HORWITZ, HARRY v EQUITABLE MUTUAL INSURANCE COMPANY MARCH 1867 COUNTY OF ST. LOUIS
586/5

OLD AFFIRMED
661/14

INVOLVED:
- INSURANCE - DOUBLE INSURANCE

OPINION: P. 557 ff. REPORTS, VOL 40.

1.

State of Missouri
County of St Louis } So Be it Remembered
that heretofore to wit: on the Thirteenth day of
January A.D. Eighteen Hundred and Sixty Six
there was filed in the Office of the Clerk of the
Circuit Court within and for the County aforesaid
a Petition in the words and figures following to wit:

Petition

Mary Horwitz Plaintiff
vs
The Equitable Mutual Insurance
Company Defendant } In the Circuit Court St Louis County

Plaintiff states that on the 25th day of January
A.D. 1865 and for a long time before defendant
was, ever since has been & still is a corporation duly
incorporated by the Laws of this State, That plain-
tiff was then & up to and at the time of the fire
and loss hereafter mentioned was the owner and
possessed of a Stock of Domestic and foreign
Liquors and that by its certain policy of Insurance
hereto annexed and made a part of this petition
executed by it on said 25th day of January A.D.
1865 and numbered 237, in consideration of
Thirty seven Dollars and fifty cents paid to it by
plaintiff defendant did insure plaintiff against
loss or damage by fire to the amount of Five Thou-
sand Dollars on said stock of Domestic and
foreign Liquors which was contained in a three story
brick house Number 34 South Main street,

West side between Walnut & Elm streets in Block Number fifty eight of the City of St Louis Missouri for six months from said 25th day of January and plaintiff states that afterwards, to wit: on the fourth day of July A.D. 1865 while said policy was in full force the said house in which said property was contained and said Stock of liquors took fire and said Stock of Domestic & foreign Liquors was then burned and greatly injured and thereby there was loss and damage thereto by fire to the amount of Twenty five Thousand Dollars - and that he gave due notice to defendant of said fire, loss and damage and duly furnished to it proofs thereof and of plaintiffs interest in said property and in all things complied with the terms & conditions of said insurance and requested & demanded of defendant the adjustment of said loss and damage and payment of the amount so insured by it, but it wrongfully refused to adjust or settle said loss or to pay the amount of its said insurance or any part thereof - Plaintiff states that at the time of defendant agreed to insure said property & at the time it did so insure it and made said policy there was insurance thereon by the Phoenix Insurance Company by its two certain policies to the amount of four thousand five Hundred Dollars which policies were in the hands & possession of defendant & its officers & agents and known to

3. it, That plaintiff applied to defendant by its officers & agents for ten thousand dollars further insurance on said property, that defendant agreed to further insure the same to the amount of Five thousand Dollars and that plaintiff should be further insured therein, the remaining five thousand dollars of additional insurance by some other insurance Company, & its Agent undertook with its consent to procure the same for plaintiff and while said additional Five Thousand Dollars of further insurance was being procured by its Agent with the full knowledge and consent of defendant, it made & delivered its said policy to plaintiff it and its agents & officers well knowing & agreeing that plaintiff should procure said five thousand Dollars of other insurance on said property by another Insurance Company, and with full knowledge of all of said facts by defendant and its consent & agreement thereto defendant made & delivered its said policy and received the said premium for its insurance, and in said policy it misdescribed said insurance of the Phoenix Insurance Company by describing it as insurance of five thousand Dollars on said property, whereas it was but four thousand five Hundred Dollars on said property and the policies were in defendants possession & known to it, and in defendants said policy as a part of the printed portion thereof was the follow-

ing proviso or condition: that in case the assured should have any other insurance against loss by fire on the property hereby insured not notified to defendant & mentioned in or endorsed on this policy, then this insurance shall be void and of no effect, and if assured or assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to said Company, and have the same endorsed on said policy, or have the same acknowledged in writing, said policy should cease and be of no further effect, and if any further insurance shall be made on said property which with the sums already insured should in the opinion of defendant amount to an over insurance defendant reserved to itself the right of cancelling said Policy by paying to plaintiff the unexpired premium pro rata & in case of any other insurance prior or subsequent plaintiff should not in case of loss or damage demand or recover of defendant any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount insured on said property — which printed proviso was not erased from said policy by defendant but which was unknown to plaintiff nor did he know that said printed proviso was in said policy. And said policy of defendant was delivered by it enclosed in an envelope to a Clerk and agent of plaintiff who did not open or read or see said policy

until after said fire & loss, nor did plaintiff or his agent know the contents or terms thereof until after said loss & relied wholly on defendant to make to plaintiff a proper policy it having full knowledge of all the facts — Plaintiff states that on the same day of the making & delivery of defendants policy after the same was done said other insurance for Five thousand Dollars on said property was obtained & effected for plaintiff from the Western Mutual Fire & Marine Insurance Company, by the agent of defendant with its consent, and defendant was forthwith duly notified thereof & consented thereto — and waived the said provisos & condition in said policy — And Plaintiff avers & charges that after said fire & loss & after due notice & proofs duly made & given, & when requested to adjust the loss & pay the amount of its insurance defendant wrongfully & corruptly refused to adjust or pay its loss upon the pretense that it was not properly notified of said insurance of the Western Mutual Fire & Marine Ins Company & did not consent thereto & did not endorse the same on its policy — for which reason alone it refused to pay plaintiff — all of which was a false & unjust pretence.

Plaintiff states that by reason of the premises he has been injured & sustained damage in the sum of Five Thousand Dollars & interest and for which he asks Judgment —

6.

Sharp & Broadhead Atty for Pltff

State of Missouri }
County of St Louis } ss Harry Horwitz pltff makes oath & states that he believes the foregoing petition & matters as therein stated are true.

Harry Horwitz

Subscribed and sworn to before me this 13th day of January 1866

Co. H. Hequembourg Justice of the Peace

Upon the same day the following Summons issued to wit:

Summons County of St Louis :ss. State of Missouri.

To the Sheriff of St Louis County - Greeting:

We command you to summon The Equitable Mutual Insurance Company to appear before the Judges of our Circuit Court, on the First day of the next Term thereof, to be held in the City of St Louis, within and for the County of St Louis, on the First Monday of February next, then and there to answer the complaint of Harry Horwitz as set forth in the annexed petition: and have you then and there this writ.

Witness, Frank A. H. Schneider, Clerk of our said Court, with the seal thereof hereto affixed at office in the City of Saint Louis, this 13th day of January in the year of our Lord, eighteen hundred and sixty six

seal

50¢ Rev Stamp

F. A. H. Schneider Clerk

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Sheriff's Return

Upon the back of said Summons is endorsed the following return of the Sheriff to wit:

Executed this writ in the County of St Louis on the sixteenth day of January 1866 by delivering a copy of the writ and petition as furnished by the Clerk to M. J. Kiun the Secretary in charge of the office of the Equitable Insurance Company the President being absent.

Fees $1.50

John C. Vogel Sheriff
By James C. Adams D.S.

And upon the 10th day of February A.D. 1866 the Demurrer to Petition was filed in the words and figures following to wit:

Demurrer to Pet.

Harry Horwitz Plaintiff
vs
The Equitable Mutual Insurance Company, Defendant

In the Circuit Court St Louis County
No 250 February T. 1866

Now comes the defendant by its attorney and demurs to the petition of plaintiff, because the same does not state facts sufficient to constitute a cause of action, in this, to wit:

1. It appears from the face of the petition that plaintiff had violated the conditions of the policy sued on, and that such violation caused the policy to cease and be of no effect. The statement of his case made in his petition shows that he has no right of action on the said policy, against defendant.

2. There is no allegation in said petition of

mistake or fraud on the part of the defendants in relation to the clause of the said policy set out in the petition concerning prior or subsequent insurance without the consent of defendant. The policy as it now appears is the true exposition of the contract and cannot be varied by any verbal agreements.

3. If there was any such agreement in relation to subsequent insurance, as stated in the petition, binding on the defendant, then the plaintiff must first fill his petition addressed to the equitable powers of this Court, and ask that the policy may be reformed so as to evidence the true conditions of the contract.

4. The said petition is uncertain and contradictory in that it alleges that defendants "agent undertook with its consent to procure the same (further insurance) for plaintiff and while said additional Five Thousand dollars of further insurance was being procured by its (defendants) agent with the full knowledge and consent of defendants, it made and delivered its said policy to plaintiff &c"; and afterwards alleges as follows to wit: "That on the same day of the making and delivery of defendants policy after the same was done, said other insurance for Five Thousand dollars on said property was obtained and effected from the Western Mutual Fire & Marine Insurance Company by the agent of defendant with its consent & defendant was further duly notified thereof and consented thereto".

9. Both allegations cannot be true.

Wm T. Mason p.d.

And afterwards to wit: on the 23d day of February A.D. 1866. the following proceedings were had to wit:

Demurrer Overruled

Harry Horwitz
vs
The Equitable Mutual Ins Co. } The Demurrer to the petition being submitted to the Court and the Court being fully advised of and concerning the premises doth order that the same be overruled—

And afterwards to wit: on the 3d day of March A.D. 1866 the following proceedings were had to wit:

Default

Harry Horwitz
vs
The Equitable Mutual Ins. Co } Now comes the plaintiff by his attorney; but the defendant failing to appear and plead further herein makes default, wherefore on motion of plaintiff it is ordered by the Court that the petition herein be taken against the defendants as confessed.

And Afterwards to wit: on the 24th day of March A.D. 1866 the following proceedings were had to wit:

Default Set aside.

Harry Horwitz
vs
The Equitable Mutual Ins Co } On motion of defendant it is ordered by the Court that the default heretofore entered herein be and the same is hereby set aside, and leave is given defendant to file an answer— Answer of defendant filed—

Which said Answer filed on the 24th day of March A.D. 1866 is in the words & figures following to wit.

