Woolverton v. Fidelity & Casualty Co., 62 N. Y. Supp. 1044, 48 App. Div. 439.

But other courts have held that, where the evidence is undisputed, the question is one of law for the court.

Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54; London Guarantee & Accident Co. v. Siwy (Ind. App.) 66 N. E. 481; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

(d) Same—Waiver of notice.

It was decided in Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760, that there is nothing in the nature of the agency of a soliciting agent to justify the insured in relying upon his statements as to the necessity of giving notice, and that this was particularly true where the policy expressly provided that "no agent has authority to waive or alter" anything therein contained. The case was distinguishable from a waiver of ordinary notice and proofs of loss under such a provision, in that it could not

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be said that the provisions for notice in an indemnity policy was not of the very essence of the contract.[8]

Where the company expressly provided that its action in defending a claim should not be deemed a waiver of a forfeiture resulting from the failure to give notice thereof, it was held that no waiver followed such action (London Guarantee & Accident Co. v. Siwy [Ind. App.] 66 N. E. 481). And a similar reservation was held in Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882, to prevent a waiver from resulting from a permission given the insured to settle with the employé for a certain sum. In National Const. Co. v. Travelers' Ins. Co., 176 Mass. 121, 57 N. E. 350, a statement made by the company that it did not refuse to look after the matter in accordance with its policy was held not to amount to a waiver, the company erroneously believing at the time that the delay in the notice given it had been caused by the excusable ignorance of the insured.

It appeared in Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882, that the company's attorneys, in the few days interim between receiving a tardy notice and the denial of liability by the company, requested and received from the insured a further written report of the loss. This action seems to have been on their own responsibility, and it is difficult to determine whether the decision that no waiver arose therefrom was based on the theory that their acts did not bind the company, or on the theory that no waiver was in any event involved in such acts. But in Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275, the hesitancy of the courts to declare a waiver of the requirement for prompt notice under an employers' liability policy plainly appeared, even aside from the question of agency. In that case the agent, with full knowledge of the circumstances attending the delay of several months, replied, to the insured's statement that the report could be made in a few days more, "Very well; that will be soon enough." A few days thereafter a report was in fact made out and submitted. The policy by its terms permitted only written waiver; but the court, beyond mentioning it in its statement of the case, paid no attention to such provision, basing its decision on the ground that the remark of the agent meant only that a report made out a few days later would do as well as one made

[8] As to the power of agents to waive notice and proofs of loss in general, see ante, p. 3486.

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out at the time of the conversation, and that, the insured being in default at that time, no waiver could arise from such conversation.[4]

(e) Fidelity insurance.

In policies or bonds of fidelity insurance it is commonly provided that immediate notice shall be given the company of any act of the employé involving a loss, that proofs of loss shall also be made, and that no claim shall be submitted to the company after a certain length of time following the expiration of the bond. Such provisions, having been framed and inserted in the contract by the company and for its benefit, should, in case of doubt, be construed against it (American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.) Nevertheless, a stipulation in such a policy that no action shall be commenced until 90 days after the production of the proofs of loss renders the proofs a condition precedent to the maintenance of an action, and a failure to comply therewith cannot be excused merely because the company had full knowledge of the matter (California Savings Bank v. American Surety Co. [C. C.] 82 Fed. 866). So, also, an agreement to indemnify for embezzlements, provided they were reported within 30 days after the expiration of the policy, has been held to render the stipulation a condition precedent, a breach of which need not be pleaded as a defense.

> **Sullivan v. Fraternal Societies' Co-operative Indemnity Union, 73 N. Y. Supp. 1094, 36 Misc. Rep. 578. See, also, as to the pleading point, Hough v. American Surety Co., 90 Mo. App. 475.**

And if the insured relies on his inability to comply with the request of the company for specific information, he should at least give the company notice to that effect before the matter comes to trial (Wieder v. Union Surety & Guaranty Co., 86 N. Y. Supp. 105, 42 Misc. Rep. 499).

Proofs of loss under such a policy are mercantile documents, and are not to be tested by the same rules of interpretation as an indictment, or even a pleading. It is only required that they shall contain a brief and general statement of the facts with substantial accuracy, truthfully informing the insurer how the loss occurred,

[4] As to the effect of leading insured to make out proofs of an ordinary property loss after default therein, see ante, p. 3510.

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and not tending, either by what they contain or what they omit, to mislead the insurer.

American Surety Co. v. Pauly, 72 Fed. 484, 18 C. C. A. 657, 38 U. S. App. 280, affirmed 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987.

Thus, in a companion case it was held that the proofs were sufficient which set forth with reasonable plainness that certain sums of money had been taken from the bank by means of acts of the cashier, described in the proof, though they failed to aver explicitly that a loss had been caused to the bank.

American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, 38 U. S. App. 254, affirmed 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987.

But in Hough v. American Surety Co., 90 Mo. App. 475, under a policy requiring such reasonable particulars and proofs as the company might "think fit," it was held that a failure to fully comply with the insurer's request for information of every oral statement made by the employé in relation to the shortage was fatal to insured's right of recovery.

Where it was provided in a fidelity insurance bond that action could only be commenced within one year from the filing of a claim by the insured, and that the claim should be made as soon as practicable after discovery of the loss and within six months after the expiration of the bond, the provision in regard to the time of filing of the claim was held material, so that a forfeiture might arise therefrom without an express provision to that effect; Civ. Code Cal. § 2611, providing that a policy may provide for forfeiture for the breach of an immaterial provision; "otherwise the breach of an immaterial provision does not avoid the policy" (California Sav. Bank v. American Surety Co. [C. C.] 87 Fed. 118). The court argued that since the stipulation as to the time of bringing action was undoubtedly material, and since it depended for its effect on the time the claim was filed, the time of filing the claim was also material. The same case also decided that while proofs of loss might not be so material that a forfeiture would be justified for failure to furnish them within a reasonable time (the policy merely providing that no right of action should accrue until 90 days after their production), yet notice of fraudulent acts of the employé would be so material, the policy providing for immediate notice of such acts, and also that the insured should give the company all aid pos-

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sible in prosecuting the offender and in obtaining reimbursement. The notice, under such circumstances, the court considered as clearly distinguishable from a mere notice of loss, delay in the sending of which has been sometimes held not fatal, in the absence of an express stipulation to that effect.[5]

A requirement that notice of the defalcation or proofs of the loss be furnished immediately means within a reasonable time under the circumstances.

American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, affirming 72 Fed. 470, 18 C. C. A. 644, 38 U. S. App. 254; American Surety Co. v. Pauly, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987, affirming 72 Fed. 484, 18 C. C. A. 657, 38 U. S. App. 280; Perpetual Bldg. & Loan Ass'n v. United States Fidelity & Guarantee Co., 118 Iowa, 729, 92 N. W. 686 (without unnecessary or unexcusable delay); Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989.

And this is primarily a question for the jury.

American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, affirming 72 Fed. 470, 18 C. C. A. 644, 38 U. S. App. 254; American Surety Co. v. Pauly, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987, affirming 72 Fed. 484, 18 C. C. A. 657, 38 U. S. App. 280; Perpetual Building & Loan Ass'n v. Guarantee Co., 118 Iowa, 729, 92 N. W. 686; Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989.

The court, however, in the Pauly Cases, seems to recognize that the question might become one of law, approving instructions as going as far as defendant could under the circumstances ask, which fixed a delay as fatal in law, of 100 days in the first case, and of 22 in the second. And in Michigan Savings & Loan Ass'n v. Missouri, K. & T. Trust Co., 73 Mo. App. 161, a delay of six months was held by the court to have released the insurer from liability.

The policy involved in the Pauly Cases provided that the notice should be given immediately after "knowledge" by insured of acts of the employé which might involve a loss. But the rule is the same where it is not expressly so provided. The insured is not bound to give notice until he has knowledge, and not simply suspicion, of acts which would justify a careful and prudent man in charging another with fraud or dishonesty. And the knowledge of a co-employé will not, in the absence of a stipulation to that effect,

[5] See ante, p. 3366.

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be imputed to the employer, so as to charge him with neglect in failing to give the notice.

American Surety Co. of New York v. Pauly, 18 Sup. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming 72 Fed. 470, 18 C. C. A. 644, 38 U. S. App. 254; American Surety Co. v. Pauly, 18 Sup. Ct. 563, 170 U. S. 160, 42 L. Ed. 987, affirming 72 Fed. 484, 18 C. C. A. 657, 38 U. S. App. 280; Pacific Fire Ins. Co. v. Pacific Surety Co., 93 Cal. 7, 28 Pac. 842; Perpetual Building & Loan Ass'n v. United States Fidelity & Guarantee Co., 118 Iowa, 729, 92 N. W. 686; Fidelity & Casualty Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440; Ætna Ins. Co. v. American Surety Co. (C. C.) 34 Fed. 291.

This principle has even been applied to knowledge of a minority of the directors, and of the bank's vice president, the policy requiring customary supervision and the immediate discharge of a defaulting employé (Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, affirming 103 Fed. 599, 43 C. C. A. 331).

In Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989, an ambiguity in the policy, which the court refused to solve, as to whether the notice was required to be given immediately after the accident, or not until the extent of the loss had been ascertained, was considered a circumstance proper to be considered by the jury in determining whether the notice was in fact given within a reasonable time.

A provision that the written statement of loss, properly certified and based upon the books of the employer, should "be prima facie evidence of the loss," was in American Surety Co. v. Pauly, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987, deemed sufficient to render such a statement prima facie proof in an action on the bond, and not merely on the presentation of the claim to the company (White, Peckham, and Shiras, JJ., dissenting). The provision was, in the opinion of the majority of the court, at least ambiguous, and therefore to be construed against the company.

Where, at the request of the company's inspector, the insured was put to the trouble and expense of employing an expert accountant to check the employé's books, the "immediate" notice required by the policy was deemed waived as to defalcations discovered by such expert, at least until the investigation was completed (Perpetual Building & Loan Ass'n v. United States Fidelity & Guarantee Co., 118 Iowa, 729, 92 N. W. 686). The inspector, in making the request, was clearly acting within the limits of his authority, so as to bind the company. Nor could the company insist

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on a stipulation in the policy prohibiting waiver by the inspector, the court relying on the theory that such stipulations apply only to conditions of the policy becoming operative prior to the happening of the event insured against.[6]

Evidence of a waiver of the proofs required by the policy cannot be admitted in support of a declaration alleging compliance therewith[7] (Fidelity & Casualty Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440).

(f) Credit insurance.

Policies indemnifying against losses from insolvent debtors usually provide that proof or notice must be given the company within a certain number of days after the insolvency of any debtor has come to the knowledge of the insured, and that final proofs of loss must be made within a certain time following the expiration of the policy. It has been held, under a policy containing such requirements, and also providing that first losses, up to a certain sum, must be borne by the insured, that the company was entitled to receive notice of the first losses, making up the initial loss which the insured agreed to bear. Though the company was not liable for such losses, yet it should know of them in order that it might ascertain its own liability.

> **Jaeckel v. American Credit Indemnity Co. of New York, 54 N. Y. Supp. 505, 34 App. Div. 565, affirmed without opinion 164 N. Y. 598, 54 N. E. 1124.**

But in American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264, 38 U. S. App. 583, a provision that "proof" of loss should be made within 20 days after knowledge of the insolvency of any debtor, etc., and that final proof of loss should be given within 20 days after the expiration of the policy, was held to require, in the first instance, no more than prompt notice that a loss had happened for the purposes of investigation and measures of protection, and that such provision was fully complied with by furnishing, within the required time, notice of the appointment of a receiver of the debtor's property in a creditor's suit, with a statement of the debtor's account, followed at the expiration of the policy by proper proof of the debtor's insolvency.

[6] **As to powers of agents to waive ordinary notice and proofs of loss of property, death, or injury, see ante, p. 3486.**

[7] **As to pleading waiver of ordinary proofs of loss, death, or injury, see ante, p. 3556.**

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It was held sufficient in American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 95 Fed. 111, 36 C. C. A. 671, that the claim furnished was prepared, as required by the policy, on the blanks of the company, and set out the particulars therein indicated. And this was true though the notice was to be of insolvency, which was defined in the policy so as to include a "nulla bona" return of a writ of execution, and though, subsequent to the notice, a writ was so returned. The blanks furnished contained no reference to such insolvency, and the court considered the interpretation of the policy furnished by such blanks to be binding on the company.

The assignment of a credit insurance company for the benefit of creditors, 9 days after the expiration of the policy, was held in Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511, to amount to a breach of the policy, so as to enable the insured to recover on a quantum meruit against the assignee, though the final proofs required by the policy to have been made within 30 days after the expiration of the policy were never furnished. Perhaps the insured might have fully performed and brought an action against the insolvent company, but, as against the assignee, he was only entitled to recover on a quantum meruit. In Gray v. Blum, 55 N. J. Eq. 553, 38 Atl. 646, the acts of the receiver of an insolvent credit company in objecting to the sufficiency of notice sent after the stipulated time, and in continually requiring corrections to be made therein, were held to estop him, as the company might have estopped itself from objecting to payment on the ground of the original delay.

Though, ordinarily, silence after receipt of proofs will be sufficient to constitute a waiver as to any defect therein, yet it cannot have that effect under express provisions of the policy that silence shall not constitute a waiver, and that changes in the conditions of the policy must be in writing, signed by the president or secretary of the company (American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 95 Fed. 111, 36 C. C. A. 671).

Error in refusing to instruct that proofs of loss were not evidence of the matter stated therein was held in Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258, 70 N. W. 886, not prejudicial, the testimony of the insured as to such matters not having been contradicted.

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XXVI. ADJUSTMENT OF LOSS.

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1. ADJUSTMENT IN GENERAL.

(a) Effect of adjustment.

It is a common provision in fire policies that the ascertainment and estimate of a loss for which the company shall be liable shall

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be made by the insured and the company, other methods of determining the loss being provided only in case the parties to the contract fail to agree.

A direct provision to this effect is contained in the standard policies of New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin. In the standard policies in force in Massachusetts, Maine, and Minnesota it is merely provided that the amount which the company shall pay, "if not agreed upon, shall be ascertained by award," etc., and in a subsequent clause that, "in case of * * * a failure of the parties to agree as to the amount of the loss it is mutually agreed" that the amount shall be referred, etc. In New Hampshire, a mode of ascertaining the loss by referees is provided, "in case difference of opinion shall arise as to the amount of any loss."

The most frequent question growing out of these provisions, and out of the adjustment of the loss between the insured and the company, is as to the binding effect of such adjustment, both as determining the amount of the loss and as fixing the liability of the company to pay the loss.[1] **Where the adjustment of the loss at a definite sum is the result of a compromise, the company agreeing to pay such sum to avoid litigation, though claiming that it is not liable at all, or that it is not liable for so large a proportion of the loss considered in the adjustment, it will be bound to pay such sum as under a separate agreement.**

Farmers' & Merchants' Ins. Co. v. Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Millers' National Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368, affirming 35 Ill. App. 105; Royal Ins. Co. v. Roodhouse, 25 Ill. App. 61; Stache v. St. Paul Fire & Marine Ins. Co., 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772.

In Sears v. Grand Lodge, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204, this rule was applied to a compromise of a claim under a life policy. Both parties believed insured to be dead, but contracted with a view to the possibility that he might be alive. Subsequently, but before payment by the company of the compromise agreed upon, it was shown that the insured was alive. The court held that under such circumstances it could not be claimed that there was such a mistake as to render the contract unenforceable. In connection, see Riegel v. American Life Ins. Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166, where a cancellation made in ignorance of insured's death was held of no effect.

[1] As to waiver of prior forfeitures by adjustment, compromise, and payment, see ante, vol. 3, p. 2733. As to the effect of adjustment on the right of garnishment, see Cent. Dig. vol. 24, "Garnishment," cols. 1907, 1908, § 60.

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And such an agreement is binding also on the insured.

Farmers' & Merchants' Ins. Co. v. Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Millers' Nat. Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368. But see Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311, where an adjustment which appeared to have been the result of compromise was held only an accord from which insured might withdraw. It further appeared in that case, however, that the company did not intend to pay the amount of the adjustment.

Nevertheless, an agreement by the company to pay the loss, though not liable therefor, has been held void as without consideration (Phœnix Ins. Co. v. Lawrence, 4 Metc. [Ky.] 9, 81 Am. Dec. 521). And in Grier v. Northern Assur. Co., 183 Pa. 334, 39 Atl. 10, where it was claimed that an agreement to pay the loss, notwithstanding a forfeiture, was made as a part of a compromise by all the companies interested, it was said that the evidence to prove such agreement should be clear and convincing.

Even though the liability of the company has not been one of the points at issue in the adjustment of the loss, yet if, after the amount has been adjusted, the company promises to pay such sum, it may, in the absence of fraud, be held upon its promise.

Lapeyre v. Thompson, 7 La. Ann. 218; Godchaux v. Merchants' Mut. Ins. Co., 34 La. Ann. 235; Granger v. Manchester Fire Assur. Co., 119 Mich. 177, 77 N. W. 693; Smith v. Glens Falls Ins. Co., 62 N. Y. 85, affirming 66 Barb. 556; Stolle v. Ætna Fire & Marine Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593; Commercial Bank v. Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391.

It has also been held that, nothing to the contrary appearing, **the law will imply a promise to pay the amount of the fully completed adjustment of a loss.**

Illinois Mut. Fire Ins. Co. v. Archdeacon, 82 Ill. 236, 25 Am. Rep. 313; Fame Ins. Co. v. Norris, 18 Ill. App. 570; Whipple v. North British & Mercantile Fire Ins. Co., 11 R. I. 139; Remington v. Westchester Fire Ins. Co., 14 R. I. 245. And see, also, Miller v. Consolidated Patrons' & Farmers' Mut. Ins. Co., 113 Iowa, 211, 84 N. W. 1049.

The case of Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray (Mass.) 596, was governed by a similar principle. In that case the policy provided that the directors should determine and pay the amount of the loss, and that, if the insured did not acquiesce in their determination, any action for the loss claimed should be brought within four months after such determination. Insured

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bringing action after that time on the policy, the company pleaded the determination and the limitation. The court held that plaintiff might amend by declaring for the amount so determined and for judgment therefor without further trial. The court said that the case was analogous to the admission of liability for a part of the amount sued for, a payment of such part into court, and a denial as to the remainder.

On the other hand, there are cases holding that an ascertainment of the amount of loss by the company and insured will not, at least in the absence of an express promise, amount to a new contract.

Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Willoughby v. St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. 272; Fire Ass'n of London v. Blum, 63 Tex. 282; Gerhart Realty Co. v. Northern Assur. Co., 86 Mo. App. 596. In connection with this case, see C. H. Brown Banking Co. v. Baker, 99 Mo. App. 660, 74 S. W. 454, where it was held that the amount adjusted might be recovered as liquidated damages. The Realty Co. Case in its statements, however, goes even further than holding that an adjustment will not in itself amount to a contract, arguing that there would not in any event be any consideration for such a contract.

And of course the adjustment will not of itself render the company liable, where it is expressly provided that it is meant only to fix the amount of damages.

Dwelling House Ins. Co. v. Garvey, 14 Ohio Cir. Ct. R. 657, 8 O. C. D. 86; Whipple v. North British & Mercantile Fire Ins. Co., 11 R. I. 139.

Where the insured has agreed to an adjustment only in consideration of prompt payment, he will not be bound thereby, in the absence of such payment (Revere Ins. Co. v. Chamberlin, 56 Iowa, 508, 8 N. W. 338, 9 N. W. 386); nor will the insured, as a member of a mutual company, be bound by the report of the committee organized under the provisions of the act of incorporation to examine and inquire into the loss and ascertain the sum due him (Mutual Fire Ins. Co. v. Rupp, 29 Pa. 526). In Pentz v. Pennsylvania Fire Ins. Co., 92 Md. 444, 48 Atl. 139, it was held that a mere offer to compromise by the company would not be admissible to prove liability.

A contract by a live stock association to pay a member a certain sum for the loss of a horse, in consideration of which settlement the promisee is to do anything he can to advance the interests of the

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association, is a conditional promise to pay such sum, and will not be construed in connection with the articles and by-laws of the association and the member's application for insurance as merely fixing the amount for which the promisee is entitled to have assessments made (Wright v. Farmers' Mut. Live Stock Ins. Ass'n, 90 Iowa, 360, 65 N. W. 308).

(b) Fraud in adjustment.

It has been held in several cases that an adjustment and compromise made by the company in ignorance of an avoidance or forfeiture of the policy will not be binding on the company.

> Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Matthews v. General Mut. Ins. Co., 9 La. Ann. 590; American Ins. Co. v. Barnett, 73 Mo. 364, 39 Am. Rep. 517; Remington v. Westchester Fire Ins. Co., 14 R. I. 245.

On the other hand, it has been held that the company must investigate at the time of the adjustment, and that actual fraud or concealment must be shown in order to defeat it.

> Smith v. Glens Falls Ins. Co., 62 N. Y. 85, affirming 66 Barb. 556, and quoted with approval in Stache v. St. Paul Fire & Marine Ins. Co., 49 Wis. 89, 50 N. W. 36, 35 Am. Rep. 772.

In regard to these cases, it may, however, be noted that in the Matthews Case the ignorance of the company was as to actual fraud. Nor was there in the Remington Case any issue as to a distinction between fraudulent concealment by the insured and mere ignorance of the company, the company claiming actual fraud and concealment in connection with the loss. But in the Barker and Barnett Cases and in the Smith Case, holding the contrary doctrine, it did not appear that there had been any fraudulent concealment as to the loss, and the breach claimed was merely as to title or mortgages. The two former cases give no reason for holding the company released from the adjustment by mere ignorance of the forfeiture, and the Smith Case only states that it was incumbent on the company, before binding itself by the adjustment, to make inquiries and ascertain as to the validity of the claim and of the policy.

An adjustment will not be defeated by a concealment or misrepresentation in regard to an immaterial matter.

> Commercial Bank v. Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391; Remington v. Westchester Fire Ins. Co., 14 R. I. 245.

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In the Remington Case the court went so far as to hold that a concealment of facts generating the suspicion that the insured himself kindled the fire would not avoid the adjustment, since the facts alleged to have been concealed did not conclusively show the insured to have been thus guilty. And in the Commercial Bank Case it was held that an alteration of books would not defeat the adjustment, unless it was further shown that the insurer was injured thereby. Under a similar principle it has been held that a misrepresentation as to a matter of law, rather than fact, will not release the company from the adjustment (Royal Ins. Co. v. Roodhouse, 25 Ill. App. 61). The mere fact that the president of an insolvent corporation, in whose favor the policy had been issued, was a party to the fraud, was held in Platt v. Continental Ins. Co., 62 Vt. 166, 19 Atl. 637, not to vary the rule avoiding the adjustment for fraud, so far as the assignee who represented the creditors was concerned.

The party to the adjustment, seeking to avoid it for fraud, has, of course, the burden of proof, and must clearly establish his charge.

Godchaux v. Merchants' Mut. Ins. Co., 34 La. Ann. 235; Stache v. St. Paul Fire & Marine Ins. Co., 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772.

(c) Same—Liability of adjuster.

In Lyons v. Smith, 55 N. Y. Supp. 148, 36 App. Div. 627, adjusters employed by the insured, but whose employment did not, by its terms, cover the determination of the validity of the policies delivered to them, and who were not notified that a certain policy was void, were held not liable for negligence in including such policy among the policies that should contribute to the loss, particularly as each policy provided that the loss should be apportioned among all the policies, whether valid or not. And even if the adjusters were liable at all, the insured would not be entitled to more than nominal damages in the absence of evidence that the insurer refused to pay such policy.

(d) Persons bound by adjustment.

Where, by the terms of a policy, a mortgagee has an interest therein, such interest can be in no way affected by an adjustment between the mortgagor and the company, to which the mortgagee is not a party.

Hall v. Fire Ass'n of Philadelphia, 64 N. H. 405, 13 Atl. 648; Harrington v. Fitchburg Mut. Fire Ins. Co., 124 Mass. 126; Hathaway v.

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Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514, affirming 58 Hun, 602, 11 N. Y. Supp. 413. See, also, Scottish Union & National Ins. Co. v. Field, 18 Colo. App. 68, 70 Pac. 149, where the policy contained a union mortgage clause.

And the same rule applies to an assignee of the policy, the company having knowledge of the assignment.

German Ins. Co. v. Curry, 13 Ky. Law Rep. 237; Fire Ass'n v. Blum, 63 Tex. 282.

(e) Powers of agents.

The company will be bound by an adjustment or compromise by any officer or agent whom it sends to the insured to represent it in the adjustment of the loss.[2]

Millers' Nat. Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368; Fame Ins. Co. v. Norris, 18 Ill. App. 570; Todd v. Quaker City Mut. Fire Ins. Co., 9 Pa. Super. Ct. 371, 43 Wkly. Notes Cas. 476. And see, also, Flannery v. State Mut. Fire Ins. Co., 175 Pa. 387, 34 Atl. 798, where, under the circumstances, the question was held to have been properly left to the jury.

So, also, where the company knows that a person is acting as its adjuster in fixing a loss, and fails to repudiate his acts until after the amount has been fixed and determined, it cannot afterwards question his authority (Schlesinger v. Columbian Fire Ins. Co., 56 N. Y. Supp. 37, 37 App. Div. 531). But the company has been held not bound by an adjustment by a local agent, whose adjustments had always been dependent on the approval of the general manager, and who before the adjustment had been informed that the company denied all liability, and that he should take no action in the matter (Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174). And in Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, it was held that the adjuster had no authority to bind the company by promise to pay the loss, though there had been a forfeiture. The case seems, however, to depend rather on a lack of consideration for the promise.

(f) Actions on adjustment.

An action may be founded on a promise contained in the compromise or adjustment.

Illinois Mut. Fire Ins. Co. v. Archdeacon, 82 Ill. 236, 25 Am. Rep. 313; Fame Ins. Co. v. Norris, 18 Ill. App. 570; Lapeyre v. Thompson, 7

[2] As to the authority of agents to waive notice or proof of loss, see ante, p. 3486.

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La. Ann. 218; Smith v. Glens Falls Ins. Co., 62 N. Y. 85, affirmed 66 Barb. 556; Stolle v. Ætna Fire & Marine Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593.

And see, also, Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108, where, under an unattacked allegation of a promise by the adjuster to pay, it was held that evidence of such promise might be introduced, though it did not seem to be otherwise pertinent to the issues made.

It has been held that limitations in the policy as to the time of bringing an action do not apply to an action founded upon an adjustment.

Illinois Mut. Fire Ins. Co. v. Archdeacon, 82 Ill. 236, 25 Am. Rep. 313; Smith v. Glens Falls Ins. Co., 62 N. Y. 85, affirming 66 Barb. 556.

On the other hand, it was held in Grier v. Northern Assur. Co., 183 Pa. 334, 39 Atl. 10, that a cause of action set up by an amendment alleging a promise by the company to pay, in the course of the adjustment, was so dependent on the policy obligation that the policy limitations applied. Nevertheless, the court further held that, the obligation under the policy proper having been forfeited, the amendment was so vital that the plaintiff could not rely on the original action having been brought within the stipulated time, and that, the limitations having meanwhile expired, the action was barred.

A declaration based on an adjustment of a loss caused by a fire must aver that the adjustment was made with the defendant, an allegation that it was made with the agent of defendant not being sufficient (Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582).

(g) Marine insurance.

The rule as to fraud in adjustment is applicable to marine insurance. Such an adjustment is not absolutely conclusive. Misrepresentations may be shown, either fraudulent or accidental (Faugier v. Hallett, 2 Johns. Cas. [N. Y.] 233). If an agent of a marine company, acting within the scope of his employment before delivery and acceptance of the policy, indorse upon it a memorandum as to the manner of settling losses thereunder which is inconsistent with the printed terms of the policy, the written memorandum must be held binding on the company (Hugg v. Augusta Ins. & Banking Co., 12 Fed. Cas. 821). And marine insurers will be bound by an adjustment made by their agent, and which they have examined

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without dissent (Bordes v. Hallet, 1 Caines [N. Y.] 444). Where nothing was clearly proved as to the extent of the authority of Boston agents of British companies except that they were empowered to issue the policies, receive the premiums, and represent the underwriters in legal proceedings in Massachusetts, it could not be presumed that they had authority to adjust a loss occurring on the British coast under a policy issued by them (Monroe v. British & Foreign Marine Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179). But where a valued English policy contained a provision that "general average, salvage and special charges as per foreign custom payable according to foreign statements or * * * per rules of port of discharge * * * at the option of assured," it was held that statements of the adjusters at New York, the port of discharge, fixing the amount of the loss, and distributing the same to the several policies in accordance with the law of the port, which required the insurer to pay in the ratio of the loss to the stipulated or policy value of the vessel, instead of in the ratio of the loss to the actual value as by the English law, were conclusive on the insurer. The company admitted that questions as to the amount of loss and general average,[s] salvage, etc., were properly determined by the New York adjusters, but claimed that there was nothing in the policy giving the adjuster authority to determine whether the actual or the stipulated value of the vessel should govern in fixing the amount payable on account of the loss as determined by them. The court pointed out, however, that the loss was "payable according to foreign statements," or "per rules of port of discharge," and that under either clause the stipulated value would govern. (Monroe v. British & Foreign Marine Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179.)

(h) Co-operative insurance.

Where it was provided in the charter of a co-operative fire insurance company that in case of a loss the directors should appoint a committee of members of the company to ascertain the amount of loss, and that, if the parties failed to agree on the amount so ascertained, the claimant might appeal to the county judge, who should appoint three disinterested persons to make a final award, it was held that the action of the adjusting committee was not a condition precedent to right of action. The directors might act

[s] As to adjustment of general average, see Cent. Dig. vol. 44, "Shipping," cols. 778–789, §§ 625–636.

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without the committee, or might appoint the committee if they chose, but the fact that they did neither would not affect the insured's rights any more than the failure of an ordinary company to adjust a loss would defeat the insured (Hughes v. Vinland Fire Ins. Co., 43 Wis. 323). And where the directors of a mutual fire association have met and agreed on the loss, substantially as provided in the contract, a stockholder cannot object on the ground of any technical irregularity in relation thereto (Newman v. Blessing, 4 N. Y. Supp. 269, 51 Hun, 642).

In Miller v. Consolidated Patrons' & Farmers' Ins. Co., 113 Iowa, 211, 84 N. W. 1049, it appeared that the directors of a mutual company, after futile efforts had been made to settle a loss, passed a motion that the settlement be left to one of the directors. The court held that such director had power to bind the company by an agreement as to the amount of loss sustained, though the charter declared that the adjuster should be guided by such regulations as the company and its directors might establish, and though the report was made on a blank furnished by the company, which merely recommended payment of a certain amount agreed to by the insured. And in Mercer County Mut. Fire Ins. Co. v. Stranahan, 104 Pa. 246, provisions in the charter and by-laws to the effect that the company's affairs should be managed by a board of directors, who should have the power to appoint other officers necessary for the transaction of its business, that in the adjustment of all losses exceeding $100 the president might call to his assistance one or more directors, as he should think necessary, and that the president should have the general supervision over the affairs of the company, were held to justify the directors in delegating their authority to adjust the loss to the adjusting committee, and to authorize the president alone, or with concurrence of any director, to make a settlement as to any loss exceeding $100.

(i) Credit insurance.

In a credit insurance case it has been held that, where the company adjusts a loss with the policy holder, and promises to pay the amount agreed on, such adjustment becomes a new and independent contract, and that the period fixed by the terms of the policy for bringing an action thereon does not apply to an action brought on the settlement (McCallum v. National Credit Ins. Co., 84 Minn. 134, 86 N. W. 892).

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(j) Employers' liability insurance.

Similar principles were applied to a policy of employer's liability insurance in Frankfort, Marine, Accident & Plate Glass Ins. Co. v. Witty, 208 Pa. 569, 57 Atl. 990. In that case, a verdict of $9,000 having been recovered by the employé against the insured, it was agreed between the insurer and the insured, whose policy was for $5,000, that an appeal should be taken by the insurer, and any sum they might on appeal or by compromise be eventually obliged to pay the employé should be met by the insured paying four-ninths and the insurer five-ninths. This contract the court held binding on the insured, though subsequently a compromise was affected with the employé for a much smaller sum than $9,000. Consideration for the contract was found in a contingent liability for more than the policy, assumed by the company, and in its agreeing to continue the litigation when it might have paid its policy and stepped out. Nor could the insured be relieved from the contract on the grounds of misrepresentations by the agent of the company, such alleged misrepresentations being in fact but expressions of opinion on the legal aspect of the litigation by one making no pretensions as to legal knowledge and not representing the company as counsel.

(k) Reinsurance.

A policy of reinsurance providing that it was to be subject to the same conditions and mode of settlement as might be adopted or assumed by the reinsured company was held in Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59, to fasten the responsibility of the reinsurer to the settlement and adjustment made by the original insurers with the original insured. Therefore, it made no difference that the settlement took the shape of judgment by confession, or that the judgment was rendered without notice to the reinsuring company of the proceedings.

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2. NECESSITY OF ARBITRATION OR APPRAISAL.

(a) Validity of arbitration clause—General rules.
(b) Same—Variation and exceptions to the rule.
(c) Same—Mutual societies.
(d) Same—Statutory provisions.
(e) Compliance with agreement to submit to arbitration as essential or collateral—General rules.
(f) Same—No action "until after full compliance."
(g) Same—"Loss not payable" until after appraisement.
(h) Same—Effect of standard policies.
(i) Same—Co-operative societies.
(j) Compliance with submission as essential or collateral.
(k) Necessity of disagreement.
(l) Necessity of demand—"At written request of either party."
(m) Same—"When appraisal has been required."
(n) Same—Miscellaneous provisions.
(o) Same—Sufficiency of demand.
(p) Same—Time of making demand.
(q) Property totally destroyed.
(r) Acts of insured violating condition.
(s) Rights of parties after failure of arbitration.
(t) Pleading and practice.

(a) Validity of arbitration clause—General rules.

It is a common provision in fire insurance policies that in case the parties to the contract are unable to agree as to the amount of loss or damage it shall be determined by arbitration or appraisal, and that no action shall be commenced on the policy until an award has been had.

It is provided by the standard policies in force in New York, Connecticut, Louisiana, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, and South Dakota that the loss or damage shall be ascertained by the insured and the company, "or, if they differ, then by appraisers as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy." Also "in the event of disagreement as to the amount of loss, the same shall as above provided be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, * * *, and the award in writing of any two shall determine the amount of such loss." Such policy further provides that "the loss shall not become payable until 60 days after notice, ascertainment, estimate, and

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satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required," and "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

In the Michigan policy the provisions are the same, except that the award is made only "prima facie evidence of the amount of such loss."

The provisions of the Massachusetts and the Maine policies are that the company shall either pay the amount of the loss, "which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided," that in case of "a failure of the parties to agree as to the amount of loss it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final on the parties as to the amount of loss and damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

The Minnesota form is similar, except that an exception is made as to buildings totally destroyed.

In the Wisconsin policy it is provided that if the insured and the company differ an ascertainment or estimate shall be made "by appraisers as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable 60 days after due notice and proof of the loss have been received by this company in accordance with the terms of this policy." Such policy also provides that, "in the event of disagreement in the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers," etc. It is further provided that unless within 30 days after proofs one or the other party "shall have notified the other in writing that such party demands an appraisement, such right of an appraisal shall be waived, * * * and the award in writing of any two shall determine the amount of said loss." It is elsewhere provided that "the loss shall become payable 60 days after notice and proof of the loss herein required have been received by this company."

In New Hampshire it is merely provided that "in case difference of opinion shall arise as to the amount of any loss under this policy other than buildings totally destroyed, unless the company and the insured shall within 15 days after notice of the loss mutually agree on referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, * * * and their award

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in writing, after proper notice and hearing, shall be final and binding on the parties."

To use the language of the court in Hamilton v. Liverpool & London & Globe Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, "such a stipulation, not ousting the jurisdiction of the court, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid according to the uniform current of authority in England and in this country." As pointed out in Reed v. Washington Fire & Mar. Ins. Co., 138 Mass. 572, the provision making the award "preliminary to and in aid and a condition of the right of action" is at least very similar to the case of a promise to pay an award. It cannot be said to oust the jurisdiction of the court, for "the agreement is not to refer a cause of action, but that a cause of action shall arise upon the appraisal or award."

Reference to the following additional cases is deemed sufficient: Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Kahnweiler v. Phœnix Ins. Co. (C. C.) 57 Fed. 562; Yeomans v. Girard Fire & Marine Ins. Co., 30 Fed. Cas. 808; Western Assur. Co. v. Hall, 112 Ala. 318, 20 South. 447; Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975; Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105, affirming 49 Ill. App. 388; Continental Ins. Co. v. Vallandingham v. Gentry, 25 Ky. Law Rep. 468, 76 S. W. 22, 116 Ky. 287; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289 (in this case the provision was general and was held invalid); Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055; Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; McNees v. Southern Ins. Co., 61 Mo. App. 335; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; Wolff v. Insurance Co., 50 N. J. Law, 453, 14 Atl. 561; Pioneer Mfg. Co. v. Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057; Herndon v. Imperial Fire Ins. Co., 107 N. C. 183, 12 S. E. 126; Phœnix Ins. Co. v. Carnahan, 58 N. E. 805, 63 Ohio St. 258; Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630; American Fire Ins. Co. v. Stuart (Tex. Civ. App.) 38 S. W. 395; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

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In but a few cases arising under this general rule that a requirement for appraisal or arbitration confined strictly to the amount of the loss will be valid does there seem to have been any difficulty in determining whether the requirement fell within the rule. In one (Trott v. City Ins. Co., 24 Fed. Cas. 215) a by-law of the insurance company made a part of the contract of insurance, and under which it was expressly stipulated that the amount of the loss would be adjusted, provided that "in case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained by any person insured under a policy issued by this company, the same shall be referred to and determined by referees." The court held that such by-law was invalid as ousting the jurisdiction of the courts, and that no reference need be made, though the policy also provided that if any dispute should arise relating to the loss it should be submitted to the judgment and determination of arbitrators mutually chosen, whose award in writing should be conclusive and binding on all the parties. The latter provision the court considered as controlled by the by-law, and therefore invalid. In another case, however (Wolff v. Liverpool & London & Globe Ins. Co., 50 N. J. Law, 453, 14 Atl. 561), a stipulation that if at any time differences "shall arise as to the amount of any loss or damage. or as to any question, matter, or thing concerning or arising out of this insurance, every such difference" should be submitted to appraisers, was held valid, the court considering the portion of the stipulation dealing with the question of the amount of the loss as distinct and several from the more comprehensive provision so that it might be enforced, though the more sweeping provision was invalid. In the marine insurance case of Stephenson v. Piscataqua Fire & Mar. Ins. Co., 54 Me. 55, the agreement to refer "any difference or dispute" was held invalid as too broad, and ousting the jurisdiction of the court.

(b) Same—Variations and exceptions to the rule.

In Nebraska the Supreme Court has decided that the stipulation requiring an award before action can be commenced is invalid, even though the question as to the liability of the company is left open for determination by the courts.

German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Home Fire Ins. Co. v. Bean, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911; Phœnix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N. W. 736; Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N.W. 746, 60 L. R.A.436.

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The fullest discussion is contained in the Hon Case (66 Neb. 555, 92 N. W. 746, 60 L. R. A. 436), where the court, in addition to emphasizing the general doctrine that the courts will not lend their aid in the enforcement of contracts tending to oust them of jurisdiction, referred particularly to the Bill of Rights of that state, § 13, providing that the courts shall be open, and that every person shall have a remedy by due course of law, and section 6, stipulating that the right of trial by jury shall remain inviolate. The case was analogous, the court argued, to a stipulation in a contract of employment that any injuries to the employé should be determined by a board of physicians, which agreement, the court considered, would be clearly invalid.

Though in Flaherty v. Germania Ins. Co., 1 Wkly. Notes Cas. 352 (not officially reported), the "ordinary provision" as to arbitration was held binding, this decision seems not to have been the prevailing Pennsylvania doctrine.

Mentz v. Armenia Ins. Co., 79 Pa. 478, 21 Am. Rep. 80; Id., 33 Leg. Int. 239; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 587, 2 Am. St. Rep. 562; Yost v. McKee, 36 Atl. 317, 179 Pa. St. 381, 57 Am. St. Rep. 604; Needy v. German-American Ins. Co., 197 Pa. 460, 47 Atl. 739; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154. See, also, Schollenberger v. Phœnix Ins. Co., 21 Fed. Cas. 728, decided by the Circuit Court, Eastern District, Pennsylvania.

The leading case in that state as to the validity of an arbitration clause is Mentz v. Armenia Ins. Co., 79 Pa. 478, 21 Am. Rep. 80, 33 Leg. Int. 239. In that case the court argued that "the cases in which the certificate or approbation of any particular person, as the engineer of a railroad company, to the amount of a claim, is made a condition precedent to an action," rest upon different principles, and hold such condition valid and irrevocable, because under such circumstances there is "an actual reference founded on a consideration." But the provision in question required the arbitrators to be chosen at a future time, and, therefore, the court argued, came under the general class of provisions seeking to oust the court of jurisdiction, and as such was invalid. Therefore the agreement to arbitrate could be revoked at any time without impairing the right of action. The clause forbidding action until after arbitration being thus held invalid, it has been further held in Pennsylvania that though arbitrators are subsequently selected, yet if the revocation by commencement of action occurs before there

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has been an award it will be effectual, and the action can be maintained.

Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Needy v. German-American Ins. Co. of New York, 197 Pa. 460, 47 Atl. 739; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154. Contra, see Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. Law Rev. 356, affirmed on other grounds in Seibel v. Lebanon Mut. Ins. Co., 197 Pa. 106, 46 Atl. 851.

And since such provision is considered revocable by either party, a refusal of an insurer to join in an appraisement will not prejudice its rights, though the policy provided for a reference to arbitrators (Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810).

Very similar to these Pennsylvania cases are cases in other states in which provisions for arbitration not definitely fixing the number of arbitrators nor the method of their appointment, but expressly requiring that no action should be brought until after such arbitration and award, were held inoperative as being too indefinite to permit of enforcement.

Case v. Manufacturers' Fire & Mar. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; Ætna Ins. Co. v. McLead, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320; Mark v. National Fire Ins. Co., 24 Hun, 565, affirmed on opinion of Supreme Court 91 N. Y. 663; and see, also, Robinson v. Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239.

Though the argument of the court in the Mentz Case (79 Pa. 478, 21 Am. Rep. 80; Id., 33 Leg. Int. 239) is based on the fact that the agreement did not name the arbitrators, yet it is further said that, had the company admitted liability, full effect would have been given to the provision. This idea that the requirement for arbitration is invalid, not only when it is so framed as to include all differences between the parties, but also unless the company expressly admits its liability, has been touched upon in a few other cases.[1]

Yost v. McKee, 179 Pa. 381, 36 Atl. 317, 57 Am. St. Rep. 604; Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

The Yost Case cannot, however, be said to have been decided on such grounds, the argument having been directed as much to the

[1] As to the effect of a denial of liability by the company as a waiver of the arbitration clause, see post, p. 3662.

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fact that the arbitrators were to be appointed at some future time. The Kahn Case decided on several other grounds that the arbitration was not necessary, and any force which the Badger Case might have had seems done away with by Canfield v. Watertown, Fire Ins. Co., 55 Wis. 419, 13 N. W. 252, which noted that the Badger Case was really decided on other grounds, and particularly by Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405, where the arbitration clause was fully upheld on the ground that it left the liability of the company, "if any, to be judicially determined."

(c) Same—Mutual societies.

The Michigan Supreme Court has several times announced that a different doctrine prevails as to purely mutual or co-operative fire companies, and that a provision in their contracts looking to a determination of any matter in dispute by a board or committee appointed for that purpose will not be invalid as ousting the courts of jurisdiction.

Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 254;
Denton v. Farmers' Mut. Fire Ins. Co., 120 Mich. 690, 79 N. W. 929;
Hogadone v. Grange Mut. Fire Ins. Co., 133 Mich. 339, 94 N. W. 1045.

No argument was attempted by the court in support of this distinction beyond the analogy between the provisions of mutual benefit certificates, which had been held valid, looking to investigation of claims by members of the order, and the provisions looking to the investigation of a fire claim by the arbitration committee. It should also be noted that the question as to the validity of the stipulation requiring the claim to be settled by arbitration was at no time directly before the court. In the Raymond Case (114 Mich. 386, 72 N. W. 254) the award had already been made, and the decision was that such award was binding. In each of the other cases the court decided that the words used did not in fact require arbitration as to anything except amount. And in Missouri a similar provision has been held invalid, at least so far as it related to a dispute as to the company's liability (White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590, 71 S. W. 707).

A distinction similar to that considered by the Michigan court was, however, drawn in the marine case of Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389, where it was held that persons who have associated themselves together as copartners in insuring

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each other from loss on cargoes might lawfully agree that the members should finally determine the amount due. Such a provision, the court held, was not strictly an arbitration clause ousting the courts of jurisdiction, but a regulation inter sese which should control, except for equitable cause shown. It might be noted, however, that the point was not as to the necessity of such a determination, but as to its validity when made.

Under section 267 of the insurance law of New York, providing that every policy holder of a co-operative insurance company shall, on sustaining a loss, immediately notify the president or secretary thereof, and the officers of the corporation shall at once adjust such loss in the manner provided by the charter and by-laws, a stipulation in the policy requiring the submission of such loss to the adjusters, and, on appeal, to the executive committee, has been held valid, and not in contravention of public policy, though the members of such board and committee were themselves liable to an assessment for the loss (Spink v. Co-operative Fire Ins. Co., 49 N. Y. Supp. 730, 25 App. Div. 484).

(d) Same—Statutory provisions.

A statute providing that, in case of total loss, the valuation in the policy on insured property or certain classes thereof shall be conclusive as to the measure of loss or damage,[2] or one providing that in such case the company shall be liable for the value of the property as fixed in the policy,[3] or one stipulating that the policy shall become a liquidated demand for such fixed value,[4] renders inoperative in case of total loss [5] a provision in the policy requiring arbitration as a condition precedent to action. The amount for which the company shall be liable having been definitely fixed by the statute, any provision in the policy looking to the fixing of a different amount is null and void.

Merchants' Ins. Co. v. Stephens, 22 Ky. Law Rep. 999, 59 S. W. 511; O'Keefe v. Liverpool & L. & G. Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; Marshal v. American Guarantee Mut. Fire Ins. Co., 80 Mo. App. 18; German Ins. Co. of Freeport v. Eddy, 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707; Queens Ins. Co. v. Same, Id.; German

[2] Rev. St. Mo. 1889, § 5897; Comp. St. Neb. c. 43, § 43; Laws Wis. 1874, c. 347.

[3] Ky. St. § 700; Rev. St. Ohio, § 3643 (case decided in 1882).

[4] Sayles' Civ. St. Tex. art. 3089.

[5] As to the effect in general of such statutes, see ante, p. 3089. As to the effect of a completed award under such circumstances, see post, p. 3633.

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Fire Ins. Co. of Peoria v. Same, Id.; Cincinnati Coffin Co. v. Home Ins. Co. (Super. Ct. Cin.) 8 Ohio Dec. 422, 7 Wkly. Law Bul. 342; Phœnix Ins. Co. v. Moore (Tex. Civ. App.) 46 S. W. 1131; Ætna Ins. Co. v. Shacklett (Tex. Civ. App.) 57 S. W. 583; Thompson v. St. Louis Ins. Co., 43 Wis. 459.

Nor can it be claimed that the clause requires an arbitration to determine whether the loss was in fact total, since that would involve an agreement to submit to the arbitrators a question of law, and would be void under the general principle that the agreement is only valid when the arbitration is to be confined to the amount of the loss (Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 72 S. W. 739, 115 Ky. 109).

The reasoning of the court, however, in Baker v. Phœnix Assur. Co., 57 Mo. App. 559, suggests that under the Missouri statute, providing that in determining the amount of damage any depreciation in the value of the property between the date of the policy and the date of the fire should be considered, the company might properly require as a condition to the action an arbitration to determine the amount of such depreciation. It was also noted in Murphy v. North British & Mercantile Co., 61 Mo. App. 323, that the company had made no showing of depreciation. The exact question was not, however, before the court in either case, and the distinction does not appear to have been elsewhere noticed, either in that state or in Kentucky, where the statute contains a similar provision.

But in Iowa, where the statute [6] provides that the policy value shall be "prima facie evidence" of the insurable value, and that the insured need only prove the loss of the building in order to maintain his action, and where it is further provided that the company shall not be prevented from showing the actual value and depreciation, it has been held that the stipulation in the policy making an appraisement a condition precedent to action was not rendered inoperative.

Zalesky v. Home Ins. Co., 108 Iowa, 341, 79 N. W. 69; and see, also, Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577.

Under the Ohio statute which specially provides that, in case of two or more policies, each shall contribute to the loss in proportion to its respective amount, the clause requiring appraisement has been held not abrogated, it appearing that there was in fact more

[6] Code, § 1742.

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than one policy (Cincinnati Coffin Co. v. Home Ins. Co., 8 Ohio Dec. 422, 7 Wkly. Law Bul. 342).

The separate valuation of different classes of property was held in Murphy v. Northern British & Merc. Co., 61 Mo. App. 323, to render the insurance separate so that recovery could be had as to a class of the property which fell within the statute, though as to the loss on other portions no action was sustainable on account of the failure to arbitrate. And in Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212, under a statute [7] providing that any stipulation that the insured should bear a portion of the loss should be void, that an examination of the property should be made and a valuation placed in the policy, that in case of total loss the amount on which premiums had been collected should be paid, and that if the loss was not partial there should be no arbitration, it was held that no arbitration was required where the amount of the insurance, added to the value claimed by the company to yet remain in the foundation of the building, was less than the insurable value fixed in the policy.

Though the standard policy adopted by the commission appointed under 1 How. Ann. St. Mich. c. 137, provided that the award therein made a condition precedent to action on the policy should be only prima facie evidence of the amount of the loss, and though it was expressly stipulated in such statute that no such company should use any other form, and that "every policy or contract made or issued contrary to the provisions" of the act should be void, nevertheless the Wisconsin Supreme Court, doubting the validity of such enactment, held further that the relations of the parties having been changed by the loss to that of debtor and creditor, and the statute containing nothing relating to the adjustment of losses between the parties, such statute did not forbid a contract between the parties entered into after a loss, whereby the arbitration was made conclusive as to the amount of the loss. Though the latter contract was thus held separate from the main contract, yet, so the court further holds, it was a modification of such original contract, and therefore needed no consideration to support it. (Montgomery v. American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.)

That a form of a policy making arbitration as to the amount of loss a condition precedent to action may be made compulsory on all insurance companies by statutory enactment was decided in

[7] Gen. Laws Minn. 1895, c. 175.

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Re Opinion of Justices, 97 Me. 590, 55 Atl. 828. No right of a domestic corporation is infringed, since it is a creature of the legislature, whose right to contract at all may, under the general reserved power to alter or repeal charters, be taken from it. Foreign corporations are, of course, equally subject to legislative action, the business of insurance being in no manner protected as interstate commerce. As to the individual's right to a jury trial, the court holds that such right can be waived and is waived when he enters into the contract. In reply to the argument that the contract is in a sense compulsory on the individual, since no company is permitted to issue any other policy, the court pointed out that, whatever the citizen's right to protect his property by contract with other individuals might be, he had no right to enter into any particular contract with the corporation which was superior to the state's right to control its own creatures, the corporations. The legislature, the court held, had authority to limit as it saw fit the powers of corporations with which individuals might wish to contract.

(c) Compliance with agreement to submit to arbitration as essential or collateral—General rules.

Aside from the questions touching the validity of the arbitration provision and those involving the exact course of procedure outlined by the policy, the further question as to when a compliance with such requirement will constitute a condition precedent to an action on the policy must, of course, be determined by the particular wording of the stipulation itself. Thus, where no condition making the arbitration a condition precedent to action "is expressed in the contract or necessarily to be implied from its terms, it is * * * well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." (Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708.)

Reference may also be made to Crossley v. Connecticut Fire Ins. Co. (C. C.) 27 Fed. 30; Liverpool & London & Globe Ins. Co. v. Creighton, 51 Ga. 95; Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; Gere v. Council Bluffs Ins. Co., 67 Iowa, 272, 23 N. W. 137; Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; Barry v. Farmers' Mut. Hail Ins. Ass'n, 114 Iowa, 186, 86 N. W. 290; McIlrath v. Farmers' Mut.

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Hail Ins. Co., 114 Iowa, 244, 86 N. W. 310; Continental Ins. Co. of New York v. Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720; Robinson v. Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239; Reed v. Washington Fire & Mar. Ins. Co., 138 Mass. 572; Winn v. Farmers' Mut. Fire Ins. Co., 83 Mo. App. 123; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252.

Nor can there be any question as to the converse of this proposition. **If there is an express stipulation forbidding any suit or action on the policy until after compliance with the provisions in relation to appraisement or arbitration, there can, of course, be no action maintained until such provisions have been met.**

Hamilton v. Liverpool & London & Globe Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Kahnweiler v. Phœnix Ins. Co. (C. C.) 57 Fed. 562; Yeomans v. Girard Fire & Marine Ins. Co., 30 Fed. Cas. 808; Western Assur. Co. v. Hall, 112 Ala. 318, 20 South. 447; Adams v. South British & National Fire & Mar. Ins. Co., 70 Cal. 198, 11 Pac. 627; Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975; Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105, affirming 49 Ill. App. 388; Vincent v. German Ins. Co. of Freeport, Ill., 120 Iowa, 272, 94 N. W. 458; Robinson v. Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co., 171 Mass. 433, 50 N. E. 943; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. E. 1055; Nurney v. Firemen's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; Nurney v. Union Ins. Co., 63 Mich. 638, 30 N. W. 352; Wolff v. Liverpool & London & G. Ins. Co., 10 N. J. Law J. 325; Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Hamilton's Ex'r v. Royal Ins. Co., 4 Ohio S. & C. P. Dec. 437; Pioneer Manuf'g Co. v. Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057. (See contra, semble opinion in Gibbs v. Continental Ins. Co., 13 Hun [N. Y.] 611. But in connection with this case, see the later New York cases cited post, under the rule dealing with the provisions of the New York standard policy.)

(f) Same—No action "until after full compliance."

But between these two classes many cases have arisen in which there was no stipulation expressly forbidding action until after compliance with the policy requirement as to arbitration, but which have nevertheless contained other provisions looking to the same general end. As to such cases the rule has been that **full effect**

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will be given to any necessary implication arising from the terms of the policy making a compliance with the arbitration requirement a condition precedent to a right of action on the policy. Thus, a provision such as is contained in the New York standard policy that the loss shall not be payable until after the award (if under the policy one has been required), coupled with a stipulation that no action shall be commenced until after compliance with all the conditions of the policy, has always been held sufficient to render necessary a compliance with the arbitration requirement before any action could be maintained.

This rule is illustrated by Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787; Phœnix Ins. Co. v. Lorton & Co., 109 Ill. App. 63; Zalesky v. Home Ins. Co., 102 Iowa, 613, 71 N. W. 566; Continental Ins. Co. v. Vallandingham & Gentry, 76 S. W. 22, 25 Ky. Law Rep. 468, 116 Ky. 287; Kersey v. Phœnix Ins. Co. (Mich.) 97 N. W. 57; Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; McNees v. Southern Ins. Co., 61 Mo. App. 335; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Hamilton's Ex'rs v. Fireman's Ins. Co. (Super. Ct. Cin.) 4 Ohio S. & C. P. Dec. 407, 29 Wkly. Law Bul. 209; Yendel v. Western Assur. Co., 47 N. Y. Supp. 141, 21 Misc. Rep. 348; Williams v. German Ins. Co., 86 N. Y. Supp. 98, 90 App. Div. 413; Bellinger v. German Ins. Co., 88 N. Y. Supp. 1020, 95 App. Div. 262. But see Summerfield v. North British & Mercantile Ins. Co. (C. C.) 62 Fed. 249, where, however, it does not appear that there was any clause of the policy postponing payment until after arbitration.

(g) Same—"Loss not payable" until after appraisement.

It would seem equally clear that the provision would not be collateral even though the policy contained no express stipulation forbidding the action until after compliance with the requirement, if it did provide that the loss should not be payable until after the appraisement had been completed; and so it has been generally held.

George Dee & Sons Co. v. Key City Fire Ins. Co., 104 Iowa, 167, 73 N. W. 594; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405; opinions of Severns, D. J., and Taft, C. J., in Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, as affirmed in Hamilton v. Phœnix Fire Ins. Co., 61 Fed. 379, 9 C. C. A. 530. See, also, Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630, where the conditions quoted by the court refer only to the payment of the loss, the court nevertheless saying that by the express terms of the contract the appraisal was made a condition precedent to any right of action.

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There is, however, a contrary decision in Mut. Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623, 21 U. S. App. 228, with which should be mentioned the argument of Swan, D. J., in Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, and a doubt expressed in Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. The policy in each of these cases provided that the loss should not become payable until after the notice, ascertainment, etc., "including an award by appraisers," when appraisal has been required. Nevertheless, it was held in the Alvord Case, and argued in the Hamilton and Kahn Cases, that a compliance with the appraisal requirement was not a condition precedent to action. This conclusion was based in each case on the language of the Supreme Court in Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, where it was said: "A provision in a contract for payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators * * * is undoubtedly valid. If the contract further provides that no action on it can be maintained until after such award, * * * then the award is a condition precedent to the right of action." But the Supreme Court in making such decision did not in fact have before it the effect of a stipulation that the loss should not be payable until after the report of the arbitrators. The provisions of the policy there considered by the court, so far as they related to arbitration, were held to contemplate two valuations—one by appraisers, whose report should form part of the proofs of loss. The condition requiring this appraisal before the loss should be payable was very similar in the Home Insurance Co. Case and in the Alvord and Connecticut Co. Cases. But as to this appraisal, the decision of the Supreme Court was merely that the pleadings did not raise any question, together with the intimation that, the report being a part of the proofs, the failure of the company to object might be a waiver. The second part of the policy provisions in the Home Ins. Co. Case, however, provided for a distinct arbitration which should be binding on the parties, but this arbitration was not by the policy made a condition precedent to action, nor, so far as appears, to liability by the company. This arbitration, the Supreme Court held, did not constitute a condition precedent to action, and it was in relation to this that the remarks of the court relied on in the Alvord Case and by Judge Swan were made. Furthermore, when the Supreme Court came to specify the circumstances under which the arbitration clause would be collateral merely, it excepted cases where "it was necessarily to be im-

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plied" that the arbitration was a condition precedent to the action.

It might be noted that the court in the Alvord Case decided that there had been in fact no compliance with the conditions under which a submission could take place, and that the decision of Judge Swan in the Connecticut Co. Case partly proceeded on the theory that under the provisions of the policy and the circumstances of the case it was in any event incumbent on the company to have made a demand for arbitration. Judge Taft, who wrote the deciding opinion in the case, assumed, rather than decided, that a compliance with the arbitration clause was a condition precedent, basing his decision on a waiver of any rights which the company might have had under the policy. In this connection reference should also be made to Hamilton v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, affirming the opinion of Judge Taft in the Connecticut Company Case.

Under the principle that where the arbitration or appraisal has been made a condition precedent to liability it will also be a condition precedent to action, it has been held that where the policy provided that the capital stock and funds of the company should be subject and liable to pay the loss, "subject always to the conditions and stipulations indorsed thereon and which constitute the basis of this insurance," and where, among other provisions, there was one requiring arbitration under certain circumstances, no recovery could be had until the required arbitration had been completed (Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232). So, also, where it was manifest from the entire agreement that the company intended to pay the sum adjusted by arbitration, it was regarded as a condition precedent to recovery for a loss, though the stipulation was not inserted in the policy in the strict and literal terms of a condition (Wolff v. Liverpool & London & Globe Ins. Co., 10 N. J. Law J. 325).

The fact that an award was to be only prima facie evidence of the amount of loss was held in Kersey v. Phœnix Ins. Co. (Mich.) 97 N. W. 57, not to do away with the provisions of the policy rendering arbitration, when properly demanded, a condition precedent to suit.

(h) Same—Effect of standard policy.

If the provisions of a standard policy are not in and of themselves sufficient to render compliance therewith a condition precedent, no greater effect will be given them because the legislature pre-

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scribed the form. The standard policy is put forward by the legislature merely 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.) So, also, the construction of the provisions of the New Hampshire standard policy in relation to arbitration have been held subject to Pub. St. c. 170, re-enacted in the same revision with the standard policy, and providing for an action by the insured if he should not be satisfied with the adjustment of the company, and that every conflicting policy provision should be void (Franklin v. New Hampshire Fire Ins. Co., 70 N. H. 251, 47 Atl. 91).

(i) Same—Co-operative societies.

It is provided in the charter of some co-operative fire insurance companies that, if the adjusting committee and the claimant fail to agree on the amount of the loss, the claimant may appeal to the county judge, who shall appoint an arbitrating committee to make a final award. It is an Illinois doctrine that under such a provision the claimant may sue on his contract without applying for the appointment of the arbitrating committee. This on the ground that the provision is not mandatory.

> Pinckneyville Mut. Fire Ins. Co. v. Kimmel, 59 Ill. App. 532, reversed on other grounds 161 Ill. 43, 43 N. E. 615; Farmers' Mut. Fire & Lightning Ins. Co. v. Lecroy, 91 Ill. App. 41.

But in New York the decision was directly to the contrary, the court arguing that the legislature having established in the charter such method of ascertaining the loss, it was the only one which the corporation could follow, and that the insured, by virtue of his membership and of his contract, which included the charter, was equally bound (Warner v. Schoharie & Schenectady Counties Farmers' Mut. Fire Ins. Co., 15 N. Y. Supp. 632, 61 Hun, 619).

(j) Compliance with submission to arbitration as essential or collateral.

It has been held that, if a submission to appraisement is not made a condition precedent to action on the policy, the action can be successfully maintained, even if, at the time it was commenced, there was pending an appraisement under the policy provisions. The agreement to arbitrate contained in the submission in such a case is considered as a collateral agreement. (Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.) And even though it is provided in the policy that the award shall be a

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condition precedent to any action on the policy, yet, if the submission to arbitrators actually agreed upon differs from the one specified in the policy, the agreement will be collateral, and may be revoked by either party prior to the award,[8] and such revocation will not be a bar to the action.

Harrison v. Hartford Ins. Co., 112 Iowa, 77, 83 N. W. 820, reaffirmed in a memorandum decision 94 N. W. 1132 (but see Harrison v. Insurance Co. [C. C.] 59 Fed. 732); British-American Assur. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426.

And this was held to be true though a statute (Code Iowa, § 4390) declared that neither party could revoke a submission to arbitration. The statute, the court held, related only to agreements made under the preceding section of the act, providing that a judgment might be entered on the award, and did not forbid the revocation of an agreement to arbitrate which did not stipulate for judgment. (Harrison v. Hartford Fire Ins. Co., 112 Iowa, 77, 83 N. W. 820, affirmed in a memorandum decision 94 N. W. 1132.) It was also held in this case that the commencement of an action would operate as a revocation, and that the revocation would not be waived by a subsequent ineffectual attempt to proceed under the agreement to arbitrate.

But in Michigan it was held that a revocation would deprive insured of his right to sue, even though the agreement to arbitrate was not the one stipulated in the policy. Such right might, however, be regained by a reasonable offer to resubmit to arbitration. (Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502.) And in another Michigan case and in Missouri it has been held that the insured will not be excused from carrying out an appraisement merely because, at the time of the submission to arbitration, there had been no dispute as to the amount of the loss. The fact that the insured need not, perhaps, have entered into the appraisal before the dispute arose, has not been considered by the courts of those states as decisive of the effect of an actual submission to arbitration.

Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Fowble v. Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485.

[8] As to the effect of entering upon a different arbitration as a waiver of the arbitration specified in the policy, see post, p. 3665.

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In Kersey v. Phœnix Ins. Co. (Mich.) 97 N. W. 57, a variance between a submission of the "amount of loss" and a submission of "value and loss" was treated as immaterial.

It would seem, however, that under the doctrine of the revocability of the new agreement the variance between the arbitration for which provision is made in the policy and that which is actually made need not be very startling in order that a carrying out of the submission shall not be a condition precedent. Thus, in the Darragh Case the variance consisted in entering into the agreement prior to an actual disagreement as to the loss, and in submitting to the arbitrators, in addition to "sound value and damage," the "cash cost of replacing" and "actual cash value," with "proper deduction * * * in case of depreciation." In the Harrison Case the agreement provided for the selection of an umpire only "if necessary," instead of before the commencement of the appraisement, as stipulated in the policy.

(k) Necessity of disagreement.

Even though it be conceded that the policy requirement as to arbitration or appraisement is valid, and that a compliance therewith constitutes a condition precedent to the right of action, there still remains the question whether the requirements of the policy, under the circumstances of the particular case, have rendered the arbitration or appraisal itself a condition precedent to such right. Under the ordinary policy provisions, the first phase of this question depends on whether there has been a disagreement between the parties as to the amount of the loss, and on the necessity and sufficiency of the demand for arbitration. As already noted, **the requirement for arbitration is usually made dependent upon the failure of the parties to agree as to the amount of the loss. Full effect has always been given this provision, and under it arbitration or appraisal has been held not a condition precedent to a right of action unless there has been in fact such a disagreement.**

The following cases illustrate the rule: Kahnweiler v. Phenix Ins. Co. (C. C.) 57 Fed. 562; Harrison v. Hartford Fire Ins. Co. (C. C.) 59 Fed. 732; Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; Hanover Fire Ins. Co. v. Harper, 77 Ill. App. 453; Capitol Ins. Co. v. Wallace, 50 Kan. 453, 31 Pac. 1070, affirming 48 Kan. 400, 29 Pac. 755; Liverpool & L. & G. Ins. Co. v. Hall, 1 Kan. App. 18, 41 Pac. 65; Long Island Ins. Co. v. Hall, 4 Kan. App. 641, 46 Pac. 47; Citizens' Ins. Co. v. Bland (Ky.) 39 S. W. 825; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Bergman v. Commercial Union Ins. Co., 12 Ky. Law Rep.

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942; Continental Ins. Co. v. Vallandingham & Gentry, 25 Ky. Law Rep. 468, 76 S. W. 22, 116 Ky. 287; Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754; Lasher v. Northwestern Nat. Ins. Co., 18 Hun (N. Y.) 98; Mark v. National Fire Ins. Co., 24 Hun (N. Y.) 565, affirmed on opinion of Supreme Court 91 N. Y. 663; Rosenwald v. Phenix Ins. Co., 50 Hun, 172, 3 N. Y. Supp. 215; Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; Randall v. Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960; Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499; Moyer v. Sun Ins. Office, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690; Boyle v. Hamburg-Bremen Fire Ins. Co., 169 Pa. 349, 32 Atl. 553; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261; American Fire Ins. Co. v. Stuart (Tex. Civ. App.) 38 S. W. 395; Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722; Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945; Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29. And see, also, Robertson v. New Hampshire Ins. Co. (Super. Buff.) 16 N. Y. Supp. 842 (affirmed in a memorandum opinion 137 N. Y. 530, 33 N. E. 336), and Manchester Fire Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231, where an agreement as to the amount of the loss was spoken of as a waiver of the appraisal.

Under this principle it has been held that **a mere disagreement as to the method of estimating the loss will not be sufficient to cause the arbitration requirement to become operative.**

Rosenwald v. Phœnix Ins. Co., 50 Hun, 172, 3 N. Y. Supp. 215; Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

So, also, where the goods were totally destroyed, it was held that a dispute as to the quantity thereof would not be a disagreement as to "the amount of sound value and of damage" (Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47). Nor will a refusal to pay the claim amount to a disagreement as to the amount of the loss.

Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; Lasher v. Northwestern Nat. Ins. Co., 18 Hun (N. Y.) 98; Bailey v. Ætna Ins. Co., 77 Wis. 336, 46 N. W. 440.

A failure to object to the proofs furnished has been held to show that there was in fact no disagreement as to the amount of loss stated therein.

Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722; Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24

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Am. St. Rep. 499; Vangindertaelen v. Phenix Ins. Co. of Brooklyn, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29.

The same effect has been given to an objection to the proofs on other grounds than the amount of loss claimed.

Randall v. Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960; Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.

An objection to the amount stated, coming after the 60 days following the filing of proofs, which the company has reserved for itself for a payment, will be too late (Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754).

It has even been held that under a provision that the ascertainment of the amount of the loss shall be made by the insured and the company, and, if they differ, by appraisement, an honest effort must be made by the company to agree with the insured as to the loss before an appraisement can be demanded.

Summerfield v. North British & Mercantile Ins. Co. (C. C.) 62 Fed. 249; Continental Ins. Co. v. Vallandingham & Gentry, 25 Ky. Law Rep. 468, 76 S. W. 22, 116 Ky. 287; Boyle v. Hamburg-Bremen Fire Ins. Co., 169 Pa. 349, 32 Atl. 553; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261. See, also, Zimerlski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55.

On the other hand, an indication of dissatisfaction with the amount stated in the proofs and a demand for arbitration has been considered sufficient evidence of disagreement as to the amount of the loss.

Kersey v. Phœnix Ins. Co. (Mich.) 97 N. W. 57; Phœnix Ins. Co. v. Carnahan, 58 N. E. 805, 63 Ohio St. 258.

The rejection by insured of an offer of a certain amount in settlement of damages will have the same effect.

Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; Pioneer Mfg. Co. v. Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057. See, also, Id., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673.

In Sisk v. American Cent. Fire Ins. Co., 95 Mo. App. 695, 69 S. W. 687, where one of the issues was a failure of arbitration, a statement that the company justly owed the loss, made by an adjuster, who had in his possession all the papers pertaining thereto, was held to bind the company.

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(1) Necessity of demand—"At written request of either party."

It is a general rule that where the policy provides for an arbitration "at the written request of either party," and that no action shall be sustainable until an award has been obtained "in the manner above provided," the arbitration, in the absence of such a demand, will not be a condition precedent to action by the insured.

Wallace v. German-American Ins. Co. (C. C.) 2 Fed. 658; Wallace v. German-American Ins. Co. (C. C.) 41 Fed. 742; German-American Ins. Co. v. Steiger, 109 Ill. 254; Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa, 70, 64 N. W. 687; Garretson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa, 17, 86 N. W. 32; Capitol Ins. Co. v. Wallace, 50 Kan. 453, 31 Pac. 1070, affirming 48 Kan. 400, 29 Pac. 755; Probst v. American Cent. Ins. Co., 64 Mo. App. 408; Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29, 20 Atl. 716; Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504. And see, also, Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597.

The same result will follow where the provision is for appraisal "at the written request of either party," and that the loss shall not be payable until the required proofs are produced and appraisals "permitted."

Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; Same v. Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 961; Same v. Liverpool & L. & G. Ins. Co., 10 Mont. 368, 25 Pac. 962; Randall v. American Fire Ins. Co. of Philadelphia, 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.

And it has been held that, even though the requirement for the award is absolute and contains no direct reference to the prior provision for arbitration "at the written request of either party," yet it must be construed with reference to such prior provision, and that under such construction no arbitration need be held unless it has been demanded.

Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; Nurney v. Union Ins. Co., 63 Mich. 638, 30 N. W. 352.

The general rule as to the effect of the clause, "at the written request of either party," does not obtain in California or Massachusetts. In those states it has been held incumbent on the insured to himself either procure the arbitration, or make a fair effort so to do, even though the policy contains such clause, and provides that the

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award, which is made a condition precedent to action, shall be obtained "in the manner above provided."

Adams v. South British & National Fire & Marine Ins. Co., 70 Cal. 198, 11 Pac. 627; Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558.

The true meaning of such a policy was stated by the Massachusetts court to be that insured was not to have a right of action until the amount of the loss had been ascertained by arbitration, or the arbitration had been waived, and that arbitration was to be had upon the written request of either party. It might, however, be noted that the court distinguished some of the cases in which a demand by the company was held necessary as based upon waiver by the company's silence. Such a distinction would seem to imply that under some circumstances a decision that the necessity of arbitration was dependent on the company's demand might not be inconsistent with the court's position.

(m) Same—"When appraisal has been required."

It is also a general rule that a policy in the New York standard form, providing that the loss shall not become payable until a certain time after proofs, "including an award by appraisers when appraisal has been required," and that "no suit * * * shall be sustainable * * * until after full compliance by the insured with all the foregoing requirements," does not require an appraisal as a condition precedent to the right of maintaining an action unless there has been a demand therefor.

Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761; Lewis Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; National Home Bldg. & Loan Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21; Chainless Cycle Mfg. Co. v. Security Ins. Co., 62 N. E. 392, 169 N. Y. 304, affirming 64 N. Y. Supp. 1060, 52 App. Div. 104; Lawrence v. Niagara Fire Ins. Co., 2 App. Div. 267, 37 N. Y. Supp. 811; Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. Rep. 736; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436; Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945; American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

But in Missouri it is held that the clause, "when an appraisal has been required," does not so limit the provision for arbitration as to make a request for appraisal necessary, but merely refers to the

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contingency of disagreement, in which case an appraisal will ipso facto have been "required."

Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; McNees v. Southern Ins. Co., 69 Mo. App. 232; Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311; Fowble v. Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485. And see Swearinger v. Pacific Fire Ins. Co., 66 Mo. App. 90.

The same doctrine is implied in Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932, though the question as to the necessity of the demand does not appear to have been directly raised. And a recent decision of the Illinois Appellate Court (Phœnix Ins. Co. v. Lorton & Co., 109 Ill. App. 63) is also in line with the Missouri decisions. The case, however, should be considered in connection with Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557, where, under a requirement that the appraisers be "mutually appointed," and a stipulation that the loss should not be payable until the appraisal should be "permitted" by the claimant, it was held that it was not incumbent on the insured to do more than furnish an inventory of the loss.

The statement in Hamilton v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, that the policy in that case (providing that the loss should not be payable until after proofs, "including an award * * * when appraisal has been required") was not materially different from the policy in Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114 (which contained no limitation in regard to "requirement"), should be construed in connection with the question before the court, which was as to the effect of the making of a demand by the company, outside the terms of the policy, entirely apart from the necessity of its having done so.

(n) Same—Miscellaneous provisions.

The decisions are not harmonious in those cases in which the policy contained neither a reference to a "request by either party," nor a limitation on the effect of the appraisal as postponing liability in cases in which it had been "required," and which, in addition, expressly made the award, or a compliance with the provision, a condition precedent to the right of maintaining an action. Some of the courts have argued that the stipulation making the award a condition precedent to action cannot be literally construed, since to do so would put it in the power of the company to entirely defeat the insured's right of action by merely refusing to arbitrate.

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Since, then, the provision cannot be literally construed, the courts have further argued it should be construed as giving each party a right to demand appraisal, but imposing the duty on one no more than the other.

Kahnweiler v. Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485, 32 U. S. App. 230, reversing (C. C.) 57 Fed. 562; Randall v. Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47 (in this case it was argued that insured, only, could successfully make a demand). And see, also, Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290. It is somewhat doubtful, however, how far the Stewart Case supports this principle. No mention, it is true, is made of any clause limiting the effect of arbitration provisions to cases where "appraisal has been required," but from the portions of the policy quoted it would seem probable that it was in the New York standard form.

Other courts have as distinctly held that under such a policy the insured cannot maintain his action without an award having been had or a waiver by some overt act of the company.

Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055. And see, also, Smith v. California Ins. Co., 87 Me. 190, 32 Atl. 872; Phœnix Ins. Co. v. Carnahan, 58 N. E. 805, 63 Ohio St. 258.

In Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, the court itself was divided. The policy contained no provision that there must be a "requirement" or a "request" before the condition would become operative beyond the use of the word "permitted" in the stipulation that, until the appraisal should be "permitted, the loss shall not be payable." Severns, District Judge, was of the opinion that this agreement between the parties was sufficient to render arbitration a condition precedent. Swan, District Judge, on the other hand, held that the word "permitted" threw the initiative in making the demand on the company; while Taft, Circuit Judge, decided that, whatever the duty of the insured may have been to take the initiative under the terms of the policy, the company had by its conduct waived its rights and itself assumed the burden. In Hamilton v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, Judge Taft, speaking for the same court, though with a different personnel, said that the court, as then constituted, was united in supporting his opinion in the Connecticut Co. Case.

In some of the cases it is impossible to determine the basis of the

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decision, the particular stipulations under which the decisions have been made not being given.

In the following cases it was decided that, no demand having been made by the company, the insured might maintain his action: Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Citizens' Ins. Co. of Pittsburg v. Bland (Ky.) 39 S. W. 825; Sun Mut. Ins. Co. v. Crist (Ky.) 39 S. W. 837; American Fire Ins. Co. v. Bland (Ky.) 40 S. W. 670. In this connection, see, also, Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120, where a failure of the company to demand appraisal until the time of payment had nearly expired was discussed as a waiver.

(o) Sufficiency of demand.

Under the doctrine that a demand by the company is necessary in order to render the arbitration a condition precedent to action, **the demand must be for an arbitration in accordance with the provisions of the policy.**

Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597; Swearinger v. Pacific Fire Ins. Co., 66 Mo. App. 90. And see Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787, where a demand for the appraisal of salvage only was held not justified under a policy providing for the determination of the amount of the loss by appraisers.

Thus, a joint demand for a joint appraisal by several insurance companies will not be within the terms of the policy providing for an appraisal by two persons, one to be selected by the company and one by the insured, etc.

Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, 16 U. S. App. 366, affirming (C. C.) 46 Fed. 42; Hamilton v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530; Hamilton's Ex'rs v. Fireman's Ins. Co., 4 Ohio S. & C. P. Dec. 407; Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787. See, also, North German Ins. Co. v. Morton-Scott-Robertson Co., 108 Tenn. 384, 67 S. W. 816, where an agent, under the circumstances of the case, was held to have participated in such a demand.

Under the theory that the demand must be plain and unambiguous, and that, if it is in writing, it will be most strongly construed against the insurer, it has been held that a notice to the insured, directing him to protect the property from further damage, and preserve all that remains "until the loss thereon has been determined in the manner stipulated for in said policy," and a further notice informing the insured that the company would not pay any amount claimed until "sixty days after the amount of loss or dam-

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age has been determined in the manner stipulated in said policy," did not constitute a demand for an appraisal of the loss (Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. Rep. 736). The insured need not comply with a demand for an arbitration outside the state (American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98); and a bare demand without any offer to appoint an appraiser, or to proceed to an appraisement, was in Lewis Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736, considered as insufficient.

If, however, the demand is unconditional, it will be sufficient, though the insurer refuses to define in advance the legal powers and duties of the appraisers.

Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Hamilton's Ex'x v. Royal Ins. Co., 29 Wkly. Law Bul. 106, 4 Ohio S. & C. P. Dec. 437.

It was also held in the Royal Ins. Co. Case, and is inferable from Hamilton v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, that a demand will be sufficient, though it follows a prior invalid demand. And in the Royal Ins. Co. Case it was further held that the suggestion of the insurer, in asking for the appraisal, that it would name one appraiser, should not be construed as claiming the right to do so, whether the insurer consented or not, and would not invalidate the demand, even conceding that the requirement that the appraisers should "be mutually agreed upon" meant that both parties must consent to both appraisers. A demand made after a dispute as to the amount of loss, and accompanied by a request to meet the insurers at a time and place convenient to, and to be designated by, the insured, for the purpose of selecting appraisers, will be sufficient (Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805). And in Pioneer Mfg. Co. v. Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057 (see, also Id., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673), a letter formally requesting arbitration in accordance with the terms of the policy was held sufficient, either with or without a paper indicating an agreement for that purpose executed by the company, and which the insured was requested to sign. If the proposed agreement was not in accordance with the terms of the policy, the insured should have pointed out the variance. Besides, in the opinion of the court, it was not the duty of the company to tender the agreement until after the proposition to arbitrate had been accepted. In Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427, 1 N.

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W. 384, the company, under the peculiar construction of the policy, was held entitled to demand, as a condition precedent, that the insured make a preliminary deposit of the costs of the appraisement.

There are numerous cases where the company either made an insufficient demand, or acted otherwise, so as to delay or hinder the arbitration, in which it has been said that the company must act in the matter in "good faith."

The following cases are illustrative: Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. Rep. 736; Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. 392, affirming 64 N. Y. Supp. 1060, 52 App. Div. 104; Continental Ins. Co. v. Vallandingham & Gentry, 76 S. W. 22, 25 Ky. Law Rep. 468, 116 Ky. 287; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

But the intent of a demand for arbitration will not of itself invalidate it if otherwise sufficient.

Phœnix Ins. Co. of Brooklyn v. Carnahan, 58 N. E. 805, 63 Ohio St. 258. And see, also, Providence Washington Ins. Co. v. Wolf (Ind. App.) 72 N. E. 606.

Where demand is necessary in order to render arbitration a condition precedent to action, an action may be maintained for a loss on goods for which no arbitration was demanded, though as to other goods for which arbitration was demanded the action must be dismissed (Pioneer Mfg. Co. v. Phœnix Assur. Co., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673). And where there have been two distinct fires, the damage done by both constitutes but one loss, to be settled in one proceeding, and therefore a demand for arbitration under the loss caused by the first fire only will not prevent an action on the policy (Mechanics' Ins. Co. v. Hodge, 149 Ill. 298, 37 N. E. 51, affirming 46 Ill. App. 479).

(p) Time of making demand.

Where the arbitration itself is considered as a condition precedent aside from any demand by the company, the silence of the company will not, even under the doctrine of waiver,[9] be held to affect its rights to arbitration. But there are numerous cases in which a delay by the company in making the demand necessary to defeat the maintenance of an action without arbitration has itself been held

[9] See post, p. 3666.

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fatal to the company's rights. The defeat of such right by this delay is certainly nearly allied to waiver, if not identical therewith. It is a "relinquishment of a right." On the other hand, it is only a "relinquishment of a right" by a failure to act, and because, under the policy, the right will expire if not exercised. The question being, to a certain extent at least, dependent on the rights of the parties under the policy, rather than on the application of the equitable principles of waiver and estoppel, it will therefore be treated as such, and without any further attempt to draw a distinction between the necessity of timely demand to render the clause effective and waiver of the right to demand arbitration by failing to exercise it.

In some of the cases it has been asserted that the demand, to be effective, must be made within a "reasonable" time.

Astrich v. German-American Ins. Co. (C. C.) 128 Fed. 477; Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. 392, affirming 64 N. Y. Supp. 1060, 52 App. Div. 104; Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. Rep. 736; Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562. But in connection with the doctrine of the Brock Case see the earlier case of Zimeriski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55, where the question was considered in relation to the time the loss became payable.

The fact that the insured has signified a desire for prompt appraisal in order to prevent a further deterioration of the goods may be considered in determining whether the delay was in fact reasonable, and a demand coming after the insured, misled by the company's acts, has rendered the appraisal impossible by a sale of the goods, will be too late (Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. 392, affirming 64 N. Y. Supp. 1060, 52 App. Div. 104). But if the goods are in a condition demanding an immediate appraisal, the insured should give notice to that effect. If he fails to do so, an immediate sale by him, prior to a demand for appraisal, will prevent the maintenance of an action for the loss (Astrich v. German-American Ins. Co., 128 Fed. 477). In Hamilton's Ex'rs v. Fireman's Ins. Co., 4 Ohio S. & C. P. Dec. 407, where ten days following the delivery of the proofs were spent by several insurance companies jointly in attempting to adjust a loss, and where the demand for an appraisement was made by one of the companies seven days after the last letter of the joint correspond-

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ence, it was held as matter of law that the demand was made within a reasonable time, the companies having the right to wait a reasonable length of time for an answer to such letter. But in Hamilton's Ex'rs v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, 22 U. S. App. 164, under similar circumstances, except that the demand was delayed for ten days longer, the subject was considered as one proper to be submitted to the jury. The cause of the delay, its effect on the insured, and its surrounding circumstances, while not, perhaps, themselves in dispute, were yet matters from which different inferences might have been drawn, thus making a proper case for the jury. It has been held in Texas, under the provision making the loss payable a certain time after proofs have been furnished, including the award, when required, and stipulating that the proofs shall be furnished within sixty days after the loss, that a demand made after the time for furnishing proofs has expired will be too late.

Lion Fire Ins. Co. v. Health, 29 Tex. Civ. App. 203, 68 S. W. 305; American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

In other jurisdictions a demand coming so late that an appraisal cannot be had before the loss becomes payable by the expiration of the designated time following the proofs has been held too late.

Zimeriski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55; Mutual Life Ins. Co. v. Thomson, 22 S. W. 87, 14 Ky. Law Rep. 800.

In this connection it may be noted that none of the cases holding a demand within a "reasonable" time sufficient had to do with a demand delayed beyond the time when the loss would otherwise have been payable. It was, indeed, expressly stated in Hamilton's Ex'rs v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, 22 U. S. App. 164, that while a delay for the full period would certainly be unreasonable, it did not necessarily follow that a delay for a shorter time should not be considered.

The doctrine that a demand, to be effective, must be made before the loss becomes payable by the terms of the policy, would, it would seem, definitely settle any contention as to the effect of a demand for arbitration postponed until after an action has been properly commenced. The question, however, seems never to have been litigated uninfluenced by other circumstances. The nearest approach was Davis v. Imperial Ins. Co., 16 Wash. 241, 47 Pac. 439, where, there having been an invalid award, and an action having been commenced, the company, on receiving notice of insured's

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intention to dismiss on his own motion, served a demand for appraisement under the terms of the policy. The court disposed of this by merely saying that it came too late.

It is also difficult to see how, under the doctrine of the necessity of demand before the loss by the terms of the policy becomes payable, there can be any question as to whether insured need wait at all, or as to how long he need wait, for a demand to be made before commencing his action. Though many of the cases holding that arbitration is not a condition precedent without a demand therefor state that the company has a right to make such a demand, yet to hold that plaintiff is bound to wait a certain time for the exercise of this right before commencing his action would be to announce a new doctrine, differing both from the doctrine that arbitration or a demand therefor by insured is a condition precedent, and from the theory that insured, in the absence of a demand by the company, may maintain his action. Nevertheless, some of the cases, particularly those speaking of the silence of the company as "waiver" of arbitration by the emphasis which they place on the lapse of time between the fire and the commencement of the action, seem to intimate that, had the action been sooner commenced, it might have been premature.

Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; National Home Bldg. & Loan Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21; Garretson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa, 17, 86 N. W. 32; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120. See, also, Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562, containing an intimation that insured must wait a reasonable time before commencing his action. But in connection see Zimerski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55.

(q) Property totally destroyed.

It has been held in Tennessee that a policy providing for plans and specifications of the building damaged; that the company might repair or rebuild; that the damage should be determined by mutual agreement, or, in case of disagreement, same should be "ascertained by a detailed appraisement"; and that no suit should be sustainable "until after an award shall have been obtained fixing the amount of such claim in the manner above provided"—did not make the award a condition precedent in the case of total destruction of a building, but that the provisions referred only to personal

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property damaged or destroyed (Doxey v. Royal Ins. Co., 36 S. W. 950). And in New York it seems settled that the standard policy provision that the "loss or damage" shall be ascertained by appraisers, who shall separately state "sound value and damage," has no reference to property totally destroyed.

Lang v. Eagle Fire Ins. Co., 42 N. Y. Supp. 539, 12 App. Div. 39; Yendel v. Western Assur. Co., 47 N. Y. Supp. 141, 21 Misc. Rep. 348. See, also, Rosenwald v. Phœnix Ins. Co., 50 Hun, 172, 3 N. Y. Supp. 215.

Nevertheless, such policy covers a case of dispute as to whether there was a total destruction of the property (Yendel v. Western Assur. Co., 46 N. Y. Supp. 141, 21 Misc. Rep. 348). And in Michigan a requirement that "loss or damage" shall be ascertained by arbitration has been held to apply, though there was a total loss of the property insured (Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055). Likewise, in Minnesota, a policy requiring that the "damage to the property" should in certain circumstances be determined by the appraisers, was held to require an appraisal in cases where the property had been totally destroyed as well as where there had been a partial destruction only (Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252). The Ohio Supreme Court has also reversed a circuit court case (Connecticut Fire Ins. Co. v. Carnahan, 10 O. C. D. 186), which held that no appraisement could be demanded for goods totally destroyed. The Supreme Court, however, did not mention either the holding or the reasoning of the circuit court, which was to the effect that to appraise the loss on such goods would require the appraisers to call witnesses and become arbitrators (Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805).

(r) Acts of insured violating condition.

The arbitration being a condition precedent to the right of action, if necessary at all, there do not, of course, arise many questions as to what would be a breach of the condition. If there has been no arbitration, and it has not been waived, no further question arises. The courts, however, where there has been a sale and dispersal of the goods saved from the fire rendering appraisal impossible, have touched upon such circumstances as strengthening defendant's case.

Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Astrich v. German-American Ins. Co., 131 Fed. 13,

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65 C. C. A. 251; Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502; Phœnix Ins. Co. of Brooklyn v. Carnahan, 58 N. E. 805, 63 Ohio St. 258; Hamilton's Ex'x v. Royal Ins. Co., 29 Wkly. Law Bul. 106, 4 Ohio S. & C. P. Dec. 437.

But a sale by the insured has been held not fatal where it was made with the approval of those representing the company, and the company was not otherwise injured (Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787), or where the arbitration has been waived (Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005.

Where the appraiser of the insured acts in bad faith and as a partisan, his conduct in preventing an appraisal will be chargeable to the insured.

Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Silver v. Western Assur. Co., 164 N. Y. 381, 58 N. E. 284, reversing 54 N. Y. Supp. 27, 33 App. Div. 450. See, also, Rademacher v. Greenwich Ins. Co., 27 N. Y. Supp. 155, 75 Hun, 83, where the question as to which appraiser was at fault was held a proper question for the jury.

Nor can the insured maintain an action where, owing to his own misconduct, the award reached was invalid (Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13). But in Connecticut Fire Ins. Co. v. Cohen, 97 Md. 294, 55 Atl. 675, 99 Am. St. Rep. 445, it was held that there must be some evidence to connect the insured with such misconduct.

(s) Rights of parties after failure of arbitration.

The courts are not agreed as to whether the policy requirements should be deemed fulfilled where the appraisers, without fault on the part of the insurer or insured, have disagreed as to an umpire, or have failed to reach a final award.[10] Some of the courts have held, apparently without any regard as to any possible question as to the necessity of a further demand by the insurer, that, the arbitration being a condition precedent, it is incumbent on insured to take further steps to secure the award.

Vernon Ins. & Trust Co. v. Maitlen, 63 N. E. 755, 158 Ind. 393; Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. 717; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Davenport v. Long Island Ins. Co., 10 Daly (N. Y.) 535; Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. Law Rev. (Pa.) 356.

[10] As to the misconduct of either party or the appraiser, and the result thereof on the validity of the award, see post, p. 3629.

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So, also, it has been held that in case the award is invalid, and a new one has not been waived, it is incumbent on insured to take proper steps toward securing such new award.

Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252. But see Germania Fire Ins. Co. v. Warner, 13 Ind. App. 466, 41 N. E. 969, where an answer setting up the invalidity of the award was held no defense to an action on the policy.

But in other jurisdictions it has been held that, in case the appraisers fail to reach an award, the insured need do nothing further.

Western Assur. Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383; Connecticut Fire Ins. Co. v. Cohen, 97 Md. 294, 55 Atl. 675, 99 Am. St. Rep. 445; Pretzfelder v. Merchants' Ins. Co., 31 S. E. 470, 123 N. C. 164, 44 L. R. A. 424; Pretzfelder v. Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302. See, also, Rademacher v. Greenwich Ins. Co., 27 N. Y. Supp. 155, 75 Hun, 83.

It might be noted that in the Pretzfelder Case there was a subsequent ineffectual attempt to agree on new arbitrators, and that the court in the Decker Case held, further, that in any event it was as much the duty of the company to demand a new appraisement as of the insured.

(t) Pleading and practice.

Under the ordinary code provision allowing plaintiff to allege generally a performance of conditions precedent, and requiring the defendant, when controverting such an allegation, to plead specifically, the defendant, in order to avail himself of the defense that insured failed to submit to an appraisal, as required by the policy, must specially allege such fact.

Kahnweiler v. Phenix Ins. Co. of Brooklyn, 67 Fed. 483, 14 C. C. A. 485, 32 U. S. App. 230; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Ackley v. Phenix Ins. Co. of Brooklyn, N. Y., 25 Mont. 272, 64 Pac. 665; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120.[11]

In some of the cases the decision is that, since arbitration is not unconditionally a condition precedent, plaintiff need not plead com-

[11] The statutes referred to in the cases cited are Code Iowa, §§ 3626, 3628; Code Civ. Proc. Mont. § 746; Code Va. 1887, § 3251 [Va. Code 1904, p. 1711].

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pliance, unless it affirmatively appears that there has been a disagreement, demand, etc.

Hanover Fire Ins. Co. v. Harper, 77 Ill. App. 453; Liverpool & L. & G. Ins. Co. v. Hall, 1 Kan. App. 18, 41 Pac. 65; Long Island Ins. Co. v. Hall, 46 Pac. 47, 4 Kan. App. 641; Bergman v. Commercial Union Ins. Co., 12 Ky. Law Rep. 942; German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Davis v. Atlas Assur. Co., 47 Pac. 436, 16 Wash. 232; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

In Merchants' Ins. Co. v. Stephens, 22 Ky. Law Rep. 999, 59 S. W. 511, evidence as to an agreement to arbitrate was held inadmissible under an answer which merely alleged that there was not a total loss.

Under this doctrine a petition is not inconsistent, though it alleges both an award and proofs of loss without an award. The necessity for arbitration may not have arisen. (Randall v. Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960.) But a general allegation of compliance will not be sufficient where it appears from the complaint that a compliance was not in fact had with the requirement as to arbitration (Vernon Ins. & Trust Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755), nor where a disagreement is alleged without any allegation of arbitration (Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932). And in Wolff v. Liverpool & L. & G. Ins. Co., 10 N. J. Law J. 325, it was held that, since arbitration was a condition precedent, it must be pleaded by plaintiff. In Michigan it has been held that, under a circuit court rule of that state, an issue as to arbitration will be raised by the general issue pleaded to a general declaration on the policy (Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502).

Where the court instructed that arbitration was a condition precedent, and by the terms of the policy it was not such a condition, defendant was not prejudiced by thus requiring plaintiff to prove more than the law required (Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180).

Where, on an issue as to whether the company was justified in refusing to define in advance the powers of the arbitrators in the arbitration which it was demanding, the evidence consisted solely of letters, the question was one for the court, and a peremptory instruction was justified.

Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419. But see, also, Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757, and Davis v. Western Massachusetts Ins. Co., 8

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R. I. 277, where, on the issue of waiver, the inference to be drawn from letters was held to have been properly left to the jury.

A holding that the action has been prematurely brought because there has been no arbitration is not a holding as to the merits of the case, and does not impugn the right of action altogether.

Kahnweiler v. Phenix Ins. Co. of Brooklyn, 67 Fed. 483, 14 C. C. A. 485, 32 U. S. App. 230; Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005; McNees v. Southern Ins. Co., 69 Mo. App. 232.

Even though it is in fact incumbent on the insured to make demand for arbitration, yet, where the case is treated by both parties on the theory that the arbitration is not a condition unless demanded by the company, the appellate court will be bound thereby, and cannot find for defendant except on that theory (Swearinger v. Pacific Fire Ins. Co., 66 Mo. App. 90).

3. VALIDITY AND EFFECT OF ARBITRATION.

(a) Nature in general.
(b) Effect of award in general—Form of award.
(c) Effect of valued policy law.
(d) Binding effect of award as determined by matters submitted.
(e) Manner of submission.
(f) Same—Submission differing from policy stipulations.
(g) Submission to tribunals of mutual company.
(h) Persons bound by appraisement.
(i) Appointment of incompetent or partial appraisers.
(j) Disagreement of appraisers—Award made without submission to all.
(k) Validity of award as affected by matters considered.
(l) Giving of notice and taking of testimony.
(m) Inadequacy of award—Misconduct.
(n) Necessity of substantial damage by misconduct or fraud.
(o) Fraud and mistake of insured.
(p) Actions to defeat award.
(q) Remuneration and liability of appraisers.

(a) Nature in general.

The "arbitrators," "referees," or "appraisers," who, with an "umpire," are under modern policies called upon by the parties to determine the "amount of loss," occupy a somewhat anomalous position. On the one hand, they partake of the nature of experts, who by personal investigation are authorized to determine the amount

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of damage done. On the other hand, they constitute a quasi court under obligations to impartially, though in an informal manner, hear such evidence as may be presented before them, basing their award not only on matters open to personal investigation, but also on matters, such as total destruction, which can only be ascertained by the evidence of others. And though, in the performance of either function, they are bound to maintain a fair-minded and disinterested attitude, yet in a certain sense each one must stand as the representative of the party appointing him.

Nearly all the decisions and rules cited in this brief are illustrative of the situation just stated, but reference may be made to the following cases as especially showing the propriety of the appraisers basing their decision on their own knowledge or expert opinion: Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; Springfield Fire & Marine Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315; Ætna Fire Ins. Co. v. Davis, 21 Ky. Law Rep. 1456, 55 S. W. 705; Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341.

The following cases illustrate the necessity of evidence and the propriety of the appraisers acting as ordinary arbitrators in determining matters outside their personal knowledge: Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395; Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 South. 33; Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13; Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16; Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691; American Fire Ins. Co. v. Bell (Tex. Civ. App.) 75 S. W. 319; Hong Sling v. Scottish Union & Nat. Ins. Co., 7 Utah, 441, 27 Pac. 170.

Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, and Townsend v. Greenwich Ins. Co., 83 N. Y. Supp. 909, 86 App. Div. 323, affirmed without opinion 178 N. Y. 634, 71 N. E. 1140, contain statements showing the dual character of an appraiser as an agent, who must nevertheless maintain a disinterested attitude in a controversy between his principal and another.

And such an "arbitration" or "appraisal," it is evident, does not fall within the purview of statutes prescribing the formal requisites of an "arbitration and award."

Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C.) 44 Fed. 151, 11 L. R. A. 623; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; Zallee v. Laclede Mut. Fire & Marine Ins. Co., 44 Mo. 530; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252. See, also, Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691, where the Zallee Case, holding that no oath need be administered, is followed, without, however, mentioning any statute.

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(b) Effect of award in general—Form of award.

Where the amount of loss, or any question touching the liability of the insurer, is submitted to arbitrators or appraisers under an agreement that the question shall be determined by their award, both parties will, in the absence of fraud or misconduct, be conclusively bound thereby, so that the matter cannot be again litigated in the courts.

Reference may be made to Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975; Security Live Stock Ins. Ass'n v. Briggs, 22 Ill. App. 107; Madison Ins. Co. v. Griffin, 3 Ind. 277; Springfield Fire & Marine Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Richardson v. Suffolk Ins. Co., 3 Metc. (Mass.) 573; Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1; Michels v. Western Underwriters' Ass'n, 129 Mich. 417, 89 N. W. 56; Zallee v. Laclede Mut. Fire & Marine Ins. Co., 44 Mo. 530; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Herndon v. Imperial Fire Ins. Co., 107 N. C. 183, 12 S. E. 126; Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Fleming v. Phœnix Assur. Co., 75 Hun, 530, 27 N. Y. Supp. 488; Townsend v. Greenwich Ins. Co., 83 N. Y. Supp. 909, 86 App. Div. 323, affirming 78 N. Y. Supp. 897, 39 Misc. Rep. 87, and affirmed without opinion 178 N. Y. 634, 71 N. E. 1140; Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498; American Cent. Ins. Co. v. Bass, 90 Tex. 380, 38 S. W. 1119; Montgomery v. American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

The right to insist on the award as conclusive is not lost by the fact that it was not accepted or acted upon by the parties, and that the amount thereof was not paid or tendered by the insurer to the insured (Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297). And where it is provided that no proceeding relative to appraisement shall waive any condition of the policy, a denial of liability by the insurer, after appraisement of loss, on the ground of breach of condition of the policy, does not waive its right to insist on the appraisement as conclusive of the amount of loss (American Cent. Ins. Co. v. Bass, 90 Tex. 380, 38 S. W. 1119). But an agreement that the award be set aside, and for a rearbitration, destroys the effect of the award; and this is true though the insurer repudiates its agreement, and the rearbitration is in fact never completed (Goodwin v. Merchants' & Bankers' Mut. Ins. Co., 118 Iowa, 601, 92 N. W. 894).

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Where the award was for the payment of a sum of money by insurer, and for an assignment by the insured to the insurer of a claim against another company, without, however, any intimation that the assignment was a condition precedent to the payment by the insurer, it was held that, even though the part of the award dealing with the assignment was valid, the insured could maintain an action for the money before tendering an assignment of the claim against the other company. The rights of the parties in such case would be the same as upon independent covenants. (Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. [N. Y.] 125.) But a statement in the award that the appraisers are unable to agree as to whether a certain part of the building should be included cannot be construed as a binding award that it should not be included in insured's recovery (Niagara Fire Ins. Co. v. D. Heenan & Co., 181 Ill. 575, 54 N. E. 1052, affirming 81 Ill. App. 678).

Where the award was that the company should forthwith pay to the assured a named sum, and that the same should be received by him in full satisfaction and discharge of his claim against said company, and that the company should pay the costs, it was a sufficiently certain basis for an action on the award (Madison Ins. Co. v. Griffin, 3 Ind. 277). But where insured property was totally destroyed, an appraisement stating the value of the property at the time of the award to be $350, and the actual damage to be $140, was not in proper form (Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691). Nor does a return by the appraisers showing the items appraised, the cost thereof, and damages thereto, having a footing on each page indicating the cost and damages, but no totals, and making no reference to the value of the goods before the fire, constitute an award or anything more than a mere invoice (St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137).

In an action for the penalty on an arbitration bond, the condition of which was to pay all such moneys as should be awarded the insured, where it appeared that the award directed the company to pay certain sums without any condition or qualification whatever, it was held that the action could be maintained, although the time within which the award was to be made was fixed by a separate instrument, rather than by a condition of the bond (Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. [N. Y.] 125).

An appraisement under the terms of the policy cannot be proved by oral evidence unless the absence of the paper is explained (Cale-

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donia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13). But where, in the proof of the amount of plaintiff's loss, a witness stated that plaintiff and defendant agreed to enter into an appraisement of the loss, it was held error not to permit such witness, on cross-examination, to identify certain papers as such agreement and the award of the appraisers (Caledonian Ins. Co. v. Traub, 80 Md. 214, 30 Atl. 904).

(c) Effect of valued policy law.

That a valued policy law will generally do away with the necessity for arbitration in case of total loss has been noted in a preceding brief.[1] **Though the amount of a total loss is submitted, and an award made, it will not amount to a waiver of the valued policy law, but the insurer will still be liable for the full amount named in the policy.**

Caledonian Ins. Co. v. Cooke, 101 Ky. 412, 41 S. W. 279; Merchants' Ins. Co. v. Stephens, 22 Ky. Law Rep. 999, 59 S. W. 511; Baker v. Phœnix Assur. Co., 57 Mo. App. 559; Jacobs v. North British & Mercantile Ins. Co., 61 Mo. App. 572; Pennsylvania Fire Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608; Thompson v. Citizens' Ins. Co., 45 Wis. 388; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; Phœnix Ins. Co. v. Luce, 5 O. C. D. 210; Eureka Fire & Marine Ins. Co. v. Gray, 24 Ohio Cir. Ct. R. 268.

But this rule is not applicable to an award fixing the amount of a partial loss (Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498). And in Baker v. Phœnix Assur. Co., 57 Mo. App. 559, it was intimated that, under a statute permitting an allowance for depreciation between the time of the issuance of the policy and the fire, an award might be valid even in case of a total loss, if it was confined entirely to a determination of the amount of such depreciation.

(d) Binding effect of award as determined by matters submitted.

The extent of the binding effect of an arbitration and award is, of course, determined by the matters submitted thereto by the parties. Therefore, where it is expressly stipulated before submission that the award shall be binding only as to the amount of loss or damage, and shall not determine or affect the question of the company's liability, or any right of defense of either party, questions as

[1] See ante, p. 3602.

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to insurer's ultimate liability are left untouched by the award, and the action must be brought on the policy.

British America Ins. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426; Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Germania Fire Ins. Co. v. Warner, 13 Ind. App. 466, 41 N. E. 969; Smith v. Herd, 22 Ky. Law Rep. 1596, 60 S. W. 841, 1121, 110 Ky. 56; Soars v. Home Ins. Co., 140 Mass. 343, 5 N. E. 149; Haslinger v. Long Island Ins. Co., 62 Mich. 144, 28 N. W. 762.

In Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623, 21 U. S. App. 228, this rule was applied to a contention of the company that an action could not be maintained on the policy.

And where, at the time of the submission to arbitration, there had been no question raised as to the validity of the policy, but rather there had been an offer of settlement and refusal thereof by insured, the submission to arbitrators under a demand for "arbitration on the subject of said loss under said policy" was held to have been intended to be limited solely to the amount of liability, and not to have submitted any question as to the validity of the policy (Kearney v. Washtenaw Mut. Fire Ins. Co., 126 Mich. 246, 85 N. W. 733).

But where the policy provided for a reference of the "amount of loss," and that the award should be conclusive in relation thereto, a submission by the insurer to arbitration, without any reference or mention of a claim that the insured lumber was so piled that under a proviso of the policy only a portion of the insurance applied to any one pile, was held to estop it from subsequently making such claim, the award of the referees as to the amount of loss being considered conclusive also on the question of apportionment (Cassidy v. Royal Exchange Assur., 99 Me. 399, 59 Atl. 549). And where all claims and demands were referred to an arbitrator, his award that a certain sum be paid to claimant was conclusive, and it was not open to the company to show that they did not by the agreement intend to admit for whose benefit the insurance was effected (Richardson v. Suffolk Ins. Co., 3 Metc. [Mass.] 573). Even though the submission does not include the question of ultimate liability, yet the company will be bound by an express promise to pay the amount fixed upon by the arbitrators (Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 121 Cal. 167, 53 Pac. 565); and a complaint alleging such a promise after the submission states an action thereon, rather than on the policy

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(Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633).

The second report of the Stockton Case (121 Cal. 167, 53 Pac. 565) contained a further decision holding the defendant company to an agreement made by the companies generally, in which it appeared that an agent acting for defendant, and defendant's counsel, participated.

Where, however, the parties did not expressly, mutually, and concurrently agree to abide by the appraisal, an action on the policy was not precluded, though the insured submitted the amount of loss to arbitration only upon a promise by the adjuster to pay the cash so soon as a letter could go to the home office and return (Patterson v. Triumph Ins. Co., 64 Me. 500). And of course, where the action is brought on the policy, it will not necessarily be defeated by the invalidity of an award (Germania Fire Ins. Co. v. Warner, 13 Ind. App. 466, 41 N. E. 969).

Where the policy contained a provision looking to an "appraisement" of the "sound value and damage," and also a stipulation that in case of difference between the parties there should be an "arbitration," which should be conclusive as to the amount of loss, and an "appraisement," only, was demanded, and "appraisers," only, appointed, it was held that the sum fixed was only an "appraisement," and not binding on the insured as to the amount of the loss (Shaw v. Wyoming Ins. Co., 1 Wkly. Notes Cas. [Pa.] 559). So, also, if the insured refuses to enter into arbitration, but agrees to the appointment of persons to appraise the property remaining after the fire, such appraisal does not deprive the insured, in an action on the policy, of the right to introduce evidence of the quantity, quality, and value of the property insured (Commercial Ins. Co. v. Friedlander, 156 Ill. 595, 41 N. E. 183). And it has been held that, if an appraisal which included only damaged property was intended by the parties to cover only such property, it would not preclude a further recovery for property totally destroyed.

Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 South. 33; Lang v. Eagle Fire Co., 42 N. Y. Supp. 539, 12 App. Div. 39.

And where the submission excluded property totally destroyed, it could not be presumed that the appraisers went beyond the scope of their employment, and included such property in their award (Fire Ass'n of Philadelphia v. Colgin [Tex. Civ. App.] 33 S. W. 1004). Nor can any fraud be imputed from the fact that the sub-

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mission renders the arbitration binding as to the amount of loss, while under the policy it was only to be prima facie evidence thereof (Michels v. Underwriters' Ass'n, 129 Mich. 417, 89 N. W. 56).

(e) Manner of submission.

A submission of a matter by parol, without any agreement to be bound thereby, does not render the award binding (Patterson v. Triumph Ins. Co., 64 Me. 500). Nor will the company be bound by a submission and award with which it has refused to have anything to do. Even though the arbitration or appraisal is a condition precedent to insured's right of action, the refusal of the company to join therein will operate only as a waiver of the condition, and not as a matter estopping the company from disputing the amount of loss as estimated. (Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810.)

A party to an insurance policy cannot, however, submit to arbitration the question as to the amount of loss, and then say the submission was void because there had been no dispute over the amount (Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757). Nor is the binding effect of an award destroyed by the fact that the insured, who had the policy in his possession, was induced to refer the matter by an innocent misrepresentation by the insurer's agent, to the effect that the policy required such a proceeding.

> Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1. See, also, Indiana Ins. Co. v. Brehm, 88 Ind. 578, where, however, the exact nature of the misrepresentations do not appear, and Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 South. 33, where there seems to have been a misrepresentation as to the legal effect of the agreement of submission.

And in Townsend v. Greenwich Ins. Co., 83 N. Y. Supp. 909, 86 App. Div. 323, affirming 78 N. Y. Supp. 897, 39 Misc. Rep. 87, and affirmed without opinion 178 N. Y. 634, 71 N. E. 1140, it was held that where the parties entered into a written agreement, as provided by the policy, appointing appraisers to determine the amount of the loss without restriction, the effect of such submission and the award thereunder could not be varied, in the absence of fraud or mistake, by parol evidence of a prior agreement for the appointment of such appraisers, by which they were to have no authority to fix the loss at a sum less than a certain named amount.

The submission may be made by an agent, and, when so made, the award under the submission will be binding on the principal.

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Thus, where the owner of more than one-half of a ship, as ship's husband, kept her insured for several years for himself and the other owners jointly without their interference, by annual policies containing a clause for submitting to arbitration any disputed loss, it was held to warrant an inference that they authorized him to settle by arbitration a claim for a loss under such a policy. And where such owner submitted a disputed loss to arbitration through his agent, and afterwards ratified the proceedings by his conduct while the arbitrators had the case under consideration, the award could not be set aside on the ground that he had no power to delegate his authority. (Hamilton v. Phœnix Ins. Co., 106 Mass. 395.) Similarly, a trustee of one to whom a loss is payable by the policy may refer it to arbitration and bind the cestui que trust, where empowered by such cestui que trust to adjust and sue for the loss (Brown v. Hartford Fire Ins. Co., 4 Fed. Cas. 379).

A submission to arbitration, signed in the names of all the insurance companies interested, by their agents, is valid and binding, where there is nothing to show that any of the persons so signing were unauthorized, and it appears that neither the plaintiff nor any of the insurance companies questioned the authority of the signers, and that the companies to whom the result had been reported considered themselves bound by the agreement (Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356). And in Security Live Stock Ins. Co. v. Briggs, 22 Ill. App. 107, a statement by the company to its agent, that it was willing to leave the matter to fair-minded men, was, in the absence of a contrary showing, held sufficient to justify an inference of authority in the agent to submit the matter to arbitration.

(f) Same—Submission differing from policy stipulations.

Though the policy contains stipulations as to the manner of the submission and the effect of the award, yet, if the parties in fact waive these provisions, and by mutual agreement submit the matter in a different manner, or agree that the award shall have a different effect, such submission will be valid, and the award rendered thereunder binding, in accordance with the subsequent agreement.

London & L. Fire Ins. Co. v. Storrs, 71 Fed. 120, 17 C. C. A. 645, 36 U. S. App. 327; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356; Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458 (distinguishing Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149, where the case turned on the fact that the arbitra-

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tion and award were not pleaded as a common-law arbitration); Springfield Fire & Marine Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315; Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341; Broadway Ins. Co. v. Doying, 55 N. J. Law, 569, 27 Atl. 927. See, also, Remington Paper Co. v. London Assur. Corp., 43 N. Y. Supp. 431, 12 App. Div. 218; and Morris v. German-American Ins. Co., 14 Ky. Law Rep. 859, where it appeared, in addition, that the result of the award had been accepted by the parties.

It is difficult to determine the exact effect of Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623, 21 U. S. App. 228. In that case approval was given to a rejection of an offer to show a submission and award, binding on its face as to the amount of loss, but not agreeing with the policy stipulations, and providing by its terms that no right or defense of either party should be waived thereby. If the evidence was offered only as a bar to plaintiff's right of action on the policy, and as showing that the action should have been on the award, the decision is in accordance with the other cases on such subject. And this is the objection which, it would seem, the court had in mind. But if the evidence was offered as conclusive on the amount of recovery, it seems entirely contradictory to the cases just cited.

