THE LAW

OF

FIRE AND LIFE

INSURANCE.

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LONDON:

J. & W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS,

PORTUGAL-STREET, LINCOLN'S-INN.

1833.

LONDON:
Printed by James & Luke G. Hansard & Sons,
near Lincoln's-Inn Fields.

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ERRATA.

Page 48, line 8, refer to *Patterson* v. *Black*, 2 Marsh. 780.
— 58, — 18, dele "not"
— 58, — 20, for "which" read "but not that the"
— 72, — 8, after "lord," dele (,)
— 76, — 10, for "of" read "and"

PREFACE.

THE difficulty of collating the scattered decisions on any point of law arising in the course of practice has occasioned the publication of summaries on almost every branch of our law. But not until the close of last Trinity Term had any distinct professional treatise appeared on the subject of Fire and Life Insurance; at that time the following Work was in the publisher's hands ready for the press, and it had become the property of the publisher, who, having lately requested the Author to complete his labours by correcting the press, he has now to present the following sheets to the Profession and to the Public. In page 27 will be found a very important decision, which the Author noted down himself in Court at the late sittings after Michaelmas Term; there will also be found other cases from the Reports published since the long vacation.

One of the principal motives which had induced the Author to undertake the subject of the following pages still operates, which is, to call attention to the fact of an opposition existing between the

maxims of Law and the usage of Commerce as to the contract of Life Insurance. To give distinctly the Law from which the legal features of any case can be known, and then to mention those particulars on which the practice of Commerce controls the Law, seemed to be the course most likely to bring discussions on Life Insurance out of the confusion into which they have too frequently fallen.

The authority of Mr. Babbage (than whom no man was more capable of executing the task of analyzing the practice of the different Insurance Companies) seems to make Life Insurance an exception to that leading idea of Insurance in general, namely, that it is a contract of indemnity as distinguished from a wager (*a*). But the argument of Mr. Babbage is easily answered, as he would at once have perceived if the pursuits to which he is devoted had been mixed with those of the profession to which the present question belongs. Mr. Babbage thinks that Marine Insurance is distinguished by the circumstance of the claim of the insured depending on his right *to abandon*, and of such claim upon a

(*a*) Mr. Babbage also uses "Assure" and "Insure," as having distinct meanings. It appears, however, that the two words only differ as "enfeeble" and "affaiblir," which have both the same meanings; the one having the Saxon prefix the other the French or Latin. So "sweeten" and "adoucir," "shorten" and "accourcir," "enfranchise" and "affranchir, &c."

capture being defeated by a *re-capture*, and that Life Insurance is distinctly void of any corresponding limitations of the claim. Now in the case of *Godsol* v. *Boldero*, the Court expressly went upon an analogy between the claim on *capture* and *re-capture*, and that of the case before them, namely, a claim on the ceasing of a life being defeated by the subsequent liquidation of the debt in respect of which the persons insured were interested in that life. And their decision against the claim in *Godsol* v. *Boldero* was soon afterwards made the ground of a similar decision of two cases in Marine Insurance upon a question of right to *abandon* as for a total loss (*b*). That insurance is an indemnity, and not a wager, Mr. Justice Buller is a distinct authority (*Mason* v. *Sainsbury*, 2 Marsh. Ins. 796, 3d edit.) "The contract really is an indemnity, though from the literal construction it is a wager." Many enlightened judges have doubted the propriety of giving legal effect to wagers: it is remarkable, that the earliest case which legalizes a wager, marks less the justice of the Bench than the flattery of the times. It was on a wager, (made six months before the Restoration,) that Charles Stuart, then an exile, would in twelve months be King of England: the decision was made within the first year of the Restoration;

(*b*) *Bainbridge* v. *Neilson*, 10 East, 345. *Brotherston* v. *Barber*, 5 M. & S. 423.

(1 Lev. 33.) Whether Life Insurance shall be hereafter considered as a contract of indemnity, or a wager, will be to be determined on the expediency of giving further effect to wagers, and of removing the barrier between them and insurance. But as the law stands, insurance is a contract of indemnity.

With regard to the arrangement of the Work, the Author found it impossible to give separate chapters for Life and Fire Insurance, the principles being generally applicable to both, and the cases fixing those principles not only being wanting in one or the other, but being likely so to remain.

The Author has hazarded some remarks upon the mode of valuing life policies with a view to a return of premium, and also on the adjustment of partial losses. Having alluded before to Mr. Babbage's calculations on Life Insurance, the Author has to state that one half of the insurance offices started in this country have broken up. The losses by clerks and agents, law expenses, and other incidentals, were data omitted in their calculations, from which omission a result mathematically true proved delusive in practice.

The Author has now concluded all his topics which can fall within the compass of a preface: he refers to the note below for a short notice of the History of Insurance, on which subject the

reader will find further information in the "Introduction" to the works of Park and Marshall (*c*).

(*c*) Some writers have shown either a zeal to affix the stamp of antiquity to the contract of insurance, or to give to such ancient nations as were celebrated for their commercial eminence, the further credit of this very useful invention of insurance. That the Rhodians, who were supreme in commerce ten centuries before the Christian Era, were the inventors of this contract, is the opinion of some writers; no traces of the fact appear in any fragments of their laws incorporated in the Roman codes; but, being without the complete body of the Rhodian law, the present age cannot give a negative to the opinion. Some passages are quoted from Livy which Emèrigon thinks show the existence of this species of contract among the Romans; but as Millar ("on insurances") has observed, there is no mention of any premium being paid for the indemnity mentioned in these passages, which resolve themselves into a statement that a risk of transport of merchandize for the use of the Roman government, was by that government taken upon themselves, as a liberal government in the cases mentioned were bound to do. (Livy lib. 23, c. 49. Ib. 25, c. 3.) Suetonius, in the Life of Tiberius Claudius (c. 18,) mentions that the emperor offered "*certa lucra*," to the corn merchants, and took the risk upon himself of transport of the cargoes. These bounties and indemnity as inducements to secure a supply of a necessary commodity in time of scarcity, are very natural. A passage from Cicero's Letters (lib. 2. 17.) is more applicable to a case of a bill of exchange than to insurance, the occasion spoken of being the payment of a sum of money by some expedient which should avoid the risk of transport of the cash. A passage in Ulpian, (Dig. l. 1, tit. 45,) may have a like solution. Grotius and Bynkenshoek are opposed to the notion of insurance being known by the Romans.

Coming to the modern States of Europe: the Jews of France are supposed to be inventors of the contract at a time

when they were driven out of that country; but the purpose to be answered on the occasion would be met by bills of exchange, which they have the reputation of having introduced into practice at that time. Their purpose was to secure to them, when out of that kingdom where their effects were left, the value of those effects. The event here alluded to took place in 1182, A. D. That the Lombards were the earliest of European States in the use of insurance is a fact of which there exists a very high degree of probability. The policy of marine insurance, even of the present day, is an antique form of contract used by the Lombards, to which fact there is reference in the instrument itself; and so early as 1620 policies made at Antwerp are expressed to be made "according to the custom of the Lombards in Lombard-street, London," (Malyne Lex Mercat. 105.) The Lombards came over to this country in the 13th century. Neither the laws of Whisby (in Gothland), of Barcelona, nor the Hanseatic code (which were made respectively in the 14th, 15th, and close of the 16th centuries), nor those of Oleron, promulgated by our Richard 1st in the 12th century, nor the famed *Consolato del Mare* of the 14th century, nor the Amalfitan Code, which preceded the same, have any trace of the contract of insurance. All the authorities upon these points are collected in the 2d vol. of *Magens* on Insurance.

For the improvement of the system of insurance law, Europe is under early obligations to the famous ordonnance of Louis XIV. (A. D. 1669,) and much is also due to the labours of the author of "Le Guidon," (re-published by Cleriàc, Rouen, 1670,) and of Pothier, Emèrigon, Roccus, Casaregis, Cocennius, Bynkenshoek and Sauterna. In this country the system was in a very unimproved state until the talent of Chief Justice Mansfield was exercised upon it. In the Reports before he presided in the Court of King's Bench there are not sixty cases; as Justice Park observes, the oldest case being in 6 *Rep.* 476.

Yet in the reign of Elizabeth a special Court or Commission of Insurance was established, composed of commercial men.

This court appears to have neglected its duties, and its jurisdiction was also contracted by decisions of the Court of Westminster. In a case, 2 *Siderf.* 121, it was decided, that a decision of the Court of Insurance was no bar to an action in the same matter in the Common Law Courts; and in 1 *Shower*, 396, it had been decided, that the jurisdiction of the same Court of Insurance did not extend to actions by the insurers but only to those by the insured. The great delays of this Court or Commission were complained of; but by the statute under which they had jurisdiction, they were compelled to act without fee or reward.

The above details relate more especially to marine insurance. It was ruled that the Commission just mentioned had no jurisdiction in matters of Life Insurance. (*Bender* v. *Oyle*, Style, 166). When Justice Park published his treatise, he remarked, "But when insurance in general is spoken of by professional men, it is generally understood to signify marine insurance." Mr. Babbage, in his recent work on Life Insurance, informs us, that at the first introduction of Life Insurance Associations the common rate was 5 per cent., and for middle-aged persons above that rate: that in 1762, the Equitable proceeded on tables calculated from bills of mortality of London, and after nineteen years on the Northampton tables, adding 15 per cent.; and after five years they used the latter table without the 15 per cent. The further mention of those authors, from Halley to Babbage, who have brought science to the aid of commerce in this particular, cannot find room here.

TABLE OF CASES CITED.

INTRODUCTION.

THE legal notion of Insurance being that it is a certain contract of indemnity, definitions here given will be made conformable thereto. In the definition or description of Life Insurance, the word *debtor* will extend to persons under merely *moral* obligations; in this sense it will comprise the case of one providing for a family or relatives; it will also extend to the case of a lessee for life of another on whose death a fine is to be paid (*a*). A larger expression, as that Life Insurance is where "property will be lost by a death, &c.," would exclude the cases of the expectations of children and relatives. An enunciation, "that the contract is an indemnity for expectancies depending on a life, &c.," would comprise the expectancies of children and relatives, but it would let in those of all the world.

(*a*) We must consider that the nominee in leases for life was originally the real lessee, and that his son was usually his successor.

FIRE AND LIFE

INSURANCE.

CHAP. I.

INSURANCE is a contract whereby one of two parties agrees, in case of the loss or damage of property by accidents of a particular description, to pay to the other to whom the property belongs a sum of money not exceeding its value.

The consideration paid for this indemnity is called the "*Premium.*" The person indemnified is called the "*Insured*" or "*Assured.*" The person indemnifying is called the "*Insurer*" or "*Assurer.*"

Fire insurance is where the cause of loss provided against is fire.

Life insurance is where debts or obligations depend wholly or partially on the personal security of the debtor, and will be lost by his death happening before they are discharged: on this event, a sum is contracted to be paid by the insurer (*a*).

(*a*) Besides these two kinds of insurance, and that on which these are grafted, viz. marine insurance, there is a species of insurance on land-carriage, where carriers give public notice that they will not be liable for loss or damage of goods ex-

THE PROPERTY.—If the agreement does not concern property directly, it is not a case of in-

ceeding a certain value, unless the goods are described to them when put into their hands as being above that value, and paid for, according to a certain scale of prices, over and above the ordinary rates of carriage. It was insisted in a case before Lord Ellenborough that these limitations of the carrier's responsibility were against common law, but the Court decided the contrary; this judgment contains the following remark: "Considering the length of time during which, and the extent and universality in which, the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction also and countenance of the Legislature itself (which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the ground of such a measure having been unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility); considering also that there is no case in the books in which the right of a carrier thus to limit his responsibility has ever been by express decision denied, we cannot do otherwise than sustain such right in the present instance," &c. *Nicholson* v. *Willan*, 5 East, 507. And see *Lyon* v. *Mills*, 5 East, 423. The earlier cases are *Tyle* v. *Morrice*, Carth. 485. *Titchborne* v. *White*, Str. 145. See *Clay* v. *Willan*, 1 H. Bl. 298. *Clarke* v. *Grey*, 6 East, 564. *Covington* v. *Willan*, Gow's N. P. C. 115. Also *Piggott* v. *Dunn*, cited in *Yate* v. *Willan*, 2 East, 134. Also 2 Maul. & S. 172.

Practitioners of conveyancing under the Scotch law receive half per cent. on the property for which the securities are made, and they are responsible for the amount if the securities prove deficient or invalid. Thus they are a species of insurers.

Endowments for children are contracts for securing to them a sum when they attain their age of 21, being a provision to supply the loss of maintenance to which they were entitled from their parents during their minority. This

surance, but of wager. Wagers are permitted by the common law, but various prohibitions are imposed on them by statute; wagering insurance is prohibited by statute, as will be shown presently. All wagers in the form of, and having the general scope of, insurance, are wagering insurances, provided that the event in which the sum is made payable be other than the loss of the property of the insured; and as they pretend to be insurances in form, or being insurances, have for their object property of a stranger, they cannot be set up as wagers allowed at common law.

Wagers on events which may indirectly concern property are not insurances on property. A wager on the event of war or peace (events which materially affect the value and stability of property) is not a valid insurance (*b*).

2. It is not necessary that the property to which the loss insured against is to accrue should exist in specie at the time the insurance commences. A claim against an infant debtor may be the subject of insurance on the life of this debtor, though the debt which is the subject of the insurance has not a legal existence until the infant attain his full age.

Standing and growing crops are usual subjects

is evidently an agreement to pay a sum in the event of the loss of income upon a certain contingency, and is by our definition an insurance. Benefit clubs which provide for payment of a sum in case of loss of income by sickness or death are also in the nature of insurance societies.

(*b*) *Molleson* v. *Staples*, Sit. af. Mich. 1778. Park Ins. cap. xxii.

of fire insurance, though if a loss accrues it generally happens to this part of the farming stock after it is gathered in, and such loss is then considered within the scope of the original contract.

3. The goods or property of an enemy, or situate in an enemy's country, cannot be the subject of insurance; nor can there be insurance on the life of an enemy, though he be debtor on personal security to a British subject (*c*). But if an insurance is determined by the loss happening, and then a war breaks out, the sum due on the insurance is recoverable after the war (*d*).

4. The property must be of a description usually made the subject of insurance: and must not be within the special exceptions of articles that cannot be insured by the conditions expressed in the policy (*e*).

Insurances on gambling property, as on lotteries, are prohibited by statute (*f*): and re-assurance or assurance against loss by an insurer, as to the sum he has contracted to pay on a policy issued by him, is also prohibited (*g*).

(*c*) 8 T. R. 548, 561. *Flendt* v. *Waters*, 15 East, 260. *Harman* v. *Kingston*, 3 Camp. 153.

(*d*) 6 Maul. & S. 92. *Contra* Hale, P. C. 1, 95. But see Mag. Charta, c. 30.

(*e*) Gunpowder, money, notes, bills, books of accounts, title-deeds, &c.

(*f*) 27 Geo. 3, c. 1. And see 9 Anne, c. 6. s. 57.

(*g*) Except in case of death, insolvency, or bankruptcy of the first insurer. Property in ships on the high seas is insured against fire by the usual shipping policy; therefore it is not usual to insure such property by a separate fire policy. So life policies are not taken out on live stock, they being insur-

5. The property must be properly described. "Coffee-house" is not properly within the expression "Inn (*h*)." "Linen" bought on speculation, but being neither household linen nor stock in trade (the party not dealing in such articles) is not included in "stock in trade, linen &c."(*i*). "Barn" may mean any farming building (*j*). "Fixtures," it would seem, may come within the expression "dwelling-house." "Farming Stock" does not include *growing crops* (*k*). If property be grossly over-valued it will invalidate the policy (*l*). If the description be not certain there can be no contract: but here there is a legislative provision, which it may be as well to set forth in this place. The stat. 9 Geo. 4, c. 13, (which has in view the collection of the revenue by policy duties, does in its effect prevent many questions arising on the construction of policies as to description of the property) enacts, that where any insurance from loss by fire shall be made originally, or continued by renewals, on two or more detached buildings, ("detached" meaning, as explained in the statute, any case where a plurality of risks can arise,) or upon goods or stock in such buildings, or in any

able as goods by fire policies. And fire policies cannot include loss of life of servants by fire: the case would be otherwise on West India estates.

(*h*) *Doe* d. *Pitt* v. *Laing*, 4 Camp. 76.

(*i*) *Watchborne* v. *Langford*, 3 Camp 422.

(*j*) *Dobson* v. *Sotheby*, 1 Mood. & Malk. 90.

(*k*) *Vaisey* v. *Reynolds*, 5 Russ. 19, S. C.

(*l*) *Levy* v. *Baillie*, 1 Mo. & P. 208; 7 Bing. 349.

detached places, (except the implements or stock upon any one farm,) then such separate building, goods or stock, shall be separately valued, and a separate sum insured on each. The penalty is a forfeiture of 100 *l.* by the insurer, and the policy shall be void. There is saveing of insurance in one gross sum in case the *average clause* be inserted in the policy. The average clause is to the effect, that where an insurance in gross is effected, and a partial loss takes place, then a sum shall be paid which bears the same proportion to the loss as the sum insured bears to the full value of the whole property included in the insurance.

More will be said on the subject of description in a future chapter (*m*).