Answer

Harry Horwitz Plaintiff
vs
The Equitable Mutual Insurance Company defendant

In the Circuit Court St Louis County No 250 February T 1866

Defendant, by its agent, in answer to the petition of plaintiff says, that it has not any knowledge or information sufficient to enable it, by its agents, to form a belief as to whether plaintiff suffered a loss and damage by fire, in burning and greatly injuring the stock of domestic and foreign liquors, to the amount of Twenty five thousand Dollars, as alleged in said petition. Defendant denies that it wrongfully refused to adjust or settle said loss or to pay the amount of its said insurance or any part thereof, as is alleged in said petition.

Defendant says that it is true that it agreed to further insure, beyond the insurance of the Phoenix Insurance Company mentioned in the said petition, the property as mentioned in its policy, to the amount of Five thousand Dollars but defendants emphatically denies that it agreed that plaintiff should be still further insured upon said property in some other insurance Company, or in any manner consented to the same, as alleged in the said petition and denies that its agent undertook with its consent to procure the said further insurance

11. for plaintiff; and denies that while said addition of Five Thousand dollars of further insurance was being procured, that it was done by its agent or with any knowledge or consent of defendant; or that it made and delivered its policy to plaintiff, it and its agents and officers well knowing and agreeing that plaintiff should procure said five Thousand dollars of other insurance on said property by another insurance Company - and denies that the said other insurance on said property was obtained by plaintiff, with a full knowledge of all the facts by defendant, or by its consent and agreement thereto, or that it made and delivered its said policy to plaintiff with any knowledge of said facts as alleged in said petition, or that it gave any permission to the plaintiff to procure any further insurance in any other insurance Company.

Defendant says that it is true, that the policy issued to plaintiff and which is annexed to and made a part of his petition, contains the printed proviso as set out in said petition: and that the same was not erased by defendant simply because it constituted and does now constitute a part of the agreement and conditions of said policy, as agreed to and accepted by the plaintiff; that plaintiffs assumed ignorance of the said proviso is only made by him to enable him to insinuate by innuendo that defendant took adventage of his ignorance and made and delivered to him a policy with

a condition not contemplated in the agreement between him and defendant.

Defendant denies that the plaintiff wholly relied it to make to plaintiff a proper policy, and says that there was no understanding, directly or indirectly, or any agreement directly or indirectly between plaintiff & defendant by which it could be inferred or understood that defendant was to issue a policy to plaintiff with the said section, quoted in the petition, erased.

Defendant denies that on the same day, of the making and delivery of defendants policy after the same was done, said other insurance for five thousand dollars on said property was obtained and effected for plaintiff from the Western Mutual Fire and Marine Insurance Company, by the agent of defendant with its consent, or that defendant was forthwith duly notified thereof or consented thereto, or that it waived the said proviso and condition in said policy, as is alleged in said petition.

Defendant denies that it wrongfully or corruptly refused to adjust or pay its loss upon the pretense that it was not properly notified of said insurance of the Western Mutual Fire and Marine Insurance Company, and did not endorse the same on its policy as is alleged in said petition; and denies that it has at any time set up any false and unjust pretense against the plaintiffs demand, but has refused and does now refuse to pay the same because the plaintiff violated the terms of said policy as hereinafter stated, as well as for a violation of the

condition of said policy mentioned in the petition, requiring the assured to give notice of any after insurance, made by him on the property and have the same endorsed on his policy.

Defendant denies that it is indebted in any manner to plaintiff for the sum of Five thousand Dollars, or any other sum; or that plaintiff is entitled to any judgment against defendant whatever.

Wherefore defendant having fully answered the petition of plaintiff prays to be discharged hence with his costs without day.

Mason & Conkis p.d.

Henry Pilkington, agent of defendant, makes oath and says he believes the above answer and the matters therein as stated, are true.

Henry Pilkington

Subscribed & sworn to before me this 19 day of March 1866 — F. A. H. Schneider Clk

And afterwards to wit: on the 18th day of May A.D. 1866 the following judgment was rendered in said cause to wit:

Judgment Harry Horwitz
vs
The Equitable Mutual Ins Co

Now at this day come the parties by their attorneys and waiving a jury submit this cause to the Court upon the pleadings and proof and the Court after hearing the same being fully advised in the premises finds the issues herein joined

in favor of the plaintiff and assesses his damages at the sum of five thousand one hundred and four Dollars. It is therefore considered by the Court that the plaintiff recover of the defendant the damages aforesaid as assessed together with his costs and charges herein expended and have execution therefor.

And upon the 23d day of May, 1866 the following proceedings were had to wit:

Mo for New Trial Overld

Harry Horwitz
vs
The Equitable Mutual Ins Co } The Court having heard and fully considered the defendants motion for a new trial herein, doth order that said motion be overruled.

And afterwards to wit: on the 29th day of May, 1866 the following proceedings were had to wit:

Appeal to Gen. Term

Harry Horwitz
vs
The Equitable Mutual Ins Co } On Motion of the defendant by its attorney, an appeal is allowed it to the General Term from the judgment herein rendered.

Bill of Exceptions filed —

Bill of Exceptions

Which said Bill of Exceptions is in the words & figures following to wit:

Harry Horwitz Plff
vs
The Equitable Mutual Insurance Company Deft } In the Circuit Court of St Louis County February Term 1866.

Be it remembered that this cause came

15. on to be heard upon the pleadings and proofs, on the 18 day of May, 1866, in Court Room No 2 and was heard by the Court sitting as a jury, both parties waiving a jury.

The plaintiff introduced as evidence the policy sued on and it was read.

(Which said policy is in the words and figures following to wit:)

Policy

$5000.00 Equitable No 237

Mutual Insurance Company of St Louis

By this Policy of Insurance, the Equitable Mutual Insurance Company, in consideration of Thirty Seven 50/100 Dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, Do Insure Mr. Horwitz against Loss or damage by Fire, to the amount of Five Thousand Dollars On Stock of Domestic and Foreign Liquors, said property is contained in a Three Story Brick House No 34 South Main St. West side between Walnut & Elm Strs. in Block No 58. City of St Louis Mo. "for 6 Months"

$5000.00 Allowed in Phoenix Ins. Co.

Reference being had to his .... Application of even Number herewith, filed in the Office of the Company, for a more particular description and as forming a part of this policy.

And the said Company, do hereby promise and agree to make good unto the said assured his executors, administrators and assigns, all such immediate loss or damage not exceeding in amount the sum insured, as shall

16.

happen by Fire to the property as above specified from the 25th day of January one thousand eight hundred and sixty Five at twelve O'clock at noon, unto the 25th day of July one thousand eight hundred and sixty..... at twelve O'clock at noon, the said loss or damage to be estimated according to the true and actual value of the property at the time same shall happen, and to be paid within ninety days after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy.

Provided, Always. And it is hereby declared, that this Company shall not be liable to make good any loss by theft, or any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, mob, or civil commotion, or of any military or usurped power.

And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this Company and mentioned in or indorsed upon this Policy, then this insurance shall be void and of no effect. And if the said assured, or..... assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this Company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this Policy shall cease and be of no further effect. And if any subsequent insurance shall be made upon the property hereby insured, which, with the sums or

17 sums already insured, should, in the opinion of the said Equitable Mutual Insurance Company, amount to an over insurance, said Company reserve to themselves the right of canceling this Policy, by paying to the insured the unexpired premium pro rata. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this Policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this Company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned property shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on, or exercising therein, any trade, business denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this Policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandize, in the same terms or conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this Company, in writing, and added to or indorsed upon this Policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these

presents shall cease and be of no force or effect.

And it is moreover declared, that this insurance is not intended to apply to or cover any books of account, written securities, deeds or other evidences of title to lands, nor to bonds, bills, notes or other evidences of debt, nor to money or bullion. And that this Policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

In Witness Whereof, the said Equitable Mutual Insurance Company have caused these presents to be signed by their President and attested by their Secretary, at their office, in the City of St Louis, State of Missouri, this day of 186

Seal

Henry Pilkington President

Attest

N. A. Papin Secretary

25¢ Rev Stamp

Conditions of Insurance

Referred to in the Body of the foregoing Policy

I. Goods not hazardous are such as are usually kept in Dry Goods Stores, including Coffee, Flour, Household Furniture and Linen, Indigo, Rice, Spices, Sugar, Teas, and other articles not combustible.

II. The following trades and occupations, goods

wares and merchandize are denominated hazardous, viz: Alcohol, Basket Sellers, Brush Makers stock, Cabinet Furniture, China, Earthen or Glass ware, or plated Glass in boxes, crates or casks, Copper Plate Printers, Cotton in bales, Hat finishers, (without use of fire except for heating their irons) Hardware and Cutlery, Jewelers stock, Liquor in Glass, unpacked, Looking Glasses in boxes, Manilla Grass in bales, Paints ground in oil, Paper hangings, Porter Houses, Potash, Pocket Book makers stock, Printers of News papers, Rags in packages, Sail makers, Ship Chandlers, Spirituous Liquors, Cigar makers, Stationers stock, Snuff makers, Threshed Grain, Tin or sheet iron workers, Victualing Houses, Watchmakers stock and Tools, Wine in glass in packages, Window or Plate Glass in packages.

III The following trades and occupations, goods wares and merchandise are denominated extra hazardous, viz: Basket makers and Straw Bleachers, Bookselers stock, Blacksmiths, Boat Builders, Brass Founders, China, Earthen or Glass Ware, or Looking Glasses unpacked, Cotton unpacked, Coopers, Coppersmiths, Druggists and Apothecaries, Furr Dressers, Flax in Bales, Fringe Makers, Gun makers or Smiths, Grate makers, Hay pressed in bundles, Hemp in bales, Ink makers, Lamp Manufacturers, Lamp Sellers stock, Lithographers, Millineers stock, Morocco Manufacturers, Optical and Mathematical Instrument makers, Painters stock, Perfumers stock, Phosphorus, Picture

and Prints, Printers of Books and Jobbing, Plate or Plated Ware Manufactories, Pocket Book Makers, Plumbers and Pewterers, Saltpetre, Silversmiths, Stables (private), Spirits of Turpentine, Stove manufactories, Toy Keepers Stock, Type or Stereotype Manufactories, Varnish, Window Plate Glass unpacked, Tobacco Manufactories.