The validity and binding effect of an award rendered under a subsequent agreement making it conclusive as to the amount of loss is not affected by the fact that the policy, containing stipulations whereby the award was only made prima facie evidence of the amount of loss, was a standard policy, and that it was provided by statute [2] that every contract made contrary to the standard policy act should be void. The subsequent agreement was a modification of the original agreement, so far as the need of a new consideration was concerned, but it was not a modification thereof in the sense that it changed the policy as issued. (Montgomery v. American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.)

(g) Submission to tribunals of mutual company.

Where a policy holder in a co-operative fire insurance association, under its requirements, submitted the determination of the amount of his loss to its adjusters, and thereafter appealed to the executive committee, he was bound by the award of such body, in the absence of fraud, mistake, or misconduct, or of some other equitable ground for an application to the courts (Spink v. Co-operative Fire Ins. Co., 49 N. Y. Supp. 730, 25 App. Div. 484).

[2] 1 How. Ann. St. Mich. c. 137, §§ 4344, 4345, 4349.

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Nevertheless, a report of a committee of a mutual company, appointed, in accordance with the act of incorporation, to examine and inquire into a loss and ascertain a sum which should form the basis of an assessment, has been held not conclusive of the amount of the loss in an action by the insured against the company (Insurance Co. v. Rupp, 29 Pa. 526). And where the constitution prohibited payment until the officers were satisfied that the fire was accidental, and provided that, when the officers were not so satisfied, the liability of the company should be finally decided by a majority of its members, a decision of the directors, refusing payment on the ground that the policy had been canceled, was not considered binding on the insured, he having never agreed to abide the decision, though the directors met at his instance (Soorholtz v. Marshall County Farmers' Mut. Fire Ins. Co., 80 N. W. 542, 109 Iowa, 522).

(h) Persons bound by appraisement.

The cases are not harmonious, either in reasoning or results, as to the binding effect on a mortgagee, to whom the loss has been made payable, of an award resulting from a submission to arbitration by the insurer and the insured mortgagor. In the early case of Brown v. Roger Williams Ins. Co., 5 R. I. 394, it was held that where the policy was payable to a mortgagee in any event, and where no arbitration clause was shown in the policy, the mortgagee would not be bound by an arbitration between the insurer and the mortgagor, named as insured. The legal effect of such a policy was that of an assignment to the mortgagee, and, so long as the debt remained unpaid, he could not be bound by an arbitration which was not shown to have been provided for in the policy, and to which he was not a party. Somewhat similar in principle is Bergman v. Commercial Union Assur. Co., 92 Ky. 494, 18 S. W. 122, 15 L. R. A. 270, where the decision that the mortgagee was not bound was founded entirely on the wording of the policy, which provided for arbitration by "the parties." This phrase the court held must have meant the true parties in interest—that is, the insurer and the mortgagee. But had there been provision made for a conclusive arbitration between the insured and mortgagor, it would have been conclusive on the mortgagee.

In connection with the Bergman Case, see Morris v. German-American Ins. Co., 14 Ky. Law Rep. 859, a superior court abstract apparently

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following the decision of the Court of Appeals, and holding, further, that the rule was not modified by the fact that the mortgagee was amply secured without the insurance.

In New Hampshire (Hall v. Fire Ass'n, 64 N. H. 405, 13 Atl. 648) and Mississippi (Georgia Home Ins. Co. v. Stein, 72 Miss. 943, 18 South. 414), however, the matter has been decided on the broader ground that the destruction of the property fixes the liability of the company, and that thereafter the rights of the mortgagee are not liable to be defeated by the acts of the mortgagor. In neither of these cases, indeed, does it directly appear whether or not the policy contained any arbitration clause further than that the Hall Case was decided in 1888, and that the insurance commissioner was in 1885 given authority to adopt the standard policy of New Hampshire.[8]

The case of Chandos v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321, was decided on principles similar to those governing the Brown and Bergman Cases, though in the Chandos Case a different result was reached. The policy in the latter case provided that the loss should be payable to a mortgagee "as his interest may appear." This phrase, the court held, prevented the policy from acting as one assigned to the mortgagee, and left the full control of the insurance in the hands of the mortgagor. And therein the policy was distinguishable from the one involved in the Brown Case. The Hall Case was also held distinguishable, it being interpreted as imputing that the mortgagee was bound only because there was no provision for arbitration in the policy. The Bergman Case was not mentioned, but it might be noticed that in the Chandos Case the policy provided for an adjustment by the "company and the insured; or, if they fail to agree," for an appraisement at the request of "either party"—a wording looking plainly to an appraisement by the "insured" and the company.

The mortgagee will, of course, be bound by an appraisement conducted with his assent and assistance (Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431). And though the agreement to pay the amount of the appraisement was made between the company and the insured mortgagor without the concurrence of the mortgagee, to whom the loss was payable, yet such fact formed no defense to an action on such promise, in which the mortgagee joined; and

[8] Laws 1885, c. 93, § 8.

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particularly was this true where, as shown by the amended complaint, the mortgage was paid after the commencement of the action (Stockton Combined Harvester & Agricultural Works v. American Fire Ins. Co., 121 Cal. 182, 53 Pac. 573).

(i) Appointment of incompetent or partial appraisers.

Where the policy and submission require the selection of "disinterested" appraisers, and the appraiser selected by the insurer is, to its knowledge, an interested person, and the insured is ignorant of such fact, the award is not binding. Such action on the part of the company is considered a fraud, vitiating the whole transaction.

Hall v. Western Assur. Co., 133 Ala. 637, 32 South. 257; Ætna Ins. Co. v. Stevens, 48 Ill. 31; Insurance Co. of North America v. Hegewald, 161 Ind. 631, 66 N. E. 902; Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875; Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, affirming 16 N. Y. Supp. 639, 62 Hun, 619; Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698.

And this effect of the fraud will extend to a company signing the appraisal agreement after the fraudulent representation to insured (Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 69 N. Y. Supp. 344). But where a party to an arbitration knows, at the time the other party selects its arbitrator, that he is ineligible, a failure to object will be deemed a waiver of such objection.

Produce Refrigerating Co. v. Norwich Fire Ins. Co., 91 Minn. 210, 97 N. W. 875; Stemmer v. Scottish Union & Nat. Ins. Co., 33 Or. 65, 53 Pac. 498.

The question as to the competency or disinterestedness of an appraiser is primarily for the jury.

Hall v. Western Assur. Co., 133 Ala. 637, 32 South. 257; Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401.

The Hall Case further decided that the knowledge of insurer and insured as to the disinterestedness of the appraiser was also for the jury.

Nevertheless, questions as to the sufficiency of the evidence to support the finding of the jury, and as to what will render one incompetent or disinterested, have been frequently before the courts. Thus, it has been held that the word "competent," as used in an in-

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surance policy with reference to arbitrators, is not applicable to one who is proven to be "a drinking man, of no account," and to have been arrested for vagrancy (Ætna Ins. Co. v. Stevens, 48 Ill. 31); and that the word "disinterested" is not limited to a lack of pecuniary interest, but means that the appraiser must not be biased or prejudiced (Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055). Perhaps the plainest illustration of such an "interested" appraiser occurs where an agent of insurer is appointed as its appraiser.

Ætna Ins. Co. v. Stevens, 48 Ill. 31; Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401. See, also, Insurance Co. of North America v. Hegewald, 161 Ind. 631, 66 N. E. 902, and Glover v. Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380, where the agency of the appraiser, his misconduct during the appraisal, and the inadequacy of the award were all considered together as showing the invalidity of the award.

But an award by appraisers will not be set aside because one of them had been in the employ of the insurance company, where the other was in the employ of the insured, and the two agreed on the loss without calling in an umpire (Remington Paper Co. v. London Assur. Corp., 12 App. Div. 218, 43 N. Y. Supp. 431).

Emphasis has also been placed on the circumstance that the arbitrator selected by insurer has been frequently employed by insurance companies in that capacity.

Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875; Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, affirming 16 N. Y. Supp. 639, 62 Hun, 619; Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 69 N. Y. Supp. 344.

But, on the other hand, it has been held that the mere fact that one is an experienced arbitrator, having been appointed by both insurers and insured, does not disqualify him, but rather renders him more competent to try similar questions.

Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498; Van Winkle v. Continental Fire Ins. Co. (W. Va.) 47 S. E. 82.

The inadequacy of an award is to be considered in determining the bias and prejudice of the appraisers.

Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875; Bradshaw v. Agricultural Ins. Co., 137 N. Y.

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137, 32 N. E. 1055, affirming 16 N. Y. Supp. 639, 62 Hun, 619; Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401.

A statement written by the umpire, and signed by him and the arbitrators after the award was made, reciting that one of the arbitrators agreed, for the insurance companies, that they would pay the amount of the award, and the other, for the insured, that he would accept such sum, has been held not to constitute such evidence of partisanship as would invalidate the award, though it showed that each arbitrator understood that he was representing the party who selected him (Ætna Fire Ins. Co. v. Davis, 21 Ky. Law Rep. 1456, 55 S. W. 705). And in Chandos v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321, the fact that the appraisers appointed by insured agreed in every particular with those chosen by the company was held sufficient evidence that the appraisers chosen by the company acted impartially.

The fact that one of three referees appointed, under a provision in a policy of insurance, to fix the amount of loss, was indorser on an unmatured note made by the insured, and secured by mortgage, does not render the reference void, in the absence of anything to show that such referee was actually interested in the recovery on the policy (Bullman v. North British & Mercantile Ins. Co., 159 Mass. 118, 34 N. E. 169).

Rev. St. Ohio, § 3643b, providing that, "where arbitrators and umpires are selected to ascertain a loss under any insurance policy issued on property in this state, said arbitrators and umpires shall be residents of the county in which such loss has occurred at least one year prior to the said loss," is constitutional. And such disqualification may be proved by the declarations of the appraiser. (Germania Ins. Co. v. Cincinnati, P. B. S. & P. Packet Co., 7 Ohio Dec. 571, 6 Ohio N. P. 173.)

(j) Disagreement of appraisers—Award made without submission to all.

Where the policy provides that the appraisers chosen by the parties shall first select an umpire to act with them in case of their disagreement, it is immaterial whether the umpire is chosen before or after the disagreement arises.

Caledonia Ins. Co. of Scotland v. Traub, 83 Md. 524, 35 Atl. 13; Chandos v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 824.

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If no disagreement, however, in fact arises, an award by the appraisers without the concurrence of the umpire will be sufficient.

Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; Enright v. Montauk Fire Ins. Co., 61 Hun, 625, 15 N. Y. Supp. 893, affirmed without opinion 142 N. Y. 667, 37 N. E. 570.

But where the umpire has been appointed, and there has been a disagreement, an award reached by the umpire and one of the appraisers, without conference with the other appraiser, is invalid. Such conduct results practically in depriving one of the parties of any representation in the appraisal proceedings, which become, therefore, of no effect as to him.

Strome v. London Assur. Corp., 20 App. Div. 571, 47 N. Y. Supp. 481, affirmed without opinion 162 N. Y. 627, 57 N. E. 1125; Schmitt Bros. v. Boston Ins. Co., 81 N. Y. Supp. 767, 82 App. Div. 234; New York Mut. Sav. & Loan Ass'n v. Manchester Fire Assur. Co., 87 N. Y. Supp. 1075, 94 App. Div. 104.

So, also, a refusal of insured's appraiser to act, and his withdrawal from the proceedings, prior to any disagreement as to the amount of loss, renders a subsequent award by the umpire and other appraiser of no effect. The umpire, under such circumstances, has no authority to act, and though the insured may not be able to maintain his action, yet he is not bound by the award so reached.

Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13. The argument of the court in Broadway Ins. Co. v. Doying, 55 N. J. Law, 569, 27 Atl. 927, is to the same effect. And see, in connection, American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. 738.

But where, prior to the withdrawal of insured's appraiser, there has been a distinct disagreement as to the amount of loss, the withdrawal will not do away with the binding effect of a subsequent award by the umpire and the other appraiser.

Caledonian Fire Ins. Co. v. Traub, 86 Md. 86, 37 Atl. 782; Broadway Ins. Co. v. Doying, 55 N. J. Law, 569, 27 Atl. 927; American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. 738.

The Traub Case further held that while the validity of the award under admitted or proved facts was for the court, yet whether there had been in fact a disagreement, so as to authorize the umpire to act, was for the jury.

When the arbitrators agreed as to the value of the insured goods before the fire, and one of them then stated his opinion as to the damage,

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whereupon the other said, "We will never agree," there was such a disagreement as authorized the umpire to act, and rendered valid an award reached by the two appraisers and umpire (Ætna Fire Ins. Co. v. Davis, 21 Ky. Law Rep. 1456, 55 S. W. 705). And in the Landau Case it was held that the award would be binding on insured, though the disagreement was brought about for the express purpose of breaking up the appraisal, or though the insured had no knowledge of the action of his appraiser. If the insured was not responsible for the action of the appraiser, the court argued that his remedy was by the immediate appointment of a new one.

In New Hampshire an entirely different conclusion has been reached, and in that state either a withdrawal of a referee, or the withdrawal from the compact of either party, before the award is published, will render the agreement of no effect (Franklin v. New Hampshire Fire Ins. Co., 70 N. H. 251, 47 Atl. 91). But it should be noted in connection with the Franklin Case that the New Hampshire standard policy, under which the decision was made, makes no reference to an appraisement signed by two of the referees only. And of course, where an award must be signed by the three arbitrators, the insured will not be bound by an award in which two only have joined (Morgan v. Merchants' Co-operative Fire Ins. Ass'n, 52 App. Div. 61, 64 N. Y. Supp. 873).

A withdrawal of an appraiser after the signing of the award will not affect its validity (Eisenberg v. Stuyvesant Ins. Co. [Sup.] 87 N. Y. Supp. 463).

(k) Validity of award as affected by matters considered.

Failure of appraisers to include in the award all the items submitted to them renders the award invalid.

Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252. In the Adams Case it was further held that it was immaterial that a schedule was not attached to the submission, the insurer's appraiser having in fact in his possession the schedule furnished by the insured in his proofs of loss, and the insurer's appraiser having a duplicate copy thereof.

This rule has been applied, also, to a failure to include the personalty in a wing of a certain building, which, with its contents, was insured by the policy (Phœnix Ins. Co. v. Moore [Tex. Civ. App.] 46 S. W. 1131). And of course, where the submission is con-

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sidered as including property totally destroyed as well as that only partially destroyed, a failure to include the destroyed property will be fatal.

Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 South. 33; American Fire Ins. Co. v. Bell (Tex. Civ. App.) 75 S. W. 319; Hong Sling v. Scottish Union & Nat. Ins. Co., 7 Utah, 441, 27 Pac. 170.

But where neither the policy nor the schedule showed that a certain piece of property should be included in the award and the attention of the appraisers was not called thereto, their failure to take it into consideration was chargeable to insured, who could not, therefore, impeach the award on the ground of such failure (Chandos v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321). And a stipulation in the submission authorizing the appraisers to make a proper deduction for depreciation by use, age, condition, location, or otherwise has been held to justify an award in which no allowance was made for patterns which were absolutely "dead," and for which there could be no use (Michels v. Western Underwriters' Ass'n, 129 Mich. 417, 89 N. W. 56). And in Springfield Fire & Marine Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315, it was held that the mere failure to include certain items of damage would not invalidate the award, provided proper means were taken to ascertain the full amount of the loss.

Where both an insurance policy and a submission to appraisal thereunder require the finding of both sound value and damage, a failure of the appraisers to find the sound value is a fatal variance, which cannot be helped by assuming that the blank left in the award where the sound value should have been inserted was intended as a finding that there was no sound value, nor by a contention that the finding of sound value was immaterial (Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395). And where it is provided that the appraisers shall "estimate and appraise the loss, stating separately sound value and damages," the appraisers are required to state separately the sound value and damage to each and every article injured by the fire, and not the sound value and damage to the stock of goods insured (Phœnix Ins. Co. v. Romeis, 15 Ohio Cir. Ct. R. 697, 8 O. C. D. 633).

Failure of arbitrators to consider the question of liability which has been submitted to them will defeat an action on the award, which was evidently intended by the arbitrators only as an ap-

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praisement of the loss (Karthans v. State Mut. Fire Ins. Co., 1 Pears. [Pa.] 104).

As already noted, the binding effect of an award is limited by the matters submitted to the arbitrators or appraisers, and it will not be presumed that they have exceeded their authority. And it has been held that even though they do go beyond their authority, and pass on matters not submitted to them, their award will not be thereby invalidated as to the matters properly submitted and decided. (Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. [N. Y.] 125.) But on the other hand it has been held that the award would not be binding where the appraisers, in determining the amount of loss, took into account an improper element of damage (Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724, affirming 31 Hun, 171); or figured the damage on an improper basis (Providence Washington Ins. Co. v. Board of Education of Morgantown School Dist., 49 W. Va. 360, 38 S. E. 679); or included the damage on totally destroyed goods, such question not having been submitted to them (Fire Ass'n v. Colgin [Tex. Civ. App.] 33 S. W. 1004). And in the Providence Washington Ins. Co. Case it was further held that it was immaterial that the improper basis was adopted in good faith. But where appraisers instructed to "arrive at the damage actually caused by said fire" reported that they considered the several elements which tended to measure the amount of the loss, and "other causes," the phrase "other causes" was construed to mean "such causes as might tend to fix the full amount of such loss, and aid them in making an award equivalent to the damages sustained" (Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498). And in Ætna Fire Ins. Co. v. Davis, 21 Ky. Law Rep. 1456, 55 S. W. 705, it was held that the award could not be disturbed by reason of the fact that the arbitrators considered that which was not a proper element of damage; as, that the knowledge of the public that the goods had been in a fire would affect their value.

Since a stipulation providing that the appraisers shall estimate "the loss, stating separately sound value and damage," looks to an appraisement in case of total as well as partial loss, an award based upon the value of property considered as totally destroyed is valid.

Williamson v. Liverpool & L. & G. Ins. Co., 122 Fed. 59, 58 C. C. A. 241; Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691.

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(I) Giving of notice and taking of testimony.

A refusal by the appraisers to give insured an opportunity to present to them the facts as to his loss renders the award invalid.

Redner v. New York Fire Ins. Co., 92 Minn. 306, 99 N. W. 886; Phœnix Ins. Co. v. Moore (Tex. Civ. App.) 46 S. W. 1131; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252. In the Redner Case it was further decided that a refusal to hear any evidence was sufficient to justify the court in setting aside the award, without a further showing that the evidence offered was material.

And it has been held that a mere failure to give insured notice of the meeting, so as to permit him to introduce his evidence, would have the same effect.

Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395; Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691; Chenowith v. Phœnix Ins. Co., 12 Ky. Law Rep. 232; Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16. In connection with the Christianson Case, see the earlier Minnesota case of Schreiber v. German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708, where special emphasis was placed on the fact that the viewing appraisers were all appointed by the company.

The decision in the Christianson Case was based upon the theory that the appraisers are somewhat in the nature of a court. But it should be noted that, as a matter of fact, the controversy was of such a nature that evidence was required for its determination. And in the cases cited from other jurisdictions the decisions were based entirely on the argument that since, under the circumstances, evidence was required in order to arrive at a correct conclusion, insured should have an opportunity to present his side of the case. This theory was also the foundation of the decision in Phœnix Ins. Co. v. Romeis, 15 Ohio Cir. Ct. R. 697, 8 O. C. D. 633, where it was held that an appraisal of a stock of goods based entirely upon an inspection of the part remaining was invalid, where it further appeared that a portion of the goods had been entirely destroyed. And that the insured would be entitled to notice, where evidence was necessary, was the doctrine of the earlier New York cases.

Linde v. Republic Fire Ins. Co., 50 N. Y. Super. Ct. 362; Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 69 N. Y. Supp. 344. And in Schmitt Bros. v. Boston Ins. Co., 82 App. Div. 234, 81 N. Y. Supp. 767, where it appeared that some of the goods had been entirely destroyed, it was held that an award in a lump sum, and made after only a casual examination, was not binding.

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But in a later New York case, decided without reference to the earlier cases, it was held that a failure to give insured notice of the meetings would not, in the absence of bad faith, affect the validity of the award. The court argued that, since the appraiser appointed by insured was in a certain sense the insured's representative, it must be presumed that such appraiser would have given the insured a hearing had any been necessary.

Townsend v. Greenwich Ins. Co., 86 App. Div. 323, 83 N. Y. Supp. 909, affirming 78 N. Y. Supp. 897, 39 Misc. Rep. 87, and affirmed without opinion 71 N. E. 1140, 178 N. Y. 634.

It should, however, be noted that it appeared in the Townsend Case that the property insured was a building, the value of which, it might be argued, could be readily and fairly determined by expert appraisers without any evidence or statements by insured. And it has been held that where this is the case the award will be valid, though no evidence was taken.

Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356; Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458. In Michels v. Western Underwriters' Ass'n, 129 Mich. 417, 89 N. W. 56, the court refused to set aside an award, though insured had not been given an opportunity to show the appraisers the parts remaining of certain property. The circumstances were complicated, and the evidence somewhat conflicting, the court basing its decision apparently on the good faith of the appraisers, and the fact that they had ample opportunity to make a full investigation by themselves.

An umpire in making his decision between the conflicting opinions of the appraisers is not governed by the same rules as to the taking of evidence as those that control the arbitrators or appraisers proper. And this is true though an award based on his decision, to be binding, must be signed also by one of the appraisers. Therefore, it has been held that an award was valid, though it was based on a finding by the umpire made after shutting himself up alone with the books and a few inadequate memoranda.

Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524. In a former report of the same litigation ([C. C.] 44 Fed. 151, 11 L. R. A. 623) it was pointed out that, considering his action as that of an arbitrator, the result must be different.

Nevertheless, the employment of an umpire is a personal trust, so as to render it improper for him to base his conclusions on facts reported to him by one of his employés (British America Assur. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426).

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There can, of course, be no objection to a lack of notice of meetings of the arbitrators, where the insured has notified his arbitrator that he will not attend, and wants nothing to do with it, and has refused the arbitrator's request to attend (Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458). Nor will an award be set aside on the ground of the refusal of the appraisers to hear material testimony, where it does not appear that the party objecting ever actually produced any witnesses. The mere announcement by insured of his willingness so to do is not sufficient.

Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498; Van Winkle v. Continental Fire Ins. Co. (W. Va.) 47 S. E. 82.

On the other hand, it has been held that the fact that an insured saw the appraisers on the street, but failed to ask to be heard, or to object to their proceeding without notice, did not constitute a waiver of notice of the time and place of the appraisement (Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395). Nor does the insured assume the consequences of such irregularities and misconduct on the part of a referee merely because it was known to him that such official was a professional referee on behalf of the interests of the company (Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16).

The doctrine that the appraisers need not hear evidence, when the facts can be ascertained otherwise, implies, of course, that it is competent for the appraisers to ascertain the loss from their own personal observation and knowledge. And even though it be considered incumbent on the appraisers to give the parties an opportunity to present their evidence, yet a reasonable latitude should be allowed the officials in the individual examination of the facts and circumstances surrounding the loss.

Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395; Christianson v. Norwich Union Fire Ins. Co., 84 Minn. 526, 88 N. W. 16; Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691. See, also, Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341; Springfield Fire & Marine Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315.

Nor is it essential that such information be obtained by them acting collectively. If one or more of the appraisers obtains knowledge of the facts, and lays it before the others, an award founded thereon will be valid. (Farrell v. German-American Ins. Co., 175

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Mass. 340, 56 N. E. 572). And even though the information obtained was not communicated to the other appraisers, yet, unless it further appear that the decision was influenced or the insured injured by such proceeding, the award will not be set aside (Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356). And since an appraiser must, to a certain extent, act as an expert, he has been held justified in obtaining the expert opinion or estimate of a third person, and basing his own judgment or opinion thereon (Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341).

(m) Inadequacy of award—Misconduct.

Inadequacy of the award, unless itself so gross as to furnish evidence of fraud or misconduct, will not justify the court in setting it aside without further evidence in that regard.

Robertson v. Lion Ins. Co. (C. C.) 73 Fed. 928; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524; Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; Strome v. London Assur. Corp., 20 App. Div. 571, 47 N. Y. Supp. 481, affirmed without opinion 162 N. Y. 627, 57 N. E. 1125; Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498; Van Winkle v. Continental Fire Ins. Co. (W. Va.) 47 S. E. 82.

In the Strome Case it was further pointed out that, even if inadequacy were sufficient to vitiate the award, it could not be proved by an offer of compromise.

And this is particularly so where the evidence of inadequacy is based upon reports of appraisers who were appointed by insured only, and who had not the same opportunities for investigation as the original appraisers.

Kentucky Chair Co. v. Rochester German Ins. Co., 20 Ky. Law Rep. 1571, 49 S. W. 780; Michels v. Western Underwriters' Ass'n, 129 Mich. 417, 89 N. W. 56.

But inadequacy of the award is a circumstance which, taken in connection with other evidence, may show that the arbitration or appraisal has not been fairly conducted, and so justify a release from its binding effect.

Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875; Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401; Glover v. Rochester-German Ins. Co.,

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11 Wash. 143, 39 Pac. 380. See, also, Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, affirming 16 N. Y. Supp. 639, 62 Hun, 619.

An award, though final on its face, may be impeached by evidence that the signature of insured's appraiser thereto was secured by false representations of an adjuster that additional items of loss might be subsequently added. Nor can such an award be sustained as to companies whose adjusters were acting in concert with the adjuster who made the representation, and who were present at the time thereof. (Herndon v. Imperial Fire Ins. Co., 110 N. C. 279, 14 S. E. 742.) And where the appraisers have made an award, and it has been approved by the insured, they cannot afterwards make an additional award, in the absence of a special agreement therefor (Eddy v. London Assur. Corp., 65 Hun, 307, 20 N. Y. Supp. 216, judgment affirmed 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686). But arbitrators need not reveal their estimate of loss upon the various articles as they fix upon the same, but may defer the giving of such information until the award is made (Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498).

Evidence that the agents of the defendant hurried up the arbitration proceedings and furnished the arbitrators with a pitcher of lemonade, and that the arbitrators and the agent avoided the insured till after the award, is not sufficient evidence of fraud or misconduct to avoid the award (Liverpool & L. & G. Ins. Co. v. Goehring, 99 Pa. 13). But it is proper for insured to allege that the company apparently agreed to arbitrate the loss, but failed and refused to meet the arbitrators at times set therefor by plaintiff, in order to introduce evidence to show bad faith on the part of defendant (Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401).

A delay of over four months in the completion of the award, from the time of the selection of arbitrators, has been held so unreasonable as to render the award invalid (Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458).

(n) Necessity of substantial damage by misconduct or fraud.

It was said in Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, that, where an appraiser was shown to have not been disinterested, an award would be set aside which was "grossly below the actual loss sustained." But in subsequent cases the Su-

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preme Court has interpreted this as meaning only that under such circumstances a "substantial" difference should be shown before the award should be set aside.

Kaiser v. Hamburg-Bremen Fire Ins. Co., 69 N. Y. Supp. 344, 59 App. Div. 525, affirmed without opinion 172 N. Y. 663, 65 N. E. 1118 (the difference between $3,930 and $3,031, being held sufficient); New York Mut. Savings & Loan Ass'n v. Manchester Fire Ins. Co., 87 N. Y. Supp. 1075, 94 App. Div. 104 (the difference between $1,300 and $1,032 being held substantial).

And it has been held that insured could not complain where an award reached by adding the estimate of the two appraisers and of the umpire, and dividing the result by three, was the same as it would have been had it been based on the estimate of the umpire alone (Ætna Fire Ins. Co. v. Davis, 21 Ky. Law Rep. 1456, 55 S. W. 705). But in Insurance Co. of North America v. Hegewald, 161 Ind. 631, 66 N. E. 902, conduct of a party to an arbitration, which had a tendency to improperly affect the decision of one or more of the arbitrators in the matter in issue, was considered sufficient to entitle the other party to have the award set aside, irrespective of whether such conduct actually produced any harmful results to the complaining party.

(o) Fraud and mistake of insured.

An award may be set aside by insurer either for fraud by means of which the award was secured (Bulkley v. Starr, 2 Day [Conn.] 552), or for fraud by which the insurer was induced to agree that the arbitrators should make a conclusive award of a certain amount (Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633). Such fraud need not consist in active misrepresentation. Thus, in the Stockton Case it was held that the award would be set aside where insured's bookkeeper, after having been instructed to show all the books, withheld one of them containing an estimate as to the cost of the destroyed articles. But new evidence having been introduced, it was held, on a subsequent appeal, that a finding could be sustained to the effect that there had been in fact no concealment of the book (Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 121 Cal. 167, 53 Pac. 565).

It was further held on the subsequent appeal that a misrepresentation by insured as to the value of the destroyed property could not be shown by testimony proving the value of other machines of the same pattern.

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An award based upon an inventory furnished by insured, and certified by him to be correct, cannot be set aside by insured for a mistake in such inventory (Kentucky Chair Co. v. Rochester German Ins. Co., 20 Ky. Law Rep. 1571, 49 S. W. 780).

(p) Actions to defeat award.

Under the common-law system of procedure, an award of appraisers or arbitrators cannot be impeached or set aside except in a separate equity action brought for that purpose.

Robertson v. Scottish Union & Nat. Ins. Co. (C. C.) 68 Fed. 173; Georgia Home Ins. Co. v. Kline, 114 Ala. 366, 21 South. 958. In the Kline Case it was further held that the rule would not be relaxed to admit proof that the arbitrators improperly refused to include in their award the property totally destroyed.

But under the code system, the award, if pleaded as a defense, may be attacked by the reply.

Sullivan v. Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146, reversing judgment 61 N. Y. Supp. 1149, 45 App. Div. 631; Phœnix Ins. Co. v. Romeis, 15 Ohio Cir. Ct. R. 697; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436.

In an action on the policy for the amount of the award, misconduct of the arbitrators cannot be pleaded in bar (Germania Fire Ins. Co. v. Warner, 13 Ind. App. 466, 41 N. E. 969).

The question of the validity of an award of appraisers cannot be raised, in an action to recover the amount of the loss, by a demurrer to the petition which alleges the regularity of all the proceedings (Langan v. Palatine Ins. Co. [C. C.] 93 Fed. 730).

A demurrer to the answer, in which defendant sets up fraud, cannot be considered as admitting the truth of such allegations as do not constitute a good defense (Germania Fire Ins. Co. v. Warner, 13 Ind. App. 466, 41 N. E. 969).

And under systems of pleading in which a reply is necessary only where there is a counterclaim or when required by the court, the award may be attacked without any reply.

Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252; Sullivan v. Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146, reversing judgment 61 N. Y. Supp. 1149, 45 App. Div. 631, contains a dictum to the same effect. But in a later case the New York Supreme Court refused to follow such suggestion (Townsend v. Greenwich Ins. Co., 78 N. Y. Supp. 897, 39 Misc. Rep. 87, affirmed on other grounds 83 N. Y. Supp. 909, 86 App. Div. 323, which in turn was affirmed without opinion 178 N. Y. 634, 71 N. E. 1140).

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But where the award is made an absolute condition precedent, and there has been an award, it would seem that the attack on the award should be pleaded in the complaint (Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975). So, also, an equity action may be maintained by insured to set aside an award, and, if successful in that regard, for a recovery on the policy of the actual loss sustained.

Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395; Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; Sullivan v. Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146, reversing judgment 61 N. Y. Supp. 1149, 45 App. Div. 631; New York Mut. Savings & Loan Ass'n v. Manchester Fire Ins. Co., 87 N. Y. Supp. 1075, 94 App. Div. 104.

And under a statute [4] providing that the court may allow plaintiff any judgment consistent with the case made by the complaint and embraced within the issues, it has been held that in such an action, even though the award should be found valid, a decree for the amount of the award might nevertheless be rendered (Maher v. Home Ins. Co., 78 N. Y. Supp. 44, 75 App. Div. 226).

But this rule does not apply where the action was instituted prior to the time when the award became payable by the terms of the policy (Bellinger v. German Ins. Co., 88 N. Y. Supp. 1020, 95 App. Div. 262). And in Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498, it was held that, since equity only obtained jurisdiction on the ground of fraud, it could not, after upholding the award as fair and impartial, render a decree for the loss of property omitted from the submission.

The fact that an award made by arbitrators appointed under a provision of an insurance policy to appraise the amount of a loss thereunder, was not made under oath, as provided in the policy, may be set up to defeat the award in a law action, and therefor affords no ground to the insurer for a suit in equity to set aside the award (Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170). And it has been held that, since fraud in procuring an award may be pleaded as a defense in an action based on an agreement by the company to pay the sum fixed, therefore such fraud will not support an equity action to restrain law actions on the agreement to pay.

Manchester Fire Assur. Co. v. Stockton Combined Harvester & Agricultural Works (C. C.) 38 Fed. 378 (based on Rev. St. U. S. § 723 [U.

[4] N. Y. Code Civ. Proc. § 1207.

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S. Comp. St. 1901, p. 583]). See, in connection, Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633, where the defense was successfully interposed, and 121 Cal. 167, 53 Pac. 565, where the defense was held not sustained.

But, on the other hand, equity actions or cross-bills have been sustained on the ground that there was no adequate remedy at law for misconduct or fraud in making the award of the appraisers.

Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C.) 44 Fed. 151, 11 L. R. A. 623; Fire Ass'n v. Allesina (Or.) 77 Pac. 123 (decided under B. & C. Comp. § 391, permitting a cross-bill where defendant is entitled to equitable relief). The court in the Bonner Case also held that the federal courts could not be deprived of their equitable jurisdiction by Code Civ. Proc. Mont. §§ 459–468, looking to the vacation of awards by motion.

Where the jurisdiction of the court depends on the amount in controversy, and the total award is greater than the sum fixed as giving jurisdiction, the action to set aside the award can be maintained by all the companies interested, though the proportionate liability of some of them is less than the jurisdictional amount. The controversy in such case is single, and the amount of the award is the amount in controversy.

Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524, modifying in this regard the former decision reported in (C. C.) 44 Fed. 151, 11 L. R. A. 623, which was based on the fact that it was not shown that the insured might not have held any one of the companies to the full extent of its policy.

It was also decided in the earlier decision that such a bill brought by all the companies was not multifarious. So, also, in Bulkley v. Starr, 2 Day (Conn.) 552, it was held that several underwriters of the same policy might join in a bill in chancery against the insured to set aside an award determining their liability to him.

Every reasonable presumption will be indulged to sustain an award.

Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170; Hall v. Western Assur. Co., 133 Ala. 637, 32 South. 257; Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; German-American Ins. Co. v. Johnson, 4 Kan. App. 357, 45 Pac. 972; Liverpool & L. & G. Ins. Co. v. Goehring, 99 Pa. 13. In Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932, it was, however, held that while every presumption must be made against fraud, yet innocent misconduct on the part of the arbitrators need only be proved by a preponderance of the evidence.

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In Phœnix Ins. Co. v. Romeis, 15 Ohio Cir. Ct. R. 697, it was held that, where the reply attacked an award set up in the answer, the court might allow the proof to follow the order of the issues made by the pleadings, but that it would not be error to require plaintiff, in order to attack the award, to offer his evidence bearing upon that point in connection with his other evidence in making out his case. And in the same case it was further held that certain statements concerning an appraisement made by one of the appraisers after his discharge were not admissible to impeach the appraisement.

There is no inconsistency in giving an instruction stating what might be recovered if facts be found showing a valid award, and one stating what might be recovered if the facts showed there was no valid award; the evidence being conflicting as to validity of award (Caledonian Fire Ins. Co. v. Traub, 86 Md. 86, 37 Atl. 782).

Grounds for invalidating the award cannot be urged on appeal, which were not set forth in the original pleadings, or added by way of amendment after the facts were brought out in the evidence (Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524). And the court, on a motion for a new trial, is entitled to disregard parol evidence erroneously admitted varying the written contract for the appointment of appraisers.

Townsend v. Greenwich Ins. Co., 83 N. Y. Supp. 909, 86 App. Div. 323, affirming 78 N. Y. Supp. 897, 39 Misc. Rep. 87, and affirmed without opinion 178 N. Y. 634, 71 N. E. 1140.

(q) Remuneration and liability of appraisers.

The "referees," as the arbitrators or appraisers are termed in some policies, are not official referees, and hence their compensation is not regulated by a statute [5] fixing the pay of such officials. But in the absence of express stipulations a joint agreement will be implied, that each party shall compensate them for one-half the reasonable value of the services. (Alden v. Christianson, 83 Minn. 21, 85 N. W. 824.) And where several insurance companies employ an appraiser to represent their interests in an appraisement, the employment will be presumed to be joint, and a payment of the appraiser's compensation by one of the companies inures to the benefit of all (Muench v. Globe Fire Ins. Co. [Com. Pl.] 8 Misc. Rep. 328, 28 N. Y. Supp. 569). But even though the agreement

[5] Gen. St. Minn. 1894, § 5572.

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between the insured and the company be considered as joint, yet a payment by the company of more than one-half the reasonable value of the services will not relieve the insured from his full liability, it being provided by statute [6] that a creditor of joint debtors may discharge any debtor without affecting the liability of the others (Alden v. Christianson, 83 Minn. 21, 85 N. W. 824).

It was further held in the Alden Case that a counterclaim by the insured, charging the referee, in general terms, with fraud and misconduct, without specifying particular acts, did not state a cause of action.

4. WAIVER OF ARBITRATION OR APPRAISAL.

(a) General rules—Parol waiver.
(b) Refusal to arbitrate—What constitutes a refusal.
(c) Circumstances justifying refusal—Sufficiency of demand by insured.
(d) Denial of liability—What constitutes denial.
(e) Same—Time and circumstances of denial.
(f) Demanding appraisement other than that specified.
(g) Failure to demand arbitration or appraisal.
(h) Acts inconsistent with intention to arbitrate.
(i) Appointment of prejudiced appraiser.
(j) Improper conduct during appraisement.
(k) Putting insured to trouble or expense after his refusal to arbitrate.
(l) Waiver of second arbitration after failure of first.
(m) Pleading and practice.

(a) General rules—Parol waiver.

It is a general rule that **the insured will be released from compliance with a contract to submit the loss under a fire policy to arbitration, as a condition precedent to bringing suit upon the policy, by any conduct on the part of the company which has the effect of preventing an appraisal from being had or an award from being made.** Under such circumstances, action may be at once commenced on the policy.

Such is the rule asserted in Hamilton's Ex'rs v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, 22 U. S. App. 164; British America Assur. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426; Summerfield v. North British & Mercantile Ins. Co. (C. C.) 62 Fed. 249; Western Assur. Co. v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48; Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep.

[6] Gen. St. Minn. 1894, § 5167.

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105, affirming 49 Ill. App. 388; Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149; Millaudon v. Atlantic Ins. Co., 8 La. 557; Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623; Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311; Fowble v. Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Savage v. Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591; Western Horse & Cattle Ins. Co. v. Putnam, 20 Neb. 331, 30 N. W. 246; Braddy v. New York Bowery Fire Ins. Co., 115 N. C. 354, 20 S. E. 477; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Stephens v. Union Assur. Soc., 16 Utah, 22, 50 Pac. 626, 67 Am. St. Rep. 595; Pencil v. Home Ins. Co., 3 Wash. St. 485, 28 Pac. 1031.

And when a waiver has been once so established, the provisions of the policy cannot be again brought into operation by a demand from the insured.

Continental Ins. Co. v. Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720; Continental Ins. Co. v. Vallandingham & Gentry, 76 S. W. 22, 25 Ky. Law Rep. 468, 116 Ky. 287; Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, 51 N. W. 123; Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686; Uhrig v. Williamsburg City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436.

Nor will the fact that the insured, in ignorance of the acts of bad faith on the part of the company, took part in arbitration proceedings subsequent thereto, constitute a waiver of such right of action (Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, 51 N. W. 123).

Waiver will result from acts of the insurer's representatives, preventing or delaying arbitration, though the policy provides that no agent shall be held to have waived any of the conditions of the policy unless such waiver is indorsed thereon in writing. Such provision does not apply to conditions to be performed after the loss is incurred.

Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577. See, also, Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558.

So, also, a statement by the company that no waiver was intended has been held only a matter to go to the jury with the other evidence on the question of waiver (Davis v. Western Massachu-

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setts Ins. Co., 8 R. I. 277); and in Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, 51 N. W. 123, it was held that the jury might consider whether what was said by agents of other companies, acting in relation to the loss, was acquiesced in by defendant's adjuster, he having been present, and having made no objection thereto.

(b) Refusal to arbitrate—What constitutes a refusal.

Obviously, there is a waiver of arbitration by a direct refusal on the part of the company to so submit the matter.

Reference may be made to Gauche v. London & Lancashire Ins. Co. (C. C.) 10 Fed. 347; Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Western Assur. Co. v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48; Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12, affirming 90 Ill. App. 280; Milwaukee Mechanics' Ins. Co. v. Schallman, 90 Ill. App. 280; Continental Ins. Co. v. Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720; Dunn v. Springfield Fire & Marine Ins. Co., 33 South. 585, 109 La. 520; Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005; Johnson v. Phœnix Ins. Co., 69 Mo. App. 226; McNees v. Southern Ins. Co., 69 Mo. App. 232. See, also, Schouweiler v. Merchants' Mut. Ins. Ass'n, 11 S. D. 401, 78 N. W. 356; Stephens v. Union Assur. Soc., 16 Utah, 22, 50 Pac. 626, 67 Am. St. Rep. 595.

A failure of the company to respond to insured's demand for arbitration has been held in itself to constitute a refusal to arbitrate.

Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12, affirming 90 Ill. App. 280; Silver v. Western Assur. Co., 54 N. Y. Supp. 27, 33 App. Div. 450.

In McDowell v. Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665, effect was given to a statute [1] declaring it to be a waiver for an insurance company to fail to act within ten days after a written request for arbitration by the insured.

Failure of an insurer, after demanding an appraisement of a fire loss at a given time and place, to appear at the time and place designated, has been held a waiver of the right of appraisement (Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W.

[1] St. 1891, c. 291.

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239), as has also a refusal of the insurer to arbitrate, except on terms other than those specified in the policy.

Summerfield v. North British & Mercantile Ins. Co. (C. C.) 62 Fed. 249; George Dee & Sons Co. v. Key City Fire Ins. Co., 104 Iowa, 167, 73 N. W. 594.

But in Astrich v. German-American Ins. Co. (C. C.) 128 Fed. 477, a waiver was held not to arise from a statement by one of the adjusters, who was present when a preliminary examination of the goods was being made, that the appraisement would be useless without a statement from the insured as to the amount of the goods entirely destroyed, which insured declined to give. At most, such a statement was a mere expression of opinion.

(c) Circumstances justifying refusal—Sufficiency of demand by insured.

A refusal of the company to arbitrate will amount to a waiver, though at the time of the demand by the insured there is pending an action which has been commenced by the insured without making any demand for arbitration.

Johnson v. Phœnix Ins. Co., 69 Mo. App. 226; McNees v. Southern Ins. Co., 69 Mo. App. 232. Note that the actions pending at the time of the unsuccessful demand were dismissed and new ones instituted.

A refusal will have the same result, though there is pending an offer to compromise (Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 380, 51 N. W. 123), or though the insured for a good reason has refused to let the former arbitration proceed (Davis v. Guardian Assur. Co., 34 N. Y. Supp. 332, 87 Hun, 414), or even though he has unjustifiably, up to the time of the demand, refused to submit to arbitration (Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005). Neither can a refusal be justified on the ground that the person nominated by the insured had acted in the same capacity for other persons on similar occasions. Such fact did not necessarily render him incompetent for the position (Meyerson v. Hartford Fire Ins. Co., 39 N. Y. Supp. 329, 17 Misc. Rep. 121, affirming 16 Misc. Rep. 286, 38 N. Y. Supp. 112). Nor can the company refuse merely because a portion of the salvage has been sold, if such sale has been made with the knowledge of the company's adjuster, and there is enough remaining to enable the company to exercise its option in relation to the purchase of salvage

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at the appraisal value [2] (Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787).

The company may, however, refuse to accede to a demand delayed until arbitration has become impracticable.

Johnson v. Phœnix Ins. Co., 69 Mo. App. 226; McNees v. Southern Ins. Co., 69 Mo. App. 232. See, also, Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005.

A demand by the insured for appraisal after the damaged property has been sold and scattered by him will not affect the company's rights (Hamilton's Ex'rs v. Royal Ins. Co., 4 Ohio S. & C. P. Dec. 437). Nor can a waiver be imputed to the company for its neglect or refusal to take further steps where its prior demand has been refused, and the insured is evidently endeavoring to avoid arbitration (Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805). The demand may be made by the insured upon any duly authorized agent (Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12, affirming 90 Ill. App. 280), and a local agent who solicits insurance, collects premiums, and issues policies will be a proper person on whom to serve such notice (Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408). A stipulation that the request shall be in writing may itself be waived, and a statement that no arbitration is required, made in response to such a verbal demand, will so operate (Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558).

(d) Denial of liability—What constitutes denial.

A denial by the company of all liability under the policy will render inoperative the provisions as to arbitration. The company cannot insist that the insured, as a condition precedent to maintaining an action, should have instituted an arbitration to ascertain the amount of the loss, as to which it was at the time denying liability.

Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408, affirming 40 Ill. App. 64; Glens Falls Ins. Co. v. Hite, 83 Ill. App. 549; Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Millaudon v. Atlantic Ins. Co., 8 La. 557; Lewis Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658, 21 South. 736; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598;

[2] As to the effect in general on insured's right of action, of a sale of salvage, see post, p. 3833.

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Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co., 171 Mass. 433, 50 N. E. 943; Denton v. Farmers' Mut. Fire Ins. Co., 120 Mich. 690, 79 N. W. 929; Hamberg v. St. Paul Fire & Marine Ins. Co., 68 Minn. 335, 71 N. W. 388; Dautel v. Pennsylvania Fire Ins. Co., 65 Mo. App. 44; Thomas v. Lebanon Town Mut. Fire Ins. Co., 78 Mo. App. 268; Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311; Seigle v. Badger Lumber Co., 106 Mo. App. 110, 80 S. W. 4; Savage v. Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591; Western Horse & Cattle Ins. Co. v. Putnam, 20 Neb. 331, 30 N. W. 246; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Yendel v. Western Assur. Co., 47 N. Y. Supp. 141, 21 Misc. Rep. 348; Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 73 S. W. 558; Stoddard v. Cambridge Mut. Fire Ins. Co., 75 Vt. 253, 54 Atl. 284; Pencil v. Home Ins. Co., 3 Wash. St. 485, 28 Pac. 1031; Hennessy v. Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892. See, also, Farnum v. Phenix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846; Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; and Lasher v. Northwestern Nat. Ins. Co., 18 Hun (N. Y.) 98, where it was also noted that there was no disagreement as to the amount of the loss.

A denial of liability, in order to operate as a waiver, need not be absolute, nor couched in express terms. Thus, where the company, on receipt of proofs of loss, admitted its liability, except for goods which it claimed were not covered by the policy, without making any reference to arbitration, it was held that it could not afterwards defend an action on the ground of noncompliance with the arbitration clause (Westfield Cigar Co. v. Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026). And where the insurance was against loss of cattle by lightning, a denial that the cattle were so killed was held as effective of a denial of the validity of the contract (White v. Farmers' Mut. Fire Ins. Co., 97 Mo. App. 590, 71 S. W. 707). Likewise, a demand for further proofs, coupled with refusal to pay until they were furnished, has been held to amount to a waiver (Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290), as has also an objection to the proofs, together with a denial that the loss was honest, and a declaration that nothing would be given the insured that he could not demand under a strict construction of the policy (Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408, affirming 40 Ill. App. 64). But in Phœnix Ins. Co. v. Lorton & Co., 109 Ill. App. 63, a declaration that, if the insured got the full amount of his claim, he would have to get it in court, though accompanied by delay and quibbling on the

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part of the company over the proofs of loss, was deemed not to constitute a waiver of the provision as to appraisal.

A mere failure to admit liability is not a denial thereof.

Western Assur. Co. of Toronto v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48; Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630.

But in Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co., 171 Mass. 433, 50 N. E. 943, where the question of liability was reserved until further information was furnished, and where, after such information had been given, and a demand for payment made, the company still remained silent, and subsequently denied liability, the question was held to be one for the jury. And in Dautel v. Pennsylvania Fire Ins. Co., 65 Mo. App. 44, a proposition to pay part of the loss was considered as an admission of liability pro tanto, and a withdrawal of the proposition as an equivalent of an absolute denial of liability.

The case of Denton v. Farmers' Mut. Fire Ins. Co., 120 Mich. 690, 79 N. W. 929, holds that though the board of auditors of a mutual fire insurance company could not, under the contract, make a decision as to the liability of the company which would be binding on the insured, yet their decision that the company was not liable would be effective as a denial of liability, and operate as a waiver of the further requirement for arbitration.

(e) Same—Time and circumstances of denial.

The weight of authority supports the proposition that **a denial of liability on other grounds, made for the first time in an action on the policy, will not estop the insurer from relying on the fact that there has been no arbitration.**

Kahnweiler v. Phœnix Ins. Co. (C. C.) 57 Fed. 562; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323; Yendel v. Western Assur. Co., 47 N. Y. Supp. 141, 21 Misc. Rep. 348. See, also, Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805, where the same holding is made under a statute [3] authorizing a defendant to set forth in his answer as many grounds of defense as he may have.

Nor under this view of the case will a waiver arise from a denial of liability in a previous action on the same policy (Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757).

[3] Rev. St. Ohio, § 5071.

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The doctrine that a waiver will arise from a denial of liability in an answer has, however, been adopted in at least one case.

Lewis Baillie & Co. v. Western Assur. Co., 21 South. 736, 49 La. Ann. 658. And see, also, German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406, and Home Fire Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521—cases in which it is difficult to tell whether the denial occurred before or at the time of the trial.

A denial of liability has been held a waiver, though the company expressly demanded arbitration.

Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; Home Fire Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521.

So, also, it has been held that a waiver will arise though at the time of the denial the amount of the loss was disputed (Sands v. Dwelling House Ins. Co., 26 Pittsb. Leg. J. [N. S.] 318), or though any intention to waive any condition was denied (Lang v. Eagle Fire Ins. Co., 42 N. Y. Supp. 539, 12 App. Div. 39).

But in Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805, reversing 10 O. C. D. 186, it was held that no waiver would arise unless the denial was made under such circumstances as would render the appraisal fruitless, or justify the insured in believing that an attempt on his part to perform the condition would be of no avail.

Though a denial occurring after a refusal of insured to sign a proper submission has been held not to amount to waiver (Pioneer Mfg. Co. v. Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057), yet in Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, the insufficiency of the insured's demand for arbitration was held to afford no excuse for a refusal by the company to arbitrate, which was based on the ground that there was no liability under the policy.

(f) Demanding appraisement other than that specified.

An insurance company, by entering into an agreement for submission to arbitration of the amount of loss, materially different in its terms from that provided in the policy, waives the right to demand an appraisement pursuant to the terms of the policy.

British America Assur. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426; Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149;

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Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341; Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502; Schouweiler v. Merchants' Mut. Ins. Ass'n, 11 S. D. 401, 78 N. W. 356; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436.

Under this rule a submission to appraisal before there has been any attempt at agreement has been held to waive the right to the appraisal provided for in the policy, which was only to be used in case the parties failed to agree.

Harrison v. German-American Fire Ins. Co. (C. C.) 67 Fed. 577; British America Assur. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426.

So, also, a submission providing for the selection of an umpire before there has been any appraisement has been considered a waiver of the policy appraisement in which the umpire was only to be selected in case the parties failed to agree (Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149). But the mere fact that all of several companies interested have demanded appraisal under their several policies, and that each selected the same appraiser, will not justify a presumption that the agreement was outside the provisions of the respective policies, so as to waive the policy requirements (Westenhaver v. German-American Fire Ins. Co., 113 Iowa, 726, 84 N. W. 717).

(g) Failure to demand arbitration or appraisal.

Though, under the terms of the policy, it may not be necessary for the insurer to make a demand in writing that the arbitration shall be a condition precedent, yet if it has so acted as to lead the insured to believe that it will send him a form of submission, the insured need do nothing further, and, if the form is not received within a reasonable time, may commence action without any appraisement.

Reference may be made to the opinion of Judge Taft in Insurance Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, approved in Hamilton's Ex'rs v. Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530, 22 U. S. App. 164.

But it would seem evident that mere silence of the company can affect its right to arbitration only in case the demand itself is necessary in order to render the arbitration a condition precedent. A holding that the company has lost any rights by silence presup-

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poses, as is pointed out in National Bldg. & Loan Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21, a prior holding that the demand was a necessary element of the procedure. So, also, a holding that a demand by the company was not necessary in order to bring the arbitration condition into operation has been considered a sufficient reason for denying a claim of "waiver by silence or delay."

Smith v. California Ins. Co., 87 Me. 190, 32 Atl. 872; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

It is, however, suggested in Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558, that the decision in that case, that insured had no right of action up to the time of his unsuccessful demand for arbitration, was not necessarily inconsistent with other cases deciding that, in the absence of a demand by the company, the action could be maintained, though there had been no demand by insured, since such other cases may have been decided on the ground of "waiver" by failure of the company to make demand. But in the Hutchinson Case itself, it appeared that there had been a lapse of nearly a year, without any demand by the company, between the fire and the insured's unsuccessful demand, and the affirmation of the judgment rested entirely on the theory that insured could not have maintained his action prior to such unsuccessful demand. Furthermore, the cases distinguished, while they occasionally use the word "waiver," seem in reality decided rather on the theory that arbitration was not a condition precedent unless demanded. In Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, the policy provided for an appraisal in case of damaged goods, and that "until such proofs, declarations and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable." There was a further provision for an arbitration in case of disagreement, and the court held that the provision as to appraisal had to do merely with proofs of loss, and that no question was raised by the pleadings in relation thereto. The court noted, however—apparently as further disposing of any question as to such appraisal—that proofs were furnished, with a request for information as to any corrections, and that no objection was made thereto. In Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 258, 8 C. C. A. 114, Judge Swan held that as to the provision making an award a part of the proofs, and making satisfactory proofs a con-

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dition precedent, the failure of the company to object to the absence of an award would operate as a waiver. The case, however, really turned on the question as to whether the arbitration was a condition precedent under the further provisions of the policy, and as to whether, if such, it had been waived by certain positive acts of the company.

There are, however, two Texas cases which hold that, where the award or appraisal is to be part of the proofs of loss, a retention by the company of the proofs, without objection to the absence of the award therefrom, will amount to a waiver of the appraisal; and this, apparently, though a demand by the company would not otherwise be considered necessary.

American Fire Ins. Co. v. Stuart (Tex. Civ. App.) 38 S. W. 395; Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

But aside from the Building & Loan Ass'n Case, and from those considering the award a part of the proofs of loss, there are believed to be no cases in which a decision that arbitration is a condition precedent to the right of action, without any demand by the company, is considered as compatible with the holding that such condition may be waived by a failure of the company to make a demand. There are cases, however—among others, those cited by the Massachusetts court—in which a decision that, though there has been no arbitration or demand by the insured, the action can nevertheless be maintained unless there has been a demand by the company, has been treated, partially, at least, as founded on a "waiver" of arbitration by failing to demand, rather than as based on a failure of the arbitration to become a condition precedent owing to the absence of any demand by the company.[4]

Reference may be made to Kahnweiler v. Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485, 32 U. S. App. 230, reversing (C. C.) 57 Fed. 562; German-American Ins. Co. v. Steiger, 109 Ill. 254; Garretson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa, 17, 86 N. W. 32; Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597; Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; Same v. Union Ins. Co., 63 Mich. 638, 30 N. W. 352; Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29, 20 Atl. 716; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

[4] As to necessity, sufficiency, and time of demand to render arbitration a condition precedent, see ante, p. 3615.

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(h) Acts inconsistent with intention to arbitrate.

In Hobson v. Queen Ins. Co., 2 Ohio N. P. 296, 2 Ohio S. & C. P. Dec. 475, where the policy required the insured to assort the property and make an inventory thereof, and further provided that, if he should remove it, the policy should be forfeited, it was held that the act of the company in taking the property out of the possession and control of the insured, and storing it at its own expense, constituted a waiver of submission of the loss to appraisers. So, also, where the policy provided for arbitration on the request of either party, and also gave to the company the option to "repair, rebuild or replace" the insured building, which option was exercised by the company, though in a manner unsatisfactory to the insured, it was held that the company, by exercising its right to repair, had precluded itself from a right to insist on arbitration, and that plaintiff was entitled to sue (Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686).

The same principle has been applied to a marine policy; and where the insurers therein took possession of a ship, and repaired her, it was held that they could not set up as a defense that there had been no arbitration (Cobb v. New England Mut. Marine Ins. Co., 6 Gray [Mass.] 192).

(i) Appointment of prejudiced appraiser.

The appointment by the company of an appraiser who was partial and interested, instead of a disinterested one, will justify a refusal by the insured to submit the loss to arbitration.

Western Assur. Co. v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48; Continental Ins. Co. v. Vallandingham & Gentry, 25 Ky. Law Rep. 468, 76 S. W. 22, 116 Ky. 287.

And where the insured informed the company that she objected to the appraiser appointed by the company, stating her grounds of objection, and the company made no response, and suit was brought 21 days thereafter, it was held that the question whether the company, by its delay, waived the appraisal, was for the jury (McManus v. Western Assur. Co., 60 N. Y. Supp. 1143, 43 App. Div. 550, affirming 48 N. Y. Supp. 820, 22 Misc. Rep. 269). But in Western Assur. Co. v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48, it was held that the insured must prove that the appraiser was, in fact, interested, a bare claim to that effect not being sufficient.

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(j) Improper conduct during appraisement.

An unauthorized interference by the company, whereby the selection of an umpire by the appraisers is prevented, will amount to a waiver of the appraisement.

Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; Powers Dry Goods Co. v. Imperial Fire Ins. Co. of London, 48 Minn. 380, 51 N. W. 123.

And in Lancashire Ins. Co. v. Murphy, 10 Kan. App. 251, 62 Pac. 729, where it appeared that the company had written insured that it would notify her of the time its representative would meet hers to fix the loss, it was held that it was proper to permit plaintiff to testify that she had never been so notified.

Where the appraiser appointed by the company, instead of acting in a disinterested manner, acts as a partisan, the company will be chargeable with the results thereof. Thus, where he uses his position to delay action by objecting without good reason to those named by the other appraiser as umpire, and by himself suggesting no names except those of persons residing at a distance, such action will amount to a waiver, and relieve the insured from a further prosecution of arbitration.

Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105, affirming 49 Ill. App. 388; Harrison v. Hartford Fire Ins. Co., 112 Iowa, 77, 83 N. W. 820; Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623; McCullough v. Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Fowble v. Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844, affirming 56 Hun, 642, 9 N. Y. Supp. 350; Braddy v. New York Bowery Fire Ins. Co., 115 N. C. 354, 20 S. E. 477; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

Likewise, a suggestion by the company's appraiser to the appraiser appointed by the insured, that by a low appraisement they might get other work from the company, has been held to justify the insured in refusing to allow the appraisal to proceed (Davis v. Guardian Assur. Co., 34 N. Y. Supp. 332, 87 Hun, 414). But where it appears that the insurer's appraiser is acting in good faith, a waiver cannot be inferred from the mere fact that the persons sug-

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gested by him as umpire do not reside in the immediate vicinity of the loss.

Kersey v. Phœnix Ins. Co. (Mich.) 97 N. W. 57; Vernon Ins. & Trust Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. 717.

Though it was held in British America Ins. Co. v. Darragh, 128 Fed. 890, 63 C. C. A. 426, that a failure of the company's arbitrator to act with reasonable dispatch would relieve the insured from further prosecution of the arbitration, yet the effect of mere delay in the progress of the arbitration does not seem to be well settled. Thus, in Silver v. Western Assur. Co., 164 N. Y. 381, 58 N. E. 284, reversing 54 N. Y. Supp. 27, 33 App. Div. 450, it was pointed out that a delay of several days on the part of the company's appraiser would not operate as a waiver, where the insured's appraiser was even less active in the matter, and the insured gave no intimation to any one that expedition was desired for any reason. So, also, in Williams v. German Ins. Co., 86 N. Y. Supp. 98, 90 App. Div. 413, where it appeared that the appraisers had done nothing for two months, owing to the inability of the insured's appraiser to act sooner, it was held that the mere fact that the appraisers did not agree on an umpire at their first meeting did not justify the insured in the next day commencing action. An even stronger case for the insured was considered in Providence Washington Ins. Co. v. Wolf (Ind. App.) 72 N. E. 606. In that case it was held that a failure of the insurer to answer a telegram sent by the insured on the seventeenth day after the loss and the eighth day after the appointment of the appraiser, stating that his adjuster was at the place of fire at heavy expense, and asking the insurer to state when its appraiser would be there, was not a waiver of the rights of the insurer under the policy, so as to justify the insured in disposing of the property on the third day after sending the telegram. The basis of this decision, apparently, was that, since the policy provided that the insurer should have 60 days after ascertainment of the amount of the loss in which to make payment, it would have 60 days in which to investigate the amount of the loss according to the requirements of the policy.[5] And the court further held that the condition of the goods "at or since the fire did not determine the time within which defendant might investigate as to the amount of the damage. That

[5] As to time in which company must make demand in writing to render arbitration a condition precedent to action, see ante, p. 3621.

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was fixed by contract. Nor was the expense to which the parties were put to secure an appraisal material." Furthermore, the intent with which the company may have acted was considered entirely immaterial, so long as, in point of fact, it was acting within its contractual rights.

Where the evidence is not conclusive as to who was at fault, or as to whether the appraiser was acting in good faith, or as the representative of the company, the question should be left to the jury.

Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 103, affirming 49 Ill. App. 388; Fowble v. Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844, affirming 56 Hun, 642, 9 N. Y. Supp. 350.

(k) Putting insured to trouble or expense after his refusal to arbitrate.

In Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N. W. 502, it was held that though the insured, by a sale of the property, had rendered a compliance with the policy requirements impossible, yet a subsequent examination of the insured waived such "forfeiture." But where there were several policies, some insuring both merchandise and fixtures, and others insuring merchandise only, a conversation with one of the adjusters of the companies in interest after loss and after a sale of the merchandise, in which such adjuster requested plaintiff to furnish proofs of loss as to the fixtures and furniture, did not operate as a waiver of the breach of a policy insuring the merchandise only, though the request was complied with by the sending of such proof to all the insurers. Though the adjuster demanded proofs as to fixtures for all the companies, yet the insured must have known that the defendant company's policy had nothing to do with such property, and that the act of the adjuster as to it was entirely unauthorized. The insured was not, therefore, justified in believing that there was any intention to waive the forfeiture already accrued by the sale of the property (Astrich v. German-American Ins. Co., 131 Fed. 13, 65 C. C. A. 251).

(l) Waiver of second arbitration after failure of first.

A refusal of the insured to submit to a second arbitration, after a failure of the appraisers to agree, was held, in Michel v. American Cent. Ins. Co., 44 N. Y. Supp. 832, 17 App. Div. 87, not to have been unjustifiable, the company having been guilty of delay

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in attempting to secure the second arbitration, and having refused to waive the provision that the loss should not become due until 60 days after notice of the amount awarded. Also, the subsequent adjustment of the loss and a request, complied with by the insured, that the proofs be made out in such amount, has been held to waive the provision for appraisal (Manchester Fire Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231). And, of course, if the defendant refuses to act further after the disagreement of the arbitrators, the provision will be waived (Harrison v. German-American Fire Ins. Co. [C. C.] 67 Fed. 577).

Where the attention of the insurer has been called to facts invalidating the award, it may either demand a new appraisal, or stand on the validity of the award already rendered. And if it adopts the latter course it will amount to a waiver of its right to any further appraisal.

Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379; Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875, 98 N. W. 100; Lang v. Eagle Fire Co., 42 N. Y. Supp. 539, 12 App. Div. 39; Germania Ins. Co. v. Cincinnati P. B. & P. Packet Co., 6 Ohio N. P. 173, 7 Ohio S. & C. P. Dec. 571; American Fire Ins. Co. v. Bell (Tex. Civ. App.) 75 S. W. 319.

In Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, affirmed on rehearing 47 Pac. 885, the company was held chargeable with the knowledge of its appraiser, so that a waiver of a second appraisal arose from its insistence on the validity of the award, though in a correspondence with the insured it said it would submit to a new appraisal, if the first one should be found invalid. And the same rule applied though a demand for a new appraisal was finally made, after the commencement of action on the policy, and nearly a year after the fire (Davis v. Imperial Ins. Co., 16 Wash. 241, 47 Pac. 439).

(m) Pleading and practice.

Allegations that defendant "wholly refused to fulfill its obligation as to arbitration" (Western Assur. Co. v. Hall, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 48), or that it "waived and dispensed" with such provision, and "utterly failed to carry out or insist" upon it (Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex.

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Civ. App. 588, 45 S. W. 945), have been held sufficient averments of waiver. And it was said in American Fire Ins. Co. v. Stuart (Tex. Civ. App.) 38 S. W. 395, that waiver could be proved under allegations of performance. But in Iowa it has been held that, under a statute [6] providing that plaintiff may make a supplemental petition alleging facts which have happened or come to his knowledge since the filing of his petition, it is not permitted to plaintiff to plead and prove a demand for appraisal made after the action was commenced (Zalesky v. Home Ins. Co., 102 Iowa, 613, 71 N. W. 566).

Where the waiver was set up by the plaintiff as a reply to a defense of no arbitration, it was held not incumbent on plaintiff, in her case in chief, to introduce evidence concerning the issues so raised (Lancashire Ins. Co. v. Murphy, 10 Kan. App. 251, 62 Pac. 729). And where, on an issue as to whether the insurer had itself prevented arbitration, the evidence consisted of letters from which different inferences might have been fairly drawn, the question was one for the jury, the ordinary rule as to documentary evidence not being applicable.

Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757. But see Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, where the construction of letters in which the insured refused to accede to a demand unless the company would define in advance the powers of arbitrators was held to be for the court.

So, also, where the evidence on the question of waiver consisted partly of letters between the parties, it was held that such letters should be submitted to the jury with the other evidence, without instruction as to their effect standing alone (Davis v. Western Massachusetts Ins. Co., 8 R. I. 277). But in Iowa, where the scintilla doctrine no longer obtains, it has been held that though the evidence was not all one way, yet, if it was sufficient to show that the company was not responsible for the failure of arbitration, the case should be taken from the jury (Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. 717).

[6] Code Iowa, § 2731.

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5. ARBITRATION IN LIFE AND ACCIDENT INSURANCE AND SUBMISSION TO TRIBUNALS OF FRATERNAL ORDERS.

(a) Arbitration.
(b) Recourse to tribunals of fraternal order as condition precedent to action.
(c) Conclusive effect of decisions by tribunals of the order.
(d) Waiver.

(a) Arbitration.

Where a certificate of life or accident insurance fixes a legal obligation upon the insurer to pay a certain sum upon the happening of the contingency insured against, rather than to pay the amount of an award, a further stipulation requiring that all disputed claims shall be submitted to arbitration before any action shall be brought thereon is invalid as an attempt to oust the courts of their jurisdiction.

Whitney v. National Masonic Acc. Ass'n, 52 Minn. 378, 54 N. W. 184; Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601; Keeffe v. National Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854; Baldwin v. Fraternal Acc. Ass'n, 46 N. Y. Supp. 1016, 21 Misc. Rep. 124; National Masonic Acc. Ass'n v. Burr, 44 Neb. 256, 62 N. W. 466; Kinney v. Baltimore & Ohio Employés' Ass'n, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142; Fox v. Masons' Fraternal Acc. Ass'n, 96 Wis. 390, 71 N. W. 363.

But see Smith v. Preferred Masonic Mut. Acc. Ass'n (C. C.) 51 Fed. 520, where, in order to hold valid a stipulation providing for the arbitration of "any claim," etc., the provision was construed as referring only to questions of the amount of loss or damage. Furthermore, the court held in that case that a stipulation requiring arbitration, but not expressly making it a condition precedent to action or liability, operates merely as an independent covenant, for the breach of which damages might be recovered in a separate action.

And the rule has been held to be the same in the case of an unincorporated society (Daniher v. Grand Lodge A. O. U. S., 10 Utah, 110, 37 Pac. 245).

It is, however, apparently the doctrine of the Michigan court that a provision looking to the arbitration of all disputed claims is valid, at least when occurring as one of the rules of a fraternal order. In Russell v. North American Ben. Ass'n, 116 Mich. 699, 75 N. W. 137), which was an action on an award, the court upheld the validity of a by-law requiring all the arbitrators to sign the

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award. And though it plainly appeared in the Russell Case that the arbitrators constituted a tribunal outside the order who were to determine "any question" as to "the validity of any claim," rather than a court or determining body within the order, yet in a subsequent case (Hoag v. Supreme Lodge International Congress, 95 N. W. 996, 134 Mich. 87), where the objection to recovery was founded upon a failure of the beneficiary to prosecute her claim within the courts of the order, it was said that the provisions of the by-laws were substantially the same in the two cases. It should, however, be noted that though the Hoag Case cites the Russell Case as a controlling authority on the question of the jurisdiction of the tribunal provided, yet in fact such question was not necessarily involved in the Russell Case, since the action there was upon the award, the beneficiary not disputing the jurisdiction of the arbitrators, but only the reasonableness of a rule requiring a new arbitration in case all the arbitrators did not all sign the first award.

(b) Recourse to tribunals of fraternal orders as condition precedent to action.

Fraternal insurance orders frequently provide a procedure for the hearing and determination within the order of all claims or disputes arising in relation to the insurance. A stipulation expressly providing that no action shall be maintained against the order until the appeals and procedure provided within the order are exhausted is valid and binding on the members. Such procedure is usually regarded as a method of presenting the claim to the order, rather than as an arbitration outside the order, and therefore as valid, though looking to a submission of the whole question.[1]

Supreme Lodge of Order of Select Friends v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373; Levy v. Order of the Iron Hall, 67 N. H. 593, 38 Atl. 18; McAlees v. Supreme Sitting Order of the Iron Hall (Pa.) 13 Atl. 755.

So, also, a provision looking to an appeal to a supreme body, whose decision shall be final, has been held valid in so far as it requires all appeals to be taken before a resort can be had by a member to the courts.

Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; Robinson v. Templar

[1] As to the right in general of a member of a beneficial order to a recourse to the courts, see Cent. Dig. vol. 6, "Beneficial Associations," cols. 2075–2077, § 21; cols. 2100, 2101, § 45.

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Lodge No. 17, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; McMahon v. Supreme Council Order of Chosen Friends, 54 Mo. App. 468. In connection, however, with the Robinson Case, see Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19, where the application of the principle is apparently restricted to cases where the rights involved are directly dependent on the contract of membership.

Such provisions have, however, in Illinois been considered as agreements to submit to an arbitration to be conducted by one of the parties interested, and as such properly subject to the strictest interpretation. Thus, a certificate agreeing to pay a certain sum in case of total disability, within the meaning of a section which looked to a determination of the question of total disability by certain officers, and giving a right of appeal to a higher body, has been held not to render the prosecution of the appeal a condition precedent to the maintenance of an action for total disability.

Brotherhood of Railroad Trainmen v. Newton, 79 Ill. App. 500; Grand Lodge Brotherhood of R. R. Trainmen v. Randolph, 84 Ill. App. 220, judgment affirmed (1900) 186 Ill. 89, 57 N. E. 882. See, in connection, Brotherhood of Railway Trainmen v. Greaser, 108 Ill. App. 598, where the question was as to the conclusiveness of the decision of the order's tribunal.

In Grand Central Lodge No. 297, A. O. U. W., v. Grogan, 44 Ill. App. 111, also, a permissive provision was held not to have rendered a submission to the courts of the order a condition precedent to action on the policy.

And it has even been held that an express stipulation requiring the prosecution of the appeal under pain of forfeiture, or making the result of the appeal conclusive, will not render a compliance therewith a condition precedent to an action based on a demand for money.

Supreme Lodge Order of Mutual Protection v. Meister, 204 Ill. 527, 68 N. E. 454; Supreme Lodge Order of Mutual Protection v. Zerulla, 99 Ill. App. 630. See, also, People v. Order of Foresters, 162 Ill. 78, 44 N. E. 401.

In other states, also, a tendency has been manifested to restrict the operation of such provisions. Thus, in Supreme Council Order of Chosen Friends v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298, the provisions of the order as to an appeal were not considered sufficiently definite to render the appeal a condition precedent to action. And in Missouri by-laws not securing any ade-

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quate method of redress by appeal to the associations, and having none of the elements of an agreement for arbitration, have been held to constitute no bar to an action instituted without exhausting such remedies as were allowed under the by-laws of the association (Harris v. Wilson, 86 Mo. App. 406).

A stipulation looking to the settlement within the order of disputes between "members" and the order does not, of course, affect the right of a beneficiary to sue without first exhausting the remedies within the order.

Kumle v. Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Burlington Voluntary Relief Dept. v. White, 41 Neb. 547, 59 N. W. 747, 43 Am. St. Rep. 701; Id., 41 Neb. 561, 59 N. W. 751; Bukofzer v. United States Grand Lodge Independent Order Sons of Benjamin, 61 Hun, 625, 15 N. Y. Supp. 922, judgment affirmed without opinion 139 N. Y. 612, 35 N. E. 204; Dobson v. Hall (Com. Pl.) 11 Pa. Co. Ct. R. 532.

In Schiff v. Supreme Lodge Order of Mutual Protection, 64 Ill. App. 341, it was held that, since one to whom the insurance was payable for the use of others was neither a member nor a beneficiary, he was not affected by a provision forbidding "members of the order and their beneficiaries" from seeking redress in a court of record without exhausting the remedies within the order. And in Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940, a stipulation for submission of differences of opinion "between any member and his lodge, or between the heirs of a member and his lodge," was held not to appear to cover controversies as to whether insured was in fact a member.

And in some cases similar decisions have been made apparently on the broader ground that such provisions are in their nature inapplicable to any one except the members of the order.

Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19; Maxwell v. Family Protective Union, 115 Ga. 475, 41 S. E. 552; Supreme Lodge Order of Mut. Protection v. Meister, 204 Ill. 527, 68 N. E. 454; Supreme Lodge Order of Mut. Protection v. Zerulla, 99 Ill. App. 630; Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Loomis, 43 Ill. App. 599; Voluntary Relief Dept. of Pennsylvania Lines West of Pittsburg v. Spencer, 17 Ind. App. 123, 46 N. E. 477; Strasser v. Staats, 59 Hun, 143, 13 N. Y. Supp. 167.

But in other jurisdictions the failure of the beneficiary to exhaust the remedies within the court has been held fatal to his right of action.

Weigand v. Fraternities Accident Order, 97 Md. 443, 55 Atl. 530; Fillmore v. Great Camp of the Maccabees, 109 Mich. 13, 66 N. W. 675;

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Hoag v. Supreme Lodge of International Congress, 134 Mich. 87, 95 N. W. 996; Cotter v. Grand Lodge A. O. U. W. of Montana, 23 Mont. 82, 57 Pac. 650; Colley v. Wilson, 86 Mo. App. 396.

Since a member of a fraternal insurance association who is denied rights to which he is entitled under its by-laws must appeal as provided by the laws of the order before he can resort to the courts, his failure so to do will defeat an action against the association by the holder of a benefit certificate, where the member had been suspended from the order, and the holder had not appealed as provided by the by-laws of the association (Modern Woodmen of America v. Taylor 67 Kan. 368, 71 Pac. 806).

The mere fact that a court is provided within the order for the purpose of passing on the conflicting claims of alleged beneficiaries will not preclude a bill by the order seeking a decree of interpleader and an injunction restraining actions at law by the different claimants. The company in such a case is powerless to institute proceedings in its own court until the claimants take some action, and, where they have demanded no adjudication, its only remedy is a resort to a court of equity to compel them to submit their claims to judicial arbitrament. (Grand Lodge A. O. U. W. v. Gaddis, 65 N. J. Eq. 1, 55 Atl. 465.)

(c) Conclusive effect of decisions by tribunals of the order.

The authorities are not harmonious as to the effect of a provision that the decision of the tribunal within the order shall be final and conclusive. Obviously, the argument that the insurer has a right to demand a proper presentation of the claim has no force as applied to an attempt to make the order's decision conclusive. And accordingly we find some of the courts holding that while the insured must first exhaust all his remedies within the order, yet, having done so, he cannot be deprived of recourse to the courts by a stipulation that the decision of the order's own tribunal shall be conclusive.

Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571; Supreme Council Order of Chosen Friends v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; McMahon v. Supreme Tent Knights of the Maccabees of the World, 151 Mo. 522, 52 S. W. 384; Baltimore & O. R. Co. v. Stankard, 56 Ohio, 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745. See, also, Albert v. Order of Chosen Friends (C. C.) 34 Fed. 721, and Supreme Lodge of Order of Select Friends v. Raymond, 57 Kan.

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647, 47 Pac. 533, 49 L. R. A. 873, in which, however, the question turned rather on a point of construction.[2]

On the other hand, it has been frequently held that since fraternal insurance orders, like beneficial associations, partake of the nature of charitable institutions, therefore the rule as to ousting the courts of jurisdiction should be somewhat relaxed as to them, so as to give effect, in the absence of fraud, to stipulations making the decisions of the order as to the insurance binding on the members and their beneficiaries.

In the following cases such stipulations were upheld as to members claiming disability benefits: Van Poucke v. Netherland St. Vincent de Paul Soc., 63 Mich. 378, 29 N. W. 863; McAlees v. Supreme Sitting, Order of Iron Hall (Pa.) 13 Atl. 755. See, also, Sanderson v. Brotherhood of Railroad Trainmen, 204 Pa. 182, 53 Atl. 767.

And in these similar stipulations were upheld as applied to the beneficiaries: Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Ass'n (C. C.) 31 Fed. 62; Canfield v. Great Camp of Knights of Maccabees, 87 Mich. 626, 49 N. W. 875, 13 L. R. A. 625, 24 Am. St. Rep. 186; Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161, 59 N. W. 417, 49 L. R. A. 592, 45 Am. St. Rep. 400; Fillmore v. Great Camp of Knights of Maccabees, 103 Mich. 457, 61 N. W. 785; Hoag v. Supreme Lodge of International Congress, 134 Mich. 87, 95 N. W. 996; Derry v. Great Hive Ladies of Modern Maccabees (Mich.) 98 N. W. 23; Barker v. Great Hive Ladies of Modern Maccabees (Mich.) 98 N. W. 24; Dick v. Supreme Body of International Congress (Mich.) 101 N. W. 564.

In Campbell v. American Popular Life Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591, the decision was held binding on the beneficiary on the ground that a definite agreement for arbitration is not against public policy. But it should be noted that the agreement was in fact for the reference of only one question, a form of arbitration almost universally held valid and enforceable.

But even though the validity of a stipulation making the determination within the order conclusive be conceded, yet, in order to have such an effect, the provision must be clear and unambiguous.

A general provision prohibiting the institution of suits "in any other way than through the regular channels of the order" will not preclude recourse to the courts to enforce a claim against the association where no provision is made for the settlement of such claims

[2] As to the conclusiveness of the decision of the tribunals of a beneficial association, see Cent. Dig. vol. 6, "Beneficial Associations," cols. 2075–2077, § 21; cols. 2100–2102, §§ 45, 46.

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as the one involved (Parliament of Prudent Patricians of Pompeii v. Marr, 20 App. D. C. 363).

A rule requiring members claiming benefits to submit their claims to designated officers of the order for investigation and allowance before bringing suit thereon does not abridge the right of members to resort to the courts when their claims have been submitted, and rejected by such officers (Supreme Lodge of Order of Select Friends v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373).

See, also, Albert v. Order of Chosen Friends (C. C.) 34 Fed. 721, where inconsistent provisions as to the power of subordinate lodges were held merely directory as to mode of preparing proofs by such lodges.

Thus, a constitution providing for an auditing committee, and making it a part of the duty of such committee to examine all books, papers, etc., and see that the business was honestly conducted, did not constitute the committee a conclusive tribunal as to death claims arising against the order, by adding to their duties that of deciding "all points of dispute and questions of doubt that may arise," and providing that "their decision shall be final."

Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168, affirming 38 Ill. App. 111, and followed in 157 Ill. 194, 42 N. E. 398; Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Loomis, 43 Ill. App. 599.

And it has even been held that a by-law providing a board to conclusively determine who were the real beneficiaries did not render conclusive the decision of such a board as to a claim of a beneficiary based upon a contract with insured.

Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19, distinguishing Robinson v. Knight Templar Lodge No. 17, I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193, in that such case involved rights immediately founded on the contract of membership.

In Illinois an agreement to pay a certain sum in case of total disability within the meaning of a subsequent section, which section provided that the question of total disability should be determined by certain officers, has been held to constitute an absolute agreement to pay the insurance, so that an unfavorable determination by the officers named and an appellate tribunal was not conclusive on insured.

Brotherhood of Railway Trainmen v. Greaser, 108 Ill. App. 598. See, also, Brotherhood of Railroad Trainmen v. Newton, 79 Ill. App. 500;

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Grand Lodge Brotherhood of Railroad Trainmen v. Randolph, 84 Ill. App. 220, judgment affirmed 186 Ill. 89, 57 N. E. 882, where the question arose as to the necessity of prosecuting the claim before the order's tribunal.

But in Iowa the same agreement was held to constitute a promise to pay only in case the officers should determine that there was in fact a disability. Such a promise the court considered valid, and distinguishable from a promise to pay in case of a disability, coupled with a provision for a submission of the question of liability to arbitration. Furthermore, but a single question was submitted to arbitration, the provision in this respect being analogous to a submission of the amount of a fire loss to arbitration.

Eighmy v. Brotherhood of Railway Trainmen, 113 Iowa, 681, 83 N. W. 1051. See, also, Lillie v. Brotherhood of Railway Trainmen, 114 Iowa, 252, 86 N. W. 279, distinguished on the ground that no question was raised as to the effect of the qualified promise to pay, the company having tried the case on the theory that the adverse determination of insured's claim was in the nature of a final adjudication.

A similar decision was rendered by the California court in Pool v. Brotherhood of Railroad Trainmen, 143 Cal. 650, 77 Pac. 661. In that case the constitution provided that all claims for disability not enumerated in a preceding section should be held to be addressed to the systematic benevolence of the order, and should in no case be made the basis of any legal liability on its part; that every such claim should be referred to a beneficiary board, and, if approved, the claimant should be paid an amount equal to the amount of his certificate; that the approval of the board should be required as a condition precedent to the right of any such claimant; and that the section might be pleaded in bar of any suit or action begun to enforce the payment of any such claim. These provisions, the court held, prevented the attaching of any legal liability whatever for a disability other than those enumerated in the preceding section. In Sanderson v. Brotherhood of Railroad Trainmen, 204 Pa. 182, 53 Atl. 767, the same provisions as those involved in Illinois and Iowa cases were held to render a favorable report by the committee a condition precedent to the commencement of an action. And in Campbell v. American Popular Life Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591, where it appeared that the contract was to pay a certain sum on condition "that, in the opinion of the surgeon in chief," insured did not die of intemperance, it was held that the

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adverse report of the surgeon in chief precluded any recovery on the policy.

It should be noted that the reasoning employed in the Sanderson and Campbell Cases supports the general validity of a conclusive arbitration of the question of disability.

On the other hand, the internal government of the order even in cases where property rights are dependent thereon,[3] will not be disturbed, except in case of fraud or departure from the order's own rules.

Hawkshaw v. Supreme Lodge of Knights of Honor (C. C.) 29 Fed. 770; Croak v. High Court I. O. F., 162 Ill. 298, 44 N. E. 525, affirming 62 Ill. App. 47; Woolsey v. Odd Fellows Lodge No. 23, 61 Iowa, 492, 16 N. W. 576.

But even in cases where the final decision of the courts of the order is otherwise considered as conclusive, such result has not been permitted to follow where the claimant has been deprived of a fair hearing as prescribed by the rules of the order. Thus, where the supreme court of the order acted entirely on the report of its committee to whom the matter was submitted, without considering the evidence produced before the committee, and where it did not appear whether the committee based its decision on the affidavits before it or on reports of false representations by insured, as to which there was no evidence whatever, and where the claimant was refused an opportunity to cross-examine the witnesses whose affidavits were produced before the committee, it was held that the adverse decision resulting from such procedure was not binding on the claimant. (Rose v. Supreme Court, Order of Patricians, 126 Mich. 577, 85 N. W. 1073.) Similarly, the consideration, by the supreme body, of a physician's certificate dealing with matters protected by statute, has been considered sufficient to relieve the claimant from the conclusive effect of the decision (Dick v. Supreme Body of International Congress [Mich.] 101 N. W. 564). But, on the other hand, the strict rules of evidence need not be observed. And where the claimant makes no objection to the presentation of the case before the committee by affidavits, and himself introduces testimony of that character, he cannot escape the decision on the ground that the witnesses should have been present in person. Nor can

[3] As to expulsion from beneficial associations, see Cent. Dig. vol. 6, "Beneficial Associations," cols. 2064–2075, §§ 12–20.

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he, without having raised any objections at the time, defeat the decision on the ground that the appeal was heard in the first instance before a committee, and that the decision on the report of the committee was based rather on the statements of counsel as to the contents of the affidavits than on the affidavits themselves.

Derry v. Great Hive Ladies of Modern Maccabees (Mich.) 98 N. W. 23; Barker v. Great Hive Ladies of Modern Maccabees (Mich.) 98 N. W. 24.

In the Barker Case it was further decided that the proceedings were not invalidated because insured's counsel, when making his argument on the report of the committee, did not know that the affidavits were accessible. And where the only objection made to the presentation of an unsworn certificate was that the claimant had a right to cross-examination, it could not afterwards be claimed that the decision was invalidated because the certificate was not in the form of an affidavit. And as to the right of cross-examination, it could not be upheld where claimant himself was relying on affidavits. Nor was the validity of the decision affected by a minor irregularity in the hearing before the committee having original jurisdiction of the matter.

In the Derry Case it was decided that a hearsay statement introduced into the discussion would not invalidate the proceedings where the company's counsel at once informed the members that they should give no weight to such statement.

A fraudulent statement made to a member at the time he joined the association, as to who might be beneficiaries, will not invalidate the decision of the order that the person named as beneficiary was not within the classes allowed by the laws of the association (Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161, 59 N. W. 417, 49 L. R. A. 592, 45 Am. St. Rep. 400).

(d) Waiver.

An absolute denial of liability by the order will waive either a requirement for arbitration as to the amount of recovery, or for a submission of the claim within the courts of the order as a condition precedent to bringing action.

In Baldwin v. Fraternal Acc. Ass'n, 46 N. Y. Supp. 1016, 21 Misc. Rep. 124, it was held that while a requirement for arbitration might be valid where the only question was as to the amount in controversy, yet it would be waived by the denial of liability. In Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940, and Supreme Lodge Order of Mutual Protection v. Zerulla, 99 Ill. App. 630, waiver by denial of liability was applied to stipulations making submission of the

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claim within the order a condition precedent to action. The decisions were made without a full statement of the reasons therefor; but it may, perhaps, be assumed that they were the same as those underlying waiver of proofs of loss, and waiver of arbitration of the amount of fire loss by denial of liability. And it is further significant that there seem to be no cases of waiver by denial of liability, where the clause was held to have been sufficient to render the award or decision of the appointed tribunal conclusive as to the question of liability.

And where the by-law does not render a submission to the order's tribunals a condition precedent to the company's liability, but only a condition of invoking judicial remedies to enforce a right, compliance with the by-law is waived by a failure of the society to file appropriate pleadings complaining of the noncompliance (Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940).

It is also a general principle that **acts of the company by means of which the insured is prevented from pursuing his remedies within the order, or misled into neglecting to do so, constitute a waiver of a stipulation requiring such procedure as a condition precedent to the maintenance of an action on the certificate.** Thus, where the order refused to appoint a commissioner for the taking of testimony as required by the constitution, such action was held to amount to a waiver of a prosecution of the claim within the order, so far as such action was not rendered harmless by the prior inactivity of the member (Haag v. Knights of Friendship, 7 Pa. Super. Ct. 425, 42 Wkly. Notes Cas. 530). Similarly, a refusal of the proper officer to certify to the sickness of insured, from which action no appeal was given, was held to excuse the member from a further prosecution of his remedies within the order (Supreme Sitting Order of Iron Hall v. Stein, 120 Ind. 270, 22 N. E. 136). And the same result has been held to follow an expression of the willingness of the company to test the matter in the courts (Gnau v. Masons' Fraternal Acc. Ass'n of America, 109 Mich. 527, 67 N. W. 546).

Where the subordinate board defers action until it is too late to take an appeal to the grand lodge and commence suit in the courts within the time allowed by the by-laws, the appeal will be considered as waived (Brotherhood of Railroad Trainmen v. Newton, 79 Ill. App. 500). Similarly, where no action is taken on the member's appeal to the higher councils of the society, he may apply to the courts of the state for relief (Harman v. Raub, 18 Lanc. Law

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Rev. 181, 25 Pa. Co. Ct. R. 97). And where the supreme council, on motion of one of its members, reviews and affirms the decision of the lower tribunal, a further appeal by the member must be considered as waived (McMahon v. Supreme Council Order of Chosen Friends, 54 Mo. App. 468). And in Colley v. Wilson, 86 Mo. App. 396, it was held that the failure of an executive committee to render a decision so that an appeal might have been taken to a biennial general council while it was in session excused the insured from a further prosecution of the matter within the order. If the company desired him so to do, it should have rendered a prompt decision, so as to have obviated the delay of two years in the settlement of the matter.

On the other hand, a statement to the insured member by the officers of the grand council that he might appeal, but that it would do him no good, has been held not to have excused the member from pursuing the course provided by the by-laws (Wick v. Fraternities Acc. Order, 21 Pa. Super. Ct. 507). And where an action was brought on the award, which was signed by only two of the arbitrators, the company was held not estopped, by the fact that it had refused to produce its by-laws before the arbitrators, to insist on one of its by-laws which provided for a new arbitration in case all the arbitrators did not sign the award (Russell v. North American Ben. Ass'n, 116 Mich. 699, 75 N. W. 137).

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XXVII. RIGHT TO PROCEEDS.

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1. PERSONS ENTITLED TO PROCEEDS—INSURANCE OF PROPERTY.

(a) Scope of brief.

The rule that, in the absence of special equities or contractual provisions, the person whose interest is covered by a fire policy is entitled to the proceeds thereof is so axiomatic as to have been never questioned. Therefore the determination of the interest covered is generally conclusive as to the persons entitled to the proceeds. Reference is therefore made to the brief dealing with the interests covered by the policy [1] as settling most of the questions touching the persons entitled to the proceeds. Nor will the amount

[1] See ante, vol. 1, pp. 720–728, and pp. 763–782.

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of recovery by any person [2] be here considered except in those cases where the sum is to be divided among various claimants, the recovery of one limiting the recovery of the other. There remains, however, a residuum of cases dealing more directly with the persons entitled to the proceeds, and dependent either on special equities existing between the parties, or on express contractual stipulations. These cases, and the rules governing therein, it is the purpose of this brief to treat.

(b) Insurance of special interests—Husband and wife.

It is a general rule that the proceeds of insurance on the interest of a life tenant belong absolutely to the life tenant, regardless of the value of the life tenancy as related to the amount of insurance. If the amount paid more than compensates for the interest, that is a matter between the life tenant and the company, in which the insured has no interest.

Harrison v. Pepper, 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404; Addis v. Addis, 60 Hun, 581, 14 N. Y. Supp. 657; Hubbard v. Austin, 6 Ohio N. P. 249, 8 Ohio S. & C. P. Dec. 111; Bennett v. Featherstone, 110 Tenn. 27, 71 S. W. 589; Sanders v. Armstrong, 22 Ky. Law Rep. 1789, 61 S. W. 700.

It has, however, been held that where the insurance is taken out in accordance with a contract with the reversioner, and the full value of the property recovered, the sum so received should either be used in rebuilding, or the interest should be paid to the life tenant, the principal going to the reversioner on the termination of the life estate (Convis v. Citizens' Mut. Fire Ins. Co., 127 Mich. 616, 86 N. W. 994). And in some of the cases similar conclusions have been reached though the insurance did not appear to have been taken out in accordance with a contract. Thus in Rhode Island it has been held that where a fire policy is issued to a life tenant for the full value of the fee, though covering only his interest in the building insured, he should be held a trustee for the remainderman as to the excess of the amount received over the value of his life estate (Sampson v. Grogan, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711). And in Clyburn v. Reynolds, 31 S. C. 91, 9 S. E. 973, it was held that the proceeds of a policy, payable to a life tenant, if collected after his death, should go to the remainderman, unless they were used in rebuilding the destroyed house.

[2] See ante, pp. 3061–3078.

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This was decided on the theory that only the interest on the insurance money arising under such a policy should in any event be paid to the tenant, the principal being reserved for the remainderman. The court argued that it would be against public policy to permit a life tenant, occupying the position of a trustee, to place himself where it would be to his gain to destroy the trust property. But even though it be conceded that the remainderman is entitled to the excess over the value of the life estate, it is incumbent on him to show what such excess is, and, having failed to do so, he cannot recover (Grant v. Buchanan [Tex. Civ. App.] 81 S. W. 820). And where the life tenant collects the whole sum in good faith and invests it in other land, the resulting trust in favor of the remainderman is only for the exact amount of the insurance money applied on the purchase (Green v. Green, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525).

Where it appeared that the policy was taken out by the life tenant under a covenant of a mortgage jointly executed by himself and remaindermen, the life tenant was held to have no authority to waive the application of the proceeds to the mortgage debt. The policy under such circumstances would inure to the benefit of all the mortgagors, and the mere authority in the life tenant to take out the policy would not authorize him to thus dispose of the interests of the other mortgagors (Connecticut Mut. Life Ins. Co. v. Scammon [C. C.] 4 Fed. 263).

The case of Hawes v. Lathrop, 38 Cal. 493, though anomalous, contains some features in common with the situation presented by insurance effected by a life tenant. The owner of property conveyed it to trustees for the purpose of establishing a school, but with a provision for reversion in case the school should be declared unsuccessful by the trustees. The trustees made an addition to the building, and insured the whole property. Subsequently the building was destroyed by fire, and the loss paid to the trustees, whereupon the trustees declared the school unsuccessful, and reconveyed the premises. Under these circumstances the court held that the owners of the property were in equity entitled to the insurance money. This decision, however, while of course involving a holding that the money stood in the place of the building, seems to have been in part at least based on the fact that no one else could establish any claim whatever.

A joint owner of property in common may separately insure his interest against fire, and in case of loss recover and retain the insur-

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ance. The rule against taking title or advantage to the prejudice of one's cotenants does not apply to such a transaction.

Harvey v. Cherry, 76 N. Y. 436; Hammer v. Johnson, 44 Ill. 192; Clapp v. Farmers' Mut. Fire Ins. Ass'n, 35 S. E. 617, 126 N. C. 388.

Where a merchant, after the issuance to him of a fire policy, takes in a partner, he may, in case of loss, recover the damages sustained by him to his share of the property, in an action brought in his own name, under Rev. St. § 4993, requiring an action to be brought in the name of the real party in interest (Blackwell v. Miami Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. Rep. 574).

And obviously an arrangement between the joint owners will not entitle the joint owner, who is a stranger to the insurance policy, to recover thereon.

Continental Ins. Co. v. Maxwell, 9 Kan. App. 268, 60 Pac. 539. See, also, Work v. Merchants' & Farmers' Mut. Fire Ins. Co., 11 Cush. (Mass.) 271.

The surviving partner of a firm may however maintain an action on a policy of insurance issued to the firm, on a house belonging to them as tenants in common (Oakman v. Dorchester Mut. Fire Ins. Co., 98 Mass. 57). And where insurance was effected by a member of a firm in the firm's name on property of the firm, and the premium was paid from funds of the firm, though charged by the member to himself, the insurance was held to be for the benefit of the firm, though the member thus effecting it intended it for its own private benefit (Tebbetts v. Dearborn, 74 Me. 392). So, also, where it appeared that the owner of an undivided one-third interest in real estate had recovered from his co-owners two-thirds of the premiums paid for insurance, he was held estopped to claim the whole insurance money for his own use (National Bank v. Bond, 89 Tenn. 462, 14 S. W. 1078).

The proceeds of a policy taken by an agent or trustee in his representative capacity goes of course to those beneficially interested in the property, and is not subject to the trustee's debts.

Lerow v. Wilmarth, 9 Allen (Mass.) 382. See, also, Braden v. Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277, where an offset was not allowed the company of a debt owed by the agent.

Where the company knows that insured is doing business solely as an agent, and the original contract ran to him as "agent," a renewal will be reformed by inserting such word and obliging the insurance company to pay the loss under it to the principal (Phœnix Fire Ins. Co. v. Hoffheimer, 46 Miss. 645).

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But where a debtor, after a levy of attachment, places insurance on the property, he, and not the attaching creditor, is entitled to the proceeds (Donnell v. Donnell, 86 Me. 518, 30 Atl. 67).

A husband in possession has been held entitled to recover for the entire loss recoverable under an insurance policy, notwithstanding his wife had an equal interest with himself in the property insured (Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463). But the fact that the husband of a married woman signs with her an application for insurance on her separate property does not give him any interest in the policy issued on such application.

Union Ins. Co. v. McCullough, 2 Neb. (Unof.) 198, 96 N. W. 79. See, in connection, McCarty v. Hartford Fire Ins. Co. (Tex. Civ. App.) 75 S. W. 934, where a man living in adultery with a woman was held not entitled to the proceeds of a policy on her property.

(c) Carriers—Warehousemen, etc.

Policies for commission merchants, warehousemen, etc., are often so written as to cover the property not only of the proprietor of the business, but also of others held by them. Where such insurance is taken out in accordance with contract or custom, or is adopted by the bailors prior to its entire appropriation by insured, such bailors will share proportionately in the proceeds of the insurance, and this is true though prior to the loss the policy was not known to the outside owners protected thereby.[8]

Watkins v. Durand, 1 Port. (Ala.) 251; Durand v. Thouron, 1 Port. (Ala.) 238; Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3; Fish v. Seeberger, 154 Ill. 30, 39 N. E. 982, affirming 47 Ill. App. 580; Johnson v. Campbell, 120 Mass. 449; Beidelman v. Powell, 10 Mo. App. 280; Souls v. Lowenthal, 81 N. Y. Supp. 622, 40 Misc. Rep. 186; Siter v. Morrs, 13 Pa. 218; Boyd v. McKee, 37 S. E. 810, 99 Va. 72; Johnston v. Charles Abresch Co. (Wis.) 101 N. W. 395. See, also, McDonald v. Palmer (Tenn. Ch. App.) 48 S. W. 338.

Therefore where the nominal insured, after notice from the bailor that he claims an interest in the insurance, appropriates all the proceeds to the payment of his own claim, and refuses to include the bailor's goods in his proofs of loss, he becomes liable to the bailor for the damages resulting therefrom (Johnston v. Charles Abresch Co. [Wis.] 101 N. W. 395). And it has been held that

[8] As to the interests covered in policies insuring warehousemen, etc., see ante, vol. 1, p. 768 et seq. As to the duty of a bailor to insure, see Cent. Dig. vol. 6, "Bailment," cols. 30, 31, § 34.

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where the bailee has contracted to insure the bailor's property, and at the time of the loss there is insurance on the property in the name of the bailee, it is incumbent on him to show the distribution of the fund, rather than on the bailor to show that there was enough left to pay for his property after disposing of other claims (Thomas v. Cummiskey, 108 Pa. 354).

But it has been held that the rule as to pro rata distribution does not apply where goods held in storage are not included by insured in his claim against the company, and where the owner of such goods has acquired no right to the insurance, either by custom of trade, or contract, or adoption of the insurance prior to the appropriation by the proprietor to his own loss of the whole sum. Until the bailor in some way adopts the insurance, or money is received on the bailor's goods, the bailee, the courts have argued, is a mere volunteer as to the insurance, privileged to cancel it as to the bailee's property. And this is in substance the effect of his appropriation of all the money.

Stillwell v. Staples, 19 N. Y. 401, reversing 13 N. Y. Super. Ct. 63; Reitenbach v. Johnson, 129 Mass. 316; Pittman v. Harris, 24 Tex. Civ. App. 503, 59 S. W. 1121.

But this distinction seems to have been rejected in Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3, where it was held that the taking out of the insurance rendered the bailee a trustee in relation thereto, and that the right of the bailor to his proportionate share of such insurance could not therefore be affected either by the failure of the bailee to include all the goods in his proofs or by the fact that the bailee knew nothing of the insurance. And in two cases it has been held that a bailor who had contracted that his goods should be protected would not take in preference to one who had not so contracted, but who had immediately after the loss, and knowledge of the insurance adopted the act of the bailee in effecting the insurance.

Ferguson v. Pekin Plow Co., 141 Mo. 161, 42 S. W. 711; Boyd v. McKee, 99 Va. 72, 37 S. E. 810.

The authorities are, however, agreed that since the charges of the bailee constitute a lien on the goods, and are in any event recoverable from the insured, such charges, so far as earned, may be deducted by him from the insurance money.

Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3; Boyd v. McKee, 37 S. E. 810, 99 Va. 72; Johnson v. Campbell, 120 Mass. 449; Beidelman v. Pow-

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ell, 10 Mo. App. 280; Johnston v. Charles Abresch Co. (Wis.) 101 N. W. 395. See, also, Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 543, 23 L. Ed. 868.

And in Home Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 71 Minn. 296, 74 N. W. 140, it was held that since the insured common carrier was liable to the shippers for the full value of the property, its claim or interest was also equal to the full value of the property, and all money received by it and paid to the shippers was received as insured, and paid as a common carrier, rather than received and turned over as a trustee, in whose name the property was insured.

An agreement between the owner of property and a contractor engaged in erecting a building thereon, to the effect that the contractor should keep the building insured "for the benefit of whom it may concern," the indemnity, however, to "be divided between the parties hereto," has been held to give the materialman no right of action against the owner for money paid to him as the proceeds of a policy issued in the name of the contractor (Mosser v. Donaldson [Pa.] 10 Atl. 766).

Where property belonging to several different bailors is destroyed by fire while in the possession of the bailee, to whom the insurance money for the total loss is paid, no one of the consignors can maintain an action at law for his share of the insurance money against the consignee, but all the different bailors should be made parties to suit in equity, wherein their several rights may be fixed and determined.

Gutman v. Rogers (City Ct. N. Y.) 13 N. Y. Supp. 576; Pennefeather v. Baltimore Steam Packet Co. (C. C.) 58 Fed. 481.

But where the insurance is so written as to entitle the bailors to recover only in case their interests are not already covered elsewhere, it is incumbent on such bailors to show in their bill that their interests are not elsewhere insured.

Pennefeather v. Baltimore Steam Packet Co. (C. C.) 58 Fed. 481; Friedman v. Woods Motor Vehicle Co., 123 Fed. 413, 59 C. C. A. 507.

(d) Lessor and lessee.

Where the lessor insures his premises at his own expense, without any agreement with the lessee to share the benefits with him, the latter can claim nothing by reason of any money received by the lessor on account of such insurance.

Roesch v. Johnson, 69 Ark. 30, 62 S. W. 416. See, also, In re Zehring's Estate, 4 Pa. Super. Ct. 243; Appeal of Mease, Id.

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And conversely the lessee and a trustee claiming through him have been held entitled to the proceeds of a policy taken out by such lessee on personal property situated on the leased premises. And this was true though the lessor had an equitable lien for rent on such property. (Northern Trust Co. v. Snyder, 76 Fed. 34, 22 C. C. A. 47.) But where a lessor on ground rent entered for arrears and stated an account with the sublessees, in which he charged them with the premium of an insurance effected by him on property of such sublessees on the premises, and the sublessees objected generally to the account, it was held a question for the jury whether the lessor intended the insurance to cover the interest of the sublessees (Miltenberger v. Beacom, 9 Pa. 198). So, also, a stipulation requiring the lessee to keep the building insured "by policies in the name of the lessor or assigned to her" has been held to give the lessor an equitable claim on the proceeds of a policy taken out by the lessee and never formally assigned.

Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80. See, also, Temmen v. Courtney (Ky.) 1 S. W. 875, where the decision turned on the sufficiency of the evidence to show an authorization by the lessor of a clause making the loss payable to another creditor.

But an action will not lie by a lessor against a subtenant to recover the proceeds of insurance effected by the subtenant under an agreement between him and the original lessee, made in view of the latter's covenant with the lessor to keep the premises insured for the lessor's benefit. There is in such case no privity of contract between the lessor and subtenant. (Keteltas v. Coleman, 2 E. D. Smith [N. Y.] 408.)

A covenant by the lessee to insure, when coupled with further provisions looking to the use of the proceeds in rebuilding, will, however, run with the land, so as to give the lessor a right to such proceeds as against the holder of a trust deed executed by the lessee, such trustee taking with notice of the lease. The question arose in an action to foreclose the trust deed, brought after the expiration of the lease, no rebuilding having been done, so that it would seem that the clause as to rebuilding could have had no practical bearing. Nevertheless the court intimated that the result might have been different had the lease not contained the clause as to rebuilding. (Northern Trust Co. v. Snyder, 76 Fed. 34, 22 C. C. A. 47.) The lessor's rights under such a clause in the lease have been held not affected either by the insolvency of some

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of the companies or by the fact that the lease called for insurance up to only two-thirds of the value while policies were in fact taken out up to the full value. No special policies having been set aside for the lessor or selected by him, it could not be claimed that the two-thirds of the policies to which he was entitled included those issued by the insolvent companies, or that, the loss and proceeds being less than two-thirds the value of the property, he should be limited in his recovery to two-thirds of such actual proceeds. (Northern Trust Co. v. Snyder, 77 Fed. 818, 23 C. C. A. 480.)

Where lessees to whom a policy was made payable under an agreement that they should rebuild refused to comply with such agreement, the lessors were entitled to the amount collected by the lessees on the policy (Hayes v. Ferguson, 15 Lea [Tenn.] 1, 54 Am. Rep. 398). But a lessee will not be deprived of the right to recover the full amount of the policy by the fact that he had an independent agreement with his lessor, whereby the premium and amount of the policy, in case of loss, were to be shared between them in stated proportions (Home Ins. Co. of New York v. Gibson, 72 Miss. 58, 17 South. 13).

(c) Death or insolvency of insured—Insurance of estate.

The modern policy is usually so written as to become payable after the death of insured to his personal representative. In such case the personal representative holds the proceeds in a double capacity. If the personal estate is not sufficient to pay the debts of deceased, resort may be had to the proceeds of the policy, and to this right the claim of the heirs is subordinate.

Wyman v. Wyman, 26 N. Y. 253; Appeal of Nichols, 128 Pa. 428, 18 Atl. 333, 5 L. R. A. 597; Estate of P. C. Callahan, 5 Lack. Leg. N. (Pa.) 105.

So, also, under such a policy, the personal representative is the proper person to maintain an action to recover for a loss occurring after insured's death.

Germania Ins. Co. v. Curran, 8 Kan. 9; German Ins. Co. v. Wright, 6 Kan App. 611, 49 Pac. 704; Stowe v. Phinney, 78 Me. 244, 3 Atl. 914, 57 Am. Rep. 796; Lappin v. Charter Oak Fire & Marine Ins. Co., 58 Barb. (N. Y.) 325; Lawrence v. Niagara Fire Ins. Co., 2 App. Div. 267, 37 N. Y. Supp. 811; Georgia Home Ins. Co. v. Kinnier's Adm'x, 28 Grat. (Va.) 88.

In Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420, 6 N. W. 865, an action on a policy for the use and benefit of a mortgagee, was held properly maintained by insured's administrator.

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But aside from the claims of creditors, the proceeds should be distributed among those entitled to the real estate.

Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204; Graham v. Roberts, 43 N. C. 99; Eagle v. Emmet, 4 Bradf. Sur. (N. Y.) 117; In re Kane's Estate, 77 N. Y. Supp. 874, 38 Misc. Rep. 276; Estate of P. C. Callahan, 5 Lack. Leg. N. (Pa.) 105; Dix v. German Ins. Co., 65 Mo. App. 34; Harrison v. Harrison's Adm'r, 4 Leigh (Va.) 371. See, also, Campbell v. Murphy, 55 N. C. 357.

Thus where it appeared that the widow of insured was entitled to occupy the homestead during her life, it was held that she would be entitled to the use for life of the insurance money (Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204). Similarly, where property devised to A. for life, with remainder to B., is destroyed after testator's death, interest on the proceeds of the insurance must be paid to A. for life, the principal being turned over to B. on A.'s death (Graham v. Roberts, 43 N. C. 99). And in Dix v. German Ins. Co., 65 Mo. App. 34, a policy payable "to the one entitled under the law to said dwelling house" was held to entitle the insured's husband to the proceeds, he occupying the property at the time of the loss as tenant by the curtesy. But one holding a life estate by purchase rather than succession is not entitled to the proceeds of a policy, for a loss occurring after the death of insured, the policy providing for a forfeiture by any change in title, except by succession on the death of insured (Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170).

The right of a remainderman to receive on the death of the life tenant the principal of the proceeds of a policy taken out by the testator has been held not affected by the fact that such proceeds were applied by the life tenant to the reconstruction of the totally destroyed building (Haxall's Ex'rs v. Shippen, 10 Leigh [Va.] 536, 34 Am. Dec. 745). But in a later case it was held that where the property was worth much more than the damage done or the insurance recovered, it was proper for the life tenant to apply the insurance to the repair of the property, and that, having done so, no liability attached to account therefor to the remainderman (Brough v. Higgins, 2 Grat. [Va.] 408).

The phrase "legal representatives," as used in the Minnesota standard policy, includes all persons, natural or artificial, who by operation of law stand in the place of and represent the interests of the insured. Therefore the court held that a receiver for an insolvent corporation was entitled to the proceeds of a policy on the

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insolvent's property (Alford v. Consolidated Fire & Marine Ins. Co., 88 Minn. 478, 93 N. W. 517).

Though the heirs of an insolvent, who have taken out insurance on their interest in the real estate vesting in them, may hold the proceeds thereof as against the creditors, yet it has been held that they cannot claim the proceeds of a policy which was in fact secured by the administrator to protect the interest of the estate. And this is true though the agent through whom the administrator acted was the guardian of the infant heirs, and charged the premium money to their account.

Herkimer v. Rice, 27 N. Y. 163. In connection, however, see Rose v. O'Brien, 50 Me. 188, where the policy "for whom it concerns" was taken out after a specific distribution of the property.

The administrator having taken out such a policy can recover thereon, though the balance of the realty is sufficient to pay the debts. Sheppard v. Peabody Ins. Co., 21 W. Va. 368. And where the administrator who was also the residuary beneficiary took out insurance on the property he could not claim the proceeds thereof as against the creditors, though he assumed to act for his own benefit. In re O'Connell's Estate, 22 N. Y. Supp. 914, 1 Misc. Rep. 50.

On the other hand, the proceeds of insurance taken out by an executor, whose duty it was to collect rent and turn it over to life tenants, have been held to vest exclusively in the remaindermen, to the exclusion of the life tenants (In re Lee's Estate, 4 Luz. Leg. Reg. [Pa.] 44).

(f) Purchase of insured property.

Owing to the general principle that a policy will protect only the interests named or implied therein, and also to the stipulation common to all modern policies, forfeiting the insurance in case of change of title or interest, the cases are rare in which a controversy has arisen as to the proceeds of a policy taken out prior to the sale of the property, and not assigned to the vendee. A few cases have, however, arisen. Thus it has been held that **where the contract of sale is so far advanced that the vendor holds the legal title as trustee for the vendee, and a recovery is had by the vendor, he must account to his cestui que trust for the proceeds of the insurance.**

William Skinner & Sons Shipbuilding & Dry-Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485; Reed v. Lukens, 44 Pa. 200, 84 Am. Dec. 425.

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And in Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220, where it appeared that the plaintiff and A. had bought a vessel and procured insurance upon it, the plaintiff indorsing A.'s notes for his half, and that A. had subsequently made a bill of sale of his half to plaintiff, it was held that the plaintiff might recover the whole amount insured. So, also, in Gates v. Smith, 4 Edw. Ch. (N. Y.) 702, it was held that where the policy was in the name of all the heirs interested in the property, and subsequently on partition sale one of the heirs became the purchaser, such purchaser, on payment of the insurance money, was entitled to any amount which might be recoverable from the insurance company.