(*m*) It may be here noticed, that by special agreement an insurance may be made to follow the change of property which takes place in farming-stock on a farm by the gradual removal and disposal of it in the market. The policy may be for 500 *l.* for the first three months, 300 *l.* for the next three months, and so on, according as a sale of the stock is expected to proceed. By this means too the Government duty payable will be diminished proportionably to the stock remaining insured.

CHAP. II.

FORM OF THE POLICY.

THE policy is the agreement of the "underwriters," or subscribed parties: it should mention the name of the person insured, the description of property, and then the life of the person which is the risk insured, or in fire policies the species of loss intended, (for which "loss," "damage," "destruction," "or waste," &c. "by fire," or any words to the same effect, will do); then any special memorandum either before the subscription of the insurer's name, or by reference to an indorsement after such subscription: the sum insured, and the amount of premiums and duty, must be inserted; also the date. The instrument must be stamped (*n*).

(*n*) Although a policy of insurance produced at the trial of an action have a sufficient stamp, evidence will be received that it had no such stamp when it was effected; in which case it is a mere nullity, though stamped afterwards by order of the Commissioners of Stamps; for it is forbidden by 35 Geo. 3, c. 63, s 14. 16, and not authorized by 37 Geo. 3, c. 136, s. 2, which extends only to such instruments as could before be legally stamped after they were executed. *Roderick* v. *Hovill*, 3 Camp. 103.

Where there are distinct interests or shares in goods, and the goods are insured at one entire sum, the stamp for that sum is not sufficient, but must be equal to the aggregate of duties due on the several interests. *Rapp* v. *Allnutt*, 15 East, 601.

The same rule of construction which applies to all other instruments applies equally to policies of insurance, viz. that they are to be construed according to their sense and meaning as collected from the terms used in them, which terms are to be understood in their plain, ordinary and popular sense, unless by the known use of trade they have acquired a peculiar meaning, or unless the context points out that, to effect the immediate intention of the parties, they must have another special or peculiar meaning (*o*). A policy may be in form of a bond, or of any other form, so that the scope and meaning is an insurance (*p*). But there seem to be some cases in which a wager was decided to be illegal because it had the *form* of

Alterations of the policy after execution in immaterial points do not make a new stamp necessary. *Robinson* v. *Touray*, 1 M. & S. 215. *Sawtell* v. *London*, 1 Marsh. 99. *Sanderson* v. *Symons*, 4 J. B. Moore, 42; 1b. 5. *Langhorn* v. *Cologan*, 4 Taunt. 329. *Ramstrom* v. *Bell*, 5 M. & S. 267. But indorsements which are the ground of action must be stamped. *Rex* v. *Goulson*, 1 Taunt. 25.

If it is covenanted in a mortgage-deed to insure for seven years, and the premiums paid are to be secured on the mortgage property, this charge is considered as "without limit," and liable to a stamp of 25 *l.*, and not to the less stamp due when the charge is limited and certain. *Halse* v. *Peters*, 2 B. & Adol. 807.

Receipts for premium need only a stamp as to the money received for premium, not as to the sum insured, nor as to the duty on the policy. 55 Geo. 3, c. 184, Schedule "Receipt."

(*o*) *Robertson* v. *French*, 4 East, 135, S. C.

(*p*) *Kent* v. *Bird*, Cowp. 583; 12 East, 126.

a policy of insurance (*q*). This decision was made to bring a case of a wager of immoral tendency, or against public policy, within the meaning of an Act (14 Geo. 3) relating to insurance. This decision is not satisfactory proof that any particular form is necessary to a policy of insurance, the wager being void as against public policy.

If the person insured be a party to the insurance, as agent for another, this should be set forth (*r*).

The words expressing the obligation may be "insure," "indemnify," "make good loss," or, "pay loss," or any other which signify that a sum is to be paid in case of loss. In life policies the words will be simply "pay" or, "caused to be paid."

The insurers may bind themselves severally or jointly, in their individual capacity, or as officers of a society, or as shareholders of a partnership. In a recent case which came before the Court of King's Bench, on an issue directed by the Vice-Chancellor (*s*), it was decided that no contract could be enforced by action at common law where the policy ran as follows: "We, the trustees and directors of the said society, whose names are hereunto subscribed, do *order, direct and appoint the directors for the time being* of the said society to raise and pay by and out of the monies, securities and effects of the said contri-

(*q*) *Roebuck* v. *Hamerton*, Cowp. 737.

(*r*) *Meyer* v. *Sharpe*, 5 Taunt. 74. 80; Ib. 558. *Davis* v. *Reynolds*, 4 Camp. 726.

(*s*) *Alchorne* v. *Saville*, 6 Moore Rep. 202.

butionship, pursuant and according to certain deeds, &c." Here it will be observed, that the subscribing parties to the policy do not promise to pay, but their successors shall pay; this, therefore, is a void contract as to the subscribing parties. And on the principle, that if the ancestor is not bound the heir, though named, is not bound (*t*); and also because the future directors were not parties to the instrument, they are not bound (*u*).

In a subsequent case (*x*), the directors subscribing the policy "declared" that the sum should be paid out of the funds of the society. This was held sufficient to support an action on the *assumpsit*.

By a decision of Lord Ellenborough (*y*), it ap-

(*t*) Finch Law, p. 119. "If a man bind his heir to pay 20*l.* every year, but do not bind himself, he shall not be bound." See *Barber* v. *Box*, 2 Saund. 37. A.—Co. Litt. 384: "I cannot make an express warranty by will, because if I am not bound, my heir cannot be bound by me to warranty nor to pay money." And see Co. Litt. 86.

(*u*) Perhaps in the above case it might have been contended that the word "direct" has a technical meaning, which would give effect to the intention of the instrument. The parties being "directors," do "direct;" that is, do undertake all which by their office they were empowered to do respecting the insurance or payment of money in case of loss: such an implied assumpsit seems warranted. But if there is no ground of action in the policy against the subscribing directors, then perhaps the assumpsit would lie against the succeeding directors who accepted the premiums in succeeding years, as each renewal of the policy might for this purpose be considered a separate *assumpsit*.

(*x*) *Andrews* v. *Ellison*, 6 Moore, 199.

(*y*) *Salvin* v. *Jones*, 6 East, 571.

pears that, where by the printed proposals it is set forth that "all insurances by the company are to be by policies signed by three or more of the trustees or acting managers," there nothing can be set up as a policy of insurance which does not answer to this description. So that a public advertisement, setting forth the terms of insurance, could not be considered as a contract between the company so advertising and parties subsequently insured.

CHAP. III.

THE DURATION OF THE POLICY.

In marine insurance there are many occasions on which it is important to determine whether the policy makes one entire risk or several risks, determinable at several points in the voyage; so in those branches of insurance which are the subject of this work, many important conclusions depend on the solution of the question, whether the risk is one and entire during the period mentioned in the policy, or separable into yearly renewable insurances? Some have supposed, that under a life policy the risk is entire, and cannot be separated into yearly periods for the benefit of the insured; and that under a fire policy the insurance annually recommences and is renewed, and that these yearly renewals cannot be considered as forming together one original entire insurance. As to the facts, (on which our opinion is to rest,)

they are these: in a policy of fire insurance it is generally declared, that if the premiums are paid yaerly, and if the directors accept the same, the money named in the policy shall be paid to the party insured whenever a loss occurs. But it is understood or declared by insurance companies, that fifteen days beyond the expiration of the year shall be allowed for payment of the next annual premium. The question is, therefore, whether the allowance of these fifteen days forms a condition uniting with the original contract, so as to form a new contract, viz. that the insurance shall continue from year to year if the future annual premiums be paid within fifteen days from the expiration of the preceding year?

It was decided in a case upon this practice of allowing fifteen days beyond the expiration of the period of insurance, that if a loss happened within the fifteen days, the premium being then unpaid, but tendered afterwards before the fifteen days expired, the insurance was at an end (*z*). In a subsequent case, which was tried before Lord Ellenborough, it was decided (*a*), that where the rate of premium was altered by the insurers, and notice thereof given to the insured, and refusal on their part to pay the increased premium, then a loss having happened within the fifteen days, and tender of the increased premium having been made after the loss and within the fifteen days,

(*z*) *Tarleton and others* v. *Stainforth*, 5 T. R. 695; 1 Bos. & Pull. 483.

(*a*) *Salvin* v. *Jones*, 6 East, 571.

that the insurers were not bound then to accept the premium, and that by the former refusal and actual non-payment of the premium at the time of the loss, the insurance was determined, and no sum recoverable for the loss. But in case there is no notice to determine the policy or to increase the premium, or in case the original policy was for a special period without any power of renewal (conditional or absolute) then the insurance is considered as continuing for that special period, or from year to year.

Life policies are limited by the words of the contract to a period of years, or to a life or joint lives, or the longest of two or more lives. Yet a question might arise, in case a year of general sickness should occur, whether the insurers have the power to consider the contract as renewed from year to year, and whether, therefore, they are at liberty to determine the contract with any year (making compensation), or to increase the premium payable at the expiration of the current year.

The existence of an insurance company, and thereby the welfare of the whole body of the insurers, might depend on such a power being conceded to the insurers. No such occasion, however, has yet arisen in the annals of life insurance. We may, therefore, consider, on the question of the duration of policies, that this is the conclusion: in fire insurance, the policy is for a special period of months or years, if so set forth, or it is for a year renewable continually for a year, with power in the directors to determine the in-

surance after any year, upon due notice. And as to life policies, they are limited for the period absolutely which is named in the policy.

There is a recent case in Chancery where an attempt was made, in a contract for purchase of a reversion, to fix the value of the expectancy of a man of sixty years of age, and a batchelor, dying without lawful issue. The Court determined, of course, that such an event could not be the subject of calculation (*b*).

Life policies may be taken out for any uncertain periods which can be reduced to a value by the calculation of probabilities, proceeding on sufficient data.

CHAP. IV.

INTEREST.

GAMBLING wagers, except in particular cases prohibited by statutes, were allowed by our common law (*c*), in which it differed from that of the Continental States of Europe. And wagering insurances, " interest or no interest," were introduced here about the close of the 17th century. Some cases were decided in Chancery against this prac-

(*b*) *Baker* v. *Bent*, 1 Russ. & M. 224.

(*c*) *Lucena* v. *Crawford*, 2 New Rep. 269; 3 Taunt. 513. *Good* v. *Elliott*, 3 T. R. 693. See 1 Ry. & Mo. 213; Young, 317.

tice, the Court declaring that "insurances were made for the benefit of trade, and not that persons unconcerned therein, and without any interest in the property, should profit thereby." A policy of life insurance was decreed to be cancelled for want of interest (*d*), (there were also other circumstances invalidating the transaction.) Policies on marine insurances received a similar construction, and were set aside by the same Court (*e*). But in 1716, the Court decided differently in a case of marine insurance (*f*). That branch of insurance is now regulated by statute 19 Geo. 2, c. 37, which declares void all policies effected by parties not having an interest. The statute 14 Geo. 3, c. 48, which in its title states as its object life insurance, extends however to other cases generally: this statute requires the insured should have an interest, reciting, "that the making insurances on lives, or *other events* wherein the insured shall have no interest, hath introduced a mischievous kind of gaming," it then enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever wherein the person for whose use or benefit, or on whose account, such policy or poli-

(*d*) *Wittingham* v. *Thornborough*, 2 Vern. 206; Prec. Cha. 20.

(*e*) *Goddart* v. *Garrett*, 2 Vern. 269; 1 Eq. Ca. Abr. 371; 2 New Rep. 296. The Court held that the premiums could not be recovered on the setting aside a policy, "interest or no interest." *Lowrie* v. *Boardieu*, 1 Dougl. 468.

(*f*) 2 Vern. 717.

cies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning hereof, shall be null and void."

Sec. 2. "And be it further enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote."

Sec. 3. "And be it further enacted, that in all cases where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

Sec. 4. "Provided always, that nothing herein contained shall extend or be construed to extend to insurances *bonâ fide* made by any person or persons on ships goods, or merchandize: but every such insurance shall be as valid and effectual in the law as if this Act had not been made" (*g*).

In conformity with this statute, there must be a continuing interest in the party insured, even after the death of the person whose life is the risk insured. In the case of *Godsol* v. *Boldero*, the life

(*g*) A wager (not being an insurance,) *without interest*, was declared good, notwithstanding this statute, in *Good* v. *Elliott*, 3 T. R. 693. And see 1 Ry. & Mo. 213.

(the late minister Pitt) determined, the interest still continuing; the party insured was subsequently paid the debt, which constituted his interest. This debt was paid, not out of the assets of the deceased, but by a grant of Parliament. It was held, that the interest of the creditor had determined upon payment of the debt: his claim against the insurers was decided to be void under the statute (*h*). There was a case in Trinity Term, 1832 (*i*), decided in the King's Bench (upon a rule for a new trial, which was refused), where the insurers recovered back the sum paid to the assigns of the person insured. In this case the person insured, or whose name appeared on the policy as the party taking out the insurance, and whose life was the risk insured, was not the party who really took the benefit of the policy, or had the disposal of the same. The assignment of the policy was made, indeed, upon notice to the Insurance-office, given in the name of the person insured, but the consideration for the assignment was received by a stranger, viz. it was the release of a debt due by another party to the person to whom the assignment was made. Thus the person making the assignment, that is to say, benefiting from the assignment, had no interest in the life. This case cannot be adduced as a decision directly in point as to a policy being void for want of interest, since there were other

(*h*) 9 East, 72.
(*i*) *Lefevre* v. *Boyle.*

circumstances of fraud in the transaction (*k*). But it may be inferred from this case, that money could be recovered back by the insurers if paid by mistake, as well in cases of failure of interest as in other events.

But there are no other cases since *Godsoll* v. *Boldero*, as to life insurance, confirmatory of the principle of an "interest" in the party taking out the insurance on a life being necessary to the validity of the policy; and there is an understanding between the insurance offices and the public, that policies will be considered valid notwithstanding a want of "interest;" so that life policies are, by the prevailing practice, put much on the footing of wagers. (*Barber* v. *Morris*, 2 *Moo. & Malk.* 62.)

With regard to fire insurance there are two early cases prior to the statute 14 Geo. 3, c. 48, where claims under policies taken out for a term unexpired at the time of the loss were decided to be bad, in consequence of the interest of the insured in the premises having ceased prior to the assignment of the policy to the party claiming indemnity. The first of these two cases is *Lynch and others* v. *Dalzell and others* (*l*). The insured party, proprietor of house and goods, which were the subject matter of the insurance, agreed to sell the same; this property was destroyed by fire in the interval between this agree-

(*k*) The verdict given on the trial was, 1st, That the assignee did not participate in any fraud in the taking out the original insurance; 2d, That the assignment to him was not *bonâ fide*.

(*l*) 3 Bro. P. C. 497.

ment and the execution of the assignment; but further, there was no agreement respecting any transfer of the policy until after the execution of the assignment of the house and goods. In this state of circumstances the assignor had no "interest" at the time when the loss happened, he having contracted to sell, which took the property out of him in equity (and the cause was decided in a court of equity); but if there was not a failure of interest then, the case of want of interest certainly arose at the time of the assignment of the policy, for that was made after the assignment of the house and goods was executed, and an assignment of the policy was not made in pursuance of any contract entered into before the transfer of the property in the house and goods. The last case was decided in 1721, before Lord King, and his decree was affirmed on appeal to the House of Lords. In the year 1734, Lord Hardwicke followed up that decision in the case of *The Sadler's Company* v. *Badcock and others* (*m*). The plaintiffs were ground landlords, to whom the house insured in this case fell in on the expiration of the lease within the term for which the lessee had taken out the policy. Anne Strode, this lessee, had taken out the policy for a term of seven years, her lease being then to expire in six years and a half. After the expiration of this lease, within the remaining months of the term for which the policy was taken out, a fire

(*m*) 2 Atk. 554. See also *Anderson* v. *Eddie*, Trin. T. 1795; Park, 575.

happened, which destroyed the house; in this interval, a month after the loss, the policy was assigned by Anne Strode to the plaintiffs. The bill was dismissed, as within the principle of *Lynch* v. *Dalzell*.

As to the quantity of interest, in the words of Mr. Justice Lawrence (*n*), "Insurance, being a contract of indemnity, cannot be said to be extended beyond what the design of such a species of contract will embrace; if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the insured would not suffer." The learned judge then proceeds to class the "insurable interests" as "things immediately subjected to the perils insured against," and "advantages to arise from the arrival of those things at their destined port." In a case before Lord Mansfield (*o*), a contractor for supplying certain public stores set up an insurable interest in a cargo expected in the market, from which he was to be supplied; this was allowed: the expected profits from his bargain with the expected goods, though not consigned expressly to or for him, were considered advantages which certainly would accrue to him, except for intervening perils in the course of the transporting the merchandize. Lord Eldon (*p*) in

(*n*) *Barclay* v. *Cousins*, 2 East, 546. And see *Lucena* v. *Crawfurd*, 2 New Rep. 314.

(*o*) *Grant* v. *Parkinson*, Park. 402; Marsh Ins. 97. S. C.; 3 Bos. & Pul. 85. S. C.; 6 T. R. 483; 3 Bos. & Pul. 103.

(*p*) Hughes Ins. 49.

a dictum on this point (not delivering judgment) wished to narrow the idea of insurable interest to "interest derived out of contracts about property," excluding the expectations of advantage from a particular market without contract.