Mem.— Bakers, Bark Mills, Blind makers, Breweries, Brimstone Works, Bookbinders, Blacksmiths, Boat Builders, Cabinet Makers, Carpenters, Coopers, Chair or Coach Makers, Workshops, Chemists, Cotton Mills, Distilleries, Dyes, Forges, Fences, Flax Mills, Frame Makers, Furriers, Fulling Mills, Gunpowder, Grist Mills, Hat Manufactories, House Building or repairing, Ink or Ivory Black or lampblack manufactories, Livery Stables, Lumber or Mahogany Yards, Malt Houses, Metal and other Mills of all kinds, Musical instrument makers, Oil Boiling Houses, Oil makers, Oakum Factories, Pump an Block Makers shops, Paper Mills, Piazzas and Privies of Wood, Printers of Books, and Jobbing, Rope makers, Sash makers, Saw or snuff mills, Ships Builders stock in Yard, Ships or other vessels in port, or their cargoes, or other building or repairing, Steam Engines or Boats, Sugar Refineries, Tallow Melters, or Chandlers, Tar Boiling Houses, Theatres or other places of public exhibition, Timber Yards, Turpentine Manufactories, Varnish makers, Woollen Mills, and generally all manufacturing establishments and all trades requiring the use of fire, heat or steam power, not before enumerated, will be insured at special

rates of premium.

IV. Application for insurance must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it, and, in case of goods or merchandise, whether or not they are of the description denominated hazardous or extra hazardous, or included in the memorandum of special rates. And a false description by the insured, of a building or its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or, in a valued policy, an over-valuation shall render absolutely void a policy issuing upon such description or valuation. And if any survey, plan or description of the property herein insured, is referred to in this policy, such survey, plan or description shall be deemed and taken to be a warranty, on the part of the assured. If, after insurance is effected upon any building or goods in this office, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such buildings or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than

at the time of insuring, such insurance shall be void and of no effect. If during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or for any other cause the Company shall so elect, it shall be optional with the Company to terminate the insurance, after notice given to the assured or his representative of their intention to do so, in which case the Company will refund a ratable portion of the premium rate.

V. Notice of all previous insurance upon property insured by this Company shall be given to them and indorsed on this policy, or otherwise acknowledged by the Company in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this Company shall be of no effect. And in case of subsequent insurance on property insured by this Company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be indorsed on the policy subscribed by this Company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of insurance this Company shall be liable for such ratable proportion, or of the loss or damage happening to the subject insured, as the amount insured by this Company shall bear to the whole amount insured thereon, with-

out reference to the dates of the different policies.

VI Books of account, written securities or evidences of debt, title deeds, writings, money or bullion, are not deemed objects of insurance. Jewels watches, plate, medals, painting, statuary, sculpture, musical instruments, and curiosities are not deemed to be included in any insurance unless specified in the policy.

VII Goods held in trust, or on commission, are to be insured as such; otherwise, the policy will not cover such property; and, in case of loss, the names of the respective owners, shall be set forth in the preliminary proofs of such loss, together with their respective interests therein, certified by them. Goods on Storage must be seperately and specifically insured. If the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void.

VIII. Policies of insurance, subscribed by this Company, shall not be assignable without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the Company, in virtue of such policy, shall thenceforth cease. And in case of any sale, transfer or change of title in the property insured by this Company, such insurance shall be void and cease.

IX This Company will ~~[illegible]~~ not be liable for damage to property, by lightning, aside from fire, nor for any loss or damages occasioned by the explosion of steam boilers or gun-powder, or loss or damage by fire, happening by means of an invasion, insurrection, riot or civil commotion, or of any military or usurped power, or of an earthquake or hurricane, or from any accident arising from the use of camphene, spirit gas or burning fluid.

X This company shall not be liable for any losses by fire, in consequence of neglect or violation of laws or regulations of police, existing and in force at the date of this policy, made to prevent accidents from fire, when laws and regulations upon this subject exist.

XI Not exceeding twenty-five pounds of powder, and that to be kept in a tin or other metallic canister, not covered with wood, shall be placed in any building insured by this Company or in any building where property is ~~kept~~ covered by this Company. and all friction matches in any such building, shall be kept in metallic vessels — a violation of either of these provisions vitiates this policy. Friction matches may also be kept by wholesale merchants in a close, wooden box, containing not less than a gross. Nor will this company be answerable for any loss arising from the use of fires in a building unprovided with a good and substantial stone

or brick chimney).

XII. Where property insured by this Company is damaged by removal from a building in which it is exposed to loss by fire, said damages shall be borne by the insured and the insurers pro rata in the proportion that the whole sum insured bears to the whole value of the property insured; of which proof in due form shall be made by the claimant.

XIII. In all cases of loss or damage on goods, wares or merchandise insured by this Company, they reserve the right of paying to the assured the actual Cash value of said goods, wares and merchandise, at the time when such fire shall occur.

XIV. In case of fire, or loss or damage thereby, or exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail so to do, this Company shall not be held answerable to make good the loss and damages sustained in consequence of such neglect, and it is mutually understood that there can be no abandonment to the insurers of the subject insured.

XV. All persons insured by this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company; and as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare on oath

whether any, and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein, in what general manner (as to trade, manufactory, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of loss, and who were the occupants of such building and when and how the fire originated, so far as they know or believe; and procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers;) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statements, and knows, or verily believes, that he, she, or they, really and by misfortune, and without fraud or evil practise, hath or have sustained by such fire, loss or damage to the amount therein mentioned; and also, if required shall produce their books of account and other proper vouchers; and shall, also if required, submit to an examination under oath by the agent or attorney of the Company, and answer all questions touching his, her or their knowledge of any thing relating to such loss or damage, or to their claim thereupon, and subscribe such examinations, the same being reduced to writing; and until such proofs

declarations and certificates are produced, and examination (if required), the loss shall not be deemed payable. Also if there appear any fraud or false swearing, the assured shall forfeit all claim under this policy. Damage to buildings not totally destroyed, shall be appraised by disinterested men, mutually agreed upon by the assured and the office or its agents; and where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article, by disinterested appraisers, mutually agreed upon, whose detailed report, in writing, shall form a part of the proofs required to be furnished by the claimant — one half of the appraisers fee to be paid by the insurers.

XVI Payment of losses shall be made in ninety days after the loss shall have been ascertained, proved and adjusted, and the proof received at the office; and, in case difference shall arise touching any loss or damage, after proof thereof has been received in due form, it may be submitted to the judgment of arbitrators, indifferently chosen, whose award, in writing, shall be binding

on the parties. In case of any loss in, or damage to, the property insured, it shall be optional with the Company, to replace the article lost or damaged with others of the same kind and equal goodness; and to rebuild or repair the building or buildings within a reasonable time; giving notice of their intention so to do, within thirty days after having received the proofs of loss required by the fifteenth article of these conditions.

XVII. It is hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any Court of law or chancery, unless such suit or action shall be commenced at the next term of court to be holden in and for the County of St. Louis, State of Missouri, and not afterwards, unless said Court shall be holden within sixty days after refusal to pay demand, but if said term of court is not held within that time, then at the next term of the Court holden in said County thereafter, unless suit is brought as above, all claims shall be forfeited under this policy.

It is agreed by the assured and the Company, and is a part of this policy, that in case of suits by or against said Company, any member thereof shall be a competent witness, except in suits where he or she shall be directly a partly; Provided, that such persons shall

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not be otherwise disqualified. It is also agreed that the records of said company, or copies thereof, duly authenticated by the signatures of the President and secretary, shall be competent evidence in any suit in which said Company may be a party.

Testimony of Hesse

Mr Hesse, a witness introduced ~~as evidence~~ by plaintiff, testified that the policy covered property that was destroyed by fire at No 34 South Main Street between Walnut and Elm streets in the City of St Louis; that he procured insurance from Mr Berg, agent of the defendant; met him at the store of Mr Horwitz & applied to him for $10.000 of insurance; think that he made examination of the stock. He told me that his company would take only $5000. that he would get the other $5000, in another Company. Mr Horwitz had already insurance in the Phoenix for $5000.00. He did not say in what company he would get the other policy. Mr Berg took the application along with him and the policy of the Phoenix Insurance Company. The next day he came back to the office and brought back the policy also of the Equitable, and reported also that he had it in view to get the other insurance at the Western Company. The same day, he brought the policy of the Equitable he got the application for insurance in the Western, and the succeeding day, he brought the policy of the Western for $5000—

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The policy of the Equitable was enclosed in an envelope when he gave it to me, and being very busy I put it in the safe where it remained until after the fire. It was not opened and I did not see it until after the fire. It was my business to attend to that matter. I was bookkeeper for the plaintiff at the time of these transactions.

The stock on which insurance was had consisted of domestic and foreign liquors. The loss by the fire which occurred

was $28000 - There was only $15.000 insurance in all the stock.

Cross Examined

The witness was shown application, and said this is the original application signed by Horsitz (Which said Application is in the words and figures following to wit:)

Application Equitable Mutual Insurance Company
Of Saint Louis, Mo.

Office, N. W. Corn. of Chestnut, Bet. Second & Third Sts.

The estimated Cash value of Personal Property, and of each building to be insured, and the sum to be insured on each, must be stated seperately. When personal Property is situated in two or more buildings, the value and amount to be insured on each must be stated seperately - three fourths only of the value to be insured. When insurance is wanted on Personal property, the same description should be given of the building containing the property as when insurance is wanted upon

31. a building.

Application of Harry Horwitz of St. Louis County, of St. Louis State of Missouri for Insurance against loss or damage by fire, by the Equitable Mutual Insurance Company, in the sum of Five Thousand Dollars, for the term of Six Months commencing the 25th day of January, 1865 at noon, on the property specified, to wit:

	Sum to be insured	Valuation	Rate per Cent
On his stock of foreign and Domestic Liquors	$5000.	$20.000	3/4

No insurance made by this Company on buildings or their contents in which ashes are kept in wooden vessels, in or near the premises, will be considered valid.