A contract of sale, however, will not entitle the vendee to the insurance where under the circumstances the loss will fall on the vendor (Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796, 78 Am. St. Rep. 207, 50 L. R. A. 680). And it has been squarely held that the vendee is entitled to no share of the money recovered on a policy taken out by his vendor before the sale. Even though the vendor is not entitled to recover on the policy, this is a matter between himself and the company.

King v. Preston, 11 La. Ann. 95; Kortlander v. Elston, 52 Fed. 180, 2 C. C. A. 657, 6 U. S. App. 283.

Where one obtains the legal title to lands through fraud in the consideration, and, after he has taken out insurance upon the buildings in his name, his title is set aside in equity at the vendor's instance, as between him and the vendor, the insurance money recovered for a loss by fire pending the litigation should be considered as representing the property destroyed (Phœnix Ins. Co. v. Mitchell, 67 Ill. 43).

(g) Mortgagees' and vendors' liens—"Loss payable to."

In the absence of an agreement, express or implied, or of a clause in the policy making the loss payable to the mortgagee, or of an assignment to the mortgagee, the mortgagee has no interest in a policy taken out by the mortgagor upon his own interest.

Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512; Vandegraaff v. Medlock, 3 Port. (Ala.) 389, 29 Am. Dec. 256; Ridley v. Ennis, 70 Ala. 463; Lindley v. Orr, 83 Ill. App. 70; Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219; Ryan v. Adamson, 10 N. W. 287, 57 Iowa, 30; Carter v. Rockett, 8 Paige (N. Y.) 437; McDonald v. Black's Adm'r, 20 Ohio, 185, 55 Am. Dec. 448; Nichols v. Baxter, 5 R. I. 491.

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Conversely a mortgagor has no interest in the proceeds of a policy insuring the mortgagee, taken out by the mortgagee to protect his own interest, or in which the interest of the mortgagor has been forfeited, leaving that of the mortgagee still in force.

Concord Ins. Co. v. Woodbury. 45 Me. 447; McIntire v. Plaisted, 68 Me. 363; White v. Brown, 2 Cush. (Mass.) 412; Burlingame v. Goodspeed, 153 Mass. 24, 26 N. E. 232, 10 L. R. A. 495; Sterling Fire Ins. Co. v. Beffrey, 48 Minn. 9, 50 N. W. 922; McDowell v. Morath, 64 Mo. App. 290; Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445; Dunbrack v. Neall (W. Va.) 47 S. E. 303. See, also, Kortlander v. Elston, 52 Fed. 180, 2 C. C. A. 657, 6 U. S. App. 283; White v. Gilman, 138 Cal. 375, 71 Pac. 436.

Where the purchaser of an equity of redemption on execution sale effected insurance upon his interest at his own cost and for his own benefit, and received from the insurers the proceeds arising from a loss within the year which the defendant in execution had for redemption, he was not bound to account for the sum so received to the defendant (Cushing v. Thompson, 34 Me. 496).

This rule has been held applicable even where the policy in fact effected by the mortgagee alone nominally insured the mortgagor, with the loss payable to the mortgagee.

Thomas v. Montauk Fire Ins. Co., 43 Hun (N. Y.) 218. See, also, Harvey v. Cherry, 12 Hun (N. Y.) 354, affirmed 76 N. Y. 436.

But it does not apply where the insurance though in the mortgagee's name is in fact taken out for the benefit of the mortgagor.

Callahan v. Linthicum, 43 Md. 97, 20 Am. Rep. 106; Concord Ins. Co. v. Woodbury, 45 Me. 447. See, also, Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779.

Where one who had contracted to purchase property took out insurance in the name of the prospective vendor, and after a fire exercised his option of purchase, he was entitled to the balance left in the hands of the vendor after a partial restoration of the property (Williams v. Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150).

And in Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618, it was held that where the mortgage debt had been paid the mortgagor became the party beneficially interested in a policy taken out in the name of the mortgagee.[4]

Where a policy insuring the mortgagor is made payable to the mortgagee "as his interest may appear," the mortgagee is entitled

[4] For a further discussion of this case, see ante, vol. 1, p. 781.

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to the insurance money up to the amount of his mortgage debt, the amount so received being applied in payment of such debt.

Connecticut Mut. Life Ins. Co. v. Scammon (C. C.) 4 Fed. 263; Lewis v. Council Bluffs Ins. Co., 63 Iowa, 193, 18 N. W. 888; Home Ins. Co. v. Marshall, 48 Kan. 235, 29 Pac. 161; Gardner v. Continental Ins. Co., 25 Ky. Law Rep. 426, 75 S. W. 283; White v. Taylor, 107 Ky. 20, 52 S. W. 820; National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289; Amey v. Granite State Fire Ins. Co., 44 Atl. 601, 68 N. H. 446; Marion v. Wolcott (N. J. Ch.) 59 Atl. 242; Baltis v. Dobin, 67 Barb. (N. Y.) 507; Rogers v. Traders' Ins. Co., 6 Paige (N. Y.) 583; Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22; Pan Handle Nat. Bank v. Security Co., 18 Tex. Civ. App. 96, 44 S. W. 15; Manson v. Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573; Burrows v. McCalley, 17 Wash. 269, 49 Pac. 508.

And of course the mortgagor under such a policy is entitled to any balance remaining after satisfying the mortgage debt.

This has been rather assumed than decided by the courts, but reference may be made to Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543; Berthold v. Clay Fire & Marine Ins. Co., 2 Mo. App. 311; Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249; Kane v. Hibernia Mut. Fire Ins. Co., 38 N. J. Law, 441, 20 Am. Rep. 409; Coue v. Niagara Fire Ins. Co., 60 N. Y. 619; Baltis v. Dobin, 67 Barb. (N. Y.) 507.

It has, however, been held that where the loss was made payable to a trustee, and the debt was not yet due, he was not authorized either to pay it over to the mortgagee without the consent of the mortgagor, or to pay it to the mortgagor for the purpose of rebuilding. Therefore when he placed it in a bank, and the money was subsequently lost by the failure of the bank, the loss fell on the mortgagor (Fergus v. Wilmarth, 117 Ill. 542, 7 N. E. 508, affirming 17 Ill. App. 98). And in Naquin v. Texas Savings & Real Estate Investment Ass'n, 95 Tex. 313, 67 S. W. 85, 58 L. R. A. 711, 93 Am. St. Rep. 855, it was held that one who had contracted to purchase lands could not demand the application of the proceeds of a policy taken out in favor of the seller to the payment of the unmatured installments. Rather did the seller have the right to rebuild the property with such money, thus placing the parties in statu quo.

Where the legal title has been retained by the vendor with a mere right of purchase in the vendee, the vendor, to whom the loss has been made payable as his interest may appear, may retain the

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amount of insurance, even though the vendee subsequently refuses to carry out the contract (Fanning v. Equitable Fire & Marine Ins. Co., 46 Ill. App. 215). Nor is it material in the distribution of the proceeds of a policy insuring the mortgagor, with the loss payable to the mortgagee, that the property left would be sufficient to satisfy the mortgage debt (Motley v. Manufacturers' Ins. Co., 29 Me. 337, 1 Am. Rep. 591).

The right of a mortgagee who has taken out such a policy for his own protection is superior to that of a mechanic for lumber and materials (Elgin Lumber Co. v. Langman, 23 Ill. App. 250). And where the secured debt is larger than the policy, a judgment in favor of a trustee to whom the loss has been made payable will relieve the company, though under some circumstances other creditors may be entitled to demand an accounting as to portions of the secured debt contracted after the transfer of the policy (Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325). Where there are two mortgagees between whom no special equities exist, and a loss under the policy is made payable to but one, such mortgagee is under no obligation to divide pro rata with the other mortgagee the proceeds of such policy.

Dunlop v. Avery, 89 N. Y. 592, reversing 23 Hun, 509; Kirchgraber v. Park, 57 Mo. App. 35.

But where it was understood by all the parties that the insurance was for the benefit of both lienholders, the one to whom it was made payable, "as his interest may appear," was entitled to only his pro rata share thereof (Parker v. Ross, 73 Tex. 633, 11 S. W. 865).

The weight of authority favors the rule that **a policy made payable to a mortgagee "as his interest may appear" will give such mortgagee no right to the proceeds arising from the destruction of property included in the policy, but not covered by the mortgage.**

Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126; Palmer Sav. Bank v. Insurance Co. of North America, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; Wilcox v. Mutual Fire Ins. Co., 81 Minn. 478, 84 N. W. 334; Washington Nat. Bank v. Smith, 15 Wash. 160, 45 Pac. 736; Walls v. Helfenstein, 28 Wis. 632.

And this rule has been held applicable though the lien was released after the destruction of the property (Lett v. Guardian Fire Ins. Co., 52 Hun, 570, 5 N. Y. Supp. 526). But in Colby v. Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. 303, it was held by a majority

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of the court that the making of the loss payable to a "mortgagee as his interest may appear" referred to the extent of the mortgage debt, and not to the property covered thereby, and that therefore the mortgagee was entitled to all the proceeds up to the amount of his loss, though only a portion of the property was covered by his mortgage. So, also, in Parks v. Connecticut Fire Ins. Co., 26 Mo. App. 511, a creditor to whom a policy was made payable "as his interest may appear" was held entitled to recover, though the transaction by which it had been attempted to give a lien on the property was void on account of existing homestead rights.

(h) Same—Covenant by mortgagor or vendee to insure.

An agreement between the mortgagor and mortgagee by which the mortgagor is charged with the duty of taking out insurance for the benefit of the mortgagee will charge the proceeds of any insurance taken out by the mortgagor with a lien in favor of the mortgagee.

Wheeler v. Factors' & Traders' Ins. Co., 101 U. S. 439, 25 L. Ed. 1055; American Ice Co. v. Eastern Trust & Banking Co., 23 Sup. Ct. 432, 188 U. S. 626, 47 L. Ed. 623; Eastern Milling & Export Co. v. Eastern Milling Export Co. (C. C.) 125 Fed. 143; Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325; Wilson v. Hakes, 36 Ill. App. 539; Wilson v. Guyer, 53 Ill. App. 348; Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Chipman v. Carroll, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; Hazard v. Draper, 7 Allen (Mass.) 267; Mosher v. Lansing Lumber Co., 112 Mich. 517, 71 N. W. 161; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Hyde v. Hartford Fire Ins. Co. (Neb.) 97 N. W. 629; Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Hathaway v. Orient Ins. Co., 58 Hun, 602, 11 N. Y. Supp. 413, judgment affirmed 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514; Swearingen v. Hartford Fire Ins. Co., 56 S. C. 355, 34 S. E. 449, former appeal 52 S. C. 309, 29 S. E. 722, rehearing denied 34 S. E. 939.

It is provided by statute in Massachusetts, Minnesota, Mississippi, and North Carolina [5] that "if by an agreement with the insured or by the terms" of a policy taken out by a mortgagor the whole or any part of the loss is to be paid to a mortgagee, the company may pay the mortgagees in the order of their priority of claim, and that the payment shall be to the extent thereof a payment and satisfaction of the liability of the company. In Maine the statute [6] is

[5] Rev. Laws Mass. 1902, c. 118, § 58; Gen. Laws Minn. 1895, c. 175, § 51; Laws Miss. 1902, c. 59; Pub. Laws N. C. 1899, c. 54, § 41.

[6] Rev. St. Me. 1903, c. 49, § 54.

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that the mortgagee of real estate "shall have a lien upon any policy of insurance against loss by fire procured thereon by the mortgagor," to take effect after filing of a written notice with the company. If the mortgagor does not consent, the mortgagee may enforce his rights, after loss, by suit against the mortgagor and the company as trustee. In this suit judgment may be rendered for the sum due on the policy, though the mortgage is not yet due. The act also provides that after the payment of costs the mortgage shall next be paid, and the balance paid the mortgagor, and that, as between mortgagees, their rights shall be determined according to the priority of their claims and mortgages by the principles of law.

This rule is also applicable to an agreement by a vendee to insure for the benefit of his vendor (Grange Mill Co. v. Western Assur. Co., 118 Ill. 396, 9 N. E. 274). But where it appeared that under a contract looking to the sale of real estate certain buildings thereon were considered as personalty belonging to the prospective purchaser, an agreement by him to insure "the premises" for the benefit of the vendor was held not to charge the proceeds of insurance taken out by such purchaser on his own buildings with a lien in favor of the vendor (Dankwardt v. Prussian National Ins. Co., 123 Iowa, 70, 98 N. W. 603). So also it has been held that one holding corporate bonds as collateral was not entitled to the proceeds of policies which were taken out for the benefit of the corporation generally, and which did not mention the bonds, though he had been promised that insurance would be taken out to secure such bonds (Bristol Bank & Trust Co. v. Jonesboro Banking & Trust Co., 101 Tenn. 545, 48 S. W. 228). And the fact that the holder of mortgaged property, as defendant in foreclosure proceedings delayed such proceedings so that a fire occurred before the decree and sale did not give the mortgagee any rights in the proceeds of a policy taken out by such defendant to protect its own interest. Nor did any right against the defendant corporation accrue to him from the promise of certain stockholders that the insurance should stand as a security for his mortgage pending the litigation. (Farmers' Loan & Trust Co. v. Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.)

Where, however, the circumstances are such that existing insurance was evidently contemplated by the parties as a security for the mortgage debt, the proceeds of such insurance will be considered as charged with a lien in favor of the mortgagee (Nichols v. Baxter, 5 R. I. 491). But an agreement by the mortgagor to protect the

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mortgagee by insurance, made after the mortgage was given, and based on no new consideration, does not give the mortgagee an equitable lien on the proceeds of such policy, and where the mortgagee claims such a lien the company can show that the insurance was in fact taken out by the mortgagor for a different purpose (Swearingen v. Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722).

As a general rule **the covenant to insure does not run with the land.** Thus one taking subject to a mortgage providing for insurance may nevertheless insure his own interest free from any lien growing out of the mortgage (Reid v. McCrum, 91 N. Y. 412). So, also, insurance taken out by the donee of personal property has been held not subject to a lien in favor of a prior mortgagee, though the donee at the time had knowledge of an agreement by the mortgagor to insure for the benefit of the mortgagee (Shadgett v. Phillips & Crew Co., 131 Ala. 478, 31 South. 20, 56 L. R. A. 461). And in Dunlop v. Avery, 89 N. Y. 592, it was held that a senior mortgagee, whose mortgage provided for insurance, had no lien on the proceeds of a policy which by its terms was made payable to a junior mortgagee. It has, however, been intimated that the rule would be different in the case of a covenant looking to the rebuilding of the property with the proceeds of the insurance. Such a covenant might run with the land, though one providing only for the payment of the money to the mortgagee should be considered as purely personal.

Northern Trust Co. v. Snyder, 76 Fed. 34, 22 C. C. A. 47; Reid v. McCrum, 91 N. Y. 412.

A contract of the mortgagor to insure for the benefit of the mortgagee gives the mortgagee no rights in insurance taken out by other creditors (Wheeler v. Factors' & Traders' Ins. Co., 29 Fed. Cas. 896, reversed on other grounds 101 U. S. 439, 25 L. Ed. 1055). And where the mortgagee released one of the mortgagors, and his interest in the property, such mortgagor was entitled to his pro rata share of insurance which had been taken out by all the mortgagors in accordance with a covenant to keep the property insured up to the extent of the mortgage (Walls v. Helfenstein, 28 Wis. 632). Nor can a mortgagee claim a right to insurance taken out by the mortgagor to protect his own interest, merely because the company in which the mortgagor insured the property in accordance with his mortgage covenant had become insolvent (Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219).

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The lien of a mortgagee who has been promised insurance is superior to that of an assignee of the policy after loss who takes with knowledge of the equity of the mortgage (Nichols v. Baxter, 5 R. I. 491), or whose assignment is supported only by a precedent debt.

Giddings v. Seevers, 24 Md. 363. See, also, Wilson v. Hakes, 36 Ill. App. 539, where the mortgagee's lien was held superior to that of assignees before loss and their representatives, whose claim was based on a precedent debt, and who took with notice of the mortgagee's lien.

In Branch v. Milford Sav. Bank, 5 Kan. App. 246, 47 Pac. 555, an assignee of a mortgage containing a covenant to insure was held entitled to priority as to a policy taken out by the mortgagor, over an assignee in insolvency of the mortgagee.

The right of an attaching creditor has also been held subordinate to this lien (Providence County Bank v. Benson, 24 Pick. [Mass.] 204). But where it appeared that the policy was assigned after loss for value, and to an innocent purchaser, it was held that the assignee's equity was superior to that of the mortgagee. Nor could the case be considered as governed by a statute [7] providing that an action by an assignee should be without prejudice to any set-off or other defense existing at the time of the assignment.

Swearingen v. Hartford Fire Ins. Co., 56 S. C. 355, 34 S. E. 449, former appeal 52 S. C. 309, 29 S. E. 722, rehearing denied 34 S. E. 939.

The lien of an assignee of a mortgage, who has been promised insurance by his assignor, is enforceable as to insurance taken out by his assignor after the purchase by such assignor of the mortgaged property, though a personal action on the promise as to insurance is barred by the statute (Hyde v. Hartford Fire Ins. Co. [Neb.] 97 N. W. 629).

(i) Same—Foreclosure, payment, and restoration.

It has been held that a mortgagor who has failed to redeem cannot recover from the mortgagee insurance money paid for the burning of the property after the foreclosure, but before expiration of the time to redeem, under a policy procured and paid for by the mortgagor for the mortgagee's benefit (Carlson v. Presbyterian Board of Relief for Disabled Ministers, 67 Minn. 436, 70 N. W. 3). So, also, a judgment creditor of a corporation who insured its real

[7] Code S. C. § 133.

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estate in the joint names of himself and of the corporation was considered entitled to money received from the insurance company on account of a partial loss occurring after the property had been bid in by him at his judgment sale. Had the loss, however, occurred before the sale, or had the debtor redeemed, it would have had a beneficial interest in such money. (Mickles v. Rochester City Bank, 11 Paige, 118, 42 Am. Dec. 103.) An agreement by a mortgagor to insure for the benefit of the mortgagee has also been held to give the mortgagee a lien on the proceeds arising from a loss occurring after judgment, but before sale (Chipman v. Carroll, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305). But, on the other hand, the mortgagee to whom the loss has been made payable has been held to have no interest in proceeds arising from a destruction of the property after foreclosure sale. The sale, in this view of the question, is considered as entirely wiping out the mortgage debt, so that the purchaser, though he be the same person as the mortgagee, has no interest as mortgagee, and cannot recover as such.

Reynolds v. London & Lancashire Fire Ins. Co., 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17, overruling National Bank of D. O. Mills & Co. v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324. See, in connection, Uhlfelder v. Palatine Ins. Co., 89 N. Y. Supp. 792, 44 Misc. Rep. 153, where, however, the insurance was in effect upon the mortgagee's interest alone. And it might be noted that in Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618, a policy issued to a mortgagee was held collectible by the mortgagor even after payment of the debt.

Obviously a mortgagee whose debt has been paid and to whom the loss was payable by the policy only "as his interest may appear" has no rights to the proceeds of such policy.

Griswold v. American Cent. Ins. Co., 1 Mo. App. 97, affirmed 70 Mo. 654; Alamo Fire Ins. Co. v. Davis, 25 Tex. Civ. App. 342, 60 S. W. 802; Phœnix Assur. Co. v. Allison (Tex. Civ. App.) 27 S. W. 894. See, also, People's St. Ry. Co. v. Spencer, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22.

And it has been held that a restoration of the property by the mortgagor will have the same effect.

Huey v. Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606. See, also, In re Moore, 6 Daly (N. Y.) 541.

In Sheridan v. Peninsular Sav. Bank, 116 Mich. 545, 74 N. W. 874, this principle was applied to a vendor holding title as security, the purchaser having replaced the destroyed property (Sheridan v. Peninsular Sav. Bank, 116 Mich. 545, 74 N. W. 874).

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A mortgagee's claim under such a policy will not, however, be barred by a mere release of the mortgage of record without actual payment of the debt or any intention of releasing the mortgagee's claim upon the insurance company (Vesey v. Commercial Union Assur. Co., Limited, of London, England [S. D.] 101 N. W. 1074). And it has been held that the mortgagee could recover under the policy, though after loss the burned property and the policy were accepted in full payment of the debt.

Bartlett v. Iowa State Ins. Co., 77 Iowa, 86, 41 N. W. 579. In Thomas v. Montauk Fire Ins. Co., 43 Hun (N. Y.) 218, a similar holding was made as to policy construed as covering the mortgagee's interest only.

(J) Same—Action on policy.

It is a general rule that **where a loss is made payable without restriction to another than insured such appointee may recover the full amount of the insured loss, without regard to the extent of his insurable interest.**

Howard Fire Ins. Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Richelieu & O. Navigation Co. v. Thames & Mersey Ins. Co., 58 Mich. 132, 24 N. W. 547; Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543; Berthold v. Clay Fire & Marine Ins. Co., 2 Mo. App. 311; Cone v. Niagara Fire Ins. Co., 60 N. Y. 619; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Dakin v. Liverpool & L. & G. Ins. Co., 13 Hun (N. Y.) 122; Georgia Home Ins. Co. v. Leaverton (Tex. Civ. App.) 33 S. W. 579. But see Carberry v. German Ins. Co., 86 Wis. 323, 56 N. E. 920.

The insured may, however, with the consent of the payee, maintain an action on such a policy in his own name.

Patterson v. Triumph Ins. Co., 64 Me. 500; Coates v. Pennsylvania Fire Ins. of Philadelphia, 58 Md. 172, 42 Am. Rep. 327; Turner v. Quincy Mut. Fire Ins. Co., 109 Mass. 568. In Ennis v. Harmony Fire Ins. Co., 16 N. Y. Super. Ct. 516, it was held that the insured could not maintain the action as sole plaintiff without alleging that the mortgage was paid.

Or the insured and payee may join in the action (Georgia Home Ins. Co. v. Leaverton [Tex. Civ. App.] 33 S. W. 579). And in some jurisdictions it has been held that the action must, in any event, be brought in the name of the person with whom the contract was made and from whom the consideration moved. Nor is

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any account taken under this rule of any possible distinction between a policy making the loss absolutely payable to another and one making it payable to another "as his interest may appear."

In Friemansdorf v. Watertown Ins. Co. (C. C.) 1 Fed. 68, and Powers v. New England Fire Ins. Co., 69 Vt. 494, 38 Atl. 148, under policies payable to mortgagee as their interests might appear, it was held that where the contract was made with the mortgagor the action should be brought in his name. In Nevins v. Rockingham Mut. Fire Ins. Co., 25 N. H. 22, and Blanchard v. Atlantic Mut. Fire Ins. Co., 33 N. H. 9, the same holding was made under policies on their face payable without reservation to the mortgagees.

The same principle will enable a mortgagee to sue in his own name where the consideration has moved from him, and to collect the full amount of insurance, though beyond his mortgage lien he can hold only as trustee (Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249). In this connection see, also, Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co., 48 Mich. 148, 11 N. W. 846; Westchester Fire Ins. Co. v. Foster, 90 Ill. 121; Carnes v. Farmers' Fire Ins. Co., 20 Pa. Super. Ct. 634—in each of which the peculiar circumstances surrounding the transaction were held to have shown such a dealing with the mortgagee as would enable him to bring the action in his own name, though nominally he was only a payee as his interest might appear.

A distinction has, however, generally been drawn between policies payable without reservation to another than insured and those payable to another as his interest may appear. Manifestly a payee of the latter kind might not have any authority to collect more than a portion of the insurance either in his own right or as trustee for the insured. And accordingly it has been held that unless the special interest of the payee is shown to be greater than the company's liability he cannot recover as sole plaintiff in an action on the policy.

Fire Ins. Co. v. Feirath, 77 Ala. 194, 54 Am. Rep. 58; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Meriden Sav. Bank v. Home Mut. Fire Ins. Co., 50 Conn. 396; Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609; Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236, 51 N. W. 367; Proctor v. Georgia Home Ins. Co., 124 N. C. 265, 32 S. E. 716; Stainer v. Royal Ins. Co., 13 Pa. Super. Ct. 25; Carberry v. German Ins. Co., 86 Wis. 323, 56 N. W. 920. See, also, Friemansdorf v. Watertown Ins. Co. (C. C.) 1 Fed. 68. But see State Ins. Co. v. Maackens, 38 N. J. Law, 564, where it was held that the mortgagee might maintain an action to recover his interest, the court exercising its discretion over actions to prevent inequitable or vexatious litigation. And in Farm-

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ers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184, the court having decided that no question as to defect of parties had been raised, held that, where a policy was entered as payable to a "mortgagee," such mortgagee became the beneficiary, and might enforce the policy.

The insured may, under such a policy, maintain an action in his own name, the court protecting the rights of the person to whom the loss is payable, and the insured holding as trustee the amount due such payee.

St. Paul Fire & Marine Ins. Co. v. Johnson, 77 Ill. 598; Smith v. Continental Ins. Co., 108 Iowa, 382, 79 N. W. 126 (decided under a statute[8] allowing a party making a contract for the benefit of another to sue without joining the latter); Anthony v. German-American Ins. Co., 48 Mo. App. 65; Hope Oil Mill Compress & Mfg. Co. v. Phœnix Assur. Co., 74 Miss. 320, 21 South. 132; Owen v. Farmers' Joint-Stock Ins. Co., 10 Abb. Prac. N. S. (N. Y.) 166; Martin v. Franklin Fire Ins. Co., 38 N. J. Law, 140, 20 Am. Rep. 372; Kane v. Hibernia Mut. Fire Ins. Co., 38 N. J. Law, 441, 20 Am. Rep. 409; Franklin Fire Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271. See, also, Bragg v. New England Mut. Fire Ins. Co., 25 N. H. 289, and Hall v. Fire Ass'n of Philadelphia, 64 N. H. 405, 13 Atl. 648. In Jackson v. Farmers' Mut. Fire Ins. Co., 5 Gray (Mass.) 52, it was held that the mortgagor might, with the consent of the mortgagee, maintain an action for a loss amounting to less than the mortgagee's interest.

But in Lane v. Sun Mut. Ins. Co., 35 La. Ann. 224, the mortgagee was held a necessary party. And see, in connection, Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 South. 887.

And obviously, where the mortgage debt has been paid, there can be no objection to an action brought by the mortgagor as sole plaintiff.

Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 259; Scottish Union & Nat. Ins. Co. v. Enslie, 78 Miss. 157, 28 South. 822.

The mortgagee to whom the loss has been made payable "as his interest may appear" may, however, join in an action by the mortgagor.

McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691; Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543; Winne v. Niagara Fire Ins. Co., 91 N. Y. 185; Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

[8] Code Iowa 1873, § 2544; Code 1897, § 3459.

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In many jurisdictions a distinction has been drawn touching cases where the interest of the payee secured by the policy is greater than the insured loss. The direction or promise to pay being sufficient to exhaust the whole fund, the insurer is held directly liable to such payee by these courts, though the promise in terms was only to pay "as his interest may appear."

Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 South. 674, 86 Am. St. Rep. 152; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Trust Co. of Georgia v. Scottish Union & Nat. Ins. Co., 119 Ga. 672, 46 S. E. 855; Traders' Ins. Co. v. Pacaud, 51 Ill. App. 252; Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772; Motley v. Manufacturers' Ins. Co., 29 Me. 337, 1 Am. Rep. 591; Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 55 N. W. 1130, 40 Am. St. Rep. 325; Lowry v. Insurance Co. of North America, 75 Miss. 43, 21 South. 664, 37 L. R. A. 779, 65 Am. St. Rep. 587; Anthony v. German-American Ins. Co., 48 Mo. App. 65; Frink v. Hampden Ins. Co., 31 How. Prac. (N. Y.) 30; Donaldson v. Sun Mut. Ins. Co., 95 Tenn. 280, 32 S. W. 251; Peck v. Girard Fire & Marine Ins. Co., 16 Utah, 121, 51 Pac. 255, 67 Am. St. Rep. 600; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120; Colby v. Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. 303; Hammel v. Queen Ins. Co., 50 Wis. 240, 6 N. W. 805.

This distinction has, however, been expressly repudiated in Wisconsin (Williamson v. Michigan Fire & Marine Ins. Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906); and in Travelers' Ins. Co. v. California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769, it was stated that it was better that insured and payee should join in the action, even though the payee's claim might be sufficient to exhaust the insurance.

Where the policy is so written as to cover the interest both of the mortgagor and mortgagee, the mortgagee can maintain an action thereon in his own name.

Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715; Kent v. Ætna Ins. Co., 82 N. Y. Supp. 817, 84 App. Div. 428; Sullivan v. Spring Garden Ins. Co., 34 App. Div. 128, 54 N. Y. Supp. 629. See, also, Crawford v. Aachen & Munich Fire Ins. Co., 100 Ill. App. 454, judgment affirmed 65 N. E. 134, 199 Ill. 367.

But in Ætna Ins. Co. v. Baker, 71 Ind. 102, the mortgagor was held the proper party to sue on a policy taken out by the mortgagee upon his interest in the property, but which was taken out for the benefit of the mortgagor, and on an agreement with him that, in case of loss, any sum paid should be credited on the mortgage debt.

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This rule applies to policies containing the union mortgage clause, at least where the mortgagee has more rights under the policy than the mortgagor.

Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439; Phœnix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679.

The mortgagee under such a policy has indeed been held a necessary party to an action to reform the policy and for recovery thereunder (Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473); and in Westchester Fire Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682, it was held that the mortgagor could not maintain an action under such a policy unless the mortgage was paid or consent to such action had been obtained from the mortgagee.

(k) Assignees and pledgees.

The equitable interest gained by an assignment of a policy as collateral security will prevail over the claim of an unsecured creditor garnishing the company, and this though the company was not informed of the assignment (Wakefield v. Martin, 3 Mass. 558). Furthermore defenses based on the assignee's lack of insurable interest, or the necessity thereof, can be invoked only by the insurer, and will not avail other creditors seeking to subject the proceeds of the policy to their claims.

Southern Fertilizer Co. v. Reams, 105 N. C. 283, 11 S. E. 467; Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78; Insurance Co. of Pennsylvania v. Trask, 8 Phila. (Pa.) 32. See, also, Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389.

Where a policy was assigned as security "first to A. and then to B.," A. and B. holding first and second mortgages, respectively, it was held that the proceeds should be applied first to the payment of A.'s mortgage and then of B.'s (Marts v. Cumberland Mut. Fire Ins. Co., 44 N. J. Law, 478). Similarly it has been held that where, shortly after the execution of a mortgage, a policy was transferred to the mortgagee, it would follow as a conclusion of law that it was assigned as collateral to the mortgage, though no mention was made of the mortgage at the time of the assignment.

Buckley v. Garrett, 60 Pa. 333, 100 Am. Dec. 564. And see, also, Caley v. Hoopes, 86 Pa. 493, where the question was whether the policy was intended as security for a mortgage or for a confessed judgment on which another than the mortgagor was also liable.

It is not necessary that the mortgage include all the property covered by the policy, in order that the mortgagee to whom the policy has been assigned may recover for the whole loss (Bentley

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v. Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. 584). Nor can a creditor of the mortgagor attaching after the assignment of the policy to the mortgagee take advantage of defects in the mortgage to defeat the mortgagee's right to the insurance fund (Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389).

Where the policy is assigned to the mortgagee as collateral security, any sum of money to which the mortgagee may become entitled as such assignee by the destruction of the insured property is applicable to the payment of the debt (Smith v. Packard, 19 N. H. 575). And where the debt has been paid the mortgagee has nothing left which he can assign (Jecko v. St. Louis Fire & Marine Ins. Co., 7 Mo. App. 308). So, also, the assignee of the mortgage and policy can, after payment of the mortgage, receive the return premium due from the company, only as attorney for the mortgagor, to whom he is liable therefor (Felton v. Brooks, 4 Cush. [Mass.] 203). And it has even been held that the payment of the mortgage debt under foreclosure coercion, after judgment on the policy in the name of the mortgagor and for the benefit of the mortgagee to whom it had been assigned, will give the mortgagor a right to the proceeds of the judgment on the policy, though such judgment was obtained on the theory that the policy might be enforced in favor of the assignee even after a forfeiture by the original insured (Robert v. Traders' Ins. Co. [N. Y.] 17 Wend. 631).

Where an assignment of a fire policy to a mortgagee is in his possession, although the mortgage debt has been paid, equity will take jurisdiction of an action by subsequent purchasers of the insured property, to whom the vendor's interest in the policy was verbally assigned, to recover for a loss (Combs v. Shrewsbury Mut. Fire Ins. Co., 32 N. J. Eq. 512).

Where, however, the debt has been settled by a transfer of the property to the mortgagee and an assignment of the policy, the mortgagee will be entitled to the proceeds, though the original insured retained the right to repurchase within a given time on the repayment of the mortgage debt [9] (Biddeford Sav. Bank v. Dwelling House Ins. Co., 81 Me. 566, 18 Atl. 298).

A pledgee of a policy has, of course, superior equities over unsecured creditors.

Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270; Wells v. Archer, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682; Baughman v. Camden Mfg.

[9] As to the effect in general of an assignment to the purchaser of the property, see ante, vol. 2, p. 1063.

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Co., 65 N. J. Eq. 546, 56 Atl. 376. See, also, Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co., 71 N. H. 445, 52 Atl. 860.

And this is true though the other creditors have a lien on the property (In re West Norfolk Lumber Co. [D. C.] 112 Fed. 759).

Though it is provided by statute [10] that there can be but one action for the recovery of any debt secured by mortgage, nevertheless the pledgee may first sue to recover the debt for which the pledge was given (Savings Bank of St. Helena v. Middlekauff, 113 Cal. 463, 45 Pac. 840).

A pledgee does not terminate his interest by sending the policy for collection to his pledgor. Nor will any rights be obtained against the pledgee by the giving of security for costs by one to whom the pledgor assigned the policy when so received for collection. But the expenses incurred in the collection of the policy by the one to whom it was so assigned should be divided between the pledgee and assignee in proportion to the amounts receivable by each under the decree of the court. (Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33.) But where the policy has become entirely void by a transfer of the property subsequent to the pledge, the pledgee's rights will not be revived by a subsequent assignment of the policy, with the company's consent, to the holder of the property (In re Hamilton [D. C.] 102 Fed. 683).

(l) Other liens.

The principles governing the application of the proceeds of a policy taken out by a mortgagor without any stipulation or special equity in favor of the mortgagee have been applied against the claims of various other classes of lienholders. **In the absence of contract or special equities, the lienholder has no claim upon the proceeds of insurance taken out in favor of the principal estate.**

Reference may be made to the following cases: Rackley v. Scott, 61 N. H. 140 (holder of a mechanic's lien); Whitehouse v. Cargill, 88 Me. 479, 34 Atl. 276 (legatee whose legacy was charged upon real estate); Lindley v. Orr, 83 Ill. App. 70 (execution creditor); McLaughlin v. Park City Bank, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343 (attachment creditor claiming fraudulent conveyance and who afterwards obtained execution); Forrester v. Gill, 11 Colo. App. 410, 53 Pac. 230 (creditors claiming a fraudulent conveyance); Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212 (preferred stockholders). See, also, Roberts v. Swift (D. C.) 13 Fed. 915, where seamen, advances of

[10] Code Civ. Proc. Cal. § 726.

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whose wages had been insured, and who had been charged with such insurance, claimed an interest in the insurance paid the owners.

Conversely, an attachment creditor has been held not bound to apply on his claim the proceeds of insurance obtained by him on the attached property without any agreement with the debtor.

International Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239. But see, in connection, Bank of South Carolina v. Bicknell, 17 L. Ed. 241, append., where without any reported opinion there is noted a reversal of a decision of the circuit court (2 Fed. Cas. 674) to the effect that a bank, which on the security of an attached bill of lading has paid a bill of exchange drawn on the consignee, has no right on the insolvency of the drawee to the proceeds of insurance taken out by such drawee on his interest in the consigned goods.

(m) Assignment after loss—Validity and sufficiency.

An assignment of the policy after loss is in effect no more than an assignment of a claim against the company, and is valid though the policy expressly provides against an assignment either before or after loss. Such a stipulation, as applied to an assignment after loss, is void as against public policy.

Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; Walters v. Washington Ins. Co., 1 Iowa, 404, 63 Am. Dec. 451; Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287; Missouri Valley Life Ins. Co. v. Kelso, 16 Kan. 481; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N. W. 303; Jecko v. St. Louis Fire & Marine Ins. Co., 7 Mo. App. 308; Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113; Combs v. Shrewsbury Mut. Fire Ins. Co., 32 N. J. Eq. 512; Mellen v. Hamilton Fire Ins. Co., 17 N. Y. 609, affirming 12 N. Y. Super. Ct. 101; Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189; Courtney v. New York City Ins. Co., 28 Barb. (N. Y.) 116; Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292; Brichta v. New York Lafayette Ins. Co., 2 N. Y. Super. Ct. 403; Rogers v. Traders' Ins. Co., 6 Paige (N. Y.) 583; West Branch Ins. Co. v. Hellfenstein, 40 Pa. 289, 80 Am. Dec. 573; Pennebaker v. Tomlinson, 1 Tenn. Ch. 598; Nease v. Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233; Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

In some of the cases it has been noted that the assignment was after proofs of loss or adjustment. Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402. See, also, Kern v. Grier, 94 Ga. 498, 19 S. E. 819.

But in Greenwich Ins. Co. v. Columbia Mfg. Co., 73 Ill. App. 560, it was held that the loss fixes the liability of the company, and that proof and adjustment are not necessary to make the claim assignable.

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And the fact that no fund was shown to have been in the hands of a mutual insurance company as due on a policy was in Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522, held not to prevent the equitable transfer of the proceeds of the policy, the claim having been thereafter definitely established under the facts existing at the time of the assignment.

Such an assignment is valid though the interest of the assignor covered or secured by the policy is not transferred to the assignee (De Wolf v. Capital City Ins. Co., 16 Hun [N. Y.] 116). Nor will the assignment be invalid for lack of other consideration than a pre-existing debt (Glover v. Lee, 140 Ill. 102, 29 N. E. 680). A voluntary assignment, which has not been accepted by the assignee, will not, however, affect the right of the insured to recover the full amount of the loss (Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 30 N. W. 497).

An assignment after loss, procured by the officers of the insurer under false representations as to its ability to pay, will be set aside as fraudulent (Derrick v. Lamar Ins. Co., 74 Ill. 404). But where it appeared that the assignor did not rely on the representations of the purchaser, but investigated for himself, and received as much as such claims were then bringing, it was held that the sale would stand, though, as it subsequently developed, the company was able to pay a much larger percentage of its liabilities (Frank v. Tolman, 75 Ill. 648).

An assignment after loss is valid though it is not evidenced by writing.

Bennett v. Maryland Fire Ins. Co., 3 Fed. Cas. 229; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426; Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265.

Thus a delivery to the assignee has been held sufficient.

Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265; Ross v. Wells, 5 Pa. Co. Ct. R. 430. See, also, Greene v. Republic Fire Ins. Co., 84 N. Y. 572.

And the same effect has been given a delivery to a third person under an agreement between the insured and his creditor that the proceeds should be applied to the satisfaction of the debt.

Hanchey v. Hurley, 129 Ala. 306, 30 South. 742. But see Aultman v. McConnell (C. C.) 34 Fed. 724, where a mere direction to an attorney to pay the proceeds to the creditor was held not sufficient.

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And in general it may be said that the validity of the assignment is governed by the same rules as those controlling the assignment of any other matured chose in action.

In the following cases the assignment was held sufficient: Spratley v. Hartford Ins. Co., 22 Fed. Cas. 973; Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522; Continental Ins. Co. v. Pratt, 8 Kan. App. 424, 55 Pac. 671. See, also, Morley v. Liverpool & L. & G. Ins. Co., 76 Minn. 285, 79 N. W. 103.

But in these it was held that no assignment had been effected: Kern v. Grier, 94 Ga. 498, 19 S. E. 819; Frankenthal v. Guardian Assur. Co., 76 Mo. App. 15; Hanchey v. Hurley, 129 Ala. 306, 30 South. 742.

(n) Same—Effect.

An assignment after loss with no reservations passes the whole claim to the assignee.

Perry v. Merchants' Ins. Co., 25 Ala. 355; Cohn v. Guardian Assurance Co., 68 Mo. App. 376; Hand v. Williamsburg City Fire Ins. Co., 57 N. Y. 41; Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522.

Thus where one of two beneficiaries assigns it after loss to the other, with authority to collect the same, paying any surplus to the assignor after the payment of a debt due by him, in the event of recovery in the suit by the assignee, the only claim the assignor would have would be against the assignee, and not against the insurance company (Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 South. 228). And though the company pays the claim to the insured in reliance on his statement that a prior order had been revoked, it will nevertheless be liable to the person to whom the order, which was in fact unrevoked, had been given (Hall v. Dorchester Mut. Fire Ins. Co., 111 Mass. 53, 15 Am. Rep. 1). Nor will payment into court as garnishee defendant protect the company where at the time of such payment it knew of the prior assignment and kept silent in relation thereto (Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522).

Policies assigned after loss for the securing of the payment "of any and all pecuniary obligations" due the creditor may be retained as security for all accounts, though the assignment was made as the result of an agreement touching certain of the credits only (Boardman v. Holmes, 124 Mass. 438).

The rights of such an equitable assignee are superior to those of insured's subsequent attaching creditor (Greenwich Ins. Co. v. Columbia Mfg. Co., 73 Ill. App. 560), or the holder of a mechanic's lien who has filed his bill after the assignment (Galyon v. Ketchen, 85 Tenn. 55, 1 S. W. 508).

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The assignee, however, takes all such claims subject to prior equities between the insured and insurer.

Archer v. Merchants' & Mfrs. Ins. Co., 43 Mo. 434; Matthews v. General Mut. Ins. Co., 9 La. Ann. 590. In Johnston v. Phœnix Ins. Co., 89 Md. 233, an indorsement made on the policy by insurer's agent was held not to have constituted such a recognition of the assignee's rights as would estop the company from asserting an offset arising from an indebtedness of the insured.

But where property covered by a policy containing the union mortgage clause was sold by the mortgagor, the purchaser, with the consent of all parties, assuming the mortgage debt, the right of such mortgagor after a loss, in his character of surety as to the mortgage debt, to pay the trustee the amount of such debt, and become the beneficiaries' assignee, was held not subject to be defeated by the prior purchase of the mortgage by the insurer. The premium paid by the mortgagor the court held was a full equivalent for the risk insured. (Merchants' Ins. Co. v. Story, 13 Tex. Civ. App. 124, 35 S. W. 68.)

Equities in favor of third persons outstanding against the proceeds at the time of the assignment have also been held superior to those of the assignee after loss.

In re Wittenberg Veneer & Panel Co. (D. C.) 108 Fed. 593; McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137. See, also, Smith v. Carmack (Tenn. Ch. App.) 64 S. W. 372, where the facts were held to have been sufficient to put the assignee on inquiry.

But an assignment after loss is not conclusively shown to have been void as to the assignee by the fact that on account of such assignment the insured was declared a bankrupt (Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426). And a company against which garnishee judgment has been rendered must show in addition that judgment has been rendered against the assignor as principal debtor before it can successfully interpose the defense that the assignment was void as in fraud of the assignor's creditors (Horst v. City of London Fire Ins. Co., 73 Tex. 67, 11 S. W. 148).

The question as to whether the assignee should sue in his own name or in that of his assignor is dependent on the rule in force governing the bringing of action on a chose in action assigned after maturity.

In Massachusetts and Illinois it has been held that the action should be brought in the name of the assignor. Merchants' Ins. Co. v.

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Union Ins. Co., 162 Ill. 173, 44 N. E. 409, affirming 58 Ill. App. 611; Hall v. Dorchester Mut. Fire Ins. Co., 111 Mass. 53, 15 Am. Rep. 1.

In Georgia the action must be brought in the name of the assignor unless the assignment was in writing so as to pass the legal title. Hartford Fire Ins. Co. v. Amos, 98 Ga. 533, 25 S. E. 575; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426.

In code states the action may be brought in the name of the assignee as the real party in interest. Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; Perry v. Merchants' Ins. Co., 25 Ala. 355; Western Assurance Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265; Continental Ins. Co. v. Pratt, 8 Kan. App. 424, 55 Pac. 671; Cohn v. Guardian Assurance Co., 68 Mo. App. 376; Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113; Mellen v. Hamilton Fire Ins. Co., 12 N. Y. Super. Ct. 101, affirmed 17 N. Y. 609; Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Northwestern Mut. Life Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446.

(o) Employers' liability insurance.

Where judgment has been obtained against an employer for death of an employé, and the employer holds a policy insuring it against liability for damages for injury to employés, the judgment creditor may issue attachment execution, and serve it on the insurer as garnishee, notwithstanding its defense that it has not consented to an assignment of any interests of the insured to such creditor, and that the insured has not suffered any loss, and therefore cannot give any better right against the insurer than it would have (Fritchie v. Miller's Pennsylvania Extract Co., 197 Pa. 401, 47 Atl. 351). And where the policy provided that the company would take upon itself the settlement of any loss and the control of legal proceedings taken against the insured, and that the insured would not settle with the employé without the consent of the insurer, the claim of the insured did not pass to one to whom he made a general assignment after the accident, and therefore the employé was not deprived by such assignment of his right of garnishing the insurance company (Anoka Lumber Co. v. Fidelity & Casualty Co., Nelson, Intervener, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689). Nevertheless the amount paid by such a company to the employer does not constitute an asset of the estate of the employé (Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141).

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2. RIGHT TO PROCEEDS IN LIFE AND ACCIDENT INSURANCE.

(a) Scope of discussion.

The questions connected with the right to the proceeds of insurance policies are numerous and varied. In a large majority of the cases the questions depend not so much on the general principles of construction as on the particular facts; and in a very large percentage of cases the decisions turn on the local laws of descent and distribution of estates. To even attempt to present a complete discussion of all the cases would simply overburden and confuse the reader, and cause him to lose sight of the principles on which the decisions rest. In the treatment of this branch of the subject, therefore, the purpose is to present the salient points—the governing principles underlying the determination of the right to the proceeds of the policy—and refer the reader for specific illustrations to the digests, where the cases are grouped according to their facts.

(b) Right to proceeds in general.

It is fundamental that, in order to be entitled to the proceeds of a life insurance policy or benefit certificate, a beneficiary must be

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properly designated and fall under the class of persons who may be beneficiaries.[1]

Berkeley v. Harper, 8 App. D. C. 308; Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538; Kinney v. Dodd, 41 Ill. App. 49; Hogan v. Wallace, 63 Ill. App. 385; Id., 46 N. E. 1136, 166 Ill. 328; Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543; Grimme v. Grimme, 101 Ill. App. 389, judgment affirmed 64 N. E. 1088, 198 Ill. 265; Supreme Lodge of Knights of Honor v. Metcalf, 15 Ind. App. 135, 43 N. E. 893; Mitchell v. Grand Lodge Iowa Knights of Honor, 70 Iowa, 360, 30 N. W. 865; Derrington v. Conrad, 3 Kan. App. 725, 45 Pac. 458; Williams v. Williams, 10 Ky. Law Rep. 37; Nuckols v. Kentucky Mut. Ben. Soc., 16 Ky. Law Rep. 270; Succession of Richardson, 14 La. Ann. 1; Brierly v. Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297; Hosmer v. Welch, 107 Mich. 470, 67 N. W. 504, 65 N. W. 280; Hanson v. Minnesota Scandinavian Relief Ass'n, 59 Minn. 123, 60 N. W. 1091; Independent Order of Sons & Daughters of Jacob of America v. Henderson, 76 Miss. 326, 24 South. 702, 71 Am. St. Rep. 532; Grand Lodge v. Elsner, 26 Mo. App. 108; Grand Lodge A. O. U. W. v. McKinstry, 67 Mo. App. 82; St. Louis Police Relief Ass'n v. Strode, 103 Mo. App. 694, 77 S. W. 1091; Shryock v. Shryock, 50 Neb. 886, 70 N. W. 515; Scott v. Provident Mut. Relief Ass'n, 63 N. H. 556, 4 Atl. 792; Eastman v. Provident Mut. Relief Ass'n, 65 N. H. 176, 18 Atl. 745, 23 Am. St. Rep. 29, 5 L. R. A. 712; Eckert v. Mutual Relief Soc. (Sup.) 2 N. Y. Supp. 612; Arnott v. Prudential Ins. Co., 63 Hun, 628, 17 N. Y. Supp. 710; Brown v. Brown, 6 Misc. Rep. 433, 27 N. Y. Supp. 129; Bogart v. Thompson, 53 N. Y. Supp. 622, 24 Misc. Rep. 581; Olmstead v. Olmstead, 76 App. Div. 582, 79 N. Y. Supp. 98; Massey v. Mutual Relief Soc., 102 N. Y. 523, 7 N. E. 619; Olmstead v. Olmstead, 177 N. Y. 579, 69 N. E. 1128; Elliott v. Whedbee, 94 N. C. 115; State v. Central Ohio Mut. Relief Ass'n, 29 Ohio St. 399; Appeal of Folmer, 87 Pa. 133; Donithen v. Independent Order of Foresters, 58 Atl. 142, 209 Pa. 170; Id., 23 Pa. Super. Ct. 442; Supreme Lodge Knights of Honor v. Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160; Standard Life & Acc. Ins. Co. v. Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781; Renner v. Supreme Lodge of Bohemian Slavonian Ben. Soc. of United States, 89 Wis. 401, 62 N. W. 80.

But the presumption is that the designation made in the certificate is a legal one, and the society has the burden of proving the contrary.

Supreme Lodge 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.

[1] For a discussion of the validity, sufficiency, and construction of the designation of the beneficiary, see ante, vol. 1, p. 796 et seq.

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And the society is the only one that can raise the objection that the beneficiary designated does not come within the class of persons who may be designated.

Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; Luhrs v. Supreme Lodge K. & L. of H., 54 Hun, 636, 7 N. Y. Supp. 487; Maguire v. Supreme Council, Catholic Benevolent Legion, 69 N. Y. Supp. 61, 59 App. Div. 143; Markey v. Supreme Council, Catholic Benev. Legion, 74 N. Y. Supp. 1069, 70 App. Div. 4; Ducksbury v. Supreme Lodge Shield of Honor, 4 Lack. Leg. N. (Pa.) 172; Schoales v. Order of Sparta, 206 Pa. 11, 55 Atl. 766; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125. See, also, Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

So, where a beneficiary designated in a certificate comes within the statutory classes of beneficiaries, but is not within the classes covered by the society's laws, an adverse claimant cannot set up lack of authority in the society to make such person a beneficiary (Tepper v. Supreme Council of Royal Arcanum, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449). And where the designation was made in good faith, and the laws of the company provide that, when the designated beneficiaries fail, the benefit is to be paid to the heirs of the member, the company cannot resist payment on the ground that the designation of the beneficiary is invalid (Sargent v. Supreme Lodge Knights of Honor, 158 Mass. 557, 33 N. E. 650). But neither the society nor a member can divert the fund from those for whom it is by statute provided that the fund was to be accumulated.

Supreme Council A. L. H. 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.

In some instances the right to recover the benefit on the death of a member of a mutual benefit society has turned on the question whether it was necessary that the member should have taken out a certificate. And it has been held that, where the constitution or by-laws of a society require a member to take out a certificate, a member who fails to comply with this requirement thereby bars his heirs from the death benefit.

Bishop v. Grand Lodge of Empire Order of Mutual Aid, 43 Hun (N. Y.) 472; Pfeifer v. Supreme Lodge of Bohemian Benevolent Slavonian Soc., 77 N. Y. Supp. 1138, 74 App. Div. 630, affirming 74 N. Y. Supp. 720, 37 Misc. Rep. 71.

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But on a further appeal of the Pfeifer Case (173 N. Y. 418, 66 N. E. 108) it was held that as the constitutional requirement that the beneficiary should be designated was adopted after deceased became a member, and as another provision excepted members of the order, who were members entitled to the death benefit, from the operation of the requirement, the issuance of a certificate was not necessary as a condition precedent to the right of recovery of the benefit. So, it was held in Grossmeyer v. District No. 1, I. O. B. B., 70 N. Y. Supp. 393, 34 Misc. Rep. 577, that the status of a beneficiary could not be changed by an alteration in the by-laws changing the manner of designating beneficiaries, where the change was made after the member had become afflicted with progressive paresis, causing death; the amendment either being not retroactive as to him, or so unreasonable, because of his health, as not to apply to him. As a general proposition, it may be said that, if a disposition of the benefit is valid when made, a subsequent change in the laws of the order restricting its disposition will not affect the rights of the beneficiaries to the fund.

Spencer v. Grand Lodge A. O. U. W., 53 App. Div. 627, 65 N. Y. Supp. 1146, affirming 22 Misc. Rep. 147, 48 N. Y. Supp. 590; Roberts v. Grand Lodge A. O. U. W., 70 N. Y. Supp. 57, 60 App. Div. 259, affirmed in 173 N. Y. 580, 65 N. E. 1112; Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Swain v. Grand Lodge of Pennsylvania A. O. U. W., 22 Pa. Co. Ct. R. 548, 8 Pa. Dist. R. 407.

In accordance with this rule it has been held that a direction made in a certificate issued by a society of one state doing business in another, valid when made, is not invalidated by the subsequent reincorporation of the society in the latter state under a charter which limits the disposition of the benefit, and that the courts of the latter state will enforce the contract as made, it not being repugnant to the general policy of the law (Hysinger v. Supreme Lodge Knights & Ladies of Honor, 42 Mo. App. 627). But where a change of beneficiary is made after a new law has taken effect, the rights of the new beneficiary are governed by such law (Grand Lodge A. O. U. W. v. McKinstry, 67 Mo. App. 82). And the proceeds of a certificate cannot be devised to a person outside the classes to which laws enacted subsequent to the issuance of the certificate restrict the beneficiaries (Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065). In Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689, it was held that a

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policy executed for a certain sum, and thereafter reduced in amount after some of the contingent beneficiaries had died, was, for the purpose of determining who was entitled as beneficiary, to be construed as of the time of its original issue.

A by-law providing that in the absence of widow and children a gratuity fund shall be paid to the next of kin of the deceased member, within the limit of representation prescribed by the statutes, contemplates payment to persons who shall be next of kin as prescribed by the statutes in existence at the time of the member's decease, though they were not under the statutes in existence at the time of the enactment of the by-law (Kemp v. New York Produce Exchange, 34 App. Div. 175, 54 N. Y. Supp. 678). In that case it was further held that an adopted child, even if not a child within the by-laws, was entitled to the fund as next of kin.

If an application is not made a part of the contract, the beneficiary named in the policy takes instead of the one designated in the application (Rice v. Rice's Adm'r, 63 S. W. 586, 23 Ky. Law Rep. 635). In Hunter v. Scott, 108 N. C. 213, 12 S. E. 1027, it was held that where the policy was received without objection, and the premiums paid regularly, the application, as modified by the policy, would be deemed to be the contract, and the beneficiaries those mentioned in the policy. And in Hutson v. Jenson, 110 Wis. 26, 85 N. W. 689, it was held that 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," the contract was expressed by the certificate, and not by the application. But in Harding v. Littlehale, 150 Mass. 100, 22 N. E. 703, it was held that the designation in the application controlled the one made in the policy, in the absence of anything else to show a contrary intention. And a similar decision was rendered in Eckler v. Terry, 95 Mich. 123, 54 N. W. 704, and Fuss v. Kroner (Super. Ct. Cin.) 24 Wkly. Law Bul. 400, 11 Ohio Dec. 85. But the decision in the latter case was based on equitable circumstances.

Where a contract of insurance provides that it shall be payable to the "devisees" of the deceased, the use of such expression excludes his estate from any interest therein (Worley v. Northwestern Masonic Aid Ass'n [C. C.] 10 Fed. 227). Under a statute providing that a policy of life insurance shall inure to the separate use of the husband, or the wife and children, the proceeds of a life insurance policy, held by a husband at the time of his death with-

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out children, becomes the property of the wife (Rhode v. Bank, 52 Iowa, 375, 3 N. W. 407). Where a policy was extended beyond the time of the death of insured, though there had been a default in the payment of a premium, the extension was for the benefit of the beneficiary named, and not for the benefit of the estate of insured, and she is entitled to the full amount of the policy (Morehead's Adm'r v. Mayfield, 58 S. W. 473, 22 Ky. Law Rep. 580, 109 Ky. 51). Though it is the intention of beneficiaries in a life policy, by delivery of an instrument to the administrator after death of insured, to evidence relinquishment of their rights, it being without consideration, they may revoke it (Saling v. Bolander, 125 Fed. 701, 60 C. C. A. 469).

Where a code of a benefit association provides that the purpose of a fund is to pay a sum to survivors of a member at his death; that if a member shall die, whose survivors possess no benefit certificate, the money shall not be paid without an order of court; and that, if a member die whose survivors produce a death certificate, the recipient of the money shall give a receipt—the term "survivors" does not include a person who is neither a relative, nor member of the household of, nor connected by marriage with, the member of the association (Koerts v. Grand Lodge of Wisconsin of Order of Hermann's Sons, 119 Wis. 520, 97 N. W. 163).

(e) What law governs.

Where a policy is issued by a company incorporated in one state to a person residing in another state, the question may arise as to what laws govern the distribution of the proceeds. In Millard v. Brayton, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294, it was held that the law of the place of consummation of the contract governed. And in Expressman's Mut. Ben. Ass'n v. Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470, the law of the place of performance was held to govern. So, in Watt v. Gideon, 8 Pa. Dist. R. 395, Pennypacker, P. J., held that the contract was governed by the law of insured's domicile by reason of the fact that the contract was consummated there. Sulzberger, J., in concurring in the result, adds as an additional ground that the law of insured's domicile governs the distribution of the proceeds. It is also to be noted that in the Millard Case the contract was consummated in insured's state, and that in the Hurlock Case the place of performance was insured's domicile. Thus, it appears that the result attained in the cases cited was in harmony with what seems

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to be the better rule—that **the distribution of the proceeds of a policy is to be governed by the law of insured's domicile.**

Such is the doctrine of Mayo v. Equitable Life Assur. Soc., 71 Miss. 590, 15 South. 791; Masonic Mut. Life Ass'n v. Jones, 154 Pa. 107, 26 Atl. 255. See, also, Knights Templars & Masonic Mut. Aid Ass'n v. Greene (C. C.) 79 Fed. 461.

In the Mayo Case this rule was held to apply, even though the policy was issued to insured while temporarily staying in another state, and left in such state for safe-keeping, as there was nothing to take the case out of the general rule that the situs of a chose in action follows the person of the owner. But in Mullen v. Reed, 64 Conn. 240, 29 Atl. 478, 42 Am. St. Rep. 174, 24 L. R. A. 664, it was held that in determining who were entitled to take as "heirs at law" under a policy issued by a Massachusetts corporation to a resident of that state the law of Massachusetts governed, though insured died in Connecticut. In Wisconsin it has been held that the right to dispose of the proceeds of a policy by will is governed by the law of the state where the contract is consummated (In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17).

(d) Policy payable to insured, his heirs or estate.

If a life insurance policy is payable to insured himself, the money accruing on the policy at his death becomes a part of his estate, like any other chose in action, and assets in the hands of the administrator, unless exempted by statute.

Union Mut. Life Ins. Co. v. Stevens (D. C.) 19 Fed. 671; Burton v. Farinholt, 86 N. C. 260; Wright v. Wright, 100 Tenn. 313, 45 S. W. 672; White v. Smith, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 401. The same rule appears to apply to a policy payable to insured's executors, administrators, or assigns. Connecticut Mut. Life Ins. Co. v. Ryan, 8 Mo. App. 535; Webb v. Roettinger, 4 O. C. D. 270, affirmed 55 Ohio St. 686, 48 N. E. 1119.

So, where a member of a beneficial association constitutes himself beneficiary in his certificate, the proceeds of the certificate will go to his personal representative (Brierly v. Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297). But where a policy is payable to the insured, his executors, administrators, or assigns, for the benefit of his widow, if any, the proceeds thereof are not assets of the insured's estate, but vest in his executor as a trustee under the policy for the widow (In re Van Dermoor's Estate,

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42 Hun [N. Y.] 326). However, a policy made payable to the assured, his executors, administrators, or assigns, for the sole use and benefit of designated persons, is not payable to such persons, but to assured's legal representatives, as trustees (Stowe v. Phinney, 78 Me. 244, 3 Atl. 914, 57 Am. Rep. 796). But the widow and children may be entitled to maintain an action on such a policy where the petition avers that there are no debts and no administration (Sun Life Ins. Co. v. Phillips [Tex. Civ. App.] 70 S. W. 603). And under constitutional and statutory provisions giving the probate court jurisdiction to administer decedents' estates and to direct the distribution of assets, said court may determine whether the proceeds of such a policy shall be distributed to creditors of the estate, on their application therefor, or to the widow and child, claiming said fund as legatees (Dulaney v. Walsh [Tex. Civ. App.] 37 S. W. 615). Where a policy for the benefit of the widow and children of the assured is made payable on his death to his executor, the latter is liable to the children, for money due and received for the children's use, for the children's share of the amount of the policy collected after deducting expenses (Gould v. Emerson, 99 Mass. 154, 96 Am. Dec. 720).

On the death of a married man the proceeds of a policy of life insurance issued to him during the existence of the community, and payable to his executor, administrator, or assigns, falls into the community, and not into his separate estate (Succession of Buddig, 108 La. 406, 32 South. 361).

Often life insurance policies and benefit certificates are made payable to the "heirs," "lawful heirs," or "legal heirs" of insured, no persons in particular being designated as beneficiaries. So, in many cases the laws under which a mutual benefit society is organized, or the laws of the society, provide for payment of the benefit to a member's heirs, if he fails to designate a beneficiary, or if there is for other reasons a failure of beneficiary. These terms are generally regarded as synonymous. But there is a conflict among the authorities as to who are entitled to the proceeds of the policy as heirs. However, the most generally accepted rule appears to be that, if not otherwise limited, the proceeds of the policy go to those who take the personal property of insured under the statute 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; Knights Templars & Masonic Mut. Aid Ass'n v.

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Greene (C. C.) 79 Fed. 461; Northwestern Masonic Aid Ass'n of Chicago 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 Knights Templars and Masonic Mutual Aid Ass'n v. Greene (C. C.) 79 Fed. 461, the word "heirs," as used to designate persons who are to take personal property, is to be construed from the context and the surrounding circumstances, and is not necessarily limited to its technical meaning. So, in Alexander v. Northwestern Masonic Aid Ass'n, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161, affirming 27 Ill. App. 29, it was held that, in view of the statute, the widow of a member who left no children or descendants of children was entitled to the entire proceeds of a certificate payable to the insured's "heirs," to the exclusion of the next of kin.

That the term includes the widow and children is also asserted in Wilburn v. Wilburn, 83 Ind. 55; Hanson v. Minnesota Scandinavian Relief Ass'n, 59 Minn. 123, 60 N. W. 1091; Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086; Lyons v. Yerex, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; Jamieson v. Knights Templar & Masonic Mut. Aid Ass'n, 9 Ohio Dec. 388, 12 Wkly. Law Bul. 272; Leavitt v. Dunn, 56 N. J. Law, 309, 28 Atl. 590, 44 Am. St. Rep. 402; Janda v. Bohemian Roman Catholic First Central Union of the United States, 71 App. Div. 150, 75 N. Y. Supp. 654, affirmed in 173 N. Y. 617, 66 N. E. 1110; Pleimann v. Hartung, 84 Mo. App. 283; Lawwill v. Lawwill, 29 Ill. App. 643; Young Men's Mut. Life Ass'n v. Pollard, 2 O. C. D. 333; Addison v. New England Commercial Travelers' Ass'n, 144 Mass. 591, 12 N. E. 407; Kaiser v. Kaiser, 13 Daly (N. Y.) 522.

Applying these rules, it has been held that, if a member has a wife, his mother cannot be the heir, especially if she was not living with him as a member of his family, and was not dependent on him (Elsey v. Odd Fellows' Mut. Life Ass'n, 142 Mass. 224, 7 N. E. 844). So, it has been held that the only child of a deceased member should be paid a fund payable to deceased's heirs in preference to deceased's brother, who lived in deceased's household, though the fund was created for the benefit of the member's "immediate family" (Norwegian Old People's Home Soc. v. Wilson, 176 Ill. 94, 52 N. H. 41, affirming 73 Ill. App. 287).

If, however, a statute giving a widow a right to share in the estate of her deceased husband does not entitle her to take as distributee, she will not be included in the term "heirs."

Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732. See, also, Gauche v. St. Louis Mut. Life Ins. Co., 88 Ill. 251, 30 Am. Rep. 554.

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Where a statute providing that, if an intestate leave no issue, one half of his estate shall go to his parents, and the other half to his wife, is the only instance where the rights given to a widow under the statutes partake of the nature of heirship, she is not entitled to share in a policy payable to insured's heirs, if there is a child surviving (Phillips v. Carpenter, 79 Iowa, 600, 44 N. W. 898). A child taken into assured's family, but never legally adopted, is not his legal heir, within the terms of a policy (Merchant v. White, 77 App. Div. 539, 79 N. Y. Supp. 1). And a bequest does not constitute the legatee an "heir" of the testator (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 assured's family, or other persons having an insurable interest (Silvers v. Michigan Mut. Ben. Ass'n, 94 Mich. 39, 53 N. W. 935). Accordingly, it has been held that, where there is no widow or children, the next of kin take.

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; In House v. Northwestern Life Assur. Co., 10 Pa. Dist. R. 41, it was said that a fund payable to the heirs goes to the next of kin, and not to the residuary legatee.

Where a by-law provides that the death benefit shall be paid only to the widow, uncles, and certain other named beneficiaries, "including the next of kin," the phrase "next of kin" does not limit the classes enumerated before, but adds to them another class, and hence does not prevent recovery of a death benefit by an uncle who is not next of kin or distributee (Maxwell v. Family Protective Union, 115 Ga. 475, 41 S. E. 552). If the policy is payable to the heirs or assigns of the assured, and is not assigned, the heirs take on the death of the assured (Mullins v. Thompson, 51 Tex. 7).

It is generally held that the "heirs" take the proceeds as purchasers, so that, in the absence of fraud, the proceeds are not subject to the claims of insured's creditors.

Hubbard v. Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; In re Andress' Estate, 5 Ohio N. P. 253, 6 Ohio Dec. 174; Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. Rep. 810; Appeal of Hodge, 8 Wkly. Notes Cas. (Pa.) 209; Mullins v. Thompson, 51 Tex. 7; White v. Smith, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 400. But in Rawson v. Jones, 52 Ga. 458, it was held that a

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policy payable to the heirs, executors, administrators, or assigns of the insured was payable to his legal representatives as assets for the payment of debts.

If a policy is payable on the death of assured to his "heirs," and heirs survive him, an executor or administrator cannot sustain an action on it (Schoep v. Bankers' Alliance Ins. Co., 104 Iowa, 354, 73 N. W. 825). And this is true even though a part of the fund might have been recovered by insured during his lifetime (Bomash v. Supreme Sitting of Order of Iron Hall, 42 Minn. 241, 44 N. W. 12). But in Pfeifer v. Supreme Lodge of Bohemian Slavonian Benev. Soc., 173 N. Y. 418, 66 N. E. 108, reversing 77 N. Y. Supp. 1138, 74 App. Div. 630, it was held that the administrator might sue to recover the fund as a quasi trustee. And if a policy is payable to the heirs, executors, administrators or assigns of insured, it is payable to his personal representatives (Rawson v. Jones, 52 Ga. 458).

Where a by-law of a corporation provided that, in the absence of a widow and children, a certain gratuity fund should be paid to the next of kin of a member on his death, the fact that a member adopted a child for the purpose of having it share in such fund is no fraud on the corporation (Kemp v. New York Produce Exchange, 34 App. Div. 175, 54 N. Y. Supp. 678).

Where a benefit 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, the fund should be distributed to the wife and children of the assured, whether the designation of the "estate" as beneficiary was illegal or not (Dale v. Brumbly, 96 Md. 674, 54 Atl. 655). And where the law excepts the proceeds of a benefit certificate from execution, and the laws of the order require beneficiaries to be blood relatives or dependents, the proceeds of a certificate payable to insured's "estate" should go to such person, being a competent beneficiary, as would take the personal estate under the statute of distribution (In re Smith's Estate, 87 N. Y. Supp. 725, 42 Misc. Rep. 639). But where those who may be beneficiaries are not limited by the laws of the order, the proceeds of a certificate payable to a member's estate must be administered by the executor in accordance with the deceased member's will (Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166).

Where a wife joined her husband in the mortgaging of a considerable portion of his real estate, conveying away her dower interest

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therein, she had a right to require the application of a life policy payable to the estate of the husband to the payment of the mortgage debts, in order that she might realize her dower interest (Bickel v. Bickel, 25 Ky. Law Rep. 1945, 79 S. W. 215).

(e) Policy payable to legal representatives.

The term "representatives," in an endowment policy of life insurance not expressed to be for the benefit of any third person, includes the administrator of the estate of the assured (Wason v. Colburn, 99 Mass. 342). So, the term "legal representatives" in a policy of insurance ordinarily means executors or administrators when not qualified by the context, but it may be shown to mean next of kin or successors or assigns (Pittel v. Fidelity Mut. Life Ass'n, 86 Fed. 255, 30 C. C. A. 21).

Ordinarily, a policy payable to the "legal representatives" of insured is collectible by the executor or administrator (People v. Phelps, 78 Ill. 147), and must be included in the inventory of the personal property and distributed as provided by statute, though exempt from the payment of decedent's debts (Kelley v. Mann, 56 Iowa, 625, 10 N. W. 211). But where the context or circumstances show that the insurance was intended for insured's family, the insurance is payable to the heirs or next of kin rather than the executors or administrators.

Loos v. John Hancock Mut. Life Ins. Co., 41 Mo. 538; Griswold v. Sawyer, 125 N Y. 411, 26 N. E. 464, reversing 56 Hun, 12, 8 N. Y. Supp. 517, 565, 960.

And where a policy is payable to the legal representatives of the insured, "for the express benefit" of his wife and two daughters, it is presumed to go to the three beneficiaries in equal parts to each (Small v. Jose, 86 Me. 120, 29 Atl. 976). So, in the case of mutual life insurance, it is, in general, held that a policy for insured's "legal representatives" is payable to the widow and children as heirs and next of kin.

Murray v. Strang, 28 Ill. App. 608; Schultz v. Citizens' Mut. Life Ins. Co., 59 Minn. 308, 61 N. W. 331.

But where insured stated in his application that the policy was for the benefit of his estate, the policy was not merely for the benefit of his immediate family, so as to be entirely payable to his widow in case he left no children, as against distant relatives (Sulz

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v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, reversing 7 Misc. Rep. 593, 28 N. Y. Supp. 263).

A policy payable to testator's legal representatives for his heirs and assigns not being within a statute authorizing a disposition by will of life insurance money, the proceeds thereof, on being paid to the executors, are held by them in trust for the heirs, with no deduction therefrom, except of such amount as the estate necessarily spent in collecting the same (Golder v. Chandler, 87 Me. 63, 32 Atl. 784).

(f) Rights of persons designated as beneficiaries in general.

Where a policy or certificate is made payable to a designated beneficiary, such beneficiary is entitled to the proceeds as against all other persons, provided there are no equitable circumstances requiring a different disposition of the fund.

McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83: Klotz v. Klotz, 14 Ky. Law Rep. 80; Succession of Emonot, 33 South. 368, 109 La. 359; Grand Lodge v. Elsner, 26 Mo. App. 108: Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383: Carraher v. Metropolitan Life Ins. Co., 11 N. Y. St. Rep. 665; Ducksbury v. Supreme Lodge, Shield of Honor, 4 Lack. Leg. N. (Pa.) 172; West v. Grand Lodge A. O. U. W., 14 Tex. Civ. App. 471, 37 S. W. 966. The insured's representatives cannot recover as against beneficiary. McFarland v. Creath, 35 Mo. App. 112; Buchannan v. Supreme Conclave Improved Order of Heptasophs, 178 Pa. 465, 35 Atl. 873, 34 L. R. A. 436, 56 Am. St. Rep. 774.

Under this rule, money collected on an insurance benefit certificate by the executrix, who is named as beneficiary therein, is not subject to administration, and the probate court has no right to order the executrix to file an inventory of it (White v. White, 11 Tex. Civ. App. 113, 32 S. W. 48). So, proceeds of a policy taken out by a testator, and in terms payable to his children, pass to the testamentary guardian, and are not assets of his estate (Senior v. Ackerman, 2 Redf. Sur. [N. Y.] 302). If a policy by its terms was payable to the "administrators" of the insured's children, it will be treated as though the word "administrator" was intended for the word "trustee" or "guardian," and the proceeds will be held for the benefit of such children (In re Schmidt's Estate, 13 Pittsb. Leg. J. [Pa.] 126).

Where the by-laws of an association provide that the benefit fund shall be liable only to the person named as beneficiary, payment of the amount due on a certificate to the person named therein cannot

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be enjoined by the heirs at law of the member on the ground that the person named is not entitled to be a beneficiary under the rules of the association (Death Benefit Fund of K. G. E. v. Liberty Castle No. 39 [Com. Pl.] 5 Pa. Dist. R. 385). And where no provision is made for payment in case of an invalid designation, the heirs of a member cannot recover on a certificate in which a beneficiary is named who is living at the death of the member, even though the person so named was not entitled to become a beneficiary under the laws of the order (Taylor v. Hair [C. C.] 112 Fed. 913). So, where the designation made is not prohibited by statute or the society's laws, the beneficiary named does not take the fund impressed with a trust in favor of the persons for whose benefit the fund was primarily raised (Manley v. Manley, 64 S. W. 8, 107 Tenn. 191). But where the beneficiary of a life insurance policy, who has no insurable interest in the assured, collects the money due on the policy, he is liable to the legal representative of the assured therefor (Riner v. Riner, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693). And where the charter or laws of a benefit society provide that the fund payable on the death of a member shall be for the benefit of his widow and children, they are entitled thereto, though another was named in the certificate of membership as the beneficiary, and paid the assessments.

Gibson v. Kentucky Grangers' Mut. Ben. Soc., 8 Ky. Law Rep. 520; **Hanna v. Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820.**

In Smith v. Pinch, 80 Mich. 332, 45 N. W. 183, it was held that a law providing that any contracts of insurance on lives of more than 65 years issued by co-operative and mutual benefit associations should be void as to the beneficiary therein named, but the amount thereof should be payable to the heirs of the member, did not apply to a policy issued prior to its passage, and that, therefore, the heirs of the assured had no claim upon money voluntarily paid to the beneficiary of a void policy.

(g) Policy payable to wife or widow.

The proceeds of a policy payable to insured's widow belongs to her, and not to the estate on his death.

Pinneo v. Goodspeed, 120 Ill. 524, 12 N. E. 196, affirming 22 Ill. App. 50; In re Tiedeken's Estate, 11 Phila. (Pa.) 95. Especially is this true if it is by statute provided that insurance for the benefit of the wife shall inure to her separate benefit. Reed v. Painter, 129 Mo. 674, 31 S. W. 919; Cole v. Knickerbocker Life Ins. Co., 63 How. Prac. (N. Y.) 442. The right to proceeds of a policy on the life of

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a married woman, payable to her husband, is separate and not community property. Martin v. McAllister, 94 Tex. 567, 63 S. W. 624, reversing (Tex. Civ. App.) 61 S. W. 522.

This rule applies even though the money with which the policy was purchased and paid for was the money of the husband (Pingree v. Jones, 80 Ill. 177). And if the fund is paid to the husband's administrator, he holds it in trust for the widow (In re Van Dermoor's Estate, 42 Hun [N. Y.] 326), and it may be recovered from him by her representatives (Kimball v. Gilman, 60 N. H. 54).

Though it is by statute provided that a policy payable to any married woman shall inure to her separate use and that of her children,[3] her children have no interest in the policy during her lifetime.

Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937; Norris v. Massachusetts Mut. Life Ins. Co., 131 Mass. 294.

The fact that a woman to whom a policy taken out by her husband on his life, payable in four years to her, is plaintiff in a pending divorce suit at the time of the maturity of the policy, does not preclude her from claiming the amount (Ætna Life Ins. Co. v. Mason, 14 R. I. 583). And a general finding in favor of a wife's claim as beneficiary under a certificate to her husband, and valid only as to a member of his family, is not erroneous because of a stipulation that she was "living separate and apart from him," since it will be presumed, in support of the finding, that the separation was without change of the legal relation (Smith v. Boston & Maine Railroad Relief Ass'n. 168 Mass. 213, 46 N. E. 626). So, a widow, entitled to benefits from a benevolent association of which her husband died a member, does not forfeit her right thereto by living in adultery with another man (Shamrock Benev. Soc. v. Drum, 1 Mo. App. 320).

Where a man who was indebted to his wife took out one policy for her benefit and another policy for the benefit of his estate, evidence, in a proceeding by the heirs to charge the wife as administratrix of her husband's estate with the proceeds of the first policy, that he had stated that he had insured his life to secure his wife and her sister, to whom he was also indebted, is not sufficient, after his death, to show that the policy for his wife's benefit was intended as security, rather than as a provision for her; the presump-

[3] St. Ky. § 654; Gen. St. Mass. c. 58, § 62.

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tion being that the declaration referred to the other policy (Appeal of Weiss, 133 Pa. 84, 19 Atl. 311).

A woman who has lived with the insured as his wife, in the honest belief that she was legally married, and who is dependent on him for support, may be designated as beneficiary and recover the benefit on insured's death.

Senge v. Senge, 106 Ill. App. 140; Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Barker v. Valentine, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578; Supreme Tent of Knights of Maccabees of the World v. McAllister, 92 N. W. 770, 132 Mich. 60, 102 Am. St. Rep. 382; Durian v. Central Verein of Hermann's Sohne, 7 Daly (N. Y.) 168; Story v. Williamsburg Masonic Mut. Ben. Ass'n, 95 N. Y. 474; Overbeck v. Overbeck, 155 Pa. 5, 25 Atl. 646; De Grote v. De Grote, 175 Pa. 50, 34 Atl. 312. The evidence was held insufficient to show that the alleged wife had been accepted as beneficiary in Schnook v. Independent Order of Sons of Benjamin, 53 N. Y. Super. Ct. 181.

But if the illicit relation is maintained with knowledge of its unlawful character, the woman is not dependent, so as to be eligible as beneficiary and entitled to the fund.

Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543; Grand Lodge A. O. U. W. v. Hanses, 81 Mo. App. 545; West v. Grand Lodge A. O. U. W., 14 Tex. Civ. App. 471, 37 S. W. 966.

Under by-laws providing that the proceeds of the certificate would be paid to the member's widow, the legal widow of the member was entitled to the benefit, and extrinsic evidence was inadmissible to show that another woman, with whom the member had gone through the form of marriage and cohabited for a long time prior to his death, was intended as the beneficiary (Bolton v. Bolton, 73 Me. 299).

If an affianced wife may be named as beneficiary, she may recover the benefit, though designated in the certificate as insured's "wife" (Bachmann v. Supreme Lodge Knights and Ladies of Honor, 44 Ill. App. 188). So, she may recover where insured directed in the application that the benefit should be paid to her, though the society refused to issue him a certificate naming her as the beneficiary (Wallace v. Madden, 48 N. E. 181, 168 Ill. 356 affirming 67 Ill. App. 524). But an affianced wife is not, by virtue of that fact, a dependent (Parke v. Welch, 33 Ill. App. 188); and where it is necessary that the beneficiary be dependent on insured, the benefit is payable to insured's next of kin, and not the affianced wife (Palmer v. Welch, 132 Ill. 141, 23 N. E. 412).

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(h) Rights of divorced wife.

A married woman named as beneficiary in an ordinary life insurance policy on the life of her husband is entitled to the proceeds, notwithstanding that she has obtained a divorce before insured's death.

Grego v. Grego, 78 Miss. 443, 28 South. 817; Overhiser's Adm'x v. Overhiser, 57 N. E. 965, 63 Ohio St. 77, 50 L. R. A. 552, 81 Am. St. Rep. 612; In re Insurance Policy, 7 Ohio N. P. 527, 5 Ohio S. & C. P. Dec. 561; Overhiser v. Mutual Life Ins. Co., 7 Ohio N. P. 527. See, also, McGrew v. Mutual Life Ins. Co., 133 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20, writ of error dismissed 23 Sup. Ct. 375, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33.

This rule applies to mutual benefit insurance, where the beneficiary is merely required to bear the prescribed relationship to insured at the time the certificate is issued.

Courtois v. Grand Lodge A. O. U. W. of California, 67 Pac. 970, 135 Cal. 552, 87 Am. St. Rep. 137; Overhiser v. Overhiser, 14 Colo. App. 1, 59 Pac. 75; White v. Brotherhood of American Yeomen, 124 Iowa, 293, 99 N. W. 1071, 66 L. R. A. 164; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 Atl. 176.

But if the beneficiary is required to sustain the relationship or be a dependent when the insured dies, a contrary rule prevails (Tyler v. Odd Fellows' Mut. Relief Ass'n, 145 Mass. 134, 13 N. E. 360), unless the beneficiary remains a dependent on insured after the divorce (Martin v. Modern Woodmen of America, 111 Ill. App. 99). In Order of Railway Conductors v. Koster, 55 Mo. App. 186, the court held that, as the status of the beneficiary was the main, if not the sole, inducement to the insurance, the rights of such beneficiary were defeated by a divorce before the death of the insured.

It is obvious that a divorced wife is entitled to no share of a benefit fund which, by the rules of the association, goes to the member's heirs (Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189), or to his widow or children (Heyman v. Meyerhoff [Com. Pl.] 16 Wkly. Notes Cas. 212). In the latter case it was held that the children were entitled to the fund. The rights of a wife holding a policy on the life of her husband, as assignee, lapse on her obtaining a divorce from him (Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411).

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(i) Policy payable to wife or children.

A policy for the benefit of insured's wife and children is payable to them on insured's death, and the fund is not assets recoverable by the administrator.

Cragin v. Cragin, 66 Me. 517, 22 Am. Rep. 588; Maryland Mut. Ben. Soc. of Improved Order of Red Men v. Clendinen, 44 Md. 429, 22 Am. Rep. 52.

The fact that stepchildren have been taken by decree of court from the custody of their stepmother after their father's death, though it was his expectation that they should remain with her, will not defeat the recovery from her of their share in a life insurance policy to which they were entitled (Clausen v. Jones, 18 Tex. Civ. App. 376, 45 S. W. 183).

Where the insurance is for the benefit of insured's wife and children, children of insured by a prior marriage should be included in the distribution.

Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Koehler v. Centennial Mut. Life Ins. Co., 66 Iowa, 325, 23 N. W. 687; McDermott v. Centennial Mut. Life Ass'n, 24 Mo. App. 73; State Life Ins. Co. v. Redman, 91 Mo. App. 49. This rule applies if the insurance is payable to insured's "family." Hutson v. Jenson, 85 N. W. 689, 110 Wis. 26.

So, it has been held that a policy payable to insured's wife and "their children" included a child by a former wife (Stigler's Ex'x v. Stigler, 77 Va. 163). But generally a contrary rule prevails.

Ætna Mut. Life Ins. Co. v. Clough, 68 N. H. 298, 44 Atl. 520; Lockwood v. Bishop, 51 How. Prac. (N. Y.) 221; Evans v. Opperman, 76 Tex. 293, 13 S. W. 312.

An insurance policy, payable to the children of insured, includes children subsequently born, as well as those in existence at the time the policy was issued.

Roquemore v. Dent, 33 South. 178, 135 Ala. 292, 93 Am. St. Rep. 33; Scull v. Ætna Life Ins. Co., 43 S. E. 504, 132 N. C. 30, 60 L. R. A. 615, 95 Am. St. Rep. 615. See, also, Sauerbier v. Union Cent. Life Ins. Co., 39 Ill. App. 620.

But if the children in existence at the time a certificate is issued are named therein as beneficiaries, an after-born child by a second wife cannot claim a share of the fund, on the ground that the object

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of the society, as expressed by its laws, is to afford aid to the "widows, orphans, and heirs or devisees" of a deceased member, the member having the right to designate the beneficiaries (Spry v. Williams, 82 Iowa, 61, 47 N. W. 890, 10 L. R. A. 863, 31 Am. St. Rep. 460). And where insured designated certain children as beneficiaries, whose names insurer promised, but failed, to insert in the policy, such children were proper plaintiffs to sue thereon, though assured had other children than those named (International Order of Twelve of the Knights and Daughters of Tabor v. Boswell [Tex. Civ. App.] 48 S. W. 1108). However, if the charter contains no provision allowing an applicant to designate the beneficiary, and the purpose of the society is to provide a fund for the entire family of a member, a certificate payable to insured's children generally, without naming them, includes children born after its issuance, though the insured requested that the certificate should be made payable to his children, naming them (Thomas v. Leake, 67 Tex. 469, 3 S. W. 703).

The word "orphans," as used in the rules of a society providing for payment of a benefit to the widow or orphans of a member, was, in Fischer v. Malchow, 101 N. W. 602, 93 Minn. 396, held to be intended in the sense of "children," and not in the strict legal sense of "orphans." Where the insurance is payable to insurer's widow and infant children, and he dies leaving a widow, but no infant children, the widow is entitled to the fund (Whitehurst v. Whitehurst, 83 Va. 153, 1 S. E. 801). An option in a policy, payable to insured's wife, or, in the event of her prior death, to his children, that it may be converted into cash, at the election of the "holder," can be exercised only by the wife and children jointly, all the parties being alive (Entwistle v. Travelers' Ins. Co., 51 Atl. 759, 202 Pa. 141).

(j) Policy payable to trustee.

A life insurance policy may be made payable to a person in trust for others. Such a trust will be enforced by a court of equity. (Silvey v. Hodgdon, 52 Cal. 363.) Where a brother's name was inserted as a beneficiary in a certificate issued to a member of a benefit association as trustee for the member's wife without his knowledge—the wife then being a minor—the trust will be enforced in favor of her when she becomes of age (Donithen v. Independent Order of Foresters, 209 Pa. 170, 58 Atl. 142).

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The proceeds of a policy payable to a trustee for the benefit of others vest in him, and do not form a part of the estate.

People v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268, affirming 94 Ill. App. 652; Cables v. Prescott, 67 Me. 583.

If neither the terms of the trust nor the beneficiaries are disclosed by the policy, they may be shown by parol.

Kendrick v. Ray, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289. See also, Bloodgood v. Massachusetts Ben. Life Ass'n, 44 N. Y. Supp. 563, 19 Misc. Rep. 460.

Where a member of a benefit association has a new certificate issued in favor of another person, under a parol agreement that the latter shall apply the proceeds to a certain purpose, a trust is created which attaches to the proceeds when they come into such person's hands (Hirsh v. Auer, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917). So, where a person holding a tontine policy made payable to himself, his executors, administrators, or assigns, executes and attaches thereto an instrument providing that the policy is for the benefit of his children, and that, in case of his death before it matures, the money derived from it is to be divided equally among them, and afterwards declares, in the presence of the children, that the policy is for them, a valid trust is created in their favor (Phipard v. Phipard, 55 Hun, 433, 8 N. Y. Supp. 728).

Any competent person can act as trustee. But **an unincorporated lodge of a benefit society cannot act as trustee for the benefit of a member's minor children with respect to the benefit payable on the member's death.** (Hart v. Hamburger, 1 N. Y. St. Rep. 293.)

One who has been named as beneficiary under an agreement that the fund shall be distributed in a certain way cannot repudiate the trust because persons will thereby become beneficiaries for whom the member could not directly provide, the order having consented to the conditions on which she was named as beneficiary (Peek's Ex'r v. Peek's Ex'r, 101 Ky. 423, 41 S. W. 434). And a contract of insurance payable to a trustee for the benefit of an estate which was in part unlawfully converted by the insured is not void as ultra vires by reason of statutory provisions protecting beneficial insurance from the claims of creditors (Bloodgood v. Massachusetts Ben. Life Ass'n, 44 N. Y. Supp. 563, 19 Misc. Rep. 460). But where persons who may receive death benefits from fraternal aid associations are restricted by law to designated classes, a person not included in such classes cannot indirectly become a beneficiary by

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agreement between the assured and one lawfully authorized to receive death benefits, in which the latter agrees to act as trustee for the person having no insurable interest (Gillam v. Dale, 69 Kan. 362, 76 Pac. 861).

Where a benefit certificate was payable to a trustee, in trust for those dependent on insured, and it appeared that he had recognized the dependence of a sister, and was in the habit of extending aid to certain nieces, the daughters of a deceased sister, one half of the fund should be paid to the sister and the other half to the nieces (Wolf v. Pearce, 20 Ky. Law Rep. 296, 45 S. W. 865). Where a company has caused the delivery of a policy to the trustee of the beneficiary, which, by its terms, is payable to him or his legal representatives, it cannot, by way of estoppel to the representatives' right to sue, set up the payment of the policy to the new trustee appointed by the insured on the death of the former, or the possession of the policy by the insured after its delivery to the former trustee (Butler v. State Mut. Life Assur. Co., 55 Hun, 296, 8 N. Y. Supp. 411, affirmed without opinion 125 N. Y. 769, 27 N. E. 409).

(k) Policy payable to any relative or person equitably entitled to fund.

Sometimes a life insurance policy reserves the right to the company to pay the amount thereof to insured's personal representatives, or to any relative, or to any person appearing to be equitably entitled to the fund as a creditor. None of the persons coming within such a provision have a vested right to the fund.

Prudential Ins. Co. v. Young, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319; Shea v. United States Industrial Ins. Co., 23 App. Div. 53, 48 N. Y. Supp. 548; Wokal v. Belsky, 53 App. Div. 167, 65 N. Y. Supp. 815.

But the company has the option of making payment to any one of the persons coming within the designated classes.

Metropolitan Life Ins. Co. v. Shaffer, 50 N. J. Law, 72, 11 Atl. 154; Brooks v. Metropolitan Life Ins. Co., 70 N. J. Law, 36, 56 Atl. 168; Wokal v. Belsky, 53 App. Div. 167, 65 N. Y. Supp. 815; Brennan v. Prudential Ins. Co., 170 Pa. 488, 32 Atl. 1042.

And payment to a person within the designated class will, in the absence of fraud, discharge the obligation of the insurer.

American Security & Trust Co. v. Prudential Ins. Co., 16 App. D. C. 318; Thomas v. Prudential Ins. Co., 158 Ind. 461, 63 N. E. 795; Metropolitan Life Ins. Co. v. Schaffer, 50 N. J. Law, 72, 11 Atl. 154;

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Brooks v. Metropolitan Life Ins. Co., 70 N. J. Law, 36, 56 Atl. 168; Thomas v. Prudential Ins. Co., 148 Pa. 594, 24 Atl. 82; Brennan v. Prudential Ins. Co., 170 Pa. 488, 32 Atl. 1042. But in Metropolitan Life Ins. Co. v. O'Farrell, 10 Kan. App. 151, 62 Pac. 673, the court (Wells, J., dissenting) held that under an answer alleging a condition of this nature, and that the company had exercised its option and paid decedent's husband, a receipt signed by decedent's husband for a sum purporting to be a payment of money due on the policy, and a check purporting to be signed by the president of defendant company, payable to the husband, without explanation, were inadmissible in evidence, on the ground that they did not tend to establish any part of the defense. However, the general rule is approved in Metropolitan Life Ins. Co. v. O'Farrell, 64 Kan. 278, 67 Pac. 835, which is undoubtedly a reversal of the decision by the Court of Appeals.

This rule applies, though the application, made part of the contract, designated a person to whom the benefit was to be paid (Metropolitan Life Ins. Co. v. Schaffer, 50 N. J. Law, 72, 11 Atl. 154), or though an agreement had been made between insured, his wife, and the company that. if the wife would pay the premiums, insured would assign the policy to her, and the company would pay the amount to her on death of insured (Thomas v. Prudential Ins. Co., 158 Ind. 461, 63 N. E. 795). But before payment the company cannot use the provision by way of discrimination against a beneficiary specially designated (Golden v. Metropolitan Life Ins. Co., 35 App. Div. 569, 55 N. Y. Supp. 143). And if the policy is delivered to the designated beneficiary, and she pays the premium thereon, gives notice of loss, and demands payment, the company cannot, by payment to another, absolve itself from liability to the named beneficiary (Carraher v. Metropolitan Life Ins. Co., 11 N. Y. St. Rep. 665). And where oral representations are made on behalf of the company, at the time a policy is taken out by a relative, who is unable to read, that it will pay to him, this constitutes a binding election at that time, and deprives the company of any option under the policy (Shea v. United States Industrial Ins. Co., 23 App. Div. 53, 48 N. Y. Supp. 548). So, where a dated application for life insurance designates a person named as sole beneficiary, the company is bound to pay the beneficiary named in the application, though the undated policy contains a condition of the nature discussed; and it is immaterial that some of the premiums were paid by the husband of the assured, and that the policy was surrendered by him to the company as executor of the insured (McNally v. Metropolitan Life Ins. Co., 16 Pa. Super. Ct. 111).

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On the insurer's failure to make payment to any one within the designated classes, insured's administrator may maintain an action on the policy (Wokal v. Belsky, 53 App. Div. 167, 65 N. Y. Supp. 815). But the personal representative of insured has no right to maintain an action to recover the proceeds as against a designated beneficiary, while the latter lives (Ruoff v. John Hancock Mut. Life Ins. Co., 86 App. Div. 447, 83 N. Y. Supp. 758). In Lewis v. Metropolitan Life Ins. Co., 178 Mass. 52, 59 N. E. 439, it was held that a relative of insured cannot enforce payment, though he has paid the premiums, but such a suit can only be maintained by the executor or administrator of the insured, with whom the contract was made. But in Western & Southern Life Ins. Co. v. Galvin, 68 S. W. 655, 24 Ky. Law Rep. 444, it was said that any one of the persons named may recover on the policy, by a proper showing of relationship.

(1) Distribution among beneficiaries.

The beneficiaries of a life insurance policy will ordinarily take the proceeds in equal shares, where no contrary provision is made in the policy.

Cragin v. Cragin, 66 Me. 517, 22 Am. Rep. 588; Hallan v. Gardner's Adm'r, 5 Ky. Law Rep. 857.

The weight of authority supports the rule that under a policy payable to insured's wife and children the beneficiaries take equally per capita.

Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Sauerbier v. Union Central Life Ins. Co., 39 Ill. App. 620; Felix v. Ancient Order of United Workmen, 31 Kan. 81, 1 Pac. 281, 47 Am. Rep. 479; In re Crane, 47 La. Ann. 896, 17 South. 431; Jackman v. Nelson, 147 Mass. 300, 17 N. E. 529; Taylor v. Hill, 86 Wis. 99, 56 N. W. 738.

In Fletcher v. Collier, 61 Ga. 654, it was held that, in view of the object and purpose of the Masonic system of insurance, the respective shares of the widow and children, under a Masonic mutual life policy for their benefit, may be equally or unequally divided, according to circumstances, such as the comparative ages, health, and strength of the children; equality not being necessarily the rule of division or apportionment.

But in Kentucky it is held that the statutory rule for the distribution of personalty of intestates governs.

McLin v. Calvert, 78 Ky. 472; Kelley v. Ball (Ky.) 19 S. W. 581; Johnson's Adm'r v. Johnson, 22 Ky. Law Rep. 422, 57 S. W. 469. But see Bell v. Kinneer, 101 Ky. 271, 40 S. W. 686, 72 Am. St. Rep. 410.

The proceeds of a policy payable to insured's heirs was, in Wilburn v.

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Wilburn, 83 Ind. 55, held payable to the widow and children in equal shares. But in Leavitt v. Dunn, 56 N. J. Law, 309, 28 Atl. 590, 44 Am. St. Rep. 402, it was held that such a policy was payable in the proportion indicated by the statute of distribution.

Where the premiums on a policy have been paid in part by one daughter, and in part by two others, the fund will be apportioned between them in proportion to the premiums paid by each (Brashears v. Metropolitan Life Ins. Co., 1 App. D. C. 420). In Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217, it appeared that the holder of a life policy, payable to his wife and children, without other designation, after the death of his wife, leaving two children, surrendered it, taking a paid-up policy, and another policy, similar to the one surrendered, and made payable in the same manner. One child, only, survived him. In regard to the rights of this child and the administrator of a deceased child, the court held that, as the surviving child had paid certain premiums on the policy, the gross amount so paid should be deducted from the fund realized and refunded to her, and not merely one-half of that amount.

(m) Rights of legatees.

As the proceeds of a life policy, payable to the executor, administrator, or assigns of the insured, become a part of insured's estate on his death, they may be disposed of by will, especially where the right of every person to devise any part of his estate is expressly recognized by statute (Fletcher v. Williams [Tex. Civ. App.] 66 S. W. 860). And in Wisconsin it is held that the proceeds of a policy may be disposed of by will, though the policy makes the insurance payable to others than those designated in the will (In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17).

In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; Stoll v. Mutual Ben. Life Ins. Co., 115 Wis. 558, 92 N. W. 277.

But generally it is held that the proceeds of a policy payable to a designated beneficiary cannot be disposed of by will.

Wilmaser v. Continental Life Ins. Co., 66 Iowa, 417, 23 N. W. 903, 55 Am. Rep. 277; McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217.

Under a statute [8] providing that a policy on the life of any person for the benefit of any married woman should inure to her sep-

[8] Gen. St. Mass. c. 58, § 2.

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arate use and that of her children independently of the husband or his creditors, a policy made in accordance therewith for the benefit of the wife and children of the assured could not be affected by his will (Gould v. Emerson, 99 Mass. 154, 96 Am. Dec. 720).

Where the laws of a benefit association so provide, the benefits under a certificate may be disposed of by will.

Stoelker v. Thornton, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140; Stice v. Carter, 23 Ky. Law Rep. 915, 63 S. W. 770; Hoffmeyer v. Muench, 59 Mo. App. 20.

But even if the proceeds may be disposed of by will, evidence that a testamentary writing on a certificate disposing of the proceeds was executed and acknowledged as a will is inadmissible in an action on the certificate, since a will must be proved before a probate court and admitted to record (Grand Fountain of United Order of True Reformers v. Wilson, 96 Va. 594, 32 S. E. 48). Though it was held in Weil v. Trafford, 3 Tenn. Ch. 108, that the amount due on a benefit certificate passed under a residuary clause in a will, yet it has been held in other cases that a general devise by a residuary clause is insufficient.

Greeno v. Greeno, 23 Hun (N. Y.) 478; Maryland Mut. Benev. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Arthur v. Odd Fellows' Beneficial Ass'n, 29 Ohio St. 557; Vance v. Park, 7 Ohio Dec. 564. In Golder v. Chandler, 87 Me. 63, 32 Atl. 784, it was held that a policy is not personal property within the phrase in a will designating a certain sum to be paid out of the "personal estate."

In analogy with this rule it was held in Duvall v. Goodson, 79 Ky. 224, that the fund does not pass under a will disposing of insured's estate, without special mention of the insurance. But a contrary doctrine is supported by Aveling v. Northwestern Masonic Aid Ass'n, 72 Mich. 7, 40 N. W. 28, 1 L. R. A. 528. If the residuary clause in a will expressly enumerates life insurance as a part of the balance of the estate, the insurance will pass under the residuary clause (Grand Lodge of United States of Independent Order of Free Sons of Israel v. Ohnstein, 85 Ill. App. 355); and the fact that the testator possibly regarded the benefit as a part of his estate does not defeat his evident intent that his residuary legatee should receive the endowment (High Court Catholic Order of Foresters v. Malloy, 169 Ill. 58, 48 N. E. 392, affirming 67 Ill. App. 665). In House v. Northwestern Life Assur. Co., 200 Pa. 173, 49 Atl. 937, the court held that though the certificate provided that if the fund

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was not specifically bequeathed it should go to insured's heirs, yet, as it appeared to be the clear intent of the parties that insured's devisees should take, the fund passed by a general devise.

Where the rules of a benefit association provide that on the death of a member his share of the beneficiary fund shall be paid to the persons named by him on the will book, and that if he names no one it shall be divided equally among his family, and a member makes a will after entering an order on the will book, the will controls the disposition of the fund (Supreme Council v. Priest, 46 Mich. 429, 9 N. W. 481). But the will of a member of a mutual benefit association, directing all policies of insurance on his life to be invested and used by his wife for the benefit of herself and their children, is not such an execution of the power of appointment of a beneficiary as will control the fund under a policy payable to his mother, where it appears that the deceased had other policies of insurance; it not appearing from the will that there was an intention to again exercise the power of appointment by naming another beneficiary (Young Men's Mut. Life Ass'n v. Harrison, 10 Ohio Dec. 786, 23 Wkly. Law Bul. 360). The policy involved in Hannigan v. Ingraham, 55 Hun, 257, 8 N. Y. Supp. 232, contained an unsigned statement that "all payments or benefits that may accrue or become due to the heirs of the person insured by virtue of this policy will be paid to ——— or lawful heirs." Deceased designated by will his wife and children as beneficiaries. It was held that the word "heirs," in the above form, meant the widow and children of deceased, and that the will was a valid designation of the beneficiaries.

Though a will is inoperative as a bequest, it may constitute such an order for the payment of the fund as is required by the rules of the association (Dennett v. Kirk, 59 N. H. 10). But if the order is required to be acknowledged, an unacknowledged will is insufficient, even as an order (Mellows v. Mellows, 61 N. H. 137).

Where the 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 were written into the certificate, so that he takes thereunder instead of under the will, and cannot resort to the probate court to recover the insurance money (Ledebuhr v. Wisconsin Trust Co., 88 N. W. 607, 112 Wis. 657). The fact that the possession of a will was intrusted to the legatee of the proceeds of an insurance policy on the testator's life will not invalidate the bequest (Fletcher v. Williams [Tex. Civ. App.] 66 S. W. 860).

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As a member of a benefit society cannot divert the mortuary fund from the objects named by statute, he cannot do so by will (Wagner v. Benefit Soc., 70 Mo. App. 161). And if the laws of an association provide that the designation shall be made during the lifetime of the member and be approved by the directors, 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.

Where the manner of changing beneficiaries is prescribed, a change must be made in such manner, and a designation by will is inoperative.

Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Appeal of Vollman, 92 Pa. 50.

But where no special formalities for a change of beneficiaries are prescribed, it seems that a change may be made by will.

Masonic Ben. Ass'n of Central Illinois v. Bunch, 109 Mo. 560, 19 S. W. 25. See, also, Kepler v. Supreme Lodge Knights of Honor, 45 Hun (N. Y.) 274.

If the law under which a society is organized expressly provides that the benefits cannot be disposed of by the will, a disposition by will is, of course, ineffective (Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065). A modification of this rule is announced in High Court Catholic Order of Foresters v. Malloy, 169 Ill. 58, 48 N. E. 392, affirming 67 Ill. App. 665. There the laws of the order denied permission to designate a beneficiary by will, and provided that no will should be permitted to control an appointment or the distribution of the benefit; that a member might surrender his endowment certificate, and take a new certificate, payable to such beneficiary as he might direct; and that, if he survived the beneficiary, and made no other disposition of the benefit, it should be paid to a certain class, if living, and, if not, it should revert to the endowment fund. It was held that, within classes enumerated as possible beneficiaries, the assured could dispose of the benefit by will where he survived the first-named beneficiary, and did not surrender the original certificate. Of course, a bequest by an insured of one-fourth of the insurance to his widow, and the remainder to an only child, there being no other property, does not violate a by-law prohibiting a member from disposing of his policy by will, so as to deprive his widow or his dependent children of its benefits (Roberts v. Roberts, 64 N. C. 695).

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In New York it has been held that where neither the statute, nor constitution, nor by-laws of a benefit association, in force at the time insured became a member, or at the time of his death, authorize a designation by will, such designation is insufficient.

Kunkel v. Workmen's Sick & Death Benefit Fund, 68 App. Div. 385, 75 N. Y. Supp. 188; In re Smith's Estate, 42 Misc. Rep. 639, 87 N. Y. Supp. 725.

So, it has been held in Tennessee that the beneficiary named in a certificate cannot be changed by will, where no such authority is given by its provisions (Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340). And in California the position is taken that where a certificate names the beneficiaries, and there had been no revocation of the certificate, the insured has no interest which he can dispose of by will (De Silva v. Supreme Council of Portuguese Union of State of California, 109 Cal. 373, 42 Pac. 32). But if the designated beneficiary dies, and the insured bequeaths the insurance to his surviving wife, directing the officers of the association to substitute her name on the certificate and pay her the money, she is entitled to the fund as against testator's children (In re Griest's Estate, 76 Cal. 497, 48 Pac. 654).

If a member has agreed to be bound by subsequent by-laws, it is held in Illinois that he will be bound by a by-law limiting the class of persons who may be beneficiaries. Hence a person not within the class will not be entitled to payment of the benefit under a bequest in the member's will. (Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065, reversing 84 Ill. App. 674.) But a clause in a constitution attached to an insured's certificate, which declares that the instrument may be amended at any time by a two-thirds vote, does not constitute an assent on the part of insured to a subsequent amendment, taking away his right to appoint by will a beneficiary other than the one named in the certificate, as the clause merely declares the manner of exercise of the power of amendment (Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263). And ordinarily a subsequent statute limiting the beneficiaries and taking away the right to devise the benefit will not affect a member's existing rights (Kersten v. Voigt, 61 Ill. App. 42, affirmed 164 Ill. 314, 45 N. E. 543).

A by-law prohibiting a change of beneficiary without the approval of the association's directors is contrary to a provision of the charter that payment may be made, among others, "to assignees or

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legatees," and hence the appointment of a new beneficiary by will is valid (Raub v. Masonic Mut. Relief Ass'n, 3 Mackey [D. C.] 68).

Under the charter of a benefit association, providing that the fund created thereby for the benefit of the widow and children of deceased members shall be paid to them upon the death of a member, unless he has left a will otherwise distributing the fund, the will of a member, bequeathing all his estate, including his life insurance, to his wife, to be used by her, after the payment of debts, "for her own and my children's benefit, as she may think proper," bequeaths to the widow the entire benefit fund, to be used as she sees proper (Stice v. Carter, 63 S. W. 770, 23 Ky. Law Rep. 915). But where the widow of a testator agreed with him, when he made his will, that, if she should be named as the sole legatee or beneficiary under the will, she would pay the proceeds of a benefit certificate held by testator to his grandchildren, the proceeds are held by her as trustee for the grandchildren, the consideration for her promise being not only the naming of her as sole legatee, but also the relinquishment by the testator of his right to otherwise dispose of the fund (Vance v. Park, 7 Ohio Dec. 564).

If a certificate of a mutual benefit association is payable on the death of a member to his legatees, his will may be referred to to ascertain the persons to whom payment should be made (People v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268, affirming 94 Ill. App. 652).

(n) Persons entitled to proceeds when designation is invalid or there is no designation.

Where there is a failure of beneficiary either because no designation has been made or because the one made is invalid, the benefit goes to the one designated by the certificate or laws of the society to take in case of a failure of beneficiary or death of the beneficiary during the lifetime of the insured.

Smith v. Covenant Mut. Ben. Ass'n (C. C.) 24 Fed. 685; Sargent v. Supreme Lodge Knights of Honor, 158 Mass. 557, 33 N. E. 650; Hadley v. Odd Fellows Beneficial Ass'n, 173 Mass. 583, 54 N. E. 345; Jewell v. Grand Lodge A. O. U. W., 41 Minn. 405, 43 N. W. 88; Whitehurst v. Whitehurst, 83 Va. 153, 1 S. E. 801; Smith v. Covenant Mut. Ben. Ass'n (C. C.) 24 Fed. 685; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480; Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543. Where the charter provided for payment, in the absence of directions by the deceased, "to the person or persons entitled thereto," the money should be paid to the family of

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the deceased (Fenn v. Lewis, 10 Mo. App. 478, affirmed 81 Mo. 259). The executor or administrator can maintain an action on the certificate for those entitled to the proceeds. Burns v. Grand Lodge A. O. U. W., 153 Mass. 173, 26 N. E. 443; Shea v. Massachusetts Ben. Ass'n, 160 Mass. 289. 35 N. E. 855, 39 Am. St. Rep. 475. He holds the fund for those entitled to it under the by-laws of the association, if such there are, and, if there are not any such, then to be distributed under the statute of distributions (Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166).

Even though a certificate or the society's laws do not provide to whom payment shall be made in case of failure of beneficiary, it is generally held that there is no reversion to the society, but that the fund goes to the persons who are within the classes entitled to take the insurance, and for whose benefit the fund is created.

Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451; Chicago Guaranty Fund Life Soc. v. Wheeler, 79 Ill. App. 241; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Kentucky Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. Law Rep. 750; Caudell v. Woodward, 15 Ky. Law Rep. 63; Gibbs v. Anderson, 16 Ky. Law Rep. 397; Lister v. Lister, 73 Mo. App. 99. In Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17, it was held that the executrix was entitled to the fund in trust for those who, at the time the contract was made, were entitled to be named as beneficiaries.

In the Wheeler Case it was said that to hold that, because a member of a benefit society holding a certificate payable to his legatee died without naming a legatee, no one should be paid the money collected by the society from surviving members, and held in its treasury for the purpose of paying the particular loss, would frustrate the whole scheme and object of its existence as a corporation. The order in which payment is to be made under this rule is in the Wheeler Case stated to be the order in which the parties to be benefited are named in the charter and by-laws, and the same view is taken in Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 106 Ill. App. 665.

A contrary rule, however, appears to find support in some of the cases. Thus, it was held in Eastman v. Provident Mut. Relief Ass'n, 62 N. H. 555, that where a sum is made payable by a society to an appointee named, and no person is so named, there is no one to whom the society is liable. So, it was held in Worley v. Northwestern Masonic Aid Ass'n, 28 Int. Rev. Rec. (N. Y.) 50, that where a society agrees to pay the fund to a member's devisees, and the

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member dies without appointing any beneficiary, his administrator is not entitled to recover the amount. And a dictum in line with the two cases just cited is to be found in Wolf v. Pearce and Ezell v. Wolf, 20 Ky. Law Rep. 296, 45 S. W. 865. But the generally accepted rule has been adopted in several Kentucky cases.

Caudell v. Woodward, 15 Ky. Law Rep. 63; Gibbs v. Anderson, 16 Ky. Law Rep. 397; Kentucky Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. Law Rep. 750.

In Mayher v. Manhattan Life Ins. Co., 87 Tex. 169, 27 S. W. 124, it was held that where the beneficiary of a life insurance policy had no insurable interest, and the father of such beneficiary paid the first annual premium, and was to pay the premiums thereafter, the heirs of the assured could recover the money due on the policy on his death, in preference to such beneficiary. And in Mutual Life Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286, it was said that, as an insured may make a person who has no insurable interest in his life the beneficiary in the life policy, the fact that the premiums are paid by such beneficiary does not render the policy void, but the courts will consider him a trustee for the benefit of those legally entitled to the policy. But in Blake v. Metzgar, 150 Pa. 291, 24 Atl. 755, the court held that the right of the legal representatives of an assured person to recover the proceeds of a speculative life policy from a person who has received the money ceases where an executor or administrator of the beneficiary has received and in good faith distributed it. And in Bloomstein v. Bloomstein, 1 Tenn. Ch. App. 187, it was said that the statutes against gaming and wagering contracts are not applicable to a contract of insurance made by a niece on the life of her uncle, so as to admit of a recovery from the niece of the proceeds of said insurance by the widow and children of the uncle; there having been no money or thing of value lost by the uncle by the making of said insurance contract.

Of course, if there is no one in existence who could become a beneficiary under the law and the rules of the society, the fund reverts to the society.

Warner v. Modern Woodmen of America (Neb.) 93 N. W. 397, 61 L. R. A. 603; West v. Grand Lodge of Ancient Order of United Workmen of Texas, 14 Tex. Civ. App. 471, 37 S. W. 966. In Halle v. District Grand Lodge No. 2, I. O. B. B., 24 Ohio Cir. Ct. R. 717, it was held that the society had the right to designate what should be done with the fund.

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Likewise, if no beneficiary is designated and there is no one in existence of those designated to take in case of the death of the original beneficiary, and a reversion is provided for in case there shall be no one living entitled to the benefit, the fund due on the death of the member will revert to the society (Grand Lodge A. O. U. W. v. Cleghorn [Tex. Civ. App.] 42 S. W. 1043).

But in determining who is entitled to receive the benefits of the provisions of fraternal beneficiary societies it is the duty of the court to construe the statute and the rules and regulations of such societies liberally, and in such manner as to carry out the purposes sought to be accomplished (Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383). Under this rule it has been held that the word "child," as used in the charter of a Masonic insurance company, providing that, on the death of a member intestate without widow or child, the fund due the member shall vest in the company, includes a "grandchild" (Duvall v. Goodson, 79 Ky. 224).