Both mortgagor and mortgagee may insure the goods; both debtor and creditor may insure on goods, or on the debtor's life; both trustee and *cestui que* trust may insure the trust property (*q*). So both vendor and purchaser have an insurable interest until the contract is completed: a case of common occurrence in marine insurance is insurance by the holder of a bill of lading (*r*).

The grantee of an annuity has only an interest during the continuance of the annuity: if that be paid off during the continuance of the grantor's life, the interest of the grantee must thereupon cease, whether the annuity is paid off by virtue of a clause for repurchase contained in the grant, or without such original provision for determining the annuity.

Where the insurance is by a creditor, the subject must not be a gambling debt (*s*); but it may be a debt to which the debtor may plead his infancy (*t*). When the debt ceases the interest expires (*u*). An

(*q*) Hughes Ins. 51. See *Lucena* v. *Crawfurd*, 2 Bos. & Pul. N. R. 295. *Smith* v. *Lascelles*, 2 T. R. 188.

(*r*) 8 T. R. 22, &c.; 1 Bur. 489; 1 Bl. Rep. 103, S. C.; *Lucena* v. *Crawfurd*, 2 Bos. & Pul. N. R. 295. See 2 T. R. 188.

(*s*) *Anderson* v. *Edie*, 1795, Park Ins. 640.

(*t*) *Dwyer* v. *Edie*, Park Ins. 639.

(*u*) *Anderson* v. *Edie*.

agent may insure on his own account if he be paid out of the profits of sale of goods, or by a commission upon such sale; or if he have a lien on the goods for payment of his charges or expenses (*x*). An assignee of a bankrupt has insurable interest in the houses or goods of the bankrupt; though as to life policies, (taken out by the bankrupt), they are not generally kept on foot by the assignees, but are sold. An executor charged with the disposition of an annuity granted to the testator has an insurable interest in the annuitant's life (*y*). The disabilities of a married woman, infant, lunatic, and alien enemy, apply to the contract of insurance. A partner, agent, husband, guardian, committee, &c. may insure *in autre droit.*

CHAP. V.

THE PREMIUM.

THE consideration is generally made payable by annual instalments. In fire insurance, there is generally reserved, by the terms of the policy, a power for the directors to alter the amount of the premium from year to year. In life insurance,

(*x*) *Flint* v. *Le Mesurier*, Park Ins. See New Rep. 313. But not an agent without an interest. *Myer* v. *Sharpe*, 5 Taunt. 74. 80; Ib. 558. *Davis* v. *Reynolds*, 4 Camp. 726.

(*y*) *Tidswell* v. *Angerstein*, Peake Rep. 151.

there is also reserved a power of increasing the premium in certain specified cases, but not otherwise: so that, except in the specified cases, the yearly premium payable on life policies continue the same for every year of the term of insurance (*z*).

It is generally a condition of policies, that the insurance shall not commence before the premium is actually paid. This is waived by their issuing the policy before payment (*a*) The annual premiums must be paid in the succeeding years, on the day of the month on which the policy was executed, or bears date. The phrase "from the day of the date," was held to mean exclusive of the day, and was distinguished from the expression "from the date," (Sir R. Howard's case) (*b*), which was ruled to include the day. This dis-

(*z*) The calculation of the risk in life insurance proceeds, first, upon the value of the risk in any particular year; and, secondly, on the chance of the risk having determined by the death of the party in one of the preceding years of the term of insurance. In fire policies this second element of the calculation is omitted; so that here each year has its separate independent risk, and consequently each year may be considered to commence an independent contract: whereas in life policies, on the contrary, the mode of calculation gives the ground of a contract for the whole term of the insurance as one integral risk, which being valued, that value is subsequently, for some collateral purposes, divided into annual instalments.

In Chapter III. is a *quære* whether there should be a discretion in the insurers to increase the premium in cases other than those provided in the policy.

(*a*) *Newcastle Fire Office* v. *M'Morran*, 3 Dow, 255.

(*b*) 2 Salk. 625. 1 Ld. Raym. 480.

tinction is justly expunged by the decision of Lord Mansfield (*Pugh* v. *Duke of Leeds* (*c*). Sir R. Howard's case was a life insurance, under a policy dated 3d Sept. 1697. Sir R. Howard died on that day the following year, at one o'clock in the morning. At the present day, the phrase is generally completed by "first and last days included." The further period of 15 days after the year has expired is generally allowed by an express clause in the policy. There is a case where a loss happened within the *fifteen days*, and the contract was under a renewable policy; the premium not being tendered till after the loss, the claim was set aside by the Court (*d*). But this decision is not relied on in practice, and has never since been acted upon, several of the offices having immediately given public notice, that they would hold themselves liable for losses which happen during the fifteen days, before payment of the premium for the ensuing year. In a case of life insurance, the tender of payment by the executors of the insured, who had died during the fifteen days, was not sufficient to support a claim under a policy on the life of the testator; but there was a condition, that if any member neglected to pay up the premiums (reserved quarterly) for fifteen days after they were due, the policy should be void, unless the member, con-

(*c*) *Tarleton* v. *Stainforth*, Cowp. 714; 5 T. R. 695; affirmed in Exchcq. Ch., 1 Bos. & Pul. 472.

(*d*) 1 Dow, 263.

tinuing in as good health as when the policy expired, should pay up the arrears within six months, and five shillings per month extra. (*Want* v. *Blunt*) (*e*). Where the fifteen days are allowed, it is in case the insurance is renewable from year to year, not where the insurance is taken out for a special term of months or years, 2 Marsh. Ins., 3 Ed. 800. In a case where an insurance-office had repeatedly given notice, that all persons insured there by policies for a year or years, should be considered as insured for fifteen days beyond the year, a particular party had had notice to pay an increased premium, otherwise the office would not continue the insurance. A loss happened within the fifteen days after the year, the insured then tendered the increased premium; but he had, previously to the loss, in reply to the notice, refused to pay the increased premium. The Court held the contract at an end when the year expired, the party having refused the terms of renewing the policy. *Salvin* v. *Jones & others* (*f*).

The objection for want of payment within due time, may have become waived by some act of the insurers: see *Norton* v. *Wood* (*g*), where payment (of interest upon a bond) after the day, was ruled not to be defeasance of a condition to pay at the day, the payments having been accepted without objection. As to who is an agent authorized to

(*e*) 12 East, 183. See 3 Camp. 137; 5 T. R. 695.

(*f*) 6 East, 571.

(*g*) 1 Russ. & Myl. 178. See *Newcastle Fire Office* v. *M'Morran*, supra.

give receipts on the part of an office for premiums on taking out or renewing insurance, this must depend on the rules applicable generally to cases of principal and agent. Where an insufficient premium has been paid by reason of a misrepresentation of the nature or class of the risk insured, the tender of the premium adequate to the true risk will not set up the contract, which was void for want of consideration. (See Cap. VII.)

RETURN OF THE PREMIUM takes place in whole or in part. In whole when the risk has never been incurred by the insurer, the contract being void in its commencement; in part where the contract is determined during the period for which it was originally made.

As to the former, the doctrine is thus laid down by Lord Mansfield (*h*), "Where the risk has never been run, though the fault or negligence of the very party insured, yet the premium must be returned." This was a case of marine insurance; but the principle is general, and is founded on the usage of merchants, as was admitted by the Court in this instance. There is, however, generally contained in modern policies of fire and life insurance a clause to the effect, that the premium shall not be recovered back for any error which may make void the policy.

Where there is fraud on the part of the insured he cannot recover back the premiums upon the

(*h*) *Stevenson* v. *Snow*, 3 Burr. 1237; 1 Bl. R. 318; Park Ins. c. xix.

avoiding of the contract, for his fraud (*i*); though the fraud is only on the part of the agent, and not of the principal party insured (*k*).

A very important decision has been recently made on these points (*l*). This was an action brought by the Provident Life Office, against the Hope Insurance Office, to recover back the premiums paid on a policy, taken out in June 1827, in the latter office, by the plaintiffs, on the life of Mr. Stevenson, for the sum of 5,000 *l.*, on which policy four annual premiums had been paid when the life ceased in the fourth year. The plaintiffs had effected this and other insurances on the occasion of an advance of 12,000 *l.*, made by them to Mr. Stevenson, to be secured by an annuity for his life. The policy contained the following proviso: "Provided, that if any untrue or fraudulent allegation be contained in the declaration, deposited with the [*Hope Insurance Company*], by [*the insured*], this policy shall be void, and all money paid under the same shall be forfeited." The declaration here referred to consisted of

(*i*) 4 T. R. 564, n.; Douglas, 451; 4 Taunt. 470; 5 Taunt. 153; 6 Taunt. 695; 1 Marsh Rep. 556; and 6 East, 316. 320.

(*k*) *Chapman* v. *Fraser*, B. R. Trin. T. 33 Geo. 3; Park Ins. 329; overruling *Whittingham* v. *Thornborough*, Prec. Cha. p. 20; 2 Vern. 206; and *Wilson* v. *Duckett*, 3 Burr. 1361. See also *Da Costa* v. *Scanderet*, 2 P. Wms. 170. See also *Tyler* v. *Horne*, Park Ins. 329, decided in Sitt. after Hil. T. 1785.

(*l*) *Duckett* v. *Williams*, Sitt. after Mich. T. 1832. Exchequ. before Lord Lyndhurst.

answers by the insured, to written interrogatories, made at the time of taking out the policy, of which the substance was, that Mr. Stevenson was then in good health, and that he had never been affected with "gout, fits, palsy, dropsy, affection of the lungs or other viscera, or with any disease tending to shorten life;" and at the foot of the declaration, it was provided, that "if there be any untrue averment, or if any material fact be untruly stated, all money should be forfeited, and the policy void." In an action to recover the sum insured, the Hope Office had set up a defence on two points, firstly, that at the time of the policy being taken out Mr. Stevenson was affected with a disease tending to shorten life: secondly, that the insured had concealed some material facts. The declaration in this action had contained, as is usual, first, special counts for the sum insured; secondly, the common money counts. The verdict was for the defendants: it was made on the special counts; the jury were discharged on the money counts. This verdict was made at a trial in the Court of Exchequer, before Chief Baron Lyndhurst, at the Sittings after Michaelmas Term 1831. At the present trial, the evidence on the former trial was read, by consent, from the short-hand writer's notes, and other witnesses were called by the plaintiffs: the defendants did not produce any witnesses on this trial. The direction of the learned Judge to the jury, after stating the case, proceeded as follows: "You are entitled, and, I think, are bound, in considering your verdict, to consider the

verdict made at the former trial, (but that not to conclude you), in case, after the testimony of witnesses on both sides given at that trial, and which has been read to you to-day, you shall be of opinion that that verdict was made on the question, " was there any disease tending to shorten life?" If you think this alone was in effect tried on that occasion, then, when you consider that verdict, and the opportunities which that jury had, their verdict ought to have great weight with you now. If you are satisfied that this was one of the questions then tried, and the question on which their verdict was given, you must show great attention to that verdict, though it is very difficult for you to form an opinion as to whether that question were the subject of their verdict. [The learned Judge then commented upon the evidence read, and on the new witnesses examined at the present trial, and proceeded:] " You have therefore to find, *whether Mr. Stevenson had, at the time of the policy being taken out, any disease tending to shorten life?*" If you find that he had, then there will be for you this other question, " *Whether the Provident Life Office did know that fact?*" Mr. Stevenson may have known it; but there may not have been any thing to lead to the conclusion that the Provident Life Office did know it at that time. Therefore, if you are satisfied that, in June 1827, Mr. Stevenson had any disease tending to shorten life, then, (for the purpose of forming your opinion, connecting with the former verdict the evidence read to you, and the new evidence produced to-day,) if you are so

satisfied, you will next find, whether the Provident Life Office, or their *immediate agents*, knew of circumstances showing that, on the 16th June 1827, he was not in condition to have a policy effected on his life. The jury returned their verdict, " Mr. Stevenson had no disease tending to shorten life at the time of effecting the insurance." A verdict for the amount of the premiums paid, 562*l.*, was taken accordingly for the plaintiffs.

From the directions of the Court to the jury in this case, it is evident that the fact of there being a disease tending to shorten life at the time of the policy being taken out does not conclude the insured under the condition of the policy that " if any material fact be untruly stated, all money paid under the policy shall be forfeited;" but that to bring this proviso into operation, the plaintiffs must have known of the existence of such facts; it being not sufficient that the existence of the disease were known to the person whose life is the risk insured. In the course of the trial some observations were made from the bench, making it a consideration whether the question of untrue statement by the insured were not a question of law, merely upon the fact that the life was uninsurable; but ultimately both questions, as shown above, were put as facts to be found by the jury. This therefore shows that the person whose life is insured may know that he is liable to a disease materially affecting the insurance, and yet the insured may be entitled to recover back the premiums as paid by them in ignorance of the failure

of subject for the contract; in other words, that the person whose life is insured is not (for the purpose of affecting them with fraud,) an agent for the insured; the misrepresentation to affect them with fraud must be made by the insured, or "their immediate agents," as directed by the Court on this occasion. It was contended in the above case, by the counsel for the defendants, that the proviso, "if there be any *untrue* averment, all money paid under the policy shall be forfeited," was intended to create a forfeiture in case the life should prove uninsurable. The argument was, that when the insurers are put to the expense of defending an action, and they succeed in proving the life to have been uninsurable, their expenses (the extra costs) should be thrown upon the other party, and that it was intended to provide for this remedy accordingly by the clause of forfeiture if any untrue averment. But this was overruled, as we have seen; therefore a clear distinction prevails—a statement may be untrue, and the party making it may believe it true; yet that incorrect statement will make a policy void: but if the insured do not know of the existing circumstances which cause his statement to be incorrect, he may recover the premium from the insurer.

An immediate conclusion from the present verdict is, that after an action to recover the sum insured, and verdict for the defendants, the plaintiffs may still try the merits of the insurance in an action to recover the premium.

Where the fraud is on the part of the insurers,

who privately know circumstances which render the contract a nullity, as where in marine insurance the underwriters know of the arrival in port of the ship which it is proposed to insure, the premium can be recovered from them (*m*).

Where the contract is void for illegality the premium cannot be recovered back, the maxim then prevails, "*in pari delicto potior est conditio defendentis.*" But a distinction has been taken, both as to fraud and illegality, whether the risk has determined, or whether all is executory, the risk still outstanding, the money not yet paid over by the agent to his principal (*n*).

Where the risk is determined by the act of the party, as by suicide in a life policy, or by an act of wilful burning in a fire policy, there can be no return of premium. The authorities cited under a former head are applicable to this case.

The premium is returned in part, firstly, by the custom of insurers when a surplus of profits upon the insurances, that have continued for a certain period of years (as seven years), remains in their hands.

Secondly, the premium is returned in part where the policy, being for a period of years, or

(*m*) 3 Burr. 1909.

(*n*) *Howson* v. *Hancock*, 8 T.R. 575 (case of bets on a horse-race). *Browning v. Morris*, Cowper, 790 (case of insurance on lotteries). *Lowry* v. *Bourdieu*, Dougl. 467 (case of marine insurance). See also *Routh* v. *Thompson*, 11 East, 42. *M'Culloch* v. *Royal Exchange*, 3 Camp. 406. *Tenant* v. *Elliot*, 1 Bos. & Pul. 3.

for life, is determined within that period. For this purpose, however, there is no apportionment of a year, so that if the contract is rendered void, even though not for fraud or illegality, within a few days after it commenced, that year's premium cannot be recovered. As to the general principle, however, of a return of premium after part of the risk has run, the contract being determined before the expiration of the full period for which insurance was originally taken out, it has been decided that return shall be made. This is by the custom of merchants. In the case of *Stevenson* v. *Snow* (before cited) which was a case of marine insurance, the principle was broadly admitted by the Court. On the trial a particular proportion of premium to be returned was insisted upon, for which amount a usage of merchants was given in evidence. On this Lord Mansfield observed, "I do not go upon the usage, for the usage found is only that, in like cases, it is usual to return part of the premium, without ascertaining what part." On this, Justice Park, in his valuable treatise on Insurance, comments (cap. xix: "Though the Court rejected the usage for uncertainty, yet they expressly say, that it serves to show what the idea of the mercantile world is on the usage."

With regard to fire insurance, no return of premium comes within the principle. Because the risk is not divisable, the time being one year, or a special period; and one year is not divisable for this purpose, as we have seen before, nor can a

special period of months or years be divided, for that would change it into another period than the one specified. With regard to life insurance, the policy, though taken out for life, may still be considered as an insurance from year to year so long as the life shall continue, the premiums being paid annually: this being like the case of a voyage from the port of embarkation to that of its ultimate destination, with intermediate ports between, on arriving at one of which the risk, by some circumstances, becomes determined.

No specific usage can be alleged as to the proportion of premium to be returned on a life policy after a certain number of years have expired (*o*).