The said Applicant makes the following statements, and gives the following answers to interrogatories here put, relating to the risk.

1. State the character and kind of property to be insured.

Ans. Foreign and Domestic Liquors.

2. Where is it situated — street and number?

Situated and known as No 34 South Main Street west side between Walnut and Elm street in Block No 58 City of St Louis Missouri.

3. Of What material is the building constructed; age size, hight, and condition, and for what purpose occupied, and by whom?

4. What is the roof covered with? Is there a gentle

and stairs to it?

Ans. Shingles

5. State the distance to other buildings, of what construction, and how are the nearest buildings occupied Be Particular?

Ans. North. Brick House. South, Brick House - East, main street - West. Alley.

6. Are the stoves, furnaces, funnels, flues, and apparatus for heating or using fire, properly secured, and will you engage to keep them so?

Yes

7. What is used for lighting? .....

8. Will you engage that the ashes and matches in and around your building shall be kept in a safe place?

Yes

9. Is the property now insured? If so, at what office, for what amount, and at what rate?

5000 in Phoenix Insurance Company at 3/4

10. Is it encumbered by mortgage or otherwise? If so, for what sum? Is there any insurance by mortgage?

11. Have you ever suffering loss of property by fire? If so, ~~for what sum?~~ were you insured, and in what ~~of~~ office. ~~Is there any insurance by mortgage?~~

12. How near to the building, to be insured, or containing property to be insured, can a building be erected without your consent

13. Is there any other fact or circumstance

affecting the risk? No.

14. What are the facilities for extinguishing fires? and is there a good engine and well organized Fire company in Town?

Block Close By –

15 Make a diagram of the risk and exposure on the back of this sheet?

And the said Applicant hereby covenants and agrees, to and with the said Company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of property, to be insured, so far as the same are known to the applicant, and are material to the risk, and further covenants and agrees, that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance, which may be fixed upon the application, or any renewal of said policy, as to render the risk more hazardous, he will notify the Secretary of said Company forthwith of such alteration.

Dated January 25th 1866 five

H. Horwitz Applicant

I ascertained by my books the amount of the loss. The loss was estimated at the cost price. There was nothing but liquors kept in the establishment. The fire did not originate in that house, but in the house west of it. Of this I am satisfied. I was not present during the fire. The liquors

were totally destroyed. All that was saved was some wines from the cellar. Some $50. or $60. worth. I arrived on the ground about one hour after the fire. I found out after the fire that the policy of the Equitable was not made out like the Phoenix's policy as I had instructed it should be made. I had full confidence in Mr Berg, and had the assurance of the company when the policy was made out that they would pay the loss, and of course there was no ground for objection.

Testimony of Frank

A. S. Frank testified as follows –

I was in the employ of Mr Horwitz when the fire took place. I know the stock of goods which was insured, and know of the loss. The loss was about $20,000 or $25,000 –

Cross Examined –

I was salesman for Mr Horwitz.

Testimony of Berg

George Berg. testified

I was agent for the Equitable insurance Company in January 1865 and had been for years and am yet. About two weeks before the insurance was made I met Mr Hesse in the street car & had some talk about insurance. I went down to the plaintiffs office on the 25 January 1865 and was introduced to Mr Horwitz by Mr Hesse He said he wanted insurance for $10000 – on stock of liquors – I told him we never took more than $5000 on any stock of goods, but I would get the

other $5000 in some other Company. Mr Hesse then showed me the policy of the Phoenix. I made out the application and Mr Horwitz signed it, and was to pay three quarters per cent. for six months. The amount was agreed upon for the whole $10000 - If I should effect the other. I then took the application & the policy of the Phoenix and handed them in at the office of the Equitable, either to the President or the Secretary, and said to them I had agreed to get $5000. more; that Horwitz had applied for $10000. I then went out, but came back without effecting insurance for the other $5000. I then started with the policy of the Equitable and the policy of the Phenix. On my way down I met Mr Ellis of the Western & told him that he could get the risk at 3/4 on Stock of liquors; that there was no rectifying carried on that required fire. I went on down to Horwitz, delivered the policies & Mr Horwitz gave me a check for the premium. I then made out application for the Western which was signed by Horwitz, and took it up to the Western. The Secretary was not in. I left the application. The next morning I went back & got the policy of the Western and then went back to the office of the Equitable and told them I had effected $5000 insurance in the Western for Mr Horwitz. The President and Secretary and I think Mr Pilkington's son were there. I then went on down to

Mr Horwitz's store & delivered the policy to Mr Hesse. Mr Horwitz drew a check for the premium - I got the money, and handed it over to the agent of the Western. I delivered the policy in an envelope, but saw no one open it. I paid premium got from Horwitz, for the Equitable the next morning, as I found the office closed that evening. Before I paid the premium I had got the policy of the Western & delivered it.

I paid the money on the Equitable policy either a little before or a little after I told them about me having obtained the policy of the Western.

Cross Examined.

I was not directed by the Equitable by its President - to secure this $5000. from the Western. The Equitable did not send me to procure the insurance from the Western. It is very common for agents when they cannot get the required amount of insurance in their own offices to go to some other office to procure any additional insurance as I did in this case. This is constantly done by agents and their own companies have nothing to do with it. When I stated in the office of the Equitable that I had procured the insurance in the Western, I did not go there I told them I had effected $5000 Insurance in the Western for that purpose. The President Secretary and presidents Son were were present. I do not know whether the President and Secretary heard me

37 make the statement. I did not adress myself particularly to any, any of them. I had no direction or authority from the Equitable to get the insurance in the Western or any other office for the plaintiff.

The plaintiff here rested his case.

The defendant put in evidence plaintiffs proof of loss with schedule.

(Which said proof of Loss is in the words and figures following to wit:)

Proof of Loss

Equitable Mutual Fire and Marine Insurance Co. of Saint Louis.

United States of America

State of Missouri. County of St. Louis. ss

Be it known, that on this Seventh day of July, A. D. 1865, before me C. Hequembourg, a Notary Public, in and for the County of St. Louis, duly commissioned and sworn, and residing in the City of St. Louis in the County and State aforesaid, personally appeared G. F. Norwitz who being duly sworn, depose and say, and each for himself says, that the following Statement and the papers therein referred to, and signed with his own hand, contain a particular, just and true account of his loss in the words and figures following, to wit:

I That on the 25th day of January, A. D. 18 the Equitable Mutual Insurance Company of St. Louis, County of St. Louis, and State of Missouri, by their Policy of Insurance, numbered ——— did insure the party herein and therein named against Loss

or Damage by Fire, to the amount of Five Thousand Dollars on Stock of Domestic and foreign Liquors - said property is contained in a three story brick House No 34 South Main Street west side betw Walnut & Elm Strs in Block No 58 City of St Louis Mo.

Give the written portion of the policy in full

For the term of six months - from the 25th day of January A. D. 1865, to the 25 day of July A. D. 1865 at noon. until the --- day of --- A. D. 18 - at noon.

II. That in addition to the amount covered by said Policy of said Company, there was in two offices other Insurance made thereon to the amount of Ten thousand Dollars viz: in the Western Mutual Ins. Co five thousand and in the Phoenix Ins Co. of Hartford Five thousand Dollars, as hereinbefore stated, besides which there was no other Insurance thereon.

III. That the actual cash value of the property so insured amounted to the sum of ($25.595 57/100) Twenty five thousand five hundred and ninety five 57/100 - Dollars, at the time immediately preceding the fire, as will appear by the annexed schedule marked A. showing a full and accurate description of each kind of property, and the value of the same, with the damage or loss on each stated seperately.

If the loss is on buildings, give their value exclusive of land, cellar and foundations

IV. That the property insured belonged to H. Horwitz

V. That the building insured or containing

state whether it is held in fee simple ... If the property be held in trust ... state in the Schedule the names of the ... numbers, and the Insurance, if any

If Real Estate, or held on lease or on commission owners marks by the owners.

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the property destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes to wit:

as a wholesale and liquor business and and a Rectifying establishment and for no other purposes whatever.

VI That on the fourth day of July A. D. 1865, a fire occured by which the property insured was injured or destroyed to the amount of $25.595 57/100 Twenty five thousand five hundred and ninety five 57/100 Dollars as set forth in this Statement, and the several schedules and papers hereunto annexed, which the deponent declare to be a just, true and faithful account of his loss as far as he has been able to ascertain the same.

State all you know about the origin of the fire.

VII That the fire originated at a time and place unknown to the said deponent and the said deponent further declares that the said fire did not originate by any act, design, or procurement on his part, or in consequence of any fraud or evil practise done or suffered by his, and that nothing has been done by or with his privity or consent, to violate the conditions of Insurance, or render void the Policy aforesaid.

Witness his own hand at St Louis in the County of St Louis, and State of Missouri, this Seventh day of July A. D. 1865.

H. Horwitz

Subscribed and Sworn to before me this Seventh day of July A. D. 1865

Seal

C. Hequemborg
Notary Public

Certificate of Justice

State of Missouri
County of St Louis } SS

I. C. Hequemborg a Notary Public, residing in Saint Louis, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire or damage as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that he has by misfortune, and without fraud or evil practise, sustained loss and damage on the property insured to the amount of Seventy five Thousand, five hundred and ninety five 57/100 Dollars.

In testimony Whereof, I have hereunto set my hand, this Seventh day of July A. D. 1865.

Seal

C. Hequemborg
Notary Public

Which Proof Schedule before referred to is in the words & figures following to wit:

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St Louis July 5. 1865

Schedule Statement specifying the goods of H. Stovitz, consumed by fire on the fourth inst: at the Store No 34 South Main street.