If a society interpleads the adverse claimants, and pays the fund into court, it thereby waives any objection to the beneficiary named and relinquishes its right to the fund.

Taylor v. Hair (C. C.) 112 Fed. 913; Supreme Council of Order of Chosen Friends v. Bennett, 47 N. J. Eq. 39, 19 Atl. 785; Supreme Council of Royal Arcanum v. Britton, 47 N. J. Eq. 325, 21 Atl. 754; Sanguinitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989. The same is true if the company admits liability and pays the fund into court. Standard Life & Accident Ins. Co. v. Catlin, 106 Mich. 138, 63 N. W. 897; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125.

An insurance company which has given the beneficiary under the policy a check for the amount thereof has thereby incurred a liability to such beneficiary, independent of the policy, and cannot, when sued on the check, question the beneficiary's ownership thereof, pay the money into court, and obtain release from liability by an interpleader stating claims of persons asserting equities adverse to the beneficiary of the proceeds of the policy (Northwestern Mut. Life Ins. Co. v. Kidder [Ind. App.] 69 N. E. 204).

If a society continues to collect assessments after knowledge that the beneficiary designated does not come within the restrictions of its laws, it will be held to have waived such restrictions.

Lindsey v. Western Mut. Aid Soc., 84 Iowa, 734, 50 N. W. 29; Bloomington Mut. Life Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518; Coulson v. Flynn, 90 App. Div. 613, 86 N. Y. Supp. 1133, affirming 83 N. Y. Supp. 944, 41 Misc. Rep. 186.

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If the charter or constitution of a society specifically provides to whom the benefit shall be paid, the member cannot exclude such persons from the benefits by having others designated as beneficiaries.

Nuckols v. Kentucky Mut. Ben. Soc., 16 Ky. Law Rep. 270; Kentucky Masonic Mut. Life Ins. Co. v. Miller's Adm'r, 13 Bush (Ky.) 489; Shamrock Benev. Soc. v. Drum, 1 Mo. App. 320.

The doctrine was in the Miller Case based on the theory that it is not within the power of the association, or a member, or both, to alter the rights of those whom the charter declares to be beneficiaries. A decision in line with this rule is that of Wertheimer v. Independent Order Free Sons of Judah, 28 App. Div. 64, 50 N. Y. Supp. 842. There the constitution provided for payment of a specified sum to the widow, with permission to the member to bequeath half thereof to his children. A member who had a wife, but no children, bequeathed half the death benefit to his sister. When the widow sought to recover the benefits, a motion for an interpleader on the ground of a claim by the sister was made, but the court held that the motion was properly denied.

Where a certificate is made payable in part to a legal beneficiary and in part to one who cannot take, the proceeds of the certificate must be paid to the legal beneficiary.

Coudell v. Woodward, 16 Ky. Law Rep. 742, 29 S. W. 614; Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057.

Where a stepmother applied for insurance on the life of her stepdaughter, but no beneficiary was named, and the stepmother paid all premiums on the policy and retained the receipt book, the policy was payable to her, since the contract was made with her; and the fact that the stepdaughter was the one insured raised no implication that the insurance was for her benefit (John Hancock Mut. Life Ins. Co. v. Lawder, 22 R. I. 416, 48 Atl. 383).

If a beneficiary designated in a policy, who is unable to take the proceeds, has paid premiums thereon, he is entitled to recover the amount so paid, with interest, as against the persons claiming as rightful beneficiary.

Gibson v. Kentucky Grangers' Mut. Ben. Soc., 8 Ky. Law Rep. 520; Lanouette v. Laplante, 67 N. H. 118, 36 Atl. 981; Fodell v. Royal Arcanum, 44 Wkly. Notes Cas. (Pa.) 498.

And in Bloomstein v. Bloomstein, 1 Tenn. Ch. App. 187, the court said that while the mere relationship of an uncle to a nephew

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or niece does not create an insurable interest of the one in the other, yet where a niece insured the life of her uncle, paid the premiums, and at his death the proceeds of the policies were by the companies paid over to the niece, the widow and children of the insured cannot recover said proceeds from the niece. In Benard v. Grand Lodge Ancient Order of United Workmen, 13 S. D. 132, 82 N. W. 404, it was held that where a husband had obtained a life certificate payable to his wife, under an agreement with her that she should help pay therefor, which she did, and shortly before his death he surrendered such certificate and received another, payable to his sister, who was a mere voluntary beneficiary, the wife had an equitable interest in the proceeds of such insurance superior to the right of the sister.

(o) Funeral benefits.

Where a benefit is paid to a widow of a member to defray funeral expenses, such benefit in her hands is impressed with a trust for that purpose, in so far as necessary, and the husband's estate is entitled to be reimbursed therefrom for amounts paid for that purpose (In re Martin, 2 Chest. Co. Rep. [Pa.] 47). The money so paid cannot be diverted to the benefit of the widow or of creditors (In re Haas [Orph. Ct.] 3 Pa. Co. Ct. R. 345, 44 Leg. Int. 196). A widow of a deceased member, who has been separated from her husband in pursuance to a mutual understanding for years prior to his death, and who has borne no part of the funeral expenses, is not entitled to the funeral benefit (Berlin Beneficial Soc. v. March, 82 Pa. 166). And where a member, who is separated from his wife and lives with another woman as his reputed wife, directs that the funeral benefit is to be paid to her, and it is so paid, the legal widow cannot recover from the society (Supplee v. Knights of Birmingham, 18 Wkly. Notes Cas. [Pa.] 280). Where the constitution of an association allows a funeral benefit, and provides that, in the absence of competent friends, the association shall appoint a committee to take charge of the deceased brother, the funeral benefit is payable to the person who had charge of the funeral, and not to the widow of the deceased member, especially if she had lived apart from him, and was not his administratrix (Fanton v. Coachmen's Benev. Union, 13 Misc. Rep. 245, 34 N. Y. Supp. 162).

(p) Endowment policies.

Under a policy payable to a designated beneficiary on insured's death before the lapse of a specified time, but to insured himself

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if he survive such period, the right of the beneficiary to the proceeds of the policy is dependent on the death of insured before the lapse of the specified period.

Tennes v. Northwestern Mut. Life Ins. Co., 26 Minn. 271, 3 N. W. 346: Miller v. Campbell, 2 Misc. Rep. 518, 22 N. Y. Supp. 388.

If insured is alive at the expiration of the period, the money due on the policy is his property, free from any trust in favor of the beneficiary and liable to the payment of his debts (Levy v. Van Hagen, 69 Ala. 17). It is also to be noted that the beneficiary must survive insured. Thus, where a policy is payable to insured himself if he live to a certain date, and, if he die before that time, to a certain person, trustee for insured's mother, there is a resulting trust in insured's favor on the mother's prior death, and the proceeds of the policy are a part of his estate (Bancroft v. Russell, 157 Mass. 47, 31 N. E. 710).

It cannot affect the rights of the various parties under a life insurance policy that, instead of fixing the exact period when an endowment shall mature, the policy gives the holder the option to fix it at any time after the lapse of a certain number of years. When the holder exercises the option, the rights of the designated beneficiary are cut off. (Travelers' Ins. Co. v. Healey, 25 App. Div. 53, 49 N. Y. Supp. 29, affirmed 164 N. Y. 607, 58 N. E. 1093.) But where a policy was made payable to named beneficiaries, and it was provided therein that on completion of a stated period, without a termination of the policy by lapse or death, the accumulations apportioned to the policy should secure to the insured one of five benefits at his option, one of which was to withdraw the entire equity in the accumulation that belonged to the policy in cash, the insured could not elect to withdraw such equity, not being a beneficiary. It was immaterial that the insured had paid the premium and had possession and control of the policy, and that the beneficiary had had no knowledge of it. (New York Life Ins. Co. v. Ireland [Tex.] 17 S. W. 617, 14 L. R. A. 278.)

The fact that a policy stipulated that, should the assured survive July 1, 1898, a fractional part of the policy should be payable to him, his executors and assigns, does not preclude the beneficiary, who, in the absence of the assured, has paid the premiums up to that time, from recovering the full amount of the policy upon the presumption of the death of the assured because of his absence from the state for seven years without being heard from, as the assured, should

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he turn out to be alive, would be estopped to make any claim under the policy (Mutual Ben. Life Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694).

(q) Vested interest of beneficiary.

Under an ordinary policy of life insurance, in which there is no reservation of a right to cut off or modify the interest of the beneficiary, the latter has a vested interest in the policy, of which he cannot be divested without his consent.

It is deemed sufficient to refer to Brockhaus v. Kemna (C. C.) 7 Fed. 609; Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; Hubbard v. Stapp, 32 Ill. App. 541; Sauerbier v. Union Cent. Life Ins. Co., 39 Ill. App. 620; Penn Mut. Life Ins. Co. v. Norcross (Ind. Sup.) 72 N. E. 132; Glanz v. Gloeckler, 104 Ill. 573, 44 Am. Rep. 94, affirming 10 Ill. App. 484; Mutual Ben. Life Ins. Co. v. Dunn, 106 Ky. 591, 51 S. W. 20; Succession of Kugler, 23 La. Ann. 455; Laughlin v. Norcross, 53 Atl. 834, 97 Me. 33; Virgin v. Marwick, 55 Atl. 520, 97 Me. 578; Preston v. Connecticut Mut. Life Ins. Co., 51 Atl. 838, 95 Md. 101; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Packard v. Connecticut Mut. Life Ins. Co., 9 Mo. App. 469; United States Casualty Co. v. Kacer, 69 S. W. 370, 169 Mo. 301, 58 L. R. A. 436, 92 Am. St. Rep. 641; Ruppert v. Union Mut. Ins. Co., 30 N. Y. Super. Ct. 155; Butler v. State Mut. Life Assur. Co., 55 Hun, 296, 8 N. Y. Supp. 411, affirmed without opinion 125 N. Y. 769, 27 N. E. 409; Geoffroy v. Gilbert, 38 N. Y. Supp. 643, 5 App. Div. 98; Sangunitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989; Herring v. Sutton, 39 S. E. 772, 129 N. C. 107; Union Central Life Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737; Entwistle v. Travelers' Ins. Co., 202 Pa. 141, 51 Atl. 759; Jones v. Jones, 23 Pa. Co. Ct. R. 254; Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503.

If, however, the policy reserves to the insured the right to change the beneficiary with the assent of the insurer, the beneficiary first designated does not take a vested interest.

Robinson v. United States Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1; Denver Life Ins. Co. v. Crane (Colo. App.) 73 Pac. 875; Hopkins v. Hopkins, 92 Ky. 324, 17 S. W. 864; Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937; Wrather v. Stacy, 82 S. W. 420, 26 Ky. Law Rep. 683; Cellery v. John Hancock Mut. Life Ins. Co., 68 N. Y. Supp. 128, 57 App. Div. 227.

But a provision in a policy requiring notice to the insurer of "any assignment" refers to assignments by the beneficiary, and is not a reservation to the insured of the right to change the beneficiary

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(Irwin v. Travelers' Ins. Co., 16 Tex. Civ. App. 683, 39 S. W. 1097).

The beneficiary in the certificate issued by a mutual benefit association, in which the member is given full power to direct the disposal of the benefit and to change the beneficiary, has no vested right in the contract of insurance evidenced thereby, as the contract is between the association and the member to whom the certificate is issued, and not between the association and the beneficiary named in the certificate.

Reference to the following cases is deemed sufficient: Lamont v. Hotel Men's Mut. Ben. Ass'n (C. C.) 30 Fed. 817; Lamont v. Grand Lodge Iowa Legion of Honor (C. C.) 31 Fed. 177; Lamb v. Mutual Reserve Fund Life Ass'n (C. C.) 106 Fed. 637; Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; Masonic Mut. Ben. Ass'n v. Tolles, 40 Atl. 448, 70 Conn. 537; Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543, affirming 61 Ill. App. 42; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961, affirming 70 Ill. App. 130; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861, affirming 93 Ill. App. 76; Balder v. Middeke, 92 Ill. App. 227; Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 106 Ill. App. 665; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Bunyan v. Reed (Ind. App.) 70 N. E. 1002; Brown v. Grand Lodge A. O. U. W., 80 Iowa, 287, 45 N. W. 884, 20 Am. St. Rep. 420; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Union Mut. Aid Ass'n v. Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Gutterson v. Gutterson, 50 Minn. 278, 52 N. W. 530; Finch v. Grand Grove U. A. O. D., 60 Minn. 308, 62 N. W. 384; Schoenau v. Grand Lodge A. O. U. W., 88 N. W. 999, 85 Minn. 349; Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402; St. Louis Police Relief Ass'n v. Strode, 103 Mo. App. 694, 77 S. W. 1091; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; Supreme Council American Legion of Honor v. Adams, 44 Atl. 380, 68 N. H. 236; Tepper v. Supreme Council Royal Arcanum, 59 N. J. Eq. 321, 45 Atl. 111; Spengler v. Spengler, 55 Atl. 285, 65 N. J. Eq. 176; Smith v. National Ben. Soc., 51 Hun, 575, 4 N. Y. Supp. 521, affirmed 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681, affirming Same v. Grand Lodge A. O. U. W., 55 Hun, 603, 8 N. Y. Supp. 185; Luhrs v. Supreme Lodge Knights & Ladies of Honor, 54 Hun, 636, 7 N. Y. Supp. 487; O'Brien v. Supreme Council Catholic Benev. Legion, 81 App. Div. 1, 80 N. Y. Supp. 775, affirmed in 176 N. Y. 597, 68 N. E. 1120; Pollak v. Supreme Council Royal Arcanum, 40 Misc. Rep. 274, 81 N. Y. Supp. 942; Thesing v. Supreme Lodge Knights of America, 11 Ohio Dec. 88, 24 Wkly. Law Bul. 401; Fischer v. American Legion of Honor, 168 Pa. 279, 31 Atl. 1089; Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 Atl. 176; Supreme Council Catholic Knights v.

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Morrison, 16 R. I. 468, 17 Atl. 57; Catholic Knights of America v. Kuhn, 91 Tenn. 214, 18 S. W. 385; Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. 869; Sofge v. Supreme Lodge Knights of Honor, 98 Tenn. 446, 39 S. W. 853; Lane v. Lane, 99 Tenn. 639, 42 S. W. 1058; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882; Cade v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 67 Pac. 603, 27 Wash. 218.

A beneficiary in a mutual benefit certificate, issued under a by-law authorizing insured to change his beneficiary at will, has, however, such an inchoate interest as will entitle her to contest the mental capacity of insured to make a designation of a new beneficiary (Grand Lodge A. O. U. W. v. McGrath, 133 Mich. 626, 95 N. W. 739).

The doctrine of the Wisconsin courts is a modification of the general rule. As finally crystallized in Foster v. Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217, it is that **the beneficiary in a policy of life insurance has a collateral subsisting interest therein, but subject to the right of the insured, who took out the policy and paid the premiums, to revoke the same.** The court relied on Clark v. Durand, 12 Wis. 223, and Kerman v. Howard, 23 Wis. 108. The rule has, too, been followed in In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17, and Stoll v. Mutual Ben. Life Ins. Co., 115 Wis. 558, 92 N. W. 277. In this connection, reference may also be made to Rawson v. Milwaukee Mut. Life Ins. Co., 115 Wis. 641, 92 N. W. 378, where it was held that the beneficiary designated in the certificate of a mutual benefit association, containing a provision allowing the insured to surrender it at any time without the consent of the beneficiary, had a vested right in the certificate, subject only to the right of the insured to substitute another beneficiary.

Though it was held in Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086, that the fact that under the by-laws of an insurance association a beneficiary may be changed without his consent does not prevent the beneficiary from obtaining a vested property right in the certificate which will be beyond the power of insured to devest, it appears that the claim of the original beneficiary was based on an antenuptial agreement and gift inter vivos. Moreover, as appears from Hill v. Groesbeck, 67 Pac. 167, 29 Colo. 161, the policy contained no clause allowing a change of beneficiary, and there was nothing to show that at the time the certificate was issued there

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was any by-law allowing it. That this is the true basis of the decision is to be inferred from the fact that the court quotes with approval Love v. Clune, 24 Colo. 237, 50 Pac. 34, where it was held that, in the absence of any provision allowing a change of beneficiaries, the beneficiary first designated takes a vested interest. So, in Weisert v. Muehl, 81 Ky. 336, 5 Ky. Law Rep. 285, where it did not appear that any right to change the beneficiary was conferred by either the charter of the association or the contract, the court expressed the opinion that there was no such difference between an ordinary life and a mutual benefit association as would restrict the operation of the rule as to vested interest applicable in the case of ordinary policies.

Reference may also be made to Johnson v. Hall, 55 Ark. 210, 17 S. W. 874; Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n v. Winterstein, 44 Atl. 199, 58 N. J. Eq. 189.

In the case of Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086, to which reference has been made, the court laid stress on the fact that the certificate was secured to the original beneficiary by an antenuptial agreement. The principle that a vested interest in the certificate of a mutual benefit association may pass by virtue of a collateral agreement is also illustrated in Webster v. Welch, 57 App. Div. 558, 68 N. Y. Supp. 55.

The interest of a beneficiary in the certificate on the life of a member of a beneficial association is a mere expectancy, which becomes vested only on the death of the insured.

Lamont v. Grand Lodge Iowa Legion of Honor (C. C.) 31 Fed. 177; Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; Voigt v. Kersten, 45 N. E. 543, 164 Ill. 314, affirming 61 Ill. App. 42; Balder v. Middeke, 92 Ill. App. 227; Kirkpatrick v. Modern Woodmen of America, 103 Ill. App. 468; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Bunyan v. Reed (Ind. App.) 70 N. E. 1002; Shuman v. A. O. U. W., 110 Iowa, 642, 82 N. W. 331; Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402; St. Louis Police Relief Ass'n v. Strode, 77 S. W. 1091, 103 Mo. App. 694; Tepper v. Supreme Council of Royal Arcanum, 59 N. J. Eq. 321, 45 Atl. 111; Pollak v. Supreme Council of Royal Arcanum, 81 N. Y. Supp. 942, 40 Misc. Rep. 274; Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

So, if the insured and the beneficiary died at the same time, there was no instant of time when her expectancy ripened into a

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vested right so as to descend to her heirs (Balder v. Middeke, 92 Ill. App. 227).

(r) Right to change beneficiary.

In view of the doctrine of vested interest, it follows that under a policy of ordinary life insurance, containing no reservation of the right to change beneficiaries, the consent of the beneficiary first designated is necessary to render valid a substitution of beneficiaries.

Penn Mut. Life Ins. Co. v. Norcross (Ind. Sup.) 72 N. E. 132; Prudential Ins. Co. v. Young, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319; Preston v. Connecticut Mut. Life Ins. Co., 95 Md. 101, 51 Atl. 838; Packard v. Connecticut Mut. Life Ins. Co., 9 Mo. App. 469; Butler v. State Mut. Life Assur. Co., 55 Hun, 296, 8 N. Y. Supp. 411, affirmed without opinion 125 N. Y. 769, 27 N. E. 409; Sangunitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989; Herring v. Sutton, 129 N. C. 107, 39 S. E. 772; Union Cent. Life Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737; Waltz v. Mutual Aid Soc., 5 Pa. Co. Ct. R. 208.

So, where the beneficiary in a policy is changed on the application of the insured, who asks that the change be made, "provided" the original beneficiary "does not claim," such change is subject to the rights of the original beneficiary, and unless he is dead, or his claim has been released or barred by limitation, the new beneficiary cannot recover on the policy (Helfrich v. John Hancock Mut. Life Ins. Co., 8 Misc. Rep. 320, 28 N. Y. Supp. 535).

A policy was delivered as a gift by the insured to the beneficiary, and was deposited in the partnership safe of the insured and beneficiary. Some of the premiums were paid by the partnership, and the policy was left in the safe of the insured after dissolution of the partnership. The insured declared his intention of procuring a transfer thereof to his wife and child. On this state of facts it was held in Allen v. Hartford Life Ins. Co., 72 Conn. 693, 45 Atl. 955, that there was no such relinquishment of the interest of the original beneficiary as would affect his right to recover.

If the policy designates several beneficiaries, a consent to a change, signed by only a part of them, is of no effect (Saling v. Bolander, 125 Fed. 701, 60 C. C. A. 469), and cannot operate to deprive those not consenting to the change of their rights under the policy (Carpenter v. Negus, 40 N. Y. Supp. 995, 17 Misc. Rep. 172).

In accordance with the foregoing principles, it has been held **that the insured cannot divest the original beneficiary of her in-**

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terest by inducing the company to accept a surrender of the original policy and to issue a new one, naming another beneficiary.

Lemon v. Phœnix Mut. Life Ins. Co., 38 Conn. 294; Pilcher v. New York Life Ins. Co., 33 La. Ann. 322; Putnam v. New York Life Ins. Co., 42 La. Ann. 739, 7 South. 602; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Packard v. Connecticut Mut. Life Ins. Co., 9 Mo. App. 469; Barry v. Brune, 71 N. Y. 261; Garner v. Germania Life Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256.

A somewhat similar principle governed National Life Ins. Co. v. Haley, 78 Me. 268, 4 Atl. 415, 57 Am. Rep. 807, where the policy, payable to the insured's wife, and upon which she had paid certain premiums, was, by an arrangement between the insured and the company, allowed to lapse, and another policy was issued in its place, payable to the insured or his representatives, and it was held that the wife could not be thus wholly deprived of the benefit of the policy, but a part thereof would be paid to her, upon the death of the insured, proportioned to the amount of premiums paid by her. So, where one took out an endowment policy on his own life for the benefit of his mother, who furnished the money for the first premium, it was held (Pingrey v. National Life Ins. Co., 144 Mass. 374, 11 N. E. 562), that, in the absence of a reservation of the power to change the beneficiary, insured could not, by surrendering the policy and taking out a new one, deprive the mother of her rights. But a policy payable to the wife of the insured, which stipulates that it "is issued and accepted upon express conditions that" the insured "may, with the consent of the company, at any time assign it, or, before assignment, change the beneficiaries therein," may, with the company's assent, be surrendered, and in its stead a paid-up policy taken, payable to a person other than the wife, she having paid none of the premiums (Bilbro v. Jones, 102 Ga. 161, 29 S. E. 118).

In opposition to the general rule referred to above, in Weatherbee v. New York Life Ins. Co., 60 N. E. 381, 178 Mass. 575, where the policy was allowed to lapse by the insured, and a new policy was substituted therefor, payable to another beneficiary, it was held that the new policy could not be treated as a continuation of the first. It was, however, conceded on a second appeal (Weatherbee v. New York Life Ins. Co., 65 N. E. 383, 182 Mass. 342) that the original beneficiary was entitled to the value of a paid-up policy as of the date of the lapse of the original. So, too, in Union

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Mut. Life Ins. Co. v. Stevens (D. C.) 19 Fed. 671, the court laid down the rule that if the insured, even by collusion with the company, suffers his policy to lapse, with the intention of securing another policy containing the name of a new person as beneficiary, the courts will not regard the second policy as a mere continuation of the first. It is to be remarked, however, that the beneficiary in the original policy died before the insured, and the issue in the case was whether the proceeds of the policy were payable to the heirs of the insured or the heirs of the beneficiary.

> The facts that a life policy, payable to the wife of the insured, was assigned by her at his instance to a bank as collateral security for his debt; that the bank, on finding the assignment to be ineffectual to transfer her interest, returned the policy to him, and ceased to pay the premiums as it had previously done, and allowed it to lapse; and that a new policy, not payable to the wife, was taken out, and assigned by the insured to the bank—do not show a fraudulent conspiracy to deprive the wife of the benefit of the insurance. Matlack v. Seventh Nat. Bank, 36 Atl. 1082, 180 Pa. 360.

It may be regarded as elementary that the consent of the insurer is necessary to a valid change of beneficiary. The beneficiary may be regarded as in a sense a party to the contract, and obviously a new party cannot be imported into the contract and substituted for the original party without the consent of the other party (Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365). This principle was applied in Canavan v. John Hancock Mut. Life Ins. Co., 39 Misc. Rep. 782, 81 N. Y. Supp. 304. So, too, in Tillman v. John Hancock Mut. Life Ins. Co., 27 App. Div. 392, 50 N. Y. Supp. 470, the insured executed a paper necessary for a change of beneficiary, and delivered it to insurer's solicitor, who told her that "it was all right," and two days thereafter she died. In the meantime the paper had been mailed to the home office, and was from there promptly returned to the local superintendent, with various questions about it, but without the signature of the president or secretary, and was received by the superintendent after insured's death. It was held that the beneficiary was not changed. Similarly, in Newman v. John Hancock Mut. Life Ins. Co., 90 N. Y. Supp. 471, 45 Misc. Rep. 320, where the policy was for the benefit of the children of the insured, the plaintiff claimed the right to the proceeds by virtue of a paper signed by the insured, requesting the insurer to make plaintiff the beneficiary because one of the insured's children had died. The paper and the policy were delivered to plaintiff, who

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placed them in his safe and kept them until after the death of the insured. The insurer knew nothing about them until after the death of the insured, and it never assented to the proposed change of beneficiary. It was held that there was no change of beneficiary, notwithstanding the fact that under Laws 1892, c. 690, § 211, the consent of the original beneficiary is not necessary to enable the insured to make a change of beneficiaries.

But in Prudential Ins. Co. v. Young, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319, it was held that the insured in a life policy payable to his executor or administrator may, without the consent of the insurer, designate his mother as his beneficiary.

The fact that a policy provides that the production thereof by the company, and of a receipt in full, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or wife, a relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person entitled thereto, does not obligate the company to change a beneficiary on the designation of another. Malburg v. Metropolitan Life Ins. Co., 127 Mich. 568, 86 N. W. 1026.

As has already been pointed out, if the laws or the contract of a mutual benefit association reserve to the member the right to change his beneficiary, the latter does not take a vested interest. It follows, therefore, that **under a reservation of the right to change the beneficiary, in whatever form it exists, the member may, irrespective of the consent of the original beneficiary, and subject only to the rules of the association, change his beneficiary at will.**

Gentry v. Supreme Lodge Knights of Honor (C. C.) 23 Fed. 718; Lamont v. Hotel Men's Mut. Ben. Ass'n (C. C.) 30 Fed. 817; Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212; Conyne Stone & Co. v. Jones, 51 Ill. App. 17; Delaney v. Delaney, 70 Ill. App. 130, affirmed 175 Ill. 187, 51 N. E. 961; McGrew v. McGrew, 93 Ill. App. 76, affirmed 60 N. E. 861, 190 Ill. 604; Presbyterian Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Bunyan v. Reed (Ind. App.) 70 N. E. 1002; Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Schillinger v. Boes, 9 Ky. Law Rep. 18, 3 S. W. 427; Leaf v. Leaf, 12 Ky. Law Rep. 47; Lockett v. Lockett, 26 Ky. Law Rep. 300. 80 S. W. 1152; Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; Barton v. Provident Mut. Relief Ass'n, 63 N. H. 535, 3 Atl. 627; Deady v. Bank Clerks' Mut. Ben. Ass'n, 49 N. Y. Super. Ct. 246; Moan v. Normile, 56 N. Y. Supp. 339, 37 App. Div. 614; Fink v. Delaware, L. & W. Mut. Aid Soc., 68 N. Y. Supp. 80,

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57 App. Div. 507; Fisk v. Aid Union (Pa.) 11 Atl. 84; Appeal of Beatty, 122 Pa. 428, 15 Atl. 861; Beatty v. Supreme Commandery United Order of Golden Cross, 154 Pa. 484, 25 Atl. 644; Hamilton v. Royal Arcanum, 42 Atl. 186, 189 Pa. 273; Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 Atl. 176; Splawn v. Chew, 60 Tex. 532; Schmitt v. New Braunfelser Unterstuetzungs Verein, 32 Tex. Civ. App. 11, 73 S. W. 568.

It has, however, been held in Texas (Schmitt v. New Braunfelser Unterstuetzungs Verein, 32 Tex. Civ. App. 11, 73 S. W. 568) that the right to change the beneficiary may exist by custom, though not reserved in the contract. In this case neither the by-laws of a beneficial association nor its contracts provided for any change of beneficiary. A member changed the beneficiary by an indorsement on the benefit certificate. It appeared that there was a custom in the society by which a member was permitted to change the beneficiary. There was no evidence that the insured knew of the custom, but the original beneficiary did not testify that he did not know of it. It was held that the facts were sufficient to show that the custom was known to insured and the association, and that they contracted with reference to it, and hence the change was binding.

The right of a member of a mutual benefit association to change his beneficiary is, in some states, expressly granted by statute.[4]

The effect of these statutes has been considered in Lamb v. Mutual Reserve Fund Life Ass'n (C. C.) 106 Fed. 637; Brown v. Grand Lodge A. O. U. W., 80 Iowa, 287, 45 N. W. 884, 20 Am. St. Rep. 420; Lockett v. Lockett, 80 S. W. 1152, 26 Ky. Law Rep. 300; Woodmen Acc. Ass'n v. Hamilton (Neb.) 97 N. W. 1017, denying rehearing 96 N. W. 989; Luhrs v. Supreme Lodge Knights & Ladies of Honor, 54 Hun, 636, 7 N. Y. Supp. 487; Fleeman v. Fleeman (Super. Buff.) 15 N. Y. Supp. 838; Steinhausen v. Preferred Mut. Acc. Ass'n, 59 Hun, 336, 13 N. Y. Supp. 36; Moan v. Normile, 56 N. Y. Supp. 339, 37 App. Div. 614; Fink v. Delaware, L. & W. Mut. Aid Soc. of Scranton, Pa., 68 N. Y. Supp. 80, 57 App. Div. 507.

A Kansas statute authorizes the change of beneficiary on the death of the beneficiary named,[5] but excepts from the provisions of the act companies doing business on the co-operative plan. It was held in Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213, that as the statute, by its terms, applies only to companies organized within the state, it did not apply to a mutual benefit association not in-

[4] Reference may be made to Iowa Laws, 21st Gen. Assem. c. 65, § 7; Ky. St. 1903, § 670; Neb. Cobbey's Ann. St. § 6584; New York Laws 1883, c. 175, § 18; Laws 1892, c. 690, § 238.

[5] Comp. Laws, c. 50a, §§ 76, 78.

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corporated in Kansas, and therefore that the death of the original beneficiary was not a prerequisite to the right of a member of the association to change his beneficiary. The Supreme Court of Indiana has held in Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 11 N. E. 449, that the right to change a beneficiary in a mutual benefit society, by mutual agreement of the association and the member, exists independently of its constitution and by-laws, and may be exercised whenever it is not limited directly or impliedly by such constitution or by-laws; and consequently the act of March 2, 1877 (Rev. St. 1881, § 3850), which declares certificates to be contracts between the association and the beneficiary, did not change the rule, except to prevent any future restrictions in the constitution or by-laws of such society upon the contract or the rights of the parties to change the beneficiary.

In the absence of any rule, law, or custom permitting it, the beneficiary cannot be changed, except by the concurrent consent of the member and the association (Grand Lodge of Order of Hermann-Soehne v. Elsner, 26 Mo. App. 108). **If the laws of the association when the certificate is issued permit a change of beneficiaries with the consent of the beneficiary originally designated, and also provide that the laws may be amended, the original beneficiary does not take such a vested interest that her rights will remain unaffected by a subsequent law permitting a change of beneficiary without the consent of the original beneficiary.**

Supreme Council Catholic Knights of America v. Franke, 137 Ill. 118, 27 N. E. 86, affirming 34 Ill. App. 651; Thesing v. Supreme Lodge Knights of America, 11 Ohio Dec. 88, 24 Wkly. Law Bul. 401; Supreme Council Catholic Knights v. Morrison, 16 R. I. 468, 17 Atl. 57; Catholic Knights of America v. Kuhn, 91 Tenn. 214, 18 S. W. 385; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38.*

If, however, by reason of the terms of the laws or the contract, the beneficiary had a vested interest, a subsequent by-law would not affect her rights.

Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n v. Winterstein, 44 Atl. 199, 58 N. J. Eq. 189.

A member of a beneficial association may, however, for a valuable consideration, estop himself from changing his designation of

* As to the effect of subsequent by-laws in general, see ante, vol. 1, p. 703.

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beneficiary, although such change is authorized by a by-law (In re Krause's Estate, 28 Pittsb. Leg. J. N. S. [Pa.] 29). So, where the member agreed with the beneficiary that if she would pay all assessments, and take care of him, he would not change the beneficiary, he cannot change the beneficiary without her consent (Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19). A similar principle was recognized in Maynard v. Vanderwerker, 24 N. Y. Supp. 932, 30 Abb. N. C. 134, but the judgment was reversed in Maynard v. Vanderwerker, 76 Hun, 25, 27 N. Y. Supp. 714, on the ground that the alleged agreement had not been proved. It must, of course, appear that the agreement relied on to give the beneficiary a vested interest has been complied with by her (Supreme Lodge Knights & Ladies of Honor v. Schworm, 80 Mo. App. 64).

Generally, it may be said that, if sound equities exist in favor of the original beneficiary of an insurance certificate, the insured is estopped to substitute a second beneficiary, whose status is purely that of a volunteer (Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733). So, where a properly appointed beneficiary, on the security offered by the certificate, has advanced moneys to the members, so that it would be inequitable to permit such member to deprive the beneficiary of such security, the right of the member to change the certificate at will is limited by the equitable right acquired by the beneficiary (McGrew v. McGrew, 93 Ill. App. 76, affirmed 60 N. E. 861, 190 Ill. 604).

A like principle governed Beckner v. Beckner, 104 Ga. 219, 30 S. E. 622; Supreme Council Catholic Benev. Legion v. Murphy, 55 Atl. 497, 65 N. J. Eq. 60.

The mere voluntary payment of assessments by the beneficiary does not give her such an equity as will estop the member from changing the beneficiary.

Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733; Masonic Mut. Ben. Ass'n v. Tolles, 70 Conn. 537, 40 Atl. 448; Grand Lodge A. O. U. W. v. McGrath, 133 Mich. 626, 95 N. W. 739; Masonic Ben. Ass'n of Central Illinois v. Bunch, 109 Mo. 560, 19 S. W. 25; Spengler v. Spengler, 55 Atl. 285, 65 N. J. Eq. 176; Fanning v. Supreme Council of Catholic Mut. Ben. Ass'n, 82 N. Y. Supp. 733, 84 App. Div. 205; Fisk v. Equitable Aid Union (Pa.) 11 Atl. 84; Heasley v. Heasley, 43 Atl. 364, 191 Pa. 539; Fischer v. Fischer, 99 Tenn. 629, 42 S. W. 448; Preusser v. Supreme Hive of Ladies of Maccabees of the World (Wis.) 101 N. W. 358.

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So, too, insured is not prevented from changing the beneficiary in his benefit society certificate, though she is his wife, merely because he pays the assessments with community property (Cade v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 27 Wash. 218, 67 Pac. 603). On the other hand, it has been held in Ohio that where a member of a benefit society stops paying his dues and assessments, separates from his family, and is divorced, and his wife pays the dues on behalf of their children, the beneficiaries, he cannot afterwards change the beneficiaries (Tudor v. Tudor, 11 Ohio Dec. 422, 26 Wkly. Law Bul. 368). In Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354, 854, it appeared that, in a division of the property on separation and divorce, the benefit certificate was given to the wife, who was named as beneficiary therein, as her own property, and for two years or more she paid all dues and assessments thereon. Some years after the date of the certificate, on an affidavit of insured that his wife refused to surrender the certificate, another certificate issued, naming insured's three adult children by a former wife as beneficiaries. It also appeared that the wife had small children by insured dependent on her for support. It was held that the wife was the rightful beneficiary.

Under the general power to change his beneficiary, the member has not the right to substitute as beneficiary one not within the class of persons who by the laws of the association may be designated as beneficiary.

Presbyterian Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Elsey v. Odd Fellows Mut. Life Ass'n, 142 Mass. 224, 7 N. E. 844; Carson v. Vicksburg Bank, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596; Luhrs v. Supreme Lodge Knights & Ladies of Honor, 54 Hun, 636, 7 N. Y. Supp. 487; Di Messiah v. Gern, 10 Misc. Rep. 30, 30 N. Y. Supp. 824; Kult v. Nelson, 53 N. Y. Supp. 95, 24 Misc. Rep. 20; Supreme Council Catholic Benev. Legion v. McGuinness, 59 Ohio St. 531, 53 N. E. 54; Stark v. Byers, 24 Pa. Co. Ct. R. 517; Groth v. Central Verein Der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 95 Wis. 140, 70 N. W. 80.

St. Mass. 1894, c. 367, § 8, provides that in case of the death of all the near relatives of the insured the certificate of insurance may be transferred to any other person, but that no contract shall be legal or valid which shall be conditioned on an agreement or understanding that the beneficiary shall pay the dues and assessments, or either. A member of a benefit society on the death of his heirs at law named one as his beneficiary who was neither related to nor dependent on the insured, in consideration of which plaintiff agreed to pay all the dues and assessments. It was held that the designation was legal, as the statute did not apply to subsequent beneficiaries

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named, but only to the original contract, whereon the insured became a member of the society. Hill v. Supreme Council A. L. H., 178 Mass. 145, 59 N. E. 652.

(s) Mode of changing beneficiary.

A mutual benefit association may make reasonable regulations defining the method by which a member may change the beneficiary named in his benefit certificate (Coleman v. Supreme Lodge Knights of Honor, 18 Mo. App. 189); and when such regulations are made they become part of the contract, and the right to change can be exercised in no other way.

Supreme Conclave Royal Adelphia v. Cappella (C. C.) 41 Fed. 1; Conway v. Supreme Council Catholic Knights of America, 63 Pac. 727, 131 Cal. 437; Rollins v. McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260; Highland v. Highland, 109 Ill. 366, affirming 13 Ill. App. 510; Delaney v. Delaney, 70 Ill. App. 130; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Mason v. Mason, 160 Ind. 191, 65 N. E. 585; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Shuman v. Ancient Order of United Workmen, 82 N. W. 331, 110 Iowa, 642; Modern Woodmen of America v. Little, 114 Iowa, 109, 86 N. W. 216; 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; Clark v. Supreme Council of the Royal Arcanum, 176 Mass. 468, 57 N. E. 787; Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826; Hall v. Northwestern Endowment & Legacy Ass'n, 47 Minn. 85, 49 N. W. 524; Coleman v. Supreme Lodge Knights of Honor, 18 Mo. App. 189; Head v. Supreme Council Catholic Knights, 64 Mo. App. 212; Grand Lodge A. O. U. W. v. Ross, 89 Mo. App. 621; Counsman v. Modern Woodmen of America (Neb.) 96 N. W. 672; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Renk v. Herman Lodge, 2 Dem. Sur. (N. Y.) 409; Ireland v. Ireland, 42 Hun (N. Y.) 212; Murphy v. Metropolitan St. Ry. Ass'n, 55 N. Y. Supp. 620, 25 Misc. Rep. 751; Gladding v. Gladding, 56 Hun, 639, 8 N. Y. Supp. 880; Wilson v. Bryce, 60 N. Y. Supp. 132, 43 App. Div. 491; Eagan v. Eagan, 68 N. Y. Supp. 777, 58 App. Div. 253; Sanguinitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989; Thomas v. Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582, affirming 15 N. Y. Supp. 15, 60 Hun, 382; Coyne v. Bowe, 48 N. Y. Supp. 937, 23 App. Div. 261, affirmed in 161 N. Y. 633, 57 N. E. 1107; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; Smith v. Supreme Council Royal Arcanum, 127 N. C. 138, 37 S. E. 159; Charch v. Charch, 57 Ohio St. 561, 49 N. E. 408; Independent Order of Foresters v. Keliher, 36 Or. 501, 59 Pac. 324, rehearing denied 59 Pac. 1109, 36 Or. 501; Appeal of Vollman, 92 Pa. 50; Jinks v. Banner Lodge, No. 484, of Ladies & Knights of Honor, 139 Pa. 414, 21 Atl. 4; Masonic Mut. Life Ass'n v. Jones, 154 Pa. 107, 26 Atl. 255; Hamilton v. Royal Arcanum, 189 Pa. 273, 42 Atl. 186.

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The rule applies where the member desires to designate a new beneficiary after the death of the original beneficiary (Head v. Supreme Council Catholic Knights, 64 Mo. App. 212).

If the association has made no rules or regulations governing the change of beneficiaries a member of such association is entitled to change the beneficiary in his certificate according to the custom prevailing in such association (Waldum v. Homstad, 119 Wis. 312, 96 N. W. 806). Similarly it was held in Collins v. Collins, 30 App. Div. 341, 51 N. Y. Supp. 922, that in the absence of any provisions prescribing the mode of changing the beneficiary, the right to change being granted by statute, the member was free to revoke his former designation as he saw fit.

The ignorance of the officers of a local lodge of a mutual benefit association, as to their duties in making a change in the beneficiary, will not excuse the assured from a substantial compliance with the rules of the order, so as to give effect to an attempted change of beneficiary, which was not made according to the rules of the association (Independent Order of Foresters v. Keliher, 36 Or. 501, 59 Pac. 1109, 60 Pac. 563, denying rehearing 59 Pac. 324, 36 Or. 501). On the other hand it was held in Davidson v. Knights of Pythias, 22 Mo. App. 263, that the neglect of the officers of the association to issue a new certificate as required by the rules cannot affect the rights of the substituted beneficiary. If the officers of the association, acting in collusion with the original beneficiary, purposely fail to follow the prescribed procedure, the rights of the new beneficiary will not be affected (Marsh v. Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382). So where an effective change is prevented by the fraud of the original beneficiary, equity will afford relief (Clark v. Supreme Council of the Royal Arcanum, 176 Mass. 468, 57 N. E. 787).

Where, with the consent of the insurer, the insured in a life policy assigned the same, the assignment purporting to convey all right, title, and interest of the insured, and all beneficial advantage to be derived from the policy, there was a change of beneficiary, as much as if there had been a substitution of the assignee for the beneficiary in that part of the policy in which the name of the beneficiary appeared (Atlantic Mut. Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933). Under Laws N. Y. 1892, c. 690, § 238, providing that a change of beneficiaries shall be made on the consent of the society in the manner prescribed by its by-laws, an indorsement on the certificate of membership directing payment to a person not named in the certificate is not a valid transfer of the insurance, without the consent of the society (Armstrong v. Warren, 83 Hun,

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217, 31 N. Y. Supp. 665). Where a member of a mutual benefit society surrendered his policy therein, and obtained in its stead a new one in favor of a creditor, the transaction amounted to a change of his beneficiary, and was not a mere assignment prohibited by Acts 21st Gen. Assem. c. 65, § 7, making void assignments of mutual benefit insurance policies (Belknap v. Johnston, 86 N. W. 267, 114 Iowa, 265).

The association cannot affect the rights of a beneficiary by any act on its part after the death of the insured (Independent Order of Foresters v. Keliher, 36 Or. 501, 59 Pac. 324, rehearing denied 59 Pac. 1109, 36 Or. 501), and the proceedings prescribed for the change of beneficiary must be substantially completed before the death of the insured to have effect.

Shuman v. Ancient Order of United Workmen, 110 Iowa, 642, 82 N. W. 331; Kemper v. Modern Woodmen of America (Kan.) 78 Pac. 452; Stringham v. Dillon, 42 Or. 63, 69 Pac. 1020; Hamilton v. Royal Arcanum, 189 Pa. 273, 42 Atl. 186; Appeal of Hamilton, Id.; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606.

If, however, the insured has done substantially all that is required of him to effect a change of beneficiary, and all that remains to be done are the ministerial acts of the officers of the association, the change will take effect, though the formal details were not completed before the death of the insured.

Berkeley v. Harper, 3 App. D. C. 308; Harper v. Berkeley, Id.; Nally v. Nally, 74 Ga. 669, 58 Am. Rep. 458; Heydorf v. Conrack, 7 Kan. App. 202, 52 Pac. 700; Schoenau v. Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; St. Louis Police Relief Ass'n v. Strode, 103 Mo. App. 694, 77 S. W. 1091; Sanborn v. Black, 67 N. H. 537, 35 Atl. 942; Luhrs v. Luhrs, 123 N. Y. 367, 25 N. E. 388, 20 Am. St. Rep. 754, 9 L. R. A. 534, reversing 53 Hun, 630, 6 N. Y. Supp. 51; Donnelly v. Burnham, 86 App. Div. 226, 83 N. Y. Supp. 659, affirmed in 69 N. E. 1122, 177 N. Y. 546; John Hancock Mut. Life Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5; McGowan v. Supreme Court of Independent Order of Foresters, 104 Wis. 173, 80 N. W. 603; Waldum v. Homstad, 119 Wis. 312, 96 N. W. 806.

So, when a member is by a physical weakness prevented from personally performing all the necessary acts, he can by full verbal instructions to another confer the power to do what is necessary to effect the change (Hall v. Allen, 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601).

The general principle that the member may employ an agent to make the change is asserted in Bowman v. Moore, 87 Cal. 306, 25 Pac. 409, where it was held that a provision empowering the mem-

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ber to change the beneficiary by "writing filed with the association" is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change. So where the member, within a few hours of his death, sent the certificate of insurance to the president of his lodge with the request that it should be transferred to new beneficiaries, an indorsement of the certificate made by the president of the lodge, in accordance with the verbal message of the owner of the certificate, was sufficient to effect a change of beneficiaries (Schmidt v. Iowa K. P. Ins. Ass'n, 82 Iowa, 304, 47 N. W. 1032, 11 L. R. A. 354).

A very common provision of the laws of mutual benefit associations is that on change of beneficiary the old certificate must be surrendered and a new one issued. Such regulations are valid (Bollman v. Supreme Lodge Knights of Honor [Tex. Civ. App.] 53 S. W. 722), and will, in general, be enforced. A mere indorsement on the certificate is not sufficient.

National Exch. Bank v. Bright, 18 Ky. Law Rep. 588, 36 S. W. 10; Thomas v. Thomas, 60 Hun, 582, 15 N. Y. Supp. 16; Thomas v. Thomas, 60 Hun, 382, 15 N. Y. Supp. 15; (1892) Id., 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582.

The original beneficiary in whose possession the certificate is cannot, however, defeat the change by refusing to surrender the certificate.

Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961, affirming 70 Ill. App. 130; Allegemeiner-Arbeiter Bund v. Adamson, 132 Mich. 86, 92 N. W. 780; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, affirming 73 N. Y. S. 1138, 61 L. R. A. 791, 95 Am. St. Rep. 554; Cade v. Head Camp Pacific Jurisdiction Woodmen of the World, 27 Wash. 218, 67 Pac. 603.

The rules of the order cannot require impossibilities (Isgrigg v. Schooley, 125 Ind. 94, 25 N. E. 151), and in such a case equity will aid the substituted beneficiary and regard that as done which ought to have been done.

Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 45 Am. St. Rep. 17, 26 L. R. A. 733; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554.

The member may, as a substitute for the surrender of the certificate, execute an instrument expressing a surrender (Hirschl v.

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Clark, 81 Iowa, 200, 47 N. W. 78, 9 L. R. A. 841), certify to the loss of the certificate (Spengler v. Spengler, 55 Atl. 285, 65 N. J. Eq. 176), or to such other facts as show the impossibility of actual surrender (Leaf v. Leaf, 12 Ky. Law Rep. 47). A statement that the certificate is beyond the member's control is, however, insufficient if in fact no attempt was made by the member to obtain possession (Supreme Council Catholic Benevolent Legion v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497).

A somewhat similar principle governed in Grand Lodge A. O. U. W. v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. Rep. 419. The only mode provided by the by-laws of the society for a change of the person designated as beneficiary was by authorizing such change in writing on the back of the certificate, in a prescribed form, attested by an officer of the society. One of the members, immediately before his death, desiring to change the beneficiary named in his certificate, which had been lost or mislaid without his fault, after unavailing search for it, executed a will whereby he bequeathed the benefit money to the person intended to be substituted. It was held that a court of equity should recognize the disposition by will as a valid designation of a new beneficiary. So in Grand Lodge A. O. U. W. v. Kohler, 106 Mich. 121, 63 N. W. 897, the member took out a policy in favor of his wife, and, after divorce from her, made a sworn statement to the company that he desired a change of beneficiary, and could not obtain possession of the certificate from his former wife. On the company's disapproval of the application, he disposed by will of the proceeds to become due on the policy, and it was held that such disposition created a valid change of beneficiary. In still a third Michigan case the principle has been applied. In Grand Lodge A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. 1, the member, desiring to change the beneficiary, executed a statement detailing the loss of the certificate, and applied for a reissue of the certificate, making his son the beneficiary. Such application was refused, the rules of the organization requiring the change to be indorsed on the original certificate. By the advice of the officers of the organization, insured attempted to make the change by giving a power of attorney to another to collect the amount which should accrue under the certificate. It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund.

The by-laws of a benefit insurance company provided that no change of beneficiaries should be made except on application by the mem-

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ber, when the old certificate should be canceled, and a new one issued. A member took out a certificate payable to his daughter, and delivered it to another for safe-keeping, and thereafter, without surrendering it, took out another certificate, payable to his wife, and kept the latter until his death. It was held that the facts that the member made no written application for a change of beneficiaries, and that it did not appear that he ever requested a change of beneficiaries, did not warrant a conclusion that no application was ever made, so as to preclude a recovery on the later certificate, as against the beneficiary named in the former. Becker v. Minnesota Odd Fellows' Mut. Ben. Soc., 62 Minn. 366, 64 N. W. 895.

The rule requiring the surrender of the old certificate, and indeed most of the rules of procedure, in effecting a change of beneficiaries, are intended only for the benefit of the association, and may therefore be waived by it.

Adams v. Grand Lodge A. O. U. W., 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Simcoke v. Grand Lodge A. O. U. W. of Iowa, 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114; Manning v. Ancient Order of United Workmen, 86 Ky. 136, 5 S. W. 385, 9 Am. St. Rep. 270; Schoenau v. Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; Fischer v. Malchow, 101 N. W. 602, 93 Minn. 396; Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402; St. Louis Police Relief Ass'n v. Strode, 103 Mo. App. 694, 77 S. W. 1091; Southern Tier Masonic Relief Ass'n v. Laudenbach (Sup.) 5 N. Y. Supp. 901; Moan v. Normile, 56 N. Y. Supp. 339, 37 App. Div. 614; Allison v. Stevenson, 64 N. Y. Supp. 481, 51 App. Div. 626; Fanning v. Supreme Council of Catholic Mut. Ben. Ass'n, 84 App. Div. 205, 82 N. Y. Supp. 733, affirmed in 71 N. E. 1130, 178 N. Y. 629; John Hancock Mut. Life Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5.

So where a certificate of change of beneficiary executed by a member in plaintiff's favor complied with all the requirements of the by-laws, except that it did not give the name of the beneficiary to be superseded, but the association did not object to such omission, and the secretary, in a letter to plaintiff acknowledging receipt of the certificate, spoke of it as "substituting your name as beneficiary," it was held that such declaration was evidence against the association, warranting a verdict that a change of beneficiary had been duly effected; there being no evidence that the acts required of the association to effect the change had not been done (Mayer v. Equitable Reserve Fund Life Ass'n, 49 Hun, 336, 2 N. Y. Supp. 79).

A waiver can, however, take place only prior to the death of the member (McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865,

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43 Am. St. Rep. 83), as the association cannot by its acts or conduct affect the rights of beneficiaries after they have become fixed by the death of the insured (Smith v. Harman, 59 N. Y. Supp. 1044, 28 Misc. Rep. 681). But it has been held that, where a mutual benefit order pays the amount of a certificate to a bank, leaving the court to determine who is the rightful claimant to the fund, it waives a failure of the member to change the beneficiary in accordance with the provisions of the constitution (Hall v. Allen [Miss.] 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601). This must perhaps be regarded as no more than a waiver of its own right to object.

The formalities necessary to a change of beneficiary cannot be waived by the officers of a subordinate lodge, as they have no power to change the rules of the association (Grand Lodge A. O. U. W. v. Connolly, 43 Atl. 286, 58 N. J. Eq. 180).

> The failure of a local court of a beneficial association to meet at a regular meeting time prior to an insured's death, and after he had applied to the secretary for a change of a beneficiary, is not a waiver by the association of a rule that a petition for such a change should be filed with the local court, where insured filed no petition prior to his death. Independent Order of Foresters v. Keliher, 36 Or. 501, 59 Pac. 324, rehearing denied (1900) 59 Pac. 1109, 36 Or. 501.

Though the association admits its liability, the respective rights of persons claiming to be beneficiaries, where a substituted beneficiary has been named, must be determined by a consideration of the power reserved to assured, under the rules and by-laws of the order, to deal with the certificate (Sofge v. Supreme Lodge Knights of Honor, 98 Tenn. 446, 39 S. W. 853). So it has been stated as a general principle that even if the right of the member to change the beneficiary is not restricted the first beneficiary and the association may require that such change should have been made in compliance with such constitution and by-laws (Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 Atl. 176). And in an Iowa case the court laid down the principle that beneficiaries who are affected by an attempted change may avail themselves of the failure of the insured to comply with the contract as well as the company with whom it was made (Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470). In view of the principles asserted in the majority of the cases these statements must, however, be regarded as mere generalizations, and as applicable only in cases where there

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has not been even a substantial compliance with the requirements, or where, as in the Wendt Case, the officers of the association exceeded their authority. Restrictions in laws of a beneficial society as to method of changing a beneficiary are matters of contract between it and insured (Supreme Court, Order of Patricians v. Davis, 129 Mich. 318, 88 N. W. 874), and though a change of beneficiaries must be made in accordance with the laws of the society, yet, when the change is made substantially as provided by the laws to its satisfaction and that of the insured, the first beneficiary cannot object to the manner of change, because it was not made in strict conformity to the law of the society.

Supreme Lodge Order of Golden Chain v. Terrell (C. C.) 99 Fed. 330; Depee v. Grand Lodge of A. O. U. W. of Iowa, 106 Iowa, 747, 76 N. W. 798; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Manning v. Ancient Order of United Workmen, 9 Ky. Law Rep. 428, 5 S. W. 385; Fischer v. Malchow, 101 N. W. 602, 93 Minn. 396; Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402; Earley v. Earley, 23 Ohio Cir. Ct. R. 618; Pennsylvania R. Co. v. Wolfe, 203 Pa. 269, 52 Atl. 247; Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340; Cade v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 67 Pac. 603, 27 Wash. 218.

Similarly, where a member of a beneficiary society makes a change of beneficiaries by will, a method not in compliance with the contract of insurance, but the original beneficiary induces the assured to rely upon her acquiescence in the provisions of such will, and accepts benefits under it after his decease, she is estopped from afterwards claiming the benefit fund under the certificate (Hainer v. Iowa Legion of Honor, 78 Iowa, 245, 43 N. W. 185). And where the original beneficiary who had possession of the certificate agreed to see that the original certificate was surrendered so as to render effective a change of beneficiary as desired by the insured, she was estopped to claim that the change of beneficiary was invalid by reason of the nonsurrender of the original certificate, and the failure to issue a new one (Supreme Conclave Royal Adelphia v. Cappella [C. C.] 41 Fed. 1). In an Oregon case (Brett v. Warnick, 44 Or. 511, 75 Pac. 1061, 102 Am. St. Rep. 639) it was held that the lack of an actual substitution as beneficiary, pursuant to the constitution and by-laws of the association, does not affect an agreement by which a person not named therein is to receive the insurance and deprive him of his equity to claim the same as against the beneficiaries named therein, if the association does not insist on the objec-

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tion, and pays the fund into court to be awarded to the contestant entitled thereto. Though the by-laws require certain formalities to be complied with in changing a beneficiary, if a member who had designated his mother as beneficiary on his deathbed desired her to pay the fund to his sisters, which direction was complied with, an assignee in bankruptcy of the mother cannot complain (Schomaker v. Schwebel, 204 Pa. 470, 54 Atl. 337).

(t) Validity and effect of change.

A change of beneficiary, to be given effect, must appear to have been made understandingly (Smith v. Harman, 59 N. Y. Supp. 1044, 28 Misc. Rep. 681), and **if it is shown that there was fraud or undue influence, or lack of mental capacity, the attempted change will be regarded as inoperative.**

Cason v. Owens, 100 Ga. 142, 28 S. E. 75; Supreme Council Catholic Benev. Legion v. Murphy, 55 Atl. 497, 65 N. J. Eq. 60; Ownby v. Supreme Lodge Knights of Honor, 101 Tenn. 16, 46 S. W. 758.

For the purpose of raising the question of mental capacity, the beneficiary in a mutual benefit certificate has a sufficient interest.

Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232, 94 N. W. 731; Grand Lodge A. O. U. W. v. McGrath (Mich.) 95 N. W. 739.

That one in directing change in the beneficiaries in his benefit certificate wrote a letter, instead of filling out blanks thereon as directed, does not tend to show lack of mental capacity (Walts v. Grand Lodge of Iowa Workmen, 118 Iowa, 216, 91 N. W. 1062). But evidence of decedent's wife that she had difficulty in seeing her husband, because of the hostility of those with whom he resided, is admissible on the issue of fraud (Shuman v. Supreme Lodge Knights of Honor, 110 Iowa, 480, 81 N. W. 717).

The mere inference that it is improbable that a father would without fraudulent inducements change the beneficiary from his infant daughter to his grown brother is insufficient to support an allegation of fraud. Broderick v. Broderick, 69 Kan. 679, 77 Pac. 534.

It is, of course, elementary that on a valid change of beneficiary the new beneficiary becomes entitled to the fund.

Citation of cases is not deemed necessary, but reference may be made to Fisk v. Equitable Aid Union (Pa.) 11 Atl. 84, 25 Pittsb. Leg. J. 168; Mulderick v. Grand Lodge A. O. U. W., 155 Pa. 505, 26 Atl. 663; Tennessee Lodge v. Ladd, 5 Lea (Tenn.) 716; Sabin v. Grand Lodge

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A. O. U. W., 55 Hun, 603, 8 N. Y. Supp. 185, judgment affirmed Same v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; National American Ass'n v. Kirgin, 28 Mo. App. 80.

If, however, the attempted change is invalid and ineffective for any reason, the rights of the original beneficiary are not affected, and the original designation remains in force.

Elsey v. Odd Fellows' Mut. Relief Ass'n, 142 Mass. 224, 7 N. E. 844; Smith v. Boston & Maine Railroad Relief Ass'n, 46 N. E. 626, 168 Mass. 213; O'Brien v. Continental Casualty Co., 184 Mass. 584, 69 N. E. 308; Coyne v. Bowe, 48 N. Y. Supp. 937, 23 App. Div. 261, affirmed in 161 N. Y. 633, 57 N. E. 1107; Supreme Council Catholic Benev. Legion v. McGinness, 53 N. E. 54, 59 Ohio St. 531; Di Messiah v. Gern, 30 N. Y. Supp. 824, 10 Misc. Rep. 30; Grace v. Northwestern Mut. Relief Ass'n, 87 Wis. 562, 58 N. W. 1041, 41 Am. St. Rep. 62; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606.

It has, however, been held in Mississippi that if a member of a beneficial association surrenders his certificate, in which his wife is beneficiary, and takes out another for the benefit of his creditor, which, under the laws of the order, he is not permitted to do, on his death the wife has no right to the fund as beneficiary under such surrendered certificate (Carson v. Vicksburg Bank, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596). And in Luhrs v. Supreme Lodge Knights & Ladies of Honor, 54 Hun, 636, 7 N. Y. Supp. 487, it was said that the rights of the original beneficiary were nevertheless terminated. Of course, if the member revokes his original designation without making another, it will be treated as if none were made, and the fund will be distributed as provided in the laws of the order (Cullin v. Supreme Tent of Knights of Maccabees of the World, 77 Hun, 6, 28 N. Y. Supp. 276).

(u) Death of original beneficiary.

Where a member designated his wife as beneficiary, and on her death married again, making no change in his benefit certificate, the second wife was entitled to the proceeds under a general clause allowing the "widow" to take the proceeds (Masonic Mut. Relief Ass'n v. McAuley, 2 Mackey [D. C.] 70). So under a provision securing the benefit fund to the "family" of a member the second wife will take in preference to the father of the member who is not dependent on him nor a member of his family (O'Neal v. O'Neal, 22 Ky. Law Rep. 616, 109 Ky. 113, 58 S. W. 529). On the other

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hand, it was held in Bickel v. Bickel, 79 S. W. 215, 25 Ky. Law Rep. 1945, that where a policy was payable to insured's wife and children, and the wife died before the insured and he married again, his second wife was not entitled to any portion of the proceeds, the wife's interest having survived to the children. If the policy is payable to the wife if she survive, otherwise to their children, on the death of the wife the children become sole beneficiaries.

Continental Life Ins. Co. v. Webb, 54 Ala. 688; Roquemore v. Dent, 33 South. 178, 135 Ala. 292, 93 Am. St. Rep. 33; Dent v. Roquemore, Id.; Chapin v. Fellowes, 36 Conn. 132, 4 Am. Rep. 49; Martin v. Ætna Life Ins. Co., 73 Me. 25; Fidelity Trust Co. of Buffalo v. Marshall, 178 N. Y. 468, 71 N. E. 8, affirming 87 N. Y. Supp. 1134, 93 App. Div. 607.

The insured cannot by an attempt to surrender the policy deprive the children of their rights (Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289), and, even while the policy provides that on the death of the beneficiary the insured may substitute another, such substitution must, according to Eiseman v. Judah, 8 Fed. Cas. 394, be made within a reasonable time.

Where the policy is in terms payable to the wife and the husband's children, and all the parties, including the company, the wife, and the guardian, have construed it as being payable equally to the wife and children, the court will not, in the proceedings against the guardian, consider the question whether, by virtue of the charter of the company, the policy should be construed as being payable to the children only in case of the wife's death before the husband. Taylor v. Hill, 86 Wis. 99, 56 N. W. 738.

If the policy is payable to the wife, if living, and otherwise to "his children," the children by his second wife will participate in the fund.

Helmken v. Meyer, 118 Ga. 657, 45 S. E. 450; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Sharpless v. Darlington, 2 Chest. Co. Rep. (Pa.) 121.

On the other hand, if the policy provides that in case the wife dies before insured the policy shall be payable to "their" children, it does not include, as beneficiaries, children of insured by a second marriage.

Evans v. Opperman, 76 Tex. 293, 13 S. W. 312; Ætna Mut. Life Ins. Co. v. Clough, 68 N. H. 298, 44 Atl. 520; Lockwood v. Bishop, 51 How. Prac. (N. Y.) 221.

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A child legally adopted is regarded as the child of the insured in law, and will therefore share in the fund.

Von Beck v. Thomsen, 60 N. Y. Supp. 1094, 44 App. Div. 373; Virgin v. Marwick, 97 Me. 578, 55 Atl. 520.

A life policy, expressed to be for the benefit of the wife and children of the assured, vests, when issued, the amount of the policy in the wife and children then in being, to the exclusion of after-born children (Connecticut Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106, 23 Atl. 105).

That the term "children" in such a case will not include grandchildren was held in Small v. Jose, 86 Me. 120, 29 Atl. 976; and in D'Arcy v. Connecticut Mut. Life Ins. Co., 108 Tenn. 567, 69 S. W. 768, it was held that if a life policy is payable to the wife, if living, otherwise to their children, and the wife and one child, a daughter, died before the insured, a minor son of the daughter takes no interest in the policy, as she was the sole beneficiary after her mother's death. So where the policy provided that if there were no children surviving the fund should go to the estate of the insured, it has been held that the issue of deceased children will not participate.

Lane v. De Mets, 59 Hun, 462, 13 N. Y. Supp. 347; Lerch v. Freutel, 73 N. Y. Supp. 1078, 36 Misc. Rep. 581; Elgar v. Equitable Life Assur. Soc. 113 Wis. 90, 88 N. W. 927; United States Trust Co. v. Mutual Ben. Life Ins. Co., 4 N. Y. Supp. 543, 56 N. Y. Super. Ct. 412, reversed 115 N. Y. 152, 21 N. E. 1025.

In some of these cases the child died before the wife, but in others the death of the wife was prior in point of time, and the decision was based on the principle that the rights of beneficiaries were not fixed until the death of the insured. On the other hand, it has been held in other cases that where the policy is payable to the wife, or in case of her death to the children, the issue of a deceased child is entitled to participate in the fund.

Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530; In re Conrad's Estate, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. Rep. 396; Voss v. Connecticut Mut. Life Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689; Connecticut Mut. Life Ins. Co. v. Fish, 59 N. H. 126; Hull v. Hull, 62 How. Prac. (N. Y.) 100; Frank v. Bauman, 35 Wkly. Law Bul. 59; Watt v. Gideon, 22 Pa. Co. Ct. R. 493, 8 Pa. Dist. R. 395; Glenn v. Burns, 100 Tenn. 295, 45 S. W. 784. In Hooker v. Sugg, 102 N. C. 115, 8 S. C. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217, and Ives v. Mutual Fire Ins. Co., 129 N. C. 28, 39 S. E. 631, it was held that the personal representatives of the deceased child was entitled to the fund.

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The theory of these cases seems to be, as said in the Voss Case, that the policy creates a vested, defeasible interest in all the children, which descends to the grandchildren.

A provision in a life insurance contract directing payment to insured's brothers and sisters, "or their living issue, according to the right of representation," means the living lineal descendants of deceased brothers and sisters. Hemenway v. Draper, 97 N. W. 874, 91 Minn. 235.

Where the policy was payable to the wife of the insured, and, in case she died before him, to their children, and the wife died before insured, leaving two sons, one of whom died before insured, the title to the insurance vested in the sons on death of the wife, and hence the widow of the deceased son takes his share under his will (Smith v. Ætna Life Ins. Co., 44 Atl. 531, 68 N. H. 405). Where the policy provided that a sum named therein should be payable to the wife of the insured or her "legal representatives" within a specified time after the death of the insured, or, if she were not then living, to her children, it was held that, the wife having died before the husband, her interest in the policy was thereby extinguished, and the creditors of her estate have no claim on the fund; the clause authorizing payment to her "legal representatives" meaning, not her "administrator," but some one appointed by her to receive the fund (In re Conrad's Estate, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. Rep. 396). But if the policy is made payable to the wife only, and contains no provision for payment to the children (Tompkins v. Levy, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31), the children are not entitled to the proceeds if the wife dies before the insured.

The decision in Simmons v. Biggs, 99 N. C. 236, 5 S. E. 235, to the effect that where the policy was for the benefit of the insured's wife and her children, and the wife died intestate before the insured, leaving children, the wife's interest in the policy was vested in her and passed to the husband's administrator as assets of her estate, is apparently based on the ground that the husband was the sole distributee of the deceased wife.

In accordance with the rule that a beneficiary in a policy in which no right of divestiture is reserved takes a vested interest is the further rule that ordinarily, if the beneficiary dies before the insured, her rights, so vested, passed to her representatives, and on the death of the insured the proceeds of the policy belong to the

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representative of the beneficiary and not to the estate of the insured.

Drake v. Stone, 58 Ala. 133; Phœnix Mut. Life Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14; Libby v. Libby, 37 Me. 359; Preston v. Connecticut Mut. Life Ins. Co., 95 Md. 101, 51 Atl. 838; Swan v. Snow, 11 Allen (Mass.) 224; Millard v. Brayton, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; Kimball v. Gilman, 60 N. H. 54; Waldheim v. John Hancock Life Ins. Co. (City Ct. N. Y.) 18 N. Y. Supp. 577; Shields v. Sharp, 35 Mo. App. 178; Geoffroy v. Gilbert, 5 App. Div. 98, 38 N. Y. Supp. 643, reversing 15 Misc. Rep. 60, 36 N. Y. Supp. 884; Cooper v. Metropolitan Life Ins. Co., 1 App. Div. 291, 37 N. Y. Supp. 129; Sterrit v. Lee, 52 N. Y. Supp. 1132, 24 Misc. Rep. 324; Conigland v. Smith, 79 N. C. 303; In re Hardy's Estate, 12 Phila. (Pa.) 29; In re Anderson's Estate, 85 Pa. 202; Foster v. Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217.

This rule does not preclude the estate of the insured from participating in the proceeds, if the insured is, under the law of descent of property, entitled to share in the estate of the beneficiary.

Appeal of Deginther, 83 Pa. 337; Olmsted v. Keyes, 85 N. Y. 593.

In Clark v. Dawson, 195 Pa. 137, 45 Atl. 674, it was held that, under life policy for benefit of wife and children of insured, the insurer agreeing to pay the amount thereof to insured's "beneficiary, or their executors, administrators, or assigns," and "in case of the death of the said beneficiary" before death of insured the amount to be paid to the executors or administrators of insured, it is only in case of all the beneficiaries dying before insured that payment is to be to the personal representatives of the latter.

It is obvious that under an endowment policy the interest of the beneficiary is contingent on the death of the insured before the expiration of the endowment period. Consequently if the beneficiary does not survive the insured the proceeds are payable to his representatives (Lamberton v. Bogart, 46 Minn. 409, 49 N. W. 230). So, where the policy is payable to the insured in case of total disability, or on his death to a designated beneficiary, if the beneficiary dies before the insured the proceeds pass to the estate of the insured (In re Gray, 25 Pittsb. Leg. J. [N. S.] 219).

The general rule may, of course, be modified or rendered inapplicable by the peculiar circumstances or provisions of the policy. Thus, in Ryan v. Rothweiler, 50 Ohio St. 595, 35 N. E. 679, where the policy was made payable at the death of the insured to his

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wife, and in case of her decease during his lifetime to her children by him, and all the beneficiaries died before the insured, the policy reverted to him, and at his death became subject to administration as his other personal estate, the theory of the court being that there was no provision for payment to the representatives of the children. So where the policy is payable to insured's wife, her name only being mentioned in the policy, and she dies before the husband, the proceeds do not go to her personal representatives (Waldheim v. John Hancock Mut. Life Ins. Co., 8 Misc. Rep. 506, 28 N. Y. Supp. 766). Where a member designated his wife and her lawful heirs as his beneficiaries, and the wife died, and the member married again, his daughter by his first wife was entitled to the benefit, and not his second wife (Day v. Case, 43 Hun [N. Y.] 179).

The policy may provide that the fund shall be payable to a designated beneficiary or to the legal representatives of the insured, and in such case, if the beneficiary dies before the insured, her representatives are not entitled to the proceeds.

Johnson v. Van Epps, 110 Ill. 551, affirming 14 Ill. App. 201; Boyden v. Massachusetts Mut. Life Ins. Co., 153 Mass. 544, 27 N. E. 669; United States Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 870, 58 L. R. A. 436, 92 Am. St. Rep. 641; Merchant v. White, 79 N. Y. Supp. 1, 77 App. Div. 539, affirming 75 N. Y. Supp. 756, 37 Misc. Rep. 376; Schumacher v. Schumacher, 32 Tex. Civ. App. 497, 75 S. W. 50.

In several states the vested interest of the beneficiary is regarded as contingent on the survival of such beneficiary. Hence the further modification of the rule is recognized, namely, that the proceeds are payable to the representatives of the beneficiary only when the insured has not, after the death of such beneficiary, made a new designation.

Johnson v. Van Epps, 110 Ill. 551, affirming 14 Ill. App. 201; Gambs v. Covenant Mut. Life Ins. Co., 50 Mo. 44; Shields v. Sharp, 35 Mo. App. 178; Brown v. Murray, 54 N. J. Eq. 594, 35 Atl. 748; Bickerton v. Jaques, 28 Hun (N. Y.) 119, 12 Abb. N. C. 25; Kerman v. Howard, 23 Wis. 108.

Since the beneficiary designated in the certificate of a mutual benefit association ordinarily has no vested interest, if such beneficiary dies before the member the proceeds of the certificate, on the death of the insured, will not belong to the heirs of the bene-

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ficiary, but, subject to the rules of the association, to the heirs of the insured.

Supreme Council American Legion of Honor v. Gehrenbeck, 124 Cal. 43, 56 Pac. 640; Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086; Washington Beneficial Endowment Ass'n v. Wood, 4 Mackey (D. C.) 19, 54 Am. Rep. 251; Covenant Mut. Ben. Ass'n v. Hoffman, 110 Ill. 603; Haskins v. Kendall, 158 Mass. 224, 33 N. E. 495, 35 Am. St. Rep. 490; Boyden v. Massachusetts Masonic Life Ass'n, 167 Mass. 242, 45 N. E. 735; Pease v. Supreme Assembly Royal Society of Good Fellows, 176 Mass. 506, 57 N. E. 1003; Michigan Mut. Ben. Ass'n v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Expressmen's Aid Soc. v. Lewis, 9 Mo. App. 412; Grand Lodge A. O. U. W. v. Dister, 77 Mo. App. 608; Supreme Council American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380; Golden Star Fraternity v. Martin, 59 N. J. Law, 207, 35 Atl. 908; Simon v. O'Brien, 87 Hun, 160, 33 N. Y. Supp. 815; Southwell v. Gray, 72 N. Y. Supp. 342, 35 Misc. Rep. 740; Tafel v. Supreme Commandery of Knights of Golden Rule, 9 Ohio Dec. 279, 12 Wkly. Law Bul. 35; Espy v. American Legion of Honor, 7 Kulp. (Pa.) 134; Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. 869; Paden v. Briscoe, 81 Tex. 563, 17 S. W. 42; Given v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 71 Wis. 547, 37 N. W. 817.

But a by-law of a mutual benefit association altering the existing by-laws so as to provide that in case of the death of a beneficiary before that of the member the administrator of the beneficiary, instead of the administrator of the member, shall receive the proceeds of the certificate, is reasonable (O'Brien v. Supreme Council, Catholic Benev. Legion, 80 N. Y. Supp. 775, 81 App. Div. 1, affirmed without opinion, 176 N. Y. 597, 68 N. E. 1120).

The certificate may, however, provide for payment to a designated beneficiary or her legal representatives, and in such case the fund will go to the heirs of the beneficiary to the exclusion of the heirs of the member, subject, however, to the rules of the association as to what classes of persons may share in the proceeds (Olmstead v. Masonic Mut. Ben. Soc., 37 Kan. 93, 14 Pac. 449). If the certificate provides for payment to the wife, "her heirs or assigns," and the insured survives the wife, on his death his estate is entitled to share with the other heirs of the wife (United Brethren Mut. Aid Soc. v. Miller, 107 Pa. 162). Where a certificate of insurance in a mutual benefit association, made payable to a member of a firm to which insured is indebted, is intended by all parties to be for the benefit of the firm, it will, as against the heirs of insured,

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be entitled to the proceeds of the certificate, though the nominal beneficiary died before the insured (Adams v. Grand Lodge A. O. U. W., 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45).

The administrator of a beneficiary named in a certificate issued by a mutual benefit life insurance society is the proper person to whom the proceeds of the certificate should be paid, though the beneficiary died before insured, where the by-laws provide that the insured shall designate the beneficiary, and can change him at will, and he fails to designate another beneficiary after the death of the one named.

Thomas v. Cochran, 89 Md. 390, 43 Atl. 792, 46 L. R. A. 160; Expressmen's Mut. Ben. Ass'n v. Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470.

If the interest of the beneficiary becomes vested by the death of the insured, the fact that she dies before the benefit is payable does not affect the disposition of the fund, but it will pass to her representatives.

Chartrand v. Brace, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; Union Mut. Aid. Ass'n v. Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; Kottmann v. Gazett, 66 Minn. 88, 68 N. W. 732.

As already intimated, the right to the proceeds of the certificate when the beneficiary dies before the insured is governed by the rules of the association. It is often provided in the laws of mutual benefit associations that on the failure of a properly designated beneficiary benefit funds shall go to certain classes of persons named in a certain order. Under such circumstances, **on the death of the designated beneficiary and the failure of the member to designate another beneficiary, the benefit fund is payable to the persons named in the laws of the association as entitled to share in the benefits and in the order in which they are thus designated.**

Masonic Mut. Relief Ass'n v. McAuley, 2 Mackey (D. C.) 70; Van Bibber's Adm'r v. Van Bibber, 82 Ky. 347; Hofman v. Grand Lodge B. L. F., 73 Mo. App. 47; Supreme Council of Royal Arcanum v. Kacer, 69 S. W. 671, 96 Mo. App. 93; Supreme Council Royal Arcanum v. Bevis, 80 S. W. 739, 106 Mo. App. 429; Grand Lodge A. O. U. W. v. Connolly, 58 N. J. Eq. 180, 43 Atl. 286; Grand Lodge A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; Arthars v. Baird, 8 Pa. Co. Ct. R. 67, 71; Deacon v. Clarke (Tenn.) 79 S. W. 383; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Riley v. Riley, 75 Wis. 464, 44 N. W. 112.

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Where the constitution of a mutual benefit insurance society provided that, on the death of a member, his certificate should be paid to his beneficiary, which should be his wife, children, adopted children, parents, brothers, sisters, or other relatives, and that if the person named should be deceased at the time of the member's death, and no change of beneficiary had been made, the benefit should be paid to the "next living relative," in the order named, the words, "next living relative" refer to the one next in relationship to the deceased member, and not to the dead beneficiary (Mattison v. Sovereign Camp, Woodmen of the World, 25 Tex. Civ. App. 214, 60 S. W. 897). On the failure of the insured to designate a new beneficiary, the proceeds of his certificate belong to his heirs under a law of the association providing that if the beneficiary dies during the lifetime of the insured the benefit shall be paid to his heirs (Grand Lodge A. O. U. W. v. Fisk, 126 Mich. 356, 85 N. W. 875). If, however, the member designates a new beneficiary, in accordance with the rules of the order, such substituted beneficiary will take the proceeds in exclusion of the insured's representatives (Schoales v. Order of Sparta, 206 Pa. 11, 55 Atl. 766).

An interesting question is presented when the insured and the beneficiary perish in the same disaster. Obviously the right to the fund in such case depends on the question whether either can, in such event, be presumed to have survived the other. No positive rule can be deduced as governing these cases, except that, in general, the burden is on the one asserting the right to the fund to show that the person through whom he claims survived the other.

Fuller v. Linzee, 135 Mass. 468; Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002, 59 L. R. A. 653, 92 Am. St. Rep. 284, affirming judgment 98 Ill. App. 525; Males v. Sovereign Camp Woodmen of the World, 30 Tex. Civ. App. 184, 70 S. W. 108.

Certainly, if the beneficiary had no vested interest under the contract, it will not be presumed that she survived so as to render her interest, otherwise merely contingent, a vested interest.

Northwestern Mut. Life Ins. Co. v. Greiner, 115 Mich. 639, 74 N. W. 187; Supreme Council of Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S. W. 671; Southwell v. Gray, 72 N. Y. Supp. 342, 35 Misc. Rep. 740.

But see Cowman v. Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550, where it was held that where the member of a benefit association, whose certificate is payable to his wife, or, in case of her death in his lifetime, to his children, or, if there be no children, to his mother, and, if she be dead, to his father, and, failing all these, to his brothers and sisters, perishes in a flood with his wife and children, there is

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no presumption as to survivorship, but the widow's representative is entitled to the fund, in the absence of evidence that she predeceased her husband.

Where two or more beneficiaries are named in the policy, and one of them dies before the death of the insured, the rights of the surviving beneficiaries will, in general, depend on the provisions of the policy. Where the policy is payable to the "husband and children" of insured, the husband does not take by inheritance the share of a child dying before the insured, but the proceeds are to be equally divided among the husband and surviving children (Bell v. Kinneer, 101 Ky. 271, 40 S. W. 686, 72 Am. St. Rep. 410); and under a policy payable to the wife and child of insured, "or, if they are not living," to the executor or administrators of insured, no part is payable to such executors or administrators, if the wife only, and not the child, of insured died before him (Fish v. Massachusetts Mut. Life Ins. Co., 71 N. E. 786, 186 Mass. 358). On the other hand, where a policy payable to two beneficiaries provided that if they died before the insured the benefits should go to the legal representatives of the insured, and one of the beneficiaries died before insured, on death of insured the interest of the dead beneficiary passed to the legal representatives of the insured, and that of the surviving beneficiary remained in him (Andrus v. Fidelity Mut. Life Ins. Ass'n, 67 S. W. 582, 168 Mo. 151). If the laws of the association provide that in the event of the death of one or more of the beneficiaries, if no other disposition be made, the benefit, in case of death of the member, should be paid in full to the surviving beneficiaries, each sharing pro rata, and one of the beneficiaries designated dies before the death of the member the other beneficiaries take the entire fund.

Bunyan v. Reed (Ind.) 70 N. E. 1002; Wright v. Wright, 15 Ky. Law Rep. 573.

If the member designates his "family" as the beneficiary, and his family consists at that time of himself and his wife and daughter, the wife and daughter are the beneficiaries; but if the daughter dies before her father, and the wife is the only member of his family who survives him, she takes the whole fund, and the daughter's children take nothing (Brooklyn Masonic Relief Ass'n v. Hanson, 53 Hun, 149, 6 N. Y. Supp. 161). Where a policy insuring the life of S. for the benefit of his wife and children provided that "in case of the death of the said beneficiary before the death of the

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person whose life is assured the amount of the assurance shall be paid at maturity to the heirs or assigns of the said person whose life is assured," and the children died before the insured, the widow was entitled to recover in her own right the full amount of the policy (Schneider v. Northwestern Mut. Life Ins. Co., 33 Mo. App. 64).

A policy of insurance on the life of A. was made payable to R., C., and J., "share and share alike, or their legal representatives." J. died before the insured. It was held that J. had a vested interest in the policy, and the money to become due under it, which immediately on his death went to his distributees, and did not survive to the other beneficiaries named in the policy. Macauley v. Central Nat. Bank, 27 S. C. 215, 3 S. E. 193.

The insured took out a policy of insurance payable on his death to his wife, her executors, administrators, or assigns, for her sole use if she survived him, but, in case she died first, the amount was to be paid to her children for their use, or to their guardian, if under age; and another policy payable to his wife or to her legal representatives on his death, but, if she was not then living, to be paid to her children or their guardian, if under age. It was held that on the death of the wife before the husband the interest in such policies vested in the children living at that time, who became substituted as beneficiaries under the stipulation of the contract of insurance, and who did not take through their mother. Fidelity Trust Co. of Buffalo v. Marshall, 71 N. E. 8, 178 N. Y. 468.

In the following cases the right of the surviving beneficiaries was considered as depending on particular statutes: Supreme Council Catholic Knights of America v. Densford, 21 Ky. Law Rep. 1574, 56 S. W. 172, 49 L. R. A. 776; Gault v. Gault, 25 Ky. Law Rep. 2308, 80 S. W. 493; United States Trust Co. v. Mutual Ben. Life Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Walsh v. Walsh, 66 Hun, 297, 20 N. Y. Supp. 933, affirmed 143 N. Y. 662, 39 N. E. 21; Farr v. Trustee of Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249.

(v) Policy procured with money wrongfully obtained.

Where premiums on a policy are paid by an insured with money wrongfully obtained from another, the person from whom such money was wrongfully taken is entitled to an equitable lien on the proceeds of the policy to the extent of such premiums and interest thereon.

Baldwin v. Begley, 183 Ill. 180, 56 N. E. 1065, reversing 84 Ill. App. 74; Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537.

And though only a part of the fund misappropriated by a member of a partnership was used to pay premiums on a life insurance

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policy for the benefit of such member's wife, the surviving partner is entitled to the proceeds of the policy to the extent of the money misappropriated (Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463, reversing Holmes v. Gilman, 19 N. Y. Supp. 151, 64 Hun, 227, which reversed in part Holmes v. Davenport [Sup.] 18 N. Y. Supp. 56). But where one of the intermediate premiums is paid by the beneficiary with her own money, she is entitled to a pro rata share of the proceeds (Dayton v. H. B. Claflin Co., 45 N. Y. Supp. 1005, 19 App. Div. 120).

3. RIGHTS OF CREDITORS AND ASSIGNEES.

(a) Rights of creditors in general.

In the absence of special equities arising in connection with an attempted but invalid assignment or pledge to creditors, payment of premiums by creditors, payment of premium by insured while insolvent, or the like, the creditors of insured have no interest in the proceeds of a policy designating or for the benefit of a special beneficiary.

Reference may be made to the following cases as illustrative: Hendrie & Bolthoff Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209; In re Donaldson's Estate (Iowa) 101 N. W. 870; Skinner v. Gaither, 87 Md. 330, 39 Atl. 876; Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep. 497; First Nat. Bank v. Simpson, 152 Mo. 638, 54 S. W. 506; Studebaker Bros. Mfg. Co. v. Welch, 51 Neb. 228, 70 N. W. 920; Southwell v. Gray, 72 N. Y. Supp. 342, 35 Misc. Rep. 740; In re Schaefer's Estate, 194 Pa. 420, 45 Atl. 311, affirming 8 Pa. Dist. R. 221; Hancock v. Fidelity Mut. Life Ins. Co. (Tenn. Ch. App.) 53 S. W. 181. See, also, Pingree v. Jones, 80 Ill. 177, and In re Van Dermoor's Estate, 42 Hun (N. Y.) 326.

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And conversely the proceeds of a policy, by its terms payable to a creditor, inure to him, at least to the extent of his debt,[1] free from the claims of other creditors or insured's family.

Belknap v. Johnston, 86 N. W. 267, 114 Iowa, 267; Maynard v. Life Ins. Co. of Virginia, 132 N. C. 711, 44 S. E. 405; Andrews v. Union Cent. Life Ins. Co., 92 Tex. 584, 50 S. W. 572, reversing (Tex. Civ. App.) 44 S. W. 610; Andrews v. Union Cent. Life Ins. Co., 24 Tex. Civ. App. 425, 58 S. W. 1039.

The creditors of an infant taking a policy of insurance on his life with his consent, they paying the premium and other expenses, are entitled, on the death of the infant, to the proceeds of the policy to the extent of their debt, whether the policy be taken in their names or in that of the infant (Rivers v. Greeg, 5 Rich. Eq. [S. C.] 274). So, also, where one holding a policy does so for the benefit of insured or his appointee, and promises to pay insured's debts out of the avails thereof, a creditor for whose benefit such promise was made can take advantage thereof, though the promise was unknown to him at the time it was made (Hutchings v. Miner, 46 N. Y. 456, 7 Am. Rep. 369).

In Jewelers' League v. Hepke, 60 N. Y. Supp. 224, 28 Misc. Rep. 716, affirmed without opinion 63 N. Y. Supp. 1110, 49 App. Div. 648, the circumstances were held to show that it was intended to make the creditor a beneficiary only to the extent of his debt. Such a decision is also found in McDonald v. Humphries, 56 Ark. 63, 19 S. W. 234. And where this is true, the net amount realized from the policy should be applied as a credit on the debt (Raley v. Ross, 59 Ga. 862).

A somewhat obscure stipulation rendering the policy void beyond the amount of the debt was in Kentucky Life & Acc. Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42, 22 U. S. App. 386, held to apply only to assignments, and not to a policy in which the creditor was named as beneficiary. And certainly it would not apply, the court held, where the beneficiary did not become a creditor until after the issuance of the policy.

The proceeds of a policy payable to insured's "heirs" vest in the heirs under the policy, and, in the absence of some other controlling circumstance, do not become a part of the insured's estate subject to payment of debts.

Hubbard v. Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; In re Andress' Estate, 5 Ohio N. P. 253, 6 Ohio Dec. 174; Mullins v. Thompson, 51 Tex. 7; White v. Smith, 2 Willson, Civ. Cas. Ct. App. § 399.

[1] As to the question of insurable interest as affecting the right of a creditor to hold more than his debt and expenses, see ante, vol. 1, pp. 301–306.

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But where the policy is payable to the heirs, executors, administrators, or assigns of the insured, the proceeds go to his legal representatives as assets for the payment of debts (Rawson v. Jones, 52 Ga. 458). So, also, in the absence of statute, the creditors are entitled to preference over the family in the proceeds of a policy made payable to insured's estate.

Bickel v. Bickel, 25 Ky. Law Rep. 1945, 79 S. W. 215; In re Kennedy's Estate, 2 Wkly. Notes Cas. (Pa.) 492.

And where a policy by its terms payable to insured's "executors, administrators, or assigns" is bequeathed by insured to his widow and child, and the estate becomes insolvent during administration, the creditors may resort to the insurance fund for the payment of their claim (Dulaney v. Walsh [Tex. Civ. App.] 37 S. W. 615).

The right of a creditor named as beneficiary is not cut off, though the debt itself is barred by the statute of limitations.

Townsend v. Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513; Connecticut Mut. Life Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

Where the policy is intended by the parties as collateral for debts then existing, it will not be extended by implication to cover subsequent debts.

Levy v. Taylor, 66 Tex. 652, 1 S. W. 900. See, also, in connection, Shove v. Shove, 79 Wis. 497, 48 N. W. 647, which, however, was decided on a question of evidence.

The personal representatives of insured, in the absence of a special contract or equity to the contrary, are entitled to any surplus which the creditor, to whom the policy has been made payable, is not entitled to hold, either on account of rules as to insurable interest or because of a prior contract with insured.

Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566; Tateum v. Ross, 150 Mass. 440, 23 N. E. 230; Strode v. Meyer Bros. Drug Co., 101 Mo. App. 627, 74 S. W. 379; Shepard v. Provident Mut. Relief Ass'n, 68 N. H. 611, 44 Atl. 530; Seigrist v. Schmoltz, 113 Pa. 326, 6 Atl. 47; Shugar v. Garman (Pa.) 4 Atl. 56; Coon v. Swan, 30 Vt. 6.

But where the contract looked to the payment to the insured's widow of the surplus over the debt, such surplus was, of course, held by the creditor in trust for her (Sell v. Steller, 53 N. J. Eq. 397, 32 Atl. 211).

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(b) Same—Mutual benefit certificates.

Mutual benefit certificates have always been regarded both by the legislatures and the courts as peculiarly intended for the protection of insured's family, rather than of his creditors. Thus, it is a general provision of statutes looking to the incorporation of mutual benefit societies that the beneficiary of any certificate issued shall be a member of insured's family or in some manner dependent upon him. Such a charter provision of the state where the contract is executed and to be performed will be given effect in another state, except so far as modified by the statute of that state granting franchise rights to transact business therein.

In re Andress' Estate (Com. Pl.) 6 Ohio Dec. 174. See, also, Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

And conversely, where by the charter of the company a creditor was permitted to take, and a substitution of a creditor was made after the issuance of a certificate to a resident of a foreign state, such creditor was entitled to the proceeds, though after the issuance of the certificate, and before the substitution, the association had obtained a license to do business in the foreign state, thereby subjecting itself to a statute [2] of such state forbidding the issuance of a certificate to a creditor.

Belknap v. Johnston, 114 Iowa, 265, 86 N. W. 267. But see, in connection, Pietri v. Seguenot, 96 Mo. App. 258, 69 S. W. 1055.

The rights of relatives or dependents, as against the creditors, are, of course, especially strong where the insured has himself designated as the beneficiary some member or members of the preferred class.

Supreme Council v. Priest, 46 Mich. 429, 9 N. W. 481; Bishop v. Curphey, 60 Miss. 22; Fisher v. Donovan, 77 N. W. 778, 57 Neb. 361, 44 L. R. A. 383; Bown v. Catholic Mut. Ben. Ass'n, 33 Hun (N. Y.) 263; In re Palmer, 3 Dem. Sur. (N. Y.) 129; In re Oerlett's Estate, 7 Pa. Dist. R. 678, 21 Pa. Co. Ct. R. 616. See, also, In re Brooks, 5 Dem. Sur. (N. Y.) 326, and Appeal of Hodge, 8 Wkly. Notes Cas. (Pa.) 209.

A designation of the "heirs at law" as beneficiaries will place the proceeds beyond the reach of creditors (Northwestern Masonic Aid Ass'n of Chicago v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810).

[2] Acts 21st Gen. Assem. Iowa, c. 65, § 7.

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Though the member has designated no one whom he wishes to take, yet, if the charter designates relatives or dependents as those to whom the certificate is to be paid, such persons will take as against the creditors.

Warner v. Modern Woodmen of America (Neb.) 93 N. W. 397, 61 L. R. A. 603; Golden Star Fraternity v. Martin, 59 N. J. Law, 207, 35 Atl. 908; Beeckel v. Imperial Council of the Order of United Friends, 58 Hun, 7, 11 N. Y. Supp. 321, affirmed without opinion 124 N. Y. 661, 27 N. E. 413; In re Beyer's Estate, Prob. Ct. Rep. (Ohio) 241; Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Morrell's Estate, 8 Wkly. Notes Cas. (Pa.) 183; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561.

And it has been held that **a designation of a creditor as beneficiary, by a member of an order doing business under such a charter, is void and of no effect.**

Kentucky Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. Law Rep. 750; Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Skillings v. Massachusetts Ben. Ass'n, 146 Mass. 217, 15 N. E. 566; Carson v. Vicksburg Bank, 75 Miss. 167, 22 South. 1, 65 Am. St. Rep. 596, 37 L. R. A. 559; Voelker v. Grand Lodge of Brotherhood of Locomotive Firemen, 103 Mo. App. 999, 77 S. W. 999; Britton v. Supreme Council Royal Arcanum, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376.

See, also, In re Smith's Estate, 87 N. Y. Supp. 725, 42 Misc. Rep. 639, and Boasberg v. Cronan (Super. Buff.) 9 N. Y. Supp. 664, reversing (Super. Buff.) 7 N. Y. Supp. 5.

It was further held in the McGregor, Schwarzenberg and Carson Cases that such a contract is not entirely void, but that the fund should go to those who might properly have been named as beneficiaries.

This rule is not varied by making the certificate payable to one lawfully authorized to receive the benefit under an agreement by him to act as trustee for a creditor. Such an agreement the courts will not enforce. (Gillam v. Dale, 69 Kan. 362, 76 Pac. 861.) But in Michigan, where it is provided by statute [8] that an assessment company may issue certificates payable to creditors, it has been held that a person insured in such an association can charge his beneficiary with payment of a debt out of the insurance money.

Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420. See, also, Maybury v. Berkery, 102 Mich. 126, 60 N. W. 699, where it was held that one who had accepted the proceeds under an agreement that the

[8] Comp. Laws, § 7487.

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should be applied in the extinguishment of a debt could not be heard to say that they were not applicable to the payment of deceased's debts.

And in New York it has been held that a member having no relatives or dependents may by will, after the death of the beneficiary named, direct the payment of debts out of the proceeds of a certificate, though the rules of the order provide that where the beneficiary dies, and no other disposition is made, the benefit shall revert to the beneficiary fund (In re Copeland's Estate, 75 N. Y. Supp. 1042, 37 Misc. Rep. 569).

(c) Persons paying premiums.

The question as to who is entitled to the proceeds of the policy, considered as a whole, and aside from the claims of creditors, is usually dependent either on the interpretation and effect of the policy as to the designation of beneficiaries, or on the effect of an assignment. In at least one case, however, the person who paid the premiums and was understood by the parties in interest to be the person beneficially interested, though neither beneficiary, assignee, nor creditor, has been held entitled to the proceeds.

Metropolitan Life Ins. Co. of New York v. Anderson, 79 Md. 375, 29 Atl. 606. See, also, Winchester v. Stebbins, 16 Gray (Mass.) 52.

Payment of premiums will not alone, however, give a creditor or invalid assignee a right to the payment of his whole claim.

Norfolk Nat. Bank v. Flynn, 58 Neb. 253, 78 N. W. 505. And see, in connection, In re Malone's Estate, 8 Wkly. Notes Cas. (Pa.) 179.

Nor does payment of assessments on a benefit certificate by a beneficiary who is incapable of taking entitle him to recover on the certificate (Clarke v. Schwarzenberg, 164 Mass. 347, 41 N. E. 655).

Nevertheless, if an assignee in good faith pays the premiums on a policy improperly assigned to him, he will be entitled to reimbursement out of the proceeds of the policy.[4]

Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725; Harley v. Heist, 86 Ind. 196, 45 Am. Rep. 285; Kentucky Grangers' Mut. Ben. Soc. v. Howe's Adm'r, 9 Ky. Law Rep. 198; Unity Mut. Life Assur. Ass'n v. Dugan, 118 Mass. 219; City Sav. Bank v. Whittle, 63 N. H. 587, 3 Atl. 645; Connecticut Mut. Life Ins. Co. v.

[4] As to the right of an assignee not having an insurable interest, see ante, vol. 1, p. 308.

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Van Campen, 57 Hun, 592, 11 N. Y. Supp. 103; De Jonge v. Goldsmith, 46 N. Y. Super. Ct. 131; Odd Fellows' Beneficial Ass'n of Columbus v. Diebert, 2 Ohio Cir. Ct. R. 462, 1 O. C. D. 589; Matlack v. Seventh Nat. Bank, 180 Pa. 360, 36 Atl. 1082; Scobey v. Waters, 10 Lea (Tenn.) 551; Stevens v. Germania Life Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

Limitations do not commence to run against such a claim until the death of insured. Stevens v. Germania Life Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824. See, also, Stockwell v. Mut. Life Ins. Co., 140 Cal. 198, 73 Pac. 833, 98 Am. St. Rep. 25.

Conversely, also, insured's administrator should be allowed for a premium necessarily paid by him after insured's death, though he does not prevail in the contest as to the proceeds between himself and insured's assignee (Von Schuckmann v. Heinrich, 93 App. Div. 278, 87 N. Y. Supp. 673).

One who has advanced the premiums under an agreement that the policy shall stand as a security for their repayment is entitled to such premiums out of the proceeds of the policy.

McDonald v. Humphries, 56 Ark. 63, 19 S. W. 234. See, also, Kritline v. Odd Fellows' Beneficial Ass'n, 7 Ohio N. P. 439, 5 Ohio S. & C. P. Dec. 592.

Nor will the issuance of a paid-up policy in lieu of one assigned to a third person as security for the payment of premiums deprive such third person of his lien for the amount of the payments (Mandeville v. Kent, 88 Hun, 132, 34 N. Y. Supp. 622). Likewise, the proceeds of a policy payable to insured's heirs have been deemed subject to the claim of the widow for reimbursement for premiums paid by her to prevent a forfeiture (Weisert v. Muehl, 81 Ky. 336). And in Stockwell v. Mutual Life Ins. Co., 140 Cal. 198, 73 Pac. 833, 98 Am. St. Rep. 25, it was held that the payment of premiums by one of several beneficiaries, in order to keep it alive, gave such beneficiary an equitable lien on the proceeds, so that others who would share therein must contribute to his reimbursement.

Obviously a voluntary payment of premiums by a stranger to the contract gives such volunteer no rights.

Meier v. Meier, 15 Mo. App. 68, affirmed 88 Mo. 566; Lockwood v. Bishop, 51 How. Prac. (N. Y.) 221; Grand Lodge A. O. U. W. v. Cleghorn (Tex. Civ. App.) 42 S. W. 1043; Leftwich v. Wells, 43 S. E. 364, 101 Va. 255, 99 Am. St. Rep. 865.

And under this principle several decisions have been rendered denying the lien of the payor of premiums under circumstances

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not easily to be distinguished from those of the cases just noted in which the lien was recognized. Thus, it has been held that no lien arises from a loan to insured for the purpose of paying premiums on a policy payable to insured's wife (Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862), or from a payment by a trustee holding the policy for the benefit of the beneficiary (Love v. Love [Pa.] 12 Atl. 498). And a beneficiary of a policy issued by a benefit society who voluntarily and gratuitously paid the assessments thereon without any contract with the insured was in Nix v. Donovan (City Ct. N. Y.) 18 N. Y. Supp. 435, held to have acquired no vested interest therein as against a person afterwards properly named beneficiary. Similarly, the payment of premiums under a mistaken belief by the payor that her son would secure the proceeds, has been held insufficient to charge the proceeds with a lien in favor of the payor to the prejudice of the proper beneficiary (Lockwood v. Bishop, 51 How. Prac. [N. Y.] 221). And in Clark v. Supreme Council Royal Arcanum, 176 Mass. 468, 57 N. E. 787, it seems to be implied that the remedy, if any, of a wife who has paid assessments on a certificate payable to the children, under a belief that the husband would secure a transfer of the certificate to her, is a bill against the administrator of the husband's estate to recover as for property obtained by fraud and coersion.

(d) Exemption statutes in general.

The question as to the effect of the insolvency of insured upon the distribution of the proceeds of a policy payable to insured's family has been treated by the courts as governed by the principles determining the effect of fraudulent conveyances, rather than by any part of the insurance law. There are, however, numerous cases treating the effect of statutes providing for an exemption of the proceeds of life policies from the claims of creditors, which may be properly considered here. And it may not be out of place to state the general rule that in the absence of a special statute the insolvency of insured will give the creditors no claim upon the proceeds of a policy procured without the expenditure of any money by insured during insolvency (First Nat. Bank v. Simpson, 152 Mo. 638, 54 S. W. 506), and that, though some of the premiums may have been paid during insolvency, this will not necessarily subject the proceeds of the policy to the payment of insured's debts, even to the extent of the premiums so paid (Central Nat. Bank v. Hume, 128

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U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; contra Fearn v. Ward, 80 Ala. 555, 2 South. 114).[5]

All the statutes bearing on the exemption of life policies or their proceeds seem based on the theory that, in the absence of an expressed contrary intent, the object of an ordinary life insurance policy should be considered as the protection of insured's family after his death, and that this object and desire is laudable and in accordance with public policy. They provide, in substance, that the proceeds of life insurance policies taken out for the benefit of certain classes of beneficiaries shall be free from the claims of creditors; but in some states insurance in excess of certain specified amounts, or procured while the insured was insolvent, is declared not exempt.[6] That a change in such statutes will affect antecedent policies has been affirmed in New York (Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433, reversing 75 N. Y. Supp. 150, 70 App. Div. 134) and denied in Washington (In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602).

Such statutes, when general in their terms, will apply to policies by their terms made payable to insured's estate or personal representatives.

Kelley v. Mann, 56 Iowa, 625, 10 N. W. 211; Coates v. Worthy, 72 Miss. 575, 17 South. 606, 18 South. 916.

And this, though the policy was taken out by insured before his marriage (Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L.

[5] For further cases touching these questions, see Cent. Dig. vol. 24, "Fraudulent Conveyances," cols. 83–88, § 56; cols. 155, 156, § 117; col. 214, § 158. As to an assignment of the policy as in fraud of creditors, see, in addition, ante, vol. 2, pp. 1108, 1109.

[6] For the provisions of the various statutes relating to the exemption of the proceeds of insurance policies, see Code Ala. 1896, vol. 1, p. 745, §§ 2535, 2536, 2733, 2734, 3539h, 3539i; St. Ark. 1893, c. 105, § 4944; Code Civ. Proc. Cal. 1903, § 690, subsec. 18, Code Civ. Proc. Cal. 1899, § 690, subsec. 12; Gen. St. Conn. Revision 1902, p. 1089, c. 253, § 4548; Rev. Laws Del. 1893 (Laws 1893) p. 599, c. 76; Code Ga. 1895, vol. 2, c. 2, subd. 12, § 2116 (2820); St. Ill. 1898 (Myers' Ed.) p. 839, c. 73, § 54; Burn's Ann. St. Ind. 1901, vol. 2, p. 1044, § 4914w; Ann. St. Ind. T. 1899, c. 49, § 3023; Code Iowa, § 1805; Gen. St. Kan. 1901, c. 50, § 3463 (108); Ky. St. 1903, c. 32, §§ 654, 655; Rev. St. Me. 1903, c. 49, § 106; Pub. Gen. Laws Md. vol. 2, p. 1278, §§ 8, 9; Rev. Laws Mass. 1902, vol. 2, c. 118, § 73; Gen. St. Mass. c. 58, § 62; Laws Minn. 1901, c. 178, § 36; Code Miss. 1892, § 1965; Rev. St. Mo. 1899, c. 119, §§ 7892, 7895; Pub. St. & Sess. Laws N. H. 1901, c. 171, p. 573, § 1; Gen. St. N. J. 1895, p. 2018; Heydecker's Gen. Law & Rev. St. N. Y. 1901, p. 3954, c. 48, § 22; Id., p. 3228, c. 38, § 317; Code N. C. 1883, c. 42, § 1841; Bates' Ann. St. Ohio 1904, §§ 3628, 3629; Pepper & L. Dig. Pa. 1894, vol. 1, p. 2383, pars. 90, 91; Pub.

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R. A. 609). But a stipulation that insurance effected by a husband on his own life shall inure to the benefit of his widow and next of kin will not extend to insurance held by an unmarried man (Wright v. Wright, 100 Tenn. 313, 45 S. W. 672). While insured under such a statute may by will effectually provide that his debts shall be paid from the proceeds of the policies payable to his estate (Union Trust Co. v. Cox, 108 Tenn. 316, 67 S. W. 814), yet such a diversion of the proceeds will not be affected by mere general statements (Cooper v. Wright, 110 Tenn. 214, 75 S. W. 1049).

A direction written on a policy to pay it to a person named is equivalent to a declaration made in the policy at the time of its issue, and brings it within a statute providing that, where the policy so declares, life insurance shall inure to the benefit of the beneficiary of the insured, not to the benefit of his creditors (Eppinger v. Canepa, 20 Fla. 262). But where the statute provided that the avails of a policy payable to a "surviving widow" should be exempt "from liabilities for all debts of such beneficiary contracted prior to the death of the assured," it did not cover the proceeds of an accident policy paid to insured, and by him transferred to his wife (Murdy v. Skyles, 101 Iowa, 549, 70 N. W. 714, 63 Am. St. Rep. 411). Neither a mere statement of intention (O'Melia v. Hoffmeyer, 119 Iowa, 444, 93 N. W. 497), nor a promise to take out a policy in favor of a creditor, followed by the taking out of one payable to the debtor's wife (In re Donaldson's Estate [Iowa] 101 N. W. 870), will subject a policy to the claim of a creditor under a statute providing that the avails of life policies shall not be subject to the debts of a decedent except by special contract or arrangement. A stipulation in a statute to the effect that in the absence of special contract the avails of life insurance are not subject to the debts of deceased, but shall inure to the separate use of deceased's husband or wife or children, and be disposed of like other exempt property of deceased, is sufficient to exempt the proceeds also in favor of collateral heirs (Larrabee v. Palmer, 101 Iowa, 132, 70 N. W. 100).

It has been held that, in an endowment policy, insurance is a mere incident, and that consequently an endowment policy is not governed by the rule exempting the proceeds of a life insurance

St. R. I. 1882, c. 166, § 21; Civ. Code S. C. 1902, vol. 1, § 1824; Mill. & V. Code Tenn. §§ 3135, 3335; V. S. 1894, §§ 2653, 2656; Ballinger's Ann. Codes & St. Wash. § 5252; Pierce's Code Wash. § 845; Code W. Va. 1899, c. 66, § 5; St. Wis. 1898, c. 108, § 2347.

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policy from execution (Talcott v. Field, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662).

A claim for nursing insured in his last illness is a debt against decedent within a statute exempting the proceeds of life insurance money from his debts; but funeral expenses of decedent are not a debt against him, and hence his administrator has been held entitled to pay such expenses out of the insurance money (Dobbs v. Chandler, 84 Miss. 376, 36 South. 388).

It has been held that a statute authorizing a married woman to cause the life of her husband to be insured, and providing that the proceeds of such a policy shall be exempt from the husband's debts, should be construed as including a policy procured by a husband for the wife on his own life (Houston v. Maddux, 179 Ill. 377, 53 N. E. 599, reversing 73 Ill. App. 203). So, also, a statute providing that a policy payable to a wife "shall be the sole and separate property of such married woman, and shall inure to her separate benefit and that of her children, * * * and be payable to her * * * free from the control * * * or claims of her husband," has been held to prevent an attachment of the surrender value of the policy during the husband's life, by the judgment creditor of herself and husband (Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094). But in Massachusetts, under a similar statute, the wife's interest has been held subject to attachment by her creditors while the husband was living, even though the children were not made parties defendant (Troy v. Sargent, 132 Mass. 408). And in New York it has been held that the money due the wife on a matured policy might be attached for a debt due from her, though under the judicial interpretation of the statute the policy was exempt from attachment, or assignment by the wife prior to its maturity.[7]

Amberg v. Manhattan Life Ins. Co., 63 N. E. 1111, 171 N. Y. 314, reversing 67 N. Y. Supp. 872, 56 App. Div. 343, which in turn reversed 65 N. Y. Supp. 424, 32 Misc. Rep. 89.

A statute exempting moneys accruing on an insurance policy issued on the life of a debtor, if the annual premiums do not exceed $500, gives the widow no rights in the proceeds of a policy, the premiums on which exceeded such sum. Such a statute, the court said, was easily distinguishable from one providing that the

[7] As to the assignability by the wife or husband of a policy governed by such statute, see ante, vol. 2, pp. 1086–1090.

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exemption should not extend beyond the moneys, benefits, etc., secured by the payment of an annual premium of $500 (In re Brown's Estate, 123 Cal. 399, 55 Pac. 1055, 69 Am. St. Rep. 74). And where several policies were taken out, the total premiums of which exceeded $300, though no one premium exceeded such sum, the excess inured to the creditors under a statute providing that a policy for the benefit of a married woman should inure to her separate use, but that, if the annual premium exceeded $300, the excess should inure to the benefit of the creditors (Bartram v. Hopkins, 71 Conn. 505, 42 Atl. 645). Similarly, where there were two statutes, one looking to insurance taken out by a married woman on her husband's life, and providing for exemption except as to the amount of annual premiums paid in excess of $500, and another looking to a policy taken out by any one and made payable to a married woman, and making no limitation as to the exemption, it was held that the limitation should nevertheless apply to both (Kiely v. Hickcox, 70 Mo. App. 617).

Where, however, the statute makes an exception only as to the excess paid from the husband's funds, the creditors can claim no interest in a policy, the premiums for which had been altogether paid from the wife's separate estate (In re Goss' Estate, 71 Hun, 120, 24 N. Y. Supp. 623). And in making the computation as to the excess, policies assigned by the husband and wife to secure his debts should not be included in the wife's share. Nor should the insurance be touched until it is determined that the other assets will not satisfy the claims of the creditors. Until such determination has been made, the fund should be paid into the hands of the administrator to be held by him for final distribution.

Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433, affirming on such points 75 N. Y. Supp. 150, 70 App. Div. 134. See, also, Kiely v. Hickcox, 70 Mo. App. 617, where it was said that the creditor had no right to appropriate the policy.

Where a statute exempted to the heirs and legatees the proceeds of a policy not exceeding $5,000, payable to insured's personal representatives, but provided for a deduction from such sum of any other insurance on the life of deceased, payable directly to such heirs, and one of the two heirs had already received on such other insurance, payable to her, more than $2,500, it was held that a $5,000 policy payable to the estate should be divided equally between the other heir and the creditors, any balance remaining after the satisfaction of the debts to be divided equally between the two heirs (Cozine v. Grimes, 76 Miss. 294, 24 South. 197).

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(c) Same—Mutual benefit certificates.

As already noted, both courts and legislatures have been particularly careful of the rights of dependents and relatives made beneficiaries under mutual benefit contracts. **The proceeds of certificates issued by such orders have been held to fall within the general statutes exempting the proceeds of life insurance.**

Masonic Mut. Life Ass'n v. Paisley (C. C.) 111 Fed. 32; Mellows v. Mellows, 61 N. H. 137; Smith v. Bullard, 61 N. H. 381.

The tendency to specially protect such beneficiaries has, however, been emphasized in many of the states by the adoption of statutes expressly exempting the proceeds of such contracts.

It is provided in Connecticut (Gen. St. 1902, c. 210, § 3588), Massachusetts (Rev. Laws, c. 119, § 17), Maine (Rev. St. 1903, c. 49) and Missouri (Rev. St. 1899, c. 119, § 7908), that the money or other benefit to be rendered or paid by any corporation doing business on the assessment plan "shall not be liable to" attachment or appropriation by any legal process "to pay any debt or liability of a policy or certificate holder, or any beneficiary named in a policy or certificate." In Ohio (2 Bates' Ann. St. 1904, c. 10, tit. 2, § 3631-18), Illinois (Hurd's Rev. St. 1899, c. 73, § 266), Nebraska (2 Cobbey's Ann. St. 1903, § 6489), and Texas (Sayles' Ann. Civ. St. Supp. 1897-1904, tit. 49a, § 11), the provision of the statute is practically the same, except the exemption from legal seizure is extended to cover seizure to pay a debt of "any person who may have any rights" under the certificate. In Kentucky (Ky. St. 1903, c. 32, § 671) and Minnesota (Gen. St. 1894, § 3312) the stipulation is against seizure by process "to pay any debt or liability of a member." In New York (Heydecker's Gen. Laws, p. 3205, art. 7, § 238) the exemption is extended not only to money "to be paid," but also to that "which has heretofore been paid or which shall hereafter be paid." The debts referred to are those of members or beneficiaries. In Texas it is stipulated, in addition to the ordinary provisions, that the proceeds "shall not be liable for the debts of the beneficiary or holder" (Sayles' Ann. Civ. St. Supp. 1897-1904, tit. 49a, § 11). In Connecticut it is also provided that "all benefits allowed by any association * * * towards the support of any of its members incapacitated by sickness or infirmity from attending to his usual business" shall also be exempted (Gen. St. 1902, c. 58, § 909). The Kansas statute relating to the exemption of life policies (see ante, "Exemption of Statutes in General") specifically covers also beneficiary certificates.