(*o*) Something like an approximation to a solution of this question may be here given. The annual premiums are fixed on the scale of an annuity for a period of years certain, which amount of annual instalments for that number of years is equal to the capital sum to be paid by the insurer on the death. This period of years is found by calculation to be about equal to half the number of years between the age of the person insured and 86 (the limit of life according to the Tables). If the insurance is to secure payment of a sum on the death of the person happening within a limited number of years, then the annual premiums are equal to instalments of an annuity which would amount to the capital sum insured in a number of years equal to half the period for which the insurance is made: so that if the premiums are paid through the whole period, the annuity, which is equal in value to the sum insured, is paid twice over. If, therefore, half the premiums be returned to the persons insured, the insurer will still have received an annuity equal to the capital sum which he risked, that is, which he would have to pay if the life were determined within this period. And the person insured can, with the half of the premiums recovered, make an addition to

This return of premium is what is called the "*value of the policy*" when it is brought into the market; this proper meaning of the expression "value of the policy" is necessary to be kept in mind. The "value of the policy" is a sum to be recovered from the insurers on a contract which is at an end; it cannot, when paid by a stranger to the insured, give to the stranger any claim against the insurers other than for the recovery of the amount so paid by the stranger; nor can it give him any claim against the insured, but only against the insurer: he, by such payment, does not become a creditor of the person insured, and he does by the transaction admit that the policy is determined. When we speak of assignment of policies, these points will be further insisted upon.

When an action is brought to recover back premiums, as on the common *indebitatus assumpsit* for money had and received, it must be brought against the principal to whom the money has been paid over, and not against an agent who received it for such principal (*p*). But if not actually paid

any new insurance he may take out at his now advanced age; the difference between the amount of the instalments he would now have to make for an insurance on his life and that of the instalments he paid at a younger age being equal to an annuity for half the period, which is the difference of his age now and at the original date.

(*p*) *Sadler* v. *Evans*, 4 Burr. 1984. *Greenway* v. *Hurd*, 4 T. R. 553. *Horsfall* v. *Huddley*, 2 Moore (C. P.) 5; 8 Taunt. 136.

over, the agent may be made defendant, though in his accounts he has debited the principal with the amount received (*q*). And if the principal be an aggregate body, not corporate, nor capable of being sued, then the agent is the proper party (*r*) to be made defendant: so if the agent has got the money into his hands illegally (*s*); so also if the money was not paid to the agent expressly to be paid over to the principal (*t*); so if the plaintiff gave notice to the agent, before the money was paid over, not to pay it over, but to suspend the contract (*u*).

CHAP. VI.

THE RISK INSURED.

FIRSTLY, as to the perils in *fire insurance*. These are comprised in the expression "losses or damages by fire." Fire must be the immediate agent; this includes lightning, but in the case of

(*q*) *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 5 M. & S. 344.

(*r*) *Miller* v. *Avis*, B. R. Midd. Sit. M. T. 41 Geo. 3.

(*s*) *Townson* v. *Wilson*, 1 Camp. N. P. C. 396. *Watkin* v. *Hewlett*, 1 Brod. 1.

(*t*) *Sanders* v. *Davis*, 1 Taunt. 359.

(*u*) *Edwards* v. *Hodding*, 5 Taunt. 815.

live-stock struck by lightning, the mark of fire must appear on the carcase, otherwise it may be a case of death occasioned by the electric shock alone, which is not a loss by fire. Fire produced by the friction of a wheel on its axle, which consumes the wheel, is a loss of the wheel by fire. The burning of a barrel or other vessel containing quick lime, which is accidentally submitted to the action of water, is a loss by fire as to the vessel, but the spoiling of the lime is not such loss. So the spoiling or consuming of any two chemical fluids or bodies by the process of combustion ensuing on their combination, is not a loss by fire as to either of the substances, but as to any third body it is such loss. Similarly, heat or fire produced by vegetable fermentation, as when a hay-rick takes fire by its own heat, is not a loss by fire as to the vegetable collection, but as to adjoining bodies it is (*x*). Another distinction is, that where fire is actually applied from design, as in the culinary and several manufacturing processes, any loss by misdirection of the process is not considered coming within the object of insurance, inasmuch as the application of heat was not by accident, and the consequential damage of over-roasting and the like is not separable from the original design of applying the flame

(*x*) The whole hay-rick is considered as under fermenting process, from the difficulty of ascertaining which part was so and which part was consumed by heat communicated therefrom.

for the due process. But clothes hanging to dry, meat under process of cureing by the slow action of smoke, if destroyed by the flame from the fire-place, are "losses by fire." So if any part of the building adjacent to the fire-place, as the chimney, the timber-work round the fire-place, and the like, be damaged or destroyed by the fire coming from the grate, these are proper objects for indemnity; but the grate itself, oven, boilers and other culinary apparatus, or any apparatus containing or applied to the fire for conducting manufacturing process, if destroyed or damaged by the fire which they contain, or to which they are applied, give no claim for indemnity.

We have included in the foregoing remarks that an essential circumstance in the loss must be, that it is accidental. Those remarks must be extended in this particular: not only design in the application of the fire producing loss excludes claim to indemnity (*y*), but if there be *gross neglect* (*z*), this would constitute a just ground

(*y*) That is to say, the misapplication of heat, in processes of trade, are not the risks contemplated in insurance. It is a general principle of law that a man who is occupied about the goods of another for hire, in the exercise of his trade, is liable for any damage he may do them while under his hand. Work ill done is as if it were wilfully ill-done.

(*z*) Or (as it is expressed in some policies) the consequences of any "hazardous operation" must fall upon the party. Insurance is not an indemnity for want of common sense to discern where there is obvious danger of communicating fire by any particular act. It should, however, be observed, that

for refusal of a claim. This has been so ruled in several cases of marine insurance, and necessarily extends itself to fire insurance, since the contrary rule would make this contract a conspiracy to endanger the safety of the inmates of a building, and that of the neighbouring buildings (*a*).

It is further necessary in this, as in all other cases of insurance, that the subject-matter of the contract should, at the time when the liability of the insurers is incurred, be free from the damage insured against; which means, not only that the buildings or goods should not already have caught fire, but that fire should not be raging in an adjacent spot, from which it is probable that it will communicate to the insured. On this

there is, besides "gross neglect," excuse for which implies that it is the act of an idiot, an inferior degree of carelessness, such as one would not admit in the management of his own affairs; there is likewise "slight neglect," that for which only a man of extreme caution would not be excusable. For these two latter species of carelessness, a depositary of goods, who receives them without being paid for his attention, is not liable. To bring a case of insurance within the rule of bailment, the goods insured may be considered, after the loss, as if they were the goods of the insurer, and had been deposited by such owner with the person who is the other party to the policy of insurance: as a depositary of the goods, without wages or hire, he is only liable for the "gross neglect," and not for the two inferior kinds.

(*a*) *Ripon* v. *Cape*, 1 Camp. 434. It was decided, however, in a case of shipping insurance, that the burning of his ship by the captain to prevent her falling into the enemy's hands was a fair loss by fire. 1 Camp. 123.

ground, a policy was set aside in the case of *Bufer* v. *Turner* (*b*). It is also usual to provide, in some cases in policies on warehouses and storehouses, that "no fire is kept, nor hazardous goods deposited" there; or such general rule is among the rules of the office, printed in their policies or proposals (*c*). The several degrees of hazard, from the nature of the goods or materials, or manner of construction of buildings, are provided for by a corresponding scale of premiums. Some things are uninsurable, as gunpowder. Certain manufactories, from their extent and their hazardous processes conjointly, and books of accounts, bills of exchange or notes, title-deeds, writings, and the like, are uninsurable (*d*), and are excepted accordingly in the conditions of insurance offices. Damage or loss by civil commotions are not subjects of indemnity; nor by invasion or foreign enemies, or by any usurped power (*e*).

Of all these instances we will give cases or

(*b*) 2 Marsh R. 46. 6 Taunt. 338.

(*c*) *Dobson* v. *Sotheby*, 1 M. & Mel. 90. This clause was ruled not to extend to the case of a tar-barrel introduced for purposes of repairs.

(*d*) Money, bills, and books of accounts, have other value besides the saleable material (which classes them as goods): to insure the value of these is not the object of a fire policy, any more than it is to insure the property depending on a life by a fire policy on his body against the event of his death by fire.

(*e*) *Drinkwater* v. *London Insurance Company*, 2 Wils. 363. *Langdale* v. *Mason*, Park, 657; Marsh Ins. 794.

authorities where they occur in the books; but of many the exemplifications are only in the records of the insurance companies, not in those of the courts of law. But before turning to such examples, it may be stated, that damage or loss may be considered to ensue immediately from fire where the property is injured from the acts of persons whose judgment or reason is temporarily suspended by the terror of the scene, and the sudden danger; thus fragile articles thrown out of window, the wasting of liquor by the act of a party who leaves the tap of the barrel open, upon the sudden happening of fire by his act; these, and the like, are immediate loss by fire upon the true principles laid down by the courts as to consequential damages (*f*). Also damage or expenses incurred in preventing the spreading of a fire by taking out of the wall an ignited beam, and the like, make a fair claim. This last case is called, in marine insurance, "gross or general average."

As to damage by mis-application of heat in

(*f*) See *Scott* v. *Shepherd*, 2 Bl. R. 392; 3 Wils. 403, S. C. The question was, whether the throwing of a squib, which being lighted and thrown had lodged on defendant's shop or stall, was the cause of the damage which ensued from this new direction given to the squib, or whether the first throwing was the immediate cause, as if the ultimate direction given was without design or decision of the party giving it that motion, but an involuntary act resulting from the instant danger. See also *Leame* v. *Bray*, 3 East, 593. *Rogers* v. *Imbleton*, 2 Bos. & Pul. 117. *Huggett* v. *Montgomery*, 2 N. R. 446.

manufacturing process, the case of *Austin and others* v. *Drew* (*g*), may be cited. The policy expressed the indemnity to be "against all the damage the plaintiffs should suffer by fire in their regular built sugar-house;" the register over the fires of the sugar-house, which was usually shut at night to exclude the air, was continued shut on a particular morning when the fires were lighted, in consequence of which the sugar was much injured by the sparks and smoke; this was held not to be a loss within the meaning of the policy. In this case, ignition had not taken place; the damage did not extend beyond the spoiling the article under process of manufacture.

Where goods on board a steam-vessel were spoiled by water escaping from the steam-boiler, this, in a policy of marine insurance, was held not to support a claim (*h*).

As to the hazardous nature of the goods or buildings insured, the description of the articles given in by the party taking out the insurance is material to its validity, so far as the description does or does not lead to the true adaptation of the premium. A coffee-house is not an "Inn" (*i*). Linen-drapery stock, purchased on speculation, is not comprised in an insurance on "stock-in-trade, household furniture, linen, wearing-apparel and plate," the insured not being a linen-draper (*j*).

(*g*) 6 Taunt. 436; 2 Marsh Rep. 130; 4 Camp. 360.
(*h*) *Scordet* v. *Hall*, 8 Bing. 607.
(*i*) *Doe* v. *Laing*, 4 Camp. 76.
(*j*) *Watchorne* v. *Langford*, 3 Camp. 422.

The fixtures are included in the term "dwelling house."

In the case of *Levy* v. *Baillie* (*k*), the policy was declared void for fraudulent mis-description in over-valuing the property insured, and lost by the fire. The Court refused to grant a rule for a new trial. The claim was for 1,085 *l.*, a verdict had been obtained for 500 *l.* It was attempted to support the rule by a suggestion that goods had been carried away during the fire by the people surrounding the premises: but this was answered, the goods insured were not of a portable nature.

In order to make out a value in the property insured equal to the amount insured, a depositary of goods for hire may add to the price of the articles the amount of his charges for custody of the articles (*l*).

But if the description be substantially correct, and a more accurate statement would not have varied the premium, the error is not material (*m*).

When an alteration in the property as to its extent or degree of hazard, or its location, takes place, notice must be given to the office.

It has been stated that loss arising by the gross

(*k*) Moore & P. 1. 208; 7 Bing. 349. So in marine insurance, a valuation which is excessive, and made with fraudulent design, vitiates a policy. 3 Camp. 319, *Haigh* v. *De la Cour.*

(*l*) It must be remembered, as to description of goods, that the Act 9 Geo. 4, c. 13, prohibits including a plurality of risks in one sum. See before, CHAP. I. p. 9.

(*m*) 1 R. & M. 92.

negligence of the insured will not make a case for indemnity from the insurer. But where the negligence is on the part of the servant of the insured the case will be otherwise. For it is held, that the negligence of the servant does not make a damage immediately, but only consequentially, damage caused by the master (*n*).

Negligence of servants causing damage by fire in dwelling-houses is punishable under statute 14 Geo. 3, c. 78, s. 84.

An over-valuation of the property insured is a a fraud upon the insurers, which will make the contract void (*o*).

Under the Acts 43 Geo. 3, c. 58, s. 1, and 7 & 8 Geo. 4, c. 30, s. 2, the wilful burning of property, with intent to defraud, is a capital felony. The intent to defraud is considered sufficiently made out on proof of the act of wilful burning (*p*).

The remedy against the hundred for wilful destruction by fire is confined now to destruction by the act of a *riotous assembly*. See the Act 7 & 8 Geo. 4, c. 31, s. 2. This statute repeals 9 Geo. 1, c. 22; stat. 22 Geo. 2, c. 46; stat. 57 Geo. 3, c. 19, and stat. 3 Geo. 4, c. 33. The

(*n*) See opinion of Chambre, J. in *Huggett* v. *Montgomery*, 2 N. R. 446.

(*o*) *Haigh* v. *De la Cour*, 3 Camp. 319. See *Levy* v. *Baillie*, supra.

(*p*) *Rex* v. *Gillson*, 1 Taunt. 25. *Farrington's case*, Russel, 1674. *Rickman's case*, East's P. C. 1035.

insurers are entitled to recover from the hundred under this statute (*q*).

Life Insurance. Accidents which necessarily terminate life, and terminate it suddenly, form a distinct class of cases from that of accidents which can be counteracted by medical skill; and these latter are separable into such as are only curable by the greatest possible skill and attention, and others which only become dangerous and incurable by the grossest neglect and want of skill.

It may not always be *material* that the insured should mention that an accident has happened, though that in effect shall cause his death. Death may be occasioned by mortification ensuing upon cutting a corn to the quick, but such an effect is not the natural and immediate consequence of cutting a corn, the effect is rather referrible to improper treatment or neglect.

Where death is caused by the act of the party, by suicide or duelling, by commission of an act of felony, and suffering a capital punishment, or in active military service, the case is not covered by the insurance.

As to what is an "insurable life," the insurance companies now generally specify certain diseases which they declare shall render the life uninsurable by them, or only insurable at an increased premium. But in an early case, before these ex-

(*q*) 3 Dougl. 61. *Mason* v. *Sainsbury*, 2 Marsh Ins. 796, 3d edit.

press conditions in policies were in use, a party subject to violent fits of the gout was considered a good life for insurance (*r*). So where Sir James Ross, from a wound received in the battle of *La Feldt*, in 1747, was troubled with a disorder attributed by the physicians to a local relaxation or paralysis, his life was considered insurable (*s*). But in a case where, on a *post mortem* examination, a severe organic disease of long standing was discovered, of which symptoms existed in the occasional derangement of the intellect of the party, these symptoms were considered material proofs against the insurability of the life, and, having been concealed from the insurers, the insured was held not entitled to the benefit of the insurance (*t*). So where there are symtoms of organic disease, which are concealed from the insurers, and the life is terminated shortly after the insurance was effected but by a new disorder, the life is considered to have been uninsurable, and the policy vitiated (*u*).

In this case of *Landeneau* v. *Desborough*, it was stated, that whether any particular disorder were one tending to shorten life was a question for a jury.

If a wound is mortal, but death does not ensue

(*r*) *Willis* v. *Poole*, Park, 650.

(*s*) *Ross* v. *Bradshaw*, 1 Bla. Rep. 312. And see *Watson* v. *Mainwaring*, 4 Taunt. 763.

(*t*) *Landeneau* v. *Desborough*, 3 Carr. & P. 353.

(*u*) *Maynard* v. *Rhode*, 1 Carr. & P. 360. See *post*. p. 52. *Watson* v. *Bevern*, Ib. p. 363. *Morrison* v. *Muspratt*, 3 Bing. 60.

until the expiration of the policy, (in the case of a policy for a term of years), the wound being received during the term when the policy was in existence, a doubt was thrown out by Justice *Willes* (in a trial on a policy of marine insurance) (*x*) whether this would be a case for indemnity under the policy.

A case of death, as punishment for felony, occurred in a policy on the life of the banker Fauntleroy; the Master of the Rolls decided that a claim would lie, the policy not excepting the case of death by the hands of justice. But this judgment was reversed on appeal to the House of Lords (*y*). Where the insurance is made by another party than the one whose life is insured, the death happening by the act of the party whose life is insured does not invalidate the policy, according to the practice of the offices.

These cases will be further gone into in the next chapter.

Sometimes a question arises as to the time *when* death happened; where the party has sailed on a voyage, and the ship is presumed to have been lost, this is a question for a jury. A verdict was returned for the plaintiffs in an action to recover from the insurers the sum insured on the life of *L. Macleane*, esq., from 30th January 1777 to 30th January 1778: the evidence being, that about 28th November 1777, Macleane sailed from the

(*x*) *Lackyer* v. *Offley*, 1 T. R. 252; 2 Dow & Clark. 1.

(*y*) 3 Russ. 351; *Bolland* v. *Disney*, 4 Bligh, 194; and see cases cited.