20	Bbls highwine in rectifyers	1058 20/gls	2 07	2190	47	
1	Cask Rum	120 ? 180 gals	50% ap.			
1	half Cask do	60 ? 90 "	270 gls	2 50	675	—
10	Bbls Vimonts Bourbon Whiskey	400 "	2 75	1100	—	
2	pipes Gin	240 "	2 60	624	—	
6	Bbls Rye Whiskey	242 "	3	726	—	
4	half pipes Brandy 80 gls ea	320 "	4	1280	—	
10	Bbls highwine			1197	—	
10	" Bourbon Whiskey	400 "	2 50	1000	—	
1	" Sepples do	40 "	2 50	100	—	
5	Casks Gingerwine	250 "	1 75	437	50	
10	" Portwine	500 "	2 25	1125	—	
50	Bbls rect. Whiskey	2000 "	1 75	3500	—	
2	" Peach Brandy	80 "	2 50	200	—	
1	" Peppermint	40 "	2 25	90	—	
4	Casks Ginger Brandy	200 "	1 95	390	—	
5	" Cherry do	250 "	2 25	562	50	
5	Bbls Apple do	200 "	2 25	450	—	
3	" Bitters	120 "	2 10	252	—	
1	" Stonton Bitters	40 "	2 10	84	—	
4	" Kummel	160 "	2 30	368	—	
30	" Domestic Bourbon	1200 "	1 95	2340	—	
25	" do Rye	1000 "	1 95	1950	—	
8	Casks Malaga Wine	400 "	1 50	600	—	

	3	Bbls Blackberry Wine 120 gals	150	180		$21.42 47

Extract of
Ledger Accounts

1865						
Jany	1	Stock on hand page 165		23358	76	
July	3	Merchandize bought up to date		30594	17	
						$53952.93
July	3	Merchandize Sold Ledger Page 249.	35181.99			
		Sales Book	26458			
			3544657			
		less 20% profit	7089.21			2835736
		Balance representing Stock				$25595.57

The defendant then rested. The defendant asked two instructions asking the Court to declare the law as follows.

Defendants Instructions

1. The Court declares the law to be that under the evidence in this case the plaintiff cannot recover.

2. The Court declares the law to be that, under the evidence in this case, it was the duty of the plaintiff upon the procurement of additional insurance, to have so informed the defendant with a view of giving actual notice thereof and of obtaining its consent thereto by writing by endorsement upon the policy, without which the plaintiff cannot recover.

The Court refused the first of said instructions and the defendant then and there excepted

to the ruling of the Court in refusing to grant the instruction.

The Court granted the second instruction with an addition of its own: (Which is as follows to wit:)

Addition to 2nd Instruction

Given with this addition. But if the defendant was notified that its own agent was procuring the additional Insurance of $5000. for plff and that after it was obtained said agent notified the defendant of the fact then it was the duty of the defendant to endorse such additional Insurance on Defts policy or to notify plff of its refusal to do so and until such refusal was notified, the defendant is estopped from setting up as a Defence that such additional Insurance was not endorsed on its policy.

The defendant then and there took its exception to the action of the Court in making said addition to said instruction as a declaration of law.

The Court decided the case in favor of the plaintiff and gave judgment against the defendant for $5704.00 Damages.

Afterwards on the 19 day of May 1866 the defendant made its motion to set aside the said judgment and asking for a new trial.

(Which said motion for a new trial is in the words & figures following to wit:)

Harry Horwitz Plff
vs
The Equitable Mutual Mutual Ins. Co

In the Circuit Court of St Louis County. Feby Term 1866.

44.
Mo for New Trial

Now, at this day comes the defendant, by its attorneys, and moves the Court to set aside the judgment rendered in the above entitled cause, and grant defendant a new trial for that:—

1. It is against the law of the case.

2. It is against the evidence in the case.

3. It is against the law and the evidence.

4. There was no proper evidence to prove the value of the property that was burned.

5. The Court erred in declaration of law—

Mason & Voorhies
Attys p. d.

Afterwards on the 23 day of May 1866 the Court having heard & considered the said motion, overruled the same. The defendant then and there took its exception to the ruling of the Court in overruling the said motion.

The matters set forth in this Bill of exceptions not appearing of record in the case, the defendant here prays the Court to sign and seal the same so that the said matters may be made of record in the case and it is accordingly done.

Sam Reber Judge

And afterwards to wit: On the 1st day of June 1866 at the General Term of said Court the following

further proceedings were had to wit:

Judgment of Special Term Affirmed

Harry Horwitz
vs
The Equitable Mutual Ins. Co } Now come the parties by their respective attorneys and the Court being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment rendered herein by the Circuit Court of Saint Louis County at Special Term be affirmed and stand in full force and effect and that the plaintiff recover of the defendant the costs of this proceeding and that execution issue therefor.

And upon the 2nd day of June the following proceedings were had to wit:

Appeal to Supreme C.

Harry Horwitz
vs
The Equitable Mutual Insurance Company } Now comes the defendant by its attorney and files a Bill of Exceptions and also an affidavit for appeal and on his motion an appeal is allowed it to the Supreme Court from the judgment herein rendered

Which said affidavit for Appeal is in the words & figures following to wit:

Affidavit for Appeal

Harry Horwitz, Plaintiff
vs
The Equitable Insurance Co. Defendant } In the Circuit Court of St Louis County February Term 1866

State of Missouri
County of St Louis } ss

Robert S. Coonies, attorney and agent for defendant, makes oath and says that the appeal

taken in the above entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

Robert S. Voorhies

Subscribed & sworn to before me this 2 day of May 1866

F. A. H. Schneider

And which said Bill of Exceptions is in the words & figures following to wit:

Bill of Exceptions

Harry Horwitz Plff vs The Equitable Insurance Company, Defendant

In the Circuit Court of St. Louis County, February Term 1866.

Be it rembered that on the 1st day of June 1866 the appeal of the above cause from Special Term came on to be heard by the Court in General Term, and the same having been heard & considered by the Court, the judgment of the Special Term was affirmed with costs. To the ruling of the Court in thus affirming the judgment of the Special Term the defendant, by its attorneys, then and there excepted, and prays that this his bill of Exceptions may be signed and sealed which is accordingly done.

C. B. Lord
Presiding Judge.

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Clerks Certificate

State of Missouri
County of St Louis } ss

I, F. A. C. Schneider Clerk of the Circuit Court within and for the County aforesaid certify that the above and foregoing is a full, true and complete Transcript of the record and proceedings in the above entitled cause as fully as the same remain on file in my office.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Circuit Court at Office in the City of St Louis this 9th day of July A.D. 1866.

F. A. C. Schneider Clk.

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84 ~~[illegible]~~ 8 (14)

March Term 1867

From St. Louis Circuit Court

Harry Horwitz
Res.
vs } Transcript

The Equitable Mutual
Insurance Company
Aplt.

Sharp & Broadhead
for Plff

Mason & Voorhees
for Defendant

Filed Nov. 26. 1866
C. F. Fitzpatrick
Clk

29.60. Paid by Appellant.

1867 April 18 Stmt & brief of Ap filed
May 3 Sub on brief by Ch Arg & Sub for Res
Stmt & vi of of Res filed
" " 20 Affirmed

Harry Horwitz, Respondent
vs.
The Equitable Mutual Ins. Company — Appellant

In the Supreme Court of the State of Missouri.

Statement of case by Appellant.

This is an action brought to recover $5000 insurance on a policy executed & delivered by the defendant to the plaintiff, covering certain domestic & foreign liquors. The case was tried by the Court sitting as a Jury.

The main defence set up is that the plaintiff violated the conditions of the policy in obtaining additional or subsequent insurance without notice to defendants, & without having the same indorsed on the policy, or otherwise acknowledged in writing, by defendant.

The Policy contains, among other agreements, the following — "And provided further, that in "case the assured shall have already any other "insurance against loss by fire on the property hereby insured, not notified to this Company and mentioned in or endorsed upon this "policy, then this insurance shall be void and "of no effect. And if the said insured, or --- "assigns, shall hereafter make any other insurance on the same property & shall not, with all "reasonable diligence, give notice thereof to this "Company, and have the same indorsed on this "instrument or otherwise acknowledged by them "in writing, this policy shall cease and be of "no further effect" — The policy recites in its body also "that the said Company agree to "make good any loss or damage, in conformity

to the conditions annexed to this policy—

Among the conditions annexed to the policy are the following— "Notice of all previous insurance upon "property insured by this Company shall be given to "them ~~the~~ and endorsed on this policy or otherwise "acknowledged by the Company in writing at or be-"fore the time of their making insurance thereon: "otherwise the policy subscribed by this Company "shall be of no Effect. And in case of subse-"quent insurance on property insured by this Com-"pany, notice thereof must also, with all reasonable "diligence, be given to them, to the end that such sub-"sequent insurance may be indorsed on the policy "subscribed by this Company, or otherwise acknow-"ledged in writing: in default whereof such "policy shall thenceforth cease the of no Effect."

The application of the assured, under which the policy was issued, is made by the policy, a part thereof, and contains the following covenant; "and "further covenants and agrees that if the situation "or circumstances affecting the risk shall be "so altered or changed during the time of any "policy of insurance which may be fixed upon "the application, or any renewal of said policy, "as to render the risk more hazardous, he will "notify the Secretary of said Company forthwith "of such alterations."