The following cases contain decisions as to what orders will fall within the provisions of such statutes: William A. Miles & Co. v. Odd Fellows' Mut. Aid Ass'n, 76 Conn. 132, 55 Atl. 607; Saunders v. Robinson, 144 Mass. 306, 10 N. E. 815; Brown v. Balfour, 46 Minn. 68,

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48 N. W. 604, 12 L. R. A. 373; Meyer v. Supreme Lodge Knights and Ladies of Honor, 72 Mo. App. 350; Klinckhamer Brewing Co. v. Cassman, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141. And where the case does fall within the statute, even a wife who has loaned money to her husband is not entitled to repayment, at his death, of the money due on the certificate held by her husband, and payable to his children (Clark v. Supreme Council Royal Arcanum, 57 N. E. 787, 176 Mass. 468).

That such a statute is valid, though exempting from its operation certain designated orders whose members represent particular classes of the general class of laborers, and whose object is rather that of labor organization than insurance, has been decided in Texas (Supreme Lodge United Benevolent Ass'n v. Johnson [Tex. Sup.] 81 S. W. 18, reversing [Tex. Civ. App.] 77 S. W. 661). But in Ohio a similar statute was held unconstitutional as discriminating between the beneficiaries of ordinary life and industrial policies, and those protected by orders covered by the statute (Williams v. Donough, 65 Ohio St. 499, 63 N. E. 84, 56 L. R. A. 766).

It has been held that, where the constitution of an order whose certificates were subject to such a statute required the designation of a beneficiary of a certain class, the making of a certificate payable to insured's estate gave the creditor no rights in the proceeds (In re Smith's Estate, 87 N. Y. Supp. 725, 42 Misc. Rep. 639). So, also, a designation of a beneficiary to receive the money and pay creditors has been held invalid (Boasberg v. Cronan [Super. Buff.] 9 N. Y. Supp. 664, reversing [Super. Buff.] 7 N. Y. Supp. 5). But in Pietri v. Seguenot, 96 Mo. App. 258, 69 S. W. 1055, the exemption was held not to entitle the insured's next of kin to the proceeds of a certificate made payable to his estate.

It is the duty of the association, when garnished for the proceeds of a certificate governed by such a statute, to interpose the statute for the benefit of the beneficiary, and if it fails to do so it cannot, when sued on the certificate, set off a sum paid by it on the garnishment (Rumbold v. Supreme Council Royal League, 69 N. E. 590, 206 Ill. 513, reversing 103 Ill. App. 596).

A statute providing for payment of the proceeds to the family, and that the fund in the hands of the association shall be "exempt from execution, and shall under no circumstances be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt of such deceased member," has been held sufficient

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to prevent a seizure of the proceeds to satisfy a debt due not only from insured, but also from a member of the family, or, it would seem, the association itself. Construed otherwise, the court argued, the section would be valueless, since the proceeds of such a certificate could rarely, under the general law, be seized for a debt of insured.

Brown v. Balfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373. See, also, Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427; Coleman v. McGrew (Neb.) 99 N. W. 663.

(f) Same—Following proceeds.

A statutory provision that money to be paid the beneficiaries shall be exempt from execution, garnishment, etc., protects the money until it has been turned over to the beneficiary. Therefore, it has been held that **where the beneficiary dies after the death of insured, but before the payment of the insurance, her personal representative cannot claim the proceeds for the payment of her debts.**

Grand Lodge A. O. U. W. v. Dister, 77 Mo. App. 608. See, also, Coleman v. McGrew (Neb.) 99 N. W. 663.

But where the money has been turned over, it is no longer exempt, under such a statute, from the beneficiaries' debts.

Martin v. Martin, 187 Ill. 200, 58 N. E. 230, affirming 87 Ill. App. 365; Hathorn v. Robinson, 96 Me. 33, 51 Atl. 236; Bull v. Case, 165 N. Y. 578, 59 N. E. 301, affirming 58 N. Y. Supp. 774, 41 App. Div. 391; Klinckhamer Brewing Co. v. Cassman, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141.

Where, however, the statute applies not only to moneys "to be paid," but to that which has "heretofore been paid," it will protect money held in the treasury of the association to the credit of the beneficiary (Ettenson v. Schwartz, 78 N. Y. Supp. 231, 38 Misc. Rep. 669). Similarly, a stipulation that the avails of all policies payable to the surviving widow shall be exempt from liability from all debts of such beneficiary contracted prior to the death of the assured exempts not only the proceeds of the policy, but also any property which the widow may purchase therewith (Cook v. Allee, 119 Iowa, 226, 93 N. W. 93). And in Kansas a statute looking to the exemption of the proceeds of policies or certificates payable to named beneficiaries from the "claims and judgments of the cred-

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itors and representatives of the person or persons named in said policy or policies of insurance" has been held to exempt from garnishment the proceeds of a certificate deposited in a bank to the credit of the beneficiary named therein.

Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072, overruling Reighart v. Harris, 51 Pac. 788, 6 Kan. App. 339, which was followed in Crumley v. Fuller, 8 Kan. App. 857, 57 Pac. 47.

(g) Assignments in general.

Questions as to the effect of an assignment of a life policy, intended to vest the entire interest in the assignee, almost invariably turn either on the necessity of an insurable interest in the assignee,[8] or the validity of such assignment as dependent either on its form,[9] or on the vested rights of the original beneficiary.[10] The rule that an absolute assignment of a life policy by the parties in interest, in violation neither of public policy nor of vested rights, will be enforced according to the intent of the parties, and vest in the assignee the right to the entire proceeds of the policy, is so fundamental as to have been rather assumed than decided.

Reference to the following cases is deemed sufficient: Mutual Life Ins. Co. of New York v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Appeal of Colburn, 74 Conn. 463, 51 Atl. 139, 92 Am. St. Rep. 231; Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Stuart v. Sutcliffe, 46 La. Ann. 240, 14 South. 912; Tremblay v. Ætna Life Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521; Hewlett v. Home for Incurables of Baltimore City, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; Commonwealth v. Unity Mut. Life Assur. Co., 117 Mass. 337; Boyden v. Massachusetts Mut. Life Ins. Co., 153 Mass. 544, 27 N. E. 669; Prudential Ins. Co. of America v. Liersch, 122 Mich. 436, 81 N. W. 258; Malburg v. Metropolitan Life Ins. Co., 86 N. W. 1026, 127 Mich. 568; Maceman v. Equitable Life Assur. Soc. of United States, 69 Minn. 270. 72 N. W. 111; Murphy v. Red, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; Anderson v. Goldsmidt, 103 N. Y. 617, 9 N. E. 495, affirming 38 Hun, 360; St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. 419; McCord v. Noyes, 3 Bradf. Sur. (N. Y.) 139; Northwestern Mut. Life Ins. Co. v. Roth, 118 Pa. 329, 12 Atl. 283; In re Burns' Estate, 27 Pittsb. Leg. J. N. S. (Pa.) 47.

But where the policy was construed by the court as payable to S., it was further held that a subsequent assignment to S. did not change

[8] See ante, vol. 1, pp. 262–278, 306. [9] See ante, vol. 2, pp. 1096–1119.
[10] See ante, vol. 2, pp. 1090–1095.

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the rights of the parties (Brockway v. Connecticut Mut. Life Ins. Co. [C. C.] 29 Fed. 766).

A policy payable to insured or his representative in 20 years or at insured's death, and assigned to insured's wife "if living," vested in the wife a right entirely contingent on her surviving the maturity of the policy, and therefore, she having died before such maturity, the proceeds of the policy were subject to distribution by the will of insured (Burton v. Burton, 67 N. Y. Supp. 338, 56 App. Div. 1).

The assignment of a policy of insurance to a husband and wife creates a joint ownership, and the survivor takes the policy, and her assignee may collect the same, and may maintain an action for money had and received against the husband's administrator, who collects the money (Arn v. Arn, 81 Mo. App. 133).

An assignment of a policy of life insurance by a husband to his wife and children will be construed to include children by another wife than the one mentioned in the assignment. Smith v. Hawthorn, 22 Pa. Co. Ct. R. 519.

And of course a reassignment by the assignee will reinstate the title of the original parties in interest.

Bartlett v. Goodrich, 47 N. E. 794, 153 N. Y. 421, affirming 36 N. Y. Supp. 770, 91 Hun, 642; Phœnix Mut. Life Ins. Co. v. Opper, 75 Conn. 295, 53 Atl. 586.

The legal presumption of the continued ownership of the policy under an assignment thereof is not rebutted by the mere possession of the policy by the insured after the death of the assignee, but such possession, coupled with the fact of inability of the assignee's executor to find the assignment among his papers, is sufficient to rebut such presumption (Cuyler v. Wallace, 91 N. Y. Supp. 690, 101 App. Div. 207). So, also, an assignee who reassigns a part to the insured, and delivers the policy to him with the assignment so attached that it can be easily removed, is guilty of laches, which will defeat his claim as against a subsequent bona fide holder (Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612).

Insured's representative cannot object that an assignee to whom the proceeds of the policy have been paid had no right thereto on account of some other assignment by insured.

Shaak v. Meily, 136 Pa. 161, 20 Atl. 515; Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854.

So, also, where an insurance company has paid a life policy without objecting that it was deceived as to the health of assured, such objection cannot be raised in an action against an assignee of the policy for the proceeds (Hoffman v. Hoke, 122 Pa. 377, 15 Atl. 437, 1 L. R. A. 229). Nor can a mutual benefit society, after having assented to an assignment, object to paying the assignee on the ground that he is not within the class mentioned in the by-laws as capable

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of being beneficiaries [11] (Smith v. People's Mut. Ben. Soc., 64 Hun, 534, 19 N. Y. Supp. 432).

(h) Assignees without interest.

The weight of authority supports the rule that a payment by the company to one claiming under an assignment void for lack of insurable interest in the assignee [12] does not entitle such assignee, as against the original parties to the contract, to retain, of the sum so received, more than could have been recovered by the assignee from the company.[13]

Basye v. Adams, 5 Ky. Law Rep. 91; 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; Hoffman v. Hoke, 122 Pa. 377, 15 Atl. 437, 1 L. R. A. 229; Stambaugh v. Blake (Pa.) 15 Atl. 705; Brennan v. Froney, 142 Pa. 301, 21 Atl. 803; Wegman v. Smith, 16 Wkly. Notes Cas. (Pa.) 186; Stoner v. Line, 16 Wkly. Notes Cas. (Pa.) 187; Quinn v. Supreme Council Catholic Knights of America, 99 Tenn. 80, 41 S. W. 343. In connection, however, with the Pennsylvania cases, see Wheeland v. Atwood, 20 Pa. Co. Ct. R. 367.

But in Maryland and New Jersey it is held that, where the company has paid the money into court, the objection cannot be afterwards raised that the assignee had no insurable interest.

Clogg v. MacDaniel, 89 Md. 416, 32 Atl. 795; Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066. In connection with these cases, see, also, Connecticut Mut. Life Ins. Co. v. Fisher (C. C.) 30 Fed. 662, where neither of the assignees who claimed the fund had an insurable interest, and the court permitted the proceeds to remain in the hands of the assignee whom the company had paid, and to whom the policy had finally passed.

Where it is held that the assignee, on account of lack of insurable interest, is entitled to take not any or only a part of the proceeds of the policy, the original holder of the policy, or his representative, is entitled to such portion as the assignee cannot hold. Thus, where there is a proper beneficiary named in the policy, the bene-

[11] As to who can be an assignee of a mutual benefit certificate, see ante, vol. 2, p. 1082; as to the effect of the failure of the company to object to the informality of an assignment, see ante, vol. 2, p. 1097.

[12] As to the validity of an assignment to one having no insurable interest, see ante, vol. 1, pp. 262–278.

[13] As to the amount which an assignee without interest can claim, aside from payment by the company, see ante, vol. 1, pp. 306–310.

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ficiary will take, rather than the personal representatives of insured.

Burnam v. White (Ky.) 22 S. W. 555; Hoffman v. Hoke, 122 Pa. 377, 15 Atl. 437, 1 L. R. A. 229; Brennan v. Franey, 142 Pa. 301, 21 Atl. 808; Wegman v. Smith, 16 Wkly. Notes Cas. (Pa.) 186. See, also, Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189, and Basye v. Adams, 5 Ky. Law Rep. 91, where the "heirs" were held entitled to the balance of the proceeds of mutual benefit certificates.

But where the policy is made payable to the insured's estate, or the beneficiary named was not a proper one, the estate is entitled to the proceeds remaining after satisfying the assignee's proper claim.

Gilbert v. Moose's Adm'rs, 104 Pa. 74, 49 Am. Rep. 570; Ruth v. Katterman, 112 Pa. 251, 3 Atl. 833; Stambaugh v. Blake (Pa.) 15 Atl. 705; Downey v. Hoffer, 110 Pa. 109, 20 Atl. 655; Stoner v. Line, 16 Wkly. Notes Cas. (Pa.) 187; First Nat. Bank v. Terry's Adm'r, 99 Va. 194, 37 S. E. 843. See, also, Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107, reversing (Tex. Civ. App.) 25 S. W. 324.

In Culver v. Guyer, 129 Ala. 602, 29 South. 779, the insured was held entitled to the excess of the surrender value of a policy assigned by him.

(i) Collateral assignment of the policy.

Where a policy has been assigned to a creditor as collateral security for his debt, he is entitled to hold such policy until his debt has been paid.

Gilman v. Curtis (Cal.) 3 Pac. 114; Id., 66 Cal. 116, 4 Pac. 1094; Cash v. Hayden's Adm'r, 83 S. W. 136, 26 Ky. Law Rep. 1045.

So, also, the creditor may retain from the proceeds the amount of his debt, together with such sum as will reimburse him for premiums and other necessary expenses incident to the policy paid by him, leaving to others entitled thereto only such sum as may be left after satisfaction of his claim.

Reference may be made to the following cases: Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244; Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268; Widaman v. Hubbard (C. C.) 88 Fed. 806; Culver v. Guyer, 129 Ala. 602, 29 South. 779; Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094; Morris v. Georgia Loan Savings & Banking Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Baldwin v. Haydon, 70 S. W. 300, 24 Ky. Law Rep. 900; McDonald v. Birss, 99 Mich. 329, 58 N. W. 359;

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King v. Van Vleck, 109 N. Y. 363, 16 N. E. 547; Palmer v. Mutual Life Ins. Co., 77 N. Y. Supp. 869, 38 Misc. Rep. 318; Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Coleman v. Anderson (Tex. Civ. App.) 82 S. W. 1057; Jones v. New York Life Ins. Co., 15 Utah, 522, 50 Pac. 620.

Cox v. Higginbotham's Adm'r, 83 S. W. 137, 26 Ky. Law Rep. 1043, and First Nat. Bank v. Terry's Adm'r, 37 S. E. 843, 99 Va. 194, also contain applications of this rule, the cases, however, turning rather on what debts were meant to be secured by the assignment. See, in connection, Dewees v. Osborne, 178 Ill. 39, 52 N. E. 942, affirming 78 Ill. App. 314, where an allegation of the complaint was held sufficient to support a claim that the policy was security for renewals of the debt.

The rights of a creditor to the proceeds of an assigned policy will not be affected by a substitution of policies (Norwood v. Guerdon, 60 Ill. 253). And in Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266, the rule as to the rights of collateral assignees was held applicable to an assignment to one whom the parties justly considered as insured's creditor, though the obligation was not, perhaps, enforceable in law; and this, though the policy provided that the claim of an assignee should not exceed his actual "bona fide indebtedness." The company had paid the money into court, and it alone could take advantage of such clause. But where the assignee assigned the policy and note for which it was collateral, and the circumstances of the assignment were somewhat suspicious, it was held that the rights of the subsequent assignees were limited by what they paid for the note (Hays v. La Peyre, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647).

An assignee has no such right as to sums voluntarily paid by him on the policy, and for which the debtor was in no way liable (Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 373). Nor does the creditor whose assignment is as security for the amount of the demand subsisting at the decease of the creditor have any interest in earning or increments paid the insured from time to time (Sommer v. New England Mut. Life Ins. Co., 21 Pa. Super. Ct. 501). And it has been held that a promise to pay a note one month after the maturity of the policy did not bind the promisor to pay the note from the proceeds of the policy [14] (Herriman v. McKee, 49 Iowa, 185).

[14] As to what will constitute an assignment of the policy, see ante, vol. 2, p. 1096.

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Where a policy payable to a named beneficiary is assigned as collateral to a debt, and the proceeds more than pay the debt and disbursements, the beneficiary is entitled to the balance.

Morris v. Georgia Loan Savings & Banking Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; In re Burns' Estate, 27 Pittsb. Leg. J. (Pa.) 47. See, also, Rison v. Wilkerson, 3 Sneed (Tenn.) 565, where by statute the widow and heirs were entitled to the proceeds of the policy. But see Binkley v. Jarvis, 102 Ill. App. 59, where, though there was a beneficiary named in the certificate, it was said that the balance would go to the representatives of insured.

Obviously, also, the parties in interest may stipulate as to whom the balance shall go.

Grenville v. Crawford, 13 Ga. 355; Harrison v. McConkey, 1 Md. Ch. 34.

Where there is neither a special beneficiary named nor a person designated in the assignment, the personal representatives of insured are entitled to the balance, to be recovered, if need be, in an action either against the company or the assignee.

Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244; Culver v. Guyer, 129 Ala. 602, 29 South. 779; Sharp v. Rose, 66 Hun, 627, 20 N. Y. Supp. 826; Jones v. New York Life Ins. Co., 50 Pac. 620, 15 Utah, 522. See, also, King v. Van Vleck, 109 N. Y. 363, 16 N. E. 547, and Earle v. New York Life Ins. Co., 7 Daly (N. Y.) 303, where the executor assigned to the person bringing the action.

It would seem that independent of a special statute the benefit of the security can be claimed, though the debt is barred by limitations.

Conway v. Caswell, 121 Ga. 254, 48 S. E. 956; Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625. See, also, Walker v. Larkin, 127 Ind. 100, 26 N. E. 684, where it was held that limitations did not apply to premiums paid by the assignee more than six years before the policy matured.

The Conway Case refers to Civ. Code Ga. 1895, § 2735, providing that, though the note is barred, the creditor may still avail "himself of the mortgage or other security." The doctrine of the Hornberger Case seems, however, to be that indicated in the text, together with the further holding that Civ. Code Cal. § 2911, providing that a lien is extinguished by lapse of the time within which an action can be brought on the principal obligation, did not apply, since, as a matter of fact, the debt and the lien had been extended by the rendition of judgment on the debt.

Under the California statute, it is, of course, essential that, where an issue has been raised as to the barring of the debt, there should

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be a definite finding thereon (Conway v. Supreme Council Catholic Knights of America, 131 Cal. 437, 63 Pac. 727).

Obviously, however, a payment or settlement of the debt will release the policy.

Hicks v. National Life Ins. Co., 60 Fed. 690, 9 C. C. A. 215, 20 U. S. App. 410; Babcock v. Bonnel, 80 N. Y. 244; Hirsch v. Mayer, 54 N. Y. Supp. 1075, 31 App. Div. 627; Shackelford v. Mitchill, 10 N. Y. Supp. 122, 16 Daly, 268.

Where a wife admits that she assigned life insurance policies as collateral security, and alleges a release of the policies, she is bound to establish the release to entitle her to payment (Dewees v. Osborne, 178 Ill. 39, 52 N. E. 942, affirming 78 Ill. App. 314).

And just as obviously an assignment of the policy without recourse to the administrator for collection will not have such an effect (Hight v. Taylor, 97 Ind. 392).

A provision in a policy providing that creditors, as assignees of the policy, shall only recover the amount of the indebtedness at the time of insured's death, together with payments made to the company by the assignee, and that the policy shall be void as to all amounts in excess thereof, applies to an assignment as collateral security. The effect of such a clause is not changed either by a further clause that the policy shall be incontestable for any breach of its provisions, or by the fact that the policy was reassigned to the beneficiary after the loss. Nor is such clause waived by the assent of the company to the assignment.

McQuillan v. Mutual Reserve Fund Life Ass'n, 88 N. W. 925, 112 Wis. 665, 56 L. R. A. 233, 88 Am. St. Rep. 986. See, in connection, Kentucky Life & Acc. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42, 22 U. S. App. 386.

Where, however, the insurer has paid the full amount of the policy into court, such clause cannot be used to defeat the rights of insured's representative to the excess over the amount of the debt (Elsberg v. Sewards, 66 Hun, 28, 21 N. Y. Supp. 10).

While it is a general rule that an assignment without the consent of a beneficiary or prior assignee having a vested interest is invalid,[15] yet, where a creditor has been misled by the company as to the validity of the policy assigned to him as security, he may recover from the company to the extent of the loan secured by such

[15] See ante, vol. 2, p. 1090.

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policy, though as to the beneficiary named in the policy it is invalid as an attempt to devest the rights of a prior beneficiary.

Pilcher v. New York Life Ins. Co., 33 La. Ann. 322; Weatherbee v. New York Life Ins. Co., 182 Mass. 342, 65 N. E. 383. For former opinion, see 178 Mass. 575, 60 N. E. 381.

And where, by the course of conduct between the parties, it was evident that the keeping alive of the policy was a joint undertaking between a first and second assignee, it was held that each should first be repaid the amount of premiums, the balance being applied to the payment of the loans (Shaw v. Cornell, 69 N. Y. Supp. 660, 59 App. Div. 573, reversing 68 N. Y. Supp. 1054, 33 Misc. Rep. 696).

An insurer need not, however, take a formal assignment in order to secure priority as to its own prior loan over an assignee who took with notice thereof. And where the loan was indorsed on the policy, no estoppel arose from the mere consent by the company to the assignment (Mutual Ben. Life Ins. Co. v. First Nat. Bank, 25 Ky. Law Rep. 172, 74 S. W. 1066). Similarly, it has been held that the rights growing out of a collateral assignment of a benefit certificate cannot be devested by a change of beneficiary, though the laws of the order provide for surrender and change of the beneficiary at the will of the member (Supreme Council Royal Arcanum v. Tracy, 169 Ill. 123, 48 N. E. 401, affirming 67 Ill. App. 202).

(j) Assignment for benefit of creditors—Bankruptcy.

In Minnesota a policy has been held not to be "personal property," within the meaning of that term as used in an assignment for the benefit of creditors (White v. Robbins, 21 Minn. 730). And under the Florida statutes, as in force in 1874, providing that, when one insured his life for the benefit of his estate, creditors could not take an interest to the exclusion of a wife or child unless it appeared affirmatively from the policy that such was the intention, it was held that an assignee in bankruptcy of the insured acquired no interest (Pace v. Pace, 19 Fla. 438). The better rule, however, seems to be that a policy of life insurance payable to the "heirs, executors, administrators, or assigns" of the insured will, under certain circumstances at least, pass as a chose in action to the insured's assignee for the benefit of creditors (Shenk v. Franke, 10 Lanc. Bar [Pa.] 146). Thus, in Larue's Assignee v. Larue's Adm'r, 96 Ky. 326, 28 S. W. 790, though the question as to whether a life policy passed under an assignment for the benefit of creditors was considered as dependent on the nature of the debt and the intention

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of the assignor in the procurement of the policy, yet, as the policy in suit was made payable to the insured, his order or creditors, and was used by the insured as a basis of credit, it was held that the policy passed under the assignment. This rule, however, the Kentucky court subsequently modified by making the passing of the policy dependent on whether it has a surrender or paid-up value at the time of such assignment. If it has such a value, it will pass as any other valuable asset. If not, it cannot be considered as representing any property rights or interest, and therefore remains with the assignor.

Barbour's Adm'r v. Larue's Assignee, 106 Ky. 546, 51 S. W. 5; Planters' State Bank v. Willingham's Assignee, 111 Ky. 64, 63 S. W. 12; Burnside's Adm'r v. National Bank of Lancaster, 23 Ky. Law Rep. 880, 64 S. W. 520.

The Burnside Case further held that it was incumbent on the person claiming under the assignment for the benefit of creditors to show such a surrender value at the time of the assignment for the benefit of creditors.

Similarly, it has been held that the receiver will take title to life endowment policies payable to the debtor or his estate, though their existence was unknown to the receiver at the time of his appointment. And having taken title, he can recover the full amount which may become due by the expiration of their term or the death of the insured, so far as such amount may be necessary to pay the judgment represented by him, and not merely the surrender value of the policies at the time of his appointment. (Reynolds v. Ætna Life Ins. Co., 160 N. Y. 635, 55 N. E. 305, affirming 51 N. Y. Supp. 446, 28 App. Div. 591.)

It is specifically provided by Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], that the trustee of the bankrupt shall "be vested by operation of law with the title of the bankrupt, * * * except in so far as it is to property which is exempt," to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him," "provided that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the policy, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such

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policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceeding, otherwise the policy shall pass to the trustee as assets."

The effect of such stipulations belongs, of course, to the law of bankruptcy, rather than insurance, but it may not be out of place to refer to the cases in which such provisions have been construed, both with reference to the various kinds of policies and the various exemption laws of the states.

Vetterlein v. Barnes, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400; In re Lange (D. C.) 91 Fed. 361; In re Buelow (D. C.) 98 Fed. 86; In re Diack (D. C.) 100 Fed. 770; In re Boardman (D. C.) 103 Fed. 783; In re Scheld, 104 Fed. 870, 44 C. C. A. 233, 52 L. R. A. 188; Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287; In re Slingluff (D. C.) 106 Fed. 154; In re Welling, 113 Fed. 189, 51 C. C. A. 151; In re Holden, 114 Fed. 650, 52 C. C. A. 346; revising order 113 Fed. 141, 51 C. C. A. 97; Meyers v. Josephson, 124 Fed. 734, 59 C. C. A. 650; Morris v. Dodd, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129; Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076.

(k) Assignment of matured claim.

A clause in an insurance policy forbidding an assignment does not apply where the claim on the policy has matured before the assignment (Mower v. Reverting Fund Assur. Ass'n, 1 Pa. Super. Ct. 170, 37 Wkly. Notes Cas. 554). And though a mutual benefit certificate as such may not be assignable, yet this does not prevent a transfer by a beneficiary of a matured claim.

Briggs v. Earl, 139 Mass. 473, 1 N. E. 847. See, also, Meagher v. Life Union Ins. Co., 65 Hun, 354, 20 N. Y. Supp. 247.

And a recognition by the beneficiary, after the death of insured, of the validity of an assignment of the certificate executed before such death, has been held to give the assignee a right to the fund (Aiken v. Massachusetts Ben. Ass'n [City Ct. N. Y.] 13 N. Y. Supp. 579).

Advantage cannot, of course, be taken of the grief and inexperience of the beneficiary (Mente v. Townsend, 68 Ark. 391, 59 S. W. 41). But where no undue influence was taken of the insured's widow, an assignment was upheld, though it was procured at the earnest solicitation of insured's father; who had lost money for which he was responsible, by loaning it to the insured (Gary v. Northwestern Masonic Aid Ass'n [Iowa] 50 N. W. 27).

In connection with these cases, see Supreme Assembly of Royal Soc. of Good Fellows v. Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A.

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601, where the proceeds of a policy were held not to fall within any of the exceptions as to the right of a married woman to deal with her property as a feme sole.

An assignment after the death of insured has been held valid as against a subsequent attaching creditor, though no notice of the assignment had been given the company.

Columbia Bank v. Equitable Life Assur. Soc., 70 N. Y. Supp. 767, 61 App. Div. 594. See, however, Linder v. Fidelity & Casualty Co., 52 Minn. 304, 54 N. W. 95, where notice of an assignment of the proceeds of a life policy to an agent authorized merely to solicit insurance, countersign and deliver policies, and collect premiums, was held not to have constituted notice to the company.

An assignee after the death of insured takes, of course, no greater rights than those of his assignor.

Ruth v. Katterman, 112 Pa. 251, 3 Atl. 833; Shugar v. Garman (Pa.) 4 Atl. 56; McQuillan v. Mutual Reserve Fund Ass'n, 87 N. W. 1069, 112 Wis. 665, 56 L. R. A. 233, 88 Am. St. Rep. 986, rehearing denied 88 N. W. 925, 112 Wis. 665, 56 L. R. A. 233, 88 Am. St. Rep. 986.

4. ACTIONS TO DETERMINE RIGHTS.

(a) In general.
(b) Pleading.
(c) Evidence.
(d) Trial and review.

(a) In general.

The rights given a creditor by statute in a policy for the benefit of insured's wife may be declared by a court of equity, in an action to which all persons interested are made parties, though the policy is not yet due (Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819, affirming 55 Hun, 178, 8 N. Y. Supp. 150). So a suit in equity may be brought against an insurance company and the claimant under a policy to establish the right of plaintiff as against the claimant to whatever may be due on the policy, leaving the liability of the company to be determined in a subsequent action at law (Mahr v. Bartlett, 53 Hun, 388, 7 N. Y. Supp. 143). And a suit in equity may be maintained to enforce performance of an agreement by beneficiaries named in a certificate to surrender the certificate and to prevent the association from paying the benefit to them, as a judg-

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ment in an action at law against the beneficiaries might prove unavailing if they were found insolvent (Brett v. Warnick, 44 Or. 511, 75 Pac. 1061, 102 Am. St. Rep. 639). But the probate court has no jurisdiction to adjudicate whether the proceeds of policies on the life of a decedent belong to the estate or to the designated beneficiary (White v. White, 11 Tex. Civ. App. 113, 32 S. W. 48).

Pendency of a suit by the executrix of insured against a beneficiary association on a benefit certificate, claiming that insured's children are entitled to all the insurance, though making others, named as beneficiaries and claiming part of the insurance, defendants, does not prevent such other beneficiaries maintaining an original bill against the association on the certificate, especially where after the death of insured they have assigned all or part of the amount due them to a person not a party to the bill by the executrix (Clement v. Clement [Tenn.] 81 S. W. 1249).

Where the proceeds of a policy have been paid to a creditor holding the policy as collateral, the personal representatives may recover the surplus remaining after satisfaction of the debt in an action for money had and received.

King v. Van Vleck, 109 N. Y. 363, 16 N. E. 547; Sharp v. Rose, 66 Hun, 627, 20 N. Y. Supp. 826.

But where the surplus has been paid to the administrator, the remedy of the insured's heirs is an action in the nature of an application for an order requiring the administrator to pay the money over to them, and not an action upon a common count for money had and received (Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660).

A policy issued by a New York company to a person who was domiciled and died in Kentucky, and payable to his personal representative, is not enforceable in Louisiana by the guardian of the minor children of the insured merely because the policy is found there (Moise v. Mutual Reserve Fund Life Ass'n, 45 La. Ann. 736, 13 South. 170).

The widow of an insured has no interest in a policy made payable to his legal representatives, and which had also been assigned by him to another, which will enable her to maintain an action thereon, where it appears that the deceased owed debts at the time of his death, and that his estate has not been settled (Jack v. Mutual Reserve Fund Life Ass'n, 113 Fed. 49, 51 C. C. A. 36). In a suit by the husband's creditors against the administratrix of the wife, to determine

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the distribution of the proceeds of a policy on the husband's life, the administrator of the husband's estate, though he may be a proper party defendant, is not a necessary one (Tompkins v. Levy, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31). So, in a suit to enjoin the collection of the proceeds of a policy fraudulently conveyed to trustees, the cestuis que trustent need not be joined as defendants, the claim being adverse to the trust (Vetterlein v. Barnes, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400, affirming [C. C.] 16 Fed. 759). In a suit involving the disposition of the proceeds of a policy, the court may appoint a trustee to defend the rights of the legal representatives of a beneficiary, instead of an administrator ad litem (United States Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641).

Under a statute providing that when a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in, an assignee is properly made a party to an action by insured's personal representative against the insurer (Hasberg v. Moses, 80 N. Y. Supp. 867, 81 App. Div. 199, affirming 39 Misc. Rep. 25, 78 N. Y. Supp. 751). And a statute providing that in all actions in which a liability is admitted by defendant, and the amount is not in dispute, if such amount is claimed by another party than the plaintiff, and the defendant has no interest in the controversy, the court may order such party made defendant, and thereupon the rights of the several parties shall be determined, and that the amount may be paid into court by defendant, and defendant stricken out as a party, covers an equitable interest arising from the assignment of a certificate of membership in a mutual benefit association (Brierly v. Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297).

A bill of interpleader may be maintained by an insurance company where the doubt as to which of the claimants of the fund is entitled thereto is a doubt as to matters of law, and not as to matters of fact (Sovereign Camp Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377). But the interpleader will not lie where the company has assumed inconsistent obligations to the adverse claimants (Supreme Council of Legion of Honor v. Palmer, 107 Mo. App. 157, 80 S. W. 699).

Where a company delivered a check to the beneficiary, which was received in full payment and in satisfaction of the policy which was surrendered, the company was thereby estopped from denying that the beneficiary was the real party in interest when the

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check was executed (Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89). And where, at the time a policy matured, insurer might have properly paid the amount due thereon to the assignee on demand, but instead refused payment, and thereafter one of the assignors served it with notice of a claim to such proceeds, insurer was not thereafter entitled to an order of interpleader (Kirsop v. Mutual Life Ins. Co., 84 N. Y. Supp. 95, 87 App. Div. 170). So an insurance company which has been garnished in one state by a creditor of the beneficiary, and sued in another state by the beneficiary, cannot at once, and before either case has proceeded to judgment, maintain a bill to require the two to interplead (Hartford Life Ins. Co. v. Weed, 75 Vt. 429, 56 Atl. 97).

Where an insolvent corporation was in the hands of a receiver at the time a liability on a policy insuring its managing stockholder accrued, any claim of the corporation to share in the proceeds of such policy on the ground that the premiums had been paid from the corporation's assets was enforceable only by such receiver; and hence the insurance company was not entitled to interplead the beneficiary and creditors of the corporation, who had asserted a claim to the proceeds of such policy, and notified the insurer thereof.

Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89; Northwestern Mut. Life Ins. Co. v. McKeen, 162 Ind. 694, 70 N. E. 1112.

(b) Pleading.

As an assignment, absolute or conditional, of a policy of life insurance, taken out by a person on his own life, is only valid in the hands of the assignee to the extent of the money paid by him with interest thereon, there is equity in a bill filed by the assignor of a life insurance policy, which avers that it was assigned to the defendant as collateral security for his debt, and that upon default in the payment of such debt the defendant, as assignee, surrendered the policy and collected the cash surrender value thereof, which exceeded the amount due the defendant with interest, and which seeks to charge the defendant as trustee for the amount he received on the surrender of the policy in excess of the amount due him with interest (Culver v. Guyer, 129 Ala. 602, 29 South. 779). So where an assured changed a policy in which his children were beneficiaries so as to make it payable to one of them, a bill by one of such children alleging that she had a vested right in the policy because of an

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agreement as to the distribution of her parent's estate prior to the father's death, and that the ultimate change of beneficiaries was induced by fraud and undue influence, stated a cause of action, and hence was not subject to demurrers relying on facts showing such change to have been valid under the laws of the association, which did not appear on the face of the bill (Goodrich v. Bohan [Tenn. Ch. App.] 52 S. W. 1105).

A bill of interpleader alleging that on the death of a member his widow, who was formerly beneficiary in his certificate, claimed the amount thereof, alleging that a substitution of the beneficiaries which had been made was the result of undue influence, did not show that one of the contesting claimants was clearly entitled to the fund, but stated facts entitling complainant to relief (Sovereign Camp Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377). So a bill has been held good on demurrer, though it averred complainant's right to deduct a certain sum from the face of the policy for a semiannual premium, as the demurrer admitted the right to make such deduction, and therefore disclosed no interest in complainant in the controversy (Provident Savings Life Assur. Soc. v. Loeb [C. C.] 115 Fed. 357). And in Morrill v. Manhattan Life Ins. Co., 183 Ill. 260, 55 N. E. 656 (affirming 82 Ill. App. 410), it was held that a bill which admitted the issuance of policies on decedent's life in his wife's favor, and receipt of proof of death, and alleged that one of the defendants claimed to hold an assignment of the policies from the wife, and had instituted actions thereon, which were pending, and that the wife, and another defendant claiming through her as assignee of a part of the proceeds of the policies, had notified insurer that they were entitled to the proceeds, and had notified it not to pay such proceeds to the alleged assignee, and threatened to sue it thereon; that insurer held the amount of the policies, and has always been willing to pay the amount to the persons entitled thereto, and offered to bring the money into court at its direction—constituted a good bill of interpleader. But where substantially all the material statements in the affidavit of an adverse claimant to a fund due under an insurance policy, which was used on a motion by the insurance company for an interpleader, were on information and belief, and the source of affiant's information was said to be an affidavit filed by claimant's husband with insurer, but not produced, to the effect that an assignment of the policy to plaintiff was for security only, and not absolute, as it appeared on its face, such affidavit was insufficient to authorize an

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order of interpleader, it being contradicted by a positive affidavit by plaintiff, and by a letter written by the insurer to plaintiff, showing the cash surrender value of the policy at the time of the assignment (Kirsop v. Mutual Life Ins. Co., 87 App. Div. 170, 84 N. Y. Supp. 95).

A showing in an answer to a bill of interpleader that one of the contesting claimants is entitled to the fund consisting of the proceeds of a benefit certificate cannot affect the complainant's right to relief by having the interpleas filed (Sovereign Camp Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377). Where two adverse claimants are joined as defendants to a bill of interpleader, they occupy, as between themselves, the position of complainant and defendant, and a sworn denial by one of them to the cross-bill filed by the other has the same effect as evidence as though contained in an answer to an original bill (Nederland Life Ins. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390).

Where the by-laws of a benefit association provided that funeral benefits should be paid to the wife or other proper person, an affidavit averring that the wife maliciously deserted her husband, and that defendant was willing to pay the mother, who attended deceased in his last illness, sets up a valid defense to an action by the wife (Smith v. Theatrical Mechanical Beneficial Ass'n [Com. Pl.] 5 Pa. Dist. R. 326). But an affidavit of defense to an action by the designated beneficiary and her children, which alleged that plaintiff was not decedent's real wife, was in Bodnarik v. National Slavonic Society (Com. Pl.) 6 Pa. Dist. R. 449, 27 Pittsb. Leg. J. (N. S.) 460, held insufficient to prevent judgment.

When a company stands ready to pay the amount due on a policy when the proper beneficiary is determined, an objection that it has not been served with a copy of the answers of contesting beneficiaries has no merit (Spencer v. Grand Lodge A. O. U. W., 53 App. Div. 627, 65 N. Y. Supp. 1146, affirming 48 N. Y. Supp. 590, 22 Misc. Rep. 147).

Where plaintiffs based their right to recover on a policy in the name of defendant on the ground that assured had changed the beneficiary, they are estopped from alleging in the same action that defendant was not the beneficiary, under a claim that they were entitled to the insurance as heirs of decedent's former wife, to whom the policy was payable prior to her death (Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086).

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A demurrer to the evidence in a suit on a life policy issued by a foreign fraternal society on the life of a married woman for the benefit of her husband does not raise the question of the right of the husband to be a beneficiary, where no such issue was raised in the pleadings or asserted at the trial (Kern v. Supreme Council American Legion of Honor, 67 S. W. 252, 167 Mo. 471).

A party who has not the possession, and is not entitled to the possession until the trial, of an application for an insurance policy, may plead it as containing her name as beneficiary when signed by the assured; and if when produced it contains another name she may prove by parol evidence that it was originally as she has pleaded it, such evidence not being objectionable on the ground that it varies the terms of the application, nor as an attempt to reform the instrument (Breeze v. Metropolitan Life Ins. Co., 24 App. Div. 377, 48 N. Y. Supp. 753). Where insured, shortly before his death, surrendered a life certificate, payable to his wife, and received one payable to his sister in exchange, in an action by the wife to recover the amount of the insurance, the liability of the association being admitted, and the controversy being between the wife and sister of the insured, the constitution and by-laws of the association, providing that there should be no vested right in the sum provided in the policy, and that the policy could be assigned, does not affect the rights of the claimants (Benard v. Grand Lodge of the Ancient Order of United Workmen of the Dakotas, 82 N. W. 404, 13 S. D. 132). In an action on a policy, the defense to which rests on a decree of divorce rendered by a court of Hawaii in an action brought there against plaintiff by the guardian of her husband, who was insane, it is not error to exclude evidence of the fact that the company had satisfied a judgment on the policy recovered by the husband's administrator in an action to which plaintiff was not a party, since the fact that the company paid the policy to the wrong party would be no defense to an action brought by the right party (McGrew v. Mutual Life Ins. Co. of New York, 64 Pac. 103, 132 Cal. 85, 84 Am. St. Rep. 20, writ of error dismissed 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33).

(c) Evidence.

In an action by the original beneficiary in a life insurance policy to establish a trust in her favor as against the substituted beneficiary, the latter is entitled to the benefit of the presumption aris-

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ing from the fact that she appears as beneficiary in the certificate (Lide v. American Guild, 69 S. C. 275, 48 S. E. 222).

The payment of the proceeds of a policy into court by the insurer does not in any way better or prejudice the legal position of adverse claimants. The party that succeeds must make a case that would have entitled him to succeed against the insurer (Ireland v. Ireland, 42 Hun [N. Y.] 212). So the burden of proving a gift causa mortis of an insurance policy is on the party claiming it; and to establish a gift inter vivos of an insurance policy there must be conclusive evidence of an intention to part absolutely with the title (Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213).

The charter, certificate of incorporation, constitution, and by-laws of a mutual benefit society limited beneficiaries to a member's widow, orphans, or other relatives, or to persons dependent upon the deceased member. A member took out a certificate for the benefit of his affianced wife, who was a widow. On a bill of interpleader by the association, the question of the beneficiary's right to the proceeds of the certificate, as against the member's heirs, turned on the question whether she was dependent on him for support. It was held that evidence that she received benefits from the estate of her first husband was relevant and admissible as tending to show her need of assistance. But evidence as to whether the beneficiary's sisters were earning wages, and were therefore able to assist her, and as to whether she paid her mother a small sum for board, was held to be irrelevant. (Alexander v. Parker, 42 Ill. App. 455.)

Where a latent ambiguity appears in a certificate as to the beneficiary intended, and an attempt is made to identify such beneficiary, the testimony of the person who drew the application for membership is admissible to show the circumstances under which the certificate was made; but testimony as to what the deceased member, after the making of the certificate, said as to his intentions is not (Hogan v. Wallace, 63 Ill. App. 385). Where defendant claimed an insurance policy as a gift from decedent, evidence of the latter's declarations, showing that his relations with his family were such as to make it probable that he would give defendant the policy, was incompetent as hearsay (Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213).

The competency of testimony with reference to statutes prohibiting parties interested from testifying against the personal representatives or assigns of a deceased as to matters equally within the knowledge

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of deceased was passed on in Great Camp Knights of Maccabees v. Savage (Mich.) 98 N. W. 26; Hirsh v. Auer, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917; Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764.

The sufficiency of the evidence was considered in Mutual Ben. Life Ins. Co. v. Wayne Sav. Bank, 68 Mich. 116, 35 N. W. 853; Breese v. Metropolitan Life Ins. Co., 37 App. Div. 152, 55 N. Y. Supp. 775; Olmstead v. Olmstead, 76 App. Div. 582, 79 N. Y. Supp. 98; Ploso v. Bitzer, 209 Pa. 503, 58 Atl. 891.

(d) Trial and review.

Where an administrator intervenes in a suit by an assignee on a policy payable to insured's legal representatives, he does so as the representative of insured's widow and children, and hence a judgment in favor of the company is conclusive on them (Pittel v. Fidelity Mut. Life Ass'n, 86 Fed. 255, 30 C. C. A. 21). But as the conclusiveness of a judgment extends only to identical issues tried between the same parties or their privies, a judgment in an interpleader suit by an insurance company to ascertain the right to insurance payable to an intestate, in which the defendants were the administratrix of intestate and the receiver of a corporation of which intestate was the principal owner, is not binding in a second action on either the insurance company or a receiver of intestate who did not know of the existence of the policies at the time the interpleader suit was instituted (Reynolds v. Ætna Life Ins. Co., 160 N. Y. 635, 55 N. E. 305, affirming 51 N. Y. Supp. 446, 28 App. Div. 591). Where plaintiff's right to the proceeds of a life policy as wife of the insured was res adjudicata as against one defendant, but not as against the other, and the evidence introduced by the latter showed that plaintiff was not the insured's wife, and was therefore not entitled to the fund, and, as between the two defendants, the one concluded by the judgment was entitled to it, the court could properly award the fund to the latter, notwithstanding the judgment (Olmstead v. Olmstead, 76 App. Div. 582, 79 N. Y. Supp. 98).

Where adverse claimants to a fund due upon an endowment certificate issued by a beneficial society are brought into court by a bill of interpleader filed by the society for the purpose of determining their rights, which are prosecuted in good faith, costs may be awarded to be paid out of the fund (Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543). And such costs will be charged against the party whose claim to the fund is found to be invalid (Sovereign Camp

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Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377).

Under a statute providing that issues of fact in actions for the recovery of money or of specific real or personal property must be tried by jury, unless a jury is waived or reference ordered, and another statute providing that every other issue must be tried by the court, with the option of taking the opinion of a jury on any specific question of fact involved or referring it,[1] an action by a creditor to enforce his lien on the proceeds of an insurance policy deposited with him as security against the assignees of the policy and others, who had received part of the proceeds with notice of plaintiff's equity, and asking a decree for contribution and an accounting, is triable by the court (Ellis v. Kreutzinger, 31 Mo. 432).

An objection that the evidence does not show a right of action in plaintiff cannot be raised by an insurer under a general motion for verdict (Clark v. Employers' Liability Assurance Co., 72 Vt. 458, 48 Atl. 639).

An averment in an answer in a suit by a divorcee on a policy of insurance on her former husband's life, that by virtue of the Hawaiian laws and the decree of divorce thereunder all her rights in such policy had passed to and become the property of her husband, is not the special assertion of a right or claim under the treaty with Hawaii, which is essential, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court adverse to such claim or right (Mutual Life Ins. Co. v. McGrew, 23 Sup. Ct. 375, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33).[2]

In People v. Court of Appeals, 32 Colo. 147, 75 Pac. 407, it was held that where a life policy was made payable to the insured's wife, if living, otherwise to her children, and the insured and his wife assigned the policy, the Court of Appeals had jurisdiction to render judgment, in an action after the wife's death by the assignee against the company for conversion of the policy, that the assignee could not maintain the action because her interest had passed to the children, though the children were not made parties to the action.

[1] Rev. St. Mo. 1855, p. 1261.

[2] For report below, see McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20.

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XXVIII. PAYMENT, DISCHARGE, AND SUBROGATION.

1. Insurer's right to repair or rebuild.
   (a) In general.
   (b) Election, and effect thereof.
   (c) Waiver of right.
   (d) Election as precluding recovery on policy.
   (e) Effect of building laws.
   (f) Failure or delay to repair or restore.
   (g) Election as contract to rebuild.
   (h) Option to take property at ascertained or appraised value.
   (i) Questions of practice.
2. Payment and discharge—Insurance other than life.
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3. Payment and discharge of life and accident policies.
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4. Penalties for refusal of, or delay in making, payment—Attorney's fees.
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   (a) Subrogation to insured's claim for damages.
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   (d) Subrogation under marine policies.
   (e) Subrogation in life and accident insurance.
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   (g) Amount of recovery.
   (h) Effect on right of subrogation of wrongdoer's payment to or release by insured.
   (i) Enforcement of right against insured who has recovered from wrongdoer or released one primarily liable.

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5. Subrogation—(Cont'd).
(j) Subrogation to rights of lienholders and mortgagees.
(k) Same—Liability on policy equaling amount of security.
(l) Same—Acts defeating insurer's right.
(m) Action to enforce rights.
(n) Same—Parties.

1. INSURER'S RIGHT TO REPAIR OR REBUILD.

(a) In general.
(b) Election, and effect thereof.
(c) Waiver of right.
(d) Election as precluding recovery on policy
(e) Effect of building laws.
(f) Failure or delay to repair or restore.
(g) Election as contract to rebuild.
(h) Option to take property at ascertained or appraised value.
(i) Questions of practice.

(a) In general.

An insurer has no right to repair or rebuild instead of paying the loss, unless such right is expressly conferred by the policy.

Branigan v. Jefferson Mut. Fire Ins. Co., 102 Mo. App. 70, 76 S. W. 643; Nordyke & M. Co. v. Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219; Wallace v. Insurance Co., 4 La. 289.

Consequently, a mutual company cannot exercise the option where it is not made a condition of the contract, though there is a subsequent amendment of the by-laws giving it such right (Bradfield v. Union Mut. Ins. Co., 10 Pa. Law J. 550).

A clause in a policy permitting the company, on notice, to rebuild or restore, instead of paying the loss in cash, is sufficiently definite to be valid. It involves an agreement to erect a building of the same general character as to material, size, and form as the one destroyed within a reasonable time. (Beals v. Home Ins. Co., 36 N. Y. 522, affirming 36 Barb. 614.) This case holds that a clause giving the insurers 30 days within which they may elect to rebuild is not repugnant to another clause, declaring that payment shall be made in 60 days. The 30 days are included in the 60, and the building is only a mode of payment. Under a policy binding the company to pay a certain loss unless they "shall, within 30 days after proof of such damage or loss, furnish the insured with a like quantity of any or all of the said goods, and of the same quality as

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those injured by the fire, or shall make good the damage or loss by paying therefor," the company has the right to pay the damages in money, or repair within 30 days (Franklin Fire Ins. Co. v. Hamill, 5 Md. 170).

Under the valued policy laws of Ohio [1] and Texas,[2] a clause in a policy giving the company an option to rebuild is void in case of a total loss.

Milwaukee Mechanics' Ins. Co. v. Russell, 62 N. E. 338, 65 Ohio St. 230, 56 L. R. A. 159; Russell v. Milwaukee Mechanics' Ins. Co., 6 Ohio N. P. 325, 8 Ohio Dec. 613; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93; Phœnix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. 992; Id. (Tex. Civ. App.) 33 S. W. 995; Orient Ins. Co. v. Same (Tex. Civ. App.) 33 S. W. 995; Merchants' Ins. Co. v. Same (Tex. Civ. App.) 33 S. W. 996; Fire Ass'n of Philadelphia v. Brown (Tex. Civ. App.) 33 S. W. 997; Royal Ins. Co. v. McIntyre (Tex. Civ. App.) 34 S. W. 669.

But it is held that the Wisconsin law [3] is not inconsistent with a statute subsequently enacted providing for a standard policy which gives the option to rebuild, though the buildings be wholly destroyed (Temple v. Niagara Fire Ins. Co., 109 Wis. 372, 85 N. W. 361). The total loss of a building under the Texas statute does not mean the entire destruction of its materials, but that the building has lost its specific character and identity as a house; and the fact that, by the use of the materials remaining, the building could be reconstructed for less than the amount of the policy, is immaterial (Royal Ins. Co. v. McIntyre [Tex. Civ. App.] 34 S. W. 669). Under the Missouri statute [4] providing that in case of a partial loss the insurer must pay a sum of money equal to the damage or repair, at the option of the insured, the company must pay a partial loss in money if the insured wishes, although its policy reserves to it the privilege of repairing.

Branigan v. Jefferson Mut. Fire Ins. Co., 102 Mo. App. 70, 76 S. W. 643; Ampleman v. Insurance Co., 35 Mo. App. 308; Havens v. Insurance Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570; Williams v. Insurance Co., 73 Mo. App. 607; Baker v. Assurance Co., 57 Mo. App. 559.

The Branigan Case holds that the insured may insist upon payment in cash of a sum equal to the damage without regard to the

[1] Rev. St. § 3643.
[2] Rev. St. art. 2971.
[3] Rev. St. 1898, §§ 1941–1944.
[4] Rev. St. 1899, § 7971.

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insurer's estimate, and, if the parties cannot agree on what will be the indemnity and refuse to arbitrate, a court or jury must decide the dispute on the evidence.

The provision is in the nature of a condition subsequent, available only at the option of the insurers.

Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; Ætna Ins. Co. v. Phelps, 27 Ill. 71, 81 Am. Dec. 217; Union Ins. Co. v. McGookey, 33 Ohio St. 555.

The insurers have the privilege to make repairs if they see fit, but, if they neglect to do so, they are liable only to pay a fair indemnity for the loss (Brinley v. National Ins. Co., 11 Metc. [Mass.] 195). Where immediate repairs were necessary in order to prevent further damage, the fact that the insured began repairs before the expiration of the time in which the company might, by the terms of the policy, elect to repair, is no defense to an action on the policy (Eliot Five-Cents Sav. Bank v. Commercial Union Assur. Co., 142 Mass. 142, 7 N. E. 550).

(b) Election, and effect thereof.

Any decisive act manifesting a deliberate choice is evidence of an election, such as sending workmen, leaving materials, and starting work (Fire Ass'n of Philadelphia v. Rosenthal, 108 Pa. 474, 1 Atl. 303). But consent to an assignment of the insured's claim does not operate as an election to pay the money (Tolman v. Manufacturers' Ins. Co., 1 Cush. [Mass.] 73). An offer to repair cannot be coupled with one of compromise (Rieger v. Mechanics' Ins. Co., 69 Mo. App. 674).

An adjuster sent out by the company to determine the amount of and settle an alleged loss is authorized to exercise the option (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559). Where the contract is made by a general agent's chief clerk for repairing a house, the insurance company, and not the general agent, is bound as principal, there being no proof that the agent knew of or ratified the clerk's transaction (Hilton v. Newman, 6 Mo. App. 304).

The option to rebuild may be exercised at any time after the loss, and before the expiration of the time prescribed for its exercise in the policy (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559). Where the policy prescribes the time within which such option may be exercised, its provisions must be strictly fol-

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lowed. Thus, where the policy gives the right to elect within 30 days after notice of the loss, repairs are unauthorized, unless the election is made, and notice thereof given to the insured, within 30 days after proofs of loss are left with the local agent (Insurance Co. of North America v. Hope, 58 Ill. 75, 11 Am. Rep. 48). So, where the policy provided that, if the insurer should elect to pay the loss, the amount should not be payable until 60 days after receipt of "due notice, ascertainment, estimate, and satisfactory proof of loss," including an award by appraisers when appraisal has been required, but that, if it elects to replace the property, it must give notice of its intention within 30 days after receipt of "the proof herein required," the notice of intention to replace the property must be given within 30 days after receipt of proof of loss, and not within 30 days after service of an award of the arbitrators, where an appraisal was required (McAllister v. Niagara Fire Ins. Co., 84 Hun, 322, 32 N. Y. Supp. 353). If the option is to be exercised within 60 days from proof of loss, and the company waives the proof of loss, the option must be made within 60 days from such waiver (Farmers' & Merchants' Ins. Co. v. Warner [Neb.] 98 N. W. 48). The option terminates when a right of action accrues on the policy at the expiration of 60 days after proofs of loss have been furnished (Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724). Where the first proofs are returned to assured for corrections, which are made, the time begins from the receipt of the corrected proofs (Kelly v. Sun Fire Office, 141 Pa. 10, 21 Atl. 447, 23 Am. St. Rep. 254).

Under a policy providing that notice of intention to rebuild should be given within 30 days after proof of loss, an application made subsequent to the passage of a decree reforming the contract of insurance, and requiring the defendant to pay the amount of the loss as fixed by the decree will be denied (Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 43 Atl. 764).

The provision constitutes a contract exclusively between the insurer and the insured. Neither a judgment creditor nor a mortgagee can interpose to prevent its performance; and, if the insurer has not given notice within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead (Stamps v. Commercial Fire Ins. Co., 77 N. C. 209, 24 Am. Rep. 443).

An election, once made, is irrevocable, and fixes the rights and duties of the respective parties to the contract (Fire Ass'n v. Rosenthal, 108 Pa. 474, 1 Atl. 303). The insurer cannot rescind its posi-

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tion and deny all liability on its contract because, pending the controversy as to election, the cost of the building has increased (Ætna Ins. Co. v. Langan, 108 Fed. 985, 48 C. C. A. 174, affirming [C. C.] 99 Fed. 374).

Where the insurers notified the insured that they would not rebuild, and subsequently, after the award of the appraisers was published, requested plans and specifications of the burned building, the demand coming too late, a compliance therewith would have been useless, and hence the refusal of insured to grant it constituted no defense to an action on the policy and the award (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559). Where the option exists, and the company elects to pay instead of rebuilding, this does not confer on a third person any right to the proceeds, where he would not otherwise have such right, because there was no privity between him and the insurer (Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170).

(c) Waiver of right.

A submission to arbitration or a demand for an appraisement is a waiver of an option to repair or rebuild.

Elliott v. Merchants' & Bankers' Fire Ins. Co., 109 Iowa, 39, 79 N. W. 452; Iowa Central Bldg. & Loan Ass'n v. Merchants' & Bankers' Fire Ins. Co., 120 Iowa, 530, 94 N. W. 1100; Alliance Co-op. Ins. Co. v. Arnold, 65 Kan. 163, 69 Pac. 174; McAllister v. Niagara Fire Ins. Co., 50 N. E. 502, 156 N. Y. 80, affirming 84 Hun, 322, 32 N. Y. Supp. 353.

And the advantage gained thereby cannot be relinquished by the insured as against a mortgagee to whom the loss is payable (Iowa Cent. Building & Loan Ass'n v. Merchants' & Bankers' Fire Ins. Co., 120 Iowa, 530, 94 N. W. 1100). This is true whether or not an award was reached, and even though the arbitration was subsequently abandoned (Elliott v. Merchants' & Bankers' Fire Ins. Co., 109 Iowa, 39, 79 N. W. 452). Thus, where an insurance company, by its adjuster, on being requested to rebuild a house destroyed by fire, unconditionally refuses to do so, and states that it will pay the amount of loss when the same is determined by arbitration, the company elects to pay the loss, and waives its right to rebuild (Platt v. Ætna Ins. Co., 153 Ill. 113, 38 N. E. 580, 26 L. R. A. 853, 46 Am. St. Rep. 877, reversing 53 Ill. App. 107). But this case holds that, where the submission expressly states that it is made "without reference to any other question or matter of difference within the terms and conditions of the insurance," it neither waives the company's right to rebuild instead of paying, nor excludes proof of a

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previous oral waiver of such right. So, where the policy provides that the company shall not be held to have waived any provision or condition of the policy "by any act or requirement or proceeding relative to the appraisal," and the estimate or appraisal is a preliminary to, or a part of, the final proof of loss required, the participation by the company in an appraisal to ascertain the damage does not constitute an election on its part to pay such damage in money (Langan v. Ætna Ins. Co. [C. C.] 96 Fed. 705). But the Elliott Case holds that a provision of the policy that no act done in investigating the loss shall waive any condition in the policy does not include things done in arbitrating under the policy, and hence, where the company demanded arbitration, it elected to make payment in money, and waived its right of election to rebuild or repair, and acts done in the course of such arbitration could not constitute a waiver or affect such election. After an award of umpires on contested proof was served, the insurer notified the insured of its intention to rebuild by a letter to which the latter did not reply. Thereupon the insurer, having in the meantime made contracts for the rebuilding of the house, notified the insured that it had sent its builder to commence work. The insured then wrote the insurer that, as it had already been notified, its right to rebuild was gone and that he would not accept the house and would sue on the policy. The insurer, having completed the house, tendered the keys, which the insured refused to receive. It was held that the latter was not estopped, in an action on the policy, from objecting to the insurer's election to rebuild. (McAllaster v. Niagara Fire Ins. Co., 50 N. E. 502, 156 N. Y. 80, affirming 84 Hun, 322, 32 N. Y. Supp. 353.)

(d) Election as precluding recovery on policy.

A refusal by the insured to permit the insurer to repair or rebuild after it has made an election to do so under the provisions of the policy will defeat a recovery on the policy.

Franklin Fire Ins. Co. v. Hamill, 5 Md. 170; Beals v. Home Ins. Co., 36 N. Y. 522, affirming 36 Barb. 614.

But the insurer, in order to defeat an action on the policy, must have distinctly elected to rebuild and put the insured in default for refusing to permit it (Daul v. Firemen's Ins. Co., 35 La. Ann. 98). And a plea by the insurer that it offered to rebuild, and was refused permission to do so, will be of no avail where an opportunity was given (Northwestern Nat. Ins. Co. v. Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185).

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Making repairs is not a full defense to an action on the policy, unless, by the repairs, the property is made as serviceable and valuable as it was before the burning (Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202). And an offer to repair, where the building is incapable of being put in the same condition it was in before the loss, will not relieve the insurer from liability under the policy (Northwestern Nat. Ins. Co. v. Woodward, 45 S. W. 185, 18 Tex. Civ. App. 496).

(c) Effect of building laws.

Policies and their reservations as to repairing buildings injured by fire are subordinated to the public safety, and the police power securing the public against insecure buildings and dangerous constructions. Where the insured building is so injured that the police authorities, acting under a provision of the city charter, prohibit the repairing thereof, the insured is entitled to recover as for a total loss (Monteleone v. Royal Ins. Co. of Liverpool & London, 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 784). He is not bound to accept only the amount of the estimated cost of repairs as claimed by the company under a provision in the policy giving it a right to repair or rebuild. So, where an insured wooden building within the fire limits established by an ordinance of the city council is destroyed by fire, and leave to repair is refused under an ordinance forbidding the repairing of wooden buildings within the fire limits, which was in force when the policy was last renewed prior to the loss, the insured is entitled to recover the full amount of the insurance, though the cost of repairing would be less than the amount of the insurance, but the diminution in value, if not repaired, would exceed the amount of the insurance (Brady v. Northwestern Ins. Co., 11 Mich. 425).

Where the policy confers on the insurer the option to repair in case of partial loss, an election made under such provision must be presumed to have been made in view of the laws and ordinances in force at the date of the policy or of the election. After a partial loss of a frame building and an election to repair, it is no excuse for failure to complete the repairs that the building inspectors, acting under a valid regulation, in force when the policy was issued, prevent the insurer from erecting a frame building, since they could have erected it of brick or other material. (Fire Ass'n v. Rosenthal, 108 Pa. 474, 1 Atl. 303.)

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(f) Failure or delay to repair or restore.

An insurance company electing to repair or rebuild under a clause in the policy giving it the option to do so must act within a reasonable time.

Kemp v. Baltimore Fire Ins. Co., 2 Gill & J. (Md.) 108; Rieger v. Mechanics' Ins. Co., 69 Mo. App. 674.

Where the right to rebuild is denied by the insured, and such denial promptly followed by suit, the company is not bound to rebuild or to attempt to do so pending suit, since it cannot be required to pay and rebuild also (Kelly v. Sun Fire Office, 141 Pa. 10, 21 Atl. 447, 23 Am. St. Rep. 254). There is no liability on the insurer's part to pay rent to the assured during the time occupied in making the repairs, where a reasonable length of time for that purpose has not elapsed (St. Paul Fire & Marine Ins. Co. v. Johnson, 77 Ill. 598).

Where the insurer elects to rebuild, the amount of money indemnity stipulated to be paid under the alternative clause of the policies ceases to be any standard for the measure of damages resulting from a breach of the agreement. The measure of damages is the cost of repairing or rebuilding where there has been a total failure, or the difference between the work as done and its value if done according to the standard of that existing before the fire (Hartford Fire Ins. Co. v. Peebles' Hotel Co., 82 Fed. 546, 27 C. C. A. 223); or the difference between the value of the building at the time of the fire and the uncompleted building which the insurance company delivered to the insured, together with interest from the time possession of such new building was delivered (Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396). Experts may be questioned as to the value of different kinds of work and materials required to put the building in as good condition as it was before the fire (Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686). Where the company elects to repair, and then, after some delay, finally refuses to do so, it is liable for damages resulting from exposure to the weather during the delay (American Central Ins. Co. v. McLanathan, 11 Kan. 533). If the assured completes the repairs, the company is liable for the cost of the repairs, without reference to the amount of the insurance (Henderson v. Crescent Ins. Co., 48 La. Ann. 1176, 20 South. 658, 35 L. R. A. 385). Where, after the failure of the insurers to complete the repairs, owing to the refusal of the building inspectors to

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permit the erection of a frame building, the insured himself has rebuilt with brick, he may recover the cost and damages for the delay; and the rental value of the property is a proper element in ascertaining the measure of damages (Fire Ass'n v. Rosenthal, 108 Pa. 474, 1 Atl. 303). Where the policy provides that the insured shall contribute one-fourth of the expense of the repairs, if the insurers, intending to comply with this provision in good faith, make repairs of substantial benefit, though not fully making good the loss, the measure of the assured's damages is the difference between the value of the building as repaired and what it would have been if fully repaired, deducting one-fourth of their value to the estate (Parker v. Eagle Fire Ins. Co., 9 Gray [Mass.] 152).

The refusal of the insured to furnish a plan of the original house, so that it may be restored according thereto, estops him from complaining that the new part does not exactly correspond with the original (Collins v. Ætna Ins. Co., 6 Fed. Cas. 117).

Where different insurers unite in a notice of election to repair or rebuild, the insured may sue the companies jointly or severally for a breach of the contract, leaving the defendant company in the latter case to seek contribution from the other companies.

Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396, 4 Benn. Fire Ins. Cas. 766; Hartford Fire Ins. Co. v. Peebles' Hotel Co., 82 Fed. 546, 27 C. C. A. 223.

If there is concurrent insurance, and the insurer's liability for a money indemnity and also on its contract to rebuild is several and not joint, the insured may maintain an action for a breach of the contract to rebuild as against one insurer, notwithstanding his compromise and settlement with all of the companies electing to rebuild except this one, where the insured received for such release an amount of money in the aggregate much less than the amount of the policies (Good v. Buckeye Mut. Fire Ins. Co., 43 Ohio St. 394, 2 N. E. 420). In this case the court also holds that, where an agreement to arbitrate the damages was entered into, the insurer being distinctly informed by the insured that he was not claiming under the policy for a money indemnity, but for not rebuilding, the agreement was not a waiver of the insured's right to recover in an action for damages for the insurer's failure to rebuild. Discussing the subject of concurrent insurance, the court says: Where some of the companies elect to rebuild, and others do not, and there is no prorating clause, there is a separate cause of action against each

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so electing for failure to rebuild when there is no subsequent agreement converting the policies into a joint contract; and, where there is no such prorating clause and no limitation on the amount of liability to rebuild, each of several companies electing to rebuild would be liable to rebuild, and several actions for the failure could be maintained, though there could be but one satisfaction for the amount of actual loss. Where several of the companies elect to rebuild, and one only does so, the assured's claim is satisfied as to all, and the one so performing is left to its right of contribution, whatever that may be, against the others. Those of the companies not electing to rebuild, and paying in money before the building is replaced, thereby diminish the amount of recovery against the other companies for a failure to rebuild, as the assured's right extends only to an indemnity for his actual loss. Money paid by such companies, if paid after the building is replaced, belongs in equity to those companies rebuilding.

(g) Election as contract to rebuild.

The general rule is that, **if the insurer exercises the option conferred by the policy by electing to repair or rebuild, the policy becomes, in effect, a contract for repairs or a building contract.**

Collins v. Ætna Ins. Co., 6 Fed. Cas. 117; Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396, 4 Benn. Fire Ins. Cas. 766; Beals v. Home Ins. Co., 36 N. Y. 522; Heilmann v. Westchester Fire Ins. Co., 75 N. Y. 7; Wynkoop v. Niagara Fire Ins., 91 N. Y. 478, 43 Am. Rep. 686; Fire Ass'n of Philadelphia v. Rosenthal, 108 Pa. 474, 1 Atl. 303.

So, it is held that where an insurer, entitled to rebuild unless the insured preferred to receive money, notified the insured of its election to rebuild, and demanded that plans be furnished in accordance with the policy, and the insured made no response, and indicated no preference for money, the policy was converted into a building contract, under which the insurer might proceed (Zalesky v. Iowa State Ins. Co., 102 Iowa, 512, 70 N. W. 187). In the Morrell Case the court holds that, if the insurer does not fulfill his contract after making an election, he is liable for the damage sustained by his failure, which may be more or less than the amount of the policy; but the action must be brought to recover damages for breach of the contract, and not on the insurance policy. It is held, however, that a by-law of a mutual fire insurance company, which provides that "the directors may, within a reasonable time, rebuild, repair, or replace the property lost or damaged," but shall not be

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liable to any action for the loss, unless the company shall neglect for 30 days to proceed to rebuild, repair, or replace, does not prevent the assured, upon the failure of the company to complete within a reasonable time such repairs, from maintaining an action on the policy for the loss, since the by-law only suspends the right of action on the policy during the time which the company has to rebuild, repair or replace the property (Haskins v. Hamilton Mut. Ins. Co., 5 Gray [Mass.] 432).

A principle contrary to the general rule has been adopted in the case of Langan v. Ætna Ins. Co. (C. C.) 99 Fed. 374, affirmed in 108 Fed. 985, 48 C. C. A. 174, where it is held that a mere notice of an election to rebuild on the part of the company does not merge, convert, or affect the contract for indemnity contained in the policy, and that an action may be maintained thereon, since otherwise, where there are several insurers, it must be held for the proper protection of the insured that each company is bound to fully repair or rebuild, and, in case that is not done, then that each company is liable to a judgment for the full damages resulting from the breach of the rebuilding contract, thus casting a heavy burden upon the company which may be avoided by taking the other view. So, in Home Mut. Fire Ins. Co. v. Garfield, 60 Ill. 124, 14 Am. Rep. 27, under a policy providing for payment of the sum insured "unless the directors shall determine to rebuild," it is held that the effect of giving notice of intention to rebuild is not to change the contract so as to make it a mere contract to rebuild, but the company, failing to rebuild within a reasonable time, becomes liable to pay the amount of the insurance, with interest, and a fair rental value of the ground while the owner is thus deprived of its use.

Though the loss is payable to the mortgagee, the legal title to the substituted contract is in the insured, and not in the mortgagee, to whom the company was bound to pay the loss in case no notice of intention to rebuild was given. Consequently, an action on the substituted contract is properly brought by the insured (Heilmann v. Westchester Fire Ins. Co., 75 N. Y. 7).

(h) Option to take property at ascertained or appraised value.

A breach by the insured of the condition in the policy relating to the right of the insurer to take the goods at their ascertained or appraised value will work a forfeiture. Thus, if the insured advertises and sells the property over the protest of the insurers after a failure to agree on an amicable settlement, and before receipt of

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the proofs of loss and an appraisement of the value of the goods, or an opportunity to examine and replace them, as provided for in the policy, is given, he will be precluded from recovering on the policy (Astrich v. German-American Ins. Co., 131 Fed. 13, 65 C. C. A. 251). But where the policy gave the company the option to take all or any part of the articles insured at an appraised value "within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention to do so," and the company was immediately notified of the loss, and proofs of loss were duly furnished and notice of the sale was given there was not such breach of the condition of the policy as worked a forfeiture (Davis v. Grand Rapids Fire Ins. Co., 36 N. Y. Supp. 792, 15 Misc. Rep. 263, affirmed 51 N. E. 1090, 157 N. Y. 685). So, where, a loss on a stock of goods having been arbitrated, the insurer, on the last day allowed it by the policy to elect between taking the goods at the appraised value and paying the loss, served a notice repudiating the arbitration, refusing to be bound by it, and demanding the selection of new arbitrators, asserting, however, that it intended to hold fast to its privilege to take the goods at their appraised value and to have them inspected with the view of exercising that privilege, the insured's refusal to allow inspection after the receipt of that notice would not relieve the insurer of liability, as the retention of the right to take the goods was inconsistent with the repudiation of the arbitration, by which the insurer must be held to have made his election not to take the goods (Model Dry Goods Co. v. North British & Mercantile Ins. Co., 79 Mo. App. 550). And under a policy providing that the insured should separate the undamaged property from that damaged, and the parties should estimate the value of that not damaged, and that the insurer might, at its option, take such goods at their appraised value, three days after loss, in the absence of unusual conditions, was ample time for the insurer to avail itself of such provisions, and failure to do so was a waiver, so that the insured did not break the contract by disposing of the goods at the end of that time (Phœnix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866). Where the policy provided that the insurer should take the undestroyed stock at its appraised value, if there was no appraisement the right to take the stock did not attach, regardless of whose fault caused the failure to appraise, and the insured's sale of the remnant without the insurer's consent cannot be taken advantage of by a demurrer to the evidence in an action on the policy (Swearinger v. Pacific Fire Ins. Co., 66 Mo. App. 90). The sale of salvage

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goods by the insured will not justify one of several fire insurance companies in its refusal to proceed with an appraisal of the loss, when such sale is made with the knowledge and consent of a board of adjusters representing all the companies, and the amount sold is so small that a sufficient amount is still on hand to enable the company to exercise its option under the policy to take its pro rata share of the salvage. (Palatine Ins. Co. v. Morton-Scott-Robertson, Co., 61 S. W. 787, 106 Tenn. 558.) The presumption is that the adjuster has authority to make arrangements for the sale of salvage, and consequently to ratify a sale thereof already made by the adjuster of another company (First Nat. Bank of Devils Lake v. Lancashire Ins. Co., 65 Minn. 462, 68 N. W. 1). Though the insurers are authorized, within 20 days after proof of loss, to elect to replace the articles lost or damaged by fire, they are not entitled to an injunction to restrain the insured from removing or disposing of his goods pending the expiration of the 20 days, in order to enable them to take an inventory with a view to such election (New York Fire Ins. Co. v. Delavan, 8 Paige [N. Y.] 419).

(i) Questions of practice.

In an action on the policy it is unnecessary to allege in the complaint that the insurer has refused to repair or rebuild, as the election to do so is a matter of defense.

Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; Ætna Ins. Co. v. Phelps, 27 Ill. 71, 81 Am. Dec. 217; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Benedix v. German Ins. Co., 78 Wis. 77, 47 N. W. 176.

The burden is on the insurance company to prove that it has made an election to repair (Harrington v. Hanover Fire Ins. Co., 5 N. Y. St. Rep. 417). In this case the sufficiency of the evidence to show an election is considered.

It is error to submit to the jury a question about which there was no dispute as to whether a building could be restored for less than the amount of the insurance under the provisions of the company's charter and by-laws (Zaleskey v. Iowa State Ins. Co., 108 Iowa, 392, 79 N. W. 148). Likewise, it is error to submit to the jury the question whether a reasonable time had elapsed to complete the repairs when the insured took possession of the premises; no proof having been offered or given that there had not been a reasonable time allowed to make the repairs (Ryder v. Commonwealth Fire Ins. Co., 52 Barb. [N. Y.] 447). But the question

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whether repairs are made within a reasonable time, depending on the dates of various notices given by the parties to each other, the delay occasioned by the sickness and death of workmen employed, and the peculiar nature of the property must be submitted to the jury, although the particular circumstances are not disputed (Haskins v. Hamilton Mut. Ins. Co., 5 Gray [Mass.] 432).

2. PAYMENT AND DISCHARGE—INSURANCE OTHER THAN LIFE.

(a) In general.
(b) Interest on amount due.
(c) Persons entitled to receive payment, and effect thereof.
(d) Application of special funds to payment, and proceedings to compel levy of assessment.
(e) Settlement and release.
(f) Recovery of payments.
(g) Pleading and practice.
(h) Contribution between insurers.

(a) In general.

The rules as to what constitutes a payment are the same in regard to the discharge of fire insurance policies as in regard to the payment of claims generally, although some questions arise which are peculiar Thus, in a case where a husband conveyed certain property to his wife, who procured insurance on it, and the policies were transferred to a creditor of the husband as collateral security for the amount owing him, and afterwards the husband became insolvent, and joined with his wife in the execution of a deed of the said property to his assignee in insolvency, and the insurance company claimed that the policies were rendered invalid by such transfer of the property insured, but, on a loss occurring, paid to the creditor the amount of the policies, and took an assignment of the claims held by the latter against the husband, and closed the account as to the policies on its books, the transaction was regarded by the court as a payment on the policies, and not merely a purchase of the claims against the husband (Appeal of Brown, 57 Conn. 66, 17 Atl. 320). In Baker v. Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357, a party obtained insurance on property which he held under a deed which was in fact a mortgage, as owner, to an amount equal to that advanced by him to redeem the property from an execution sale and his expenses. He had also taken a bill of sale of his grantor's growing crops, and received the proceeds of their

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sale. Upon the destruction of the premises by fire, the adjuster, finding the grantors in possession, objected to paying the insurance, but it was finally settled between the insured and the company by the latter paying the insured the amount he had advanced, less the amount he had received from the crops, and he transferred his interest under his contract with his grantors, and made a deed of the property to the company. It was held that, the company having notice of the grantors' rights, this operated as a payment of the insurance, and that upon a bill to enforce their agreement they were entitled to a credit of the full amount of the policies. Upon a loss of the insured property, a payment by the insurance company of the full amount of the policy constituted a payment of the policy, although the company took a receipt stating that the money was received by the insured as a loan pending a suit to determine whether a third person was responsible for the loss, and that it should be repaid to the company in case a recovery should be had from such third person, and although there was an express stipulation in the policy requiring such loan at all events.

Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Deming v. Merchants' Cotton Press & Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

If an insurance company, in settlement of a loss, delivers to the insured its draft, and subsequently repudiates the settlement, refuses to pay the draft, and denies all liability, the insured may treat the draft as worthless, and proceed to enforce payment of the policy, as if no attempted settlement had been made (Insurance Co. of North America v. Osborn, 26 Ind. App. 88, 59 N. E. 181). Where the company sent the insured five drafts in payment of a loss, and the latter collected one, and returned the others for a certain indorsement, which the company refused to make, there was no acceptance by the insured enabling him to recover on the drafts instead of on the policy, the acceptance of the one draft only operating as a payment pro tanto (Morrill v. New England Fire Ins. Co., 71 Vt. 281, 44 Atl. 358). It is a sufficient defense to a suit on a draft given in settlement of a loss that the draft was issued under the belief that the statements in the proofs of loss were true, whereas they were false and fraudulent (Miller v. Iron City Mut. Fire Ins. Co., 4 Pa. Super. Ct. 605).

A policy issued by the agent for a foreign insurance company, in which no place is stipulated for the payment of the loss, is regarded

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as payable in the state (Moshassuck Felt Mill v. Blanding [R. I.] 21 Atl. 538, 17 R. I. 297). And a statement in a policy that the insurance, in case of loss, will be paid "60 days after due notice and satisfactory proof of the same have been received at this office," does not mean that the insurance is to be paid at the home office (Curnow v. Phœnix Ins. Co., 37 S. C. 406, 16 S. E. 132, 34 Am. St. Rep. 766).

Injunction may be maintained by a policy holder in a mutual insurance company to restrain the company from paying a fraudulent claim (Carmien v. Cornell, 148 Ind. 83, 47 N. E. 216).

(b) Interest on amount due.

In an action on a fire policy, interest may be recovered on the amount of the loss from the commencement of the action.

Huchberger v. Home Fire Ins. Co., 12 Fed. Cas. 793; Marthinson v. North British & Mercantile Ins. Co., 64 Mich. 372, 31 N. W. 291.

In an early case it is held that although interest is not, as a rule, recoverable for unliquidated damages or uncertain demands, yet jurors have in many cases a discretion to allow interest by way of damages, and they may do this on the amount of a partial loss on a policy, if under all the circumstances they think it proper (Anonymous, 1 Johns. [N. Y.] 315). But interest is not recoverable as a matter of right, where the insurer has offered to pay the amount actually due, which offer was refused (Budd v. Union Ins. Co., 4 McCord [S. C.] 1). And if the money is not wrongfully withheld, but the failure to pay is due to insolvency only, interest will not necessarily be allowed on claims against the insolvent (Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97).

Where the policy provides that any difference as to the amount of the loss shall be submitted to arbitration, and that no action shall be maintained on the policy until after a demand, and it does not appear that the amount to which the insured became entitled was payable at a fixed time after the loss, or that the amount has been wrongfully withheld by the insurer, or that the sum due was liquidated, or that the insured had demanded payment before the bringing of the action, interest should be allowed on the amount of loss only from the time the suit was brought, and not from the time of the loss (Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558). So, an insurance company cannot be adjudged in default for not paying a claim against

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it while ignorant of the existence thereof, no notice of such claim having been given; and hence interest on such a claim can be allowed only from the date of instituting suit thereon (Thwing v. Great Western Ins. Co., 111 Mass. 93). Interest on the amount of a loss, as fixed by arbitrators, should not be allowed from the time of the loss until the decree was rendered in a suit to set aside the award, since the suit was not prosecuted to recover the amount awarded, and the damage sustained by the insured, although ascertained by the appraisers, was unliquidated until the decree was rendered (Stemmer v. Scottish Union & National Ins. Co., 33 Or. 65, 53 Pac. 498).

When a loss becomes payable at a fixed time, it will bear interest from that time.

Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.

Thus, where a policy provides that the loss shall be payable 60 days after the furnishing of notice and proofs of loss, the insured is entitled to interest from the expiration of such time.

Webb v. Protection Ins. Co., 6 Ohio, 456; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297; Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395.

The insured is entitled to interest from that time as a matter of right, and not merely at the discretion of the jury (Home Ins. Co. v. Patterson, 12 Ky. Law Rep. 941). But it has been held that a contract in the policy to pay the loss on a certain day after proof thereof is not a contract to pay interest after that day, if the loss be not then paid (Oriental Bank v. Tremont Ins. Co., 4 Metc. [Mass.] 1).

Though the policy provides that it shall be paid within 60 days after proof of loss, interest does not run before the expiration of the 60 days.

Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578; Phœnix Ins. Co. v. Public Parks Amusement Co., 37 S. W. 959, 63 Ark. 187; Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425.

Under a provision that "the loss shall not become payable until 60 days after notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required," where there has been no appraisal by arbitrators, the loss becomes "due and payable" 60 days after proofs of loss, within the meaning

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of the Missouri statute (Rev. St. 1899, § 3705) fixing the time from which a claim arising on a written contract shall draw interest (Reading Ins. Co. v. Egelhoff [C. C.] 115 Fed. 393). And if a loss is made payable 60 days after due notice and proof thereof, the insured is entitled to interest after the expiration of 60 days from the time of furnishing proof of loss, not from the time of adjustment (Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141, affirming 12 Hun, 416) even though the proofs of loss are rejected by the company because they contain a clause stating that the estimate of value was made by persons agreed upon (Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50). Thus, it may be said that, when there is no doubt as to the amount of the loss, interest is allowed from the time specified in the policy, but that, where the preliminary proofs are indefinite in this particular, interest is not allowed (McLaughlin v. Washington County Mut. Ins. Co., 23 Wend. [N. Y.] 525).

Where the loss was payable 60 days from proof thereof, and the goods, which were totally destroyed, were worth more than the full face of the policy, which fact would have been immediately ascertained by an honest appraisement, and payment was demanded and refused, the damage was so far liquidated that interest accrued from the date of demand made when payable (Schmidtt Bros. v. Boston Ins. Co., 81 N. Y. Supp. 767, 82 App. Div. 234). But though a policy stipulates for the payment of losses 60 days after adjustment, yet, if the assurers make reasonable efforts to effect an adjustment, they will be liable for interest only from a judicial demand, and not from the expiration of 60 days from date of loss (Gettwerth v. Teutonia Ins. Co., 29 La. Ann. 30).

When a provision in the policy that the loss is payable 60 days after notice and proof thereof is waived, interest should be computed from the date of the loss.

> Hartford Fire Ins. Co. v. Landfare, 88 N. W. 779, 63 Neb. 559; Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703.

The Landfare Case holds that this provision is waived by such action of the company as waives proof of loss. By agreeing to arbitrate, the company waives the provision, so as to entitle the insured to interest on the amount of his loss, in case an arbitrators' award is set aside, from the date of the loss (Glover v. Rochester German Ins. Co., 11 Wash. 143, 39 Pac. 380).

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Under a fidelity insurance bond, interest should be allowed, independent of statute, from the date of embezzlements, or from the end of each year, if the jury or the chancellor choose, to the filing of the proofs of loss; but on this amount there can be no interest for three months after that time, where by the terms of the contract the loss is not due until three months after filing proofs of loss (Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., 26 C. C. A. 146, 80 Fed. 766).

It is a uniform rule, in estimating the loss upon a vessel which has never been heard of and is therefore considered as lost, to calculate interest after 12 months and 30 days from the last period when the vessel was heard from (Hallet v. Phœnix Ins. Co., 11 Fed. Cas. 289). But on a claim for insurance, the vessel not having been heard from for more than a year, and there being no evidence of actual loss at the time of abandonment, no interest is due (Osacar v. Louisiana State Ins. Co., 5 Mart. N. S. [La.] 386).

A claim arising under a policy of indemnity insurance which was signed by the insured in New York, and is there payable, is governed as to interest by the law of New York, although the policy may have been delivered in another state (Cudahy Packing Co. v. New Amsterdam Casualty Co. [C. C.] 132 Fed. 623). But a policy of insurance covering property in Illinois, made and delivered in Nebraska, on which action is brought in Nebraska, is subject to the law of Nebraska relative to interest on the amount due thereon (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559)

(c) Persons entitled to receive payment, and effect thereof.

Payment to a wrong person will not discharge the insurer from liability. Thus, it is no defense to an action on a policy that after its issuance a third person, wrongfully claiming the insured property, insured it with the same company, without the plaintiff's consent, and that such second policy was paid, and the policy holder compelled, by a decree in chancery, to account therefor to the plaintiff, though such second policy was intended by the company to be a substitute for the first (Commercial Union Assur. Co. v. Scammon, 126 Ill. 355, 18 N. E. 562, 9 Am. St. Rep. 607, affirming 27 Ill. App. 74). But a payment of the amount due an individual on a policy to a quartermaster of the government, under a military order, during the late Civil War, is a sufficient defense to an action by the policy holder for the amount due her (Slocomb v. Merchants' Mut. Ins. Co., 24 La. Ann. 291).

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Payment to a duly authorized agent, or to an assignee, will discharge the insurer. Where an agent to insure retains the policy, he is an agent to collect on a loss. The presumption is that an agent collecting the money and corresponding with his principal in regard to the collection does retain the policy, and that his principal is liable for the money collected to a party for whom that principal acted. (De Ro v. Cordes, 4 Cal. 117.) So, an agent, effecting insurance for his principal and whom it may concern, having possession of the policy, has power to adjust a loss with the insurance broker, receive payment, and give up the policy (Erick v. Johnson, 6 Mass. 193). When one who has insured a vessel for whom it might concern takes in a partner in her ownership, and transfers the policy in his individual capacity to the plaintiffs, payment to them is good (Hermann v. Louisiana State Ins. Co., 7 La. 502). But if the assignee of a policy as collateral, after loss, adjusts merely his own loss with the company, the residue of the insurance revests in the assignor, and he may sue the insurer therefor without regard to the assignee's surrender of the policy, and without alleging a reassignment of the policy, or that the assignee had fraudulently adjusted the loss (Summers v. Home Ins. Co., 56 Mo. App. 653).

A question as to the validity and effect of the payment of a loss frequently arises between the mortgagor and mortgagee of the insured property. Where an owner of property which was destroyed by fire had taken out a number of insurance policies on the same, each of which contained a "mortgage clause," making the insurance payable to a mortgagee of the property, and the full value of the property destroyed was paid to such mortgagee by some of the insurance companies, such owner thereafter has no right of action against another insurance company, even if before such settlement of the loss it may have been liable to him on its policy (Norwich Union Fire Ins. Soc. v. Wellhouse, 39 S. E. 397, 113 Ga. 970). But where a mortgagee assigned a claim upon an insurance company for money due in consequence of the destruction of the building on the mortgaged property, upon a subsequent assignment of the claim by the assignee to the mortgagor, the mortgagor's right to collect the same of the company cannot be defeated by a payment by the company to the mortgagee (Haskell v. Monmouth Fire Ins. Co., 52 Me. 128). However, where a part owner of a vessel mortgaged it to the plaintiff, and then procured insurance "on account of whom it may concern, loss payable to him," a payment of a judgment on the policy to the administratrix of the mortgagor

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bars a suit by the mortgagee (Sleeper v. Union Ins. Co., 65 Me. 385, 20 Am. Rep. 706). But when a policy, procured by the owner of the fee, provides for the payment of the loss to the mortgagee as his interest may appear, an accord and satisfaction entered into between the insurer and the owner does not bar the mortgagee's right to recover for his loss (Hathaway v. Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514). Where insurance was effected by the agents of a partnership, stated in the policy to be for the benefit of whoever might be interested at the time of loss, if any should occur, the mortgagee of one of the partners, after the dissolution and before the loss, was entitled to the share of the mortgagor in the money paid on the policy, to the extent of his debt, and, the insurance company having paid the loss to the agents, after notice of the rights of the mortgagee, they were liable to him for the amount of his claim (Rogers v. Traders' Ins. Co., 6 Paige [N. Y.] 583). But, if the mortgagee has neglected to file the statutory notice for the purpose of charging the insurers with knowledge of his right, a settlement of loss made between the insurers and the mortgagor, in good faith, without knowledge on the part of the insurers of the mortgage, is good, and payment of the loss to the mortgagor discharges the insurers (Burns v. Collins, 64 Me. 215). So, where a mortgagor covenanted to keep the buildings insured for the benefit of the mortgagee for a certain sum, but without his knowledge procured a policy for a less sum in his own name only, and kept it, and the company, not knowing of the terms of the mortgage, paid the amount of the loss to the mortgagor, the mortgagee has no equitable lien upon the policy which he can enforce against the company in the name of the mortgagor (Stearns v. Quincy Mut. Fire Ins. Co., 124 Mass. 61, 26 Am. Rep. 617). Where a policy was transferred after loss, for value, to one without notice that a mortgagee of the premises had an equitable lien on the proceeds thereof by reason of an agreement of the mortgagor to insure for the mortgagee's benefit, payment of the policy by the company to such assignee is a good defense to an action by the mortgagee to enforce his equitable lien, though the company made such payment with notice of the mortgagee's equity, since it was legally liable to pay such assignee, his claim being superior to that of the mortgagee (Swearingen v. Hartford Fire Ins. Co., 34 S. E. 449, 56 S. C. 355). If an insurer paid its proportion of the amount of a loss, fixed by an appraisement, to a mortgagee of the property, as authorized by the policy, the insured is not entitled to sue on the

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policy without offering in the pleadings to return to the insurer the amount so paid and tendering the same on the trial (Townsend v. Greenwich Ins. Co., 83 N. Y. Supp. 909, 86 App. Div. 323, affirming 78 N. Y. Supp. 897, 39 Misc. Rep. 87; affirmed 178 N. Y. 634, 71 N. E. 1140).

A question as to the validity and effect of the payment also comes up frequently between the vendor and purchaser of the insured property. A vendee having agreed to insure the property for the vendor's benefit, of which (and of the vendor's claim) the insurance companies had notice, a payment to the vendee was wrongful, and the companies remain liable to the vendor (Grange Mill Co. v. Western Assur. Co., 118 Ill. 396, 9 N. E. 274). So, if a policy covers a dwelling and the personalty therein contained, and is assigned to one to whom the dwelling is conveyed with the consent of the insurer, and the dwelling and contents are destroyed, a payment to the grantee of the value of the dwelling will not preclude the insured from suing for the value of the personalty (Clark v. German Ins. Co. of Freeport, 84 Mo. App. 243). Likewise, where one who had a contract for the purchase of certain property made a parol agreement to sell the same to a third party, who, it was agreed, should take possession and keep the property insured for his vendor's benefit, and such party took out an insurance policy in his own name, and the vendor assigned his interest in the contract to another, who notified the company of the assignment, and also of his claim to the insurance money, such assignee is entitled to the moneys due upon such insurance, and the company is liable to him to the extent of his interest, not exceeding the amount due on the policy, although it has paid the amount of the insurance to the party who took out the policy (Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641). In an action on a policy, where the question of ownership of the property is in issue, and it appears that the conveyance to the assured operated, as between the parties, to convey the whole title to him, it answers every requirement of the contract of insurance, and payment of the loss to the assured will absolve the insurer from any claim by the grantor's creditors, with the rights of whom it is not concerned (Smith v. Agricultural Ins. Co., 6 N. Y. St. Rep. 127). Where a policy is issued with knowledge on the part of the company's agents that the insured has already entered into an executory contract for the sale of the house, the policy, however, containing no reference to such contract or to the vendee, a settlement by the vendor, after loss, in full, in rela-

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tion to his own interest, precludes him from thereafter maintaining an action on the policy for the use of the vendee (Wright v. Continental Ins. Co., 117 Ga. 499, 43 S. E. 700). If a contract for the sale of land has been fully performed after the premises have been injured by fire, and the proceeds of a policy placed on the property by the vendor have been collected by him as trustee for the vendee, the latter cannot hold the company liable for paying the money over (William Skinner & Sons Ship Building & Dry Dock Co. of Baltimore City v. Houghton, 48 Atl. 85, 92 Md. 68, 84 Am. St. Rep. 485).

The injury of an employé does not render a fund payable to the master under a policy insuring him against liabilities for injuries to employés a trust fund for the benefit of the injured employé; and therefore a good-faith settlement with the master before the employé obtains judgment against him, and without knowledge of any claim of the employé to the fund, and before he brings suit to subject it to his claim, relieves the insurer from any liability to the servant, and the master may use the proceeds of the settlement as he sees fit, as there was no privity of contract between the insurer and the employé (Bain v. Atkins, 63 N. E. 414, 181 Mass. 240, 57 L. R. A. 791, 92 Am. St. Rep. 411).

(d) Application of special funds to payment, and proceedings to compel levy of assessment.

The capital stock of an incorporated insurance company is not the primary or natural fund for the payment of losses which may happen by the destruction of the property insured (Scott v. Eagle Fire Co., 7 Paige [N. Y.] 198); but the interest on the capital stock and the premiums received for insurance constitute the ordinary fund from which losses are to be paid. Where a mutual insurance company, by an amendment of its charter, was authorized to issue policies for cash premiums instead of deposit notes, and it was further provided that such premiums, together with the deposit notes, should constitute the capital of the company, and be liable for the payment of expenses and losses, inasmuch as the burden of a loss was to be borne by those who were members at the time of such loss, the cash premiums cannot be applied to the payment of losses accruing before they were received, but must be applied in the same manner as the premium notes (Ohio Mut. Ins. Co. v. Marietta Woolen Co., 3 Ohio St. 348). If the insured property is destroyed by fire to so great an amount that all the deposit notes and 1 per

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cent. on all the property insured is not more than sufficient to pay the losers, and afterwards, before the deposit notes are collected, another fire destroys other property insured in the same company, the losers by the latter fire are not entitled to any part of the fund arising from the notes and 1 per cent. assessed (Coston v. Alleghany County Mut. Ins. Co., 1 Pa. 322). An action on a policy which provides that only certain funds of the company shall be applicable to the payment of any loss may be maintained without proving that the company has any such funds, and without a previous demand for the application of such funds (Cobb v. New England Mut. Marine Ins. Co., 6 Gray [Mass.] 192).

Where the charter of an insurance company provided "that all policies or contracts founded thereon shall be binding and obligatory upon said company, and the company shall be liable for all loss or damage sustained agreeably to and on such terms and conditions as shall be contained in the policy," and the policies indicated that the corporation alone was the insurer, and that it was to be held generally, and as an entirety, without any suggestion that liability was confined to any specific fund, and without any reference to any other instrument than the charter itself, a by-law according to which losses by sea were to be paid only out of the funds derived from marine insurance, and losses by fire were to be paid only out of the funds derived from fire insurance, was excluded by the terms of the contracts, and was not binding on the insured persons sustaining loss (Doane v. Millville Mut. Marine & Fire Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625).

The assured, on the failure to make an assessment, need not seek specific performance, but may sue at law for the breach of his contract (Hall v. Citizens' Mut. Live Stock Ass'n, 11 Ohio Dec. 145, 25 Wkly. Law Bul. 79). When, after judgment against a mutual fire insurance company in an action on a policy, it refuses to make an assessment on its members necessary in order to raise funds with which to pay the judgment, the policy holder may have mandamus to compel such assessment (Perry v. Farmers' Mut. Fire Ins. Ass'n, 132 N. C. 283, 43 S. E. 837). And where the articles of association of a mutual insurance company required it to make an assessment when necessary to pay losses adjusted, and, having adjusted the plaintiff's loss, the company neglected to make the necessary assessment within the proper time, the plaintiff is entitled, in an action on the policy, to amend his petition so as to pray for an order of mandamus to compel the levy of such assessment

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(Harl v. Pottawattamie Mut Fire Ins. Co., 74 Iowa, 39, 36 N. W. 880). In the distribution of the proceeds of an assessment made to pay losses, all the losses should be paid pro rata without reference to priority in the time of loss (Richards v. New Hampshire Ins. Co., 43 N. H. 263).

(e) Settlement and release.

If a loss is claimed under an alleged oral contract of insurance which has some evidence to support it, payment of a little more than half the claim in settlement is within the power of the directors, as a valid compromise of a doubtful claim (Stoehlke v. Hahn, 158 Ill. 79, 42 N. E. 150, affirming 55 Ill. App. 497). Where an attempt was made to cancel a policy by the insurer without notice to the insured, and after a loss an agent of the insurer told the insured's agent that the policy had been canceled, and tendered to the insured's agent the amount of the premiums which had been paid, and the same was accepted by the insured, it was held the transaction could not be regarded as a compromise (Cassville Roller Mill. Co. v. Ætna Ins. Co., 79 S. W. 720, 105 Mo. App. 146).

The principle that the payment of a part of a debt or of liquidated damages for the whole is not a satisfaction of the entire debt applies to the discharge of claims under insurance policies. Thus, where, after the settlement of a fire loss, a draft was drawn in favor of the insured for the amount agreed on, but, the company being informed by the plaintiff before payment of the draft that he held a mortgage on the goods destroyed, payment of the draft was refused, and after the plaintiff had sued the insured to recover the mortgage debt the company paid the insured an amount less than the adjusted loss in full settlement thereof without any new consideration, such payment does not constitute an accord and satisfaction (C. H. Brown Banking Co. v. Baker, 99 Mo. App. 660, 74 S. W. 454). So, a writing declaring that $400 was received in full satisfaction for the loss, "canceling $1,500 on said policy," the liability of $400 being undisputed, is not a technical release, and the payment forms no consideration for a discharge of the insurer's further liability (Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424). But the doctrine that the payment of a part of the amount due does not operate as a satisfaction of the whole does not apply to an unliquidated loss under an open policy (Riggs v. Home Mut. Fire Protection Ass'n, 39 S. E. 614, 61 S. C. 448). The liquidation of a claim against another company forms

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no consideration for an agreement with the defendant company (Western Massachusetts Ins. Co. v. Duffey, 2 Kan. 347). While a compromise of a doubtful claim is a sufficient and valid consideration for a promise to pay money for the settlement of such a claim, the surrender of a mere groundless claim, known by both parties to be unenforceable, is not a sufficient consideration. Thus, after the policy had been avoided by a sale of the insured property without the company's consent, the mortgagee of the property cannot recover on a promise alleged to have been made by the insurer to pay him a certain sum in settlement of the loss (Melcher v. Insurance Co. of Pennsylvania, 97 Me. 512, 55 Atl. 411).

A settlement of a loss under a fire policy is invalid, and will be set aside, where the same was obtained by fraudulent means. Thus, an insured is not bound by a settlement by which he accepted in full satisfaction of his claim one-half the amount previously fixed by the adjusting agent as the amount of the loss, where he was induced to accept the reduced amount through the false and fraudulent representations of the company's agent (London & Lancashire Ins. Co. v. Oaks, 15 Ky. Law Rep. 540). So, a settlement of a claim for half the amount a party was entitled to, made in ignorance of the law, and on the fraudulent representations of the other party, who knew of such ignorance, and who knew the rights of the parties, will be set aside (Titus v. Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 28 L. R. A. 478, 53 Am. St. Rep. 426). Likewise, a policy holder who is induced to execute an assignment of the policy in blank to one claiming to be an adjuster of the company upon payment by him to her of 25 per cent. of the amount of the policy, and his false representation that the company will not be able to pay any more, when it is in fact able to pay all its liabilities, the blank in the assignment being afterwards filled with the name of such adjuster, is entitled to recover the balance due on the policy after deducting the amount paid by the adjuster at the time of the assignment (Burnham v. Lamar Ins. Co., 79 Ill. 160). And where the adjuster of the company, after a loss under a policy, represented to assured that the policy was void, because the title to the property was not in him, whereupon assured settled with the adjuster for about one-half of the amount due on the policy, and it appears that the condition as to title had been waived, the settlement will be set aside as procured by fraud, though the adjuster acted in good faith (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).

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A person seeking to be relieved from a settlement must show false representations of a material fact on which he relied, and had a right to rely, when in so doing he was misled to his injury (Ætna Ins. Co. v. Reed, 33 Ohio St. 283). A claim of false representations and deceit cannot be sustained where one party has equal knowledge with the other as to the subject-matter or means of knowledge easily within his reach. Where the insured alleged that he was induced to settle a claim for a less amount by reason of the representations of the insurer's agent that he had signed a written application for the policy wherein he had made false statements as to incumbrances on the property, and there was no showing that the insured asked to see or inspect the application, or that the insurer or its agent practiced any fraud or deceit so as to throw the insured off his guard, and cause him to forfeit all his right to examine the alleged written application, he cannot recover (Davis v. Phœnix Ins. Co., 81 Mo. App. 264). So, an insurance adjuster who disputes the claim of the insured, and occupies a hostile position throughout the negotiations, and gives his opinions falsely concerning the legal rights of the parties on questions of law and on facts, where the assured has the same knowledge or means of knowledge with himself, cannot be regarded as occupying any fiduciary relation, which would entitle the assured to rely on his representations; and a settlement hastily made with him under such circumstances, and under a threat that payment would not be made without suit, will not be set aside for fraud, as the insured is bound to inform himself of his rights before acting, and to stand upon them, and, failing so to do, is himself responsible for the loss (Mayhew v. Phœnix Ins. Co., 23 Mich. 105). And where, in trover for the value of a policy, claimed to have been obtained from the plaintiffs by the fraud of the company's adjuster, it appears that after a partial loss the adjuster visited the plaintiffs, and expressed the opinion that the policy was worthless, as the title to the property had not been correctly stated, and also threatened to sue upon a premium note, and have the plaintiffs "taken to town" on account of it, and that he then offered a cash payment, and to give up the note, which offer was accepted, and a receipt in full settlement of the loss executed, and the plaintiffs' testimony that they did not read the receipt, or know what it contained, was opposed by the evidence of the adjuster and an attorney who accompanied him, and there was no pretense that the contents of the receipt were falsely stated, the court holds that a judgment in the plaintiffs' favor cannot be

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sustained (Phœnix Ins. Co. v. Van Allen, 29 Ill. App. 149). The insured is bound by a compromise where it appears that, as to the facts alleged to have been misrepresented, he knew all and more than did the adjuster, and he was not bound to adopt the latter's opinion as to matters of law (Ordway v. Continental Ins. Co., 35 Mo. App. 426). The court cannot set aside a settlement, made with a knowledge of the facts by both parties, by reason of the false representations by the insurer that the insured was bound by an inventory taken two months before the loss, and that the insurer was liable for only three-fourths of the value of the goods lost, from which the value of the goods saved must be deducted, and that a discount must be allowed for a cash payment, since they were affirmations of matters of law equally open to the inquiry of both parties (Georgia Home Ins. Co. v. Warten, 113 Ala. 479, 22 South. 288, 59 Am. St. Rep. 129). The assertion of an adjusting agent that the insured would not be likely to recover more in an action for the loss is an expression of opinion, and not a representation on which she had any right to rely (American Ins. Co. v. Crawford, 7 Ill. App. 29).

Persons who effected settlements with two insurance companies for losses on policies conditioned to be void if other insurance were written without consent, knowing that the insurers were ignorant that that condition was broken, are deemed to have conspired to defraud such insurers (Teutonia Ins. Co. v. Bussell [Tenn. Ch. App.] 48 S. W. 703). If an insurance company, believing that it has a defense to an action on a policy on the ground of fraud, nevertheless compromises the suit upon a valid consideration, understanding the law and the bearing of the facts, such compromise is conclusive, though it afterwards appears that such fraud could have been proven, and the action defeated (Barlow v. Ocean Ins. Co., 4 Metc. [Mass.] 270).

Where a settlement is procured by fraud, the assured must rescind the settlement by returning or tendering the money received under it before he is entitled to sue on the policy.

Riggs v. Home Mut. Fire Protection Ass'n, 61 S. C. 448, 39 S. E. 614; Norwich Union Fire Ins. Soc. v. Girton, 124 Ind. 217, 24 N. E. 984; Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 103; Harkey v. Mechanics' & Traders' Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295; Brown v. Hartford Fire Ins. Co., 117 Mass. 479; Home Ins. Co. v. McRichards, 121 Ind. 121, 22 N. E. 875; Potter v. Monmouth Mut. Fire Ins. Co., 63 Me. 440.

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If the plaintiff, before suit, and in his complaint, offers to return a draft received in settlement, and on the trial produces it in court, to be subject to the decree, the tender of a return of what he received is sufficient (Berry v. American Cent. Ins. Co. of St. Louis, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548, affirming 55 Hun, 612, 8 N. Y. Supp. 762). And where a complaint to recover for the loss of wearing apparel destroyed by fire alleges that there has been an adjustment as to the loss of household furniture, but none as to family apparel, it is not necessary for the plaintiff to aver that he had refunded the benefits under such adjustment (German Fire Ins. Co. v. Seibert, 24 Ind. App. 279, 56 N. E. 686).

Settlements between an insurer and an insured have all the elements of a contract, and are as incapable of rescission as any other contract (Georgia Home Ins. Co. v. Warten, 113 Ala. 479, 22 South. 288, 59 Am. St. Rep. 129). So, where, during an adjustment of a fire loss with several insurers, the defendant company asserted that its policy had been reduced by a notice from $1,250 to $500, and it was agreed that the loss should be settled on a basis of 50 per cent. of the face of the policy then in force, after which the insured, though objecting that he had never received notice of the reduction, executed proofs of loss reciting that the amount claimed against defendant was $250, which he agreed to accept, and, when paid, discharged the insurer from all liability on account of the loss, and after payment of such amount kept the draft for more than a month, and then returned the same, he is bound by the settlement in the absence of fraud (McLean v. American Mut. Fire Ins. Co., 122 Iowa, 355, 98 N. W. 146). Likewise, where the insured accepted a draft from an insurance agent in payment of a loss under a policy, and signed a receipt in full, knowing that the company had instructed the agent to deliver the draft to him only on condition that he should receipt in full for all claims against the company, he is concluded from recovering any balance claimed against the company under the policy (Kern Brewing Co. v. Royal Ins. Co., 127 Mich. 39, 86 N. W. 388). If a loss by fire has been adjusted, and the loss paid, according to the terms of the policy, the settlement cannot, in the absence of fraud, afterwards be opened up, and the company held further liable because of the omission of certain losses by mistake (Untersinger v. Niagara Ins. Co., 6 Ohio Dec. 986, 9 Am. Law Rec. 401). Thus, the plaintiff cannot, after making the value agreed upon in an adjustment the basis of his action,

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recover an additional sum on the ground that there was error in the adjustment for the reason that both the plaintiff and defendant were mistaken as to the validity of insurance taken in "other companies" (Saville v. Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542; Same v. London & L. Ins. Co., 8 Mont. 431, 20 Pac. 650). Where, after damage by fire to property insured by several companies, a compromise was agreed to whereby, in consideration of the payment of 98 per cent. of the loss, the policies should be delivered up and canceled, and three days after the agreement a second loss by fire occurred, and after the second loss two of the original insurance companies paid the owners their proportion of such compromise, and the owners surrendered the policies for cancellation, and gave a receipt in full of all claims for loss on stock, etc., insured under the policies, reciting that in consideration thereof the policies were canceled and surrendered, the right of indemnity of the assured ceased on the making of the compromise, and they cannot recover, on the surrendered policies, for the second loss (King v. Ætna Ins. Co., 36 Mo. App. 128). But if the assured, after a loss, indorses upon a policy of insurance a receipt of a sum of money equal to the amount of such policy from the insurance company, with a statement that the same is in full satisfaction of all loss or damage, and that the policy is thereby surrendered and canceled, such receipt will not be taken as having any reference to claims under other policies held by him, issued by the same company and covering the same losses (Post v. Ætna Ins. Co., 43 Barb. [N. Y.] 351). An agreement entered into between the insurer and the insured before adjustment, that the investigation of the loss should not operate as a waiver or invalidate any rights of either of the parties, does not limit the conclusiveness of a settlement subsequently effected (McLean v. American Mut. Fire Ins. Co., 122 Iowa, 355, 98 N. W. 146). It is no defense, however, to an action on a policy, that the insured has executed a release of damages from an explosion which caused the fire, where such release provides that it shall not affect the claim of the insured against the insurance companies for loss occasioned by fire, and that he shall be entitled to receive that sum in addition to the sum paid by the releasee (Insurance Co. of North America v. Fidelity Title & Trust Co., 123 Pa. St. 523, 16 Atl. 791, 2 L. R. A. 586, 10 Am. St. Rep. 546).

A settlement, made by parties to a marine policy, of partial losses, with an agreement that it be canceled that day, both par-

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ties being in ignorance of the fact that the vessel had then been totally lost, is a bar to a claim for a total loss (Soper v. Atlantic Mut. Fire & Marine Ins. Co., 120 Mass. 267). One who settles with the insurers for a partial loss, and surrenders his policy without notifying them of a claim pending for salvage, cannot, if the salvage be decreed, recover such further loss (Batre v. Louisiana Ins. Co., 13 La. 577).

Where the amount of a claim under an employer's liability insurance policy for injuries to an employé is sent by the insurance company to the agent through whom the employer obtained the policy, and the agent, with the consent of the employer, applies the same to a claim held by him against the employer, the injured employé may recover such amount, though he had executed a receipt for the amount, and given a release of all claims on account of the accident, as such papers were required by the insurance company before payment of claims (Dearborn v. Holmes Refining Co., 7 Misc. Rep. 513, 28 N. Y. Supp. 493).

A policy taken out by a remainderman, payable to the life tenant, as her interest may appear, is payable to them jointly, and therefore a release by the life tenant operates as a release as to all (Ridge v. Home Ins. Co., 64 Mo. App. 108). While the doctrine is well settled that one of several obligees may execute a valid release by which the entire obligation will be discharged, to do so it must be so intended, and must be free from all fraud as to the other obligees. Thus, where, a policy of insurance having been issued to three persons, and a loss having occurred, the insurer proposed to two of the assured that he would pay them a given sum if they would release the entire policy, or a less sum if they would release their proportionate interest in the insurance money, and they accepted the latter proposition, and signed a paper which the insurer represented to be a release only of their two-thirds interest, when, in fact, by its terms it was a release of the entire policy, the release cannot operate to discharge the obligation on the policy as to the assured who did not join in the release and had no knowledge of its execution, since either the parties to the release did not intend it should so operate, or the insurer intended to defraud the insured who did not join in it, and the existence of either fact would protect him (Lumberman's Ins. Co. v. Preble, 50 Ill. 332).

Where an insurance company compromised with the assured after having denied its liability, one who claims to be subrogated to the insurance money must give evidence of liability of the com-

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pany further than mere proof of the compromise (Grange Mill Co. v. Western Assur. Co., 17 Ill. App. 299).

(f) Recovery of payments.