Cape of Good Hope in the *Swallow* sloop of war. Several captains of vessels, who had sailed the same day, believed that the *Swallow* must have been as forward on the voyage as their ships on the 13th or 14th January 1778, the period of a violent storm; the *Swallow* was much smaller than their vessels, which with difficulty weathered the storm.

CHAP. VII.

MISREPRESENTATION—CONCEALMENT—NON-COMPLIANCE WITH WARRANTIES.

THE general class of circumstances which render a life or property uninsurable, or less than ordinarily insurable, have been given. But in this, as in every other contract, it may be asked, on which of the parties falls the duty of ascertaining the state of the risk? Lord Mansfield, in the case of *Carter* v. *Boehn* (*a*), gave some heads for a rule in this matter. "The insured need not mention what the insurer ought to know; what he takes upon himself the knowledge of, or what he waives being informed of: the insurer need not be told general topics of speculation." This last head of general speculations will comprise the nature of different climates as affecting European constitutions, the healthiness or unhealthiness of different

(*a*) 3 Bur. 1905; 1 Bl. Rep. 593.

trades, occupations, or courses of living, the hazardous nature (in fire insurances) of different constructions of building, or of their materials, or the uses for which the building is employed, and the like. The insurance companies, however, by experience, now issue "proposals" in most cases interrogating upon certain points affecting the particular class of persons applying to become insured: the answers are then referred to in the Policy.

As to matters within the knowledge of the insured alone, what is a fradulent concealment or misrepresentation depends simply on whether the matter was "*material*" to the consideration of the risk; this is a matter of fact to be ascertained by a jury; "and if material, the consequence is matter of law that the policy is bad (*b*)."

The distinction between a misrepresentation and a non-compliance with warranty, as given by the Courts, is quoted in the note below (*c*).

(*b*) *Rodgson* v. *Richardson*, 1 Bl. Rep. 463.

(*c*) "Insurance is a contract upon speculation. The special facts upon which the risk is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his statement, and proceeds upon confidence that he does not keep back any circumstances within his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

The contract is equally void whether the misrepresentation were made on the part of the insured or of his agent, or of any other party concerned on

". The question therefore must always be, 'Whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement or a concealment; fraudulent, if designed: or, though not designed, varying materially the object of the policy, and changing the risk understood to be run?'" Lord Mansfield in *Carter* v. *Boehn*, 3 Burr. 1905; 1 Bl. Rep. 593.

Again, in *Mayne* v. *Walter*, B. R. East, 22 Geo. 3, Lord Mansfield distinguished, "A representation is a state of the case, not part of the written instrument, but collateral to it, and entirely independent of it; and it is sufficient that a representation be substantially performed."

"Even written instructions, if they are not inserted in the policy, are only representations; and in order to make them valid and binding as a warranty, it is absolutely necessary to make them part of the instrument by which the contract of indemnity is effected. If a representation be false in any material point, it will avoid the policy; and if the point be not material, the representation can hardly in any case be fraudulent."

Again, in *Pawson* v. *Watson*, Cowp. 785: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a *warranty* or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy it must be performed."

And in Dougl. 247–260: "If he represents facts to the underwriter without knowing the truth, he *takes the risk upon himself* (by so representing)."

And Dougl. 271: "The great question is, whether the representation was false, and that, in a material instance, fraud is found out by the materiality of the point. To make written instructions binding as a warranty, they must be inserted in the policy." Cowp. 790; and see end of CHAP.

his behalf about the insurance (*d*). And it makes no difference that the loss depends on other circumstances than those which the misrepresentation or concealment concerns: the contract is void (*e*).

A few cases will illustrate the doctrine of misrepresentation. In *Morrison* v. *Muspratt* (*f*) the policy was set aside because the parties effecting the insurance referred the insurers to a surgeon who was little acquainted with the health of the subject of the insurance, and concealed the fact of another medical attendant having declared that it was not a good life. This part of the evidence not having been put to the jury by the judge, a rule for new trial was made absolute. In this case was cited, among others, that of *Lynch* v. *Hamilton*, (3 Taunt. 44,) where Lord Mansfield observed, "without doubt it is an established principle, that the person insuring is bound to communicate every intelligence which can affect the mind of the insurer in either of these two ways; firstly, whether he will insure at all? secondly, at what premium?" In *Huguenin* v. *Ryley* (*g*), the declaration described the insured as resident at *Fisherton Anger*, at a time when she was a prisoner in the county gaol there; it was

(*d*) *Thompson* v. *Buchanan*, 4 Bro. P. C. 483. *Fitzherbert* v. *Mather*, 1 T. R. 12. But see *Duckett* v. *Williams*, ante, p. 30.

(*e*) *Seaman* v. *Fonnereau*, 2 Stra. 1181; Park Ins. cap. 10. *Webster* v. *Forster*, 1 Esp. R. 407. *Willis* v. *Glover*, 1 New Rep. 14; Park Ins. cap. 10.

(*f*) 12 Moore, 231; 4 Bing. 60.

(*g*) 6 Taunt. 186.

held to be a question for the jury, whether the imprisonment was a material fact. In the case of *Stockpole* v. *Simeon* (*h*), the assured recovered, the broker employed by him having stated that his employer would not warrant, but that he believed it a good life. There was suspicion, on account of the person having gone to the South of France, and died shortly afterwards. It was suggested on the trial that he went to France to avoid his creditors. But in the case of *Everett* v. *Desborough* (*i*) the policy was declared void; here the party insured had told the office, that he knew nothing of the life, that the office must apply to the person whose life was the subject of the insurance: the office did apply to him accordingly: he concealed material points respecting the state of his health. In *Landeneau* v. *Desborough* (*k*), the subject of the insurance had long been afflicted with catarrhal cough, and with occasional fits of mental aberration: these facts had not been communicated to the insurers: the policy was void. The counsel for the plaintiffs (Brougham) argued, that the question for the jury was, "whether there had been a concealment of any circumstance which the party insured thought material?" But judges Bayley and Littledale overruled this. In *Maynard* v. *Rhode* (*l*), there was a concealment of organic disorders of long standing, and

(*h*) Park, 648.
(*i*) 3 Mo. & P. 190; 5 Bing. 503, S. C.
(*k*) 3 Carr. & P. 353.
(*l*) 1 Carr. & P. 360.

death ensued within six months after the policy was effected. In the case of *Watson* v. *Mainwaring* (*m*), the cases left for the verdict of the jury were two; first, whether the death had been caused by *organic dispepsia?* secondly, whether, if it were the common dispepsia, the disorder had been excessive in degree? The verdict returned was, that it was not organic nor excessive, but the common dispepsia; the verdict accordingly was for the plaintiff: a motion for rule for new trial was refused. The case thus put to the jury was in consequence of the evidence of medical men stating that the question whether the disease tended to shorten life depended on its quality, (whether it were organic), or on the degree of the affection, the violent dispepsia, though of the common kind, and not organic, having a tendency to shorten life. In the case of *Edwards* v. *Barrow* (*n*), the counsel for the plaintiff submitted to a non-suit, letters of the deceased being given in evidence where she had stated, both shortly before and after the policy was executed, that "her health was quite gone, and her constitution undermined," though the medical men, on a *post mortem* examination of the body, had found nothing of disease tending to shorten life; and though they stated that they did not think it material to havebe en stated to the office that the

(*m*) 4 Taunt. 763. See the case of *Duckett* v. *Williams*, before noticed.

(*n*) C. P. April 23, 1830.

deceased had had a child, she being a single woman.

With regard to the rule, that a warranty or condition must be inserted in the policy—a rule which was confirmed by the opinion of all the judges in *Lothian* v. *Henderson*, (Bos. & Pul. 499) (*o*)—the Court would not hear evidence that it was the custom of the insurer to consider a written memorandum, wrapped up in or wafered to a policy, as part of such policy (*p*). But a writing in the margin may be a warranty (*q*). But printed proposals referred to in a policy are part of the policy (*r*). In the case of *De Hahn* v. *Hartley* (*s*), the effect of a warranty, as distinguished from a representation, was further defined by Lord Mansfield: "a representation may be *equitably* and *substantially* answered; but a warranty must be *strictly* complied with." This is at common law; but courts of equity will relieve against a condition in insurance as in any other contract. The grounds for such relief are, accident, error, fraud, surprise, operating against the complainant; and in general, where the condition is in the nature of a penalty, and the party insisting

(*o*) *Pawson* v. *Watson*, Cowp. 790.

(*p*) *Pawson* v. *Barnevelt*, Dougl. 12, note. *Prize* v. *Fletcher*, Ibid.

(*q*) *Bean* v. *Stupart*, Dougl. 11. *Kenyon* v. *Perthon*, Dougl. 12, note.

(*r*) *Worsley* v. *Wood*, 6 T. R. 710, "in error." *Routledge* v. *Burrel*, 1 H. Bl. 254.

(*s*) 1 T. R. 343.

upon the penalty can be put in as good condition as was intended by the original contract, the penalty will be set aside; as is always done in the case of mortgage deeds, where, strictly, the estate is forfeited by non-payment of the mortgage money within a year. Sometimes, where the premium is insufficient, by reason of error in statement of the property, the offices pay on the loss such portion as the premium paid bears to the true premium.

In practice, a reference to arbitration is provided for by the policy in case of dispute as to the matters in or concerning the policy, by which equitable relief is generally obtained. As to the force of a condition to refer all matters to arbitration, the discussion is reserved to a future chapter (*t*).

There are conditions or warranties which do not go to the defeating the contract as to payment of the loss, but which concerns collateral matters. It is an usual condition that the premium shall be forfeited in case of fraud or misrepresentation. A distinction has been taken as to return of premium generally, whether the contract is determined by the loss having happened, or whether it is undetermined or "executory" (*u*). Where the nature of the risk has been mis-stated, the assured may, on discovering his error, recover back the premium, or in case the insurers refuse, the contract will proceed. Where the contract is

(*t*) Part III. (*u*) Park Ins.

"executed," the Courts of Common Law will not, but Equity will, relieve in a clear case of mistake or surprise. Where it is a condition of the policy that the churchwardens shall certify as to the cause of the loss, this must be strictly complied with (*x*).

Where the same property is insured with several insurers, and one is sued for the whole loss, the insurer can recover a contribution from the others (*y*). It is generally a condition of the policy that the insured shall give notice of any other insurance on the same property.

CHAP. VIII.

ADJUSTMENT.

In life insurance the loss must always be a total loss. In fire insurance there are partial losses and total losses. It is not the custom in fire insurance to except any class of articles from the benefit of indemnity for partial loss which would be proper subjects for indemnity from total loss; though in marine insurance there is such a custom, whereby frivolous claims and complicated adjustments for breakage and spoiling of certain goods is avoided. In marine insurance, on such articles as fruit and fish, there is usually a con-

(*x*) *Wood* v. *Worsley*, 2 H. Bl. 574. *Oldham* v. *Bewicke*, Ib. 77, n. *Routledge* v. *Burrell*, 1 H. Bl. 254.

(*y*) *Newby* v. *Read*, 1 Bla. 416. *Rogers* v. *Davis*, Park Ins.

dition that there shall be no claim unless the loss is total, which means, in this case, that the things have ceased to exist *in specie*; or that there shall be no claim unless the loss reach 20, 30, or some other specified amount per cent. In fire insurance the policy usually (*z*) contains a clause that the insurers shall have the option of paying the claim or of restoring the goods that have been damaged or destroyed; this custom relieves the law of a distinction which prevails in marine insurance, viz. that in total losses (that is, where the voyage is not worth pursuing and the like) (*a*) the insured may *abandon* the goods, and shall be paid the whole sum insured, the insurers receiving the goods saved; and, on the other hand, where the loss is partial, and where all the loss and expenses do not reach one half the value of the cargo, the insurers shall be allowed to reinstate the exact damage incurred, leaving the goods in the possession of the insured. The subject, therefore, to be considered here, is, the mode of adjustment of losses without distinction as to their being total or partial, leaving any remarks that may be due to the distinction of total and partial loss to the end of this chapter.

The mode of adjustment of losses depends, for the most part, upon certain general rules of insurance-law adopted by the courts of this country, applicable equally to losses by fire or by marine

(*z*) Park Ins. cap. vi. vii.; 2 Burr. 1209.

(*a*) "Total loss" is used with two different meanings, as above, in marine insurance.

perils. The decisions upon these general rules in our courts happen to have been given generally in cases of marine insurance.

First Rule. If an adjustment of a loss at a certain amount be agreed to by the insurers, or if the insurers agree to pay the whole amount insured, they are not absolutely bound by their agreement, but may make any defence in resistance of payment "which the facts or the law of the case will furnish" (*b*).

Second Rule. If payment of the loss have been made by the insurers, not in pursuance of any written adjustment as to the amount, or if it have been made upon such written adjustment, but, from mistake of the facts, (as if they did not know the policy contained a certain warranty while they were making the adjustment, which warranty has not been complied with), or if there have been any fraud on the part of the insured, in all these cases the money paid by them may be recovered by the insurers (*c*).

Third Rule. After payment made, if there be no *fraud*, nor mistake of facts, the insurers are bound by their own act (*d*). In this case the in-

(*b*) *Bilby* v. *Lumly*, 2 East, 469. *Bainbridge* v. *Neilson*, 10 East, 345.

(*c*) Ibid. And *Chatfield* v. *Paeton*, 2 East, 471; 5 Taunt. 155. *Denham* v. *Hartley*, 1 T. R. 343; 2 T. R. 186.

(*d*) *Da Costa* v. *Firth*, 4 Burr. 1966. *De Garron* v. *Galbraith*, Park, 194. The money cannot be reclaimed, though the insured have subsequently to payment stipulated to return it. *Forrester* v. *Pigou*, 3 Camp. 380.

surers are entitled to any accruing benefit from the goods. This last part of the third rule is part of the general law, that when the vendor has parted with goods at a price, he has lost all title to accretions arising out of such goods: it is also analogous to the rule, that where a surety has paid for the principal debtor he may afterwards stand in the place of the debtor; as if he were surety on sale of a mare, which proved unsound, he is at least entitled, on payment of the purchase-money back to the purchaser, to retain the mare, and if she is with foal to retain that also. This third rule will extend to life insurance, so that after payment of the loss, if the insured should receive the amount of the debt from his debtor's executors, as in the case of *Godsall* v. *Boldero*, the insurer will be entitled to claim such amount in the hands of the insured. So if a house have been damaged or destroyed, and, after payment on the policy, the neighbours have subscribed to re-instate the loss, the insurers would be entitled to the amount of such subscription.

When a loss by fire is reinstated, the insurers restoring old materials with new, it is not the custom for the insurers to claim a deduction of one-third the amount (as in marine insurance) for the difference between new and old materials, or to make a deduction in any other proportion of the amount.

The value of goods destroyed is made at their invoice price by the custom of marine insurance. "The nature of the contract is, that the goods shall

come safe to the port of delivery, or if they do not, that the insurer will indemnify the owner to the amount of the value of the goods stated in the policy. The adjustment can never depend on future events or speculations. How long is he to wait? a week, a month, a year? The defendant did not insure that there should be no rise in the market" (*f*).

However, in valuing farming stock, there can be no invoice price; the price of the market must therefore here be taken in making the estimate. Deductions will, of course, be made from the market value in respect of expenses of carriage, and the like, not incurred when goods are burned on a farm.

When a bale of goods, or any quantity of goods on which a separate price is fixed in the invoice, is partially destroyed, the rule is, to take the proportion between what that quantity would sell at if sound, and what it sells at in its damaged state: then the invoice price is diminished in this proportion, and the remainder is the amount to be paid by the insurers. By this means an exact value is obtained, which would not be had if the selling price were taken, as the damaged part might, when market prices are high, exceed the cost price of the whole, and so the insurers have the benefit of the rise and pay nothing; or the price of the markets might be so low that goods in a sound state would only fetch the price

(*f*) *Lewis* v. *Rucker*, 2 Burr. 1167.

damaged goods, and damaged goods not sell for anything, so that the insurers would here lose by the fall of the market. In estimating the price of damaged goods, the gross proceeds, including market-tolls and other expenses (which are the same for equal bulks without regard to quality,) are taken, and not the net proceeds. This rule was set by Justice Lawrence; but it seems objectionable (*g*).