The Evidence shows that after the policy sued on was executed, and delivered to and accepted by the plaintiff, he acquired additional insurance of $5000 00 in the Western Mutual Fire & Marine Ins. Co.; but that there was no notice of this latter insurance given to the defen-

-dant, nor was it endorsed on the policy or other-
-wise acknowledged by the defendant in writing.
There is no allegation or pretence set up in the petition that there was a notice of such fur-
-ther insurance given by plaintiff to the defendant, or that the same was endorsed on the policy, or otherwise acknowledged in writing by defendant, as required by the covenants and conditions of the policy - On the contrary, the petition alleges that the said conditions, as printed in the policy, were to be erased by agreement of the parties, and alleges ignorance on the part of the plaintiff as to the obligations of said policy upon him.
There was no proff whatever, nor did the plain-
-tiff attempt to make any, that the said conditions were to have been erased from said policy: nor was any stress laid upon his ignorance of the conditions.
There was an attempt by the plaintiff to show that the fact of the further insurance was known to George Berg, as agent of the Company & thus brought to the knowledge of the defendant; but there was a failure of such proff, even. It is shown by the evidence that Berg in this mat-
-ter acted on his own behalf, & not - as agent of the Company - And the evidence shows a total absence of any step or action on the part of the plaintiff to notify to the defendant the additional insurance, and have the same endorsed on the policy or otherwise acknowledged in writing.
The only evidence on the subject of notice of further insurance was that of George Berg, called by plaintiff, who; on cross-examination, testified

as follows — "I was not directed by the President of the Equitable to secure this $5000 from the Western. The Equitable did not send me to procure the insurance from the Western. It is very com-
-mon for agents, when they cannot get the ~~requi-~~ required amount of insurance in their own offices, to go to some other office to procure any additional insurance, as I did in this case. This is constantly done by agents, and their Com-
-panies have nothing to do with it. When I stated, in the office of the Equitable that I had procured the insurance in the Western, I did not go there I told (to tell) them I had effected $5000 insu~~rance~~
-rance in the Western for that purpose. The President, Secretary and Presidents' son were present, I do not know whether the President and Secretary heard me make the statement? I did not address myself particularly to any of them. I had no direction or authority from the Equitable to get the insurance in the Western or any other office for the plaintiff"

The defendant offered in evidence the proffs of loss furnished by plaintiff to show the additional insurance in the Western Mutual Ins. Co.

The Policy recites the $5000 insurance in the Phenix at the time it was executed.

The defendant asked the Court, sitting as a jury, to declare the law as follows —

"1 — The Court declares the law to be that under the evidence in this case the plaintiff cannot recover.

"2 — The Court declares the law to be that under the evidence in the case, it was the duty

of the plaintiff, upon the procurement of additional insurance, to have so informed the defendant with a view of giving actual notice thereof and of obtaining its consent thereto by writing, by indorsement upon the policy, "without which the plaintiff cannot recover".

The Court refused the first of said instructions and the defendant took its exception.

But granted the second, with the following modification or addition. "But if the defendant was notified that its own agent was procuring the additional insurance of $5000 for plaintiff, and that after it was obtained said agent notified the defendant of the fact, then it was the duty of the defendant to indorse such additional insurance on defendants policy, or to notify plaintiff of its refusal to do so; and until such refusal was notified, the defendant is estopped from setting up as a defence that such additional insurance was not indorsed on its policy."

The defendant excepted to the action of the Court in making the said addition.

The Court decided the case in favor of the plaintiff and gave judgement for $5000 damages.

The defendant made its motion for a new trial as follows - "Now, at this day, comes the defendant, by its attorneys, and moves the Court to set aside the judgement rendered in the above entitled cause, and give defendant a new trial, for that, -

"1. It is against the law of the case.

"2. It is against the evidence in the case.

"3- It is against the law and the Evidence.
"4- There was no proper Evidence to prove the value of the property that was burned.
"5- The Court erred in declaring the law.
This motion was overruled, and the defendant took its exception.
The case being embodied in a Bill of Exceptions, an appeal was asked by defendant, and granted, to General Term of Circuit Court, where the same was heard on the said Bill of Exceptions, and the Judgement of the Special Term was affirmed, with costs. The defendant took its Exception to the said ruling, and now brings the case to this Court by Bill of Exceptions, on appeal; but no bond was given in the case.

Rooks & Mason
atty for Defendants

99

In Supreme Court.

Harry Horwitz. Res-

v

The Equitable Mutual Insurance Company Appellant

Statement of Case by Appellant.

Voorhis & Mason
attys for Appel^t

Filed April 18 1867
O T Fishbackelk
per E P McCarty Dep

Harry Horwitz. Res.
"
The Equitable Mutual
Ins. Co. Appel.

In the Supreme Court.

Brief of Appellant.

I. The Policy itself, as well as the Conditions annexed to it; and as well, also, the Covenants of the application for the policy; make the notification of a subsequent insurance, and the endorsement thereof on the policy, or an otherwise acknowledgement by the defendant in writing, a promissory warranty. These stipulations were, therefor, a condition precident to any right of recovery on the policy.

Hutchinson v. West. Ins. Co., 21 Mo. 97.
Deitz v Mound City Mut.
Fire & Life Ins. Co. 38 Mo 85.
14 N.Y. 418; 9 Cush. 470; 11 Cush. 265
12 Cush. 144; 6 Gray. 169.

II. The plaintiff, of his own motion, never assayed to give the defendant notice of the subsequent insurance in the West. Mut. Ins. Co.; nor did he directly or indirectly apply to have the same endorsed on the Policy, or for a written acknowledgment by the defendant. The policy sued on was executed, delivered and accepted before the insurance was procured from the West. Mut. Ins. Co.

It is Contended by the plaintiff that the defendant had verbal notice, by its own agent of such insurance, and it therefor became the duty of

defendant to endorse the additional insurance on the policy. The evidence, however, shows that the defendant had executed and delivered to plaintiff the policy sued on, the day prior to the insurance obtained from the West. Mut. Ins. Co.; and that the defendant had no part or lot in the matter of the subsequent insurance. It seems a very strange notion that the defendant, upon what did not ~~amo~~ amount to a mere report, should not only perform its own duties, but should also discharge a part of the duties of the plaintiff, which the contract made obligatory upon him to perform. George Berg states distinctly that he was not, and did not act as the agent of Defendant in procuring the insurance in the West. Mut. Ins. Co.; that it was a matter totally his own.

There was no legal or moral obligation on the defendant to take notice of a mere casual observation that additional or subsequent insurance had been obtained. There was a total neglect of duty on the part of the plaintiff. He never made a move to comply with the conditions of the policy and of the application in the matter of the subsequent insurance. It does not lie in his mouth to charge that the defendant is estopped, when he has been totally negligent of what was his duty, ~~before~~ and which must be performed by him before there could be raised any circumstances to work an estoppel on the defendant.

Had the plaintiff informed the officers of the defendant that he had acquired the subsequent insurance, but failed to present his policy for the endorsement of the same thereon, or have the acknowledgement of consent thereto, in writing;

the defendant could not be estopped to plead the defence set up in this case. The endorsement upon the policy, or the acknowledgment of the defendant in writing, otherwise, was a condition precedent, without which the plaintiff could not recover.

Carpenter v the Prov. Ins. Co. 16 Pet. 512.
Barrett v Union Mut. Fire Ins. Co.
7 Cush. 178.
1 Phillips on Ins. 477. Also cases cited above

The plaintiff attempts to make his ignorance of the conditions of the policy a sort of virtue by which the defendant was obliged to notify him of his duty in relation to the subsequent insurance. But, ignorantia facti non excusat. He cannot take advantage of his own ignorance to charge the defendant.

III. The Court erred in refusing the first instruction or declaration of law asked by the defendant. His own case, made on the evidence, showed that the covenants and conditions of the Policy and Application, in relation to subsequent insurance were condition precedent to which the plaintiff had not complied.

IV The Court erred in refusing the second instruction as asked by the defendant. It involves the law as applicable to this case, and is in conformity to the principles set forth in this brief.

The addition attached to this instruction by the Court, seems to have been given under a misapprehension of the evidence. Tho' Berg was the agent of the defendant for soliciting insurance, he is particular in his evidence to state, in substance,

that he set about the procurement of the additional insurance on his own account, and not as agent of the defendant. The Court has assumed, contrary to the evidence, that Berg was the agent of defendant in procuring the additional insurance, and that the fact of such procurement was therefore notice to the defendant. But even if this had been true, the plaintiff had not complied with the condition precedent, requiring him to procure the endorsement on the policy, or acknowledgement in writing from the defendant, of consent to the same.

The theory of the Court in modifying the second instruction seems to have been that George Berg, who was the soliciting agent for defendant, having brought to his own company $5000. on application of the plaintiff, and remarking that he had other $5000. to place, and his afterwards casually remarking that he had obtained, for plaintiff, insurance in the Ard. Mut. Ins. Co. for $5000-; sufficient notice was imparted to the defendant to make it the duty of defendant to endorse on its own policy permission for, or otherwise have acknowledged, in writing, the permission to obtain the additional or subsequent insurance. The evidence, however, does not show that the defendant was in any manner properly notified of additional insurance or that subsequent insurance would be obtained from some other office, except as stated in the application and policy. Nor does it show that the defendant had been solicited to give permission for other insurance, other than that mentioned in the policy, and which was mentioned in the application is existing in the Phenix Ins. Co.

The defendant was guided by, and bound by, the

application of the plaintiff as containing his wishes and the terms upon which the policy was to be executed delivered and accepted. It was executed and delivered by the defendant and accepted by the plaintiff upon the agreements and stipulations contained in the application, and policy with its conditions annexed, and made part of the same.

George Berg acted as the agent of plaintiff in obtaining the subsequent insurance in the West. Mut. Ins. Co., and by no construction of facts or law can he be made the agent of defendant in procuring that insurance. He repudiates that idea himself, and says he acted independently of the defendants.

It could in no sense be the duty of the defendant to follow up an agent of the plaintiff to ascertain if any other insurance had been taken. The status of the defendant and plaintiff had been fixed by their written contract contained in the application and policy, before the insurance was obtained in the West. Mut. Ins. Co., and no mere verbal declarations or understandings could change that status so as to impose any new obligations or duties upon either party.

The authorities cited above are explicit on these points. The defendant can in no case be made answerable for the negligence and ignorance of the plaintiff. The case should be reversed.

Morris T Mason

Attorney for Appellant.

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C

Harry Horwitz. Res

v

The Equitable Mutual Insurance Company. App.

Brief of Appellant.

Voorhis & Mason
attys.