An insured, who caused the fire by which the property was destroyed, if he recovers from the insurer by false representations, may be compelled to refund what has been paid him (McConnel v. Delaware Mut. Safety Ins. Co., 18 Ill. 228). Similarly, an insurance company which has paid a loss through ignorance that the policy has become void may recover back the payment (Columbus Ins. Co. v. Walsh, 18 Mo. 229). In this case the court holds that, in an action to recover back money paid in ignorance of the fact that the policy had become void by reason of other insurance, the defendant cannot resist repayment on the ground that he procured the insurance as the agent of the real owner, if such agency was not disclosed before the payment was made under the policy. But where an insurer sues to recover a payment made for a loss on the ground that before the loss the insured had sold the property, and by falsely and fraudulently representing himself to be still the owner had induced the payment to be made to him, a mere concealment by the defendant of the change in ownership is not sufficient to render him liable (Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray [Mass.] 177).

When the insured has assigned the right to collect the money, the insurer cannot, in general, recover the same from the assignee receiving it in good faith. Thus, where, after a loss by fire occurring through the fraud of the insured had been adjusted, he assigned his claim under the policy to a creditor to secure a debt, and the insurers, at the request of the insured, paid to the creditor the amount so adjusted, both parties being ignorant of the fraud, since the sum so paid did not exceed the amount of the debt, the insurers cannot recover it back from such creditor, whether the debt was contracted before or at the time of the assignment (Merchants' Ins. Co. of Providence v. Abbott, 131 Mass. 397). This case also holds that, although the sum paid to the creditor exceeded the amount of his debt to the assured, a joint action against them for the recovery of the money will not lie. So, the defendant having received the money on a policy of insurance as the agent of the insured, and promptly paid it over to his principal, without notice of any adverse claim or reason to suspect it, the plaintiffs, who sue to recover the money on the ground that neither the defendant nor his prin-

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cipal had an insurable interest, and who have been guilty of laches, must look to that principal (Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219). In Cincinnati Ins. Co. v. Rieman, 3 Ohio Dec. 280, a general cargo policy insured a commission firm for account of whom it might concern, in such amounts and for such property as might be indorsed on the policy. The subsequent indorsement was for account of the consignors, with loss, if any, payable to the consignee firm. A loss having occurred, the money was paid to the consignee firm, who retained a part for their commissions and delivered the balance to consignors. It was held that the insurance company could not recover from the consignee firm any part of the amount paid them for the loss, upon the ground of fraud practiced by the consignors, since the contract of insurance must be considered as between consignors and the company, and the defendants could not be charged as agents of the consignors.

A bill in equity will not lie to recover money paid upon a policy alleged to have been void by reason of fraud on the part of the insured, the remedy being at law (Charleston Ins. Co. v. Potter, 3 Desaus. [S. C.] 6). In an action to recover money paid by mistake, amendments to the complaint, charging that the defendant made false and fraudulent representations, with intent to deceive and defraud the plaintiff, are material, and should be allowed without an affidavit of merits (Continental Ins. Co. v. Phillips, 83 Wis. 354, 53 N. W. 774).

Where the underwriters allege that neither the defendant nor his principal had an insurable interest in such cargo, the burden of proof is on the plaintiffs to show that fact (Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219). An underwriter who has paid a loss on a policy cannot recover it back, unless he makes out affirmatively a clear case of mistake as to the fact or the law (Elting v. Scott, 2 Johns. [N. Y.] 157). It is incumbent upon the company to show affirmatively that after making payment it discovered evidence showing itself not liable on the policy; and such evidence must consist of proof showing that, because of the fraud of the insured, the policy was, ab initio, void, or that after it issued he was guilty of conduct either vitiating the policy, or rendering it unconscionable for him to receive money thereon, and fraudulently concealed from the company, at the time of receiving payment, the fact that he had been guilty of such conduct (Rome Grocery Co. v. Greenwich Ins. Co. of New York, 36 S. E. 63, 110 Ga. 618). Where the insured has by fraudulent representations obtained a payment in

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excess of the amount of his actual loss, the insurer can recover only the excess, and not the full amount paid, in the absence of a showing that the loss was caused by the defendant's wrongful act (Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104). In an action to recover money fraudulently obtained, it is admissible to show what the defendants testified before the grand jury was the value of goods found secreted after the fire, and supposed to have been taken from their building by a third person, against whom the jury found an indictment for setting the fire and stealing the goods (New Hampshire Fire Ins. Co. v. Healey, 151 Mass. 537, 24 N. E. 913).

Where, in an action to recover money paid on a loss, on the ground of a misdescription of the risk and deceptive proofs of loss, it appeared that the premises had been held adversely to the insured, who, however, had recovered against the holder in ejectment, but had not taken out a writ of possession, and the application for insurance was verbal, and made by an agent who told the insurance agent of the suit and its result, and that the defendant was entitled to a new trial, and the agent then filled out the policy, describing the premises as occupied by a tenant, the case should go to the jury (Hurd v. St. Paul Fire & Marine Ins. Co., 39 Mich. 443). In an action to recover back money paid on a loss of coal, based on the insured's failure to disclose that they were charterers of the barge by the capsizing of which the loss occurred, where the evidence of the notice to the company of such fact after loss and before payment was meager, and the only evidence as to whether the company had knowledge of that fact when the risk was taken was given by the company's agent, who testified that he had no notice, it is reversible error to permit the shipping clerk of the insured to testify that he knew that they were charterers, and that the company's agent saw his books before the policy issued, and on such evidence to submit to the jury the question of the company's notice at the time the risk was taken, the books of themselves giving no information as to the fact in question (Reliance Marine Ins. Co. v. Herbert, 3 App. Div. 593, 38 N. Y. Supp. 373). In an action to recover the sum paid on a policy through the fraudulent statements of the insured, the court should instruct that, to entitle the plaintiff to recover, the jury should find that the defendant knew his statements were false (Hartford Live-Stock Ins. Co. v. Matthews, 102 Mass. 221). Where, in an action to recover back money paid for losses on property destroyed, which it was claimed

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was not covered by the policy, the evidence showed that the plaintiff sent its adjuster after the fire to estimate and adjust the loss, and that he certified that the property covered by the policy had been destroyed, an instruction that in case of fraud or deception by the insured, by reason of which the company was compelled to pay for losses which it had not insured against, the adjustment would not be final, and the plaintiff's action would lie, but, if the adjuster was not misled in any way, his decision would be final, is proper (Nebraska & I. Ins. Co. v. Segard, 29 Neb. 354, 45 N. W. 681). Where an insurance company sued to recover a payment made for a loss under its policy, alleging that the defendant had conveyed away the insured premises prior to the loss, and falsely and fraudulently represented to the plaintiff that he still had an interest therein, thereby inducing the payment to him, and the court instructed that if the defendant, knowing he had no title, concealed that fact from the company, thereby inducing the payment, the company could recover, the instruction was erroneous, in that it failed to directly submit to the jury both the falsity of the representation and the defendant's knowledge that it was false (Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray [Mass.] 177). In this case the court holds that an instruction that if the defendant knowingly concealed the change in ownership from the company, and the company was thereby induced to make the payment, and would not have paid it had it known the facts, then the company could recover, is erroneous, as relieving the company of the burden of proving that the insured had no right to recover for the loss.

Where, pending a controversy as to the liability of several insurance companies for a loss, one company paid the insured 95 per cent. of the face of its policy, and took from him a bond for repayment in case a judgment should be rendered adverse to him in any of the actions contemplated against the other insurance companies, such bond is a guaranty, and not a contract of suretyship, and no recovery can be had thereon if the principal obligation was void for any cause other than the personal disability of the principal obligor (Parrish v. Rosebud Mining & Milling Co. [Cal.] 71 Pac. 694). This case holds that the intention of the parties was to make such repayment contingent on a judgment adverse to the insured on the merits in a case involving the same questions as were involved in the controversy with the obligee, and hence a judgment against the insured in one of such actions, on a defense not available to the obligee, did not justify a recovery on the bond. A recovery

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cannot be had in an action on the bond against an obligor other than the insured in an action to which the insured is not a party.

(g) Pleading and practice.

In an action on a policy of insurance, the petition is sufficient without averring that the damages have not been paid, since payment is a matter of defense, to be pleaded and proved by the defendant (Hanover Fire Ins. Co. v. Schellak, 35 Neb. 701, 53 N. W. 605). Interest on the claim from the beginning of the action may be awarded under the prayer for proper relief, though not specially prayed in the petition (Travelers' Ins. Co. v. Henderson Cotton Mills, 27 Ky. Law Rep. 653, 85 S. W. 1090). But a special count for interest is not improper or subject to demurrer (Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 South. 228). Where the company in its answer alleges that the insured, the plaintiff's assignor, agreed to take a less sum than was due under the policy, a reply that such agreement was after the assignment to the plaintiff, which was known to the defendant, and that the plaintiff's assignor and the adjusters had agreed that, if the plaintiff found that the defendant was liable to the extent of the policy, the agreement to take a less sum should be at an end, is good in substance, on demurrer (American Cent. Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159). In Hartford Fire Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 South. 651, the court considers the insufficiency of a reply alleging duress from threats of imprisonment and duress of actual imprisonment as avoiding a settlement. Where the plaintiff replies to a plea of compromise and settlement in two paragraphs—the first admitting the acceptance of a sum on the policy, but alleging that such acceptance was the direct result of duress, was not accepted as full payment, but was accepted on account, and because of the duress; and the second specifically denying the receipt of the sum in full settlement, but alleging that it was received on account, and because of the duress—an amendment adding to the reply a general denial of each and every allegation made by the defendant, except that the plaintiff claimed the full amount insured by the policy, does not change the scope of the plaintiff's case, or, with the reply, present inconsistent defenses to the affirmative matters set forth in the answer (Bergman v. London & L. Fire Ins. Co., 34 Wash. 398, 75 Pac. 989). Where the petition sets up an assignment of the policy as collateral security to a building company which constructed the insured dwelling; that the pur-

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pose of the transfer was to secure $750 due from the plaintiff to the building company, and that this amount only was paid by the defendant to the holder of the policy; that the defendant thereafter refused to pay the balance due under such policy, to wit, $250, which belonged to the plaintiff after the satisfaction of the debt which had been secured by the policy—such averments are sufficient to warrant the introduction of evidence tending to show that the assignee of the policy had received payment of its own claim only (Summers v. Home Ins. Co., 56 Mo. App. 653).

In an action on a policy containing a clause of payment in 90 days "after proof and adjustment" of the loss, evidence of usage is admissible to prove the meaning of the words "after proof and adjustment thereof" (Allegre v. Maryland Ins. Co., 6 Har. & J. [Md.] 408, 14 Am. Dec. 289). Where the general agent of an insurance company was authorized to settle claims, and was in the habit of drawing drafts on the company for the same, proof that the company was in the habit of honoring such drafts is admissible in an action founded on one of them (Fayles v. National Ins. Co. of Hannibal, 49 Mo. 380). While payment by the insurance company of one-half the liability on a policy before it was due is a sufficient consideration for releasing a claim to the remainder, if so intended by the parties, parol evidence is admissible to show that it was not so intended, but was a mere waiver by the insurance company of the provision allowing it 60 days within which to pay the claim (Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860). This case also holds that parol evidence is admissible to show that the settlement referred only to the damage to the vessel, and that the expense of raising her was left open for future adjustment.

In Prinz v. Citizens' Ins. Co., 80 App. Div. 638, 81 N. Y. Supp. 141, the court considers the sufficiency of the evidence to show that the amount paid the mortgagee was included in the amount paid in settlement, so that the insurer should be required to release the mortgage. In Rennolds v. German-American Ins. Co., 62 Mo. App. 104, the court considers the sufficiency of the evidence to warrant a finding that an adjustment was the result of fraud between the agent and the adjuster.

Whether the leaving of blanks for the name of the transferee of insurance policies was negligence on the part of the holder of them, who intrusted them to a person to have the transfer noted on the books of the company, such as would cast the loss of an errone-

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ous payment on the holder, rather than the insurance company, is a question for the jury (Vanderslice v. Royal Ins. Co., 9 Pa. Super. Ct. 233, 43 Wkly. Notes Cas. 381). Likewise, where the defendant offers in evidence the following paper, "In consideration of the payment by the H. Ins. Co. of $1,000, I hereby waive all claims against the W. M. Ins. Co." (the defendant), signed by the plaintiff, the jury is judge of the fact whether the proof is satisfactory of a want of consideration for the receipt (Western Massachusetts Ins. Co. v. Duffey, 2 Kan. 347). If the policy calls for payment 60 days after proofs of loss, and the jury have been charged not to find for the plaintiff unless there has been a waiver of proof by the company, a subsequent instruction that, if the jury find for the plaintiff, they should calculate interest from 60 days after loss by fire, is not erroneous, as assuming the existence of the waiver, since the jury could not award interest under the instructions unless there had been such waiver. But such instruction is erroneous in failing to state that a cause of action would not accrue under the terms of the policy until after 60 days from the date of the waiver, and that interest would not begin until the accrual of a cause of action. (East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.)

(h) Contribution between insurers.

In case of double insurance an insurer who has paid the whole loss may compel a proportionable contribution from the other insurers, they being in this respect sureties for each other.

Thurston v. Koch, 23 Fed. Cas. 1183; Millaudon v. Western Marine & Fire Ins. Co., 9 La. 27, 29 Am. Dec. 433; Whiting v. Independent Mut. Ins. Co., 15 Md. 297.

In such case the insured may elect to sue either or all of the insurers, leaving them to have contribution among themselves.

Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Clem v. German Ins. Co., 36 Mo. App. 560.

So, where one who is insured concurrently in seven companies makes a claim for his whole loss against six of them, and the whole loss is thus settled and paid, the seventh company is discharged as to him, and its liability, if any, is to the other companies for contribution (Williamsburg City Fire Ins. Co. v. Gwinn, 88 Ga. 65, 13 S. E. 837). And if two policies are concurrently executed, the

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operation of the priority clause is excluded, and the assured may recover his whole loss upon either policy, the other underwriter being liable only for contribution (Potter v. Marine Ins. Co., 19 Fed. Cas. 1167). But the insurer cannot claim contribution from subsequent insurers where the policy contains a proviso "that, in case of subsequent insurance, the insurer shall nevertheless be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent insurers" (American Ins. Co. v. Griswold, 14 Wend. [N. Y.] 399).

The right to contribution is based upon the concurrence of the policies, and it is necessary that the several insurers should be bound with equal certainty and in the same sense for the same loss (Baltimore Fire Ins. Co. v. Loney, 20 Md. 20). **In order that there shall be double insurance, it is obvious that the interest insured must be identical.** Thus, where one, as agent of a company, took out in his own name a policy of insurance on merchandise, his own or held by him in trust or on commission, and at the same time took out policies in the name of the company on the same goods so held on commission and insured by his policy, the latter policy covered the merchandise and not the agent's interest in it, and it was contributory with the company's policies, as the insurance on the merchandise was double (Robbins v. Firemen's Fund Ins. Co., 20 Fed. Cas. 858). Likewise, if policies on a main building, which were also to cover additions, provided that the companies should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance covering the property, and afterwards an addition was built and specifically insured by policies containing the same clause, the latter policies are entitled to contribution from the earlier policies as to a loss on the addition (Meigs v. London Assur. Co., [C. C.] 126 Fed. 781). But where the owners of cotton ship it by a carrier and obtain insurance on it, and the carrier at the time has annual policies covering the cargoes of its steamer, which policies contain a clause limiting the insurance to the interest of the insured, and a fire occurs, this does not constitute double insurance, and the shipper's insurers cannot make the carrier's insurers contribute to their loss (Royster v. Roanoke, N. & B. S. B. Co. [C. C.] 26 Fed. 492). So, if the owner and a mortgagee have effected insurance on their separate interest, in an action by the owner on his policy the insurer is not entitled to maintain a cross-action for contribution against the company insuring the mortgagee's interest (Home Ins. Co. v. Koob, 68 S. W. 453, 24

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Ky. Law Rep. 223, 113 Ky. 360, 58 L. R. A. 58, 101 Am. St. Rep. 354). And where a policy, by its terms, limits the company's liability to the loss affecting the interest of the assured, not to exceed the sum agreed on as the amount of the policy, and not to exceed the interest of the assured, and also provides that "goods on storage must be separately and specifically insured," and the depositors of goods on storage have specifically and separately insured their own goods, in an action by the assured warehouseman for the benefit of the owners of merchandise on storage, as the company is not responsible for goods on storage in which the assured had no interest, there can be no contribution, there being no double insurance (Home Ins. Co. v. Gwathmey, 82 Va. 923, 1 S. E. 209).

The principle of contribution can only be enforced by the party paying, who was under a legal obligation to do so. So, it is held that where there are several policies of insurance, each stipulating to pay the proportion of loss which the amount insured by it bears to the whole amount insured on the property in all the policies, the contracts are independent, and each insurer binds itself to pay its own proportion, without regard to what may be paid by others, and no right of contribution exists in favor of either of them (Hanover Fire Ins. Co. of City of New York v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. Rep. 386). And if one pays more than its share, it is not entitled to contribution from the others; but if, of several policies, one only contain this clause, and the others pay more than their ratable share, they will be entitled to contribution from the underwriters on the policy containing this clause (Lucas v. Jefferson Ins. Co., 6 Cow. [N. Y.] 635).

Payment must have been made in full before a claim for contribution can be enforced. In a case where a compress company took out policies to nearly half the value of the loss in certain insurance companies to indemnify the owners and carriers, such companies cannot claim contribution against other companies who have insured the owners directly, until they have paid the full amount for which the compress company or the carriers are liable (Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518).

In determining the amount of contribution of several insurance companies to the expenses of a suit which they had previously joined to defend, the insolvent companies cannot be considered. (Security Ins. Co. v. St. Paul Fire & Marine Ins. Co., 50 Conn. 233.) This case holds, further, that where several insurance companies

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combined to defend a claim for a loss, agreeing that each should pay such proportion of the expense as the amount of its insurance bore to the whole amount of insurance, plaintiff company, which was made sole defendant in a suit by the insured for the whole amount, and was compelled to pay it, can enforce contribution for one-half of such amount against the only co-signing company within the jurisdiction, the policy of such latter company being for the same amount as the plaintiff's. In an action on policies of fire insurance, where it appears that one of the policies was for a specific amount on fixtures and a specific amount on stock, and that the other was a blanket policy, covering both fixtures and stock, and it appears that the adjusters of the two companies figured on the loss, the amount of which was refused by the insured, and that they subsequently increased the amount, which was accepted by and paid to the insured, and it also appears that, while there was no distinct agreement as to the loss on fixtures, there was a provisional adjustment as to the loss on fixtures and stock, respectively, to which a supplemental amount was added to procure a compromise settlement, a decree of the court apportioning, on the provisional figures, contribution to the amount paid for compromise, will be sustained (Herr v. Greenwich Ins. Co., 20 Pa. Super. Ct. 169).

3. PAYMENT AND DISCHARGE OF LIFE AND ACCIDENT POLICIES.

(a) Time for payment.
(b) Interest on amount due.
(c) Persons entitled to receive payment, and effect thereof.
(d) Settlement and release.
(e) Matters peculiar to mutual benefit associations.
(f) Recovery of payments.
(g) Pleading and practice.

(a) Time for payment.

A provision in a life policy as to the time of payment is for the benefit of the insurer, and may be used with a view to its own interests and convenience. Thus, where the policy provided that the company should pay the insurance within 90 days after notice and proofs had been furnished, the company is not bound to wait the full 90 days before paying the loss after proofs by an assignee of the policy, so as to enable the executrix of the insured to make

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known her claim (Home Mut. Life Ass'n v. Seager, 128 Pa. 533, 18 Atl. 517).

A policy providing for payment in installments is payable only as such installments fall due. Accordingly, where the policy obligated the company to pay in annual installments after the decedent's death, and provided that the installments might be commuted for a single payment, payable when the first installment became due, if the written consent of the insured was filed with the company, the company is not required to pay at once the entire face value thereof, nor the commuted value—such consent not having been filed—but only the installments as they mature (New York Life Ins. Co. v. English, 96 Tex. 268, 72 S. W. 58, reversing [Tex. Civ. App.] 70 S. W. 440). So, under the laws of a beneficial association, providing that, if the insured should become disabled to perform any or all kinds of labor, he should receive annually one-tenth part of the sum for which his certificate was issued, until the aggregate received should equal the sum specified in such certificate, an insured disabled to perform any or all kinds of labor can recover only the annual installments as they become due, and is not entitled to the whole amount (Supreme Tent of Knights of Maccabees of the World v. Cox, 60 S. W. 971, 25 Tex. Civ. App. 366).

In determining the time of payment, the provisions of the certificate govern where the charter of a benefit society provides that benefits shall be paid as provided for either in the by-laws or in the certificate, and the certificate provides that benefits shall be paid at the end of seven years, and the by-laws provide that the benefit found to be correct shall be adjusted within 90 days of the expiration of the certificate (Failey v. Fee, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311, 55 Am. St. Rep. 326).

(b) Interest on amount due.

The general rule is that **a life policy or benefit certificate bears interest from the time the same was due and payable or payment was refused.**

Unsell v. Hartford Life & Annuity Ins. Co. (C. C.) 32 Fed. 443; Supreme Lodge Knights of Honor v. Lapp's Adm'x, 25 Ky. Law Rep. 74, 74 S. W. 656; Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324; Supreme Lodge A. O. U. W. v. Zuhlke, 129 Ill. 298, 21 N. E. 789; Supreme Council Catholic Knights of America v. Franke, 137 Ill. 118, 27 N. E. 86, affirming 34 Ill. App. 651; Grand Lodge Brotherhood of Locomotive Firemen v. Orrell,

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109 Ill. App. 422; Knights of Pythias v. Allen, 104 Tenn. 625, 58 S. W. 241. Where the insurer denied liability under a certificate, the beneficiary in the certificate is entitled to legal interest on the amount of the certificate from 90 days after the insured's death, though the beneficiary was a nonresident of the state, so that no tender of the amount due could be made to her in the state (Alexander v. Grand Lodge A. O. U. W., 119 Iowa, 519, 93 N. W. 508).

But under the Illinois statute [1] providing for interest on instruments in writing, a contract of membership in a mutual benefit association, embodied in the certificate of membership, the constitution, and by-laws, and such oral evidence as is necessary to connect them, is an unwritten contract, on which interest is not recoverable.

Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Loomis, 142 Ill. 560, 32 N. E. 424; Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Tucker, 157 Ill. 194, 42 N. E. 398.

In an action on certificates of insurance to compel the defendant to make assessments to pay the loss caused by the death of the assured, the plaintiff is not entitled to interest on the amount provided for by the certificates, as the liability is not fixed until determined by the court (Courtney v. United States Masonic Ben. Ass'n [Iowa] 53 N. W. 238). Under the Tennessee statute [2] providing that all bills single, bonds, notes, and liquidated settled accounts, signed by the debtor, shall bear interest from the time they become due, a policy of insurance providing that the benefit to be paid in case of death shall be a sum equal to one payment to the endowment fund by each member holding an equal amount of endowment, though insufficient to pay the amount called for by the policy, draws interest as a matter of law from the date of filing the proofs of death, where no defense is made to an action on the policy, on the ground that the fund arising from the assessment is insufficient to pay the certificate (Knights of Pythias v. Allen, 104 Tenn. 625, 58 S. W. 241).

A company paying into court the amount due under a policy to abide the result of a contest therefor between rival claimants is not liable for interest on such amount pending trial (Lilley v. Mutual Ben. Life Ins. Co. of Newark, 92 Mich. 153, 52 N. W. 631). As a general rule, a demand for payment is necessary to start the

[1] Rev. St. c. 74, § 2.

[2] Shannon's Code, § 3494.

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running of interest. Thus, where the policy is payable on a day named therein, interest is recoverable only from the date of the writ, unless a demand is alleged (Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151). This case holds that where the policy was payable to the wife and children of the insured 90 days after notice and proofs of death, or to the insured himself, should he live to a specified age, the 90-day clause had no application in case the policy by the latter provision became payable to the insured, and interest was not payable except as damages for wrongfully withholding the money. So, if the policy stipulates that the assurers shall not pay the amount of the policy until 90 days after notice and proof of the assured's death, and it appears that due notice of death was not given the assurers, they will be liable for interest only from judicial demand (Trager v. Louisiana Equitable Life Ins. Co., 31 La. Ann. 235). Though, under a promise to pay in 90 days after due notice and satisfactory proof of death, interest does not accrue until the date of legal demand, if, on proof of death being tendered to the defendant, it refuses to recognize the policy as any claim against the company, this waiver of proof is a waiver of the condition that payment is not to be made until a limited time after proof, thereby permitting suit to be brought at once, and interest may be allowed without a demand (Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. [Tex.] 160). Where the insurer, in a policy reciting that it would pay to the insured's representatives a stated sum on satisfactory proof of the insured's death, denied any liability on the ground that the insured was not dead, interest did not accrue on the sum stated in the policy until proofs of death were made (Rogers v. Manhattan Life Ins. Co., 71 Pac. 348, 138 Cal. 285).

On a policy payable in another state, interest is properly awarded according to the law of such state (Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446).

(c) Persons entitled to receive payment, and effect thereof.

Policies frequently contain provisions to the effect that the production by the insurer of the receipt of any person furnishing satisfactory proof that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall constitute conclusive evidence of payment to the proper person. Under such a provision it is held that a payment to the daughter of the insured, who produced the

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policy and the premium receipt book, and her receipt, constitutes a complete defense against any claim of the beneficiary named in the application (Metropolitan Life Ins. Co. v. Schaffer, 50 N. J. Law, 72, 11 Atl. 154). In this case the court says that, if the beneficiary had a vested interest in the policy, the above condition operated as an appointment by the parties to the contract of insurance of various persons, any of whom were authorized to receive payment of the sum agreed to be paid on the death of the insured. In the case of Bradley v. Prudential Ins. Co., 72 N. E. 989, 187 Mass. 226, under a similar provision including any person appearing to the insurer to be equitably entitled to receive the payment by reason of having incurred expense in any way on behalf of the insured for her burial or for any other purpose, where it appeared that the insured had, after separation from her husband, gone through a form of marriage with another man, and that they lived together as husband and wife until the time of her death, and her putative husband paid some of the premiums on the policy, and at her death paid her funeral expenses, and the insurer, with knowledge of such payments, in good faith paid to him the amount due on the policy, and took his receipt therefor, it was held that the receipt of such person was a bar to an action by the insured's administrator. The discretion of the company in making payment to a person as equitably entitled thereto, within the meaning of the condition, is not reviewable (Brennan v. Prudential Ins. Co. of America, 170 Pa. 488, 32 Atl. 1042). In this case the court holds that, where the company makes a compromise with one appearing to it to be equitably entitled to the insurance, the payment by it of the amount compromised on will prevent recovery by another of the balance; the company not having fraudulently selected a person having no claim on the insurance, for the purpose of making a compromise and thus escaping a greater liability. But the provision affords no defense to an action by the assignee of the policy, where the company has not exercised such option by paying the amount of the insurance to some other person (Floyd v. Prudential Ins. Co., 72 Mo. App. 455). Likewise, the provision has been held insufficient to protect the insurer in making payment to another, where the application names a beneficiary (McNally v. Metropolitan Life Ins. Co., 49 Atl. 299, 199 Pa. 481). And where the policy was surrendered to the insurer by a person to whom it was assigned as collateral security, payment to another belonging to the designated classes is no defense to an action by such assignee on the policy

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(Wilkinson v. Metropolitan Life Ins. Co., 63 Mo. App. 404, 64 Mo. App. 172).

Payment may be made without the appointment of an administrator for the insured. The fact that a policy was made "payable to the assured, his executors, administrators, or assigns," does not authorize the insurance company to insist that the succession of the deceased policy holder shall be placed in the hands of an administrator when the heirs have been placed in possession by order of court, a receipt from the heirs being a sufficient protection (Pratt v. Manhattan Life Ins. Co. of New York, 47 La. Ann. 855, 17 South. 341). An assignment of a policy by the terms of which the assignee was to receive the proceeds, and, if other securities held by him were insufficient for that purpose, to apply the same to the satisfaction of his claims against the assignor, and to pay over the residue, if any, to the wife of the latter, is such a consummated transfer and delivery of the policy as to take from the assignor the legal power and dominion over it, and authorizes the company to pay the money to the assignee without the interposition of the administrator of the assignor (Harrison v. McConkey, 1 Md. Ch. 34).

Where a policy provides for payment to a beneficiary, payment to the guardian of the beneficiary, who is a minor, is authorized (Brooks v. Metropolitan Life Ins. Co., 70 N. J. Law, 36, 56 Atl. 168). A policy providing that, under certain circumstances, payment upon the death of the insured should be made to the guardian of his children for their use, if they were under age, means to the legally qualified guardian, and none other is capable of receiving the amount so as to relieve the obligation of the insurance company (Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580, 14 N. E. 811). Under such circumstances a guardian ad litem is the proper person to receive payment. But if the minors take advantage of the notice and proofs served by one as their guardian, and claiming the ownership of the policy in that capacity, they thereby affirm the guardianship and her authority over the policy as owner, and hence payment to her will discharge the company (Wuesthoff v. Germania Ins. Co., 52 N. Y. Super. Ct. 208).

A payment by the insurer to the wrong person will not discharge the company's liability. The insurer is bound to pay to the insured's illegitimate children their share under a certificate payable to "legal heirs," where the insured had made them his legal heirs, under the statute (Code, § 3385), by recognizing them in writing, though he did not inform the insurer of their existence, and the

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insurer had paid the amount of the policy to the legitimate children after having used diligence to find the legal heirs (Brown v. Iowa Legion of Honor, 78 N. W. 73, 107 Iowa, 439). In this case the court holds that the sum due to the "legal heirs" on a certificate of life insurance is not a joint indebtedness, in the sense that payments to part of the heirs will operate as a discharge as to all, in view of the statute (Code, § 2923) providing that a conveyance to two or more persons creates a tenancy in common, unless a contrary intention is expressed. Where an insurance company paid a balance due on a policy to the guardian of certain minors, under an instrument which it erroneously treated as an assignment, and which was in fact a mere designation of beneficiaries, such payment is no defense to its liability to pay such balance to the guardian in his capacity as executor under a will, subsequently executed, bequeathing the balance to the minors (Stoll v. Mutual Ben. Life Ins. Co., 92 N. W. 277, 115 Wis. 558). But a company is not liable to an assignee of an interest in the policy when it has already paid the amount of the policy to the beneficiary named therein, in ignorance of the assignment (Linder v. Fidelity & Casualty Co. of New York, 52 Minn. 304, 54 N. W. 95). If a company has paid over the proceeds of a policy to its agent on the faith of an assignment, and it is alleged that such assignment was a fraud upon the estate of the assured, practiced by said agent, before a recovery can be had against the company it must be shown that it had notice of the fraud before payment to the assignee (Northwestern Mut. Life Ins. Co. v. Roth, 87 Pa. 409). A payment to a creditor to whom the policies have been assigned as collateral security will discharge the insurer, even though the debtor made a general assignment, conditioned that all creditors accepting its benefit should release their claims in full, and the creditor in question proved its claim under such assignment, and received dividends, the amount of its debt remaining unpaid having largely exceeded the amount of the policies, where the debtor made no effort to reclaim the policies, but notified the company to cancel the same, the creditor, however, continuing to pay, and the company accepting, the premiums thereon for more than 20 years, and until the death of the insured (Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625). A company, having paid a policy issued in favor of the insured's wife, or, should he survive her, in favor of her children, on the death of the insured, who survived the wife, to the administrator of the insured's estate, who accounted for it to the orphans' court, where

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the administration was pending, which court found that he was the wife's only child and sole heir, cannot be compelled to pay again one-half of the policy to the children of a deceased stepson of the wife, though the insured intended that such stepson should share in the policy (Voss v. Connecticut Mut. Life Ins. Co., 131 Mich. 597, 92 N. W. 102). Where the amount of a mutual benefit certificate has been paid by the company to a beneficiary, without insurable interest, after written notice that the fund was claimed by the widow and heirs, but no claim was made by the widow in her capacity as executrix, she cannot, as executrix, recover such proceeds from the company (Bomberger v. United Brethren Mut. Aid Soc. [Pa.] 6 Atl. 41). An executor who accepts payment on a life policy due the estate, and distributes it to creditors, cannot recover on a former policy, payable to himself individually, for which the other had been substituted and of which he had notice, without restoring the amount received under the policy last issued (Kelly v. Connecticut Mut. Life Ins. Co., 50 N. Y. Supp. 139, 27 App. Div. 336). In this case testator's son understood for many years that his father's life insurance was payable to him. As executor, he inventoried the policy, which was payable to the estate, and recited that the original had been surrendered for a change in benefit. The company's agent told the son that there had never been another policy issued, but he was offered full access to their books. He accepted payment as executor, and released the company. The court holds that he was chargeable with notice that the former policy had been issued for his benefit, and still existed in law.

Where a life company delivered a check to the beneficiary, which was received in full payment and satisfaction of the policy, which was surrendered, the company is thereby estopped from denying that the beneficiary was the real party in interest when the check was executed (Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89).

(d) Settlement and release.

A release can be established otherwise than by a formal instrument under seal. The surrender of a policy by a creditor who has taken it out on the life of the deceased, together with a receipt in full of all demands written on the face of it and signed by such creditor, operates as an absolute discharge (McKenty v. Universal Life Ins. Co., 16 Fed. Cas. 196). But a release, by a creditor to whom a benefit certificate has been assigned as collateral security

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for a loan, on the payment of the loan, of all his rights under the certificate, which is surrendered by him, does not discharge the association from the payment of the balance of the certificate over and above the loan (Cushman v. Family Fund Soc. [Com. Pl. N. Y.] 13 N. Y. Supp. 428). Where the beneficiaries in a certificate issued by a fraternal benefit society disagreed with it as to the amount due under the certificate, the society insisting that the amount named in the policy was reduced to a certain sum by an amendment of the by-laws passed after the issuance of the certificate, and refused to pay that sum until the beneficiaries signed a certificate acknowledging payment of the policy and surrendered it for cancellation, the acceptance by the beneficiaries of a draft for the amount tendered by the society, and the signing and delivery of the certificate required, were evidence of a settlement by the beneficiaries with full knowledge of all the facts, sufficient to establish an accord and satisfaction (Simons v. Supreme Council A. L. H., 70 N. E. 776, 178 N. Y. 263, reversing 81 N. Y. Supp. 1014, 82 App. Div. 617). In this case the court holds that the fact that one of the beneficiaries wrote above his indorsement, "Receipt below given for $1,900 only," while the beneficiaries had claimed a larger amount, was not a protest affecting the legal effect of the surrender certificate.

A surrender of a life policy, and the release of the company from liability thereon, on payment by it of a less sum than is due on the policy at its surrender value, is without consideration and void (Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303). This is true even though the beneficiary gave a receipt for the whole amount actually due, agreeing to receive the amount paid in full, as where the beneficiary was shown a by-law of the company reducing her claim far below the amount actually due, and settled with the company under the mistaken belief that the by-law was applicable (Goodson v. National Acc. Ass'n, 91 Mo. App. 339). So, a receipt or release in full, given on payment by a beneficial association of $2,000 of the $5,000 which a certificate provided should be paid, is without consideration as to the $3,000; liability for the $2,000 not being denied, but conceded (Supreme Council American Legion of Honor v. Storey [Tex. Civ. App.] 75 S. W. 901). Where a life policy provided that the insurer would pay to the beneficiaries $5,000 if the insured died from any cause other than suicide, and also the assessments that the insured had paid under the policy, and, on the death of the insured, the

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insurer, claiming that the insured committed suicide, paid the amount of the assessments, which were payable, though the insured committed suicide, a release of further liability on receiving the amount of the assessments paid was without consideration, and did not prevent the collection of the face of the policy if the insured did not commit suicide (Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066). But it has been said that a policy of insurance is not a liquidated demand which the payment of a less sum cannot satisfy, even though accepted as such, because of the lack of a consideration for releasing the balance (Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74, 100 Am. St. Rep. 666).

A receipt in full for all claims under a policy, though not conclusive, is always prima facie evidence of a settlement, and should not be varied or set aside but for weighty reasons, especially after a lapse of time (Benseman v. Prudential Ins. Co. of America, 13 Pa. Super. Ct. 363). A beneficiary cannot rescind and recover on the policy unless he first returns or tenders the amount he has received under the compromise.

> Westerfield v. New York Life Ins. Co., 129 Cal. 68, 58 Pac. 92; Moore v. Massachusetts Ben. Ass'n, 165 Mass. 517, 43 N. E. 298; Manhattan Life Ins. Co. v. Burke, 70 N. E. 74, 69 Ohio St. 294, 100 Am. St. Rep. 666; Slater v. United States Health & Accident Ins. Co., 95 N. W. 89, 133 Mich. 347.

But it has been held that this is unnecessary where in any event he is entitled to retain that which he has received (Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339).

A settlement obtained by fraud is invalid and will be set aside. Thus, a settlement of a $5,000 claim on a mutual benefit insurance certificate for $1,900, induced by the company's representation that it had enacted a by-law reducing the insurance in that proportion, when the company knew that the by-law had been held void by the Supreme Court, will be set aside as fraudulent (Simon v. Supreme Council L. of H., 86 N. Y. Supp. 866, 91 App. Div. 390). So, a settlement secured through fraudulent representations to the executor of the insured, whose mental faculties are impaired by age, financial disasters, and affliction, that the company will contest and defeat the collection of the policy, will be set aside (McLean v. Equitable Life Ins. Soc. of the United States, 100 Ind. 127, 50 Am. Rep. 779). A release procured by an insurance adjuster of a claim on a policy by fraudulently representing that the policy was

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void because not having been delivered in the good health of the insured is not binding (Northwestern Life Ass'n v. Findley, 29 Tex. Civ. App. 494, 68 S. W. 695). Where a beneficiary releases a beneficial order, on the payment to her of $500, from the payment of her claim of $3,000, because the officers of such order falsely represented that deceased was not in good standing at the time of his death, and she had no claim whatever against it, a court of equity will set such release aside, and the fact that she had the benefit of the advice of competent counsel does not deprive her of the right to have such release set aside, if he also was misinformed by such officers (Henry v. Imperial Council of Order of United Friends, 52 N. J. Eq. 770, 29 Atl. 508). Where the company fraudulently represented to the beneficiary that the deceased died by his own hand, while of sound mind, and that the company had proof of it, these were material facts, which the beneficiary had a right to rely on, and the beneficiary may retain the money received, and sue for the damages resulting from the deceit (Michigan Mut. Life Ins. Co. v. Naugle, 130 Ind. 79, 29 N. E. 393).

A compromise cannot be set aside as having been procured by false representations as to matters of law or as to facts which the party giving the release was bound to know, nor for a misrepresentation which is the assertion of something in futuro, in the nature of a threat, and is not a fraud in law (Dunn v. Commonwealth Ins. Co., 8 Fed. Cas. 96). If a beneficiary, who did not know that the policy contained a clause by which it was not contestable at the time of the death of the insured, was induced to settle by representations of an agent of the company, who knew of such clause, that certain warranties were false, and that the company was not liable on the policy, and the warranties were false, and the incontestable clause was not clear in its terms, the settlement was not fraudulently procured, since the representations of the fact were true, and the statement that the company was not liable was the mere statement of an opinion by one not occupying a confidential relation to the beneficiary (Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014). The mere fact that the insured in an accident policy was induced to sign a discharge on representations made by the insurer's physician as to his condition, where such representations were concurred in by insured's physician, but both were mistaken, and there is no evidence that their representations were not their honest opinions, will not avoid the release on the ground of fraud (Wood v. Massachusetts Mut. Acc. Ass'n, 174

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Mass. 217, 54 N. E. 541). Where the company, by claiming that a policy was void for breach of a warranty in the application of insured, as to his health, compromised the claim with the beneficiary (the wife) by giving her a fourth of its face value, and she had talked the matter over with a friend, and had acted on the advice of her attorney, and there was nothing to show that the company had acted in bad faith in giving or concealing information, or that it had misled the beneficiary in regard to the health of insured, the compromise is binding on the beneficiary (Milne v. Northwestern Life Assur. Co., 52 N. Y. Supp. 766, 23 Misc. Rep. 553). In this case the court holds that the beneficiary cannot claim that the policy in fact had never lapsed, in the absence of any fraud or misrepresentations, and where the adjustment had been acted on by both the insurer and the beneficiary.

A beneficiary is entitled to return the sum received under a settlement, and recover the actual amount due, if she was unduly influenced or overreached in making the settlement. It is not necessary for her to prove either strict legal duress or actual fraud (Northwestern Mut. Life Ins. Co. v. Woods, 54 Kan. 663, 39 Pac. 189). A settlement obtained by taking the beneficiary by surprise, and by requiring her to act at once, without an opportunity to take legal advice or to ascertain the facts, is invalid (Order of United Commercial Travelers of America v. McAdam, 125 Fed. 358, 61 C. C. A. 22).

Under the Illinois statute [8] providing that a guardian may settle all accounts of his ward, or, with the approbation of the court, compound for the same, the guardian of beneficiaries in a life policy has no authority, without an express order of the court, to compromise the claim and accept a settlement for less than the full payment.

Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303, reversing 21 Ill. App. 258; Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

The Hayes Case holds that the company bringing about such a surrender is affected with notice of the guardian's want of authority, and becomes liable for the conversion of the policy in an action by the ward without a previous demand; the measure of damages being the balance of the principal sum due on the policy, with interest. The Crayton Case holds that the minor beneficia-

[8] 1 Starr & C. St. p. 1241, § 17.

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ries are not estopped, on reaching their majority, from claiming the face of the policy, by accepting from the guardian, as they attain their majority, their share of the amount paid. So, where, the son of a member of a mutual relief association being in fact entitled to the whole of the fund payable on his father's death, his guardian, on making claim therefor, was informed by the president that only a part of the fund was due to the son, and that the balance belonged to another person, who had been named as a beneficiary, and the guardian, in good faith, without disputing this, accepted the smaller sum, and signed a receipt in full, the remainder of the money being then paid to the person supposed to be entitled thereto, a suit may still be maintained by the son for the balance of the fund, and the guardian's passive assent to the payment of the balance to the wrong person does not amount to an estoppel (Tyler v. Odd Fellows' Mut. Relief Ass'n, 145 Mass. 134, 13 N. E. 360). A settlement by a guardian may be set aside for fraud, though made under the direction of the probate court (Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411).

(e) Matters peculiar to mutual benefit associations.

A payment to trustees appointed by a benevolent society to receive assessments and to pay the money received over to the persons entitled thereto does not discharge the society, such trustees being agents of the society.

Pfeifer v. Supreme Lodge of Bohemian Benevolent Slavonian Soc. of United States, 173 N. Y. 418, 66 N. E. 108, affirming 74 N. Y. Supp. 720, 37 Misc. Rep. 71; Osterman v. District Grand Lodge No. 4, I. O. B. B. (Cal.) 43 Pac. 412.

Liabilities which have already accrued against a benefit insurance company are not discharged by the tender back of an assessment paid to the company (Burlington Voluntary Relief Department v. White, 41 Neb. 547, 59 N. W. 747, 43 Am. St. Rep. 701). Where a life policy was payable to insured and "the surviving members" of a certain club, "whose certificates remain in force, share and share alike," and there was no provision for the payment of the sum due to all of the surviving members of the club in one installment, to be divided among those entitled thereto, a member is entitled to be paid directly by the insurer (Emmeluth v. Home Ben. Ass'n, 12 N. Y. St. Rep. 654).

Benefit certificates frequently contain a provision that they shall be payable only on the return and surrender of the certificate.

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Under such a provision, where the certificate has been paid by one branch of the order, which has separated into two bodies, and the certificate has been surrendered, the other branch of the order is discharged, because of the inability to surrender the certificate (Bock v. Ancient Order of United Workmen, 75 Iowa, 462, 39 N. W. 709). But the provision is waived where the society refuses to pay solely on the grounds of nonpayment of assessments, and that another beneficiary has been substituted (Himmelein v. Supreme Council A. L. H. [Cal.] 33 Pac. 1130). And if the certificate is in the possession of a person other than the beneficiary, who refuses to deliver the same, the condition relating to surrender will be reasonably and equitably construed, and the beneficiary may recover, though he cannot surrender the certificate (Smith v. Supreme Council Royal Arcanum, 37 S. E. 159, 127 N. C. 138).

A stipulation in the contract of a railroad relief association that a person receiving benefits shall release the railroad company from liability for the injuries received or for the death of the assured is held valid.

Fuller v. Baltimore & Ohio Employés' Relief Ass'n, 67 Md. 433, 10 Atl. 237; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 47, 66 Am. St. Rep. 456; Clinton v. Chicago, B. & Q. R. Co., 60 Neb. 692, 84 N. W. 90; Oyster v. Burlington Relief Department of Chicago, B. & Q. R. Co., 65 Neb. 789, 91 N. W. 699, 59 L. R. A. 291.

So, a stipulation that in case suit is brought by a member or his representatives to recover for the injuries or death, and is prosecuted to judgment or compromised, recovery under the certificate shall be precluded, is not against public policy nor invalid as restricting the liabilities of railroads for the negligence of their employés (Donald v. Chicago, B. & Q. R. Co., 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971). In this case the court holds that the compromise of such an action brought by the administrator of the member defeats all rights of the beneficiary of the certificate arising from the contract of membership. In the Fuller Case the court holds that where a member of a railroad relief association whose constitution provided that the railroad's liability should be released before the benefit should be paid, had designated his mother as his beneficiary, and upon his death his wife and minor child, the persons legally entitled to damages, did not release the railroad company, but brought suit, and recovered damages by a compromise, the mother had no right of action against the relief association for

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benefits. The Oyster Case holds that, where the full penalty prescribed by the statute has been recovered for killing an employé, the beneficiary named in the certificate of such employé cannot maintain an action against the railroad company on the benefit certificate. Acceptance by a member of relief benefits operates as a release and satisfaction of the claim for damages arising from the injury (Chicago, B. & Q. R. Co. v. Olson [Neb.] 97 N. W. 831). But this case holds that the fact that a member, after electing to accept the benefits under his membership, brought an action against the company for damages, does not annul the former election nor bar his right to the benefits thereunder. The election of the widow of a member to accept the provisions of the certificate under which she was beneficiary will not bar an action by the personal representative against the railroad company for the benefit of the minor children of the deceased.

Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Oyster v. Burlington Relief Department of Chicago, B. & Q. R. Co., 65 Neb. 789, 91 N. W. 699, 59 L. R. A. 291.

(f) Recovery of payments.

Mistake and fraud are the grounds upon which a recovery of payments made on a policy is usually sought. By payment of a policy the insurer is deemed to have settled or waived all questions as to the validity of the original contract except fraud.

Metropolitan Life Ins. Co. v. Harper, 17 Fed. Cas. 218; Mutual Life Ins. Co. v. Wager, 27 Barb. (N. Y.) 354.

The Wager Case holds that if a person insures the life of his creditor, and upon the creditor's death receives the amount of the policy, no action will lie to recover back the same on the ground of false representations made by the person obtaining the insurance, or his agent, in regard to the health of the insured at the time of the application for insurance.

Where a receiver of a corporation of which the intestate was the principal owner, with knowledge that intestate's administratrix had concealed certain life endowment policies payable to intestate, in fraud of intestate's receiver, was permitted by the court, on representing that such policies were payable to the administratrix, to collect the insurance under an assignment of the policies by the administratrix, the company, on being required to pay the amount a second time, has the right to recover of the receiver of the corporation the amount wrongfully received by him (Reynolds v. Ætna

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Life Ins. Co., 55 N. E. 305, 160 N. Y. 635, affirming 51 N. Y. Supp. 446, 28 App. Div. 591).

In order that an insurance company may recover from a husband, as his wife's administrator, the amount paid to him upon a policy of insurance on his wife's life, on the ground that the beneficiary and the company's medical examiner had conspired to cheat and defraud the company by means of false and fraudulent representations in obtaining the insurance, it must appear that the insured had knowledge of the existence of fraud (National Life Ins. Co. v. Minch, 6 Lans. [N. Y.] 100). False and fraudulent representations in the certificate of the insurer's medical examiner, and representations fraudulently made by others in the application for insurance, of which the insured is shown to have been ignorant, do not charge the insured with participation in the fraud, or knowledge of it, so as to enable the insurer to maintain an action for the recovery of the payment of the loss on the ground of conspiracy to defraud in obtaining the insurance. But it is said that an innocent principal cannot take an advantage resulting from the fraud of an agent without rendering himself civilly liable to the injured party. Accordingly, when a husband, as agent of his wife, by fraud procured an insurance upon her life, money paid upon the policy by the insurance company to the personal representative of the wife after her death may be recovered back, notwithstanding the wife was innocent of the fraud (National Life Ins. Co. v. Minch, 5 Thomp. & C. [N. Y.] 545). Where a wife, acting with her husband's knowledge and consent, procures an insurance of her life for his benefit, the premiums being paid by him, and the policy delivered into his possession, she is, in effect, his agent, and, though he may have been ignorant of misrepresentations made in her application, he cannot claim, in an action against him to recover the sum paid on such insurance, that he was ignorant of false statements made in the application, which the evidence showed to have been well known to him at the time the policy was delivered, and when he demanded and received the money (Centennial Mut. Life Ass'n v. Parham, 80 Tex. 518, 16 S. W. 316).

By paying the amount of a policy after knowledge of fraud inducing it to issue the same, the insurer ratifies the contract, and cannot afterwards recover the money paid by it (New York Life Ins. Co. v. Hord, 77 S. W. 380, 25 Ky. Law Rep. 1219). So, where an incontestable insurance policy was procured by fraud, and the company did not elect to rescind the same during the life of in-

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sured, and, on her death, under an impression that it could not defend an action on the policy, paid the same, it is not entitled to maintain an action against insured's administrator for deceit to recover the amount of the policy paid and other damages (New York Life Ins. Co. v. Weaver's Adm'r, 70 S. W. 628, 114 Ky. 295). Where the insurer paid a loss under a policy, knowing that a defense existed to the claim, but believing that a payment would benefit the company, it cannot thereafter recover the money so paid (National Life Ins. Co. v. Jones, 59 N. Y. 649, affirming 1 Thomp. & C. 466).

If a payment is made under a mistake of fact, the insurer is generally entitled to recover back the same. Thus, where officers of a mutual benefit society have paid the whole of a benefit to certain beneficiaries, having been led into the mistaken belief that no other beneficiary with a superior right was in existence, and the latter beneficiary recovers from the company the part due him, the company may recover back such amount from the former beneficiary (Gaines v. Kentucky Grangers' Mut. Ben. Soc., 11 Ky. Law Rep. 580). So, where money has been paid by a mutual benefit association to a person incapable of receiving it, under the charter of the society, by reason of a mistake of fact, the society may, in an action against it by the widow and children of the member, recover such payment of the person to whom it has been made, on a cross-petition, such person being entitled to retain the payment actually made by him to keep the certificate in force (Gibson v. Kentucky Grangers' Mut. Ben. Soc., 8 Ky. Law Rep. 520). But mere ignorance of a fact which would have enabled the company to defend on account of a breach of warranty is not such a mistake of fact as will enable it to recover back money paid upon the policy (National Life Ins. Co. v. Minch, 53 N. Y. 144).

In an action to recover back moneys paid for an alleged loss, because of fraud, the burden of showing that there was in fact no loss is on insurer (Mutual Life Ins. Co. v. Wager, 27 Barb. [N. Y.] 354).

(g) Pleading and practice.

An action against an insurance company for the difference between the face of a policy and a sum agreed on under a compromise, in which the complaint alleged that the plaintiffs had repudiated the compromise on the ground of fraud and demanded the balance due, and which was submitted under a charge that, if the jury believed the averments to be true, they should find for the

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plaintiffs for the difference between the amount received and the face of the policy, with interest, is an action based on the policy, and not an action in tort for deceit (Westerfield v. New York Life Ins. Co., 129 Cal. 68, 58 Pac. 92). In this case the court holds that where the complaint does not offer to restore the sum paid in compromise, and the court submits the case to a jury, and rescission is not touched on in the judgment, the action cannot be regarded as a suit for rescission.

Equity has jurisdiction to set aside as fraudulent a settlement of a minor's claim on an insurance policy by his guardian under the direction of the probate court, there being no adequate remedy at law (Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411). If the beneficiary in a life certificate after the death of the insured was induced by false statements made by representatives of the association to settle her claim and receipt the certificate, her remedy, in a federal court, at least, is in equity, and not at law, where evidence to avoid the settlement and receipt for fraud is not admissible (Stephenson v. Supreme Council A. L. H. [C. C.] 130 Fed. 491). Where an assignment of a policy by the insured to his creditor, though prima facie absolute, was treated by all parties as intended for security merely, and the creditor himself did not claim the entire amount of insurance, but on the death of the insured surrendered the policy and assignment, with the notes which it was intended to secure, on payment of his claim by the insurer, it is not essential that a court of equity should decide that the assignment was intended as security merely, before bringing suit in the city court of New York to enforce payment of the balance of the policy to the representatives of the insured (Cushman v. Family Fund Soc. [City Ct. N. Y.] 9 N. Y. Supp. 272).

An action against an insurance company for fraudulent representations, inducing a settlement of a death claim against it, is not within a by-law of the company which provides that no action shall be sustained in any court of law or chancery on any death claim unless the same shall be commenced within 12 months after the death of the member (Wabash Val. Protective Union of Crawfordsville v. James, 8 Ind. App. 449, 35 N. E. 919).

Under a policy reserving the right of the company to pay to the executor, husband, wife, relative, or lawful beneficiary, a plea that, before suit brought, the company had paid the policy to the guardian of the lawful beneficiary, who was a minor, is good on demurrer (Brooks v. Metropolitan Life Ins. Co., 56 Atl. 168, 70 N. J. Law, 36).

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A failure of the insurer, pleading payment to another, to aver that such other had filed proofs of loss, will not invalidate it; such provision being for the benefit of the company (Brooks v. Metropolitan Life Ins. Co., 56 Atl. 168, 70 N. J. Law, 36). The issue of a fraudulent procurement of a release set up in the answer may be first tendered by the reply (Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339). Where a contract of settlement is pleaded as a defense, and it appears that at the time of such settlement a dispute existed as to the liability of the company, a reply alleging simply that the compromise was induced by fraud, but failing to allege a payment or tender back of the amount received from the company, is not responsive to the answer, and is insufficient (Manhattan Life Ins. Co. v. Burke, 70 N. E. 74, 69 Ohio St. 294, 100 Am. St. Rep. 666). The defendant, a railroad relief association, having averred that certain parties entitled to damages on account of the accident had brought suit against the railroad company, and had recovered damages, and had not released the company, a replication thereto, alleging that the accident was not the result of any negligence of the company, and that the parties were not entitled to damages unless there was such negligence, is not a sufficient replication, as it does not negative the material parts of the plea (Fuller v. Baltimore & O. Employés' Relief Ass'n, 67 Md. 433, 10 Atl. 237).

A genuine indorsement by the insured on the policy, assigning all his interest therein to a third party, and a receipt by the latter of payment "in full of all claims on the within policy," presents a prima facie defense to a claim thereon (Northwestern Mut. Life Ins. Co. v. Roth, 118 Pa. 329, 12 Atl. 283). The defendant association having paid the policy to an assignee, the burden of proof is on the plaintiff to show that the assignment on the policy was not valid, or that the assignee had no insurable interest in the life of deceased; and, neither being shown, the prima facie title of the assignee is a complete defense to the action (Home Mut. Life Ass'n v. Seager, 128 Pa. 533, 18 Atl. 517). If the defendant alleges in defense that the plaintiff consented that the money due should be applied in paying a sum embezzled by the insured, and that it was so applied, the burden of proving such issue is on the defendant (Osterman v. District Grand Lodge No. 4, I. O. B. B. [Cal.] 43 Pac. 412).

Where a by-law of a beneficial society provided that, at the death of a member, $25 was to be paid to his widow or relatives, to provide for his decent interment, in a suit by the widow of a deceased

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member against the society for the benefit, where it appeared that the widow had for years been voluntarily separated from her husband, and had incurred no expense towards his interment, evidence to show that the benefit had already been paid to the decedent's son-in-law, at whose house he died, and who bore the funeral expenses, is admissible (Berlin Beneficial Soc. v. March, 82 Pa. 166). The company having paid the amount of the policy to an assignee, a letter from the assignee's agent to the company urging payment, and stating that the writer would be responsible if the company should have any trouble about it, and adding that there was no danger in that respect, is not admissible for the plaintiff executrix to show notice to the company of adverse claim, and that payment was not made in good faith (Home Mut. Life Ass'n v. Seager, 128 Pa. 533, 18 Atl. 517). Proof of payment by the association to one named as executrix in an instrument inoperative as a will, executed by the insured, with the approbation of the father of the beneficiary, who was a minor, is not relevant in an action by the beneficiary, nor proof that the proceeds thereof had been applied to the support of the beneficiary (Grand Fountain of United Order of True Reformers v. Wilson, 96 Va. 594, 32 S. E. 48).

Where the plaintiff is entitled to recover, the submission of the question of interest to the jury is error, as the plaintiff is entitled to such interest from the time at which, under the contract, the money was due (Supreme Lodge Knights of Honor v. Lapp's Adm'x, 25 Ky. Law Rep. 74, 74 S. W. 656). If a life policy is settled for less than its face by representations by the company that the policy is not collectible, when in fact it is collectible, and suit is afterwards brought for the balance due thereon, the question whether there was any consideration which would render the settlement a valid accord and satisfaction should be submitted to the jury (Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014). So, whether the agent was sincere and acted in good faith in representing that the incontestable clause was of doubtful interpretation is for the jury (Franklin Life Ins. Co. v. Villeneuve, 29 Tex. Civ. App. 128, 68 S. W. 203). Where, after the death of a debtor, a creditor, for whom the debtor had taken out a policy on his life, settled with the company in full of all demands under the policy, and surrendered it, and thereafter assigned all right, title, and interest in the policy to the administratrix of the assured, subject to the amount which he had received from the company, and such administratrix brought an action against the company to recover

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such balance, claiming that the creditor was a mere trustee for the amount of his debt, and that the settlement by him could not affect the estate of assured, there being no evidence outside of the policy to show that the assured was a trustee, and that when his debt was paid he must account for the balance of the amount specified in the policy, the construction of the contract, so far as the intention of the parties thereto was concerned, was one for the court alone, and not for a jury. (McKenty v. Universal Life Ins. Co., 16 Fed. Cas. 196.) Under a policy authorizing payment to either the personal representatives, husband or wife, or relative by blood or marriage, of the insured, and providing that the production of a receipt by the company, signed by any one of these persons, should be conclusive evidence that the insurance money had been paid to the person or persons lawfully entitled to receive the same, in an action by the husband and administrator of the insured, an affidavit of defense which sets up a payment of the policy to the mother of the insured, and a receipt by her for the same, is sufficient to prevent judgment, and to warrant the submission of the case to the jury (Pfaff v. Prudential Ins. Co. of America, 141 Pa. 562, 21 Atl. 663). Where, in an action by the original beneficiary to recover on an assigned policy of life insurance, which provided that upon proof of death the insurance should be paid to the representatives of the insured or his assignee, the complaint alleged that the company and assignee "conspired to defeat the plaintiff out of the proceeds of the policy," and the plaintiff introduced evidence that the policy was in force at the time of the death of the insured, and that payment was made to the assignee in accordance therewith, but did not attack the validity of the assignment, the direction of a verdict for the defendant was proper (Mellerup v. Travelers' Ins. Co., 95 Iowa, 317, 63 N. W. 665).

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4. PENALTIES FOR REFUSAL OF, OR DELAY IN MAKING, PAYMENT—ATTORNEY'S FEES.

(a) Validity and construction of statutes.
(b) Application to different kinds of insurance.
(c) Operation and effect of statutes.
(d) Attorney's fees.

(a) Validity and construction of statutes.

Though there is a conflict in the decisions as to the validity of statutes imposing penalties upon insurance companies for the nonpayment or delay in making payment of claims, the weight of authority is that such laws are valid.

The Texas statute [1] imposing on life and health insurance companies, upon a failure to pay a loss within the time specified in the policy after a demand therefor, a liability in addition to the amount of the loss of 12 per cent. damages and reasonable attorney's fees, has been held constitutional and valid, and not objectionable as taking property without due process of law, or as denying the equal protection of the laws to such companies, or for any other reason, although such obligation is not imposed upon other classes of insurance companies.

Fidelity Mut. Life Ass'n v. Mettler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; Merchants' Life Ass'n of United States v. Yoakum, 98 Fed. 251, 39 C. C. A. 56; Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Union Cent. Life Ins. Co. v. Chowning, 26 S. W. 982, 86 Tex. 654, 24 L. R. A. 504; Mutual Life Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; Mutual Life Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Mutual Life Ins. Co. v. Simpson (Tex. Civ. App.) 28 S. W. 837; Fidelity & Casualty Co. of New York v. Allibone, 90 Tex. 660, 40 S. W. 399, affirming 39 S. W. 632, 15 Tex. Civ. App. 178; Kansas Mut. Life Ins. Co. v. Coalson, 54 S. W. 388, 22 Tex. Civ. App. 64; New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; New York Life Ins. Co. v. English (Tex. Civ. App.) 70 S. W. 440; Sun Life Ins. Co. of America v. Phillips (Tex. Civ. App.) 70 S. W. 603.

This holding is based on the ground that the state has the right to prescribe the terms upon which foreign corporations may do business therein. Insurance companies established by charter from

[1] Rev. St. art. 2953; Rev. St. 1895, art. 3071.

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one state have no natural right to carry on business in any other state, permission to do so being a privilege for which the payment of a substantial sum as licensee may be required. In the case of New York Life Ins. Co. v. Smith (Tex. Civ. App.) 41 S. W. 680, upon a rehearing the Texas statute was held unconstitutional by a divided court upon the authority of Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. But the Smith Case is expressly overruled in New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

So, the Tennessee statute [2] making insurance companies refusing in bad faith to promptly pay a loss, and policy holders bringing suit in bad faith, liable to a penalty, as damages, not exceeding 25 per cent. of the loss or the claimed loss, is held not to be repugnant to the equality clause of the federal Constitution, as there is such a difference between the insurance business and other kinds of business as to justify the act (Continental Fire Ins. Co. v. Whitaker & Dillard [Tenn.] 79 S. W. 119, 64 L. R. A. 451).

A contrary view has been taken, however, of the Georgia statute [3] providing for a penalty of 25 per cent. of the liability of the insurance company and all reasonable attorney's fees, where the company refuses in bad faith to pay a loss within 60 days after a demand has been made. This statute is held to be in violation of the fourteenth amendment of the federal Constitution, as a taking of property without due process of law, and a denial of the equal protection of the laws.

Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67; Phœnix Ins. Co. of Hartford v. Schwartz, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752.

Likewise, the Missouri statutes [4] providing that, if an insurance company has vexatiously refused to pay a loss, damages not exceeding 10 per cent. and a reasonable attorney's fee may be recovered, is held to be unconstitutional as denying to insurance companies the equal protection of the laws (Williamson v. Liverpool, L. & G. Ins. Co. [C. C.] 105 Fed. 31). The business of insurance, the court says, is not of such a character as to render insurance contracts or actions thereon proper subjects for discriminative legislation under the police power of the state. Nor is the fact that the

[2] Acts 1901, p. 248, c. 141, §§ 1, 2.
[3] Civ. Code, § 2140.
[4] Rev. St. 1899, § 8012; Rev. St. 1889, § 5927.

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payment must have been "vexatiously refused" to subject the defendant to the penalty material, since no corresponding penalty is incurred by the plaintiff in case the suit is vexatiously brought.

It has been held that the Texas statute (Act 1874) is not retroactive, and does not apply to losses occurring before the passage of the act (Piedmont & A. Life Ins. Co. v. Ray, 50 Tex. 511). So, it is held that the amendment of 1899 to the Missouri statute (Rev. St. 1889, § 5927) allowing a recovery for attorney's fees, where there has been vexatious delay in paying the loss, cannot relate back and apply to a refusal to pay a loss occurring before the amendment went into effect (Thompson v. Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889). Such statute is a law relating to the performance of the insurance contract, and not to the remedy; and hence in a suit in Missouri on an insurance contract made in Kansas, between citizens of that state, there can be no recovery under the Missouri statute for vexatious delay (Thompson v. Traders' Ins. Co., 68 S. W. 889, 169 Mo. 12).

(b) Application to different kinds of insurance.

There are some kinds of insurance companies which are exempted from the statutes of certain of the states, either by express provision or by implication. Thus, under the Texas statute [5] exempting mutual relief associations which have no capital stock, and whose funds are raised by assessment, from the operation of the general insurance laws, a fraternal beneficiary corporation created under the laws of a sister state, whose relief funds are created by assessments on its members, which has subordinate lodges to which application is made for membership, and which issues benefit certificates, the amount payable on which is under a by-law dependent on the sum collected by assessments, is not liable to the penalties provided by the general statute.

Supreme Council A. L. H. v. Story, 97 Tex. 264, 78 S. W. 1; Supreme Council A. L. H. v. Larmour, 81 Tex. 71, 16 S. W. 633.

The court holds in the Story Case that the burden of showing that the association is withdrawn from the protection of the statute by a failure to make an annual statement to the insurance department, as provided for in the statute, is on the beneficiary suing on the certificate, reversing the lower court (75 S. W. 901). But in

[5] Rev. St. 1895, art. 3096; Sayles' Civ. St. art. 3096.

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Mutual Reserve Fund Life Ass'n v. Payne (Tex. Civ. App.) 32 S. W. 1063, it was held that it was incumbent on a company which had rendered itself amenable to the penalty to show every fact necessary to bring it within the exception of the statute. It is also held that the Texas statute imposing a penalty on a life or health insurance company has no application to accident insurance companies, the two being distinct.

Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Ætna Life Ins. Co. v. J. B. Parker & Co., 96 Tex. 287, 72 S. W. 168; Id., 30 Tex. Civ. App. 521, 72 S. W. 621.

The Missouri statute does not apply to town mutual insurance companies, since they are expressly exempted from the provisions of the statute relating to insurance companies generally [6] (Sappington v. St. Joseph Town Mut. Fire Ins. Co., 77 Mo. App. 270).

As regards foreign and domestic corporations, the Georgia statute (Code, § 2850) applies, both in its letter and purpose, to foreign corporations doing business in the state, as well as to domestic corporations, even though the contract may have been concluded by the issuing of the policy in another state whose laws contain no such provision (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18). But the Indiana statute [7] has reference to domestic corporations only, the title of the act not being broad enough to include foreign corporations (Commonwealth Ins Co. v. Monninger, 18 Ind. 352). A foreign insurance company which obtains permission to do business in Texas cannot avoid the penalty by a stipulation in the policy that it shall be payable in the state of incorporation in which no such penalty is provided for (Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014).

(c) Operation and effect of statutes.

In the absence of statute there is no liability for damages beyond legal interest, where an insurance company fails to make payments as provided for in the policy (New Orleans Ins. Co. v. Piaggio, 16 Wall. 378, 21 L. Ed. 358). The question of the company's liability arises under the statutes of the various states providing a penalty for the failure to make prompt payment of losses, and depends on the wording of the different statutes. Under the Missouri statute, providing for a penalty in case of vexatious delay it is held that for-

[6] Laws 1895, p. 200.

[7] 1 Rev. St. p. 334, § 22.

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mal affirmative proof of vexatious refusal to pay is not required, but such refusal, to justify the infliction of the penalty, must have been willful or without reasonable cause; and this question of willfulness will not be determined by the outcome of things at the trial, but by the appearance before the trial as judged by a prudent and reasonable man (Blackwell v. American Cent. Ins. Co., 80 Mo. App. 75). In Mack v. Lancashire Ins. Co. (C. C.) 4 Fed. 59, the federal court holds that, in order to recover under the Missouri statute, it must be shown that there was no reasonable ground for contesting either the validity or the amount of the claim. Under the provision of the Missouri statute permitting a recovery of a sum not exceeding 10 per cent. of the policy, it is held error to instruct that, if the defendant has vexatiously delayed, the jury may assess damages "to the amount of ten per cent." (Ramsey v. Philadelphia Underwriters' Ass'n, 71 Mo. App. 380).

Under the Texas statute imposing a penalty on a company failing to pay a loss within the time specified in the policy, after a demand is made therefor, a demand is necessary, notwithstanding its apparent futility, and the suit itself is not a sufficient demand.

Employers' Liability Assur. Corp. v. Rochelle, 35 S. W. 869, 13 Tex. Civ. App. 232; Northwestern Life Assur. Co. v. Sturdivant, 59 S. W. 61, 24 Tex. Civ. App. 331.

Where the beneficiary is uncertain by reason of conflicting claims, and the company proceeds promptly and properly to file its bill of interpleader, it is not liable for the statutory penalties for failure to pay the loss within the time specified in the policy after a demand of payment (Stevens v. Germania Life Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824).

Under the Texas statute the penalty will only be charged on the portion of the amount due which the company withholds (Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014). If the policy is payable in annual installments, the penalty and the attorney's fees should be computed only on the installments due when the suit was instituted (New York Life Ins. Co. v. English [Tex. Civ. App.] 70 S. W. 440). Where it is undisputed that 10 per cent. is a reasonable attorney's fee, it is not error to charge the jury to find 10 per cent. as attorney's fees (New York Life Ins. Co. v. English [Tex. Civ. App.] 70 S. W. 440). A petition alleging that 10 per cent. on the amount due on the policy, amounting to $207,

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is a reasonable attorney's fee for prosecuting that action, will sustain a judgment for $250 for such fees; that in fact being 10 per cent. of the amount due (Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123).

The Georgia statute provides that, in case of a refusal "in bad faith" to pay a loss in 60 days, certain damages may be recovered. The term "bad faith" means any frivolous or unfounded refusal to pay, and the refusal need not necessarily be fraudulent. (Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220.) It does not, however, apply where a company refuses to pay a loss on the ground that the house was used, with the knowledge of the owner, as a place for prostitution (Phenix Ins. Co. v. Clay, 28 S. E. 853, 101 Ga. 331, 65 Am. St. Rep. 307). So, the fact that the books kept by the insured, while sufficient to comply with the iron-safe clause of the policy, were conflicting, and difficult to be understood by reason of their not being kept on some clear and regular system, affords a good reason on the part of the company for being unwilling to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed by the plaintiff, and it is not bad faith for the agent to refuse to pay the whole of the loss claimed (Liverpool & L. & G. Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006). But where the evidence and the allegations of the defendant show that it delayed payment on the pretext of wanting to investigate the matter, but that it made no effort in that direction, and after the commencement of the suit it offered to pay the face of the policy, the jury may properly infer "bad faith" (Hull v. Alabama Gold Life Ins. Co., 79 Ga. 93, 3 S. E. 903). Likewise, where the agents of the company show active sympathy with one who claims the proceeds of a policy against the legal representative of the insured, and refuse to pay any part of the same until such claimant is satisfied, though such claim is for a portion only, it is evidence of bad faith (Mutual Life Ins. Co. v. Watson [C. C.] 30 Fed. 653). Counsel fees are also recoverable in a case where the insurance company, after offering to settle for a discount, attempts to force the plaintiff to take less than the amount to which he is entitled by threatening to prosecute him on a charge of burning the property; the evidence showing a scheme to force him to settle for a small amount (Watertown Fire Ins. Co. v. Grehan, 74 Ga. 642). The question of good or bad faith is to be solved by evidence applicable to the merits of the controversy, and not by

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a collateral inquiry depending on evidence having no relevancy to the merits, but only to the special question. Consequently, evidence that a report was current in the neighborhood that the assured was not dead, but had run off in order to defraud his insurers, is not admissible to show the good faith of the insurer, as it was the duty of the insurer to investigate the truth of such report (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18). In this case the court holds that the affidavits produced to the insurer as the required preliminary proof of the death of the insured are not competent to show bad faith, since the good faith of the company should not be judged by ex parte affidavits, but by the case made at the trial.

Under the Georgia statute making the forfeiture depend on a refusal to pay for 60 days after demand, a demand for the amount due on the policy, and a refusal to pay, 60 days before suit brought, must be plainly averred, and such averment must be established on the trial.

Lester v. Piedmont & A. Life Ins. Co., 55 Ga. 475; Ancient Order of United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890.

Under the Georgia statute it is held that evidence as to what would be a reasonable attorney's fee should be confined to a fee certain, where no contract for an additional fee is shown (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18). In this case the court holds that evidence as to any fee or compensation for services which would have been rendered only on the contingency that the litigation should be protracted beyond the trial and verdict by motion for a new trial or by a writ of error is inadmissible.

(d) Attorney's fees.

Attorney's fees under statutes imposing penalties, and incidentally allowing the recovery of such fees as a part thereof, have been treated under the preceding subdivisions of this brief. The statutes of some of the states provide for the recovery of attorney's fees which, although in the nature of penalties, are not such, strictly speaking. These statutes are generally sustained by the courts under the doctrine that attorney's fees may be imposed upon a delinquent insurance company under the police power of the state as a kind of penalty incurred in the conduct of a business affected with a public interest. Hence, statutes authorizing the allowance

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of such fees, passed in Florida,[8] Kansas,[9] and Nebraska,[10] have been held to be constitutional and valid.

Tillis v. Liverpool, L. & G. Ins. Co. (Fla.) 35 South. 171; L'Engle v. Scottish Union & National Fire Ins. Co. (Fla.) 37 South. 462, 67 L. R. A. 581; Assurance Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Shawnee Fire Ins. Co. v. Bayha, 8 Kan. App. 169, 55 Pac. 474; Hartford Fire Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821, affirming 62 Neb. 213, 86 N. W. 1070, 97 Am. St. Rep. 624; Insurance Company of North America v. Bachler, 44 Neb. 549, 62 N. W. 911; Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313; Farmers' Mut. Ins. Co. v. Cole (Neb.) 93 N. W. 730; Lansing v. Commercial Union Assur. Co., Id. 756.

The Florida statute is held not to have been repealed by a later act [11] providing that after its passage, in an action on a policy, the measure of damages shall be such part of the amount on which premiums are paid as the damage sustained is part of the insurable value.

Hartford Fire Ins. Co. v. Redding (Fla.) 37 South. 62, 67 L. R. A. 518; L'Engle v. Scottish Union & National Fire Ins. Co. (Fla.) 37 South. 462, 67 L. R. A. 581.

Under the Wisconsin statute [12] providing that insurance companies interested in the same loss may be joined as defendants, and that an attorney's fee of $20 be allowed against each defendant in case of recovery, attorney's fees are limited to $20 against each defendant, though the action was brought against the companies separately, and afterwards consolidated (Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805).

The Nebraska statute empowers the court to allow a reasonable sum as an attorney's fee in an action on any policy covering real property (Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375). Such statute also applies to a policy covering both real and personal property.

Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N. W. 30; Home Fire Ins. Co. v. Skoumal, 51 Neb. 655, 71 N. W. 290.

[8] Laws 1893, p. 101, c. 4173.
[9] Gen. St. 1901, § 3410 (Laws 1893, c. 102, § 3).
[10] Comp. St. 1899, c. 43, § 43.
[11] Act May 31, 1899, p. 33, c. 4677.
[12] Laws 1893, c. 235.

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The date when the risk was written is immaterial (American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068). The statute does not authorize the allowance of an attorney's fee for services rendered on error.

Eddy v. German Ins. Co., 51 Neb. 291, 70 N. W. 947; Home Fire Ins. Co. v. Skoumal, 51 Neb. 655, 71 N. W. 290.

An attorney's fee cannot be recovered in an action upon a policy issued under the valued policy act, unless it is demanded in the petition, and the matter is presented to the trial court; but although it is not prayed for in the petition, if it is demanded in writing by the plaintiff at the time of the rendition of the judgment, such act will be treated as an amendment of the prayer of the petition (Hartford Fire Ins. Co. v. Corey, 53 Neb. 209, 73 N. W. 674). The court has jurisdiction to allow such fees at the time the ruling is made upon the defendant's motion for a new trial, although such motion is not passed upon at the term during which the verdict and judgment were entered (Home Fire Ins. Co. v. Weed, 55 Neb. 146, 75 N. W. 539).

Under the Kansas statute the award falls strictly within the category of costs, and is to be taxed by the court as such, and not by the jury (Alliance Co-operative Ins. Co. v. Corbett, 69 Kan. 564, 77 Pac. 108).

5. SUBROGATION.

(a) Subrogation to insured's claim for damages.
(b) Same—Assignment of rights to insurer.
(c) Same—Effect of statutes fixing the liability of railroad companies.
(d) Subrogation under marine policies.
(e) Subrogation in life and accident insurance.
(f) Subrogation in guaranty and indemnity insurance.
(g) Amount of recovery.
(h) Effect on right of subrogation of wrongdoer's payment to, or release by, insured.
(i) Enforcement of right against insured who has recovered from wrongdoer or released one primarily liable.
(j) Subrogation to rights of lienholders and mortgagees.
(k) Same—Liability on policy equaling amount of security.
(l) Same—Acts defeating insurer's right.
(m) Action to enforce rights.
(n) Same—Parties.

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(a) Subrogation to insured's claim for damages.

When an insurer pays to the insured the amount of the loss, it is subrogated, in a corresponding amount, to the insured's right of action against any other person responsible for the loss.

Reference may be made to the following fire and marine cases: Garrison v. Memphis Ins. Co., 19 How. 312, 15 L. Ed. 656; Hall v. Nashville & Co. Building Co., 13 Wall. 367, 20 L. Ed. 594; Liverpool & G. W. Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, affirming (C. C.) 22 Fed. 715; Liverpool & G. W. Steam Co. v. Insurance Co. of North America, 129 U. S. 464, 9 Sup. Ct. 480, 32 L. Ed. 800; American Tobacco Co. v. United States, 32 Ct. Cl. 207; Amazon Ins. Co. v. Iron Mountain, 1 Fed. Cas. 586; Insurance Co. v. The C. D., Jr., 13 Fed. Cas. 65; Mutual Safety Ins. Co. v. Cargo of the George, 17 Fed. Cas. 1082; The Planter, 19 Fed. Cas. 807; The Frank G. Fowler (D. C.) 8 Fed. 360; The Montana (D. C.) 17 Fed. 377; Id. (C. C.) 22 Fed. 715; Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co. (C. C.) 17 Fed. 919; Union Ins. Co. v. Dexter (D. C.) 52 Fed. 152; Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; Over v. Lake Erie & W. R. Co. (C. C.) 63 Fed. 34; Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; St. Louis, A. & T. R. 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; Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138; Chicago & A. R. Co. v. Glenny, 51 N. E. 896, 175 Ill. 238, affirming 70 Ill. App. 510; Egan v. British & Foreign Marine Ins. Co., 61 N. E. 1081, 193 Ill. 295, 86 Am. St. Rep. 342, affirming 88 Ill. App. 552; Atchison, T. & S. F. R. Co. v. Home Ins. Co., 59 Kan. 432, 53 Pac. 459; Atchison, T. & S. F. R. Co. v. Neet, 7 Kan. App. 495, 54 Pac. 134; Georgia Ins. & Trust Co. v. Dawson, 2 Gill (Md.) 365; Svea Assur. Co. v. Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95; Hart v. Western Railroad Corporation, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Monmouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Atlantic Ins. Co. v. Storrow, 1 Edw. Ch. (N. Y.) 621; Id., 5 Paige (N. Y.) 285; Home Ins. Co. v. Western Transportation Co., 33 How. Prac. 102, 27 N. Y. Super. Ct. 257; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun (N. Y.) 182; Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171, reversing 10 Hun, 59; Sun Oil Co. v. Ohio Farmers' Ins. Co., 15 Ohio Cir. Ct. R. 355, 8 O. C. D. 145; Kennebec Coal & Ice Co. v. Wilmington & N. R. R. Co., 13 Wkly. Notes Cas. (Pa.) 162, 2 Chest. Co. Rep. 29; Gales v. Hallman, 11 Pa. 515; Kentucky Marine & Fire Ins. Co. v. Western & A. R. R. Co., 8 Baxt. (Tenn.) 268; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; Deming v. Merchants' Cotton Press & Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Houston Direct Nav. Co. v. Insurance Co. of North America (Tex. Civ. App.) 31 S. W. 560, 685; Brighthope Ry. Co. v. Rogers, 76 Va.

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443; Swarthout v. Chicago & N. W. Ry. Co., 49 Wis. 625, 6 N. W. 314; Wunderlich v. Chicago & N. W. Ry. Co., 93 Wis. 132, 66 N. W. 1144; Allen v. Chicago & N. W. Ry. Co., 94 Wis. 93, 68 N. W. 873; Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N. W. 908.

The principle on which an insurer is permitted to recover against one whose wrongful act has caused the loss is not based on the theory of a direct legal right of the insurer against the wrongdoer, nor on any vested interest in or ownership of the property insured, but on the doctrine of subrogation, which is founded, not on contract, but on the relationship of the parties and on equitable principles for the purpose of accomplishing the substantial ends of justice (Leavitt v. Canadian Pac. Ry. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152).

The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insurance company to a liability, whether the company's right be based on an equitable subrogation or an express assignment, is traced through the insured; that is, **no cause of action can exist on behalf of the insurer unless it existed in favor of the insured.**

United States v. American Tobacco Co., 17 Sup. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081; Omaha & R. V. Ry. Co. v. Granite State Ins. Co., 53 Neb. 514, 73 N. W. 950.

So, though a city ordinance granting a franchise to a water company provided that, if the company failed to furnish sufficient water to extinguish a fire, it should be liable for all damages thereby occasioned, an insurance company, which had paid a fire loss resulting from the insufficient supply of water to extinguish the fire, could not sue the water company, as, conceding that it was subrogated to the insured's rights against the water company, there was no cause of action, as the insured had no rights. (Phœnix Ins. Co. v. Trenton Water Co., 42 Mo. App. 118).

It is, however, sufficient if there is a cause of action for negligence against the person responsible for the loss, and it is not necessary to show any positive wrongful act (Hall v. Nashville & C. R. Co., 13 Wall. 367, 20 L. Ed. 594, affirming 11 Fed. Cas. 240). In the case of the loss of property in the custody of a carrier, where the bill of lading expressly excepts the carrier from liability for loss from fire, there is no basis for subrogation unless it appears that the fire was the result of negligence (New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co., 20 La. Ann. 302); but an

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exception of a certain cause of loss, though caused by negligence, being invalid, cannot affect the insurer's right of subrogation.

The Montana (D. C.) 17 Fed. 377. See, also, Insurance Co. of North America v. Liverpool & G. W. Steam Co. (C. C.) 22 Fed. 715, affirmed Liverpool & G. W. Steam Co. v. Insurance Co. of North America, 129 U. S. 464, 9 Sup. Ct. 480, 32 L. Ed. 800.

The right of subrogation against a carrier, in view of a clause in the carrier's charter subjecting it to all common-law liabilities, is not affected by the provisions of Rev. St. U. S. § 4282 [U. S. Comp. St. 1901, p. 2943], exempting every owner of a vessel from liability for a loss by fire unless caused by design or negligence of such owner (Houston Direct Nav. Co. v. Insurance Co. of North America [Tex. Civ. App.] 31 S. W. 560).

Though it was held in New England Mut. Marine Ins. Co. v. Dunham, 18 Fed. Cas. 66, affirming 8 Fed. Cas. 46, that, until payment of a loss occasioned by the act of a wrongdoer, the latter is not liable to the underwriters, it was held in The Manistee, 16 Fed. Cas. 617, that an insurance company, after notice and proof of loss and demand of payment, may recover of the wrongdoer the amount due on its policy, although it has not made actual payment.

The right of subrogation in equity does not depend on the presence of a special clause in the policy conferring the right.

Marine Ins. Co. v. St. Louis Iron Mountain & S. Ry. Co. (C. C.) 41 Fed. 643; Pelser Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

The standard policy, however, contains a clause providing, in substance, that if the company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, the company shall, on payment of the loss, be subrogated, to the extent of such payment, to all right of recovery by the insured, for the loss resulting therefrom, and such right shall be assigned to the company by the insured on receiving such payment. In view of this clause it was said in Stoughton v. Manufacturers' Natural Gas Co., 165 Pa. 428, 30 Atl. 1001, that though subrogation is based upon equity, and no doubt the statute, in providing for the subrogation of the insurer to the rights of the insured against the party primarily responsible for the loss, meant that it should be administered on equitable principles, the effect of the statute is to put such subrogation on the footing of a legal right, which must prevail unless a stronger equity be shown against it. In the first instance it relieves the insurer, who has paid the policy, from the

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burden of showing an equity to subrogation, because it is now an express legal right given by the statute and the contract of the parties.

The right of subrogation in favor of marine insurers on payment of a loss, whether partial or total, is independent of any abandonment, and exists without it.

Hogan v. Manselly, 12 Fed. Cas. 313; The Frank G. Fowler (D. C.) 8 Fed. 360; Pearse v. Quebec Steamship Co. (D. C.) 24 Fed. 285; The St. Johns (D. C.) 101 Fed. 469; Holbrook v. United States, 21 Ct. Cl. 434; Hall v. Nashville & C. R. R. Co., 13 Wall. 367, 20 L. Ed. 594.

The insurer's right of subrogation is not affected by the failure of the company to comply with the laws regulating insurance companies.

St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; The Manistee, 16 Fed. Cas. 617; affirmed 16 Fed. Cas. 618; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 41 Fed. 643; 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; Phenix Ins. Co. v. Pennsylvania R. R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co., 149 Mo. 165, 50 S. W. 281.

Moreover, if the insurer has paid the loss, the fact that it might have successfully contested the claim under the policy and relieved itself of liability to the insured does not affect its right of subrogation. The equities between the insurer and the insured are not matters with which the wrongdoer has any concern.

United States v. American Tobacco Co., 17 Sup. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081; Amazon Ins. Co. v. The Iron Mountain, 1 Fed. Cas. 586; Sun Mut. Ins. Co. v. Mississippi Valley Transportation Co. (C. C.) 17 Fed. 919; Pearse v. Quebec S. S. Co. (D. C.) 24 Fed. 285; In re Harris, 57 Fed. 243, 6 C. C. A. 320, 14 U. S. App. 506; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

So, too, the fact that the insurer was negligent in assuming the risk does not affect its right, as it is under no duty to the wrongdoer to exercise care in insuring the risk (United States Casualty Co. v. Bagley, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424).

The right of subrogation extends to reinsurers as well as original insurers, and a reinsurer which has paid to the insurer its propor-

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tion of a loss insured against may maintain a libel in rem to recover of the carrier the amounts so paid, with interest, where the owner had been fully satisfied for the loss by the original insurer (The Ocean Wave, 18 Fed. Cas. 568). The right may be enforced against municipalities, and, where insured buildings are destroyed by the municipal authorities to stay the ravages of a fire, the underwriters, upon paying the loss, will be entitled to indemnity from the city (Pentz v. Receivers of Ætna Fire Ins. Co., 3 Edw. Ch. [N. Y.] 341).

In an action on a policy, judgment was rendered against the company for the whole value of a wall alleged by the company to be a party wall. The wall was rebuilt by plaintiff, and subsequently the adjoining owner erected a building on his lot, using the wall as a party wall. It was held that the insurance company, to the extent of one-half the value of the old wall, was subrogated to plaintiff's right against the adjoining owner for one-half the value of the new wall (Monteleone v. Harding, 50 La. Ann. 1147, 23 South. 990).

The insurer cannot be subrogated, in case of loss, to the insured's right of action for damages against one who sold him the insured property through fraudulent representations of its value (Farmers' Fire Ins. Co. v. Johnston, 113 Mich. 426, 71 N. W. 1074). Likewise, where the owner of a grain elevator entered into a pooling arrangement with other elevator companies, by which, notwithstanding his elevator might be destroyed by fire, and the general fund thereby diminished, he should receive his percentage of the common fund in which the earnings of the elevator was placed, the insurer of the use and occupancy of such an elevator is not entitled to subrogation to the rights of the insured under the arrangement (Michael v. Prussian Nat. Ins. Co., 63 N. E. 810, 171 N. Y. 25, affirming Buffalo Elevating Co. v. Same, 71 N. Y. Supp. 918, 64 App. Div. 182). In Phenix Ins. Co. v. Chadbourne (C. C.) 31 Fed. 300, the agents of the owners of a vessel advanced, at the owners' request and for their benefit, the money necessary to enable the vessel to make a voyage, and took out a policy of insurance to secure the amount advanced. The vessel was lost, and the insurance money collected by the agents. It was held that the receipt of the money extinguished and satisfied the debt, and that neither under an assignment to the insurance company, nor under the doctrine of subrogation, could the company maintain an action against the owners to recover the amount from them.

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Where the insurance, though procured by the owner of the property, is taken out for the benefit of the carrier, no right of subrogation arises as against the carrier.

Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013; The Sidney (D. C.) 23 Fed. 88; The Sydney (C. C.) 27 Fed. 119.

Where property in the control of a carrier, and on which there are several policies of insurance, is burned, the amount of insurance being greater than the amount of the loss, and the effect of the policies is such that they contribute ratably, one of the insurers so contributing cannot be subrogated to any rights as against the others (Home Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 71 Minn. 296, 74 N. W. 140).

(b) Same—Assignment of rights to insurer.

Though the right of subrogation is in some cases based on the clause in the policy providing for an assignment to the insurer of the cause of action against the wrongdoer (Egan v. British & Foreign Marine Ins. Co., 61 N. E. 1081, 193 Ill. 295, 86 Am. St. Rep. 342), it is generally held that **an assignment is not necessary to support the right.**

Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 41 Fed. 643; St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia, 55 Ark. 163, 18 S. W. 43; Fidelity Title & Trust Co. v. People's Natural Gas Co., 150 Pa. 8, 24 Atl. 339; Swarthout v. Chicago & N. W. Ry. Co., 49 Wis. 625, 6 N. W. 314; Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N. W. 908.

Even though the statute (Laws N. C. 1899, c. 54, § 43) provides for an assignment by insured to the company of his right of action against the one whose negligence caused the loss, the company, on paying the loss, may maintain the action, though no assignment has been made (Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co., 132 N. C. 75, 43 S. E. 548).

Code N. C. § 177, provides that all actions must be prosecuted in the name of the real party in interest, but "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." It was held that if the exception in the section operated to prevent a fire insurance company, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, c. 54, § 43, which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured (Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co., 132 N. C. 75, 43 S. E. 548).

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It seems to be well settled that **the insurer, by paying the loss caused by the wrongful or negligent act of a third person, thereby obtains an equitable assignment of the insured's cause of action against such person.**

Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; The Sydney (C. C.) 27 Fed. 119; Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618; Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719.

Under Civ. Code Mont. § 1351, providing that a thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner, the right to recover damages for the negligent destruction of property by fire, together with the right to have the jury assess interest in its discretion, as they are authorized to do by section 4281, in actions for the breach of obligations not arising from contract, is assignable, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the property owner. Caledonia Ins. Co. v. Northern Pac. Ry. Co. (Mont.) 79 Pac. 544.

Where cotton covered by two policies was destroyed while in the custody of a railroad company, and the two insurers paid the owners of the cotton the full amount of their loss, any claim of the owners against the railroad company thereupon passed to the insurers by subrogation, and a subsequent assignment thereof to one of them by such owners was unavailing (Platt v. Pennsylvania R. Co., 58 N. Y. Super. Ct. 587, 11 N. Y. Supp. 632).

Where, on payment of loss under a policy insuring advances, the insured assign to the insurer their claim against the vessel and its owner for advances and commissions, such assignment passes to the insurer the insured's claim for commission for procuring a charter for the vessel, even though the claim for advances does not pass because it has been previously released. Phœnix Ins. Co. v. Parsons, 129 N. Y. 86, 29 N. E. 87.

(c) Same—Effect of statutes fixing the liability of railroad companies.

In view of the statutes existing in many states declaring that, when any injury is done to the property of any person or corporation by fire communicated by the locomotive of any railroad corporation, such railroad corporation shall be responsible in damages to the person or corporation injured, the question has been raised whether the statute affects the insurer's right of subrogation against the railroad. In Hart v. Western Railroad Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719, where the Massachusetts statute (St. 1840, c. 85, § 1) was involved, the court held that the right of the in-

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surer was not affected. However, that circumstances may modify this principle has been asserted in Colorado. In Home Ins. Co. v. Atchison, T. & S. F. R. Co., 19 Colo. 46, 34 Pac. 281, certain property having been burned by fire set out by a railroad's locomotives, the owner put in his claims to the road, which were allowed, and he gave the road a receipt for the money, releasing all claims to date. His claim did not, in terms, include certain hay destroyed in the same fires, on which he had insurance. The insurance company, having settled with him for the hay, took an assignment of his claim against the railroad company, and sued it for the amount of the loss. It was held that, as the assured's assignment was ineffectual, in view of his previous release to the railroad company, and the insurer's claim therefor was purely equitable, it could only be pleaded on equitable grounds, and the insurer's mere averment that it had paid the loss was not enough to show its right to subrogation. The court said: "It is urged by counsel that plaintiff's cause of action is supported by strong equities. If so, the facts showing such equities should have been pleaded, thus giving defendant opportunity to controvert them, or to confess them, and save further costs in the action. When insured property is destroyed by the carelessness or negligence of a third party, it may be well said that an insurance company liable to its policy holder for the loss should, in equity, upon making payment, be subrogated to the rights of the insured against the wrongdoer; but, where the liability exists by mere force of the statute, the equity of the insurance company is not necessarily very strong, and in some instances it may be very slight, or have no existence at all. The statute makes the railroad company liable unconditionally, irrespective of any negligence on its part. The statute is upheld as a statute of indemnity—a remedial statute, whereby the owner may recover for the loss of his property. Insurance is granted for a consideration against fires caused by the operation of the railroad, as well as against fires otherwise caused. How, then, can it be said that the insurance company has a strong equitable claim to reimbursement from the railroad company for losses occasioned by fires from its trains, especially in a case where the fire has occurred without any fault or negligence of the railroad company—a purely accidental fire? In the present case the complaint does not allege that the railroad company was guilty of any negligence in causing the fire which destroyed the cattle company's hay, nor does it allege that plaintiffs obtained the assignments of the cattle company's

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claim in consideration of their insurance and payment for the property destroyed, nor does it allege any other equitable matter to uphold a partial assignment."

In Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co., 68 Pac. 670, 17 Colo. App. 275, it was claimed on the authority of the Home Insurance Company Case that the insurance company could not be subrogated to the owner's rights where recovery is based solely on a statute. The court said, however: "Of course, to enforce liability under the statute, it * * * is required that the owner should be a party to the suit, because it is to him that the statute specifically gives a right of recovery and of indemnity. It is his right only which can be enforced, and it must be done in his name. In all cases the right of subrogation is based upon the doctrine that the contract of insurance is treated as an indemnity, and the insurer, as a surety, is entitled to all the remedies and securities of the assured, and to stand in his place or upon doctrines of a similar equitable character. This being true, we see no reason why the right of subrogation should be denied in one instance any more than the other, unless because of some prohibitory statute, or unless, perhaps, in the absence of any contract for subrogation, the facts might be such as to negative the existence of any equities in behalf of the insurer. None of such possible exceptions, however, apply to this case." Moreover, the present case is to be distinguished from the Home Insurance Company Case, as in the latter the insurance company based its action on its equities, and it was held that, if it had a right of action based on equities, the facts showing such equities should have been pleaded. In addition to this, the policy contained the subrogation clause, thus taking it entirely out of the reasoning of the court in the Home Insurance Company Case.

Reference may also be made to Mathews v. St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and Mobile Ins. Co. v. Columbia & G. R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725, where it was held that statutes making railroad companies liable for property injured or destroyed by fire from locomotives, and giving the companies an insurable interest in property along its route, do not affect the right of subrogation.

(d) Subrogation under marine policies.

Neither the abandonment to the insurer of a vessel sunk in collision nor a bill of sale conveying the same vests the insurer with a right of action against the vessel in fault for the collision, which

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can exist only on the principle of subrogation arising out of the performance of the insurance contract (The Livingstone, 130 Fed. 746, 65 C. C. A. 610). Privity between the insurer and the person whose negligence caused the loss is not essential to support the insurer's right. Thus, in The Liberty No. 4 (D. C.) 7 Fed. 226, certain insurance companies under contract with the owner of a cargo issued to him a policy of insurance upon the same. The owner of a barge contracted with the owner of the cargo to receive and deliver the cargo at a point of destination, and, having received the cargo, the barge owner contracted with a towboat to have the barge towed. By the negligence and fault of the towboat, the cargo was lost. The insurance company paid the loss, and took an assignment of the claims. It was held that the insurance companies might maintain an action in admiralty in their own names to recover for the loss occasioned by the negligence, though no privity existed between them and the towboat.

Where the charter of a vessel provided for the payment to the charterer of the amount of inland freight advanced by the latter to railroad companies, and that the charterer should pay the cost of insuring the ship against loss, and the charterer's agents procured insurance, for the benefit of whom it might concern, on the inland freights, and shortly thereafter the vessel burned, the insurer, and not the ship, was ultimately, as well as primarily, liable for the loss, and there was no right of subrogation (The Clintonia [D. C.] 104 Fed. 92).

Where the mortgagee of a vessel, who has never been in possession, recovers, upon a marine policy insuring his interest, judgment for a total loss by the barratry of the master appointed by the mortgagor, and subsequently recovers judgment in tort for the conversion of the vessel by the same act of barratry, both of which judgments are satisfied, the underwriters are entitled to be subrogated to the mortgagee's rights in the damages recovered by him for the injury to his interest in the property, notwithstanding their refusal, pending the action of tort, to accept an offer from the mortgagee to transfer the control of that action to them upon condition that they should pay the expenses already incurred therein, and without prejudice to the mortgagor's rights in the judgment to be recovered (Mercantile Marine Ins. Co. v. Clark, 118 Mass. 288).

The rights of the insurer may be affected by an abandonment. Thus, where insurers to whom the owners have abandoned took possession at an intermediate port of goods damaged during a voy-

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age by the fault of the carrier, and there lost them, they cannot hold the carrier liable on his acknowledgment to deliver the goods at the end of the voyage in good order and condition (The Mohawk, 8 Wall. 153, 19 L. Ed. 406). So, too, where property damaged through the negligence of a common carrier was abandoned by the owner to the underwriters, who paid the loss, sold the property, and brought suit against the carrier for damages, the underwriters were not entitled, as against the carrier, to any commission on said sales, since, title to the property having passed to insurers, they could not recover commissions for selling their own property (Sun Mut. Ins. Co. v. Mississippi Transp. Co. [D. C.] 16 Fed. 800). When a vessel insured has been sunk by a collision with another vessel through the fault of the latter, and, pending an action brought by the insured against the owners of the vessel in fault for the injury, claiming the full value for a total loss, the assured abandons to the underwriters, who accept the abandonment, the action proceeds for the benefit of the latter (Fox v. The Lucy A. Blossom, 9 Fed. Cas. 638). The master and part owner of a vessel which has been sunk by collision with another vessel through the fault of the latter may enforce, as bailee of the insured cargo, the insurer's claim on account of loss of the cargo, arising on abandonment, against the vessel in fault and her master (Newell v. Norton, 3 Wall. 257, 18 L. Ed. 271).

Where, in consequence of stranding, necessary salvage expenses are incurred for the rescue of the ship and cargo, including direct injury to the ship in salvage operations, the insurers on a valued policy on the ship are liable to the insured in the first instance, independently of any general average adjustment, for the direct injury to the ship, but, on payment, they are subrogated to any rights of the assured to a general average contribution on the cargo for their share of that loss. International Nav. Co. v. British & Foreign Marine Ins. Co., 108 Fed. 987, 48 C. C. A. 181, affirming (D. C.) 100 Fed. 304.

The right of subrogation of an insurer, who has paid a policy on account of collision, to a fund recovered from the wrongdoer, is subordinate to the rights of damage claimants against the injured vessel, growing out of the collision, where she has been surrendered by the owner in proceedings for limitation of liability (The St. Johns [D. C.] 101 Fed. 469). If both vessels are held in fault for a collision which resulted in the loss of one vessel, and in the death and injury of passengers and the loss of baggage and cargo, for which claims are filed, and the proceeds of the other

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vessel, surrendered under the limited liability act, are insufficient to pay all losses, the owners of the vessel destroyed are equitably estopped from claiming any part of the fund on account of the loss of the vessel until the claims of third parties, for which she is jointly liable, have been paid in full; and her insurers, who have paid the loss, are subrogated only to the rights of the owners (The Catskill [D. C.] 95 Fed. 700).

(e) Subrogation in life and accident insurance.

In special cases an attempt has been made to apply the doctrine of subrogation to life insurance. In Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 65 Am. Dec. 571, the insurance company, which had paid a death loss on one who had been killed while a passenger on defendant's train, the death being due to the railroad company's negligence, brought an action against the railroad company to recover the amount so paid, basing its action on the theory of subrogation. The recovery was, however, denied, and the court laid down the general principle that as there was no privity of contract between the insurer and the wrongdoer and no direct obligation of the latter to the former, growing out of the relation of the wrongdoer to the insured by contract or otherwise, no action could be sustained against the wrongdoer by the insured, though the loss was due to the acts of the wrongdoer. Such acts affected the insurer only through his artificial relation of contractor with the insurer. The loss was a remote and indirect consequence of the act of the wrongdoer.

The question came before the Supreme Court of the United States in Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580, which arose in Louisiana. The Civil Code of Louisiana (article 2315) provides that the right of action given for the act causing damage to another shall survive in favor of the widow and minor children of the insured person, or, in default of these, in favor of his surviving father or mother; and article 2316 provides that every person shall be responsible for the damage he occasions, not merely by his act, but by his negligence. The court, however, held that a life insurance company which pays the sum due on its policy has no right of action against the murderer of the insured, either at common law or under the Code, the provisions of the Code not inuring to the insurer.

In Ætna Life Ins. Co. v. J. B. Parker & Co., 30 Tex. Civ. App. 521, 72 S. W. 621, where an accident policy was involved, the con-

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tention of the insurer was that, as insured was injured through the negligence of the employer, the fact that he settled with the latter, and released it from liability, was a defense to the action for his accident insurance on the theory that the insurer was entitled to be subrogated to the insured's action against his employer, but the court held that in accident, as in life, insurance, no right of subrogation existed. The court said: "But there is an essential distinction between a liability for loss of property which has been insured, and that for damages on account of injuries inflicted upon a person by the negligence of another. In the case of the destruction of property by fire in the first instance, the damage or loss which has been caused by the carrier and that indemnified against is identical. It is the value that has been destroyed. But where a person has received personal injuries, caused by the negligence of another, several elements enter into the estimate of damages besides the mere stipulated indemnity for loss of time contracted for in the accident policy, and the loss is by no means identical. In the one there may be included full compensation for mental and physical suffering, loss of time, diminished capacity to earn money, etc., and in some instances punitory damages; while the other is a stipulated sum for loss of time only, which may or may not be full indemnity even for them. The accident policy undertakes to indemnify the insured, whether his injuries are the result of negligence or not, while the person or corporation inflicting the injuries can be held liable only for negligence; and, since so many elements enter into the estimate of the loss in the case of one that do not enter into or form any part of the other, there is wanting that identity of damages or loss that would entitle the insurer to subrogation on payment of the claim against him." This view of the right of subrogation in life and accident insurance was also asserted by the Supreme Court in Ætna Life Ins. Co. v. J. B. Parker & Co., 96 Tex. 287, 72 S. W. 168, 580, where the question was raised on certificate from the Court of Appeals.

(f) Subrogation in guaranty and indemnity insurance.

The doctrine of subrogation in equity applies in guaranty insurance, though it is obvious that in fidelity insurance, contract insurance, and judicial insurance the right can hardly be distinguished from the general right of the surety to be subrogated. To attempt to treat of this phase of the question would be outside of the scope of the present work. The reader is referred to the

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text-books and digests, where the general doctrine of subrogation is treated. For present purposes it is deemed sufficient to notice a few of the cases in which special features of the doctrine have been applied.

The right of subrogation in this class of insurance is recognized in London Guaranty & Accident Co. v. Geddes (C. C.) 22 Fed. 639; Continental Trust Co. v. American Surety Co., 80 Fed. 180, 25 C. C. A. 364; Farmers' & Traders' Bank v. Fidelity & Deposit Co., 108 Ky. 384, 56 S. W. 671; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; St. Paul Title & Trust Co. v. Johnson, 64 Minn. 492, 67 N. W. 543; City Trust, Safe Deposit & Surety Co. v. Haaslocher, 91 N. Y. Supp. 1022, 101 App. Div. 415.

But a creditor of a contractor for public work, whose claim is not within the class secured by the statutory bond given by the contractor, has no privity with the surety on such bond which entitles him to be subrogated in equity to a security taken by such surety to indemnify it against loss by reason of its suretyship (American Surety Co. v. Lawrenceville Cement Co. [C. C.] 110 Fed. 717).

In City Trust, Safe Deposit & Surety Co. v. Haaslocher, 101 App. Div. 415, 91 N. Y. Supp. 1022, it appeared that certain breweries formed a mutual association for insurance against loss from liability for personal injuries, and, a claim for personal injuries having been made against one of the members, the insurer was notified to defend, and in compliance with the notice undertook the defense of the action, which resulted in a judgment against the insured. To save itself from having to pay the judgment, the insurer procured a surety to execute an appeal bond, and after the bond was executed the insurer withdrew from the case on the ground that the insured was in default of assessments. The surety proceeded to perfect the appeal, and also sought and procured a new trial on the ground of newly discovered evidence, and finally compromised the case without the appeal having been heard. It was held that the surety was entitled to be subrogated to the rights of the insured against the insurer for the amount paid on the settlement of the claim, it appearing that the settlement was a reasonable one, was made in good faith, and for the benefit of the insured.

In St. Paul Title Insurance & Trust Co. v. Johnson, 64 Minn. 492, 67 N. W. 543, it appeared that defendant executed a real estate mortgage to secure the payment of the note, and as further security he and his codefendants executed to the mortgagee a

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bond conditioned that he would complete certain buildings on the mortgaged premises, pay and discharge all claims for labor and material furnished for the building, and all liens on account thereof, and indemnify and save harmless the mortgagee from all such claims and liens, and from all damage or loss arising therefrom, including expenses incurred in clearing or satisfying the same. The insurer issued its policy of insurance of title, guarantying the mortgagee that his mortgage was the first lien on the premises, and agreeing to indemnify him against prior liens. The defendant having failed to pay certain claims for labor and material furnished for the completion of the building, the same became liens on the premises superior to the lien of the mortgage. The insurer paid off these liens and obtained an assignment from the mortgagee. It was held, therefore, that the insurer had a cause of action on the bond to recover the amount it had paid to satisfy such liens.

Where a bond by a fidelity insurance company to indemnify an employer against loss by reason of a shortage of grain caused by the actual fraud or dishonesty of the employé provided how the existence and amount of the shortage should be ascertained, and that, when so ascertained, it should be evidence that it was caused by the fraud or dishonesty of the employé, and not by any of the various other causes mentioned for which the company was not to be liable, it was not necessary, in an action by the company against the employé to recover the amount paid under the bond for loss on account of a shortage, to allege that the shortage was caused by defendant's fraud or dishonesty (Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464).

A fidelity company, insuring the honesty of a railway company's employés, was compelled to pay certain indemnity, and sued the employé to recover the amount so paid. The defendant denied the execution of the policy, and the only proof thereof was a copy of the policy attached to a deposition of an officer of the railway company. It was held that a demurrer to the evidence was properly sustained. Fidelity & Casualty Co. v. Yoder, 63 Kan. 880, 64 Pac. 1027.

Under a policy insuring an employer against loss on account of injuries to employés, and providing that, if any suit is brought against the insured to enforce any claim for damages on account of an accident covered by the policy, the insurer will defend on behalf of the insured or settle at its own cost, and the insured shall

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not settle any claim without the consent of the company previously given in writing, the insurer has no right to demand an employé's discharge in case he refuses to settle, on the ground that it was subrogated to practically all the rights of the insured (London Guarantee & Accident Co. v. Horn, 101 Ill. App. 355, affirmed 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185).

(g) Amount of recovery.

The general rule is that **the right of the insurer to be subrogated to the rights of the insured against the person responsible for the loss extends no further than the amount the company was compelled to pay.**

Dunham v. New England Mut. Marine Ins. Co., 8 Fed. Cas. 46, affirmed in 18 Fed. Cas. 66; Atchison, T. & S. F. R. Co. v. Neet, 7 Kan. App. 495, 54 Pac. 134; Cumberland Telegraph & Telephone Co. v. Dooley, 110 Tenn. 104, 72 S. W. 457; Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co., 31 Tex. Civ. App. 104, 71 S. W. 419.

And though the Supreme Court of the United States in Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, held that the recovery of the insurer may be for the entire loss sustained by the nominal plaintiff, and is not limited to the amount of the insurance paid, the decision does not in fact contravene the general rule. The action was brought in the name of the insured for the use of the insurer, and the court said: "Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned. The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had for the recovery of its value. * * * We are of the opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs, without regard to the amount of insurance paid."

In Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618, it was held that under Rev. St. c. 162, § 13, providing that if

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any person shall willfully or maliciously injure or destroy any building he shall be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured, an insurance company which had paid a loss for fire occasioned by a wrongdoer was entitled, in an action against such wrongdoer, brought in the name of the insured, to recover, if at all, not merely the amount paid to the insured, but damages equal to three times the value of the destroyed property.

In Ætna Ins. Co. v. Confer, 158 Pa. 598, 28 Atl. 153, it was held that a judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the property owner as to the amount of his loss as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment. The court said: "Undoubtedly, as between him [defendant] and the railroad company, the judgment is conclusive, but the plaintiff was no party to that suit. However significant the judgment may be as evidence in this issue, it does not necessarily follow, as between these parties, that that judgment determines the whole amount of plaintiff's loss by the fire."

Where fire is caused by the negligence of a railroad company, an insurance company which has paid a policy on the property injured may sue in the name of the owner against the railroad company to recover from it the amount so paid, not exceeding the difference between the value of the property and any sum already paid by the railroad company to the owner. Dyer v. Maine Cent. R. Co., 58 Atl. 994, 99 Me. 195, 67 L. R. A. 416.

Where the owner of tows lost by a tug invited the insurer of their cargoes to join with him in a suit against the tug, and the insurer refused to do so, but, after the tug's liability had been established by a decree, then filed a separate libel, it had waived its right to share pro rata with the original libelant, and was only entitled to the surplus, if any, after his decree was satisfied (The Battler [D. C.] 67 Fed. 251). Where a ship sunk by collision and abandoned to the insurer, being an actual total loss, is insured by a valued policy, and the stipulated sum is paid to the owner, who subsequently recovers her actual value, which exceeds her insurance value, as damages from the vessel responsible for the collision, the insurer is only entitled to be reimbursed from such recovery by receiving back the amount it has paid out, with interest, and the insured is entitled to the remainder in payment of his un-

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compensated loss (The Livingstone, 130 Fed. 746, 65 C. C. A. 610, reversing [D. C.] 122 Fed. 278).

If insured recovered from the company whose negligence caused the fire $9,000 for loss of goods, and $9,000 for interruption of business, insurance companies which had previously settled with insured for $17,360 could hold him only for pro rata shares of $9,000, since that was all he recovered for loss on the property insured (Svea Assur. Co. v. Packham, 48 Atl. 359, 92 Md. 464, 52 L. R. A. 95). And in the same case it was held that if insured agreed with his attorneys to give them 30 per cent. of what they would recover against a certain gas company whose negligence caused the loss, and the insurance companies who settled with such insured after suit brought knew of the arrangement and made no objection thereto, the insured could rightly retain such per cent. out of the judgment obtained against the gas company for the payment of his attorneys, and the balance alone could be claimed by the insurers.

If the premiums are covered by the policy, they constitute a part of the loss, and may be recovered by the insurer in the action to enforce the right of subrogation (Holbrook v. United States, 21 Ct. Cl. 434). If the amount of the insured's recovery against the vessel in fault is paid to the proctor, and by him to the insured, after deducting his fees and expenses, the insurer may recover from the insured the full amount without any deduction (Hardman v. Brett [C. C.] 37 Fed. 803, 2 L. R. A. 173).

Whether the insurer shall be allowed interest on the amount it has paid is within the discretion of the jury (Home Ins. Co. v. Pennsylvania R. Co., 11 Hun [N. Y.] 182).

(h) Effect on right of subrogation of wrongdoer's payment to or release by insured.