Where buildings or stock are not insured to their full value, the effect would be sometimes the same as if an insurance were effected making a certain amount payable upon the loss of whichever of several properties, each of the full value of the

(*g*) The damaged goods may fetch nothing beyond the price paid for the tolls and charges of the market; the other goods may sell at a profit; yet when the selling prices of the two are compared, the proportion may be as ten to one, or in any other certain ratio: for example, if a load of damaged hay sells for 10 *s.*, and 10 *s.* has been paid as the charge of tolls and carriage, while a load of good hay sells for 5 *l.*, including 10 *s.* for tolls, the proportion is ten to one; the cost price was (suppose) 4 *l.*, therefore $\frac{1}{10}$ of 4 *l.*, or 8 *s.*, will be, by the rule, the price to be set down as the value of the damaged hay if sold in the rick-yard: while in a market giving a profit of 10 *s.* in every 4 *l.*, the hay would not fetch 1 *s.* So, if instead of a profit there were a loss by the sale in the market, as, for example, a loss of 8 *s.* per load, the selling price would be 4 *l.* 12 *s.* of the sound hay; 2 *s.* for the damaged hay (including tolls and expenses as before,) that is, the selling prices are as forty-six to one; so that, by the rule, the cost prices will be in this proportion, that is, the good hay being 4 *l.* in the rick-yard, the damaged hay will be charged at about 20 *d.* (which is about $\frac{1}{46}$ of 4 *l.*), while in effect this damaged load paid 10 *s.* in charges, and fetched 2 *s.* by the sale. If it be

sum insured, should be destroyed, and so from time to time whenever any of the several properties should be destroyed. To prevent this, the insurers stipulate, that the loss in such case shall not be paid in full, but in such proportion as the total of property covered by the insurance bears to the value for which the premium is paid, and the value stated in the policy. This is called the average clause (*h*). The Act 9 Geo. 4, c. 13,

said the rise or fall of the market is to be distributed partly on the goods and partly on the market charges and expenses, this will give a new rule, but not that in question. If the difference between the selling price and the aggregate of the cost price and subsequent charges be called profit (or loss, as the case may be,) then this difference may be apportioned, so much for the goods, so much for the charges: now if the charges, increased or decreased by their profit or loss, be deducted, the remainder of the selling prices of the sound and damaged will be in proportion to their respective original prices, before profit or loss was incurred. The deduction from the selling price of the sound goods being made by apportioning the profit or loss between the goods and charges, in the ratio of the goods to the charges, this amount will be deducted from the selling price of the damaged goods, since the charges are the same whatever the quality. Then the respective remainders will be in proportion to the respective prices of sound and damaged goods in a market where there has been no advance or fall, but prices are as at the place of production. If the selling prices are 10*l.* and 10*s.*, charges 5*s.*; if profit on the 10*l.* is 1*l.*, $\frac{1}{40}$ of 5*s.*, *i. e.* 6*d.*, goes to profit on charges: 9*l.* 14*s.* 6*d.* and 4*s.* 6*d.* are the prices to be compared; the ratio between them is the ratio of cost prices.

(*h*) The word "average" has four distinct meanings in marine insurance. We must be careful not to apply the doctrine of Average in that branch of insurance to cases of fire insurance,

which makes it necessary to value separately in insurances each detached building and all separate deposit of goods, provides an exception if the policy contain the average clause. This statute also excepts from its provisions farming implements and stock, hence insurers generally have to apply the average clause in cases of farming stock. But when a society of journeymen insure their tools, in whatever buildings any of the members may be exercising their calling, the insurance must be made subject to the average clause.

CHAP. IX.

Of the Assignment of Policies.

Possession gives, in a certain manner, title to land: possession is alone sufficient to make a title to goods other than land: bills and notes, which by custom pass current from hand to hand, require no evidence of title other than possession. The custom (local or general) of merchants, can make other contracts of third parties transferable, so that every possessor of the written evidences of the contract shall have title or claim against the third parties who originally bound themselves by the contract. Thus, in the case of *Lang* v. *Smith* (*i*), the Court, in determining that the possession of certain Neapolitan Scrip gave no title to the stock

(*i*) 7 Bing. 284; before Chief Justice Tindal.

or fund, declared, "the question is, whether these securities, from the course of dealing, have acquired in the City the character of bank-notes, bills of exchange, exchequer bills, dividend warrants, and other instruments, which form part of the circulation of the country."

By the custom of marine insurance, policies are transferable freely with the bills of lading. There is no custom recognized which makes policies of fire and life insurance pass currently to successive owners of the property insured, nor to other persons, by transfer of the possession of the policy. As a general rule, where the possession of property is in one party, and a recognized claim to it resides in another, such claim can only become a transferable interest by the possessor being a party to the transfer by some act or admission; his acceptance of notice of the transfer is sufficient for this purpose. On this general principle, several cases upon policies of life insurance have been determined. On fire insurance no case of transfer of policies has come before the Courts within a recent period. Whether, with regard to both or either of these kinds of insurance, a custom will grow up, making policies of insurance to "run with" the property insured, as custom has made several covenants (originally only personal contracts) to "run with the land," is a fair subject of speculation. In a recent work on Insurance it is stated, that the mercantile world are not satisfied with the decisions of the Courts against the free transferability of policies (*k*).

(*k*) Ellis on Fire and Life Insurance.

Nevertheless the decisions are sound in principle: custom alone can give new properties to policies, separating them from bonds, trusts, covenants, and other *chose in action* (*l*).

NOTICE OF ASSIGNMENT OF POLICIES.—Now with regard to *notice*. The case of *Williams* v. *Thorpe* (*m*), was where the assignees of a bankrupt were the plaintiffs in the bill: a party to

(*l*) In the work above referred to, (p. 153) a policy of insurance is distinguished from a bond: the latter being security for a sum of money now due, the former "a security against future loss." But the mischief of assignment without notice is not distinguishable for the two cases. In the words of Mr. Ellis, "No man would accept as a security from *A.*, or give valuable consideration to *A.* for an assignment of a debt actually due and owing to him from *B.*, unless notice be forthwith given to *B.*; because if notice be not given, *A.* may still recover the debt as soon as he pleases." The concluding expression need only be altered from "recover the debt" to "assign the debt," in order to meet the case of a policy of insurance. The mischief is, that the policy is assignable. It is not equitable that he should recover or assign the thing after transferring his right to another; but the equity the other has against him is against him only, not against a subsequent assignee; notice alone can make one equity prevail over the other.

From a prospectus of a modern insurance company, (the West of England,) it would appear that the practice of giving notice is thought objectionable by some who do not like disclosure of assignment of their property: the prospectus accordingly states that assignments shall be valid without notice. The above decisions say they shall not be valid without notice, though the insurers have a custom not to require notice.

(*m*) 2 Simons, 259.

whom the bankrupt has assigned a policy on his life was defendant. Though it was shown that "assigns" were mentioned in the policy, though the party taking the policy by the assignment had paid the premiums which fell due upon it in two successive years, and though it was proved by the evidence of Mr. Morgan, joint actuary of the office (the Equitable Insurance Company) that it was not the practice of the office to require *notice* of the assignment of policies, but to give effect to the assignment when proved upon the coming in of the claim on the determination of the risk: yet the Court decreed that notice was necessary under the general law of assignment of debts. The policy was ordered to be given up accordingly, as being in the reputed ownership of the bankrupt. This decision was followed up in a case which came before the Court subsequently, at an interval of three years, viz. in the case *Ex parte Colville re Severn* (*n*). (The authorities are very carefully collected in this case).

With regard to the practice of the offices requiring notice of assignments, the period differs; in one office forty-two days, in another three months is allowed, in another the assignment is to be mentioned to the office as soon as possible. With regard to the form of notice this is not fixed (*o*); it must, however, be express and not implied. Payment of the premium by the assignee is not notice

(*n*) January 10, 1831; 1 Montag. Ca. Bank. 110. See *Dearle* v. *Hall*, 3 Russ. 1.

(*o*) See *Ex parte Stright*; 1 Mont. 502.

by itself, as is shown in the case of *Williams* v. *Thorpe*. There is no case showing the precise limit of time within which it is considered requisite that notice should be given in the absence of any rules of the particular office on this point. In the case of *Ex parte Colville* more than six months appears to have elapsed; in the case of *Williams* v. *Thorpe* there was an interval of fifteen months between the assignment of the policy and the claim of the assignees of the bankrupt arising by the issuing of the commission. Perhaps, in the absence of a definite rule as to any office, the Courts would fix the time by taking the average duration on a comparison of the practice of the different offices. This period being fixed, where there are two or more conflicting claims, on neither of which notice has been given to the office, the time for giving such notice being expired as to none or as to all, the first in date will have the preference.

After a commission of bankruptcy (or declaration of insolvency) has issued, it will be too late to give the *notice* to the insurance office, though with their consent, if the regular period within which, according to the rules of the office, notice should have been given, has expired. The commission issuing will prevent notice being given to complete the assignment, the regular period for notice not having expired. This principle, if not decided by the two cases above cited, is in conformity with the rule in bankruptcy against rela-

tion back to the date of the deed where enrolment is subsequent to the commission (*o*).

An *execution* taken out against the "goods and chattels," does not include *choses in action*, of which are policies of insurance (*p*); therefore, whether *execution* be in itself *notice* of transfer cannot be made a question. As to, who is agent

(*o*) See *Perry* v. *Bowers*, 1 Jones, 196; 1 Vent. 360. *Bennet* v. *Gandy*, Carth. 178. See 12 Mod. 3.

(*p*) But the execution affects all things which *can be sold*; (the *venditioni exponas* being an essential or distinctive part of the writ,) and policies, it seems, are sold at auctions: therefore *quære?* The dictum of Lord King, in *Lynch* v. *Dalzell*, is in point: "These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment; but they are only special agreements with the persons insuring." The reasoning of Lord Hardwick, in the case of *Badcock* v. *Sadler's Company*, on the point of assignability, appears far from conclusive: "The society are to make satisfaction in case of any loss by fire. To whom or for what loss are they to make satisfaction? Why to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage." This argument would be against the assignability of all warranties. It is quite clear indeed that it is the person, and not the thing, which is insured against damage; as in a life policy, it is not life which is insured against its natural termination, but it is a loss, consequent upon the death of an individual, to third parties, which constitutes the cause of indemnity. Nevertheless, the parties to be damified by such loss may vary at intervals of time, and it is for their benefit that large funds are raised by mutual subscriptions.

to be affected with *notice*, the usual agents or officers of the company receiving the articles of agreement for policies will be those to take the notice.

INTEREST OF ASSIGNEES OF POLICY.—The case of *Ashley* v. *Ashley* (*q*) was this: a policy on the life of *A. B.*, executed in 1802, was assigned to *H.* in March 1810, in consideration of 5 *s.* *H.* died in October 1810. A suit was instituted in Chancery against the executors of *H.* by *A. B.* the insured; the executors sold the policy under a decree of the Court of February 1815. In August 1817, the executors assigned the same to General Ashley. In 1817, General Ashley died: a sale of the policy, under a decree of the Court, took place in 1819. *F.* became the purchaser. Objections were made to the title of the vendors on the part of the purchaser. The Court directed a reference; the Master reported in favour of the title. Exceptions to the report came on for hearing. The Court ordered that the report should be confirmed. His Honor, the Vice-Chancellor, stated the question to be, "whether the dealing with the policy had been such that a Court of Equity would compel the assured to permit the assignee to sue in his name in bringing an action on the policy." In this case, the dealing had been under decrees of the Court: a case therefore certainly had arisen where there was such equity as against

(*q*) 3 Sim. 149.

precept to the sheriff, "*Venditioni exponas.*" Yet a policy can (according to the practice sanctioned by the Courts) be sold. An *extent* from the Exchequer would reach a policy, as the sheriff can seize debts under stat. Hen. 7. By attainder the policy must, it should seem, be held to pass to the Crown; so by *escheat*, a policy of insurance against fire must be held to cease until the lord, by escheat, give notice of his title to the insurers.

When the landlord has entered for forfeiture of any lease, or is *in* of his reversion, the policy ceases as to the tenant; it will pass to the landlord on his giving notice of his title to the insurers. By the Building Act, 14 Geo. 3, c. 78, s. 83, the insurers may at their discretion, lay out the money in re-instating the buildings burnt down, instead of paying the amount to the insured. This Act only extends to places within the bills of mortality; but a similar proviso, without restriction as to places, is generally inserted in policies.

No payment made to a bankrupt after the date and issuing of the commission is valid: therefore, after that period, no title under the policy exists except in the assignees (*u*). The policy passes to the assignees notwithstanding any assignment by the bankrupt previous to the commission, if such assignment were not accompanied with notice to

(*u*) *Colville & Geddes in re Severn*, 1 Mont. 110. *Cox* v. *Listard*, Doug. 166.

the insurers; it being considered a case of *reputed ownership* in default of such notice (*v*).

This being an executory property, cannot be a *donatio causâ mortis*. The devisee or legatee of a policy is not entitled to receive the amount of the claim under the testator's policy directly from the office, without the assent of the executors; wanting such assent, he must receive it through the executors. Executors should get in the assets in 12 months; should they neglect to claim under the policy within 12 months, this would be an implied consent that the legatee should claim.

It is said that a policy (of fire insurance) is not a covenant *running* with the land, nor in any way concerning the realty. But if a man, having a freehold estate of inheritance in a house, were to die, leaving no property other than the freehold-house, and an unexpired policy of insurance on the house, would the policy constitute *bona notabilia* within the jurisdiction of the spiritual courts, or would it be considered as accompanying the realty?

Money recovered upon a loss by fire under a policy, was held to follow the uses of a settlement of the real estate, which comprised the house burnt down. The settlement was to the use of *J. B.* for life, remainder to *W. B.* for life, remainder to *J. B.* in fee. The money had been paid to

(*v*) *Williams* v. *Thorpe*, 2 Simons, 257; and *Colville & Geddes*.

J. B. who placed it in the funds instead of rebuilding the houses, but he left a memorandum that the money so invested was recovered for a loss on the settled property (*x*).

So where in an annuity charged on the real estate under the will, the executrix had renewed a policy of insurance taken out by the testator previously to date of his will, upon a house, the only real estate of the testator; upon a bill for an account filed by the annuitant, the proceeds of the insurance were decreed to be paid into Court as trust monies liable to the annuity for lives (*y*). Where a testator bequeathed two policies of insurance by his will on certain trusts, and after making his will received the money on the respective losses happening under the policies, this was ruled to be an ademption of the legacy (*z*).

There is another case, which will be here cited, for the double purpose of showing that a policy of insurance may be the subject of the usual limitations of real estate, and that the accretions or profits added to the policy (according to the rules of the insurance company so distributing their surplus capital among the insured) follow the uses of the settlement. By the marriage settlement of the daughter, a policy on her father's life was

(*x*) *Norris* v. *Harrison*, 2 Mad. 268.

(*y*) 3 Simons, 77; *Parry* v. *Ashley*.

(*z*) *Barker and Wife* v. *Raynor*, 5 Madd. 208.

vested in trustees, and power to dispose of the policy by will was given to the daughter. She bequeathed this accordingly in three portions. It was held to pass accordingly. The policy was for 3,000 *l.*, and in the settlements and will it was described as "the sum of 3,000 *l.* for which *A.*'s life was insured," and by the will 1,000 *l.* was the amount of each portion. 9,000 *l.* was received under the policy by the addition of Bonuses. It was decided by the Vice-chancellor, Sir J. Leach, that the 9,000 *l.* passed by the will, and 3,000 *l.* passed by each bequest of "1,000 *l.*, part of the sum of 3,000 *l.*"

When an annuity, with which as a collateral security a policy on the grantor's life is taken out by the grantee, is paid off, the premiums of insurance are not recoverable by the grantee against the grantor of the annuity, unless in the grant of annuity there were a stipulation to that effect (*a*). When the grantor of an annuity becomes bankrupt, a policy on his life, taken out by the grantee, will be directed to be sold; the proceeds of the sale, after payment of expenses, to go "in payment to the grantee of what shall be due to him in respect of his payment for premiums and interest, and also in respect of the value of the said annuity, and the arrears thereof, as far as the

(*a*) *Burder* v. *Browning*, 1 Taunt. 522. See 5 Ves. 620, 623. Where the annuity is higher in consequence of the insurance, this is not usurious; *Holland* v. *Pelham*, Exch. June 8, 1831.

same will extend to pay and satisfy;" the grantee is then allowed to prove for the remainder under the commission (*b*).

Proof on policies, where the loss has not yet happened, may be made by the creditor holding the policy at the time of bankruptcy of the debtor: this was settled in *Cox* v. *Listard*, (before cited) (*c*).

The executor, and not the heir, (though the houses descend to the heir), is entitled to recover where the policy is made payable to one of his executors, administrators and assigns, which is the usual form (*d*). It is sometimes provided, by the deed of constitution of insurance companies, that policies shall be considered personal estate.

Where there is a partnership, and one of the partners is, under the articles of partnership, constituted sole owner of the building, and he takes out an insurance, and the house is burnt down; under a commission of bankruptcy against the partners, the money recovered under the policy is considered the separate estate of that partner (*e*).

Where a trader assigned to a creditor, as security for his debt, a contingent interest, limited on the event of his wife surviving her mother, and the creditor insured the life of the wife, and she died, and the husband subsequently became bankrupt; the creditor's proof, under the commission,

(*b*) *Tierney, ex parte*, 1 Mont. 78.
(*c*) Dougl. 166, note.
(*d*) *Mildmay* v. *Folgham*, 3 Ves. 472.
(*e*) *Ex parte Smith*, Buck. 149; 3 Mad. 63.

was limited to the difference between the sum recovered on the policy, and the full amount of his debt. The sums paid by him for premiums on the policy were also allowed in the account (*f*).

In a case where a debt was contracted by the bankrupt after the bankruptcy, and the creditor then took out a policy on the life of the bankrupt, and, on the life determining, recovered from the insurers, declaring in the action, on two counts, under the first as for an interest in himself, and under the second count as for an interest in the assignees, and he recovered on the second count, on an action by the assignees to recover from him the sum paid by the insurers, it was determined that the action was not maintainable by the assignees (*g*).

So there is no lien, for part of purchase-money unpaid, on a policy taken out by the purchaser of goods or houses (*h*). There is a case not yet reported where the mortgagee for a term dependant on a life, insured on that life to the amount of the mortgage-money, and recovered from the insurers, having previously entered into a further contract with the mortgagor for purchase of the fee at a certain price, with a proviso that the amount of the life-interest should be deducted from the price of the fee simple. It was decreed by the Vice-chancellor that the mortgagee should

(*f*) *Ex parte Andrews*, 1 Madd. 574.