Filed April 18 1867
C. F. Fishbackelk
per E. M. Carly Dep

Harry Horwitz - ~~Plaintiff~~
against Defendant in Error
The Equitable Mutual Insurance
company -
Plaintiff in Error -
In Supreme Court -

Statement by Dept in Error -

In January 1866. plaintiff com=
menced his suit. to recover for
a loss by fire - of his stock of goods,
insured by defendant, under its
policy -
In his petition he averred,
The incorporation of defendant,
The ownership of the goods - insured -
The contract of insurance -
The fire. loss & damage - notice
& proofs of loss &c -
That at the time defendant agreed
to insure & at the time it did ins=
=ure plff - there was other insurance
on the goods by the Phoenix Ins Co. to
amount of $4.500 - the Phoenix
policy being in defendants hands
& known to it -
That plff applied to defendant

for $10.000 of insurance in addition to that of the Phoenix.

That defendant agreed to give $5.000 - and agreed that plff should be further insured on the goods the other $5.000 (making the $10.000 of insurance wanted) by another insurance Company.

That defendant, agent, with its consent undertook to procure the other $5.000 of insurance, so as to make up the $10.000 wanted.

That while this other $5.000 was being procured by defendant, agent, with defendants knowledge & consent defendant made & delivered its policy - the one sued on - it & its officers well knowing & agreeing that the other $5.000 was being, & was to be gotten & was gotten.

Knowing & agreeing to all these facts defendant made & delivered its policy - and received the premium from plff -

That in its policy it misdescribed the insurance of the Phoenix, by describing it as an insurance of $5.000 on the goods - when in fact

it was only for $4.500 – & the policy was in defendants hands & before it & known to it –

That in the printed portion of defendants policy, there was a provision – that if there was other insurance on the property not notified to Dept & mentioned in or endorsed on the policy – the policy should be void – and if plaintiff should thereafter make any other insurance on the same property & should not with reasonable diligence give notice thereof & have the same endorsed on the policy or have it acknowledged in writing the policy should cease & be of no further effect – if a further insurance should be effected, so as to make in the company's opinion an over insurance, it had the right to cancel the policy by returning a pro rata premium – and in case of other insurance being effected, prior or subsequent – assured should only recover the proper proportion of any loss of defendants – as to insurance bore relation to all insurance on the property –

This proviso in the printed form or part of the policy, was not erased but it was unknown to plaintiff. The policy having been delivered to plaintiff's clerk enclosed in an envelope & not opened, read, or its contents known until after the fire, & he relied wholly on defendant to make & give to him a proper policy - as it knew all the facts -

That on the same day defendants policy was delivered & after it was done, the said other $3.000. insurance was effected & obtained by defendants agent with its consent, - and it waived the said provision & condition in its said policy — but after the fire & loss, it unjustly set up this proviso & said other $5000. insurance as a defence & on that ground alone refuses to pay - which is in bad faith - after such waiver -

The loss was $25.000 - & judgment is asked for $5.000 -

To this petition - the defendant filed a demurrer - raising the question - Whether it was competent

for the defendant to waive said proviso in its printed policy, & if so - whether the facts stated amounted to a waiver of it -

The demurrer, being considered by the Court at General Term, was overruled -

Defendant answered putting in issue pretty much all of the averments of the petition - putting the plaintiff upon the proof - & raising the same question - made by the demurrer - as to alleged waiver of said provision -

On the issues - the trial was submitted to the Court by the parties.

The plaintiff gave evidence - not objected to - to prove the averments of the petition & tending to establish the issues - And upon the question of waiver of said provision - proved that plaintiffs Clerk applied to the defts agent for $10.000. insurance, in addition to that of the Phoenix - that defendants agent agreed for the $10.000. additional - & agreed upon the amount

of premium for the $10.000 - and told plaintiffs Clerk - that he would give $5.000 - in defendants company & get $5.000 in another company - that defts agent then took the Phoenix policy to describe the property & risk by it. - went to defendants office, where its President & Secretary were, told them of the application for the $10.000. of insurance - that he had agreed for it - $5.000 in defts Company & to get $5.000 in another Company. & left the Phoenix policy with them in the office to make out the policy by. while he went to another company to get the other $5.000. to make up the $10.000 - asked & agreed for.

He returned to defendants office got its policy & started to deliver it & on the way ~~procured~~ arranged for the other $5.000 from the agent of the Western Ins Company. - He on the next morning got the Westerns $5000 policy & at once told the President & secretary of deft - that the other $5.000 had been gotten by him from the Western Ins Co. & about the same time ~~handed~~ over to them the Premium received from plaintiff

It was also proven that the policy

of Dept to Pltff clerk
"was delivered" enclosed in an envelope, laid in the safe by the plaintiffs clerk & not opened, or read - until after the fire - he relying on them for the $10.000 of insurance, agreed for & paid for.

It was shown that the loss was $25.000 to $28.000 - & the whole insurance $14.500 -

The defendant made no objection to any of the evidence - and offered no evidence, on the point of the waiver - or on any issue in the case - except amount of loss, & as to which the evidence was full.

The Defendant asked the court to declare the law is follows.

1 "That under the evidence in the cause plaintiff cannot recover

Which the court refused -

2nd - "That under the evidence in the cause, it was the duty of the plaintiff upon the procurement of additional insurance - to have so informed the defendant, with a view of giving actual notice thereof, and of

obtaining its consent thereto by writing by endorsement upon the policy. without which the plaintiff cannot recover. —

The court added to this instruction the following — "But if the defendant was notified that its own agent was procuring the additional insurance of $5000 for plff — and that after it was so obtained said agent notified the defendant of the fact, then it was the duty of the defendant to endorse such additional insurance on defendants policy or to notify plaintiff of its refusal to do so. and until such refusal was notified the defendant is estopped from setting up as a defense that such additional insurance was not endorsed on its policy" —

The instruction was then given.

Judgt — was for plff —
appeal to General Term & the judgment affirmed & appeal to this court —

Sharp & Broadhead
for Rept —

No 99

Harry Horwitz
Rept

vs

Equitable F & M
Ins Company
Appts

Statement by
Sharp & Broadhead
for Repts

Filed May 3d 1867
O. T. Fishback Ak
per E. M. Carlz Dep

Harry Hanwitz - Respondent
vs
The Equitable Fire & Marine
Ins Company - Appellant
In the Supreme Court
Brief of respondent - by
Sharp & Broadhead, of Counsel.

It is conceded -
~~[illegible]~~ by respondent - ~~but~~ that the condition in the policy - as to further assurance - is a condition or provision, for the benefit of the insurer - which must be complied with - or offered to be complied with - or must be shown that a compliance was waived, by the party entitled to its benefit -

Throughout the entire progress of the cause - the evident effort of appellant has been to avoid the question of a waiver of the provision - by it - when the petition is directly framed upon that distinct point -

The familiar doctrine - as a

general rule - that parol
= evidence is not admissible to
vary, alter or explain a written
contract, is not involved in
any manner = for it is
admitted & shown - that the condi
= tion was in the written contract
and no attempt is made, &
it is not asked - to show that
the contract, was anything but
what the writing states, - but
to show - that while the contract
was with this condition in it, as
a part of it - yet the Appellant
(for whose exclusive benefit
it was) waived the performance
of it, literally - and waived the
benefit of it -

This will readily be seen
to be the true & only question,
as raised by the demurrer,
& afterwards by the answer,
& by the instructions - and is
the only question now in the
case - Could the Appellant
by its acts, declarations, parol
agreements, & representations
waive, this condition in the

written policy - or its performance by respondent.

The case of Hutchison vs Western Ins Co. 21st No 97. in no way affects the question before us, - that case is simply & solely upon the ground of non performance of the condition - and no claim made that it had been waived, no amendment, issue or proof on the point - indeed the question is not in the case in any manner.

So in the case of Deitz vs Mound City Ins Co. 38th No 85 - the question was whether or not there had been a compliance with this condition of the policy = it was an endeavor by the assured to prove compliance; to prove notice & a written acknowledgment thereof - as the condition prescribed, & by the defendant to disprove it - the whole case is upon the ground that performance was not waived or claimed to be - or in any way dispensed with & must be shown -

So also — in case of Carpenter vs Providence Washington Ins Co, 16 Peters Supreme Court Reps, 495. a paragraph — of the opinion at page 512, was relied upon, — that paragraph is only to the effect, that where the question is, whether the condition is complied with — by a mere verbal notice — the contract requiring notice & a written endorsement or acknowledgment of it — the mere verbal notice — is not performance — at law, — tho the court intimates that in equity it would be different, — when the question of performance or non performance is the point in issue, & it is not claimed in that case that performance was dispensed with.

In 7th Cushing 175. Barnet vs N. M. & Ins Co — the only point was — whether a parol agreement as to existing insurance — made prior to the written contract can

be shown — to vary the terms of the written contract — there then was insurance prior to the making of the policy sued on — & the attempt was made to prove by parol, that prior to the making of the written contract sued on, there was an understanding that that prior insurance should remain — the court holds, that under the rule above stated, the evidence was not admissible — it was a parol agreement prior to the written one, & must be held to be merged in the subsequent written contract. — See pages 177 & 180 of that case — we admit the doctrine, in its full force — the theory, upon which this suit was brought — upon which it was tried & upon which the judgment rests — in no manner conflicts with it.

The foregoing are the only cases, we believe, which appellant invoked — in aid of his view of the case —

The question - and the only question involved - here - as above indicated, is in no way conflicts with the above authorities - It is admitted - that the ~~proposition~~ in question, in the policy is a condition precedent to recovery & when the question of performance or non performance, is on trial, performance, according to the terms of the condition must be shown

And it is admitted that verbal evidence cannot be received to vary - enlarge or diminish the terms of a written contract. -

But the proposition maintained is - that it is competent for the terms or provisions of a written contract, to be waived or modified - or, for performance of them - or any one or more of them, to be waived or dispensed with -

2. That such waiver may be shown by express parol agreement — or by the acts, declarations & conduct of the parties — either or both —

3. Even if this were not so — That the provision in question, that the failure to report the further insurance & have it endorsed — or otherwise acknowledged in writing — or the policy should, ~~[illegible]~~ — is one solely for appellants benefit — and the right thereunder may or may not be asserted by him — but if not asserted — but treated as waived by him — he is estopped from afterwards asserting it as a defense —

(ceased & be of no further effect & if other insurance was effected the company had the right to cancel &c)

These propositions may be treated together — and are fully sustained as we think by the following authorities —

+ 35th New Hampshire Reps 329.
Atlantic Ins Co vs Goodell.- particularly at Reps 332 to 335-

16th Maryland Reports 261.
National Fire Ins Co vs Crane.