It is a well-settled rule that, **if an insured settles with or in any way releases a tort feasor from liability for a loss before payment of the loss has been made by the insurer, the latter's right of subrogation against the tort feasor is thereby destroyed.**

Savannah Fire & Marine Ins. Co. v. Pelzer Mfg. Co. (C. C.) 60 Fed. 39; Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138; Kennedy Bros. v. Iowa State Ins. Co., 119 Iowa, 29, 91 N. W. 831; Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828; Phenix Ins. Co. v. Parsons, 56 N. Y. Super. Ct. 423, 4 N. Y. Supp. 621; Dilling v. Draemel (Com. Pl.) 9 N. Y. Supp. 497; Dundee Chemical Works v. New York Mut. Ins. Co., 12 Misc. Rep. 353, 33 N. Y. Supp. 628; Bloomingdale v. Colum-

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bia Ins. Co. (Sup.) 84 N. Y. Supp. 572; Niagara Fire Ins. Co. v. Fidelity Title & Trust Co., 123 Pa. 516, 16 Atl. 790, 10 Am. St. Rep. 543; Highlands v. Cumberland Valley Farmers' Mut. Ins. Co., 203 Pa. 134, 52 Atl. 130; Pelzer Mfg. Co. v. Sun Office of London, 36 S. C. 213, 15 S. E. 562; Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N. W. 908.

A provision for subrogation in a policy insuring advances is violated where the insured, after being requested by the owner to insure their advances so that in case of loss they would not call on the owner for reimbursement, reply that they have "covered the amount by insurance," since they thereby became estopped from asserting any claim against the owner in case of loss (Phœnix Ins. Co. v. Parsons, 129 N. Y. 86, 29 N. E. 87).

An agreement by an insured with a carrier that, in case of a loss for which the carrier is liable, the latter shall have the benefit of any insurance on the property, likewise deprives the insurer of any right of subrogation against the carrier.

Phœnix Ins. Co. v. Erie & W. Transp. Co., 19 Fed. Cas. 532; Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013; Home Ins. Co. v. Western Transp. Co., 33 How. Prac. (N. Y.) 102; Fayerweather v. Phenix Ins. Co., 7 N. Y. St. Rep. 25; Home Ins. Co. v. Western Transp. Co., 27 N. Y. Super. Ct. 257; Dundee Chemical Works v. New York Mut. Ins. Co., 12 Misc. Rep. 353, 33 N. Y. Supp. 628; Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173; Platt v. Richmond, Y. R. & C. R. Co., 108 N. Y. 358, 15 N. E. 393; Fayerweather v. Phenix Ins. Co., 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805; North British & Mercantile Ins. Co. v. Central Vermont R. Co., 158 N. Y. 726, 53 N. E. 1128, affirming 40 N. Y. Supp. 1113, 9 App. Div. 4; Roos v. Philadelphia, W. & B. R. Co., 13 Pa. Super. Ct. 563; British & Foreign Marine Ins. Co. v. Gulf, C. & S. F. Ry. Co., 63 Tex. 475, 51 Am. Rep. 661; Insurance Co. of North America v. Easton, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424.

However, a clause in a bill of lading excepting the carrier from liability against "damage that can be insured against" does not prevent an insurance company which has paid the shipper's loss pending a suit against the carrier from being subrogated to his rights, nor from continuing the suit for its benefit, since the clause is not equivalent to a contract that the carrier shall have the benefit of an insurance on the insured goods (The Hadji [D. C.] 16 Fed. 861). So, clauses in a bill of lading exempting the carrier from liability for any loss or damage arising from fire and wet, and giving him the benefit of the insurance, do not exempt the vessel from a gen-

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eral average claim by the underwriters for damage caused in extinguishing a fire, since the bill of lading only affects rights and liabilities incident to the contract of carriage (The Roanoke, 59 Fed. 161, 8 C. C. A. 67, 18 U. S. App. 407, affirming [D. C.] 53 Fed. 270, and Id., 46 Fed. 297). Likewise, a condition in a policy on the excess of value above $20 per barrel of spirits to be forwarded by carrier, that the insured, on payment of a loss, should assign all his claim against the carrier, and that any act of the insured waiving or tending to defeat or decrease any such claim before or after the insurance should avoid the policy, is not broken by a stipulation with the carrier for a valuation of $20 per barrel on the goods shipped, as the condition provides only that an existing liability of the carrier, when perfected, shall not be waived or diminished by the insured, but not that he shall perfect such liability.

Kidd v. Greenwich Ins. Co. (C. C.) 35 Fed. 351; St. Paul Fire & Marine Ins. Co. v. Kidd, 55 Fed. 238, 5 C. C. A. 88.

If a settlement with and a release of the wrongdoer is only for the excess of the damages above the insurance, and expressly provides that the claim against the insurer is not included, or that it shall operate as a full release only on payment by the insurer, the latter's right of subrogation on payment of the insurance is not affected.

Insurance Co. of North America v. Fidelity Title & Trust Co., 123 Pa. 523, 16 Atl. 791, 2 L. R. A. 586, 10 Am. St. Rep. 546; Atchison, T. & S. F. R. Co. v. Home Ins. Co., 59 Kan. 432, 53 Pac. 459; Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171.

However, if a full and complete release is given the tort feasor, this extinguishes the insurer's right of subrogation, even though that part of the loss covered by the insurance was not in fact settled for.

Home Ins. Co. v. Atchison, T. & S. F. R. Co., 19 Colo. 46, 34 Pac. 281; Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461.

If payment of the insurance has been made by the insurer, a subsequent settlement by the tort feasor, with knowledge of such payment, and release from the insured, will not deprive the insurer of its right of subrogation.

Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138; Hartford Fire Ins. Co. v. Wabash Ry. Co., 74 Mo. App. 106; Omaha & R. V. Ry. Co. v. Granite State Fire Ins. Co., 53 Neb. 514, 73 N. W. 950; Mon-

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mouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Home Ins. Co. v. Western Transp. Co., 33 How. Prac (N. Y.) 102; Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171, reversing 10 Hun, 59; Kennebec Coal & Ice Co. v. Wilmington & N. R. Co., 2 Chest. Co. Rep. (Pa.) 29; Brighthope Ry. Co. v. Rogers, 76 Va. 443.

And an insurance company which has paid the insurance is entitled to an injunction restraining insured from settlement or collection of his claim by suit against the tort feasor, without subrogation (Hartford Ins. Co. v. Pennell, 2 Ill. App. 609). But it seems that the existence of an unsatisfied judgment against the insurer for the insurance will not prevent a release by the insured of his claim against the wrongdoer from defeating the insurer's right of subrogation (Atlantic Ins. Co. v. Storrow, 5 Paige [N. Y.] 285). In Queen Ins. Co. v. Hudnut Co., 8 Ind. App. 22, 35 N. E. 397, it was said that an answer by an insurance company in an action on a policy, which alleged that defendant and the insured, after investigation, were satisfied that a company which owned a steamboat which was forced against the property by high wind was liable on account of negligence, that the insured elected to and did bring an action against the latter, but was unsuccessful, and that the insured did not assign to defendant all its rights to recover from any other person or corporation for such loss, as provided by the policy, but had sought to recover from the steamboat company in its own right, was insufficient, since it did not show a release of defendant from liability.

(i) Enforcement of right against insured who has recovered from wrongdoer or released one primarily liable.

If an insured, to whom the insurer has paid a loss resulting from the act of a wrongdoer, recovers damages from such wrongdoer, he will hold for the insurer such portion of the recovery as equals the amount which he received from the insurer (Weber v. Morris & E. R. Co., 35 N. J. Law, 409, 10 Am. Rep. 253), and the latter may recover such amount by a suit in equity (Monmouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107). So, if the insured settles with the wrongdoer causing the loss, and afterwards, without informing the insurance company of such settlement, receives from the latter payment for the loss, the insurance company may recover from him the money so paid (Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller, 98 Iowa, 731, 68 N. W. 443).

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Where an insured, on settlement of his policy, agreed to sue the railroad company alleged to have caused the loss, for the benefit of the insurer, and did so in his own behalf, but not in behalf of the company, he acted as a trustee for the insurance company, and he could not settle his own interests and leave the insurance company to prosecute its own suit. If he made a settlement of the suit, he settled for himself and the company. Hence a petition by the company setting forth the bringing of such action by the insured as its trustee under an agreement to sue for it, and its fraudulent dismissal without the knowledge of the insurance company and after the time when its right of action was barred by limitations, stated a good cause of action against such insured. (Norwich Union Fire Ins. Soc. v. Stang, 9 O. C. D. 576.) But where the insurer refuses, on request, to contribute to the suit by the insured against the wrongdoer, the insured is answerable to the insurer for no more, if for anything, than the surplus of the amount recovered from the wrongdoer which may remain after full satisfaction of his uncompensated loss and the expenses of the recovery (Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. Rep. 746).

In Svea Assur. Co. v. Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95, it appeared that an insured was paid his loss by the companies insuring him. He thereafter settled a suit, brought against a gas company for negligence in causing the fire, for much less than he was paid by the insurance companies, but much more than they offered him at first in satisfaction of his loss. Such settlement was made in good faith, and with the full approbation of all the insurers assisting in the suit, being the majority of those interested, but one of the insurers, which had refused to have any connection with the suit, was not notified that such settlement was contemplated. It was held that the insured was justified in settling the suit as he did. In Ætna Ins. Co. v. Confer, 158 Pa. 598, 28 Atl. 153, an affidavit of defense which alleged that plaintiff had declined to join in the prosecution of the suit against the wrongdoer, and had waived all claim to any money which might be thus recovered, and that defendant's actual loss was greater than the amount recovered from the railroad company and the sums paid him by various insurance companies, was held sufficient to withstand a rule for judgment, and to require the submission to the jury of the issues of fact presented. If an insurer pays a loss, and, after receiving an assignment of claims of the insured against a vessel and its owner for advances, brings suit against the owner of the vessel, and is defeated, the record of such suit is admissible in evidence in a subsequent suit brought by the insurer against the insured to recover the amount paid in settlement of the loss (Phœnix Ins. Co. v. Parsons, 129 N. Y. 86, 29 N. E. 87).

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(j) Subrogation to rights of lienholders and mortgagees.

It is a general rule that **where the interest of a mortgagee is separately insured for his own benefit, and a loss occurs before payment of the mortgage, the underwriters are bound to pay the amount of such debt to the mortgagee, providing it does not exceed the insurance, and are thereupon entitled to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor.** The payment of the insurance by the underwriter does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor.

Reference may be made to the following cases: Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; Dick v. Franklin Ins. Co., 10 Mo. App. 376, affirmed 81 Mo. 103; St. Paul Title Ins. & Trust Co. v. Johnson, 64 Minn. 493, 67 N. W. 543; Sussex Co. Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541; Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544, reversing 5 Hun, 321; Ulster County Sav. Inst. v. Leake, 73 N. Y. 161, 29 Am. Rep. 115, reversing 11 Hun, 515; Thomas v. Montauk Fire Ins. Co., 12 N. Y. St. Rep. 783; Kernochan v. New York Bowery Fire Ins. Co., 12 N. Y. Super. Ct. 1; Thornton v. Enterprise Ins. Co., 71 Pa. 234.

The Massachusetts court has, however, refused to follow this rule, and while in that state, as elsewhere, it is held that a mortgagor obtains no beneficial interest in a policy taken out by a mortgagee upon his own interest,[1] yet it is further held that the company, having accepted the premium for carrying the risk, can claim no right of reimbursement from the separate and distinct contract of indebtedness.

Suffolk Fire Ins. Co. v. Boyden, 9 Allen (Mass.) 123; King v. State Mut. Fire Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683. See, however, Allen v. Waterhouse Fire Ins. Co., 132 Mass. 480, where there was a clause looking to subrogation.

It seems to have been assumed in Phœnix Ins. Co. v. First Nat. Bank, 85 Va. 765, 8 S. E. 719, 17 Am. St. Rep. 101, 2 L. R. A. 667, that the company is entitled to subrogation under a policy in terms insuring the mortgagor, but in fact taken out and paid for by the mortgagee. But where a contract looking to the sale of property insured in the name of the owner was paid by the company to such owner and prospective vendor, it was incumbent on the company

[1] As to the general rule that the policy covers only interest named, see ante, vol. 1, p. 765.

As to mortgagor's right to share in the proceeds of a policy taken out by the mortgagee, see ante, p. 3699.

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claiming to be subrogated to an alleged lien of such owner, as vendor, to show that the contract of sale was so far completed as to divest insured of ownership, leaving her only interest in the property that of a vendor holding securities (Nelson v. Bound Brook Mut. Fire Ins. Co., 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308).

A rule similar to that governing the insurance of a mortgagee's interest obtains where either by the policy or by separate contract it is agreed that a policy by its terms insuring a mortgagor, with the loss, if any, payable to a mortgagee, shall nevertheless be valid and binding as to the mortgagee in cases in which the insurance has been forfeited as to the mortgagor. Such policies, indeed, generally contain a special stipulation looking to an assignment to the insurer of the whole or a part of the securities held by the mortgagee and paid by the insurer under a loss for which it was not liable to the mortgagor. Evidently, such a contract, so far as the right of subrogation is concerned, is a separate insurance of the mortgagee's interest as to any loss for which the company is not liable to the mortgagor, giving the mortgagor no right to claim a reduction of his debt by the payment to the mortgagee.

The union mortgage clause by which such an insurance is usually effected provides that, "whenever this company shall pay the mortgage * * * and shall claim that as to the mortgagor or owner no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee the whole principal due, or to grow due, on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities, but no subrogation shall impair the right of the mortgagee to recover the full amount of his claim."

It is also expressly provided by the standard policies of Maine, Massachusetts, Minnesota, and New Hampshire that whenever the "company shall be liable to a mortgagee for any sum for loss under this policy for which no liability exists as to the mortgagor or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested upon such payment the said mortgage, together with the note and debt thereby canceled."

Reference may also be made to the following cases: Allen v. Watertown Fire Ins. Co., 132 Mass. 480; Springfield Fire & Marine Ins. Co. v. Allen, 43 N. Y. 389, 3 Am. Rep. 711; Ulster County Savings Inst. v. Leake, 73 N. Y. 161, 29 Am. Rep. 115, reversing 11 Hun, 515; Utter v. Lewis, 10 Pa. Dist. R. 50; Alamo Fire Ins. Co. v.

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Davis, 25 Tex. Civ. App. 342, 60 S. W. 802; Wisconsin National Loan & Bldg. Ass'n v. Webster, 119 Wis. 476, 97 N. W. 171.

Such a contract between the mortgagee and insurer is valid, though unknown to insured, and the rights arising therefrom may be assigned by the insurer (Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445).

The insurance company will not, however, be entitled to subrogation under such a policy where it was in fact liable to the mortgagor; and this is true though the policy provides for subrogation if the company pays the insurance to the mortgagee, "claiming that as to the mortgagor" no liability exists.

Traders' Ins. Co. v. Race, 142 Ill. 338, 31 N. E. 392, affirming 31 Ill. App. 625. The Appellate Court held that the insurer seeking to enforce its mortgage rights must first secure a determination in a law court as to whether the policy was in fact forfeited as to the mortgagor, but the Supreme Court reversed it on this point, holding that the question as to insurer's right of subrogation and its right to foreclose the mortgage was an equitable question, and that equity, thus having jurisdiction of the matter, had the power to determine all incidental questions connected therewith.

Obviously, the principles underlying subrogation do not apply where the policy, both on its face and by the intention of the parties, insures the mortgagor, naming the mortgagee merely as a payee as his interest may appear. Under such a policy the mortgagor has a beneficial interest in the contract, and the insurer cannot be subrogated to the rights of the mortgagee.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; Home Ins. Co. v. Marshall, 48 Kan. 235, 29 Pac. 161; Pearman v. Gould, 42 N. J. Eq. 4, 5 Atl. 811. See, also, Gardner v. Continental Ins. Co., 25 Ky. Law Rep. 426, 75 S. W. 283.

In Gardner v. Continental Ins. Co., 25 Ky. Law Rep. 426, 75 S. W. 283, this rule was held applicable to such a policy, though by mutual mistake it contained an express provision for subrogation in case of payment to the mortgagee.

Therefore, where a mortgagee secured a judgment under such a policy for less than his mortgage debt, by which judgment, however, the mortgagor was not bound, and the company paid such judgment, it was not entitled, in a subsequent action by the mortgagor, to a credit for the amount of the mortgage debt, but only for the amount actually paid. Even though the payment concluded the mortgagee from claiming more of the proceeds of the policy, this in no way affected the rights of the mortgagor, or subrogated

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the insurer to any balance to which the mortgagee would have been entitled had it not been bound by the judgment and the payment thereof. (Havens v. Germania Ins. Co., 135 Mo. 649, 37 S. W. 497.)

It has also been held that an agreement between the mortgagor and mortgagee that the insurance shall be for the benefit of the mortgagor, and a payment of premiums by the mortgagor, will take a policy on its face insuring only the mortgagee out of the ordinary rule, and defeat the insurer's right of subrogation.

Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428; McDowell v. Morath, 64 Mo. App. 290.

In Ætna Ins. Co. v. Baker, 71 Ind. 102, the same holding was made, though it appeared that the mortgagee paid the premiums. The mortgagee was, however, allowed such premiums out of the proceeds of the policy.

This rule is applicable to a policy issued to the owner of land and paid to her by the company after a partially completed sale, in which she retained a lien on the property and agreed that the insurance should stand for the joint benefit of herself and vendees (Nelson v. Bound Brook Mut. Fire Ins. Co., 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308). Nor does it make any difference that the agreement between the mortgagor and mortgagee was unknown to the insurer[2] (Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428). But where the policy issued to a mortgagor, with the loss payable to the mortgagee, expressly stipulates for subrogation in case of payment of a loss to the mortgagee for which the company should not be liable to the mortgagor, such stipulation will entitle the insurer to subrogation, though the policy was issued with knowledge of a clause in the mortgage authorizing the mortgagee to insure, and providing that the premiums should be covered by the mortgage. The fact that the mortgagee was authorized to take out a policy protecting the mortgagor does not change the nature of the policy actually issued.

Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544, reversing 5 Hun, 321; Dick v. Franklin Fire Ins. Co., 81 Mo. 103, affirming, on opinion of lower court, 10 Mo. App. 376.

Under the general rule as to the nature of a collateral assignment, whereby the policy is regarded as still insuring the mort-

[2] As to the avoidance of the insurance by failing to give notice of an agreement defeating the right of subrogation, see ante, vol. 2, p. 1428.

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gagee,[3] and also under the doctrine that a forfeiture as to the assignor defeats, also, the rights of the assignee,[4] it is evident that **no right of subrogation will accrue to the insurer from the payment of the policy to one to whom it has been assigned as collateral to a debt.** The relation of the parties under such an assignment is similar to that existing between a mortgagor and a mortgagee to whom the loss has been made payable, and it seems never to have been doubted that the assignor is entitled to the benefit of any payment made. It would seem, however, that where it is held that the assignee can recover, though the assignor named as insured cannot, it should be further held that the insurer should be subrogated to the rights of the assignee. The parties under such circumstances seem rather in the position of a mortgagor and mortgagee insured under the union mortgage clause, or with a policy insuring the mortgagee alone. And that the insurer will be subrogated where the forfeiture as to the assignor occurred by a sale of the property, entirely divesting him of interest, was held in Kip v. Receivers of Mut. Fire Ins. Co., 4 Edw. Ch. 86. But in Robert v. Traders' Ins. Co., 17 Wend. (N. Y.) 631, reversing 9 Wend. (N. Y.) 474, it was held that the payment of the debt by the assignor, after judgment recovered by the assignee, would entitle the assignor to the benefit of the judgment, though, on account of other insurance taken out by the assignor, he himself could not have recovered on the policy. It should, however, be noted that the Robert Case has been overruled, in so far, at least, as it intimated that the assignee could recover at all under circumstances defeating the right of the assignor (Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391).

(k) Same—Liability on policy equaling amount of security.

The payment of only a portion of the debt to an insured mortgagee does not entitle the insurer to subrogation to a proportionate amount of the security. The right of the mortgagee to fully collect the debt must take precedence of the right of subrogation, leaving in the insurer only a right to any surplus realized on the securities beyond the debt as reduced by the payment of the insurance (Phœnix Ins. Co. v. First Nat. Bank, 85 Va. 765, 8 S. E. 719, 17 Am. St. Rep. 101, 2 L. R. A. 667). And of course a requirement for an assignment to the insurer of the mortgage and debt, or so much thereof as will be sufficient to pay the loss, does not require an

[3] See ante, vol. 2, p. 1065.

[4] See ante, vol. 2, p. 1535.

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assignment of the whole debt, when it more than equaled the amount of the insurance (New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221). So, also, where there were several policies containing stipulations for an assignment of a proportionate interest in the debt and security, the mortgagee was entitled to deduct reasonable attorney's fees incurred in actions on some of the policies, before applying the proceeds thereof on the mortgage debt (New Hampshire Fire Ins. Co. v. National Life Ins. Co., 112 Fed. 199, 50 C. C. A. 188, 57 L. R. A. 692). Nevertheless, the securities, after a payment by the insurer, must be considered as held in trust by the insured for the insurer [5] (Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541). And it would seem that, even in the absence of contract, the insurer who has paid a loss not so large as the mortgage may pay the amount still unpaid on the mortgage and demand an assignment thereof; and this, though the mortgage does not include the whole debt owing to the insured (Bound Brook Mut. Fire Ins. Ass'n v. Nelson, 41 N. J. Eq. 485, 5 Atl. 590, reversed on other grounds 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308).

Questions dependent on a payment of only a portion of the loss may be considered as partially solved by the stipulation already noted as contained in the union mortgage clause and in some of the standard policies, giving the insurer the option of paying the entire mortgage debt and demanding an assignment of the securities. Thus, the express stipulation of the union mortgage clause that the right of subrogation shall not impair the right of the mortgagee to recover the full amount of his claim can leave no doubt that, in the absence of a full payment of the debt and demand for assignment, the company will be liable to the extent of its policy for any deficiency between the amount realized on the security and the debt (Eddy v. London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; affirming 65 Hun, 307, 20 N. Y. Supp. 216). The clause as to impairing the rights of the mortgagee will not, however, operate to render unnecessary a proportionate assignment otherwise required, merely because the mortgaged property at foreclosure brought so little that with the insurance it did not equal the amount of the debt. The assignment would in any event be subject to the clause as to impairing the mortgagee's rights, but

[5] As to forfeiture of the insurance by acts defeating insurer's right of subrogation, see ante, vol. 2, p. 1792.

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that should not prevent the insurer from having his assignment under which he might act and protect his interests, if any there should prove to be (Dick v. Franklin Fire Ins. Co., 81 Mo. 103, affirming on opinion of Appellate Court, 10 Mo. App. 376). An offer of payment in full, and demand for assignment of the securities, as stipulated in the policy, must be made within a reasonable time, and before the mortgagee has incurred expense in attempting to collect the policy. Furthermore, it must include not only the original debt and interest, but also all sums which the mortgagee has reasonably spent to protect the property and uphold his security (Eliot Five Cents Sav. Bank v. Commercial Union Ins. Co., 142 Mass. 142, 7 N. E. 550). The question as to whether the company would waive its right to subrogation to any surplus remaining from the proceeds of the securities beyond the debt as reduced by the payment actually made by the company, by failing to pay the debt in full, and demand an assignment as authorized by the policy, is an interesting question, which has apparently never been litigated.

(1) Same—Acts defeating insurer's right.

It has been held that a failure of the holder of a mechanic's lien, who had procured insurance on his interest, to further prosecute the enforcement of his lien after a loss, did not defeat his right of action against the company by defeating the company's right of subrogation. In the first place the evidence showed that the company was not injured by the discontinuance of the action. And aside from this, it was no concern of the company whether he prosecuted his lien or not, unless they desired to be subrogated, and gave him notice to that effect; and what the effect of such action would have been, the court found it unnecessary to decide (Insurance Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473). Similarly, a stipulation for subrogation has been held ineffectual to prevent the insured from making any settlement with other companies deemed advantageous. Even though the right as to any other security "on the property in question" extended to the other insurance, it did not authorize the insurer which was contesting the claim to prevent the settlement with the other companies, or enable it to charge the mortgagee on the mortgage debt with more than was actually received in the settlement (New Hampshire Fire Ins. Co. v. National Life Ins. Co., 112 Fed. 199, 50 C. C. A. 188, 57 L. R. A. 692). In New Jersey, also, the court has refused to determine,

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in an action on the policy, the effect of a release of his security, by insured, on the insurer's right of subrogation. Such right was equitable, the court said, and could not be left to the jury on the trial. (Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. Law 541.) And in Morrison v. Tennessee Marine & Fire Ins. Co., 18 Mo. 262, 59 Am. Dec. 299, where, however, the point sought to be raised did not clearly appear, the court held that, since no right of subrogation arose before payment, such right could not be considered in a litigation on the policy.

On the other hand, it has been held that, where the insurer is entitled to subrogation, any act of the insured mortgagee destroying such right will amount to a pro tanto payment of the policy.

> Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Thomas v. Montauk Fire Ins. Co., 43 Hun (N. Y.) 218. See, also, Attleborough Sav. Bank v. Security Ins. Co., 168 Mass. 147, 46 N. E. 390, 60 Am. St. Rep. 373, and Seymour v. Tradesmen's Trust & Saving Fund Co., 203 Pa. 151, 52 Atl. 125.

It is obvious, however, that no such effect will follow a release of the mortgagor, which takes account of the existence of the policy and the rights of the parties thereunder. Such a release destroys neither insurer's right of subrogation nor insured's right against the company. (Thomas v. Montauk Fire Ins. Co., 43 Hun [N. Y.] 218.) Nor were the insurer's rights under a policy providing for an assignment of the security affected by an agreement by the mortgagee to convey to a third person, who was to pay the expense and have the benefit of the insurance, and who had, in fact, paid such expense before the loss took place. The agreement itself looked to the policy, and the purchaser had recognized it and its terms before the loss by paying the expense thereof. (Davis v. Quincy Mut. Fire Ins. Co., 10 Allen [Mass.] 113.) And where a conveyance of the property in satisfaction of the debt was not consummated prior to the loss, there was no such change in title as would affect the right of insurer, accruing under a union mortgage clause, on payment of the debt to the mortgagee (Magoun v. Fireman's Fund Ins. Co., 91 N. W. 5, 86 Minn. 486, 91 Am. St. Rep. 370).

(m) Action to enforce rights.

Where a policy of insurance provides that the insured, in claiming and accepting payment for a loss, thereby assigns and transfers all his right to claim for such loss against any person to the com-

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pany, to inure to its benefit, an action by the company to recover a proportionate part of the amount received by the insured as damages, based on such provision of the policy, is an action on a written contract, and not on a mere implied promise to pay, arising from the relation of the parties as determined by the contract, and hence a statute providing that actions on unwritten contracts, or to recover damages for injury done to property, shall be commenced within five years next after the cause of action accrues, is not applicable (Egan v. Boston Ins. Co., 110 Ill. App. 1).

An insurance company, after payment of a loss by fire occurring in one state, occasioned by sparks from a locomotive, is entitled to recover from the railroad company for negligently setting the burned building on fire, by suit in another state, by right of subrogation (Home Ins. Co. v. Pennsylvania R. Co., 11 Hun [N. Y.] 182). And where an insurance company has instituted, in the name of the insured, an action against a third party whose wrongful act or negligence caused the loss which the insurance company has paid, the jurisdiction of a court in Pennsylvania cannot be affected by an allegation of the defendant that it is threatened with a suit by the plaintiff in another state (Kennebec Coal & Ice Co. v. Wilmington & N. R. Co., 2 Chest. Co. Rep. [Pa.] 29).

Insurance companies who have paid part of a loss cannot be joined with the insured in an action to recover from the wrongdoer primarily liable, so as to defeat defendant's right of removal to the federal courts on the ground of diverse citizenship (Southern Bell Telephone & Telegraph Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579, affirming [C. C.] 66 Fed. 453). The federal court will separate the legal cause of action, and will not allow the joinder of parties having only equitable claims to defeat the right of removal (Over v. Lake Erie & W. R. Co. [C. C.] 63 Fed. 34).

A complaint in an action against a railroad by an insurance company paying a loss caused by the negligence of such railroad, which alleges that the property is of "great value," is not demurrable for failure to allege that the property was of any value, though it would have been better pleading to state its specific value (Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405). Where the insurer of a vessel, impressed into the military service after payment of the policy, sued in the Court of Claims under the act of March 3, 1849, and the act of March 3, 1863, to recover reimbursement of the government, the facts connected

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with the making of the policy and paying the loss must be shown by the petition (Shaw v. United States, 8 Ct. Cl. 488).

If an insurance company, intervening in an action by insured for a fire, sets out the policy in its petition of intervention, and alleges liability and loss thereunder, proof of loss, and payment to insured of the amount which it seeks to recover, and sets out an assignment of insured's right of action, by which it claims to be subrogated to insured's rights, it is not necessary to attach the written assignment as an exhibit (Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533). And an insurance company, intervening in an action by an insured against a railroad company for damages from fire, may make the allegations of plaintiff's petition, which sets forth the acts of negligence of defendant in causing the fire, that plaintiff is a corporation, and owned the property, part of its petition in intervention by way of reference, where it seeks to recover damages on assignment of insured's right of action (Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533).

It is not error for interveners to file a joint supplemental petition in reply to defendant's answer, where the matter alleged in the joint petition is common to all of them (Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533).

Where a suit by an insurance company to enforce the right of subrogation is dismissed because the company has no right of action against the defendant, the court may permit the company to amend, and make the insured plaintiff for the use of the company (Holcombe v. Richmond & D. R. Co., 78 Ga. 776, 3 S. E. 755). And where a decree in admiralty in favor of an insurance company was reversed because it was suing for only a part of the damages sustained by insured, and leave was given to amend, and show that the excess had been paid, released, or otherwise extinguished, so that claimants were no longer liable therefor at the suit of any one, and the libel was amended by an allegation that the only party in interest, except libelant, was the company owning the injured vessel, which had authorized libelant to file the libel and collect the amount of insurance paid, and that the company made no further claim for damages, and in support of such averment libelant offered in evidence a release executed by such company pursuant to a resolution of its board of directors, but after the cause was remanded, which released any claim for damages beyond those sued for by libelant, such amendment, and the evidence in support

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thereof, conformed to the requirements of the mandate, by showing that, at the time the libel was filed, libelant was the only party in interest asserting any claim, and that the claimants were fully protected against a second suit, and entitled libelant to maintain the suit to recover its own damages (Fairgrieve v. Marine Ins. Co., 112 Fed. 364, 50 C. C. A. 286).

Where underwriters who have paid a loss for injuries to a tow caused by negligent navigation sue the wrongdoer in admiralty, an answer which admits that libelants were the underwriters on the hull does not fairly raise the issue as to the right of the insured, who had hired the barge, to insure for the owners (The Frank G. Fowler [D. C.] 8 Fed. 360).

The defendant in an action to enforce the right of subrogation cannot rely on defenses which might have been raised between the insurer and the insured.

Amazon Ins. Co. v. The Iron Mountain, 1 Fed. Cas. 586; The Planter, 19 Fed. Cas. 805; Sun Mut. Ins. Co. v. Mississippi Valley Transportation Co. (C. C.) 17 Fed. 919; Pearse v. Quebec Steamship Co. (D. C.) 24 Fed. 285; In re Harris, 57 Fed. 243, 6 C. C. A. 320, 14 U. S. App. 506; Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1; United States v. American Tobacco Co., 17 S. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081, affirming 32 Ct. Cl. 207; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

So, the defendant cannot rely on negligence by the insurer in assuming the risk (United States Casualty Co. v. Bagley, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424). Nor will defendant be permitted to set up the payment of the insurance company's part of the loss (Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190).

The burden of proving negligence is on the insurer when suing to enforce its right of subrogation (Union Ins. Co. v. Shaw, 24 Fed. Cas. 580). And a showing that a locomotive passing over defendant's right of way caused the fire does not shift the burden of proof to defendant to show freedom from negligence, but the fact proven stands as substantive evidence of such negligence (West Side Mut. Fire Ins. Co. v. Chicago & N. W. Ry. Co. [Iowa] 95 N. W. 193).

In a suit to enforce the right of subrogation, the proof of loss is properly admitted as showing plaintiff's liability to the insured (Liverpool & L. & G. Ins. Co. v. Southern Pac. Co., 125 Cal. 434,

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58 Pac. 55). And it is not error to admit a written assignment from the insured to the insurer (St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia, 55 Ark. 163, 18 S. W. 43). But the insurer's own declarations and admissions are not admissible against its right of subrogation (H. C. Judd & Root v. New York & T. S. S. Co. [C. C.] 130 Fed. 991).

Where an insurer, having paid a loss on a cargo sunk by a collision, libeled the vessel responsible for the accident, and an assignee of the claims of other insurers, who had also paid losses on the cargo, also filed similar libels against the vessel, but delayed the prosecution of his suits until the first litigation was terminated favorably to the insurer, and contributed nothing to the cost of this litigation, and in no way assisted in the favorable outcome, the insurer's claim should be first satisfied in full from the proceeds of the litigation before the claims of the assignee are considered (Woodworth v. Corn Exch. Ins. Co., 5 Wall. 87, 18 L. Ed. 517). Where the insurer of a vessel pays a loss, occasioned by her injury through the fault of another vessel, only after the damage has been appraised by a commission, and the ordinary steps have been taken to verify such appraisement, there is a strong presumption that the damage was equal to the amount paid; and the estimate of witnesses who made an examination of the vessel five or six years later for the express purpose of minimizing the damages does not justify an appellate court in reversing a decree for damages against the offending vessel equal to the amount of the original appraisal, and which is also supported by other evidence (Fairgrieve v. Marine Ins. Co., 112 Fed. 364, 50 C. C. A. 286).

The sufficiency of instructions was considered in Boston Marine Ins. Co. v. Slocovitch, 55 N. Y. Super. Ct. 452.

(n) Same—Parties.

Where an insurance company has paid a loss occasioned by the negligence of a third person, the company may, in some jurisdictions, bring an action against such third person in the name of the insured to recover the amount it has paid.

The Sydney (C. C.) 27 Fed. 119. See, also, The Sidney (D. C.) 23 Fed. 88; Hall v. Nashville & C. R. Co., 13 Wall. 367, 20 L. Ed. 594; St. Louis, A. & T. R. Co. v. Fire Ass'n of Philadelphia, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83. See, also, Id., 55 Ark. 163, 18 S. W. 43; Kennebec Coal & Ice Co. v. Wilmington & N. R. Co., 2 Chest. Co. Rep. (Pa.) 29. Such suit may be brought in the insured's name without his consent. Monmouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.

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And the insured may sue the persons primarily liable, even though he has been indemnified by the insurer (Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812). He, however, recovers as trustee for the insurer to the extent of the insurance paid by the latter.

Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; Hart v. Western Railroad Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Gales v. Hallman, 11 Pa. 515.

But an insurer which has paid a loss on property lost through the negligence of a third person, which is afterwards paid to the insured by the wrongdoer, with knowledge that the insurance company had paid the same, cannot proceed in one action against both the insured and the wrongdoer, as the two are not jointly liable, so that a decree could be made or judgment given against both. Where, in such suit, a money judgment only is prayed for, a demurrer will be sustained for the misjoinder, but, if a general prayer for relief is added, the suit will be retained, to give such equitable relief as the facts may warrant. (Monmouth Mut. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.)

Under the code practice, which requires a suit to be brought by the real party in interest, an insured who has been fully indemnified by the insurer cannot sue the person primarily liable, as his right of action has, by acceptance of payment from the insurer, passed to the latter.

Allen v. Chicago & N. W. Ry. Co., 94 Wis. 93, 68 N. W. 873; Sims v. Mutual Fire Ins. Co. v. Town of La Prairie, 101 Wis. 586, 77 N. W. 908.

Still, if it is by statute provided [6] that an action may be prosecuted to the end in the name of the original party, notwithstanding any transfer of interest, an insured may continue an action against the tort feasor, though the insurance company has paid him the full amount of his insurance on the buildings (Nichols v. Chicago, St. P., M. & O. Ry. Co., 36 Minn. 452, 32 N. W. 176).

If a loss had been paid in full by the insurer, a suit against the wrongdoer occasioning the loss may in some jurisdictions be brought in the name of the insurer, and the insured need not be joined as a party (Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. [C. C.] 41 Fed. 643). In that case it was held that a statute pro-

[6] See Gen. St. Minn. 1878, c. 66, § 41.

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viding that, where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant, has no application to such action, as the insurer does not sue as assignee, but by right of subrogation. But where the insured is indemnified only in part by the insurer, both the insured and the insurer may join in an action against the one primarily liable for the loss.

Crandall v. Goodrich Transportation Co. (C. C.) 16 Fed. 75; Firemen's Fund Ins. Co. v. Oregon R. & Navigation Co. (Or.) 76 Pac. 1075, 67 L. R. A. 161; Swarthout v. Chicago & N. W. Ry. Co., 49 Wis. 625, 6 N. W. 314. In Wunderlich v. Chicago & N. W. Ry. Co., 93 Wis. 132, 66 N. W. 1144, it was said that under such circumstances the insurer should join the insured in the action against the tort feasor.

Under such conditions the insured and insurer both have an interest in the amount recovered from the wrongdoer causing the loss, and the entire liability of such wrongdoer may be determined in one suit (Kennebec Coal & Ice Co. v. Wilmington & N. R. Co., 2 Chest. Co. Rep. [Pa.] 29).

In Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co., 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151, it was held that, where the insurance paid by the insurer was less than the value of the property destroyed, the insurer must be joined as a party to an action by the insured against the tort feasor, either as plaintiff or defendant, a Code provision requiring suits to be brought in the name of the real parties in interest. And in Pratt v. Radford, 52 Wis. 114, 8 N. W. 606, it was said that under a similar statute the insurers who had paid the insured money due him, in whole or in part, must be joined with insured in a suit against the one primarily liable for the loss. However, a corporation insuring goods in the course of transportation on a vessel may compromise a loss with the insured, take an assignment of the bill of lading, and the insured's claim against the owners of the vessel causing the loss, and maintain an action against such owners for the full amount of the loss, notwithstanding that it exceeds the amount of the policy (Home Ins. Co. v. Northwestern Packet Co., 32 Iowa, 223, 7 Am. Rep. 183). And where the insured has released the wrongdoer after payment by the insurer, a suit may be maintained by the latter against the wrongdoer to recover the sum paid, and such suit is not a splitting of the demand (Hartford Fire Ins. Co. v. Wabash Ry. Co., 74 Mo. App. 106).

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Where several insurance companies have become subrogated to the rights of insured against the company whose act caused the loss, the mode of enforcing subrogation in the absence of statutory enactment is by action in the name of insured for the benefit of such insurance companies, and one of such companies cannot maintain a separate action to recover its proportion of the loss (Mobile Ins. Co. v. Columbia & G. R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725). In Hare v. Headley, 52 N. J. Eq. 496, 28 Atl. 452, it appeared that, after a decree and sale, a fire occurred in the mortgaged premises. The mortgagee having received a certain amount from insurance effected by the mortgagor, a second mortgagee obtained an order that said amount should be credited on the decree, and the surplus be paid into court. The decree provided that the proceeds of sale should be appropriated to the second, after the payment of the first, mortgage. It was held that in an action by the assignee of the insurance companies, claiming under an agreement with the first mortgagee for subrogation, to be entitled to the fund in court, all parties to the original suit who had an interest in the money, or in the manner of its disposition, should be made parties.

Where an insurance company has paid a part of a loss, it should intervene in an action by the insured against the tort feasor for the purpose of being subrogated to the rights of the insured to the extent of such payment, and the amount recovered should be adjudged to the insured and the insurer according to their respective interests (Lake Erie & W. R. Co. v. Falk, 56 N. E. 1020, 62 Ohio St. 297). And such intervention may take place after a decree has been rendered in favor of such owners on a mandate from the appellate court, as the issues raised by the intervention relate solely to the distribution of the fund recovered (Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700). Where a policy provided that, in the event of fire caused by the act or neglect of another, the insurer, on payment of the loss, should be subrogated, to the extent of such payment, to all right of recovery of the insured, in an action on the policy by the insured to recover for such loss the insurer may cause the party whose negligence caused the fire to be impleaded, and have the rights of all three parties determined, though the insurer has not paid the loss to the insured (Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co., 31 Tex. Civ. App. 104, 71 S. W. 419).

At common law the right of an insurance company paying a loss

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occasioned by third persons, to recover from such third persons, must be asserted in the name of the insured.

New England Mut. Marine Ins. Co. v. Dunham, 18 Fed. Cas. 66, affirming Dunham v. New England Mut. Marine Ins. Co., 8 Fed. Cas. 46; Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; Over v. Lake Erie & W. R. Co. (C. C.) 63 Fed. 34; Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138; Peoria Marine & Fire Ins. Co. v. Frost, 37 Ill. 333; Kennebec Coal & Ice Co. v. Wilmington & N. R. Co., 13 Wkly. Notes Cas. (Pa.) 162, 2 Chest. Co. Rep. (Pa.) 29; Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812. In Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618, it was said that a statute (Rev. St. Me. c. 162, § 13) providing that a person willfully or maliciously injuring, destroying, or defacing a building without the owner's consent shall be liable to the person injured for three times the value of the property destroyed or injured, does not give the insurer a right of action in its own name.

But in a court of equity or of admiralty, or under the modern codes of practice, this right may be asserted by the insurance company in its own name, where it has paid the insured the full value of the property destroyed.

The Sydney (C. C.) 27 Fed. 119; The Sidney (D. C.) 23 Fed. 88; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 41 Fed. 643; Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; Liverpool & G. W. Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, affirming (C. C.) 22 Fed. 715; Liverpool & G. W. Steam Co. v. Insurance Co. of North America, 129 U. S. 464, 9 Sup. Ct. 480, 32 L. Ed. 800; Atchison, T. & S. F. R. Co. v. Home Ins. Co., 59 Kan. 432, 53 Pac. 459; Hartford Fire Ins. Co. v. Wabash Ry. Co., 74 Mo. App. 106; Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171, reversing 10 Hun, 59; Sims v. Mutual Fire Ins. Co. v. Town of La Prairie, 101 Wis. 586, 77 N. W. 908. Insurers under the French spoliation act of 1885, who have paid the insurance, can sue to recover in their own names (Holbrook v. United States, 21 Ct. Cl. 434).

However, if the value of the property destroyed exceeds the insurance money paid, it is generally held that the suit must be brought in the name of the insured.

Ætna Ins. Co. v. Hannibal & St. J. R. Co., 1 Fed. Cas. 207; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 41 Fed. 643; Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; Watts v. Southern Bell Telephone & Tele-

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graph Co. (C. C.) 66 Fed. 453, affirmed Southern Bell Telephone & Telegraph Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579; Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190.

But an insurer who has indemnified the insured to the extent of the insurance may bring an action in its own name against the wrongdoer primarily liable, where the latter, by paying the remainder of the loss, has obtained a release from the owner (Hartford Fire Ins. Co. v. Wabash Ry. Co., 74 Mo. App. 106).

An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty, in the partnership name, to recover the amount of the loss from the carrier (Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, affirming The Queen [D. C.] 78 Fed. 155).

An objection that a suit by an insurance company against one alleged to be primarily liable for a loss paid should have been brought by the insured should be raised by the answer, to be available (Home Ins. Co. v. Pennsylvania R. Co., 11 Hun [N. Y.] 182). And if the defendant in such a suit did not raise the objection of defect of parties, and in its answer allege that the insured has no claim whatever against it, defendant cannot complain that the action was not brought in the name of insured, or that insured was not joined as plaintiff (Chicago, B. & Q. R. Co. v. German Ins. Co., 2 Kan. App. 395, 42 Pac. 594).

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XXIX. REINSURANCE.

1. SPECIAL MATTERS RELATING TO REINSURANCE CONTRACTS.

(a) Risks covered.
(b) Extent of liability.
(c) Defenses open to reinsurer.
(d) Rights of original insured.

(a) Risks covered.

An insurer cannot stipulate for indemnity by reinsurance against a risk which he has not assumed (Commonwealth Ins. Co. v. Globe Mut. Ins. Co., 35 Pa. 475); but this does not mean that the risk assumed by the reinsurer must be coextensive with the risk covered by the original policy. Though a contract of reinsurance applies to the same subject-matter as the original policy, and relates to perils of the same character, it may be for a less, though not a greater, risk (London Assur. Corp. v. Thompson, 62 N. E. 1066, 170 N. Y. 94). So when the original insurance was by a time policy, reinsurance for a specific voyage the ordinary length of which was less than the time originally insured is valid (Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. 250). As illustrative of the rule, reference may also be made to Milwaukee Mechanics' Ins. Co. v. Palatine Ins. Co., 128 Cal. 71, 60 Pac. 518, where the original insurer had issued a policy on certain property for one year, the risk running from June 20, 1894, to June 20, 1895. Thereafter it applied to defendant company for a policy of reinsurance covering the period from June 19, 1894, to June 19, 1895. The property burned June 20, 1895. It was held that though the general custom was to issue reinsurance policies for the same period of time covered by the original policy, still such fact would not operate as against the plain letter of a contract prescribing a definite period of time; hence the reinsurer was not liable for the loss.

There being no general form of marine insurance policy, and reinsurers not always assuming the same risk as the original insurers, it cannot be presumed that the risk covered by a reinsurance was the same as covered by the original policy. Insurance Co. of State of Pennsylvania v. Telfair, 61 N. Y. Supp. 322, 45 App. Div. 564.

A reinsurer is not liable to the insurer for a loss which, unknown to either paty, occurred before the reinsurance was effected, if the

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parties contracted with reference to a custom that reinsurance took effect from the time when it was 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). Where the reinsurer by contract assumed the "trade, contingent liabilities, and good will" of a company retiring from business, and agreed to pay the losses and reap the advantages which were "to accrue" from its assumption of the losses of the other company, while the company going out of business agreed to discharge its "outstanding obligations," the reinsurer was not liable for losses through fires before the contract was made (Olsen v. California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446). The reinsurance may, however, cover risks to be taken by the original insurer in the future. Thus, in Boston Ins. Co. v. Globe Fire Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303, it was held that a policy of reinsurance, by which a company undertakes to indemnify another company to the extent of one-half its losses by fire on marine risks it then holds or may thereafter take during the life of the contract, is not a wager policy, but is governed by the laws and usages of marine insurance, and is in the nature of an open policy, which, by such laws and usages, is valid; nor is its validity affected by the fact that it contains no stipulation for notice by the reinsured of the subsequent policies it issues. In Imperial Fire Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609, 30 U. S. App. 409, the contract of reinsurance provided that the company should be liable only for such proportion of the loss as the sum insured bore to the cash value of the whole property. Another condition provided that it should be subject to the same risks, conditions, valuations, indorsements, assignments, and mode of settlement as were or should be assumed by the insured company, and the loss should be payable pro rata at the same time and in the same manner as by that company. It was held that policies subsequently issued by the insured company which did not contain the coinsurance clause were covered by the policy of reinsurance.

An insurance company having risks on a vessel, her cargo and freight, made application for reinsurance as follows: "Reinsurance is wanted by the M. Insurance Company for $——— on cargo on board of the ship G., on the excess of insurance which [insurer] may have over $50,000, not exceeding $15,000." It was held that the policy issued on such application attached to any excess over $50,000 which the plaintiffs had at risk on the cargo alone, and not

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on vessel, freight, and cargo, and, as the original insurer's risk on the cargo alone at no time amounted to said sum, there could be no recovery (Mercantile Mut. Ins. Co. v. State Mut. Fire & Marine Ins. Co. of Pennsylvania, 25 Barb. [N. Y.] 319).

Under a contract of reinsurance confining the location of the risk within certain limits, there can be no recovery for a risk located outside of said limits, though it is erroneously stated to be within said limits in the schedule of risks. So where the contract for reinsurance distinctly provided for reinsurance of policies on risks in New York state only, and the schedules describing the risks to be reinsured embraced certain risks elsewhere than in New York, as well as those in that state, the policies of reinsurance, though they in terms covered the risks which were set forth in the schedules, only covered the risks in New York state (London & L. Fire Ins. Co. v. Lycoming Fire Ins. Co., 105 Pa. 424).

A warehouse five stories high, with a common outer wall and two partition walls dividing the building into three compartments on each floor, with doors eight feet square in each of the walls between the several compartments in each of the five stories, the entire structure being under one management and devoted to the same use, is but one building, within the meaning of a reinsurance compact, which limited the liability of an insurance company to $5,000 in any one building or risk. German-American Ins. Co. v. Commercial Fire Ins. Co., 95 Ala. 469, 11 South. 117, 16 L. R. A. 291.

(b) Extent of liability.

The contract of reinsurance is a contract of indemnity, and binds the reinsurer to pay to the reassured the whole loss sustained in respect of the subject insured, to the extent for which he is reinsurer.

Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Hone v. Mutual Safety Ins. Co., 3 N. Y. Super. Ct. 137, affirmed, 2 N. Y. 235; Philadelphia Trust, Safe-Deposit & Ins. Co. v. Fame Ins. Co., 9 Phila. (Pa.) 292.

Whether the reinsurance is for the whole or part of the risk of the original insurer, it binds the reinsurers to make good to the insurer the loss up to the amount of the reinsurance (Chalaron v. Insurance Co. of North America, 21 South. 267, 48 La. Ann. 1582, 36 L. R. A. 742).

Though a reinsurer is only liable for the amount for which the insurer is legally liable (Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant, Cas. [Pa.] 71), whether the reinsurer is liable to the

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full extent of the reinsurance or merely for the amount actually paid by the original insurer is a question on which the courts are not agreed. It has been held in Illinois (Illinois Mut. Fire Ins. Co. v. Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620), and in Ohio (Commercial Mut. Ins. Co. v. Detroit Fire & Marine Ins. Co., 38 Ohio St. 11, 43 Am. Rep. 413), that if the original insurer discharges its liability by the payment of a less amount than the original insurance, this amount is the measure of indemnity to be recovered from the reinsuring company, provided such amount is within the amount of the reinsurance policy, and does not exceed the actual loss. On the other hand, it has been held in Missouri that the true measure of damages is not what the original insurer has paid, but what he is bound under his policy to pay by reason of the loss (Gantt v. American Cent. Ins. Co., 68 Mo. 503). So in In re Republic Ins. Co., 20 Fed. Cas. 548, it was said that under the clause, "loss, if any, payable at the same time and pro rata with the insured," the reinsurer is liable to pay the amount the first insurer is liable for, and not the amount it actually pays.

Specific application of these principles has been made where the original insurer has become insolvent. Thus, in Illinois Mut. Fire Ins. Co. v. Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620, to which reference has already been made, where the policy of reinsurance stipulated, "Loss, if any, payable pro rata, at the same time and in the same manner as the reinsured company," it was held that, in case of loss, if the reinsured should pay only 10 cents on the dollar of its insurance, the reinsurer would pay at the same rate on the amount of its policy. It was, however, said (Cashau v. Northwestern Nat. Ins. Co., 5 Fed. Cas. 270) that the condition that in case of loss the reinsurer shall pay pro rata at and in the time and manner as the reinsured, means merely that the reinsurer shall have all the advantages of the time and manner of payment specified in the policy of the reinsured. It has no reference to the insolvency of the reinsured. That is to say, **the liability of a reinsurer to pay the whole amount of a loss, to the extent of the reinsurance, to the reinsured, is not affected by the insolvency of the latter or his inability to fulfill his own contract with the original policy holder.**

Consolidated Real Estate & Fire Ins. Co. of Baltimore v. Cashow, 41 Md. 59; Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235, affirming 3 N. Y. Super. Ct. 137; Blackstone v. Alemannia Ins. Co., 56 N. Y. 104; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Strong v. American Cent. Life Ins. Co., 4 Mo. App. 7.

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In Hunt v. New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602, the original insurer was reinsured as to one-third of the risk by a second insurer, which was as to one-half the risk by it assumed reinsured by a third insurer, which agreed to settle a loss "pro rata with the reinsured, and at the same time and place, and upon the same terms and conditions." A loss occurred, which the first insurer paid. The second insurer paid no part of the loss, and went into liquidation, and it was uncertain whether its assets were sufficient to satisfy its liabilities. It was held that the third insurer was liable for one-sixth of the loss, irrespective of the amount the second insurer might ultimately pay.

Under the "pro rata" clause, the liability of the reinsurer is proportionate to the amount actually at risk, and where the policy of reinsurance was for half the amount of the original insurance, and the amount of the original insurance was reduced to less than the amount of the reinsurance policy, the reinsurer was not liable, on a loss occurring, for the full amount of the reduced insurance, but for one-half thereof (Home Ins. Co. v. Continental Ins. Co., 70 N. Y. Supp. 824, 62 App. Div. 63, affirmed in 180 N. Y. 389, 73 N. E. 65). That is to say, where the amount of original insurance is $10,000 and the reinsurance is $5,000 the insurer is liable for one-half of the loss, but if the original insurance is subsequently reduced to $2,000 the insurer does not thereby become liable for the whole amount of any loss. But where a policy of reinsurance binds the reinsurer to make good to the reinsured all loss or damage not exceeding a specified sum, such loss or damage to be estimated according to the actual cash value of the property at the time of loss, the contract imports on its face that the reinsured is to make a full indemnity, and evidence of a local custom among insurers to pay only such a proportion of the loss as the amount of reinsurance bears to the original policy cannot be received to reduce the amount of recovery on the contract; there being no ambiguity therein (Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235).

Where the application clerk employed in the home office of the reinsuring company had full authority to accept risks and to cancel policies, he had prima facie authority to sign an agreement waiving a provision in a contract of reinsurance providing that the reinsurer should not be liable on such risks to exceed in any case the amount of the risk retained by the original insurer, and where at the time the reinsurer was asked to sign a waiver of such provision, the agent

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was informed that the object of the document was to enable certain companies to reinsure their risks and avoid such clause in the contract of reinsurance, and he was further informed that such reinsurance had already been effected to some extent, the notice was sufficient to put the reinsurer on inquiry as to the extent of the reinsurance which it was thus asked to ratify, and, in the absence of inquiry, constituted a waiver of such clause with regard to contracts made before as well as after the date of the waiver. Northern Ins. Co. v. Associated Mfrs.' Mut. Fire Ins. Corp., 90 N. Y. Supp. 14, 97 App. Div. 634.

A contract by which a fire insurance company undertakes to adjust and pay losses under the policies of another company, thereby reinsured by it, as it would under its own policies if issued direct to the said assured, in pursuance of which it assumes the management of the business of the latter company, when assented to by the creditors of the retiring company, makes the latter and the reinsuring company jointly liable for a loss under a risk thus reinsured (Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897).

In view of the foregoing principles, it is also obvious that when the reinsurance is for only a part of the amount of the original insurance the reinsurer, in case of a partial loss, is liable, under the pro rata clause, for only its proportionate part of such loss (Norwood v. Resolute Fire Ins. Co., 36 N. Y. Super. Ct. 552, 47 How. Prac. 43). That is to say, where the reinsurance was for half the amount originally insured, and a loss occurred less than the amount of the original insurance, the reinsurer, by virtue of the pro rata clause, was not bound to pay the full amount reinsured, but only one-half the loss (Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104).

The liability of the company reinsuring accrues at the same time with the liability of the reinsured (Blackstone v. Alemannia Fire Ins. Co., 4 Daly [N. Y.] 299), and **it is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer.**

Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Hone v. Mutual Safety Ins. Co., 3 N. Y. Super. Ct. 137; Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104; Philadelphia Trust Safe-Deposit & Insurance Co. v. Fame Ins. Co., 9 Phila. (Pa.) 292.

The original insurer, to recover of his reinsurer, must prove the extent of the loss in the same manner as the original insured must have proved it against him (Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co., 29 N. Y. Super. Ct. 316). Where the policy of

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reinsurance stipulated that it should be subject "to the same risks, valuations, conditions, and mode of settlements as are or may be adopted or assumed by" the original insurer, this clause fastened the responsibility of the reinsurer to the settlement and adjustment made by the original insurer with the original insured as to the amount of loss (Consolidated Real Estate & Fire Ins. Co. of Baltimore v. Cashow, 41 Md. 59). And on the original insurer's ascertaining by a proper investigation that it is legally liable to pay a certain amount to the insured under its contract, such payment being made, the reinsurer cannot question the validity of the insurer's act, in the absence of an allegation and proof that the insurer acted fraudulently or collusively, to its injury (Insurance Co. of State of New York v. Associated Manufacturers' Mut. Fire Ins. Corp., 74 N. Y. Supp. 1038, 70 App. Div. 69, affirmed in 174 N. Y. 541, 66 N. E. 1110).

Proof of a judgment recovered against the insured company on its policy, in the defense of which suit the reinsuring company took part, is sufficient proof of a loss.

Ocean Ins. Co. v. Sun Mut. Ins. Co., 18 Fed. Cas. 547, reversing Id. 540, and reversed 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

In Jackson v. St. Paul Fire & Marine Ins. Co., 99 N. Y. 124, 1 N. E. 539, the court held, in an action between the original insurer and the reinsurer, that where the original insurer has been found to be legally liable upon its contract, and the amount due is ascertained, it is not open to the reinsurer to inquire into the merits of the contentions settled by the action against the original insurer.

An indorsement on a policy of reinsurance provided that the reinsurance should be "to the extent of one-half of the amount of each and every risk which equals or exceeds in value the sum of $15,000" on cargoes insured by the reinsured under certain open policies, and "on cargoes of the value of $50,000 and upwards this policy is to cover the excess of $25,000, not exceeding the sum of $50,000 on any one cargo." The open policies issued by the reassured provided that the insured should "enter for insurance all goods at the full value thereof." It was held that in fixing the liability of the reinsurer the word "risk," as used in the indorsement, referred to the value of the property as indorsed on the open policies, rather than the value of the property as adjusted after a loss.

Continental Ins. Co. v. Ætna Ins. Co., 138 N. Y. 16, 33 N. E. 724, reversing 62 Hun, 554, 17 N. Y. Supp. 106; Same v. Greenwich Ins. Co., 138 N. Y. 601, 33 N. E. 728.

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A reinsurer is liable, in the event of a loss, to pay the full amount thereof, not exceeding the sum mentioned in his contract, notwithstanding a clause in the policy providing that in case there was any other insurance, prior or subsequent, on the property insured, the reinsured should be entitled to receive, in the event of a loss, only a proportionate part thereof; such clause referring to the case of a double reinsurance (Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235, affirming 3 N. Y. Super. Ct. 137). In Alker v. Rhoads, 76 N. Y. Supp. 808, 73 App. Div. 158, a reinsurance policy against losses not exceeding $5,000 during a term from September 15, 1895, to January 1, 1896, after reciting the terms of the contract, etc., contained the clause, "$15,000, September 15, 1895, to January 1, 1896, without right of cancellation by either party." A $10,000 loss accrued, and the first proof thereof, prepared by the person who formulated the reinsurance contract, stated that, "There being an implied agreement to carry a total insurance concurrent with your form of policy of $15,000, the adjustment is to be made as though such $15,000 insurance was in force," and that the insurer's proportion of the loss was, therefore, one-third. It further appeared that insured had taken out $10,000 additional reinsurance on the risk, though $5,000 of this had been allowed to lapse. The second proof of loss demanded $5,000, without apportionment. It was held that the policy contemplated reinsurance to the extent of $15,000, and the insurer was liable only in the proportion of $5,000 to $15,000; that is, for one-third of the loss.

In Ocean S. S. Co. v. Ætna Ins. Co. (D. C.) 121 Fed. 882, it appeared that the libelant, a marine carrier, was accustomed to issue to shippers "insured bills of lading," which bound it as an insurer of the cargo covered thereby, and against the risks so assumed it took out a marine policy with respondent, which contained the provision that "this insurance is hereby understood and agreed to be in effect a reinsurance of the risks which are or may at any time be assumed by the assured, and the assurers agree to pay the assured in full all claims for such losses arising from perils enumerated in the policy as the assured may, in their judgment, settle for with the owners or other parties interested in the merchandise." A loss of cargo occurred from fire, which was one of the perils insured against, and, the contribution to be made by the insured bills of lading cargo having been determined in general average, libelant paid the same. It was held that by the plain terms of the policy respondent was liable for the full amount so paid to the extent of

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the amount named in the policy, which was one of reinsurance, and not of co-insurance such as would entitle respondent to prorate the loss with libelant; and that it was immaterial that the loss was only partial, both as to the entire cargo and the insured bill of lading cargo.

A reinsurer is generally liable for the costs and expenses of a suit, paid by the reinsured to the original insured.

Hastie v. De Peyster, 3 Caines (N. Y.) 190; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468; New York State Marine Ins. Co. v. Protection Ins. Co., 18 Fed. Cas. 160.

But expenses incurred by the reinsured in defending in an action on the original policy cannot be recovered, when the reinsurer was not notified of such action (Insurance Co. of State of Pennsylvania v. Telfair, 57 N. Y. Supp. 780, 27 Misc. Rep. 247).

An insurance company with whom another company has reinsured certain risks cannot purchase claims for losses against the latter company which were not reinsured, and offset them against its own liability, but claims for losses, which the reinsurer had reinsured, are a valid counterclaim against its indemnity of reinsurance upon such claims. In re Cleveland Ins. Co. (C. C.) 22 Fed. 200.

In Burke v. Rhoads, 81 N. Y. Supp. 1045, 82 App. Div. 325, it appeared that a policy of reinsurance issued by an unincorporated association of underwriters provided that a judgment recovered in an action on the policy should be satisfied out of the premiums in the hands of the underwriters unexpended, if sufficient, and otherwise out of the deposits made by the several underwriters; but if both should be insufficient, then out of the individual liability of the several underwriters, as thereinbefore expressed and limited; that the total liability of each underwriter on all policies "now or hereafter in force," after the application of the total unexpended premiums, should not exceed $2,500. In an action against defendant, as one of such underwriters, to recover his proportionate share of a judgment rendered in an action on the policy, defendant set up that he had long since paid the limit of his liability. It was held that if defendant continued to issue policies and sell insurance after the fund measured by the limited liability was exhausted he must be held to have renewed his contract on the original terms, and was bound to provide a fund on the terms and conditions thereof, and the payment of his previous liability constituted no defense to the enforcement of the policy.

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Where fifteen persons were associated as underwriters, each liable for a stated proportion on all risks, and all outstanding risks were reinsured in another company, one of the fifteen had no individual cause of action against the reinsuring company for the proportion of a risk he had paid, as their contract was with the association, and his individual liability did not give him an individual right as against the reinsurers (Thompson v. Colonial Assur. Co., 68 N. Y. Supp. 143, 33 Misc. Rep. 37, affirmed in 70 N. Y. Supp. 85, 60 App. Div. 325).

(c) Defenses open to reinsurer.

As the risk assumed by the reinsurer is commensurate with the risk incurred by the original insurer, it is evident that **the reinsurer may make the same defenses as are open to the original insurer.**

This principle has been asserted in general terms in New York State Marine Ins. Co. v. Protection Ins. Co., 18 Fed. Cas. 160; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant, Cas. (Pa.) 71.

So, too, a clause in a policy of reinsurance, "Loss, if any, payable at the same time and pro rata with the insured," has been construed as merely giving the reinsurer the benefit of any defenses the first insurer may have (Ex parte Norwood, 18 Fed. Cas. 452).

But the fact that the reinsurance is subject to all the conditions of the original insurance does not entitle the reinsurer to raise the objection that its consent was not asked to a change in interest (Manufacturers' F. & M. Ins. Co. v. Western Assur. Co., 145 Mass. 419, 14 N. E. 632). The insured can only be required to look to the original insurer for consent to such a change (Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co., 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423).

An agreement by the original insurer to employ counsel and defend the claim creates merely an agency, and the reinsuring companies, by allowing the defense to proceed, make the attorneys so employed their own (Strong v. American Cent. Life Ins. Co., 4 Mo. App. 7). In Gantt v. American Ins. Co., 68 Mo. 503, the U. Ins. Co. reinsured part of the risk on a boat load of cotton, and being about to be sued by the insured, for a loss, entered into an arrangement with the reinsuring companies, by which it was agreed that the U. Company should employ such counsel as it saw proper to defend the suit, and if the defense should be successful the reinsurers should pay their pro rata share of the attorney's fees and

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costs, and if it should fail they should pay their pro rata proportion of the judgment, attorney's fees, and costs. It was held that the agreement, at most, made the U. Company the agent of the reinsurers to make the defense, and not a trustee for them; that the reinsurers had the right at any time to come in and defend on their own behalf; and that there was nothing in the agreement which required the U. Company to retain a pecuniary interest in the litigation, or forbade it to make a compromise of its liability. On the other hand, in Commercial Assur. Co. v. American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712, where on suit being brought against the original insurer it was agreed that it should control the defense, it was held that the reinsurer was not liable to the original insurer for any part of the money paid by the original insurer by way of compromise without the consent of the reinsurer.

(d) Rights of original insured.

The ordinary contract of reinsurance is only between the original insurer and the reinsurer. The original insured has no such interest therein as will entitle him to proceed directly against the reinsurer.

Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Carrington v. Commercial Fire & Marine Ins. Co., 14 N. Y. Super. Ct. 152; Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant, Cas. (Pa.) 71.

The theory of reinsurance is that, when reinsurance is made, it should be made in the name of and for the benefit of the company, and not of individual policy holders (Casserly v. Manners, 48 How. Prac. [N. Y.] 219). Consequently the contract of reinsurance inures to the benefit of all creditors of the original insurer, and the policy holder has no equitable lien on the proceeds.

Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104; Consolidated Real Estate & Fire Ins. Co. of Baltimore v. Cashow, 41 Md. 59; Appeal of Goodrich, 109 Pa. 523, 2 Atl. 209.

But if the contract of reinsurance includes a promise to assume and pay the losses of policy holders, actions, in case of loss, may be brought by them upon such promise directly against the reinsurer (Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438). So, where a foreign insurance company sells its business in the United States to a domestic company, in consideration of which the latter "reinsures" the foreign company's

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risks, and agrees to pay all the losses arising under its policies, a policy holder in the foreign company may sue the domestic company on his policy (Johannes v. Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249). In Shoaf v. Palatine Ins. Co., 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804, it appeared that an insurance company contracted for reinsurance with another company, by which the reinsurer expressly assumed all liabilities under outstanding policies, but agreed to pay the reinsured company only after claims had been duly proved in an action against it. The reinsurer also agreed, in the event of such litigation, to defend the same, and pay all costs and expenses incident thereto. It was held that one who held a policy in the reinsured company when the contract of reinsurance was made was not required to sue the reinsured company before he could maintain a suit against the reinsurer on the contract of reinsurance to recover a loss on his property covered by his policy, though he was not a party to, nor in privity with, the contract of reinsurance.

A contract of a company to pay losses under policies issued by another company as promptly as losses under its own policies is not a contract of reinsurance, under Civ. Code, § 2646 et seq., and hence the company is directly liable to the insured. Whitney v. American Ins. Co. (Cal.) 56 Pac. 50.

In Hoffman v. North British & Mercantile Ins. Co., 35 Misc. Rep. 40, 70 N. Y. Supp. 106, the right of the policy holder to proceed against the reinsuring company was denied because the contract of reinsurance had not been perfected.

On the insolvency of the T. Ins. Co., by which plaintiffs were insured, defendant company contracted with the T. Co. for a certain consideration to assume the T. Co.'s fire risks not otherwise reinsured from a certain date. The contract required other payments from the T. Co. to be made at dates specified, and declared that it should be null and void unless the payments were made, and also that it was a temporary agreement, to be replaced by a final contract of like terms and conditions when the total amount due under the schedules could be ascertained. Defendant thereafter notified the T. Co.'s agents of such assumption, and received from it all of its assets, and thereafter proceeded to collect premiums and adjust losses under policies so assumed. It was held that defendant, having taken all of the T. Co.'s assets, and thereby rendered it permanently insolvent, could not relieve itself from liability on the T. Co.'s policies by subsequently declaring the contract of assumption void for the T. Co.'s failure to pay subsequent installments thereunder as required. Ruohs v. Traders' Fire Ins. Co., 78 S. W. 85, 111 Tenn. 405, 102 Am. St. Rep. 790.

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XXX. SPECIAL MATTERS RELATING TO THE REMEDY.

1. JURISDICTION AND VENUE.

(a) Jurisdiction in general.

In the absence of statutory regulation, the right of action on an insurance policy is transitory, authorizing an action against the insurer in any jurisdiction where process can be served.

Mohr & Mohr Distilling Co. v. Insurance Cos. (C. C.) 12 Fed. 474; Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W.

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991; Northwestern Mut. Life Ins. Co. v. Lowery, 20 S. W. 607, 14 Ky. Law Rep. 600; Johnston v. Trade Ins. Co., 132 Mass. 432; Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100.

Hence in an action on a policy it is not necessary to allege where it was made (Lauer v. Equitable Life Assur. Soc., 8 Ohio N. P. 117, 10 Ohio S. & C. P. Dec. 397). Nor does it alter the case that the policy sued on is a benefit certificate (Perrine v. Knights Templars & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841).

In line with the above, the New York courts hold that a foreign beneficial life association doing business in New York by permission, on condition of holding itself subject to process of the local courts, cannot escape the jurisdiction of such courts by pleading that the contract, applied for and issued through a New York agent, was made and delivered at the home office, when sued by a resident of a third state (O'Neill v. Massachusetts Ben. Ass'n, 63 Hun, 292, 18 N. Y. Supp. 22).

Under a statute[1] professing to extend the remedy against foreign insurance companies and allowing suits to be brought against them on any contract made or delivered within the state, an action may be maintained in New York against a foreign insurance company on a policy actually handed to insured within the state by an agent of the company (Burns v. Provincial Ins. Co., 35 Barb. [N. Y.] 525, 13 Abb. Prac. 425). And the Iowa court has held that an action may be maintained in North Dakota on an accident policy made to plaintiff when a resident of the state, though not a resident at the time of suit, and though the accident under which the claim under the policy accrued happened in another state (Green v. Equitable Mut. Life & Endowment Ass'n of Waterloo, 105 Iowa, 628, 75 N. W. 635).

In a number of states it is provided by statute that an action may be maintained against a foreign corporation on a cause of action arising within the state.[2] Under such a provision, failure to pay a loss payable within the state creates a cause of action arising within the state.

Carpenter v. American Acc. Co., 46 S. C. 541, 24 S. E. 500; Griesa v. Massachusetts Ben. Ass'n, 60 Hun, 581, 15 N. Y. Supp. 71, affirmed 133 N. Y. 619, 30 N. E. 1146; Curnow v. Phœnix Ins. Co., 37 S. C. 406, 16 S. E. 132, 34 Am. St. Rep. 766; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451.

[1] Acts N. Y. 1849, c. 107.

[2] N. Y. Code Civ. Proc. § 1780; Acts Md. 1868, c. 471, § 211 (Pub. Gen. Laws 1904, art. 23, § 411); Code S. C. § 423.

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And the fact that the company has withdrawn from the state and ceased to do business there will not affect the principle (Ben Franklin Ins. Co. v. Gillett, 54 Md. 212). But where the rules of a foreign mutual benefit association required proof of death claims to be made at the home office, whereupon an assessment would be levied, and the claim paid there, the cause of action was held not to arise within the state (Rodgers v. Mutual Endowment Assessment Ass'n, 17 S. C. 406).

The Georgia court has held, however, in Bawknight v. Liverpool & London & Globe Ins. Co., 55 Ga. 194, that it had no jurisdiction of an action in personam against a foreign insurance company on a judgment recovered in another state, though it would be otherwise if the action had been on a contract made in the state. The court suggested that an action in rem by attachment or garnishment would lie to reach assets within the state.

Courts of equity will only assume jurisdiction of an action on an insurance policy where some special relief is asked, in addition to a money judgment, which will bring the case within some of the recognized heads of equity jurisdiction.

Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423 (specific performance of an oral contract to insure); Fuller v. Detroit Fire & Marine Ins. Co. (C. C.) 36 Fed. 469, 1 L. R. A. 801 (apportionment of single loss among several companies on different policies); Blair v. Supreme Council, A. L. of H., 208 Pa. 262, 57 Atl. 564, 101 Am. St. Rep. 934 (bill for cancellation of previous accord and satisfaction, and involving an examination of the condition of a fund in the defendant's hands).

A contract of marine insurance is held to be a maritime contract within admiralty jurisdiction, though not exclusively within the jurisdiction of the federal courts (New England Mut. Marine Ins. Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90). The federal court, sitting in admiralty, also (in Slocum v. Western Assur. Co. [D. C.] 42 Fed. 235) took jurisdiction of an action on a policy of marine insurance issued in a foreign country to American citizens, and through American brokers, on freight on a United States vessel between South American ports.

Under a state statute permitting a single suit against several insurance companies under several policies, the federal circuit court has no jurisdiction unless the alleged liability of each defendant is over $2,000, their liability being several, and not joint (Wisconsin Cent. Ry. Co. v. Phœnix Ins. Co. [C. C.] 123 Fed. 989).

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(b) Stipulations limiting place of bringing suit.

The general rule as to agreements in the policy as to where suits shall be brought is that such stipulations limiting the place of bringing an action on an insurance contract are invalid as against public policy, or as affecting the jurisdiction of the courts. The principle established seems to be that while one may waive his right to submit a difference actually pending with another to the decision of the courts of justice, yet public policy will not permit him to contract in advance that he will not resort to the courts in any question which may thereafter arise.

Slocum v. Western Assur. Co. (D. C.) 42 Fed. 235; Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray (Mass.) 596; Hall v. People's Mut. Fire Ins. Co., 6 Gray (Mass.) 185; Bartlett v. Union Fire Ins. Co., 46 Me. 500; Nute v. Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174; Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212; Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N. W. 746, 60 L. R. A. 436.

Such a stipulation, waiving the right to sue on the policy anywhere but in the home state of the corporation, was also held invalid in Missouri as infringing an act[3] requiring an agent, as preliminary to the right to do business, to file a resolution of the company in the county where he was to operate, authorizing suits in the state, in which process should be served on such agent (Reichard v. Manhattan Life Ins. Co., 31 Mo. 518). And where the contract was made and the death occurred in another county, a clause limiting the county where suit should be brought was held void as violating a statute[4] allowing insurance companies to be sued in the county where the contract was made or in which death occurred (Matt v. Iowa Mut. Aid Ass'n, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483).

In New York, however, the Supreme Court has taken the opposite position, holding that a stipulation limiting the county where suit must be brought does not limit the jurisdiction of the court, the Supreme Court being the same court in whatever county it sits, and that the provisions of a statute directing the venue of the action might be waived by the parties (Greve v. Ætna Live-Stock Ins. Co., 81 Hun, 28, 30 N. Y. Supp. 668).

After filing an affidavit to the merits and pleading the general

[3] Rev. St. Mo. 1855, p. 884.

[4] Code Iowa 1873, § 2584.

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issue, it is too late to object that, by stipulation of the policy in suit, the exclusive jurisdiction over the action belongs to the court of another county (Smith v. Peoples' Mut. Live Stock Ins. Co., 173 Pa. 15, 33 Atl. 567).

There is, however, no valid objection to a stipulation in a policy by which the insured agrees to restrict himself to a particular and appropriate form of remedy in the courts (Eggleston v. Centennial Mut. Life Ass'n of Iowa [C. C.] 19 Fed. 201). In this case the company only agreed to pay over the amount received by it from assessments which it promised to levy on other members, and it was held that an action at law for damages would not lie, though the company refused to levy any assessment, the insured having stipulated to sue only in equity to compel an assessment.

(c) Charter provisions limiting place of bringing suit.

Where the charter of the company or other statute undertakes to limit the place of bringing suit, any conditions of the limitation must be complied with in order to make the limitation effective.

Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25; Arnet v. Milwaukee Mechanics' Mut. Ins. Co., 22 Wis. 516; Williams v. N. E. M. F. Ins. Co., 29 Me. 465; Boynton v. Middlesex Mut. Ins. Co., 4 Metc. (Mass.) 212.

A company, whose charter contains a provision limiting the county where actions may be brought but also limiting the scope of its operations, may, by taking advantage of subsequent statutes enlarging the field of action of domestic insurance companies, bring itself under the general statutes relative to the venue of actions (Knox County Mut. Ins. Co. v. Bowersox, 6 Ohio Cir. Ct. R. 275). A general statute, authorizing an action against an insurance company in any county where it has an agency, on a cause of action arising out of a transaction of such agency, is not an unconstitutional interference with the rights of a company whose charter limits suits against them to a particular court. The later act only affects the remedy (Howard v. Kentucky & L. Mut. Ins. Co., 13 B. Mon. [Ky.] 282).

A clause in the charter of an insurance company providing that, on notice of a loss within 30 days, the directors should determine the amount of the loss, and that if dissatisfied with such determination the insured might bring suit at the next term of court in the county where the company was established, has been held not

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an express or implied repeal of the general law[5] permitting the insured to sue in the county of his residence (Martin v. Penobscot Mut. Fire Ins. Co., 53 Me. 419).

(d) Venue.

The question of venue in actions on policies of insurance is almost exclusively governed by statutory rules, and the determining factors are various. It may safely be stated that an action may always be brought in the county where defendant has its principal office, whether under express enactment[6] or independent of any statutory provision. But the Massachusetts statute[7] tacitly permits a resident of another state to sue a domestic insurance company in any county of the state.

Allen v. Pacific Ins. Co., 21 Pick. (Mass.) 257; Boynton v. Middlesex Mut. Ins. Co., 4 Metc. (Mass.) 212.

In Missouri a foreign insurance company may be sued in any county in the state (Stone v. Travelers' Ins. Co., 78 Mo. 655). Under the Georgia statute providing that any insurance company having an agency or more than one place of doing business in the state shall be subject to suit within the county where the principal office of such company is located, or in any county where such company may have an agency or place of doing business, or in any county where such agency or place of doing business was located at the time the cause of action arose, where the contract was made in the state, but the company maintained no agency there, suit may be brought in any county where the company can be found (Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100).

In some of the states the venue may be based on the fact of defendant's having an agency in the county.[8] In Nebraska it is broadly held that a domestic insurance company is situated in any county in which it maintains a servant or agent for the transaction

[5] Rev. St. Me. c. 81, § 6.

[6] Ga. Civ. Code (1873) § 3408, (1895) § 2145; Civ. Code, 1895, § 2145; Mass. Rev. St. (1836) c. 90, § 16; Rev. Laws (1902) c. 167, § 7; W. Va. Code, c. 123, §§ 1, 2; Code Iowa, § 3499.

[7] Mass. Rev. St. (1836) c. 90, § 16; Rev. Laws (1902) c. 167, § 7. These provide that an action between a private corporation and a natural person may be brought either in the county of the latter's residence or in that where the corporation has its place of business or holds its annual meetings.

[8] Neb. Code Civ. Proc. § 55; Pub. Gen. Laws Md. 1904, art. 75, § 23; Ga. Civ. Code (1873) § 3408, (1895) § 2145; Rev. St. Mo. 1899, § 997.

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of business (Bankers' Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269; Id., 55 Neb. 117, 75 N. W. 585). And so in Kentucky a foreign insurance company having resident agents in different counties with identical powers may be sued in either of such counties (Owen v. Howard Ins. Co., 9 Ky. Law Rep. 147; Id., 87 Ky. 571, 10 S. W. 119).

The West Virginia courts hold that the insertion in the statute relating to venue [9] of a provision specifically referring to actions on insurance policies does not restrict such actions to the counties mentioned in such provision, but that such insertion was an extension and not a limitation of plaintiff's rights, so that plaintiff might sue under any section of the statute that he could make fit his case (Carson v. Phœnix Ins. Co. of Hartford, Conn., 41 W. Va. 136, 23 S. E. 552). Under the Maryland act [10] providing that where a fire insurance company has an agent in a county in which a building is situated which is burned while insured by it, suit may be brought in any court of competent jurisdiction as other suits are brought, by service on such agents, the courts hold that suits may be brought in the counties where such agents reside (Henderson v. Maryland Home Fire Ins. Co., 44 Atl. 1020, 90 Md. 47). The Georgia act [11] allows an insurance company to be sued in any county where it has an agency, which agency was located there when the contract was made or when the cause of action accrued. Under this act it is held that it is not sufficient that an agency was located in the county where the suit is brought, when the contract was made or when the cause of action arose, if there be none there when suit is brought.

Empire State Ins. Co. v. Collins, 54 Ga. 376; Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Atlanta Home Ins. Co. v. Tullis, 99 Ga. 225, 25 S. E. 401; Gaines v. Bankers' Alliance, 113 Ga. 1138, 39 S. E. 502.

[9] W. Va. Code, c. 123, §§ 1, 2, provide, as far as affects actions on insurance contracts, that the action may be brought in any county (a) where any defendant resides; (b) in case a corporation is defendant, where the principal office is or the chief officer resides, and if neither of these is in the state, where it does business; (c) if it be against a nonresident, where he may be found, or may have estate or debts due him; (d) in an action on an insurance policy, in the county in which the insured property was situated, or in which the person whose life was insured had a legal residence when the right of action accrued; (e) in any county wherein the cause of action or any part thereof arose, though none of the defendants reside therein.

[10] Pub. Gen. Laws Md. 1904, art. 75, § 23.

[11] Ga. Civ. Code (1873) § 3408, (1895) § 2145.

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The act applies to foreign as well as to domestic corporations (Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100). An averment that the company had an agent in the county is not equivalent to the jurisdictional requirement that it had an agency (Atlanta Acc. Ass'n v. Bragg, 102 Ga. 748, 29 S. E. 706). And the averments as to defendants having or not having an agency in the county where suit is brought are essential to the stating of a cause of action (Equity Life Ass'n v. Gammon, 118 Ga. 236, 44 S. E. 978). And the appointment of an agent in a county who is left free to establish his own office at any point he may wish, or to have none at all, the expenses of any office established to be met by the agent and not by the company, is not the establishment of an agency which will give the courts of the county jurisdiction of a suit against the company (Orebaugh v. Equity Life Ass'n, 42 S. E. 208, 115 Ga. 842).

In many states [12] the place where the contract was made is a determining factor in the question of the county in which suit should be brought.

Cameron v. Mutual Life & Trust Co., 96 N. W. 961, 121 Iowa, 477; Mutual Fire Ins. Co. v. Hammond, 106 Ky. 386, 50 S. W. 545.

The provisions of the Iowa Code that insurance companies may be sued in any county in which their principal place of business is kept "or" in which the contract was made are not equivalent definitions of the same county, but are intended to permit a choice of places (Teller v. Equitable Mut. Life Ass'n of Waterloo, 108 Iowa, 17, 78 N. W. 674). Where an application for insurance is made by letter to agents in another county, and the policy is issued by them, an action on the policy is based on a transaction in the county where the agency is located (Sun Mut. Ins. Co. v. Crist [Ky.] 39 S. W. 837). Where the policy, issued from the home office and sent to the local agent for delivery, does not correspond with the application, the contract is not complete till accepted by the insured, and the place of the contract is the local agency and not the home office (Yore v. Bankers' & Merchants' Mut. Life Ass'n, 88 Cal. 609, 26 Pac. 514). And an association which operates on the assessment plan in paying benefits and which designates its business as insurance is an insurance company, within the meaning of these

[12] Code Iowa (1897) § 3499; McClain's Code Iowa, 1888, § 3789; (1897) Ann. Code, § 3499; Ky. Civ. Code Prac. § 71.

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acts (Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601).

It is a common provision of the statutes [13] that an action may be brought against an insurance company in any county in which the cause of action or any part of it arose. Under such a provision it is not necessary in Nebraska that there shall be an agent in the county (Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991). But an action against a domestic insurance company in a county in which it has no agent, and in which no part of the cause of action arose, cannot be maintained (Western Travelers' Acc. Ass'n v. Taylor, 87 N. W. 950, 62 Neb. 783).

A cause of action is held to have arisen in the county of the residence of the person to whom the money due under a policy is payable.

Hosley v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 86 Wis. 463, 57 N. W. 48; Harvey v. Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580; Carson v. Phœnix Ins. Co. of Hartford, Conn., 41 W. Va. 136, 23 S. E. 552; Brabham v. Same, 41 W. Va. 139, 23 S. E. 553; Haas v. Mutual Relief Ass'n of Petaluma (Cal.) 42 Pac. 237.

In several of the states the cause of action on a life insurance policy is held to have accrued in the county where the death of the insured occurred.

Bankers' Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269; Id., 55 Neb. 117, 75 N. W. 585; Bruil v. Northwestern Mut. Relief Ass'n, 72 Wis. 430, 39 N. W. 529; Rippstein v. St. Louis Mut. Life Ins. Co., 57 Mo. 86; Union Cent. Life Ins. Co. v. Pyers, 36 Ohio St. 544.

It is also a common statutory provision [14] that an insurance company may be sued in any county in which the loss insured against occurred, or, as expressed sometimes,[15] where the property insured may be located. Under such a provision it is immaterial that other incidental relief was asked than recovery on the policy (Benesh v. Mill-Owners' Mut. Fire Ins. Co., 72 N. W. 674, 103 Iowa, 465). And construing such provision in connection with a statutory enactment forbidding justices of the peace any jurisdiction over actual residents of another county,[16] a justice of the peace of the county

[13] Neb. Code Civ. Proc. § 55; W. Va. Code, c. 123, § 2; Wis. Rev. St. § 2619, subd. 5; Rev. St. Mo. 1899, § 997; Bates' Ann. St. Ohio (4th Ed.) § 5023.

[14] McClain's Code Iowa, 1888, § 3789; Code (1897) § 3499.

[15] Act Pa. Apr. 24, 1857; P. & L. Dig. col. 2378, § 74.

[16] Code Iowa, 1873, § 3507.

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in which a fire loss occurs is held to have jurisdiction of an action on the policy though issued by a company whose principal office was in another county (Hunt v. Farmers' Ins. Co., 67 Iowa, 742, 24 N. W. 745).

Under the Pennsylvania statute, providing that actions against companies "incorporated by the legislature" may be brought in the county where the insured property may be located, an action may be so brought against a company incorporated under an act of the legislature though its letters patent were granted by the governor (Beech v. Farmers' & Breeders' Mut. Live-Stock Ins. Ass'n, 137 Pa. 617, 20 Atl. 943). It is further held that such act was intended as an extension of the remedy, and does not prevent a plaintiff from suing in any county where valid service of process can be made of the defendant (Southern Building & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88).

Under the provisions of the Pennsylvania act [17] extending to life and accident insurance companies "all the provisions" of the act [18] authorizing insurance companies to be sued in the county where the property insured is located, an action on a life insurance policy may be maintained in the county where the insured resided during life.

Quinn v. Fidelity Beneficial Ass'n, 100 Pa. 382; Shrom v. National Life Ins. Co., 11 Wkly. Notes Cas. (Pa.) 530; Whalen v. Pennsylvania Mut. Aid Soc., 2 Leg. Rec. Rep. (Pa.) 370; Spangler v. Pennsylvania Mut. Aid Soc., 12 Wkly. Notes Cas. (Pa.) 312, 40 Leg. Int. (Pa.) 202; Quinn v. Fidelity Beneficial Soc., 12 Wkly. Notes Cas. (Pa.) 311.

And these statutes were not repealed by the act giving jurisdiction in such cases to justices of the peace, such act being merely supplemental in its nature (Coyle v. Metropolitan Life Ins. Co. [Com. Pl. Pa.] 8 Kulp, 169).

The Illinois statute [19] providing that the circuit court of the county where plaintiff resides shall have jurisdiction of all actions brought therein by an individual against any fire or life insurance company incorporated under any law of the state is held to apply to mutual benefit societies and fraternal insurance companies, in spite of the acts [20] declaring them not to be insurance companies,

[17] Act Pa. Apr. 8, 1868.
[18] Act Pa. Apr. 24, 1857.
[19] Ill. Rev. St. 1891, c. 110, § 3, (1901) p. 1337, § 3.
[20] Ill. Laws 1883, p. 74, § 31; Rev. St. 1891, c. 73, § 133.

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these acts only exempting them from the general insurance law, and substituting a special code of rules.

Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168; Traders' Mut. Life Ins. Co. v. Humphrey, 109 Ill. App. 246, judgment affirmed 69 N. E. 875, 207 Ill. 540.

And the decision applies equally to suits in equity as well as to actions at law (Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168).

These decisions practically overrule the earlier cases in the appellate court.

Northwestern Life Ass'n v. Stout, 32 Ill. App. 31; Union Mut. Acc. Ass'n v. Riel, 38 Ill. App. 414; Covenant Mut. Ben. Ass'n v. Baldwin, 49 Ill. App. 203.

The Iowa court in Prader v. National Masonic Accident Ass'n, 95 Iowa, 149, 63 N. W. 601, maintains the doctrine as finally laid down in Illinois, but Ohio maintains the earlier Illinois doctrine, and holds that a mutual protection company, incorporated under Act 1872, which pays to the families of its members, upon death of such members, the proceeds of an assessment, is not a life insurance company, but is governed by the general incorporation laws, and can be sued only in the county of its principal office (Sargent v. Mutual Life Ins. Ass'n, 4 Wkly. Law Bul. 659, 7 Ohio Dec. 646).

2. LIMITATION OF ACTIONS.

(a) Premature action.
(b) Same—Waiver.
(c) Same—Pleading and practice
(d) Statute of limitations.
(e) Validity of provision in policy.
(f) Operation and effect of provision.
(g) Computation of time.
(h) Commencement of action.
(i) Same—Discontinuance of action, dismissal, or nonsuit.
(j) Same—Nature of proceedings.
(k) Waiver and estoppel.
(l) Pleading and practice.

(a) Premature action.

Either by statute or by the provisions of the policy or certificate it is usually provided that an action shall not be brought until a cer-

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tain time has elapsed in order to allow the company to make payment. The Iowa statute[1] prohibits an action on a fire policy within 90 days after notice and proof of loss. It is held that this statute, being merely remedial, has no extraterritorial force (State Ins. Co. of Des Moines, Iowa, v. Du Bois, 7 Colo. App. 214, 44 Pac. 756). It applies to mutual fire associations (Bradford v. Mutual Fire Ins. Co., 84 N. W. 693, 112 Iowa, 495); to insurance on a stock of goods as well as to buildings (Wilhelmi v. Des Moines Ins. Co., 86 Iowa, 326, 53 N. W. 233). It is in the nature of a statutory limitation, and is not eliminated from a policy by a provision that the contract of insurance is wholly embraced in the policy and application of the assured (Vore v. Hawkeye Ins. Co., 76 Iowa, 548, 41 N. W. 309). Thus an action must fail, as being prematurely brought, if commenced before the expiration of the 90 days, though brought after the loss has become payable by the terms of the policy.

Taylor v. Merchants' & Bankers' Ins. Co., 83 Iowa, 402, 49 N. W. 994; Wilhelmi v. Des Moines Ins. Co., 86 Iowa, 326, 53 N. W. 233; Worley v. State Ins. Co. of Des Moines, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. Rep. 334.

But such provision did not become a part of a contract of insurance executed while it was in force, so as to preclude an action thereon within 80 days after the section was repealed by the statute (Code, § 1744), reducing the time to 40 days (Jones v. German Ins. Co. of Freeport, Ill., 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860).

A stipulation in the policy limiting the time within which legal proceedings shall be brought is valid.

Provident Fund Soc. v. Howell, 110 Ala. 508, 18 South. 311; O'Brien v. Mechanics' & Traders' Fire Ins. Co., 45 How. Prac. (N. Y.) 453.

The company has until the expiration of such time to pay (Doyle v. Phœnix Ins. Co., 44 Cal. 264); **and suit commenced prior thereto is prematurely brought.**

Gillon v. Northern Assur. Co. of London & Aberdeen, 127 Cal. 480, 59 Pac. 901; Gauche v. London & L. Ins. Co. (C. C.) 10 Fed. 347; Jackson v. Southern Mut. Life Ins. Co., 36 Ga. 429; Dwelling House Ins. Co. v. Shaner, 52 Ill. App. 326; Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Gallenbeck v. Northwestern Mut. Relief

[1] Acts 18th Gen. Assem. c. 211, § 8 (Miller's Code, p. 299); McClain's Code, § 1734; Code 1897, § 1744.

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Ass'n, 87 N. W. 614, 84 Minn. 184; Camberling v. McCall, 2 Dall. (Pa.) 280, 1 L. Ed. 381, 1 Am. Dec. 341; Kelly v. Supreme Council of Catholic Mut. Ben. Ass'n, 61 N. Y. Supp. 394, 46 App. Div. 79.

This is true even though the answer setting up such defense was not filed until after the debt was due (Fire Ass'n of Philadelphia v. Colgin [Tex. Civ. App.] 33 S. W. 1004). The commencement of the suit is the issuance of process, not its service (Gauche v. London & L. Ins. Co. [C. C.] 10 Fed. 347). But where there was no proper service of an original notice in an action against a foreign insurance company, the appearance of the defendant will be considered as the commencement of the action (Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761). The condition, as it creates a restriction on the remedy of the insured, is, however, to be strictly construed (State Ins. Co. v. Maackens, 38 N. J. Law, 564).

Under the New York statute [2] authorizing suits to be brought against insurance companies for losses, if payment is withheld more than two months after such losses "shall have become due," where a loss was allowed, payable in 60 days, the loss became due when allowed, and a suit instituted 2 months after that time was well brought.

Utica Ins. Co. v. American Mut. Ins. Co., 16 Barb. (N. Y.) 171; Allen v. Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442.

It has been held that a condition in the policy that payment will be made in 60 days after proof of loss is a waiver of the company's rights under the statute (Howard v. Franklin Marine & Fire Ins. Co., 9 How. Prac. [N. Y.] 45). Under the Michigan statute [3] providing that suits at law may be maintained against an insurance company for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become "due," an action will lie on a policy providing that the sum for which the company might be liable should be payable 60 days after due notice, at the expiration of 60 days after satisfactory proofs of loss have been received by the company (Putze v. Saginaw Valley Mut. Fire Ins. Co., 94 N. W. 191, 132 Mich. 670, reversing 86 N. W. 814, 132 Mich. 670). Where the policy provided that, if the company had special regulations, such regulations should form a part of the policy, but that all agreements affecting the policy

[2] Laws 1849, p. 448, § 16. [3] Comp. Laws, § 7326.

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should be written or printed on it, in the absence of a reference in the policy to a provision in the charter of the insurer or in the statute governing mutual companies, that suit could not be brought until 60 days after the loss became due, a suit brought 60 days after the proofs of loss were received by the insurer was not premature (First Baptist Church of Jackson v. Citizens' Mut. Fire Ins. Co., 119 Mich. 203, 77 N. W. 702). Under the New Hampshire statute [4] authorizing an action on a policy if the insurer fails to adjust the loss within 15 days after notice thereof, an action may be maintained after the expiration of such time, although the policy provides that the insurer shall pay within 60 days, and that time has not expired (Franklin v. New Hampshire Fire Ins. Co., 47 Atl. 91, 70 N. H. 251).

Under a policy providing that "the loss shall be paid 60 days after due notice and proofs of the same by the assured shall have been received," the 60 days are reckoned from the delivery of such proofs (State Ins. Co. v. Maackens, 38 N. J. Law, 564). Such clause refers to proofs of loss required by the policy to be made in 30 days after the fire, and not to other proceedings by insured thereafter to be performed by him (Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724). The time begins to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company.

Huchberger v. Home Fire Ins. Co., 12 Fed. Cas. 793; Huchberger v. Providence Washington Ins. Co., 12 Fed. Cas. 795, affirmed 12 Wall. 164, 20 L. Ed. 364; Wood v. Farmers' Life Ass'n, 95 N. W. 226, 121 Iowa, 44; Thomas v. Guaranty Fund Life Ass'n, 73 Mo. App. 371.

So where the holder of a benefit certificate dies on June 5th, and proofs of death are immediately sent to the association, the receipt and sufficiency of which are not denied, and the cause of action on the certificate matures within 90 days after the service of such proofs, a suit commenced October 19th is not premature (Thornburg v. Farmers' Life Ass'n, 98 N. W. 105, 122 Iowa, 260).

Where the policy requires the insured to furnish duplicate bills of goods purchased only if required by the insurer, such duplicate bills are not a part of the proofs of loss (Ætna Ins. Co. v. McLead, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320). If the proof was a substantial compliance with the policy, the 60 days began to run from the date of service, even though the proof, as served, did not

[4] Pub. St. c. 170, § 9.

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contain a magistrate's certificate, and was returned for the purpose of having a certificate attached, where such certificate was not an essential part of the proof, unless "required," and could be made on a separate paper without returning the proof for that purpose (McNally v. Phenix Ins. Co. of Brooklyn, 137 N. Y. 389, 33 N. E. 475, reversing 62 Hun, 620, 16 N. Y. Supp. 696). But where a claimant on a policy, having presented proofs that were clearly defective and were objected to by the insurers, subsequently served perfect proofs, notifying the insurers that they were intended as of the time of the delivery of the former proofs, and merely to obviate any technical objections, an action brought at a due period after the service of the defective proofs, but immediately after the delivery of the second proofs, was prematurely brought (Kimball v. Hamilton Fire Ins. Co., 21 N. Y. Super. Ct. 495). So where a policy required a sworn account and proof of loss to be made, setting forth the value of the property, the amount of other insurance, and a plan and specification of the building insured, and more than 60 days after a notice of loss the company's secretary wrote to the insured asking for more specific proofs of loss, and these were furnished about a month after, but without plans or specifications, inasmuch as the company had clearly 60 days after the proofs were furnished within which to elect to pay the loss or rebuild, a suit brought within 20 days was premature (German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586). But an objection to proofs of death which complains as to the condition of deceased's health, when first insured, affords no ground for delaying the action more than the stipulated time after such proof is submitted (Bankers' Reserve Life Ass'n v. Finn, 64 Neb. 105, 89 N. W. 672). Where the company waived proofs of loss by an examination of the assured under oath, the loss became payable at least at the expiration of 60 days from the time when such examination, subscribed by the assured, was duly delivered to the insurer (Badger v. Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848). Under a by-law of an accident company providing that no suit should be maintained on its policy unless commenced within 30 days from its refusal to entertain a claim or pay an award, and that failure to pay within 60 days from the day of making proofs of injury should be construed by the beneficiary as a refusal to pay the claim, and no suit should be brought unless commenced within 30 days from the expiration of the 60 days, a beneficiary has a right to wait 60 days from the insured's death before taking notice that the claim will not be paid

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voluntarily, and then may sue at once (Metropolitan Acc. Ass'n v. Froiland, 59 Ill. App. 522). Where no preliminary proof of interest is required, but the sum insured is payable in 60 days after proof of death, upon fulfillment of this condition the right of action is complete on the expiration of that time (Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith [N. Y.] 268).

Where a policy does not make the award of appraisers a part of the proofs, the damages are due immediately after the filing of an award subsequent to the expiration of the 60 days (Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559). Where the policy provides for payment "sixty days after the claim has been allowed by the directors" of the insurance company, an actual allowance by the directors is not an indispensable prerequisite to the right of the insured to claim payment or bring his action on the policy (Southern Mut. Ins. Co. v. Turnley, 27 S. E. 975, 100 Ga. 296). In a policy providing that, "in case of loss, the assured shall forthwith notify the secretary in writing, and shall, as soon as may be, render to the company a particular statement in writing, signed and sworn to by him, of the property lost or damaged, the value of the same," and further providing for payment of the insurance within a certain time "subsequent to notice as aforesaid of such loss," the latter provision fixes the time of payment by reference to the notice of loss, not to the proof of loss (Cargill v. Millers' & Manufacturers' Mut. Ins. Co., 33 Minn. 90, 22 N. W. 6).

In an action on matured benefit certificates, the defense that the suit was prematurely brought, on the ground that, under the by-laws, the treasurer could not pay them until certain proceedings were had, and that, if there was no money in the treasury to pay the certificates, an assessment would have to be made, is not available, where it does not appear that the failure to pay was for want of funds in the treasury (Wheeler v. Supreme Sitting of Order of Iron Hall, 110 Mich. 437, 68 N. W. 229).

(b) Same—Waiver.

The provision is one in favor of the company, and may be waived by it, being merely a stipulation that during such time it shall not be liable for costs (Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113). **A denial of all liability and a refusal to pay under any circumstances is a waiver, and an action may thereupon be commenced at once.**

Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co., 18 Fed. Cas. 447; German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W.

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672; California Ins. Co. v. Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376; Merrit v. Cotton States Life Ins. Co., 55 Ga. 103; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Williamsburg City Fire Ins. Co. v. Cary, 83 Ill. 453; Phœnix Ins. Co. of Brooklyn v. Weeks, 45 Kan. 751, 26 Pac. 410; Whitten v. New England Live Stock Ins. Co., 165 Mass. 343, 43 N. E. 121; Hand v. National Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Home Fire Ins. Co. v. Fallon, 45 Neb. 554, 63 N. W. 860; State Ins. Co. v. Maackens, 38 N. J. Law, 564; Farmers' Mut. Fire Ins. Co. v. Ensminger, 12 Wkly. Notes Cas. (Pa.) 9; Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Massell v. Protective Mut. Fire Ins. Co., 35 Atl. 209, 19 R. I. 565; Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. (Tex.) 160; Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366; Hartford Fire Ins. Co. v. Josey, 6 Tex. Civ. App. 290, 25 S. W. 685; Hoffecker v. Newcastle County Mut. Ins. Co., 5 Houst. (Del.) 101; Continental Ins. Co. v. Wickham, 35 S. E. 287, 110 Ga. 129; Wickham v. Continental Ins. Co., Id.; Columbus Mut. Life Ass'n v. Plummer, 86 Ill. App. 446; Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991; Cobb v. Insurance Co. of North America, 11 Kan. 93; Phillips v. United States Ben. Soc. of Saginaw, 120 Mich. 142, 79 N. W. 1; Edwards v. Fireman's Ins. Co., 43 Misc. Rep. 354, 87 N. Y. Supp. 507; Modern Brotherhood of America v. Cummings (Neb.) 94 N. W. 144; Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97; Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665; Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 73 S. W. 558.

The Maackens Case holds that this is true even though, had the insured delayed until after the designated time had elapsed, the 6-month limitation would have barred his action; a contention that the company's waiver of the 60-day limitation merely placed the insured in the same position he would have occupied had his suit not been instituted until after the 60 days had expired not being tenable. But the company must have absolutely refused to pay the loss (Cascade Fire & Marine Ins. Co. v. Journal Pub. Co., 1 Wash. St. 452, 25 Pac. 331). And by merely denying, in an answer, any liability for the loss it does not waive its right to plead in abatement that the action has been prematurely brought (La Plant v. Fireman's Ins. Co., 68 Minn. 82, 70 N. W. 856).

Where the underwriter has by his acts waived proof of loss or death, the insured's right of action accrues immediately.

Allegre v. Maryland Ins. Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; Omaha Fire Ins. Co. v. Hildebrand, 54 Neb. 306, 74 N. W. 589; Cole v. Preferred Acc. Ins. Co., 81 N. Y. Supp. 901, 40 Misc. Rep. 260;

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Whitten v. New England Live-Stock Ins. Co., 165 Mass. 343, 43 N. E. 121; Snowden v. Kittanning Ins. Co., 122 Pa. 502, 16 Atl. 22; Pendleton v. Knickerbocker Life Ins. Co. (C. C.) 5 Fed. 238.

This is true even though proofs are furnished notwithstanding such waiver (Insurance Co. of North America v. Forwood Cotton Co., 12 Ky. Law Rep. 846). And an offer to pay the loss, except upon certain things claimed not to be covered by the policy, is a waiver of proofs of loss (Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202). But a failure of the company to object to deficiencies in proofs of loss, although dispensing with fuller proofs, does not operate as a waiver of the time allowed after proofs are made in which to pay the loss (German-American Ins. Co. v. Hocking, 115 Pa. 398, 8 Atl. 586).

By agreeing to arbitrate, the company waives the provision (Glover v. Rochester German Ins. Co., 11 Wash. 143, 39 Pac. 380). So where payment was offered of what the company assumed to be the amount of its liability, but which was in fact a less sum, and it refused to pay more, the condition of the time of payment was waived (Baltimore Fire Ins. Co. v. Loney, 20 Md. 20). And if the insurers refuse to adjust the loss, an action will lie within the time limited.

Phillips v. Protection Ins. Co., 14 Mo. 220; Hosmer v. St. Joseph Town Mut. Fire Ins. Co., 80 Mo. App. 419.

But it is held that the Iowa statute bars an action within the time limited, notwithstanding the company denies any liability and absolutely refuses to pay the loss.

Quinn v. Capital Ins. Co., 71 Iowa, 615, 33 N. W. 130; Vore v. Hawkeye Ins. Co., 76 Iowa, 548, 41 N. W. 309; McConnell v. Iowa Mut. Aid Ass'n, 79 Iowa, 757, 43 N. W. 188; Finster v. Merchants' & Bankers' Ins. Co., 97 Iowa, 9, 65 N. W. 1004; Blood v. Hawkeye Ins. Co., 103 Iowa, 728, 69 N. W. 1141.

And under such statute a suit cannot be commenced within 90 days after a waiver of proofs (Harrison v. Hartford Fire Ins. Co. [C. C.] 59 Fed. 732).

(c) Same—Pleading and practice.

An allegation that 60 days have elapsed after proofs of loss were received by the defendants before the action was commenced is necessary, where the policy specifically provides that the loss shall not be payable until after 60 days, and that no suit shall be sus-

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tainable until after full compliance with all the requirements of the policy (Clemens v. American Fire Ins. Co., 75 N. Y. Supp. 484, 70 App. Div. 435). But a general averment of performance of conditions precedent will, it is held under the practice act of New Jersey (Gen. St. p. 2554), and Missouri (Rev. St. 1899, § 634), embrace such condition.

Vail v. Pennsylvania Fire Ins. Co., 67 N. J. Law, 66, 50 Atl. 671; McGannon v. Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778.

Under the Iowa statute a petition showing that the action was commenced less than 60 days after proof of loss is demurrable (Von Genechtin v. Citizens' Ins. Co., 75 Iowa, 544, 39 N. W. 881). Where a policy attached to the declaration as required by the Virginia statute (Code, § 3251, as amended by Acts 1895–96, p. 707), contained no provision allowing the defendant 60 days after loss to pay the same, which was contained in a provision of the defendant's by-laws, the declaration which was filed within such period was not demurrable on the ground that the action was prematurely brought (Farmers' Benev. Fire Ins. Ass'n v. Kinsey, 43 S. E. 338, 101 Va. 236). Where the policy stipulated that the company should not be liable to pay until after the 60 days from the loss, and pending these 60 days a petition was filed, the irregularity may be cured by a supplemental petition (Franklin Ins. Co. v. McCrea, 4 G. Greene [Iowa] 229). The objection that satisfactory proofs of death were not furnished 90 days before the action was begun, as required by the policy, must be made by plea in abatement, and not by demurrer (Triple Link Mut. Indemnity Ass'n v. Williams, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34). Where the defendant did not plead in its grounds of defense, filed as required by the Virginia statute (Code, § 3249 [Va. Code 1904, p. 1709]), that the action was prematurely brought, such objection is waived (Farmers' Benev. Fire Ins. Ass'n v. Kinsey, 43 S. E. 338, 101 Va. 236). A plea that the suit was brought before the expiration of the time limited in the policy for the insurer to pay the loss is a plea in abatement, and should be filed at the first term, and, if filed later, should be stricken on motion (Rosser v. Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. 286). Under a rule of practice (Mich. Cir. Ct. Rule 7), requiring all facts on which is based a defense that any written instrument set forth in the declaration is void to be set forth in a notice added to the plea, a notice stating that the suit was prematurely commenced, and that the plaintiff had not waited as long

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as the law required after the claim became due before suing, is sufficiently specific (Putze v. Saginaw Val. Mut. Fire Ins. Co., 86 N. W. 814, 132 Mich. 670, reversed on other grounds, 94 N. W. 191, 132 Mich. 670). Under the Iowa statute, where the objection that an action was brought before the expiration of the time limited is taken by motion in arrest of judgment, it is not waived because not sooner made (Woodcock v. Hawkeye Ins. Co., 97 Iowa, 562, 66 N. W. 764).

(d) Statute of limitations.

As regards the application of the general statute of limitations, where parol evidence is necessary in order to show that the person claiming benefits is the person entitled thereto the contract is an unwritten one.

> **Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Loomis, 142 Ill. 560, 32 N. E. 424, reversing 43 Ill. App. 599. See, also, Kauz v. Great Council of Improved Order of Red Men, 13 Mo. App. 341.**

Where the amount and the time of payment are dependent upon the general provisions of the by-laws, the liability is a statutory one (Georgia Masonic Ins. Co. v. Davis, 63 Ga. 471). But the California statute (Code Civ. Proc. § 339), providing that actions on written contracts executed out of the state are barred in two years, does not apply to an action on a policy which provides that it shall not be operative until countersigned by the general agent of the insurer in California, and which was countersigned in the latter state after being signed in Connecticut by the insurer (Curtiss v. Ætna Life Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114). It has been held that a cause of action on a benefit certificate is not barred by laches short of the statute of limitations (Stewart v. Grand Lodge Ancient Order of United Workmen, 100 Tenn. 267, 46 S. W. 579). However, where no action was brought on a life policy for 10 years after the right accrued, it was held that the plaintiff was guilty of such laches as to prevent a recovery (Northwestern Mut. Life Ins. Co. v. Lowry's Adm'x [Ky.] 20 S. W. 607).

As to the time when the statutory limitation begins to run, it has been held to run from the day when the widow could make the demand payable by presenting proper proofs of her husband's death; that is, from the date of death (Kauz v. Great Council of Improved Order of Red Men, 13 Mo. App. 341); or from the expiration of a reasonable time for preparing and presenting the requisite

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proof of death and demanding payment, rather than from the time the demand was actually made (Spratley v. Mutual Ben. Life Ins. Co., 11 Bush [Ky.] 443); or from the time the company notifies a claimant that his claim is rejected (Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Loomis, 142 Ill. 560, 32 N. E. 424). But under a policy providing that any difference as to the amount of loss shall be submitted to arbitration, and that no action shall be maintained until after demand, where there is a dispute as to the amount of the loss, no cause of action accrues until the amount of the loss has been ascertained by arbitration, or until the arbitration has been waived; and the fact that neither party has made a written request for arbitration is not sufficient to set the statute running (Hutchinson v. Liverpool & L. & G. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558).

Where the constitution of a benefit society provided that jurisdiction should be vested in a board of arbitration to determine all controversies as to the liability of the grand lodge for any claim made against it by those claiming to be beneficiaries of deceased members, and a decision of a majority of the board should be conclusive, subject to appeal to the grand and supreme lodge, and a claim was referred to the board of arbitration, and its report, signed by the members of the board, declared that the plaintiff "is entitled to receive and have paid to her by this grand lodge the said sum of $2,000, payable to her under said beneficiary certificate," this is an unequivocal admission of liability on the part of the grand lodge, taking the claim out of the statute of limitations (Dearborn v. Grand Lodge, A. O. U. W., 138 Cal. 658, 72 Pac. 154).

A certificate issued by the insurance commissioner reciting that a company has complied with all the laws is prima facie evidence that such company has complied with the provisions requiring foreign insurance companies to file with the insurance commissioner the name of an agent on whom process may be served, thus entitling it to the benefit of the statute of limitations (Harrigan v. Home Life Ins. Co., 61 Pac. 99, 128 Cal. 531).

(e) Validity of provision in policy.

The general rule is that a condition in a policy of insurance providing that no recovery shall be had thereon unless suit is brought within a given time is valid.

Vette v. Clinton Fire Ins. Co. (C. C.) 30 Fed. 668; Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466; Carter v. Humboldt Ins. Co., 12

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Iowa, 287; Stout v. City Fire Ins. Co. of New Haven, 12 Iowa, 371, 79 Am. Dec. 539; Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. 183; State Ins. Co. of Des Moines v. Stoffels, 48 Kan. 205, 29 Pac. 479; Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197; Tasker v. Kenton Ins. Co., 58 N. H. 469; Ripley v. Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Roach v. New York Ins. Co., 30 N. Y. 546, affirming Ripley v. Ætna Ins. Co., 29 Barb. 552; Ryan v. Metropolitan Life Ins. Co., 2 City Ct. R. (N. Y.) 421; Suggs v. Travelers' Ins. Co., 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847.

This is true even though the period is less than that prescribed by the statute of limitations.

Cray v. Hartford Fire Ins. Co., 6 Fed. Cas. 786; Virginia Fire & Marine Ins. Co. v. Aiken, 82 Va. 424; Same v. Wells, 83 Va. 736, 3 S. E. 349; Smith v. Herd, 60 S. W. 841, 1121, 110 Ky. 56, 22 Ky. Law Rep. 1596; Ward v. Pennsylvania Fire Ins. Co., 33 South. 841, 82 Miss. 124.

But the time fixed must be reasonable, and not show imposition or undue advantage in any way.