(*g*) *Grant* v. *Atkinson*, 4 Taunt. 380.

(*h*) *Neale* v. *Reid*, 1 B. &. C. 661 ; 3 Dowl. & Ryl. 158, S. C. See 2 Stark. 401, 402.

have the deduction of the value of the life-interest, and should also retain the sum which he had recovered from the insurers under his policy taken out in that life, and that the vendors were not entitled to any benefit under such policy (*i*).

A promise to procure an insurance to be effected, makes the party promising liable in case of loss without an insurance having been effected according to the promise (*k*).

Where it is among the conditions of sale of a life-interest that the life is insurable, any concealment of material circumstances will make void the contract. In this case the life was described in the particulars of sale, and at the sale, as "very healthy, aged 48," and "healthy gentleman, aged 48, whose life is insurable." The auctioneer stated "insurance to be guaranteed at five guineas per cent." Something, it was alleged, was also said about an allowance by way of abatement in the purchase-money would be made if the insurance offices required a larger premium than five guineas, but this was afterwards taken out of the bill. Now it was proved that about four guineas was the usual premium on a good life of the age of 48; and it was argued for the vendors, that the stating that five guineas was the expected premium operated as notice to the purchasers that the life was not a good life. The defendants admitted that they

(*i*) *Watson* v. *Bruton*, Sitt. after Hil. Term, 1830.

(*k*) *Wilkinson* v. *Coverdale*, 1 Esp. Rep. 75. *Wallace* v. *Telfair*, 2 T. R. 188, n.

knew that five guineas was greater than the premium for a healthy life, but denied that this was notice to them of the life being unhealthy. The Court decreed that there was not notice to the purchasers as to the life being other than a good life, and dismissed the bill for enforcing specific performance of the purchase. In this case one surgeon stated the life was good in June 1828, but he did not know as to the state of health in January 1829: another medical man stated that it was good except as to rheumatism in Nov. 1828; other evidence went to prove, that except rheumatism it was a good life in April 1829; but it was proved that previously the party had had cow-pox and the gout. He had a paralytic stroke in May; having been refused on an application to insure in the Guardian and the Equitable on the 2d April. The sale was in November 1828 (*l*).

A carrier is not liable for goods burned in his warehouse where they were left for the owners to take away when they pleased, being left there after notice of their arrival in the carrier's custody to the owners. One of these carriers having paid the loss, he was not entitled to recover from his partners any portion of the amount, or to make it a partnership transaction (*m*).

With regard to the relations of vendor and purchaser where the property is destroyed by perils which are the subject of insurance, see Sugden's

(*l*) *Brealey* v. *Collins*, 1 Young, Exch. 317.

(*m*) *Wilkinson* v. *Coverdale*, 1 Esp. Rep. 75

Vendor and Purchaser, cap. 5, sec. 2. It is shown, that by the rule in equity the loss falls on the purchaser after the agreement to purchase has been settled, but not where the purchaser has made objections to the title, which remain unanswered at the time of the loss. Where the sale is before a Master in Chancery the rule is different, the loss falls on the vendor and not on the purchaser, until the report of the sale has been absolutely confirmed, even though an order *nisi* to confirm the report should have passed (*n*).

In the same section the rule is stated as to the case of an annuity on the life of vendor, granted by purchaser as consideration for the sale to him; here, if vendor die immediately, the loss falls on that party, not on purchaser. Whether an agreement to take a house and pay rent can be enforced where the premises are consumed by fire before the day appointed for the defendant's entry, is doubtful (*o*). A covenant for quiet enjoyment

(*n*) The cases cited are 2 vol. Coll. of Decisions, p. 56. *Paine* v. *Meller*, 6 Ves. 349; reversing *Stent* v. *Bailey*, 2 P. Wms. 220; and *White* v. *Nutt*, 1 P. Wms. 62. References are there given also to 2 Vern. 280, and to *Poole* v. *Shergold*, 2 Bro. C. C. 118. *Revell* v. *Hussey*, 2 Ball & Beal, 280. *Harford* v. *Purrier*, 1 Madd. 532.

(*o*) *Phillipson* v. *Leigh*, Esp. Rep. 398. *Paradise* v. *Jane*, Aleyne, 26. *Monk* v. *Cooper*, 2 Str. 763; 2 Ld. Raym. 1477. *Belfour* v. *Weston*, 1 T. R. 310. *Doe* d. *Ellis* v. *Sandham*, Id. 705. 710. *Cutter* v. *Powell*, 6 T. R. 323. *Hare* v. *Groves*, 3 Anstr. 687. *Baker* v. *Holtpzaffell*, 4 Taunt. 45; 18 Ves. 116. The above are affirmative. Contra *Brown* v.

does not extend to oblige lessor to rebuild in case of fire (*p*).

If a lessor covenant in a lease with his lessee to rebuild in case of fire, he is only bound to replace the premises as they were at the time of the lease, not with the additions made by the tenant (*q*). A lessee who covenants generally to repair, is bound to rebuild it if it be burned by accidental fire, by lightning, or by the King's enemies (*r*). Tenant for years is bound to rebuild in case of fire, though no covenant (*s*). So where one holds over after his lease expired, though he hold over under a verbal agreement only, he is bound by the covenant to repair contained in the lease, and therefore must rebuild in case of fire (*t*). If there be a covenant to repair, it is not limited to the sum mentioned in a subsequent covenant settling the amount to which insurance is to be effected (*u*). A covenant to insure premises within the bills of

Quiliter, Ambler, 619. *Steele* v. *Wright*, 1 T. R. 708 (cited). See also *Weighall* v. *Waters*, 6 T. R. 488; 2 Anstr. 575.

(*p*) *Brown* v. *Quiliter*, Ambl. 619, 620. See *Bayner* v. *Walker*, 3 Dow. P. C. 233.

(*q*) *Loader* v. *Kemp*, 2 C. & P. 375. *Quære* as to covenant of lessor to insure.

(*r*) *E. Chesterfield* v. *D. Bolton*, 2 Com. Rep. 627. *Bullock* v. *Domitt*, 6 T. R. 650; Dyer, 33; 2 Chit. Rep. 608. *Poole* v. *Archer*, 2 Show. 401. *Pym* v. *Blackburn*, 3 Ves. 34; Co. Litt. 37, a. n. 1.

(*s*) *Rooke* v. *Warth*, 1 Ves. 462.

(*t*) *Digby* v. *Atkinson*, 4 Camp. 275.

(*u*) Ibid.

mortality, as in 14 Geo. 3, c. 78, is a covenant running with the land (*x*). Where the lessor had insured previously to the lessee insuring, under a covenant that the lessee should insure to the amount of two-thirds of the value of the buildings, and in the joint names of the lessor and lessee: lessor claimed as for a forfeiture, the lessee not having insured in the joint names, but in his own name only: it was held that the lessor having done what would lead a reasonable and cautious man to conclude that he was doing all that was necessary as to insurance, could not recover for a forfeiture (*y*). The statute 6 Anne, c. 31, which restores the common law as it was before the Statute of Gloucester, viz. taking away the liability of tenants for damage by accidental fire, does not prevent the liability to rebuild under the covenant to repair; nor the liability to continue to pay rent though the premises are lying in ruins by accidental fire (*z*). But where accidents by fire are excepted, the covenant does not oblige lessee to rebuild (*a*): the lessor is not bound to rebuild (*b*). An injunction will not lie to stay an

(*x*) *Vernon* v. *Smith*, 5 Barn. & A. 1.

(*y*) *Doe* d. *Knight* v. *Rowe*, 1 Ry. & M. 343; 2 C. & P. 246.

(*z*) *Belfour* v. *Weston*, 1 T. R. 310. *Weighall* v. *Waters*, 6 T. R. 488. *Hare* v. *Groves*, 3 Anstr. 687.

(*a*) *Bullock* v. *Dommitt*, 6 T. R. 651; 2 Chit. Rep. 608. *Tempany* v. *Burnand*, 4 Camp. 20. *Brown* v. *Knile*, Brod. & B. 395; 5 Moore, 164.

(*b*) *Bayne* v. *Walker*, 3 Dow. P. C. 223.

action for payment of rent while the premises are lying waste after fire (*c*): even where there is an exception of accidents by fire in the covenant to repair, an injunction will not lie to an action for rent (*d*). Where the landlord is bound to repair, and the tenant, from sudden accident, is compelled to make repairs, he may set it off as money paid to the use of the landlord in an action for rent (*e*). A covenant to insure in "some sufficient insurance office" is not void for uncertainty, but means that the premises shall be insured in some office where such insurances are usually effected (*f*).

Where the lessee under a covenant to insure within the 15 days after expiration of the year allowed by the offices for taking out renewals of policies, payment was made subsequently; though the acceptance by the office was expressed to be "as reviving the insurance from the former year," the covenant was held broken (*g*). Where the lessee died, and his representatives had an

(*c*) *Belfour* v. *Weston*. *Baker* v. *Holtzapffell*, 4 Taunt. 45. *Hare* v. *Groves*, 3 Anst. 687.

(*d*) *Holtzapffell* v. *Baker*, 4 Taunt. 45. *Hare* v. *Groves*, 3 Anstr. 687. But where the lessor has insured, and recovered from the insurers, an injunction until the house is rebuilt will lie to an action for rent; *Brown* v. *Quiliter*, Ambl. 619, 620. Where there is no exception of accidents by fire, an injunction will not lie; *Leeds* v. *Chatham*, 1 Sim. 149.

(*e*) *Waters* v. *Weighall*, 2 Anstr. 575.

(*f*) *Doe* d. *Pitt* v. *Shewinn*, 3 Camp. 134.

(*g*) Ibid.

indorsement of their *interest* made on the policy, as required by the forms of the office, and accepted by them, but it was not made till after the three months allowed for that purpose, this was held to be no breach of the covenant (*h*). Equity will not relieve against a forfeiture for a breach of covenant to insure in a lease (*i*).

The Building Act (14 Geo. 3, c. 78, s. 83) provides, in respect of buildings within the weekly bills of mortality, that " It may be lawful for the directors and governors of the several insurance offices, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burned down, demolished or damaged by fire, or upon any grounds of suspicion that the owner, occupier, or any other person, &c. who shall have insured such house or other building, have been guilty of fraud, or of wilfully setting their house or other building on fire, to cause the insurance money to be laid out and expended, as far as the same will go, toward rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, &c., unless the party claiming such insurance money shall, within 60 days next after his claim is adjusted, give sufficient security to the governors or directors of the insurance-office where such house or houses or other buildings are

(*h*) *Doe* d. *Pitt* v. *Laing*, 4 Camp. 73.

(*i*) *Rolfe* v. *Harris*, 2 Price, 206, *n*. *Reynolds* v. *Pitt*, ib. 212, *n*.; 19 Ves. 134. *White* v. *Warner*, 2 Meriv. 459.

insured, that the same insurance-money shall be in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors and directors."

CHAP. II.

INSURANCE COMPANIES: AGENTS.

INSURANCE being generally conducted by extensive partnerships or companies, it becomes important to inquire into the leading duties and liabilities of partners, so far as the duties and liabilities of partners generally enter into inquiries relative to the contract of insurance (*k*). Partners are jointly and severally liable for each other's acts concerning the partnership: at law, they must sue and be sued collectively, without the omission of any, even a dormant partner (*l*): in equity, a

(*k*) It will not be necessary to consider the effect of the statute 6 Geo. 1, the ("Bubble Act") on insurance companies, since the repealing statute of 6 Geo. 4, cap. 91, has left joint stock companies as at common law. By the common law of England, partnerships, with liabilities limited to the capital subscribed, and in proportion to the subscription of each partner, are not allowed: though such restricted partnership liabilities are, according to the law of several of the Continental States of Europe. See H. Bl. 1. 37; they are allowed to certain companies in Ireland under 21 & 22 Geo. 3, c. 46.

(*l*) *Mitchell* v. *Tarbutt*, 5 D. & E. 649; see 4 B. & A. 374 5 Taunt. 609.

part may sue in the name of the rest, and part may be sued in the name of the rest, where the partnership consists of an inconvenient number of individuals. (*See* Mitford's Pleadings.) But partners cannot sue each other at all at law nor equity, whether the cause of suit be a partnership transaction, or whether a private contract apart from the joint trading, have raised a particular obligation between one or more of the partners and the rest (*m*). Most of the insurance companies are empowered by particular Acts of Parliament to appear in suits in all courts of justice through their chief officer or officers, as specified in the Act. There is a Standing Order of the House of Lords in this matter, requiring the investment of three-fourths of the capital in the public funds pending the passing of the enabling act for which they are applying. There are exceptions to the general rules here given. Any member of a firm may be sued by the others, in equity, if a general balance of accounts between the firm and such individual have been struck, or if the bill pray also a dissolution of the partnership (*n*). Also, if he have fraudulently or improperly possessed

(*m*) In equity, if the bill do not pray a dissolution of partnership also, it will not be entertained. *Forman* v. *Homfray*, 2 V. & B. 329. *Goodman* v. *Whitcombe*, 1 J. & W. 589; see Ibid, 594.

(*n*) See Gow on Partnership, p. 84. *Foster* v. *Allanson*, 2 D. & E. 479. But a bill for an account, without praying a dissolution, may be maintained, 4 Madd. 143; 1 Sim. & Stu. 124.

himself of partnership property, relief will be given to the partnership in equity against the individual member of the firm (*o*).

The courts of law have relaxed the rule with regard to suits between the company and third parties. In the case of *Andrews* v. *Ellison* (*p*), the defendants pleaded, against a claimant under a policy, that they, the subscribing directors, were not bound; a *rule nisi* was obtained for the arrest of judgment upon a verdict against the defendants. The Court decreed that judgment should not be arrested, the subscribing directors having "stipulated and declared" that they would pay out of the funds of the society. In a recent case, *Lefevre* v. *Boyle* (*q*), on a rule for a new trial, it was decreed that the plaintiffs were sufficient parties to the action, they having subscribed and *sealed* the policy as directors and trustees.

As to commissions of bankruptcy, the case *Ex parte Guthrie in re Savery* is an authority that the officer of the society appointed by an Act of Parliament to sue cannot take out a commission of bankruptcy. But even under the commission of one who is a shareholder, the partnership are

(*o*) *Foster* v. *Donald*, 1 Jac. & W. 252.

(*p*) 6 Moore, 199; where the force of the words of the agreement is distinguished from that of a case where the parties subscribing a policy "do order, direct and appoint the directors, &c. to pay," which words did not raise an agreement to pay on the part of the subscribers.

(*q*) K. B. Trin. Term, 1832.

allowed to prove the debts of the society: this was the case under the bankruptcy of Fauntleroy, who had the accounts of the Stratford Club, of which he was a member, at his bank.

In the action for recovering premiums paid on a policy, the parties to be sued are the principals, and not the agents who received the money (*q*). But there are exceptions to this rule. If the principals are an extensive association, yet are not corporate bodies, nor capable of being sued as corporate bodies, or otherwise, the action may be brought against the agent (*r*). If the agent have obtained possession of the money illegally (*s*): if the money were paid to the agent without expressing that it was so paid for the benefit of the principal (*t*): in either of these cases the agent may be sued. If, after the money was paid to the agent, but before he had paid it over to his principal, the party paying gave notice to rescind the contract and repay the money, though he has paid it to the principal the agent may be sued (*u*). In all these cases the agent may be sued if the money be not yet paid over to his principal by the agent: the agent may be sued although he

(*q*) *Sadler* v. *Evans*, 4 Burr. 1984. *Greenway* v. *Hurd*, 4 T. R. 553. *Horsfall* v. *Handley*, 2 Moore, (C. P.) 5; 8 Taunt. 136, S. C.

(*r*) *Miller* v. *Avis*, B. R. Sitt. after M. T. 1801.

(*s*) *Townson* v. *Willson*, 1 Camp. N. P. 396.

(*t*) *Snowdon* v. *Davis*, 1 Taunt. 359.

(*u*) *Edwards* v. *Hodding*, 5 Taunt. 815.

may have placed the money to the credit of his principal in his accounts (*x*).

Any agent of a company can make a valid indorsement altering a policy, if such is the custom of the company, and if they do not refuse at the time (*y*). When an agent is bankrupt, and a claim under a policy has been made through him, the office cannot set off this with a debt for amount of premiums in his hands (*z*). By the stat. 57 Geo. 3, c. 117, "No extent in aid shall be issued on any bond given by any person or persons as a surety or sureties for the paying or accounting for any duties which may become due to His Majesty from any body or society, whether incorporated or otherwise, carrying on the business of insurance against any risks, either of fire or of any other kind whatever" (*a*). Agents of insurance companies are therefore the objects of an extent in chief taken out by the Stamp-office, and not of an extent in aid taken out by insurers. Insurance companies are not allowed to make "re-assurance," *i. e.* to insure the risks of their policies with another insurance company, unless such first insurers be insolvent, become a bankrupt (or, in case of single insurers, in case they die, when their representatives may make

(*x*) *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 3 M. & S. 344.

(*y*) *Borklebank* v. *Sugrue*, 5 Carr. & P. 21.