Fireman's Fund Ins. Co. v. Western Refrigerating Co., 55 Ill. App. 329; Brown v. Savannah Mut. Ins. Co., 24 Ga. 97.

Thus a stipulation that no action shall be sustainable unless commenced within twelve months after loss or death is valid and binding.

Cray v. Hartford Fire Ins. Co., 6 Fed. Cas. 788; Davidson v. Phœnix Ins. Co., 7 Fed. Cas. 37; O'Loughlin v. Union Cent. Life Ins. Co. (C. C.) 11 Fed. 280; Underwriters' Agency v. Sutherlin, 55 Ga. 266; Andes Ins. Co. v. Fish, 71 Ill. 620; Glass v. Walker, 66 Mo. 32; Fellowes v. Madison Ins. Co., 2 Disn. (Ohio) 128, affirming Madison Ins. Co. v. Fellowes, 1 Disn. (Ohio) 217; Corn City Mut. Ins. Co. v. Schwan, 1 Ohio Cir. Ct. R. 192, 1 O. C. D. 105; Waite v. Spring Garden Ins. Co., 1 Wkly. Notes Cas. (Pa.) 155; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Merchants' Mut. Ins. Co. v. La Croix, 35 Tex. 249, 14 Am. Rep. 370, Id., 45 Tex. 158; Wilson v. Ætna Ins. Co., 27 Vt. 99; Riddlesbarger v. Hartford Fire Ins. Co., 7 Wall. 386, 19 L. Ed. 257; Hartford Fire Ins. Co. v. Amos, 25 S. E. 575, 98 Ga. 533; Stephens v. Phœnix Assur. Co., 85 Ill. App. 671; Harrison v. Hartford Fire Ins. Co., 102 Iowa, 112, 71 N. W. 220, 47 L. R. A. 709; Edson v. Merchants' Mut. Ins. Co., 35 La. Ann. 353; Richter v. Michigan Mut. Life Ins. Co., 66 Ill. App. 606; Roman v. Michigan Mut. Life Ins. Co., 96 Ill. App. 355; Owen v. Insurance Co., 87 Ky. 571, 10 S. W. 119; Kentucky Mutual Security Fund Co. v. Turner, 89 Ky. 665, 13 S. W. 104; Lee v. Union Cent. Life Ins. Co. (Ky.) 56 S. W. 724; Lowe v. United States Mut. Acc. Ass'n, 115 N. C. 18, 20 S. E. 169; Suggs v. Travelers' Ins. Co., 71

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Tex. 579, 9 S. W. 676, 1 L. R. A. 847; John Morrill & Co. v. New England Fire Ins. Co., 44 Atl. 358, 71 Vt. 281.

So a limitation of six months is valid. Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 517; Brown v. Savannah Mut. Ins. Co., 24 Ga. 97; Schroeder v. Keystone Ins. Co., 2 Phila. (Pa.) 286; North Western Ins. Co. v. Phœnix Oil & Candle Co., 31 Pa. 448; Edwards v. Metropolitan Life Ins. Co., 5 Kulp (Pa.) 259; McFarland v. Peabody Ins. Co., 6 W. Va. 425; Provident Fund Soc. v. Howell, 110 Ala. 508, 18 South. 311; Wilhelmi v. Des Moines Ins. Co., 72 N. W. 685, 103 Iowa, 532; Lewis v. Metropolitan Life Ins. Co., 62 N. E. 369, 180 Mass. 317; Sweetser v. Metropolitan Life Ins. Co., 8 Misc. Rep. 251, 28 N. Y. Supp. 543; Prudential Ins. Co. v. Howle, 10 O. C. D. 290, 19 Ohio Cir. Ct. R. 621; Griem v. Fidelity & Casualty Co., 99 Wis. 530, 75 N. W. 67.

And a limitation of four months has been sustained (Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray [Mass.] 596).

A contrary view, however, is taken by some courts, and such conditions are held invalid as being against the policy of the law and in conflict with the statute of limitations.

French v. Lafayette Ins. Co., 9 Fed. Cas. 788, affirmed in 18 How. 404, 15 L. Ed. 451; Union Cent. Life Ins. Co. v. Spinks, 83 S. W. 615, 26 Ky. Law Rep. 1205; Travelers' Ins. Co. v. Henderson Cotton Mills (Ky.) 85 S. W. 1090; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Miller v. State Ins. Co., 54 Neb. 121, 74 N. W. 416, 69 Am. St. Rep. 709; Omaha Fire Ins. Co. v. Drennan, 56 Neb. 623, 77 N. W. 67.

The condition is also held invalid where it conflicts with the statute providing that the time within which suit may be brought shall not be limited or shall not be limited to less than a certain time.

Small v. Westchester Fire Ins. Co. (C. C.) 51 Fed. 789; Massachusetts Ben. Life Ass'n v. Hale, 96 Ga. 802, 23 S. E. 849; Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315; Dolbier v. Agricultural Ins. Co., 67 Me. 180; Brower v. Supreme Lodge Nat. Reserve Ass'n, 74 Mo. App. 490; Johnson v. Dakota Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799; Vesey v. Commercial Union Assur. Co., Ltd., of London, England (S. D.) 101 N. W. 1074; German Ins. Co. v. Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173.

The Vesey case holds that the South Dakota statute (Civ. Code § 1276) providing that every condition in a contract which limits the time within which a party may enforce his rights is void, is not repealed, in so far as it affects fire policies, by a provision in a policy limiting the time for an action on the policy to 12 months after

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the fire, though the form of the policy was prepared by the state auditor under the authority conferred by statute (Laws 1893, c. 105, p. 174), no authority having been given him to insert provisions in conflict with the statutes. Where, however, the policy is issued and the loss occurs before the statute goes into effect, it does not apply, though the action is brought after its passage.

Sample v. London & L. Fire Ins. Co., 46 S. C. 491, 24 S. E. 334, 57 Am. St. Rep. 701, 47 L. R. A. 696; Farmers' Co-operative Creamery Co. v. Iowa State Ins. Co., 112 Iowa, 608, 84 N. W. 904.

A condition that no suit shall be sustained unless commenced within twelve months next after the loss is not in contravention of the North Carolina statute (Code, § 3076), which forbids an insurer to limit the term within which suit shall be brought to a period less than a year.

Muse v. London Assur. Corp., 108 N. C. 240, 13 S. E. 94; Lowe v. United States Mut. Acc. Ass'n, 115 N. C. 18, 20 S. E. 169.

Where the contract required that it was to be construed at all places to have been made in San Francisco, Cal., by the California law a contractual limitation for bringing suits on insurance policies being valid, though the period is less than the ordinary period of limitations, and the insurer had a license to do business in Missouri, and the contract was made in the latter state by an authorized agent, the fact that the policy required suit to be brought in 90 days after the cause of action accrued, and the suit was not brought within that time, does not preclude a recovery, since under the Missouri law, by which the contract was governed, notwithstanding such stipulation as to the law of California, contracts limiting the statutory period of limitation are invalid (Summers v. Fidelity Mut. Aid Ass'n, 84 Mo. App. 605). But a provision requiring an action to be brought "within 12 months after the fire" does not prohibit the bringing of an action within the meaning of the Wisconsin statute (Rev. St. § 1975), which forbids the insertion of such a provision in insurance policies (Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 39 Am. St. Rep. 877, 21 L. R. A. 743).

Where the charter was printed in the policy, and the contract made subject thereto, a limitation contained in the charter was binding on the insured (Higgins v. Windsor County Mut. Fire Ins. Co., 54 Vt. 270). But a by-law of a mutual company is not a bar to a member's right to bring an action after the time limited therein,

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unless it is made a part of the policy (Mutual Accident & Life Ass'n of State v. Kayser, 14 Wkly. Notes Cas. [Pa.] 86). And a condition in the policy is not binding on the insured, unless it was embodied in the application or has a consideration to support it (Barnes v. McMurtry, 29 Neb. 178, 45 N. W. 285). Ignorance, however, on the part of the insured that the policy contains such a clause does not affect the company's right to avail itself of the limitation (De Grove v. Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305). And the insured cannot be released from the condition by a mistake in the policy as to the time when the risk commenced (Farmers' Mut. Fire Ins. Co. v. Barr, 94 Pa. 345). So a provision that the policy shall be incontestable does not preclude the company from asserting that an action was not brought within the time required by the policy (Brady v. Prudential Ins. Co., 168 Pa. 645, 32 Atl. 102). And the condition is binding on the insured although neither the contract is made nor the suit brought in the state where the company is established, and the conditions of insurance allow the insured 30 days to furnish proofs of loss, and provide that the loss shall not be payable until 90 days after the filing of such proofs and of an estimate thereof by appraisers chosen by the parties, if there is no evidence of unreasonable delay or waiver of the condition by the insurers (Fullam v. New York Union Ins. Co., 7 Gray [Mass.] 61, 66 Am. Dec. 462). But a stipulation that differences about the amount of the loss shall be determined by arbitration, and that no suit shall be maintained until after an award or unless brought within a year after the loss, is invalid, as to the time limit, since by refusing to arbitrate the company could prevent an award, and consequently prevent suit, until after the expiration of the year (Leach v. Republic Fire Ins. Co., 58 N. H. 245).

(f) Operation and effect of provision.

No recovery can be had if an action is not brought within the time specified in the policy, unless the provision has been waived or unless there is a valid excuse for nonperformance.

Brooks v. Georgia Home Ins. Co., 99 Ga. 116, 24 S. E. 869; Hekla Ins. Co. v. Schroeder, 9 Ill. App. 472; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Ohio v. Western Assur. Co., 65 Miss. 532, 5 South. 102; Keim v. Home Mut. Fire & Marine Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Corn City Mut. Ins. Co. v. Schwan, 1 O. C. D. 105; North Western Ins. Co. v. Phœnix Oil & Candle Co., 31 Pa. 448; Warner v. Insurance Co. of North America, 1 Walk.

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(Pa.) 315; Sullivan v. Prudential Ins. Co., 172 N. Y. 482, 65 N. E. 268; Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 545; Graham v. Niagara Fire Ins. Co., 106 Ga. 840, 32 S. E. 579; Shackett v. People's Mut. Ben. Soc., 107 Mich. 65, 64 N. W. 875; Coldham v. Pacific Mut. Life Ins. Co., 2 Ohio S. & C. P. Dec. 314.

The condition it is held goes to the right as well as to the remedy (Cray v. Hartford Fire Ins. Co., 6 Fed. Cas. 788). Presentation of the loss and demand of payment is not sufficient (Merchants' Mut. Ins. Co. v. Lacroix, 35 Tex. 249, 14 Am. Rep. 370; Id., 45 Tex. 158). But if the other conditions in the policy cannot be reasonably complied with in the time limited, the expiration thereof is no defense (Martin v. State Ins. Co., 44 N. J. Law, 485, 43 Am. Rep. 397).

A provision of a policy that no suit should be maintainable thereon "unless the same shall be commenced within twelve months after the death of said insured" is unambiguous, and the limitation will be enforced in accordance with the plain meaning of its terms where the declaration counts on the contract alone, and alleges no extrinsic facts excusing delay in bringing suit (Kettenring v. Northwestern Masonic Aid Ass'n [C. C.] 96 Fed. 177). So where the charter of an insurance company provided that a party insured, having suffered a loss by fire and not being satisfied with the decision of the directors on the claim presented, might bring suit against the company at the next court to be holden in the county, if not held within 60 days of said decision, but, if holden within that time, then at the next court holden in said county thereafter, and the first court was holden within 60 days, and the plaintiffs did not bring suit at the next court, but did bring suit at the court held after the next, their right of action was barred (Portage County Mut. Fire Ins. Co. v. West, 6 Ohio St. 599). But where a policy provides "that when a policy is issued upon the interest of a mortgagee the assured must first exhaust the primary security before he can recover the amount of insurance," and also that no suit shall be brought thereon more than six months after the loss or damage, such provisions being inconsistent, the ordinary statute of limitation is applicable (Dwelling-House Ins. Co. v. Kansas Loan & Trust Co., 5 Kan. App. 137, 48 Pac. 891). And where a reinsurance policy consists of an ordinary fire policy, to which a rider is attached, containing the substantial part of the agreement for reinsurance, a provision in the ordinary policy form limiting the right

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of action for loss to one year after loss does not apply, but the six-years limitation applies, as in case of any other policy of reinsurance (Alker v. Rhoads, 76 N. Y. Supp. 808, 73 App. Div. 158).

Though an accident policy provides that no suit shall be brought unless within a year from the accident, yet an indemnity of $25 a week for 52 weeks, if the disability lasts that long, being provided, and proceedings to enforce payment thereunder being forbidden till expiration of 3 months after proofs of loss are furnished, the limitation of a year applies only where the disability is for a time short enough to allow it; and, it having lasted 47 weeks, an action brought within 20 days after the expiration of the 3 months thereafter is in time (Dennison v. Masons' Fraternal Acc. Ass'n of America, 69 N. Y. Supp. 291, 59 App. Div. 294). A claim against a casualty insurance company for disbursement for surgical aid to a person injured, and for the defense of an action by such person for the injuries, is governed by the same limitation as is prescribed by the policy for the losses arising under the policy; no independent contract by the insurer to pay such items being shown (People v. American Steam-Boiler Ins. Co., 41 N. Y. Supp. 631, 10 App. Div. 9).

Though the policy contains a stipulation for ascertainment of the amount of the loss by agreement or arbitration, unless the assured was prevented by the action or nonaction of the insurer in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the policy (Thompson v. Phœnix Ins. Co. [C. C.] 25 Fed. 296). And whether the requirement that "no suit shall be brought in any case except to enforce payment of the award of the said arbitrators, unless the association refuse to arbitrate" is or is not reasonable, an action brought by the insured after more than one year from the date of the alleged accident, he having made no demand for an arbitration, is too late (Ritch v. Masons' Fraternal Acc. Ass'n, 99 Ga. 112, 25 S. E. 191). So a policy requiring suit to be brought thereon within six months after a loss, exclusive of any time consumed in arbitration, and providing that any difference as to the amount of the loss may be submitted to arbitration on a written request of either party, and that no suit shall be brought until after such arbitration, does not authorize the insured to bring suit after the expiration of six months, in the absence of a request by one of the parties for an arbitration within such time (Garrettson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa, 17, 86 N. W. 32).

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If the limitation applies only under certain conditions, such conditions must exist or it will not bar an action. Thus where a policy provided that in case of loss the insured should permit his claim to be adjusted and determined by the company, and if he was not satisfied with the adjustment the question might be submitted to reference, or he might bring an action for the loss at the term of court to be held in a certain county, and not afterwards, unless such term of court should be held within 60 days after the adjustment, in which case he might sue at the succeeding term thereof, this limitation as to time of suit did not apply where the company claimed a total exemption from all liability, but only to cases where the company determined the amount to be paid and the party was not satisfied with their adjustment (Landis v. Home Mut. Fire & Marine Ins. Co., 56 Mo. 591). And under a similar provision the courts are not precluded from the jurisdiction of actions brought to recover for losses in cases where no such determination of the amount of the loss has been made by the directors.

Williams v. New England Mut. Fire Ins. Co., 29 Me. 465; Bartlett v. Union Mut. Fire Ins. Co., 46 Me. 500.

So where by a provision of a policy, "in any case of a disputed claim," no action should be maintained unless it was instituted "within 12 months after the alleged cause of such claim," and after a loss on the policy, proofs of loss were forwarded to the insurers, who made several formal objections to their sufficiency, and asked for further proofs, but made no objection to the claim for loss, the insurers, by making only formal objections to the sufficiency of the proofs, did not bring about a "dispute" as to the claim, and therefore an action can be brought after the expiration of the 12 months (People v. Liverpool, L. & G. Ins. Co., 2 Thomp. & C. [N. Y.] 268).

A limitation that all suits shall be commenced within one year after the loss does not affect a proceeding to correct an error in announcing and entering a verdict by which the amount of such policy was omitted therefrom (Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283). Nor does it apply to an action to enforce a compromise agreement made between the parties after the property was destroyed (Hanover Fire Ins. Co. v. Hatton [Ky.] 55 S. W. 681). A limitation in a Lloyd's insurance policy that action thereon must be commenced within 12 months after loss refers only to the action to establish the

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claim, not to proceedings against the several underwriters to enforce a judgment (Lawrence v. Schaefer, 42 N. Y. Supp. 992, 19 Misc. Rep. 239).

On a renewal of a policy on plaintiff's "interest as a mortgagee" in property, a clause was fraudulently inserted by the insurer providing that the insured must first collect such portion of her security as was collectible, and that the company would be responsible only for the balance. It also provided that an action on the policy must be commenced within 12 months. It was held that the limitation would not begin to run until the rendition of a judgment reforming the policy by striking out the unauthorized clause (Hay v. Star Fire Ins. Co., 13 Hun [N. Y.] 497).

As to persons bound by the stipulation, the requirement of a policy to which is attached the "mortgage clause," that suit shall be brought within 12 months after loss, is binding upon the mortgagee (American Building & Loan Ass'n v. Farmers' Ins. Co., 11 Wash. 619, 40 Pac. 125). Where, however, a policy, issued to a mortgagee on his interest as mortgagee, contained a provision that actions thereon should be commenced within 12 months, and also provided that, when the insured was a mortgagee, the loss should not be payable until such portion of the mortgage debt as could be collected had been enforced, and that the insurer should be liable only for the balance, as the latter clause was inconsistent with the former, the former did not apply to the case of the insurance of the interest of a mortgagee (Hay v. Star Fire Ins. Co., 13 Hun [N. Y.] 496). But it is held that a clause in a policy issued by a mutual insurance company, that suit shall only be brought at a term of court next succeeding the loss, applies to members of the company only, not to one who holds the policy as collateral security (Smith v. Atlantic Mut. Fire Ins. Co., 22 Fed. Cas. 424). And where a policy issued to a mortgagor provides that the loss, if any, is payable to the mortgagee as its interest may appear, and the mortgagee fails to bring action within the time limited by the policy, and is barred thereby, such bar is not effectual against an action by the mortgagor within the time limited by the contract (Shawnee Fire Ins. Co. v. Bayha, 8 Kan. App. 169, 55 Pac. 474).

(g) Computation of time.

The determination as to when the time for beginning an action begins to run depends in most cases upon the wording of the particular provision in question. **The general rule is that the limita-**

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tion runs from the time when the loss becomes due and payable and the right to sue accrues, and not from the time when the loss occurs.

Friezen v. Allemania Fire Ins. Co. (C. C.) 30 Fed. 352; Vette v. Clinton Fire Ins. Co., Id. 668; Case v. Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; McConnell v. Iowa Mut. Aid Ass'n, 79 Iowa, 757, 43 N. W. 188; Matt v. Iowa Mut. Aid Ass'n, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483; Owen v. Howard Ins. Co., 9 Ky. Law Rep. 147; Hay v. Star Fire Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Steen v. Niagara Fire Ins. Co., 61 How. Prac. 144, affirmed 89 N. Y. 315, 42 Am. Rep. 297; Sample v. London & L. Fire Ins. Co., 46 S. C. 491, 24 S. E. 334, 47 L. R. A. 696, 57 Am. St. Rep. 701.

Thus it is generally held that the time begins to run from the close of the period allowed after the proofs are furnished for the payment of the claim and not from the date of loss.

Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; Sun Mut. Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034; Ellis v. Council Bluffs Ins. Co., 64 Iowa, 507, 20 N. W. 782; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Fireman's Fund Ins. Co. v. Buckstaff, 38 Neb. 150, 56 N. W. 697, 41 Am. St. Rep. 727; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; City of New York v. Hamilton Fire Ins. Co., 39 N. Y. 45, 100 Am. Dec. 400, affirming 23 N. Y. Super. Ct. 537; Mix v. Andes Ins. Co., 9 Hun (N. Y.) 397; Cooper v. United States Mut. Acc. Ass'n, 57 Hun, 407, 10 N. Y. Supp. 748; Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; Steele v. Phenix Ins. Co., 51 Fed. 715, 2 C. C. A. 463, 7 U. S. App. 325, reversing (C. C.) 47 Fed. 868; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411; Read v. State Ins. Co., 72 N. W. 665, 103 Iowa, 307, 64 Am. St. Rep. 180; Bradford v. Mutual Fire Ins. Co., 84 N. W. 693, 112 Iowa, 495.

Or the limitation begins to run from the time the proofs are furnished, or, under special provisions of the policy, within a given time thereafter. Standard Life & Acc. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Chandler v. St. Paul Fire & Marine Ins. Co., 21 Minn. 85, 18 Am. Rep. 385; Kirk v. Ohio Val. Ins. Co., 8 Ohio Dec. 182, 6 Wkly. Law Bul. 200.

Where a policy stipulates that no legal proceedings for a recovery shall be brought within three months after proofs of injury are furnished, nor at all unless begun within six months, the six-months period of limitation begins to run from the date the proofs are filed, and not at the expiration of three months (Provident Fund Soc. v. Howell, 110 Ala. 508, 18 South. 311). But if the company has waived proofs of loss, the cause of action at once accrues, and suit must be instituted within 12 months after the waiver (North-

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western Mut. Ins. Co. v. Campbell, 11 Ky. Law Rep. 762). Nevertheless in a case where the policy requires proofs to be filed within 60 days, and the action to be commenced within 6 months, after the death of assured, payment to be made by the association within 45 days after the filing of such proofs, the defendants' denial of liability immediately after the death, even if it is a waiver of such proofs, does not give a right of action before the expiration of 45 days after death; and an action brought within 6 months from that time is not barred (McConnell v. Iowa Mut. Aid Ass'n, 79 Iowa, 757, 43 N. W. 188). And the provision in a policy limiting the right of recovery thereon is not a bar to an action brought after that time, where the policy also provides that no suit shall be begun within ninety days from the date of furnishing proofs of death, and the answer alleges that sufficient proofs have not yet been delivered (Bloodgood v. Massachusetts Ben. Life Ass'n, 44 N. Y. Supp. 563, 19 Misc. Rep. 460). But under the Iowa statute (Laws 1880, c. 211, § 3) providing that proofs of loss shall be made within 60 days after loss, and that no action on the policy shall be begun within 90 days after making such proofs, where a policy provided that an action thereon must be brought within 6 months from the loss, and proof of loss was neither made nor waived within the time limited by the statute, an action not brought within the 6 months is barred; the statute having no application to such a case, so as to extend the time for bringing suit (Cornett v. Phenix Ins. Co., 67 Iowa, 388, 25 N. W. 673).

Where the policy provides that no suit shall be brought until after an award, the limitation, it is held, commences to run from the date of the award, and not from that of the loss.

Levy v. Virginia Fire & Marine Ins. Co., 15 Fed. Cas. 437; Hong Sling v. Royal Ins. Co., 8 Utah, 135, 30 Pac. 307; Barber v. Fire & Marine Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800.

Thus, an action brought promptly upon the expiration of 60 days from the adjustment of the loss is not barred because commenced more than 6 months after the loss occurred (New York v. Hamilton Fire Ins. Co., 23 N. Y. Super. Ct. 537, affirmed 39 N. Y. 45, 100 Am. Dec. 400). And where the right to sue does not accrue until an appraisement is ended or abandoned by the insurer, the insured has 12 months thereafter in which to sue (Harrison v. Hartford Fire Ins. Co. [Iowa] 80 N. W. 309). In this case it was held that where an agreement to appraise a loss under a policy provided

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for the appointment by two appraisers, selected by the parties, of a third person, "if necessary," and not that he be selected, as the policy required, before the appraisement should be commenced, and the parties treated the agreement as valid and sufficient, and in an action on the policy the defendant pleaded that the agreement was in force, the agreement delayed the running of the time within which an action might be begun after the loss, notwithstanding the defect therein. So, where a policy required an arbitration of a loss before the bringing of suit, which could not be brought within 60 days, and had to be brought within a stated time after the loss, in computing the time within which suit had to be brought, the 60 days and any time consumed in arbitration should be excluded (Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743). But in the absence of any reason for an extension growing out of an appraisal the action must be brought within 12 months after the fire (Williams v. German Ins. Co., 86 N. Y. Supp. 98, 90 App. Div. 413).

Other courts, however, hold that the limitation runs from the time of the fire or actual destruction of the property; and especially is this true where the policy provides that the action must be brought within a given time after the fire or loss occurs.

Thompson v. Phœnix Ins. Co. (C. C.) 25 Fed. 296; Chambers v. Atlas Ins. Co., 51 Conn. 17, 50 Am. Rep. 1; Johnson v. Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47, affirming 1 Ill. App. 309; McElroy v. Continental Ins. Co., 48 Kan. 200, 29 Pac. 478; State Ins. Co. v. Stoffels, 48 Kan. 205, 29 Pac. 479; Rottier v. German Ins. Co., 84 Minn. 116, 86 N. W. 888; Bradley v. Phœnix Ins. Co., 28 Mo. App. 7; Grigsby v. German Ins. Co., 40 Mo. App. 276; King v. Watertown Ins. Co., 47 Hun (N. Y.) 1; Allen v. Dutchess County Mut. Ins. Co., 88 N. Y. Supp. 530, 95 App. Div. 86; Travelers' Ins. Co. v. California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769; Corn City Mutual Ins. Co. v. Schwan, 1 Ohio Cir. Ct. R. 192, 1 O. C. D. 105; Egan v. Oakland Home Ins. Co., 29 Or. 403, 42 Pac. 990, 54 Am. St. Rep. 798; Virginia F. & M. Ins. Co. v. Wells, 83 Va. 736, 3 S. E. 349; Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 39 Am. St. Rep. 877, 21 L. R. A. 743; McFarland v. Railway Officials' & Employés' Acc. Ass'n, 5 Wyo. 126, 38 Pac. 347, 677, 27 L. R. A. 48, 63 Am. St. Rep. 29.

Such time cannot be extended, even though the policy also provides that no action shall be begun until certain examinations have been made, which examinations were not made nor waived by the company until 13 days after the fire (State Ins. Co. v. Meesman, 2 Wash. St. 459, 27 Pac. 77, 26 Am. St. Rep. 870). So, where the

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company repudiated all liability within five days after the fire, the period of limitations began to run at the time of the fire; and, where the fire occurred on November 30th, the period of six months expired on May 30th following (Daly v. Concordia Fire Ins. Co., 65 Pac. 416, 16 Colo. App. 349). An action for a loss occurring September 15, 1889, commenced March 15, 1890, may be maintained when it is provided that the action must be brought within six months "after the loss" (Dwelling House Ins. Co. v. Osborn, 1 Kan. App. 197, 40 Pac. 1099). If a fire broke out August 23d, extending into the next day, a suit begun February 24th of the following year is barred by a six-months limitation clause (Allemania Ins. Co. v. Little, 20 Ill. App. 431). But if the last day falls on Sunday, the plaintiff has the whole of the following Monday in which to bring an action.

Ryer v. Prudential Ins. Co., 85 App. Div. 7, 82 N. Y. Supp. 971; Owen v. Howard Ins. Co., 87 Ky. 571, 10 S. W. 119.

A provision in a life policy that "no suit or action shall be instituted under this policy till 10 days have expired after the filing of proofs of death, nor after 6 months from the date of death of the insured," means that the suit must be brought before 6 months after the date of death, and after the expiration of the 10 days (Meyers v. Metropolitan Life Ins. Co., 7 Ohio S. & C. P. Dec. 573, 6 Ohio N. P. 34). But under a policy providing that no action thereon should be maintainable after a year from the date of insured's death, and also providing that the death loss should be payable within 90 days after the first periodical mortuary premium paying day next ensuing the date of acceptance by the company of satisfactory proof of death, the period of limitation did not begin to run until 90 days after death (Kettenbach v. Omaha Life Ass'n, 69 N. W. 135, 49 Neb. 842). Where a benefit certificate was issued, providing that an action thereon must be brought within a year from the death of insured, and afterwards, but before the death of insured, a by-law was adopted prescribing a new form of certificate, providing that action could not be brought thereon until proof of death, and claimant's right had been filed and passed on by the board of trustees, and then should be brought within a year after the action of the board, an action on the first certificate, brought within a year after rejection of the claim by the board of trustees, but not within a year from the death of the insured, was not brought in time, since the by-law had no retroactive effect, but prescribed only a new form of certificate, relating to future con-

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tracts (Modern Woodmen of America v. Bauersfeld, 62 Kan. 340, 62 Pac. 1012).

As regards accident insurance, where the policy of a mutual company provided that suit must be brought within six months after losses had occurred, and contained a promise to pay a certain sum for every week the insured might be disabled from following his usual occupation, not exceeding ten weeks, the cause of action was not complete until the expiration of ten weeks after the accident, and the six months was properly computed from then (Mutual Accident & Life Ass'n of State v. Kayser, 14 Wkly. Notes Cas. [Pa.] 86). So, where an accident policy provided for immediate written notice of an injury, and proof of the accident within seven months, no action under the policy to be begun more than one year from the time of the accident, and no legal proceeding for recovery thereunder to be brought within three months after the receipt by the company of proof of the injury, the year in which suit was required to be commenced began, not at the date of the death of the insured, but upon the expiration of the three months after furnishing proofs of death, during which legal proceedings were prohibited (Allibone v. Fidelity & Casualty Co. [Tex. Civ. App.] 32 S. W. 569). And where the company, by its certificate, undertakes to pay the insured certain amounts in case of bodily injury, and, in case of death resulting from such an injury, to pay to the wife of the insured a certain sum, and the certificate further specifies that no suit shall be brought to recover any sum unless commenced within one year from the time of the alleged accidental injury, an action may be brought on the policy by the widow of the insured more than one year after the accident, if it is brought within one year after the insured's death, since the widow's right of action does not accrue, and the prescribed period of limitation begin to run against her, until the death of the insured (Cooper v. United States Mut. Ben. Ass'n, 132 N. Y. 334, 30 N. E. 833, 16 L. R. A. 138, 28 Am. St. Rep. 581, affirming Same v. United States Mut. Acc. Ass'n, 57 Hun, 407, 10 N. Y. Supp. 748).

In the case of marine insurance, where a policy insuring a tug against liability for loss or damage arising from collision provided that suit thereon must be brought within a year after the date of the loss, and it also provided that the insured should not be liable unless the liability of the tug should be established by suit, and that losses should be payable 60 days after proofs of such loss or damage and of the amount thereof, such provisions must be con-

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strued together, and, so construed, proofs of loss could not be made until after a judicial determination of the liability of the vessel, and the limitation commenced to run 60 days after such proofs were furnished, unless they were waived (Rogers v. Ætna Ins. Co. of Hartford, 95 Fed. 103, 35 C. C. A. 396, affirming [D. C.] 76 Fed. 569). Under a similar provision it was held that the loss from which the 12 months' limitation commenced to run did not occur until the insured had paid the damage pursuant to a decree of a court of last resort adjudging him or his tug liable therefor (McWilliams v. Home Ins. Co., 57 N. Y. Supp. 1100, 40 App. Div. 400). The loss does not occur when the vessel runs on a shoal, within the provision of a policy that claims under it shall be prosecuted within a year from the date of the loss; the policy also providing that there shall be no liability if the vessel grounds in certain known shallow places; the question of loss not depending on the vessel going aground, but on the expense of getting her off and repaired, and losses being payable, by provision of the policy, after proof of loss or damage (Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601, 79 N. W. 898).

As to when a loss occurs, within the meaning of the contract of reinsurance, it appeared in Royal Ins. Co. v. Vanderbilt Ins. Co., 102 Tenn. 264, 52 S. W. 168, that a company reinsured another company for a loss by using a regular form of policy, and pasting on its face a slip providing that the intention was to cover the original insurer's liability, with the understanding that the insurance was subject to the same conditions and mode of settlement as might be taken by the insured company. The original policy provided that no suit thereunder should be sustainable unless commenced within 12 months "after the loss." The reinsurance policy provided that it was to be on the basis that the company would not be liable for a sum greater than the portion reinsured bears to the whole sum insured by the company reinsured, and in case of loss the reinsurer "to pay pro rata at the same time and in the same manner as paid by the company reinsured." It was held that the loss, in so far as it related to the clause limiting the time for bringing actions, was that which accrued to the reinsured when it made payment to discharge its liability.

Under a policy insuring against liability for injuries to third persons, providing that, in case the insured should be sued by a person injured, an action by the insured on the policy must be brought within six months from the "termination" of the action by the in-

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jured person, the "termination" of such action, in which judgment for the plaintiff therein had been affirmed on appeal, was on the filing of the mandate of the appellate court, and not on the payment of the judgment (People v. American Steam Boiler Ins. Co., 89 Hun, 456, 35 N. Y. Supp. 322).

As to facts tolling the provision, it is held that the **infancy of the assured in the case of fire insurance, or of the beneficiaries in the case of life insurance, does not prevent the enforcement of the limitation.**

Mead v. Phœnix Ins. Co., 75 Pac. 475, 68 Kan. 432, 64 L. R. A. 79; O'Laughlin v. Union Cent. Life Ins. Co. (C. C.) 11 Fed. 280; Suggs v. Travelers' Ins. Co., 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847.

The condition does not operate in case of war between the countries of the contracting parties, as does the statute of limitations in like cases; and the term of 12 months does not, as it does in the case of the statute of limitation, open and expand itself, so as to receive within it the term of legal disability created by the war, and then close together at each end of that period, so as to complete itself as though the war had never occurred; but, nevertheless, war is a sufficient excuse for not bringing a suit within the limitation prescribed by the policy (Semmes v. Hartford Fire Ins. Co., 13 Wall. 158, 20 L. Ed. 490). But it is held that a disability imposed on the insured by the Civil War to sue the insurer, a Connecticut company, for a loss occurring in Arkansas in 1861, does not prevent the operation of a restriction in the policy to sue within one year from the loss (Phœnix Ins. Co. v. Underwood, 12 Heisk. [Tenn.] 424). The fact that an injunction has been issued in an action by a third party against the policy holders and the insurance company, restraining the company from paying and the holders from receiving the loss, does not restrain the bringing of an action on the policy (Wilkinson v. First National Fire Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166, affirming 9 Hun, 522). Where, however, the beneficiary is enjoined from receiving payment until the six months have expired, a suit may be brought after the removal of the injunction at any time within the statute of limitations (Earnshaw v. Sun Mut. Aid Soc., 68 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460). If an action was commenced within the year, but was dismissed because the plaintiff had failed to pay his privilege tax, he is not entitled to sue under Mississippi statute (Ann. Code 1892, § 2758) providing that when any person shall be prohibited by law, or re-

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strained or enjoined, from commencing an action, the time during which he shall be prohibited shall not be computed as part of the time limited, as the plaintiff was not prohibited by law from commencing his action by dismissing his suit voluntarily because he had violated the law in not paying the proper privilege tax (Ward v. Pennsylvania Fire Ins. Co., 33 South. 841, 82 Miss. 124). So, the insured's prosecution for arson affords no excuse for the failure to prosecute his claim, as required by the policy (Edson v. Merchants' Mut. Ins. Co., 35 La. Ann. 353). But obstinate and unjust refusal of a physician to furnish a certificate of the cause of the death of the insured, so that those interested are thereby prevented from complying with the condition, does not deprive them of the right to enforce the policy (O'Neill v. Massachusetts Ben. Ass'n, 63 Hun, 292, 18 N. Y. Supp. 22). The limitation ceases to run upon the appointment of a receiver within the time (Clark v. Lehman, 65 Ill. App. 238). So, the appointment of a receiver of a national bank, and his taking possession of its books and its assets, so far incapacitates the bank from investigating frauds by its officials, and bringing suit on policies insuring their fidelity, as to excuse a delay by the bank in bringing suit on such policies, within a period of limitation fixed therein (Jackson v. Fidelity & Casualty Co., 75 Fed. 359, 21 C. C. A. 394). The Wisconsin statute (Rev. St. 1898, § 4234) extending the time for the commencement of an action where the person entitled to bring the same dies, and which forms a part of the chapter on limitations of actions, various sections of which specify certain exceptions to the running of limitations, applies to limitations by law, and not to contracts of insurance limiting the time within which the beneficiary may sue (Fey v. I. O. O. F. Mut. Life Ins. Soc., 98 N. W. 206, 120 Wis. 358). And, where the insured dies, if none of the persons interested in the estate attempt to secure the appointment of a temporary administrator in order to give the proper notices and commence the suit in time, or attempt themselves to comply with the terms of the policy, the failure to comply therewith is not excused by the fact that there was no personal representative of the estate (Matthews v. American Cent. Ins. Co., 48 N. E. 751, 154 N. Y. 449).

An acknowledgment or new promise will not revive a cause of action (Williams v. Vermont Mut. Fire Ins. Co., 20 Vt. 222). But the limitation is arrested by, and begins to run anew from, the date of a part payment of the amount (Kentucky Mut. Security Fund Co. v. Turner, 89 Ky. 665, 13 S. W. 104, 11 Ky. Law Rep. 793).

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(h) Commencement of action.

Prosecution within the provision of a policy that claims under it shall be prosecuted within a year from the date of the loss is the commencement of suit (Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601, 79 N. W. 898). It refers technically to the institution of an action, and not merely the making of efforts for the collection of a policy (Carraway v. Merchants' Mut. Ins. Co., 26 La. Ann. 298). If a policy insuring against liability to vessels for negligent collision acquires the establishment of the loss by suit in behalf of the other vessel, a further requirement that suit shall be prosecuted within one year from the date of loss is satisfied by a joint suit in which the liability can be lawfully adjudged (Rogers v. Ætna Ins. Co. [D. C.] 76 Fed. 569).

The mere filing of a pleading is not the commencement of the action, no citation being served.

East Texas Fire Ins. Co. v. Templeton, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 424; Modern Woodmen of America v. Bauersfeld, 62 Pac. 1012, 62 Kan. 340.

In Home Fire Ins. Co. v. Murray, 40 Neb. 597, 59 N. W. 102, where the action had been commenced by filing a petition it was held that Code Civ. Proc. tit. 2, § 19, providing that "an action shall be deemed commenced within the meaning of this title, as to defendant, at the date of the summons which is served on him," does not apply to the condition of an insurance policy requiring action thereon within one year after loss. But the filing of a declaration will be the commencement of a suit if summons is waived by an agreement to enter an appearance (Akin v. Liverpool & L. & G. Ins. Co., 1 Fed. Cas. 264). In Fidelity & Casualty Co. v. Love, 111 Fed. 773, 49 C. C. A. 602, it appeared that within the time limited by a policy of life insurance after the death of the insured a declaration was filed in an action thereon against the company. The statute of Mississippi, in which state the action was brought, provides that "an action shall for all purposes be considered to have been commenced and to be pending from the time of filing of the declaration if a summons shall be issued thereon for the defendant." With the declaration was filed a waiver of summons and an entry of appearance for defendant, signed by an agent duly authorized to accept and acknowledge service of process. Subsequently, but after the expiration of the period of limitation, a summons was issued and served upon the same agent, who,

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so far as appeared, was the only person on whom it could have been served, and to such service defendant appeared. It was held that the action was commenced, within the meaning of the statute, on the day the declaration was filed.

Though it has been held in Illinois (Hekla Ins. Co. v. Schroeder, 9 Ill. App. 472) that the mere making out, signing, and sealing of a summons by the clerk, and delivery thereof to the plaintiff or his attorney, is not a commencement of the suit so as to avoid the bar of limitation, in other jurisdictions it has been held that the issuance of a summons and placing in the hands of an officer in good faith is a commencement of the action within the statute or condition, though not actually served within the time limited.

Harvey v. Detroit Fire & Marine Ins. Co., 79 N. W. 898, 120 Mich. 601; Farrell v. German-American Ins. Co., 56 N. E. 572, 175 Mass. 340; Standard Life & Accident Ins. Co. v. Askew, 11 Tex. Civ. App. 59, 32 S. W. 31.

And in Iowa it has been held (Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529), that under Rev. St. Wis. § 4240, providing that an attempt to commence an action by delivering a summons to an officer for service shall be equivalent to a commencement thereof within the meaning of provisions of law limiting the time for the commencement of an action, an action on a fire policy which provides that action shall be instituted in six months after loss is commenced in time when the summons was issued before, but was not served till after, the expiration of such time.

If summons is issued in good faith for the purpose of securing a valid service, and service fails, an alias summons will relate back to the first, so as to save the limitation.

Schroeder v. Merchants' & Mechanics' Ins. Co., 104 Ill. 71; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754; American Cent. Ins. Co. v. Haws (Pa.) 11 Atl. 107; Everett v. Niagara Ins. Co., 142 Pa. 322, 21 Atl. 817.

But see State Ins. Co. v. Stoffels, 48 Kan. 205, 29 Pac. 479, where it was held that if an action is begun by filing a præcipe, and the issue and service of summons, and such summons and service is set aside on motion after the time limited has expired, and a new summons is issued and served, the action is too late, and cannot be maintained.

In Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 490, it was held that the provisions of Code Civ. Proc. N. Y.

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§ 399, declaring that an attempt to commence an action is equivalent to an actual commencement of it, when the summons is delivered to the sheriff with the intent that it shall be actually served, applies as well to limitations created by contract as to those imposed by statute; and, moreover, that the limitation contained in the standard policy is not properly a contractual limitation, but one specially prescribed by law. Where a petition was filed, and a summons issued, within the year limited by the policy, but the summons was not served because there was no agent within the county on whom service could be made, and a substituted declaration was filed and an alias summons issued after the expiration of the year, the action was nevertheless begun within the time limited in the policy (Georgia Home Ins. Co. v. Holmes, 75 Miss. 390, 23 South. 183, 65 Am. St. Rep. 611). So, if a summons was issued before the expiration of the time limited, returnable two days after it expired, and no agent of the company was found on whom to make service, a second summons issued on the return of the first was in time to save the limitation (Peoria Ins. Co. v. Hall, 12 Mich. 202). But the mere fact that the superintendent of insurance was absent from the county of his official residence when the summons was received by the sheriff for service on him does not excuse failure to serve within the year, as service could have been made on the deputy superintendent (Quinn v. Royal Ins. Co., 81 Hun, 207, 30 N. Y. Supp. 714).

Conceding that a requirement in a policy that suit shall be "commenced" within 12 months from loss contemplates issuance of summons in that time, if such summons, served in time, correctly indorsed and entitled and in conformity with the petition, fails to have the correct name of defendant inserted in the body, it may be corrected by amendment after the limitation, under Code, § 137, authorizing an amendment of "any pleading, process, or proceeding," and such amendment relates back to time of original filing (Burton v. Buckeye Ins. Co., 26 Ohio St. 467).

Where a policy on which 100 underwriters are severally liable for the one-hundredth part of the insurance stipulates that the assured shall not sue more than one of the underwriters at one time, and that a final decision in any action thus brought shall be decisive of the claim of the assured against each of the underwriters, and is conditioned that no action shall be brought thereon after three years, service on one of the underwriters as defendant within the time prescribed is sufficient to prevent the running of the statute

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as against all the underwriters (New Jersey & P. Concentrating Works v. Ackerman, 6 App. Div. 540, 39 N. Y. Supp. 585, affirming 15 Misc. Rep. 605, 37 N. Y. Supp. 489).

(i) Same—Discontinuance of action, dismissal, or nonsuit.

In many states it is provided, in the statutes relating to limitation of actions, that if an action is commenced within the time limited, and fails for a reason other than negligence or defects in matters of form, a new action brought within a specified period thereafter shall be deemed a continuance of the first, and therefore within the limitation.[5] Such a provision, however, does not apply to the limitations which are expressly stipulated for in the contract of insurance, but only to limitations under the general statutes.

> **Harrison v. Hartford Fire Ins. Co. (C. C.) 67 Fed. 298; Harrison v. Hartford Fire Ins. Co., 102 Iowa, 112, 71 N. W. 220, 47 L. R. A. 709; McElroy v. Continental Ins. Co., 48 Kan. 200, 29 Pac. 478; Lewis v. Metropolitan Life Ins. Co., 62 N. E. 369, 180 Mass. 317; Ward v. Pennsylvania Fire Ins. Co., 33 South. 841, 82 Miss. 124; Keystone Mut. Ben. Ass'n v. Norris, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572; Howard Ins. Co. v. Hocking, 130 Pa. 170, 18 Atl. 614.**

And it was held in Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 545, that a provision in an insurance policy requiring suit to be brought within one year after loss does not operate as a statute of limitations, and therefore the plaintiff, after the nonsuit, is not entitled to renew the action within one year thereafter, under Pub. Acts 1895, c. 193, providing that, on the entry of a nonsuit in an action commenced before the running of limitations, the plaintiff therein may renew the action within one year thereafter, even though the policy containing the provision is a standard policy issued in compliance with Pub. Acts 1893, c. 226, requiring all fire policies to be of a certain form.

So, where the action was defeated because it was commenced within 90 days after notice of loss, contrary to Acts 18th Gen. Assem. c. 211, § 3, plaintiff was not entitled to maintain a second action, not commenced within 6 months after the fire, although defendant did not set up in the first action the defense of prematurity

[5] McClain's Code Iowa, § 3742; Code Iowa 1886, § 2537; Code Kan. § 23; Pub. St. Mass. c. 197, § 13; Ann. Code Miss. 1892, § 2756. The Pennsylvania Act of March 27, 1713, provides for the bringing of a second action after the reversal of the first.

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until the 6-months limitation had expired (Wilhelmi v. Des Moines Ins. Co., 72 N. W. 685, 103 Iowa, 532).

In Goodwin v. Merchants' & Bankers' Mut. Ins. Co., 118 Iowa, 601, 92 N. W. 894, an arbitration was had between the insured and the company, and within six months after the loss the insured sued to set aside the award on the ground of fraud. On the trial of the action the company offered to set aside the award and enter on a rearbitration, which offer the insured accepted and dismissed the action. The company then refused to rearbitrate, and the insured brought a new action. It was held that the company could not set up as a defense to such new action a clause in the policy requiring actions thereon to be brought within six months.

In this connection see, also, Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 19 L. Ed. 257; Williams v. Greenwich Ins. Co., 98 Ga. 532, 25 S. E. 31; Melson v. Phœnix Ins. Co., 97 Ga. 722, 25 S. E. 189; McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781; Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; Prudential Ins. Co. v. Howle, 10 O. C. D. 290; Sun Mut. Ins. Co. v. Levy, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 428; Wilson v. Ætna Ins. Co., 27 Vt. 99; McFarland v. Ætna Fire & Marine Ins. Co., 6 W. Va. 437.

The rule will not apply if the first action was dismissed by reason of a mistake on the part of the clerk in placing the action on the wrong calendar. Phœnix Ins. Co. v. Belt Ry. Co. of Chicago, 54 N. E. 1046, 182 Ill. 33, affirming 82 Ill. App. 265.

On the other hand, it has been held in Arkansas (Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66) that Sand. & H. Dig. § 4144, authorizing plaintiff suffering nonsuit in an action on a policy to commence a new action within one year thereafter, and providing that no stipulation in the policy shall deprive insured of the benefits of the section, includes a voluntary nonsuit as well as a nonsuit "suffered," and hence a plaintiff, having taken a nonsuit, is entitled to begin a new suit within one year thereafter, though not within a year from the date of the fire, notwithstanding a provision of the policy declaring that no suit thereon should be sustained in any county unless commenced within 12 months next after the fire. So, in Union Cent. Life Ins. Co. v. Skipper, 115 Fed. 69, 52 C. C. A. 663, it was held, construing the same statute, that a plaintiff who commenced two successive suits on a life insurance policy, and who suffered a nonsuit or dismissal in each case for reasons not conclusive of the merits, may com-

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mence a new action within one year after the termination of the last, notwithstanding any limitation clause in the policy.

Reference may also be made to Rogers v. Home Ins. Co., 95 Fed. 109. 35 C. C. A. 402, where it was held that a provision of an insurance policy that "all claims under this policy shall be void, unless prosecuted by suit at law within twelve months from the date of the loss," is satisfied by the bringing of a suit on the policy in good faith within the 12 months, although such suit is dismissed, on an objection of defendant, on the ground of misjoinder, and a new suit, which is practically a continuation of the first, may be maintained, though brought after the expiration of the 12 months.

A Lloyd's fire policy provided that judgment in a preliminary suit against the attorney for the underwriters should be conclusive on the several underwriters as to the extent of their liability. After recovering judgment against the attorney, suit was commenced against one of the underwriters, the complaint alleging the recovery of judgment against the attorney. This judgment was afterwards vacated, but another judgment was thereafter recovered against the attorney. It was held in Peabody v. Germain, 57 N. Y. Supp. 860, 40 App. Div. 146, that, the judgment against the attorney not being a condition precedent to a suit against any of the underwriters, the insurer's cause of action did not fall by the vacating of the first judgment, so as to require a refusal of the application to set up the second judgment by supplemental complaint.

(j) Same—Nature of proceedings.

Where a creditor of the insured attached the amount due his debtor under the policy for a loss, by a process of foreign attachment, within 12 months after such loss occurred, and, after the 12 months had expired, brought scire facias against the insurance company, the attachment suit saved the claim against the limitation contained in the policy (Harris v. Phœnix Ins. Co., 35 Conn. 310). And where a life policy provides that suits thereon must be begun within a year after the insurance is payable, and during the year the claim for loss is attached at the suit of a creditor of the insured, such attachment suit will not be discontinued after the year has expired, though the company offer to satisfy the creditor's claim; it appearing that the insurance money exceeds the creditor's claim in amount, and that, if the attachment suit is discontinued, further recovery from the company will be barred by the limitation of the policy (Bowe v. Knickerbocker Life Ins.

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Co., 27 Hun [N. Y.] 312). So, too, the commencement of garnishee proceedings to subject money due on an insurance policy is the commencement of a suit, within the meaning of the policy providing that a suit thereon must be commenced within a certain time (Ritter v. Boston Underwriters' Ins. Co., 28 Mo. App. 140).

Where an action at law was brought on a policy within the time limited, and it was found that it could not be sustained by reason of a mistake in the form of the policy, a bill in equity, brought while that suit was pending, and after the six months had expired, for the correction of the policy, and for an injunction against the defense set up in the action at law, was not barred by the expiration of the time limited (Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 517). But if an action at law is brought on the policy within the year limited, and a nonsuit is granted by reason of a mistake in the name of the party to whom the policy was made payable, such mistake being discovered for the first time at the trial of the action at law, and it appears that the agent of the company has willfully withheld it, and all information as to its terms and conditions, from the plaintiff, a bill in equity for reformation of the policy, and for recovery thereon as reformed, brought immediately after such nonsuit, though after the time limited in the policy for bringing actions thereon, is to be regarded as a continuance of the first, and not barred by limitation (Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 South. 887). So, where an action was brought on a fire insurance policy, which provided that suit be brought in one year after loss, and, owing to a mistake in the description of the property in the policy, then first discovered, plaintiff filed a substituted petition, asking for a reformation, and within six months after obtaining a reformation began another action on the policy, the last action is to be deemed a continuation of the first, and is not barred because not brought within the time limited in the policy (Jacobs v. St. Paul Fire & Marine Ins. Co., 86 Iowa, 145, 53 N. W. 101).

In Rosenbaum v. Council Bluffs Ins. Co. (C. C.) 37 Fed. 7, 3 L. R. A. 189, the policy provided that no action could be maintained after six months. An action having been brought on it in the state court, where amendments are permitted after the sustaining of a demurrer, the cause was transferred to the federal court. A demurrer having been sustained, plaintiff filed a bill for reformation of the contract in accordance with the practice of

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the federal court, thus restraining the prosecution of the legal action until after the specified six months. It was held that defendant could not complain of the delay and take advantage of the provision of the policy, as the failure to prosecute the action within six months was caused by the difference in practice between the state and federal courts.

An amendment to the pleadings which does not set up a new cause of action is not a new action, which will be barred by the limitation.

Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Johnston v. Farmers' Fire Ins. Co. of York, 106 Mich. 96, 64 N. W. 5; Stainer v. Royal Ins. Co. of Liverpool, 13 Pa. Super. Ct. 25.

So, amendments which merely substitute or bring in new parties are not barred by the limitation.

Fidelity & Casualty Co. of New York v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Thomas v. Fame Ins. Co., 108 Ill. 91, affirming Fame Ins. Co. v. Thomas, 10 Ill. App. 545; United States Ins. Co. v. Ludwig, 108 Ill. 514; Jamison v. State Ins. Co., 85 Iowa, 229, 52 N. W. 185.

A condition indorsed on an undelivered life policy, payable to the legal representatives of the assured, provided that no suit should be brought thereon after one year from death. Owing to a misapprehension as to who the beneficiaries were, a suit at law on the policy was brought by a wrong party within the 12 months. The error was not discovered until a few days after the expiration of the 12 months, when a bill in equity was filed by the proper party plaintiff to compel delivery of the policy, which defendant had wrongfully refused to do, and to obtain a decree for the amount due thereon. It was held in Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, affirming in this respect the decision of the Circuit Court (101 Fed. 33), that the plaintiff was not barred by the limitation.

Where an action on a policy is commenced within the 12 months limited by its conditions, one to whom the loss is payable as his interest may appear may intervene in the action, although his petition is filed more than 12 months after the loss occurred. Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769.

But if the plaintiffs cannot recover on their original complaint, because of violation of the terms of the policy, an amendment, after the time limited by the policy for bringing an action thereon,

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setting up a new cause of action by alleging a promise by defendant to pay notwithstanding such violation, is not allowable, where the time elapsed since such promise exceeds the time within which the policy requires an action to be brought (Grier v. Northern Assur. Co., 39 Atl. 10, 183 Pa. 334).

(k) Waiver and estoppel.

A stipulation in the policy limiting the time within which action may be brought thereon is for the benefit of the company, and may be waived by it.

This principle has been rather assumed than decided. Reference may, however, be made to the following cases as specifically stating such doctrine: Scottish Union & Nat. Ins. Co. v. Enslie, 78 Miss. 157, 28 South. 822; Ames v. New York Union Ins. Co., 14 N. Y. 253; Repley v. Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Covenant Mut. Life Ass'n v. Baughman, 73 Ill. App. 544; Fritz v. British-American Assur. Co., 208 Pa. 268, 57 Atl. 573; Edwards v. Metropolitan Life Ins. Co., 5 Kulp (Pa.) 259.

An express waiver is, of course, sufficient to defeat the effect of the stipulation.

Moore v. Phœnix Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; Virginia Fire & Marine Ins. Co. v. Aiken, 82 Va. 424.

Nor is the right to a granted extension defeated by the bringing of an unsuccessful action within the time specified in the policy (Cochran v. London Assur. Corp., 93 Va. 553, 25 S. E. 597). But where the policy was one of reinsurance, the limitations therein contained were not waived by a further clause to the effect that the policy was "subject to the same risks, valuations, privileges, conditions, assignments, and mode of settlement as are, or were, or may be, assumed or adopted by the reinsured company, and to cover such property as may be protected by the said reinsured company, and loss to be paid at the same time" (Atlas Mut. Ins. Co. v. Downing, 12 Pa. Super. Ct. 305).

In determining the effect of policy limitations, as elsewhere in the law of insurance, the courts have been quick to seize upon evidence of waiver or estoppel releasing the insured or beneficiary from the effect of the limiting stipulation. Thus, it is a general rule that **any act or conduct of the insurer directly causing a postponement of the action beyond the stipulated time will amount**

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to a waiver of the limitations, and justify the bringing of an action after such stipulated time.

De Farconnet v. Western Ins. Co., 122 Fed. 448, 58 C. C. A. 612, affirming (D. C.) 110 Fed. 405; Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Andes Ins. Co. v. Fish, 71 Ill. 620; Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359, affirming 59 Ill. App. 522; Peoria Ins. Co. v. Hall, 12 Mich. 202; Turner v. Fidelity & Casualty Co., 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; Nevins v. Rockingham Mut. Fire Ins. Co., 25 N. H. 22; Sweetser v. Metropolitan Life Ins. Co., 28 N. Y. Supp. 543, 8 Misc. Rep. 251; Williams v. German Ins. Co., 86 N. Y. Supp. 98, 90 App. Div. 413; Methvin v. Fidelity Mut. Life Ass'n of Philadelphia, Pa. (Cal.) 58 Pac. 387, judgment reversed on other grounds, 61 Pac. 1112, 129 Cal. 251; Hall v. Union Cent. Life Ins. Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. Rep. 844; Frels v. Little Black Farmers' Mut. Ins. Co., 98 N. W. 522, 120 Wis. 590.

So, also, where proofs are furnished a reasonable time before the expiration of policy limitations, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the policy provides a longer time than that for examining the proofs.

Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420, 6 N. W. 865; Robinson v. Metropolitan Life Ins. Co., 37 N. Y. Supp. 146, 1 App. Div. 269, affirmed without opinion 157 N. Y. 711, 53 N. E. 1131; Magner v. Mutual Life Ass'n of City of Brooklyn, 162 N. Y. 657, 57 N. E. 1116, affirming 44 N. Y. Supp. 862, 17 App. Div. 13.

Nor can a clause requiring the commencement of the action within a specified time, "without reference to the time of furnishing proofs of death," be construed as doing away with the waiver effected by a refusal of the company to furnish the required blanks, thereby delaying the bringing of the action (Methvin v. Fidelity Mut. Life Ass'n of Philadelphia, Pa. [Cal.] 58 Pac. 387, judgment reversed on other grounds 61 Pac. 1112, 129 Cal. 251).

The stipulation will not, however, be waived by the action of the company in defeating an improper suit commenced within the time stipulated, or by the taking of costs in such action.

Vincent v. Mutual Reserve Fund Life Ass'n, 74 Conn. 684, 51 Atl. 1066; Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; Sullivan v. Prudential Ins. Co., 172 N. Y. 482, 65 N. E. 268, reversing 71 N. Y. Supp. 525, 63 App. Div. 280.

And where the first action was defeated as having been prematurely brought, the insurer did not waive the policy limitations by

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failing to raise in its pleadings in the first action the issue on which such action was defeated, so as to give the insured an opportunity to dismiss and bring a proper action before the expiration of the stipulated time (Howard Ins. Co. v. Hocking, 130 Pa. 170, 18 Atl. 614). And it has been held that the retention of the policy by the company, at least in the absence of deceit either intended or accomplished, will not amount to a waiver of the stipulation as to the time of bringing action.

Lewis v. Metropolitan Life Ins. Co., 180 Mass. 317, 62 N. E. 369; Sullivan v. Prudential Ins. Co., 172 N. Y. 482, 65 N. E. 268, reversing 71 N. Y. Supp. 525, 63 App. Div. 280. But see, in connection, Dougherty v. Metropolitan Life Ins. Co., 38 N. Y. Supp. 258, 3 App. Div. 313.

Closely allied to the cases holding the limitations to have been waived by acts or conduct directly inducing delay are those cases in which a waiver has been found in the delay resulting from negotiations and attempts at settlement carried on by the company in such a manner as to throw their conclusion after, or unreasonably near to, the time fixed by the policy for the commencement of the action. Such conduct the courts have invariably held will amount to a waiver of the limitations.

German Ins. Co. v. Johnson, 52 Ill. App. 585; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Magner v. Mutual Life Ass'n, 44 N. Y. Supp. 862, 17 App. Div. 13; Austen v. Niagara Fire Ins. Co., 45 N. Y. Supp. 106, 16 App. Div. 86; Bonnert v. Pennsylvania Ins. Co., 129 Pa. 558, 18 Atl. 552, 15 Am. St. Rep. 739; Fritz v. British America Assur. Co., 208 Pa. 268, 57 Atl. 573; Burlington Ins. Co. v. Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111.

Obviously, also, a delay beyond the stipulated time, induced by the reliance of the insured or beneficiary on a direct promise by the company to pay the claim, will not defeat the action.

Metropolitan Life Ins. Co. v. Dempsey, 72 Md. 288, 19 Atl. 642; Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601; Scottish Union & Nat. Ins. Co. v. Enslie, 78 Miss. 157, 28 South. 822; Ames v. New York Union Ins. Co., 14 N. Y. 253; Solomon v. Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22; Harris v. Iron City Mut. Fire Ins. Co., 3 Lack. Leg. N. (Pa.) 258; Universal Fire Ins. Co. v. Stewart, 3 Penny. (Pa.) 536; Horst v. City of London Fire Ins. Co., 73 Tex. 67, 11 S. W. 148; Galloway v. Standard Fire Ins. Co., 45 W. Va. 237, 31 S. E. 969.

The Jennings Case further decided that such a promise made to the

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beneficiary of a life policy will inure to the benefit of the personal representative suing thereon.

And where an action brought in proper time was dismissed for lack of proper prosecution, under repeated assurances by the company that litigation was not necessary, and that the claim would be paid, the policy limitations could not be raised as against a subsequent action brought to enforce the claim (Home Ins. & Banking Co. v. Myer, 93 Ill. 271).

Similarly, the securing of a fraudulent assignment of the claim by an agent of the company, and the issuance to such assignee of a certificate of indebtedness, has been held to justify an action by insured after the expiration of the stipulated time, on the ground that the waiver implied in the recognition of indebtedness inured also to the defrauded assignor (In re State Ins. Co. [D. C.] 16 Fed. 756). But a simple adjustment of the amount of a loss has been held not to amount to an implied promise to pay,[6] or to constitute a waiver of the condition in the policy that an action must be brought within a fixed time.

Garretson v. Hawkeye Ins. Co., 65 Iowa, 468, 21 N. W. 781; Willoughby v. St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. 272.

Nor did any waiver arise from a stipulation accompanying a cancellation of a policy of reinsurance, to the effect "that it is understood that the company is liable for all losses that may have occurred prior to this date." Such a stipulation was rather a mere recognition of the fact that the policy was in force as to fires which had already occurred (Atlas Mut. Ins. Co. v. Downing, 12 Pa. Super. Ct. 305).

The most common form of waiver of policy limitations involves delays induced both by dilatory negotiations and by promise of payment; and it is a universal rule that **where the insurer, by its acts in negotiating for a settlement, has led insured to believe that he will be paid without suit, it cannot take advantage of the provision in its policy requiring action to be brought within a stated time.**

Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; Alten v. McFall (C. C.) 89 Fed. 463; Curtis v. Home Ins. Co., 6 Fed. Cas. 1005; Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325; Derrick v. Lamar Ins. Co., 74 Ill. 404; Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610, affirming 33 Ill. App. 548; Illinois Live Stock Ins. Co. v. Baker, 153

[6] As to the effect of an adjustment as a promise to pay, see ante, p. 3584.

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Ill. 240, 38 N. E. 627, affirming 49 Ill. App. 92; Mutual Ben. Life Ass'n v. Coats, 48 Ill. App. 185; Phœnix Ins. Co. v. Stewart, 53 Ill. App. 273; Fireman's Fund Ins. Co. v. Western Refrigerating Co., 55 Ill. App. 329; Grant v. Lexington Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; Mickey v. Burlington Ins. Co., 35 Iowa, 174, 14 Am. Rep. 494; Bish v. Hawkeye Ins. Co., 69 Iowa, 184, 28 N. W. 553; Phœnix Ins. Co. v. Rad Bila Hora C. S. P. S., 41 Neb. 21, 59 N. W. 752; Martin v. State Ins. Co., 44 N. J. Law, 485, 43 Am. Rep. 397; Bowen v. Preferred Acc. Ins. Co., 81 N. Y. Supp. 840, 82 App. Div. 458; Peters v. Empire Life Ins. Co. (Sup.) 90 N. Y. Supp. 296; Harold v. People's Mut. Acc. Ins. Ass'n, 12 Pa. Co. Ct. R. 454, 2 Pa. Dist. R. 503; St. Paul Fire & Marine Ins. Co. v. McGregor, 63 Tex. 399; Mutual Reserve Fund Life Ass'n v. Tolbert (Tex. Civ. App.) 33 S. W. 295; David v. Oakland Home Ins. Co., 11 Wash. 181, 39 Pac. 443; McArdle v. German Alliance Ins. Co., 90 N. Y. Supp. 485, 98 App. Div. 594.

But mere negotiations entered into between the parties, showing no intention on the part of the company to pay, and not calculated to mislead the insured or beneficiary into delaying action, will not amount to a waiver of the stipulation as to the time of bringing suit.

Vincent v. Mutual Reserve Fund Life Ass'n, 74 Conn. 684, 51 Atl. 1066; Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466; Allemania Ins. Co. v. Little, 20 Ill. App. 431; Metropolitan Acc. Ass'n v. Cliffton, 63 Ill. App. 152; Carlson v. Metropolitan Life Ins. Co., 172 Mass. 142, 51 N. E. 525; Elliot v. Mutual Ben. Life Ass'n of America, 76 Hun, 378, 27 N. Y. Supp. 696; Allen v. Dutchess County Mut. Ins. Co., 88 N. Y. Supp. 530, 95 App. Div. 86; Schroeder v. Keystone Ins. Co., 2 Phila. (Pa.) 286; John Morrill & Co. v. New England Fire Ins. Co., 71 Vt. 281, 44 Atl. 358; McFarland v. Peabody Ins. Co., 6 W. Va. 425.

And obviously there is no reason why a mere denial of liability on other grounds should operate as a waiver of the stipulation.

Ripley v. Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362, reversing Ripley v. Astor Ins. Co., 17 How. Prac. [N. Y.] 444; De Grove v. Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305; Farmers' Mut. Fire Ins. Co. v. Barr, 94 Pa. 345.

Conduct of the insurer after the expiration of the policy limitations, by which the insured or beneficiary is induced to go to trouble or expense in the procuring of proofs of loss, etc., will amount to a waiver of the clause limiting the time within which an action may be commenced.

De Farconnet v. Western Assur. Co., 122 Fed. 448, 58 C. C. A. 612, affirming (D. C.) 110 Fed. 405; Covenant Mut. Life Ass'n v. Baugh-

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man, 73 Ill. App. 544; Behymer v. Metropolitan Life Ins. Co., 4 O. L. D. 266, 3 Ohio N. P. 183; Harold v. People's Mut. Acc. Ins. Ass'n, 12 Pa. Co. Ct. R. 454, 2 Pa. Dist. R. 503.

And in Bowen v. Preferred Acc. Ins. Co., 82 App. Div. 458, 81 N. Y. Supp. 840, a mere statement by the company, made after the expiration of the stipulated time, to the effect that "there should be no difficulty in the way of our arriving at an understanding as to the merits of the claim," was considered as one of the elements on which the waiver was founded. The better rule, however, seems to be that fraudulent conduct causing delay, or unsupported promises to pay, occurring after the barring of the action by policy limitations, will not amount to a waiver of such stipulation.

Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 545; National Fire Ins. Co. v. Brown, 128 Pa. 386, 18 Atl. 389; Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; Hill v. Phœnix Ins. Co., 14 Wash. 164, 44 Pac. 146. See, also, Preferred Mut. Acc. Ass'n v. Beidelman, 1 Monag. (Pa.) 481, and also note in connection, Williams v. Vermont Mut. Fire Ins. Co., 20 Vt. 222, where it was said that, if an action was not brought within the time stipulated in the act incorporating the company, no legal liability was left which might be reanimated and rendered capable of being enforced at law, by an acknowledgment or new promise. The case was distinguishable, the court said, from one in which an effort was made to remove the statute bar from an ordinary action of debt.

The proper consideration of this question involves, of course, the whole question as to the nature of waiver, and whether it may be founded on intention or on estoppel only. Reference is therefore made to the briefs treating such questions as applied to waiver of forfeiture and avoidance, and the failure to furnish proofs of loss.

And obviously a willingness, after the expiration of the policy limitations, to pay one person as to whom a liability may exist, does not imply a waiver of such limitation as to another person making a claim under the policy.

King v. Watertown Fire Ins. Co., 47 Hun (N. Y.) 1. See, also, Williams v. Vermont Mut. Fire Ins. Co., 20 Vt. 222.

That acts and promises of the insurer to pay the loss, continuing up to and beyond the time stipulated for the bringing of action, will amount to a waiver of the limitations, rather than a mere suspension thereof during the continuance of such conduct or promises, is a principle generally assumed, but expressly decided in Galloway v.

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Standard Fire Ins. Co., 31 S. E. 969, 45 W. Va. 237. Where, however, prior to the expiration of the time the insured or beneficiary is informed, or obtains knowledge, that an action will be required, the question is more complicated, being closely analogous to the question already considered as to when limitations will commence to run. Under such circumstances the courts have reached at least two varying conclusions. In some jurisdictions it has been held that, if a reasonable time for the action remains after it is evident that recovery can be had only by action on the policy, the limitations will be enforced; and it is to be noted that in the cases supporting this doctrine the action was brought a less time after the expiration of the limitations than was consumed during the period of the limitations in useless negotiations, etc.

Steel v. Phenix Ins. Co. (C. C.) 47 Fed. 863, reversed on other grounds 51 Fed. 715, 2 C. C. A. 463; Garido v. American Cent. Ins. Co. (Cal.) 8 Pac. 512; Blanks v. Hibernia Ins. Co., 36 La. Ann. 599; Law v. New England Mut. Acc. Ass'n, 94 Mich. 266, 53 N. W. 1104; Lentz v. Teutonia Fire Ins. Co., 96 Mich. 445, 55 N. W. 993. See, also, Vincent v. Mutual Reserve Fund Life Ass'n, 74 Conn. 684, 51 Atl. 1066.

The case of Voorheis v. People's Mut. Ben. Soc. of Elkhart, 91 Mich. 469, 51 N. W. 1109, apparently contains language at variance with the principle thus asserted, but in so far as it sets out a contrary doctrine it must be considered as overruled by the later cases. Furthermore, the language used was not necessary to the decision rendered, the action having been in fact commenced within the stipulated nine months after the completion of proofs, before which, the court held, the limitations could never be considered as commencing to run.

On the other hand, it has been held that, even if plaintiff obtains knowledge before the expiration of the limitations that action will be necessary, nevertheless the time in which he may be considered as having been delayed or deceived should not be computed in determining the time within which the action must be commenced.

Allemania Fire Ins. Co. v. Peck, 33 Ill. App. 548, affirmed without particular mention of this point (1890) 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610; Black v. Winneshiek Ins. Co., 31 Wis. 74. See, also, Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188.

The converse of this doctrine has also been applied in Wisconsin (Fey v. I. O. O. F. Mut. Life Ins. Soc., 120 Wis. 358, 98 N. W. 206), where an action commenced after the expiration of the

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limitations, as so computed, was held too late. But the Illinois court, in a more recent case than the one stating the rule as to the exclusion of the time of a waiver, has gone further, and said that it was inclined to hold that, "if any substantial part of the time provided by the limitation is lost by reason of the waiver, the limitation is wholly gone," and cannot be revived, leaving the case to be governed entirely by statutory limitations. The language does not, however, seem to have been strictly necessary to the decision reached, for the court further said that it was probably true that the letter of the company on which reliance was placed as giving the insured notice that he must bring an action was in fact written to prevent the bringing of the suit. (Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627, affirming on opinion of lower court 49 Ill. App. 92.)

That the general officers in charge of negotiations as to the payment of the loss may, in the absence, at least, of special stipulations, waive the requirement of the policy as to the time of bringing action, seems never to have been questioned. And it has been held that a general agent can also bind the company in this particular (German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481). So, also, an adjuster authorized to settle a loss and secure proof can effect a waiver by demanding proofs which cannot be furnished before the expiration of the limitations.

Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678. See, also, Burlington Ins. Co. v. Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111.

But, generally speaking, such power is confined to the managing officers, and cannot be exercised by local agents, either directly, or by promises as to matters outside the usual scope of such agents' authority.

Underwriters' Agency v. Sutherlin, 55 Ga. 266; Graham v. Niagara Fire Ins. Co., 106 Ga. 840, 32 S. E. 579; Carlson v. Metropolitan Life Ins. Co., 51 N. E. 525, 172 Mass. 142. See, also, Hill v. Phœnix Ins. Co., 14 Wash. 164, 44 Pac. 146. For a contrary doctrine see Ide v. Phœnix Ins. Co., 12 Fed. Cas. 1168.

Statements of a local agent as to his authority are not, of course, proper proof in relation thereto (Barry & Finan Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761).

Nor can a waiver be predicated on statements of a clerk in a local office, such statements being directly opposed to the known

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attitude of the agents themselves (Coryeon v. Providence Washington Ins. Co., 79 Mich. 187, 44 N. W. 431).

The effect of clauses attempting to limit waiver to written indorsements by certain named officers is too broad a subject to be discussed with the few cases arising under this topic. It is, therefore, deemed sufficient to refer, for the principles involved, to the briefs dealing with waiver as related to forfeiture and avoidance, and failure to furnish the required proofs, and merely cite the few cases in which such clauses have been construed with reference to a waiver of the policy limitations.

In the following cases the stipulation limiting waiver was held ineffectual to prevent a waiver: Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458 (in general); German Ins. Co. of Freeport, Ill., v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481 (general agent); Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678 (adjuster); Universal Fire Ins. Co. v. Stewart, 3 Penny. (Pa.) 536 (president); Burlington Ins. Co. v. Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111 (adjusting agents).

But in these effect was given to the restricting clause: Carlson v. Metropolitan Life Ins. Co., 172 Mass. 142, 51 N. E. 525 (superintendent); Waynesboro Mut. Fire Ins. Co. v. Conover, 98 Pa. 384, 42 Am. Rep. 618 (general agent); Flynn v. People's Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 137 (local agent).

(l) Pleading and practice.

The courts are by no means unanimous as to the proper method of raising the issue whether the action was brought within the policy limitations. In some jurisdictions it has been held that a complaint showing on its face that the action was commenced after the expiration of the limitations is demurrable unless it also contains further allegations excusing or waiving such failure.

McElhone v. Massachusetts Ben. Ass'n, 2 App. D. C. 397; Oakland Home Ins. Co. v. Allen, 1 Kan. App. 108, 40 Pac. 928; Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Minerick v. People's Mut. Fire Ins. Co., 4 Ohio Dec. 228, 1 Cleve. Law Rep. 134. See, also, Vincent v. Mutual Reserve Fund Life Ass'n, 74 Conn. 684, 51 Atl. 1066, where the case turned on the sufficiency of the demurrer.

But in other jurisdictions the failure to bring the action within the stipulated time has been held a matter of defense, to be raised by the answer, and not taken advantage of by demurrer.

Humboldt Ins. Co. v. Johnson, 1 Ill. App. 309; Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743;

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Barber v. Fire & Marine Ins. Co. of Wheeling, 16 W. Va. 658, 37 Am. Rep. 800. In connection, however, with the Brewing Co. Case, see Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287, and Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. 183.

A mere denial that the conditions of the policy have been complied with has been deemed a sufficient allegation of the defense (O'Laughlin v. Union Cent. Life Ins. Co. [C. C.] 11 Fed. 280). But where the limitations do not commence to run until after the acceptance of the proofs of loss or settlement by arbitration, the answer must allege when such proof was made or arbitration completed.

Barnes v. McMurtry, 29 Neb. 178, 45 N. W. 285. See, also, Cox v. Farmers' Mut. Fire Ass'n, 48 N. J. Law, 53, 3 Atl. 122, where it was held necessary to allege that the by-law relied on was adopted prior to the issuance of the policy.

Letters of the company containing promises of payment, which induced plaintiff not to bring his action before the expiration of the stipulated six months, have been held not proper exhibits to be attached to the complaint (Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308, 21 N. W. 652). And the federal court in Illinois, following Gunton v. Hughes, 181 Ill. 132, 54 N. E. 895, which, however, was a case dealing with statutory limitations, has held that, under the rule making the limitations a matter of defense, the matter in avoidance of the limitation cannot be pleaded in the declaration, but is matter for replication after the limitation has been pleaded by defendant (Kettenring v. Northwestern Masonic Aid Ass'n [C. C.] 99 Fed. 532). The Gunton Case, in the opinion of the federal court, overruled the earlier case of Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627, affirming on the opinion of the lower court 49 Ill. App. 92, where it was asserted that while it was unnecessary to plead the matter of avoidance in the declaration, yet, if plaintiff did so, the general issue would put him on his proof and raise the issue as to the waiver.

A replication alleging a waiver of the condition is bad if it does not set forth the acts and declarations which amounted to such waiver (Oakman v. City Ins. Co., 9 R. I. 356).

The proof must, of course, correspond with the issues. Thus, under an answer which sets up as a defense that the policy sued on provided that no action should be brought thereon unless commenced within one year from the date of the accident, defendant cannot show that the policy provided that no recovery could be

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had unless action should be begun within six months from the date of the receipt of proofs of the injury (Keeffe v. National Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854). And where plaintiff pleaded waiver only of the clause regulating the filing of proof of loss and certain procedure thereon, and alleged performance on his part of all the other conditions of the policy, he may not prove a waiver of the limitation of the action (Allen v. Dutchess County Mut. Ins. Co., 88 N. Y. Supp. 530, 95 App. Div. 86). But in South Carolina it has been held that, though the answer set up limitations, and the bringing of the action after the stipulated time was admitted, yet insured should have been permitted to show that defendant had waived the stipulations of the policy, or was estopped from urging the same (Sample v. London & L. Fire Ins. Co. of Liverpool, 42 S. C. 14, 19 S. E. 1020).

Where an insurance company defends an action on a policy on the ground that the suit was not brought within the time required by the policy, it has the burden of proof to show that defense (Allibone v. Fidelity & Casualty Co. [Tex. Civ. App.] 32 S. W. 569). But the burden is on the plaintiff beginning an action on an insurance policy six months after the death of the insured to prove a waiver of a provision that no suit could then be brought, and that a failure to sue before should be conclusive evidence against any claim, notwithstanding the provisions of all statutes of limitations, since the failure is a complete defense unless waived (Carlson v. Metropolitan Life Ins. Co., 51 N. E. 525, 172 Mass. 142).

Where the answer sets up the expiration of the period within which the policy provides that suit must be brought, as a bar to the action, letters written by officers of the company, and having a tendency to establish plaintiff's claim that he was induced by promises and representations to delay bringing suit, are admissible in evidence to sustain such claim (Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308, 21 N. W. 652). Testimony of plaintiff's counsel that he delayed bringing the action by reason of the superintendent's assurances that the company would pay the claim, if just, is competent only to show that plaintiff acted on such assurances for the purpose of estopping defendant if it was responsible for them (Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601).

The sufficiency of the evidence to show a waiver of the limitation clause was considered in Sullivan v. Prudential Ins. Co., 71 N. Y. Supp.

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525, 63 App. Div. 280; Bonnert v. Pennsylvania Ins. Co., 129 Pa. 558, 18 Atl. 552, 15 Am. St. Rep. 739; Everett v. London & L. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

A provision in a life insurance policy limiting the time within which suit may be brought thereon is an essential part of the contract, and the taking of a case from the jury because not begun within the period is not error, where there was no evidence introduced tending to show that the limitation had been waived (Meyer v. Metropolitan Life Ins. Co., 9 Ohio S. & C. P. Dec. 596, 7 Ohio N. P. 480). Whether the limitation clause has been waived is a question for the jury.

Hartford Fire Ins. Co. v. Amos, 25 S. E. 575, 98 Ga. 533; Coursin v. Pennsylvania Ins. Co., 46 Pa. 323; Preferred Mut. Acc. Ass'n v. Beidelman, 1 Monag. (Pa.) 481.

And if the policy of insurance has been lost, it is for the jury to say, in an action against the insurer, whether defendant has proved that it contained the clause against actions after six months (Metropolitan Life Ins. Co. v. Dempsey, 72 Md. 288, 19 Atl. 642).

Where the question of the stipulation contained in an insurance policy as to the time within which suit must be brought is not presented to the court by the pleadings, it is error to instruct the jury as to the legal effect of such a clause (Barber v. Fire & Marine Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800).

3. PROCESS.

(a) Place of service.
(b) Persons on whom service may be made.
(c) Solicitors of insurance.
(d) Reception of premiums as affecting character of agency.
(e) Service after cessation of agency.
(f) Service on state auditor, insurance commissioner, etc.
(g) What constitutes "doing business" in the state, so as to justify substituted service.
(h) Effect of withdrawal from state.
(i) Mode of service.

(a) Place of service.

A fire insurance company of one state insuring property in another state in which it is also authorized to do business is subject to service of process in such latter state according to its laws.

Gude v. Dakota Fire & Marine Ins. Co., 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860; Osborne v. Shawmut Ins. Co., 51 Vt. 278.

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So, a life insurance company may be sued on a policy in the state where insured was domiciled, by one having possession of the policy in such state, though the policy is payable in the state where the company was incorporated (Equitable Life Assur. Soc. v. Brown, 23 Sup. Ct. 123, 187 U. S. 308, 47 L. Ed. 190). But it is obvious that service of process may be had on the secretary of an insurance company at the general office of the company (Whalan v. Mutual Aid Soc., 2 Leg. Rec. Rep. [Pa.] 370).

(b) Persons on whom service may be made.

A statute providing that those who represent insurance companies within the limits of a state shall be considered agents upon whom service of process may be made violates no provision of the Constitution of the United States (Milwaukee Trust Co. v. Germania Ins. Co., 106 La. 669, 31 South. 298). But a law permitting service on an agent of a foreign company does not authorize service on such agent after its passage on a cause of action accruing prior to the enactment of the law (Warren Mfg. Co. v. Ætna Ins. Co., 29 Fed. Cas. 294).

Where it is so provided by statute, service of process may be made on any agent of a foreign company within the state (Niagara Ins. Co. v. Rodecker, 47 Iowa, 162). And under such provisions it is not necessary to show, in a declaration and summons against a foreign company, that defendant is a foreign insurance company, and that named persons are the duly authorized agents of the company to receive service of summons (Georgia Home Ins. Co. v. Holmes, 75 Miss. 390, 23 South. 183, 65 Am. St. Rep. 611). Where it was shown that the person on whom process was served was an agent of the company, so as to make the service valid, testimony of such person that he was the agent of such company was immaterial. And where it is provided that any person receiving or transmitting money for a company's use or transacting any business on its account shall be deemed its agent, evidence that the company had not by vote appointed the person on whom process against it was served as its agent is immaterial (Reyer v. Odd Fellows' Fraternal Acc. Ass'n, 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288).

The president of a subordinate lodge having the power to decide all questions of law and order, subject to the approval of the president of the supreme lodge, and to approve every claim before payment is made, is a local agent of the association within a statute au-

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thorizing the service of citations on local agents of foreign corporations (Bankers' Union of the World v. Nabors [Tex. Civ. App.] 81 S. W. 91). And even though a fraternal association, having for one of its objects the insurance of its members in the state, has no president or other officer therein, service may be made upon any one of the associates within the state, under a statute [1] providing that, where two or more persons are associated in any business under a common name, the associates may be sued in such common name (Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684).

An action to recover the full amount of indemnity contracted to be paid by an accident policy on the death of the insured by accidental means is one founded on a contract of life insurance, within the meaning of the Arkansas statute [2] providing that, in any action on a policy or certificate on the life of a person against any fraternal society, service of process may be made on the chief officer, or, in his absence, on the secretary of any subordinate lodge or society of such fraternal society in the state; and a subsequent statute [3] authorizing a different mode of service in actions on insurance policies generally did not operate to repeal the former act, or to render service thereunder invalid in case of a policy issued by a society having local subordinate lodges or societies in the state (Travelers' Protective Ass'n v. Gilbert, 101 Fed. 46, 41 C. C. A. 180).

In New York it has been held that a law (Laws 1895, p. 176, c. 349, amending Code Civ. Proc. § 2881) authorizing service of summons in a justice court on a local agent of an insurance company residing in the county, when no other person resides in the county on whom service can be had, and no one has been designated to receive it, is applicable to the city court of Elmira (Murray v. American Casualty Ins. Co., 85 N. Y. Supp. 449, 88 App. Div. 224).

In Pennsylvania, service of process upon a foreign insurance company, which has complied with the provisions of the registry law and has designated an office and an agent, must be made at such office (Potts v. Prudential Ins. Co., 6 Pa. Dist. R. 520) and on the designated agent (Henry v. Prudential Ins. Co., 9 Kulp, 384). However, in Kenton Ins. Co. v. Osborne, 21 Ky. Law Rep. 330, 51 S. W. 306, it is said that service on the agent who issued the policy, and with whom the contract was made, is prima facie sufficient, as the burden is on the defendant to show that there was

[1] Gen. St. Minn. 1894, § 5177.

[2] Acts Ark. 1895, p. 188.

[3] Acts Ark. 1897, p. 31.

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a higher officer in the county. A secretary of a local division of a benefit association required to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, to place thereon the name of any member of the insurance department joining his division by transfer from any other division, and to whom members are required to give notice of any changes of residence, must be considered an insurance "agent" of the association, under the Wisconsin law as to service of process (Dixon v. Order of Railway Conductors of America [C. C.] 49 Fed. 910).

Service on one of the members of a firm is sufficient where such firm is agent for the insurance company (Kenton Ins. Co. v. Osborne, 21 Ky. Law Rep. 330, 51 S. W. 306).

Service on a special agent of an insurance company, who has no office or place of business, is void, according to Means v. Lycoming Ins. Co., 1 C. P. Rep. (Pa.) 6. And a person employed by a company as attorney to investigate losses, to look up testimony in lawsuits, and at times to look after local agents, but not to take risks or to issue policies, and who has no office in the state, is not an "appointed agent" for service, nor one "employed in the general management" of the company, nor one having an office or agency for the company, within the Iowa statutes, on whom service can be made (Philp v. Covenant Mut. Ben. Ass'n of Illinois, 62 Iowa, 633, 17 N. W. 903). In Moore v. Monumental Mut. Life Ins. Co., 77 App. Div. 209, 78 N. Y. Supp. 1009, it is said that an unauthorized service on a person assumed to be the agent of a fraternal insurance company is not aided by the fact that there was available a representative of the company on whom service could properly have been made.

Jurisdiction over a foreign insurance company not authorized to do business in the state is not acquired in Iowa by service on a nonresident adjusting agent, not employed in the general management of the business, or in any office or agency in the state, made while he was temporarily within the state (Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761).

(c) Solicitors of insurance.

Where service may be made on any general agent of the company or "other agent" transacting the business thereof in the county, service may be made on a soliciting agent (Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330). But where it is merely provided that

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service may be made on any agent connected with an agency in actions growing out of or connected with such agency, service cannot be made on a recording and soliciting agent in an action growing out of the transactions of another and former agent who had conducted a different office in the same town, and whose powers were limited to the soliciting of insurance (State Ins. Co. v. Granger, 62 Iowa, 272, 17 N. W. 504). And under a law authorizing suits against insurance companies to be brought in the county where the property insured is situated, and service to be made on an agent of the company, service must be made on an agent in charge of a branch office, and not on one in an office of his own, who merely solicits insurance and delivers policies (Eberman v. American Fire Ins. Co., 164 Pa. 515, 30 Atl. 398). So, under a law allowing suit to be brought against a company in any country where it may "have an agency or transact any business," service on a traveling agent or on one authorized only to effect insurance is not sufficient (Parke v. Commonwealth Ins. Co., 44 Pa. 422). Likewise, it is held in Louisiana that a foreign corporation, represented by a general agent and local board of directors residing in the city of New Orleans, cannot be served with process by service on a local agent authorized to receive applications for insurance and binding receipts therefor, who has not exercised or represented that he possessed any other authority (Weight v. Liverpool, London & Globe Ins. Co., 30 La. Ann. 1186). But under the laws of Wisconsin, making one who solicits insurance, and receives compensation therefor, the agent of the insurance company, and providing that service of process may be made on such agent, service may be made on a person who solicited a policy, one year and a half after it was issued, though the policy provides that such person is the agent of insured only (Fred Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa, 31, 63 N. W. 565).

(d) Reception of premiums as affecting character of agency.

A statute constituting one collecting premiums the agent of the company, "to all intents and purposes," includes within the "purposes" service of summons; and hence service may be made on a bank, which has performed one or more of the acts stated in the law (Bankers' Life Ins. Co. v. Robbins, 55 Neb. 117, 75 N. W. 585). And persons authorized to collect and transmit premiums for foreign companies have been held to be agents on whom service

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could be made under the laws of Indiana, Kansas, and Mississippi.

Reyer v. Odd Fellows' Fraternal Acc. Ass'n, 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288; Southwestern Mut. Ben. Ass'n v. Swenson, 49 Kan. 449, 30 Pac. 405; Sadler v. Mobile Life Ins. Co., 60 Miss. 391.

So, a person soliciting a policy and collecting the premium thereon has been held to be an agent to accept service under the laws of Wisconsin and Texas.

Fred Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa, 31, 63 N. W. 565; Southern Ins. Co. v. Wolverton Hardware Co. (Tex. Sup.) 19 S. W. 615.

But the fact that a person collects premiums from a local branch, and transmits them to the central organization of a fraternal insurance company, does not constitute such person a managing agent on whom service may be made, under the New York Code (Moore v. Monumental Mut. Life Ins. Co., 78 N. Y. Supp. 1009, 77 App. Div. 209). A motion to quash a service on the ground that the person on whom service was made was not defendant's agent was in Ætna Life Ins. Co. v. Hanna, 81 Tex. 487, 17 S. W. 35, held properly overruled, as it was not shown that plaintiffs or the insured had knowledge of the revocation of the power to accept service given the agent some years before, and filed in the department of insurance statistics, and it appeared that the agent continued to receive premiums, and was appointed by the company to adjust the loss.

(e) Service after cessation of agency.

Under a statute of another state providing that service of process on policies issued there by foreign companies may be had on the agent of the company there or the inhabitant of the state who issued the policy, service on the person who issued the policy, if still an inhabitant of the state, though no longer an agent of the company, will give the courts of that state jurisdiction of the action, so that a judgment may be enforced in Massachusetts (Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray [Mass.] 201, 71 Am. Dec. 743). So, under a provision that, on failure of a foreign company to have an agent in the state on whom process may be served, the person who solicits insurance or transmits an

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application for insurance shall be held to be the agent of the company as to all the duties and liabilities imposed by law, service on the agent who had issued the policy sued on was sufficient, though at the time of service he was not in the company's employ (Pervangher v. Union Casualty & Surety Co., 81 Miss. 32, 32 South. 909). Likewise, under a statute requiring any foreign insurance company doing business in the state to appoint an attorney at law in each county where its agencies are established, and to file with the territorial auditor an instrument authorizing such attorney to acknowledge legal service of process, and consenting that any service of process on such attorney shall be as valid as if served upon the company, service of process on the continuing partner of a dissolved firm which had been designated as attorneys to accept service has been held good, though such person was not a member of the bar, and though the firm, some months previous to such service, had ceased to be agents for defendant, the instrument designating the firm as attorneys, however, remaining on file (Gibson v. Manufacturers' Ins. Co., 144 Mass. 81, 10 N. E. 729). But under a law providing that, when a foreign company ceases to do business in the state, its agents last designated or acting as such shall be deemed to continue for service of process, etc., service must be made on the agent who last acted for the company. Hence, where it appears that the agent served had been discharged from the company's service, and another agent appointed, before the company discontinued business in the state, the service is insufficient (Michigan State Ins. Co. v. Abens, 3 Ill. App. 488).

(f) Service on state auditor, insurance commissioner, etc.

A law requiring foreign insurance companies to file with a state officer a power of attorney authorizing such officer to accept service for them does not repeal a general law authorizing service on resident agents, but is merely cumulative.

Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212; Burlington Ins. Co. v. Mortimer, 52 Kan. 784, 35 Pac. 807; Jones v. Hartford Ins. Co., 88 N. C. 499; Bankers' Union of the World v. Nabors (Tex. Civ. App.) 81 S. W. 91.

Where, as a condition for the right of doing business in a state, a foreign company authorizes a state officer to accept service for it so long as the company has unsatisfied liabilities in the state, such power, being contractual in its nature, and given in consid-

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eration of the permission to do business in the state, is irrevocable.

Biggs v. Mutual Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955; Moore v. Mutual Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637. See, also, Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519, affirming 82 N. Y. Supp. 908, 84 App. Div. 324.

A foreign company which has filed with a state officer, as required by statute, its written consent to the bringing of suits against it by service of process on such officer, and which thereafter does business in the state, is estopped from questioning the validity of a process served in strict compliance with the law (Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738). So, the company cannot make a special appearance and have the service of process on the state officer set aside on the ground that plaintiff has no claim against it for which it is liable, since that is the very question to be determined (Moore v. Mutual Reserve Fund Life Ass'n, 39 S. E. 637, 129 N. C. 31). Where a statute provides that process may be served on a foreign insurance company by serving the insurance commissioner, service on the deputy insurance commissioner, though made at the commissioner's office, is insufficient (Old Wayne Mut. Life Ass'n v. Flynn [Ind. App.] 66 N. E. 57).

A foreign company doing business in a state requiring the appointment of a state officer to accept service will be presumed to have made such appointment, in the absence of pleading and proof to the contrary, according to Mut. Fire Ins. Co. v. Hammond, 106 Ky. 386, 50 S. W. 545. But in Old Wayne Mutual Life Ass'n v. Flynn (Ind. App.) 66 N. E. 57, it was said that in the absence of an averment in the complaint, in an action against a foreign insurance company on a judgment rendered against it in a state not its domicile, showing that it had filed a stipulation in such state authorizing service on it by serving the insurance commissioner or a designated agent, as required by the laws of such state, it must be inferred that it had not filed the requisite stipulation. Generally, it is held that a company doing business in a state is estopped to say that it has not filed the required stipulation, and has not assented to service on the designated state officer (Ehrman v. Teutonia Ins. Co. [D. C.] 1 Fed. 471). Hence the company is bound by such service (Old Wayne Mut. Life Ass'n v. Flynn [Ind. App.] 66 N. E. 57). And under statutes providing that every foreign in-

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surance company doing business in the state shall file its written consent that service of process in all actions against it may be made on the state auditor where it has no agent in the county where suit is brought, a summons in an action against a foreign insurance company upon a liability incurred by doing business in the state may be served upon the auditor, if there is no agent in the county where the suit is brought, though the company has never been licensed to do business in the state, and has never filed a written consent to such service of summons (Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co. [C. C.] 55 Fed. 27). But in Lubrano v. Imperial Council of the Order of United Friends, 20 R. I. 27, 37 Atl. 345, 38 L. R. A. 546, it was held that where a foreign company served by leaving a copy of the writ with the insurance commissioner does not appear, and the record affirmatively shows that defendant has not appointed such commissioner its attorney to accept service, as required by law to enable it legally to transact business in the state, the suit must be dismissed for want of service. And in Greenleaf v. National Ass'n of Railway Postal Clerks (C. C.) 130 Fed. 209, it was held that a Maine statute authorizing service on the insurance commissioner applies only to foreign insurance companies which have complied with the statutes and obtained a license to do business in the state.

The Virginia law [4] permitting service on the auditor of public accounts has been held (Millan v. Mutual Reserve Fund Life Ass'n [C. C.] 103 Fed. 764) not to apply to foreign assessment companies. And in Grand Lodge A. O. U. W. v. Bartes, 64 Neb. 800, 90 N. W. 901, it was said that a fraternal beneficiary association, having a grand lodge and principal place of business in the state and doing an insurance business therein, was a domestic corporation on which service of summons should be made according to the general provisions of the Code (chapter 2) relating to service of summons on corporations and insurance companies.

Under the Indiana statute of 1883 which makes it unlawful for any foreign insurance company to do business in that state until it has filed with the auditor of state a copy of a resolution of its directors consenting that, "in any suit against the company," process may be served on any of its agents in the state, "with like effect as if such company was chartered, organized or incorporated in the state," and further agreeing that such service may be made "while

[4] Code 1887, §§ 1265-1267 [Va. Code 1904, p. 1266].

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any liability remains outstanding against such company in the state," it has been held that a foreign insurance company which has complied with these requirements may be validly served, in the manner prescribed, not only in suits upon obligations arising out of business done within the state, but in suits upon contracts of insurance made and payable in other states (Mooney v. Buford & George Mfg. Co., 72 Fed. 32, 18 C. C. A. 421, 34 U. S. App. 581).

The Michigan law (Comp. Laws 1871, § 1683) permitting service of process against foreign insurance companies doing business in the state upon the agent is not applicable to process from a justice court, but only to that of courts of record (Hartford Fire Ins. Co. v. Owen, 30 Mich. 441). But a stipulation filed by a foreign insurance company with the state insurance commissioner under the Pennsylvania law (Act 1873, § 13) agreeing that "any legal process affecting the company," served as therein prescribed, shall have the same effect as if served personally on the company, includes the process of foreign attachment served on it in a suit against its policy holder, who has sustained a loss (Darlington v. Rogers, 36 Leg. Int. [Pa.] 115).

The Georgia law of 1887 (Acts 1887, p. 123) does not authorize the insurance company to appoint an attorney to accept service for a foreign company which has failed to comply with the requirements of the law as to the appointing of a local representative on whom service could be made (Equity Life Ass'n v. Gammon, 118 Ga. 236, 44 S. E. 978). But where a foreign insurance company maintains no place of doing business, but appoints an agent, upon the agent absenting himself from the state, the insurance commissioner has power under the statute to appoint a successor with authority to acknowledge and receive service of process in all proceedings against it in any court on contracts made in the state (Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100).

(g) What constitutes "doing business" in the state so as to justify substituted service.

Rev. St. Me. tit. 4, c. 49, § 63, providing that "any person having a claim against a foreign insurance company may bring a suit therefor in this state," etc., and that, in case no agent can be found on whom such service can be had, service may be made on the insurance commissioner of the state, is applicable only to insurance companies which are, or have been, doing business in the state; and where it appeared that the insured resided, and the property

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was located, in the state of Maine, that the insurance company was a Tennessee corporation having no office nor agent in Maine, and that the insurance was effected by correspondence through the mails, it was held in consideration of a further provision of such statute requiring insurance companies "doing business" in the state to procure a license for that purpose, that these facts did not constitute a carrying on of business in the state of Maine by defendant, so as to entitle plaintiff to substituted service (Hazeltine v. Mississippi Val. Fire Ins. Co. [C. C.] 55 Fed. 743). Similarly, in Romaine v. Union Ins. Co. (C. C.) 55 Fed. 751, it appeared that application for insurance was made to an insurance broker in Memphis, Tenn., who applied by mail and telegram to one N., another insurance broker at Cincinnati, Ohio, for the same insurance. N. procured policies from companies having no office nor agents in the state of Tennessee, forwarded the policies to the broker at Memphis, and shared with him the commissions on the premiums. N. was agent of one of these companies at Cincinnati, but he neither had authority to appoint, nor did it appear that he had appointed, subagents at Memphis. No other transactions by defendant companies in Tennessee were shown. It was held that defendant companies were not "doing business" in Tennessee, or "found" or resident there, so as to render them liable to substituted service, or to service upon the Memphis brokers. The doctrine that the negotiation of policies by correspondence is not doing business within the state is also applied in Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C.) 124 Fed. 259.

An Illinois insurance company which delivers in Illinois to a citizen of Wisconsin a policy insuring property in the latter state is subject, in a suit on such policy, to the laws of Wisconsin as to service of summons on insurance companies. Firemen's Ins. Co. v. Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335, affirming 51 Ill. App. 339.

(h) Effect of withdrawal from state.

The effect of the withdrawal of the company from the state on the service of process has been considered in several interesting cases. It has been held in Kentucky (Merrill v. Knickerbocker Life Ins. Co., 4 Ky. Law Rep. 729) that the statute providing that, if an insurance company ceases to do business in Kentucky, any person who acted as its agent shall be considered to continue as such for the purpose of service of process in actions on its policies or contractual liabilities incurred during the time it

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transacted business in Kentucky, was intended to apply only to such contracts of insurance as were entered into in Kentucky after the time the law took effect, and does not apply to an action on a policy issued in Louisiana prior to the passage of the act. And where a foreign insurance company, as provided by Ky. St. 1899, § 631, consents, on coming into the state to do business, that service of process on the insurance commissioner of the state shall be a valid service on the company, that consent extends to all actions relating to any business done by the company while in the state, though it may have withdrawn from the state prior to the bringing of the action.

Home Ben. Soc. of New York v. Muehl, 59 S. W. 520, 109 Ky. 479, rehearing denied 60 S. W. 371, 22 Ky. Law Rep. 1264; Germania Ins. Co. v. Ashby, 65 S. W. 611, 112 Ky. 303, 99 Am. St. Rep. 295.

So, too, it has been held in Kansas (Mutual Reserve Fund Life Ass'n v. Boyer, 62 Kan. 31, 61 Pac. 387, 50 L. R. A. 538) that the fact that a foreign life insurance company had at one time transacted business in Kansas under the license issued by the superintendent of insurance, and that it had filed in his office, as required by statute, its "written consent, irrevocable," to the institution of suits against it in the state, and the issuance of summons against it directed to the superintendent of insurance, does not subject it to suit on a policy of insurance wholly executed in another state, if, previous to the issuance of such policy, it had withdrawn or been expelled from Kansas, and had ceased to do business there.

Sand. & H. Dig. Ark. § 4137, requires foreign insurance companies, as a condition to the doing of business in the state, to file a stipulation with the auditor, agreeing that any legal process may be served upon the auditor or upon an agent designated, with the same effect as though served upon the company within the state. It further provides that, "so long as any liability of the stipulating company to any resident of the state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with service at the office of said company within the state." It was held in Collier v. Mutual Reserve Fund Life Ass'n (C. C.) 119 Fed. 617, that a foreign life insurance company, which entered the state and did business therein, filing the required stipulation designating an agent, was bound by the statute, which became a part of its contracts, and could not, after securing a large number of policies in the state,

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withdraw itself from the jurisdiction, and deprive the holders of such policies of the right to sue it therein by canceling the appointment of such agent, and revoking the authority of all its other agents; and that, in an action on one of such policies, it was bound by service made on its agent so designated and on the state auditor.

But see Millan v. Mutual Reserve Fund Life Ass'n (C. C.) 103 Fed. 764, where it was held that, upon a foreign insurance company ceasing to do business in the state of Virginia, it is no longer amenable to the jurisdiction of the courts of that state, under Code 1887, § 1267 [Va. Code 1904, p. 1267], providing that service of process in actions against a foreign insurance company may be made upon the agent of the company, or, in the absence of the appointment of an agent for such purpose, then upon the auditor of public accounts.

In People v. Commercial Alliance Life Ins. Co., 40 N. Y. Supp. 269, 7 App. Div. 297, it was held, in a proceeding on a judgment against an insurance company rendered in Maine on service on the insurance commissioner after the company had withdrawn from the state, that the court had no jurisdiction of the cause of action, and that the judgment was not enforceable in New York. But in Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519, where, at the time a policy was issued by a foreign insurance company in North Carolina, a stipulation was on file providing for service of process on the company upon the secretary of state, and while the policy was in force the statute was amended, and a second stipulation filed by the company providing for service of process on the state insurance commissioner, and thereafter the holder of such policy obtained a judgment in North Carolina against the company by service of process upon the insurance commissioner, such judgment cannot be defeated in an action thereon in another state on the ground that jurisdiction was not acquired, because the company had attempted to revoke its designation of the insurance commissioner as the party on whom service of process could be made, and had ceased to do business in the state. The decision in the Woodward Case was based on Biggs v. Mutual Reserve Fund Life Ass'n, 128 N. C. 5, 37 S. E. 955. In that case it appeared that a power of attorney was made by the insurance company in strict conformity with Laws 1899, c. 54, § 62, subd. 3, providing that, as a condition precedent to a foreign insurance company's right to do business in the state, such company should appoint the insurance commissioner

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its attorney to accept service for the company, the authority to continue in force irrevocable so long as any liability of the company remained outstanding in the commonwealth. It was therefore held that such power was irrevocable, and in force as long as any liability of such company existed in the state, though the company had ceased to do business in the state through any local officer or agent, and service of process against such company thereafter on the insurance commissioner was a valid service. The court in the Woodward Case also cited with approval Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987, where it was held that the cancellation, by the insurance commissioner of Kentucky, of the license to do business in that state, granted to an insurance company which had consented, pursuant to Ky. St. 1899, § 631, that service of process upon such commissioner in any action brought in the state should be a valid service upon the company, does not render such service insufficient to bring that company into a court of the state as a party defendant to a suit brought by a citizen of such state upon a cause of action which arose out of transactions between the parties while the insurance company was carrying on business in Kentucky under the license.

The Tennessee statute (Acts 1875, c. 66) provides that a foreign insurance company must file a power of attorney authorizing the secretary of state to accept service at any and all times after it has been admitted to do business, even though it may subsequently have retired, or been excluded from the state. Acts 1895, c. 160, § 49, expressly repeals the above act, and in section 9, subsec. 3, provides that a power of attorney to receive service must be deposited with the state treasurer or insurance commissioner. A foreign company filed a power of attorney, as required by the first act, but withdrew from the state before the later act went into effect. It was held in D'Arcy v. Connecticut Mut. Life Ins. Co., 69 S. W. 768, 108 Tenn. 567, that its policy holders in the state were still entitled to serve process on the secretary of state.

The statute of Virginia, passed in 1856, regulating the conduct of the business of foreign life insurance companies who should do business therein, provided, among other things, that such companies should have an agent in that state upon whom service of process could be made. In 1877 the existing law was amended so as to provide that, in case of the death of such an agent, his personal representative was authoried to accept service of process against such corporation. In 1852 the defendant, a foreign company, insured the de-

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ceased, and in 1856 duly appointed an agent with authority to accept service of process in that state, who continued to act as such up to the time of the war, but not thereafter, to defendant's knowledge or with its consent, whose authority was not, however, formally revoked until 1866. This agent died in 1876, and one Edrington became his administrator. The death of the insured occurred in 1869, and in 1878 this plaintiff, the administrator upon his estate, brought a suit in a state court against this defendant by serving process upon Edrington, who had no authority from the defendant to accept service and was not its agent, unless made so by the act of 1877. There was no appearance for the defendant, and the plaintiff recovered a judgment upon which this action was brought. It was held that the state court had no jurisdiction. Ellis v. Connecticut Mut. Life Ins. Co. (C. C.) 8 Fed. 81.

(i) Mode of service.

A citizen of New York may sue a foreign fire insurance company by service of summons without other process being required either for the commencement or continuance of the action under the New York statutes requiring foreign fire insurance companies to appoint an attorney in New York on whom proofs of loss can be served, and authorizing suits against foreign corporations, which may be commenced by service of summons as in ordinary actions (Gibbs v. Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513).

Under the Kansas statute providing that, in an action against an insurance company of another state, or of a foreign government, doing business in the state, the summons shall be directed to the superintendent of insurance, and shall require the defendant to answer by a certain day not less than 40 days from its date, and that the superintendent shall forward a copy to the company sued, the form of the summons must be in the form prescribed by the statute providing for summons in civil actions generally, directed to the sheriff, except only that it must be directed to the superintendent, and require the defendant to answer in not less than 40 days (Westchester Fire Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682); and where a summons the same as that prescribed by the statute, except that it was directed to the superintendent of insurance, and not to the sheriff, was forwarded to the superintendent of insurance, who forwarded a copy thereof to the secretary of the defendant company, which had filed its written consent to service of process, on the superintendent, though not to the company's general agent, the court obtains personal jurisdiction of the company (German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69). It is proper for the clerk of court in which the action is commenced

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to direct the summons to the superintendent of insurance, and forward it directly to him (Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738).

As regards the county to which process may issue, the Missouri statute relating to service of process on foreign insurance companies does not enlarge the power of justices of the peace, so as to authorize a justice in one county to issue summons to another (United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571). Under the Pennsylvania statute authorizing suit on an insurance policy to be brought in any county where the insured property is located, process to be served upon the president or other chief officer of the company or upon the agent of any foreign company, and a later statute extending the provisions of the previous act to life and accident companies, where a suit on a life policy issued by a domestic company was brought in the county of the insured's residence, and summons issued to the sheriff of another county for service on the officers of the defendant, such service was unauthorized and will be set aside (Auspach v. Guardian Mut. Aid Soc., 10 Wkly. Notes Cas. [Pa.] 568). And in an action against a foreign insurance company, service of summons, made out of the county where the suit is brought, can only be sustained on proof that the insured, at the time of his death, lived within the county where the suit was brought (Dillon v. Metropolitan Life Ins. Co., 7 Kulp, 507, 16 Pa. Co. Ct. R. 126, 4 Pa. Dist. R. 262).

Service by a deputy sheriff is sufficient under the Missouri statute providing for service on town mutual insurance companies by the acting sheriff of the county in which the company may have its principal office (Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911).

Under the South Carolina statute providing for service by publication where the defendant is a foreign corporation, if it has property within the state or the cause of action arises therein, where a citizen of South Carolina made in that state an application for membership in a Maryland mutual life association, the rules of which required proof of death, and assessments to be made in Maryland, and the Maryland corporation had no office, officer, or property in South Carolina, as the contract was to be performed in Maryland, the cause of action on the certificate of membership arose there, and service on the defendant in South Carolina by publication was bad (Rodgers v. Mutual Endowment Assessment Ass'n, 17 S. C. 406). The Ohio statute authorizing service of summons

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without the state by mail applies only where the policy is in the hands of a resident of the state (Heart v. Lycoming Fire Ins. Co., 26 Ohio St. 594).

Under the Kansas statute, where the summons was directed and forwarded to the superintendent of insurance, the superintendent properly indorsed acknowledgment of service thereon and made return of the same (Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738). The return of a sheriff that he has served the summons in an action against a foreign insurance company doing business in this state by serving it on the company's "lawful attorney" shows prima facie a good service of the writ; the words "lawful attorney" being regarded as meaning the attorney on whom the statute law authorizes such process to be served, and service upon whom is declared to be equivalent to service on the company (Webster Wagon Co. v. Home Ins. Co., 27 W. Va. 314). So a return, "Served with summons and plaintiff's statement on the N. A. Society of the city of New York, defendant, by giving true copies of the same to S., its agent and attorney, for service of process in this state, and made known to him the contents thereof," shows a sufficient service (Felty v. National Acc. Soc., 19 Pa. Co. Ct. R. 473). And where the petition—the policy being annexed thereto as an exhibit—and the citation clearly show that an action was against the Texas Fire Insurance Company of Waco, Tex., of which J. W. O. was secretary, a return showing service on "the Texas Fire Insurance Company, the within named defendant," by delivery of a copy of the writ and petition to J. W. O., its secretary, is sufficient to sustain a default (Texas Fire Ins. Co. v. Berry [Tex. Civ. App.] 67 S. W. 790). Under the Pennsylvania statute providing that actions against insurance companies may be brought in the county where the insured resides, and the summons directed to the sheriff of any county in the state, it is not necessary that the return of service should state that the insured was a resident of the county where suit was brought (Coyle v. Metropolitan Life Ins. Co., 8 Kulp [Pa.] 169). Under the Iowa statute requiring the return to state the time, manner, and place of service, and that a copy was delivered, or offered to be delivered, to the defendant, a return showing that service was made upon the defendant insurance company's agent "in the city of W., August 5, 1872," and that the agent refused to receive a copy, is sufficient as a statement that copy was offered, refusal necessarily implying offer (Farmers' Ins. Co. v. Highsmith, 44 Iowa,

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330). A return upon a summons served upon a foreign insurance company under the New Jersey statute, "that it was served upon the defendant at the statehouse, in the city of Trenton, N. J., in the office of the commissioner of banking and insurance," is not vitiated by the addition to the return that it was served as above stated "by giving and delivering to the deputy commissioner of banking and insurance a true copy thereof" (United States, to Use of Sayre & Fisher Co., v. Griefen, 70 N. J. Law, 123, 56 Atl. 120). Under the Missouri statute relative to the service of process on town mutual insurance companies, which provides that a certified copy of the petition and summons shall be served on the president and secretary or other chief officer in charge of the "principal office" of the company, a return showing service on the secretary in charge of the company's "usual business office" is insufficient (Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911). This case further holds that under the statute which provides that if the corporation have no business office in the county where suit is brought, or if no person shall be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued to the sheriff of any county where the chief officer may reside or be found, or where any office may be kept, a return of a summons served outside of the county in which suit was commenced, which fails to state that the president or other chief officer of the company could not be found in the county, is insufficient.

A notice of a suit, directed to the "Des Moines Insurance Company of Des Moines, Iowa," and served on the "Des Moines Insurance Company," is the commencement of an action against it, where the petition filed in pursuance of the notice shows that the defendant intended to be notified was the "Des Moines Insurance Company" (Woodruff v. Des Moines Ins. Co., 90 Iowa, 735, 57 N. W. 592). Suit being brought against a fire insurance company in the proper county, a defect in the service of process, in that instead of being on the resident agent it is on an officer in another county, does not deprive the court of jurisdiction, but must be taken advantage of by motion to quash the writ (Henderson v. Maryland Home Fire Ins. Co., 44 Atl. 1020, 90 Md. 47). Where the lack of jurisdiction because of an improper return of service is asserted in the first paragraph of the answer, additional paragraphs do not waive the jurisdictional defect (Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911).

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