(*z*) *Scott* v. *Irving*, B. & Ald. 1, 605.

(*a*) *Rex* v. *Wrangham*, Exch. May 2, 1831.

re-assurance) (*b*). In case the insured become bankrupt, and the assignees claim for a loss happened subsequently to the bankruptcy, the insurers may set off premiums due under the policy against the claim of the assignees (*c*).

The companies and their agents are accountants to the Crown for duties paid on policies (*d*), by stat. 55 Geo. 3, c. 184. By the above statute the receipts of the insurers to the insured are not liable to stamp in respect of the amount of duty, but only of premium contained in them. If there be several insurances in different insurance offices on the same property, all are to contribute proportionally, and no more can be recovered on the several insurances than the amount of the loss (*e*).

(*b*) 19 Geo. 2, c. 37.

(*c*) *Graham* v. *Russell*, 5 M. & Sel. 498; 2 Mont. 561.

(*d*) Public hospitals, and property in any foreign friendly State, are exempted from duty.

(*e*) *Newby* v. *Read*, 1 Bla. 416. *Rogers* v. *Davis*, Beawes Lex Merc. 242; Park Ins. *Davies* v. *Gilbert*, Ib.

PART III.

OF THE PROCEEDINGS ON POLICIES OF INSURANCE.

An usual clause of policies is, that matters in dispute shall be referred to arbitration. In whatever form this clause is put, it will not take away the jurisdiction of the ordinary courts of law in the matter. But if a reference be pending, this may be pleaded in bar to an action (*a*). Where the amount only is in dispute the agreement to refer may be enforced (*b*). The Courts of Equity have jurisdiction in this as in all other contracts where there is fraud, mistake or accident (*c*); but equity will not make a decree where the parol averments to alter the contract are contradictory (*d*). Equity has also jurisdiction in aid of the Common Law Courts, as to direct a commission to take the evidence of witnesses abroad (*e*): also where the policy was taken out by a trustee, and the trustee will not allow his name to be used in an action at law (*f*).

(*a*) *Kill* v. *Hollister*, 1 Wils. 129.

(*b*) *Thompson* v. *Charnock*, 8 T. R. 139.

(*c*) *Henkle* v. *Royal Exchange*, 1 Ves. sen. 318. *Motteux* v. *London Assur.*, 1 Atk. 545.

(*d*) *Henkle* v. *Royal Exchange*, 1 Ves. sen. 317. See 1 Ves. jun. 57; 3 Bro. 27; 5 Ves. 593; 6 Ves. 328.

(*e*) *Chitty* v. *Selwin*, 2 Atk. 359.

(*f*) 1 Atk. 547; 2 Atk. 359.

But the remedy is at common law, except under the above circumstances (*g*).

A bill of interpleader will lie where both landlord and tenant sue the insurance office (*h*). An action at common law may be brought in the name of the party or parties whose names are in the policy, or of one of them where one is only interested (*i*). It is sufficient that the action be brought in the name of the party to the policy, though others are jointly interested (*k*), and though he be only agent (*l*). The action should not be brought against an agent, though he have subscribed the policy, but against the principal. An insurer cannot be held to bail at the suit of the insured, unless the damages have been liquidated by an adjustment of the account between the parties (*m*).

The remedy is assumpsit if the policy is not under seal, or debt or covenant, if under seal: it is a *special assumpsit*, with counts charging generally (which are always necessary for the recovery of premiums). If the action is only to recover premiums, it will be the general *indebitatus as-*

(*g*) *Dr. Ghetoff* v. *London Assur.*, 4 Bro. P. C. 496. or 525.

(*h*) *Paris* v. *Gilham*; *Jones* v. *Paris*, Coop. 56.

(*i*) *Marsh* v. *Robinson*, 4 Esp. 98.

(*k*) *Cosack* v. *Wells*, 1 Chit. Plead. p. 5, (4 edn.)

(*l*) *Parker* v. *Beasley*, 2 M. & S. 426. *Hagedorn* v. *Oliverson*, Ib. 485; 2 B. & A. 314; 16 East, 141. 341; 2 Bos. & P. 155, n.

(*m*) *Lear* v. *Heath*, 5 Taunt. 201; 1 Marsh, 19; Ib. 21; 1 M. & S. 494, 499; 5 M. & S. 439.

sumpsit for money had and received to his use. In all cases it is proper, after the count for *special assumpsit*, to add general counts, in order that if the contract is declared void, the premiums may be recovered (*n*). When the action is brought by the assurer for recovering back the indemnity on discovery of fraud, or the like, the action is the common *indebitatus assumpsit* for money had and received (*o*).

In the action of the insured, the declaration sets forth, 1st, The policy; 2d, The defendant's subscription to the policy; 3d, The thing insured; 4th, The name or names of the parties interested; 5th, The cause of loss; 6th, The amount of loss. A particular form of declaration is allowed by statute to some of the insurance offices; which, however, is not in practice resorted to.

1st. The policy must be described according to its true effect; any material variance will be fatal. It is material to state the regulations indorsed on the policy forming the conditions of the insurance, also all indorsements altering the policy after it was executed (*p*). It is not material to state that the instrument was stamped, nor that the parties interested were described in the policy, for though their names must be inserted according to the statute, yet that not being neces-

(*n*) Selwin N. P. " Assumpsit."

(*o*) 2 Marsh, 740; 2 East, 469; *Herbert* v. *Champion*, 1 Camp. 134.

(*p*) *Strong* v. *Hervey*, 3 Bing. 304; 11 East, 633; 4 Camp. 20; 1 Stark. 294; 7 Taunt. 385; 2 B. & C. 20.

sary at common law, need not be stated in pleading. Subsequent counts may refer to the first, describing the policy as of the same tenor or effect. It is necessary in the first count to state the policy in its exact terms, omitting clauses which do not apply to the case (*q*). When the policy was made on the part of the insured through an agent, it may be stated as made by the principal (*r*).

2d. A general averment that the defendant became an insurer on the premises mentioned in the policy is sufficient. The consideration must be stated to be the premiums mentioned in the policy renewed annually (*s*).

3d. It is sufficient to state generally that the life or goods as mentioned in the policy are the goods or life on which the loss has happened.

4th. In the averment of interest, if the party be described as interested in a part, when his interest extends to the entirety, this is sufficient (*t*): an averment that he is interested in the whole, when his interest only extends to a part, is sufficient (*u*). But where two are jointly interested, and one is stated to be interested in one count and the other

(*q*) *Robinson* v. *Tobin*, 1 Stark. Rep. 336.

(*r*) *Bell* v. *Janson*, 1 M. & S. 201. 204; 2 Salk. 519. *Case* v. *Barber*, 1 Ray. 450; 1 Saund. 167.

(*s*) 2 Marsh, 687. See 2 Marsh, 686.

(*t*) But if he recover for one third, he cannot afterwards bring an action for the two thirds remaining of his interest.

(*u*) *Page* v. *Fry*, 2 Bos. & Pul. 240; 3 Esp. R. 185; but this decision is questioned. See also *Marsh* v. *Robinson*, 4 Esp. R. 98.

in another count, this variance is fatal (*x*). The names of a firm need not be severally set forth, it is sufficiently described as the firm of *E. & Co.* The interest may have been at any time during the period of the risk; it is not necessary it should have existed when the policy was taken out (*y*). An averment of interest at the time of the policy being effected is not material, and if alleged need not be proved; it is sufficient to prove that the interest was vested during the period of the risk, and is now subsisting (*z*). A payment of money into Court precludes the defendant from objecting that the averment of interest was not substantiated (*a*).

5th. The cause of loss should be correctly stated, detailing the facts.

6th. A partial loss may be given in evidence under an allegation of a total loss. "This is an action upon the case, which is a liberal action, and the plaintiff may recover less than the ground of his declaration supports, though not more" (*b*).

When an adjustment has taken place it need not be declared upon specially, but may be given in evidence as an admission upon the usual declaration, or upon an account stated (*c*).

(*x*) *Cohen* v. *Hannam*, 5 Taunt. 101; *Bill* v. *Ansley*, 16 East, 411.

(*y*) *Wright and others* v. *Welbie*, 1 Chit. Rep. 49. Vide *Mellish* v. *Bell*, 15 East, 4.

(*z*) *Rhind* v. *Wilkinson*, 2 Taunt. 237.

(*a*) 16 East, 146.

(*b*) *Gardiner* v. *Crossdale*, 2 Burr. 904; Bl. R. 198.

(*c*) Marsh Ins. 644.

The *venue* may be laid in any county, and cannot be changed if the cause of action arise out of the realm. But the *venue* may be changed before plea in abatement or bar, upon the usual rule (except in case the policy be under seal) upon affidavit that the cause of action arose in that other county. If material evidence arise in two counties, the *venue* may be laid in either; and if it be laid in a third county the Courts will not change it. On special grounds the Court will change the *venue* in all cases (*d*).

In actions of assumpsit the *plea* of the general issue enables the defendant to avail himself of most matters of defence. But disabilities, the Statute of Limitations, a tender, bankruptcy of defendant, and sometimes, where material, the bankruptcy of the plaintiff, also "set off," must be severally pleaded specially. Also recovery under another policy will be a bar to an action respecting the insurance on the same interest (*e*).

Production of the policy, with adjustment, is not proof of payment (*f*). When the policy is by deed under seal, and the action consequently debt or covenant, there is, strictly speaking, no general issue. But a general plea is allowed by statute to some of the insurance offices.

Payment of Money into Court (*g*). Money may

(*d*) Sid. 625.

(*e*) See Selwin Nisi Pr. "Assumpsit."

(*f*) *Adams* v. *Saunders*, 1 Mo. & Mal. 373.

(*g*) This is under stat. 19 Geo. 2, c. 37, s. 7. See *Solomon* v. *Bewicke*, 2 Taunt. 317.

be paid into court upon the whole declaration, or upon one or more of the counts contained in it. When the assured are only entitled to recover the premiums, money should be paid in on that count. A payment of money into court generally is an admission of the policy stated in the special counts, unless the plaintiff has by his conduct induced the defendant to suppose that the question to be tried was a question of fraud (*h*). And a payment into court is not an admission beyond the extent of the sum paid in, and the admission will be strictly limited to the very objects of the policy, and the very averments in conformity with those objects contained in the declaration. Where the demand is illegal on the face of it, the payment into court is no admission. So the payment into court does not prevent a defence of illegality, or the Statute of Limitations (*i*).

As to Evidence.—1st, In proof of the contract, and the subscribing parties to, and the consideration of, the policy. 2d, The proof of interest in the thing or life insured. 3d, Existence of the thing insured at the time when the risk commenced. 4th, Compliance with warranties. 5th, Proof of loss. 6th, Evidence for the defendant. 7th, Competency of the witnesses.

The policy is the only evidence that the insurance

(*h*) *Muller* v. *Hartshorne*, 3 Bos. & Pul. 556.

(*i*) *Cox* v. *Parry*, 1 T. R. 464; 1 Bos. & Pul. 264; 2 Marsh Ins. 703; *Long* v. *Greville*, 3 B. & C. 10.

was effected (*j*). The signature of the defendant subscribing the policy should be proved; though this is generally admitted. A proper stamp must have continued on the policy from the time it was executed inclusive (*k*). When the policy has been signed by an agent for the insurers, proof of his agency is required (*l*). The payment of the premiums must be proved. Parol agreements to contradict the terms of the policy will not be allowed to be given in evidence; but an agent who took out the policy may give in evidence whatever he did, said or wrote, relative to the contract, because such is proof of the contract. Indorsements as to change of residence of the insured are part of the policy (*m*).

2d. The interest or ownership of the insured in the goods or thing insured must be made out by deeds or writings, invoices and the like, and the value of the goods or amount of the interest must be made out.

(*j*) *Reculist's case*, 2 Leach Cro. Ca. 811. *Weston* v. *Emes*, 1 Taunt. 153.

(*k*) 35 Geo. 3, c. 136, s. 2. *Rapp* v. *Allnutt*, 15 East, 601. See 3 Camp. 103. Exception from stamp duty. Label, slip or memorandum of heads of insurance of Royal Exchange or London Assurance, ib. tit. "Agreement." But in *Rex* v. *Gilson*, 1 Taunt. 25. under an insurance with the London Assurance Society, an indorsement on the policy, relative to a change in the situation of the property, being without a stamp, was not received in evidence.

(*l*) *Neal* v. *Irving*, 1 Esp. Rep. 60.; *Haughton* v. *Ewbank*, 4 Camp. 88.

(*m*) 1 Taunt. 95. See *Routledge* v *Burrell*, 1 H. Bl. 254.

3d & 4th. The existence of the thing according to the warranties at the time of the risk commencing must be clearly proved.

5th. With regard to proof of loss. The certificate of burial in case of life policy; the certificate of *churchwardens* (*n*), where required by the terms of the policy in fire insurance, must be produced. Sometimes a death will be presumed where the ship in which a party sailed has not been heard of, and, from circumstances, appears to have been overtaken by a storm in which other ships perished. The loss must be proved to have happened by the means and in the manner stated in the declaration, otherwise the defendants would not know what case they have to meet.

As to the evidence for the insurers: this will be to make out a case of concealment, want of interest, non-compliance with warranties, and the like. What was material to have been communicated by the insured to the insurers is a question for a jury: fraud is an inference of law from the fact of materiality, if found. Production of the policy, with memorandum of adjustment, is not proof of payment (*o*).

With regard to the competency of witnesses: The general rules will prevail as to the necessity of the witness having no interest in the event of

(*n*) *Oldham* v. *Bewicke*, 6 T. R. 722; *Routledge* v. *Burrell*, 1 H. Bl. 254; *Woosley* v. *Wood*, 2 H. Bl. 574; and 6 T. R. 110.

(*o*) *Adams* v. *Sanders*, 1 Mo. & Mal. 373.

the issue, or having abandoned or released all such interest. The declaration of the wife as to her state of health was allowed as evidence in an action by the husband on a policy on her life (*p*). The plaintiff cannot recover interest upon the sum insured. (*q*)

As to proceedings in bankruptcy: Since it is rare that a commission of bankruptcy issues against the insurers, we shall not consider that case (*r*). Under a commission issued against the insured, if the assignees sue upon a loss happening after the bankruptcy, the insurer may set off the amount of premiums due upon the policy, (see page 90.)

An action against the hundred, in case of incendiarism, may be brought by the insurers, but must be in the name of the insured (*s*).

In action by the insurers against the insured, for an attempt to defraud the insurers, proof of wilful fire is full evidence of the intent to defraud (*t*).

Finally, the principle of recovery back of sums paid by insurers upon improper claims (noticed in a former page, 18) must be here again insisted

(*p*) *Aveson* v. *Lord Kinnaird*, 2 Sim. & Stu. 606. S. C.

(*q*) *Higgins* v. *Sargent*, 2 B. & C. 248.

(*r*) Where the insurer is only a trustee, his bankruptcy is not in practice made an objection to his being named plaintiff in the action. *Duckett* v. *Williams*, ante; and see before, p. 88.

(*s*) 3 Dougl. 61. *Mason* v. *Sainsbury*, 2 Marsh Ins. 796, 3d edition.

(*t*) See *ante*, Cap. VI.

on. The principle of recovery by the insurers is not restricted to the case of fraudulent claims as is sometimes supposed. If a claim be settled, by the insurers paying the amount under circumstances of mistake, mistake of *facts* not of the *law*, which mistake could only have been prevented by the disclosure, at the time of settling the claim, of facts which were not disclosed, whether by fraud or in ignorance on the part of the insured or of any other persons with whom knowledge of the fact rested, from this state of circumstances will result a rule that the amount paid for such claim shall be recovered by the insurers (*u*). It would be hard, indeed, were the rule otherwise. The courts of law will set aside the penalty of a bond, and look at the bond as an agreement, with a view to discover what was the consideration for the stipulation of payment, and will measure according to the consideration the amount due on such bond; in other words, will ascertain the damages incurred by the breach of the condition, and alter the amount of the penal sum accordingly (*x*). But as to the notion that the parties to a contract cannot be put in the situation they were intended to be placed because the money has been paid, this rests on no authority, and, as it appears,

(*u*) *Forrester* v. *Pigou*, 3 Camp. 380; *Chatfield* v. *Paxton*, 2 East, 471; see 5 Taunt. 155; Marsh (Insurance 2, p. 740) is of opinion that the money ought to be recovered, though it had been paid to the insured under process of law; but this authority only goes to the case of a fraud.

(*x*) See *Evans'* Statutes; Notes on 8 & 9 Will. 3, c. 11.

bears but lightly upon reason. Payment of purchase money is not the execution of the contract as between vendor and purchaser of land; the purchase money may be still recovered in case of failure of consideration by reason of incumbrances on the estate, &c. Again, it is not every failure of consideration which will occasion a return of the purchase money. If the house be destroyed by fire or tempest, or the life drop, in the respective cases of purchase of a house or of a life estate, the purchase money is absolutely due, must be paid, and cannot be recovered. There the failure of consideration does not arise from any act or omission of the parties. The rule as to the insurer lies between the foregoing points. So that where the consideration fails not by accident nor by the act or omission of the insurer, he is entitled to restitution. But he has paid the claim: but payment is not the execution or close of every contract; and failure of the consideration is a good ground for the action of assumpsit, and that this *assumpsit* applies to insurance we have just quoted authorities.

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