+ 5th Hills Reports (N.Y.) 147.
Potter vs Ontario & Livingston Ins Co.

5th Denio? reports 154 - Trott vs Saratoga Mutual Ins Co.-

32nd New Hampshire Reps 313-
Union Mu & Ins Co vs Keyser-

+ 14th N York Reps. (4th Kernan) 253
Ayres vs N Y & L Ins Co.-

+ 19th Barbour 440 - Viele vs Genesee Mu Ins Co-
31st Vermont 552-

+ 31st Mo Reports 546. Berseke vs Globe Mu Ins Co-
+ 31st Mo Reps 555. Summers vs St Louis Ins Co.
Trustees vs North Western Ins Co of N.Y. - Ins Sup Co N.Y. Gen Term 1862. - Commercial & Insurance Journal.

It is established by the foregoing & numerous other authorities —

a — That the provision in question like any other provision in a contract — and the performance of it, may be dispensed with & waived —

b — That this, or any other matter of defence, which appellant had under the terms of the policy — may be waived — and that — even — after loss — a fortiori, if the waiver was before loss, & the assured rested upon it, acquiesced in it or acted upon it as in this case —

c — That the provision in question renders the contract vaidable — not void ab initio, & ~~for loss~~ if not avoided by the insurer after he knows the facts — but acquiesced in & treated as valid, he is, on principles of common honesty, held to waive it, & estopped from afterwards pleading it in bar

35th N.H. 328. to 335 - Atlantic Ins Co. vs Goodell - a well considered case & sustained by several authorities cited - was on the point of a condition in the policy - that the policy was to be void, if there was any other insurance not endorsed on the policy - decides that having other insurance & not having it endorsed, does not make the policy absolutely void. it is only voidable, at the time, - the company may waive it - and its acts & declarations & conduct may be shown - to establish a waiver -

16th Md Reps 260 - is to the effect that, even prior insurance notified to the company at the time of making its policy but not endorsed, - the insurer cannot in equity, afterwards avoid its policy on that ground. see pages 250, 282 & 3 of opinion -

Union Ins Co vs Keyser - 32 N. H. Reps 313 to 316. -

By the charter of the Company - power to issue policies was entrusted to the directors & they were required to divide them into 4 separate classes of risks & issue & assign all policies to one class, - & to make by laws, &c - They made by laws describing different classes of risks. - They issued policy as of one class of risks, which, by law was of a different class - knowing the fact which was that fire & steam were used - & the class to which they assigned it was - that fire & steam not used.

In suit on the policy it was claimed that policy was void, it being in violation of the charter & by laws. But it was decided that the provisions & conditions, in the Insurance, were made by the Co, for its protection - & they have the power to waive the conditions. They knew fire & steam were used - & so knowing, insured contrary to their by law & thereby waived its requirement & policy was binding - see also Case, 6 Cushing 342 - 1 Cushing 257. -

Ames vs The N York Union Ins Company
14 N.Y. Rep's (4 Kernan) 253. –

By the terms & conditions of the policy, all applications to be in writing, & specify all incumbrances & existing insurance – which was to be part of policy & warranty of the facts stated –

Also – in case of other insurance not mentioned in the application, endorsed on the policy or otherwise approved by the Secretary in writing the policy should be void. – and there should be no waiver of the conditions without the concurrence of the Secretary endorsed on the policy, or specifically acknowledged in writing by him – and that any want of conformity to the conditions should render the policy void – and bar an action thereon. –

Suit is upon the policy to recover for a loss. –

The facts were. policy with these conditions was delivered by an agt of the Ins Co. – This agt made out an application & gave it to the Company. Plffs never saw it,

No mention was made of any mortgage, or other insurance. The agent had known 2 years before of a mortgage of $3000, knew nothing of it since - & it was no where mentioned in application or policy, or in writing in any way.

Held that the agent, having known of the mortgage - verbally, it was his fault, that it was not mentioned in writing - in the application - The Co thro' its agent had verbal notice of it & received the premium & issued the policy. It thereby waived, the condition that it should be in writing & approved by the Secretary -

And also, - as to the other insurance, the facts were, the agent knew of it verbally. he made a memorandum of it, on the policy - but never did report it, or say anything about it to the Company. The Secretary never even knew of it - of course did not "endorse it on the policy or otherwise approve it specifically in writing - Held that the knowledge of the agent & memoranda

made by him, was sufficient compliance with the condition to bind the Company —
Held further — that it was the duty of the Co's agent, as he knew of the insurance, to have it acknowledged in writing by the Secy & if the condition was not com=pleid with — a compliance was dispensed with & waived by the Co. & it is bound from setting up this failure, as a defence against a loss. —

Read enough of this case to show the points & grounds of the decision —

Frost vs Saratoga M Ins Co —
5th Denio 154.

In the application, which was made part of the policy — assured warranted — falsely — that there was no building within a certain distance of the one insured. The Ins Co learned it was not true — but continued the Ins, & assessed premm note & assessment

paid - the Company is estopped, after a loss from setting up this breach of warranty, as a defence to a suit on the policy - by their acts they have waived that defence.

So in 19th Barbour 440. - it is held that - treating the transaction as binding - by any acts of the Company - or it's officers - after knowledge that one of the conditions of the policy has been violated is a waiver of such condition, and after loss - the company cannot set up this condition & claim that such violation precludes a recovery - ~~that it would be [illegible]~~

In the case referred to in 5th Hill 147. The suit was on the policy for a loss - the policy provided that in case the assured or his assigns should thereafter get any other insurance on the property, & should not with all reasonable diligence give notice thereof to the Company & have the same endorsed on the policy, or otherwise acknowledged & approved

by them in writing - the policy should cease & be of no further effect, and in case of other insurance on the property, prior or subsequent, assured should not recover, any greater portion of the loss from that company, than the amount insured by its policy bears to the whole amount of the property — the plff got further insurance on the property without notice thereof to defendants, it was not endorsed on the policy or acknowledged and approved in writing — after a fire & suit, on the trial the court below nonsuited plff, because he did not show this condition performed. — The court, Bronson Judge delivering the opinion takes, what we maintain to be the true & now well settled ground, both in law & fair honest dealing — that it was the duty of the assured to give due notice to the company of the further insurance — and then it was the duty of the insurance company

to endorse, or approve in writing its acceptance of it — or to dis=approve, & cancel the policy, or notify the assured — that he might act accordingly — if it does not disapprove, the assured cannot = & is bound by it — and it is a waiver of the written approval or endorsement. — & the want of it cannot — afterwards be claimed as a defence = when they were notified of other insurance, they could terminate the risk, or let it continue = if they chose to terminate it — the assured could then get other insurance in its stead, "honesty & fair dealing forbids" that after lass they shall say they did not approve in writing —

In the cases of Bersche vs Globe M Ins Co 31st Mo 546 & case of Sauer vs St Louis M Ins Co. 31st Mo 555. — one of the written conditions of the policy was — if there was misrepresentation or concealment of facts the policy was to be void — or if the risk

was in any way increased, the policy was to be void.

The condition of the policies in both cases were violated. by which the policy provided that the policy became void. Yet this court holds & reaffirms - that the breach of the condition - like that of any other contract may be waived, and the acts or declarations of the company, indicating an acquiescence in, or waiver of the breach - will bar it from afterwards claiming it as a defence.

And this - even after the loss has happened - how much more strongly than upon every consideration - should the insurer be held to an acquiescence or waiver - before a loss - for that, before the loss is relied upon & acted on by the assured.

He relies upon this insurance,

He refrains from getting insurance elsewhere -

He conforms his conduct to, & conducts his business in the manner permitted by the policy -

with the insurers knowledge & acquiescence, — (none of which apply to waiver after loss) — and then after a loss has happened. it would be a most manifest & gross fraud & injustice upon him — if the underwriter can claim that the policy was *void* all the while — because the *letter* of the bond was departed from — when they had treated it as waived — all the while —

We think the ruling of the Court & its instruction was all that appellant could ask — for the evidence — not objected to, showed in the strongest manner — that cotemporaneous with — & after the making of the policy in this case — the condition in question & its literal compliance with, was waived, & the policy treated as a valid subsisting policy. down to the loss —

The latter part of the condition in question, shows what was meant to be accomplished by it — It is that if there was other insurance gotten which in the Company's opinion, made the total insurance, an over insurance the Company had the power, to cancel its policy — the company — when other insurance was taken, might cancel its policy — or might not, at its election — the whole of the condition is to be taken together.

Here — the Company — had present notice — knew of the other insurance intended when it made out its ~~premium~~ policy — knew it was to be made, when it delivered its policy — knew, it had been gotten & effected — when it collected its premium for its insurance — It had the claim, to cancel its policy, or let it continue — it

elected the letter & acted upon it & induced plff so to act, until after the loss —

The latter part of the condition in question — also provided for an apportionment of any loss among all the insurers — prior or subsequent — so that any loss for less than the whole amount of all of the insurance on the property — had to be equitably apportioned among all the insurers & deft not made liable for more than its pro rata —

With all these safeguards & protections the deft elected to continue its risk — along with the other insurance, until after the loss — The loss proving to be greater than all of the insurance, it cannot now, after reaping all the benefits — avoid liability — in the way its sought to do —

Sharp & Broadhead
for Repts

No 99

Harry Hornet
Respt
vs
Eq Mr F & M Ins
Co — Appelt

Brief by
Sharp & Brandtner
for Respt

Filed 2 May 3 1867
C. S. Fishbacher
per E. M. Carey Dep

In the Sup Ct Mo
March T. 1867.

Harry Norwitz Res.
v
The Equitable Mut Ins Co App

Appeal from St Louis Circuit Court.

Opinion of the Court.

This was an action brought to recover the sum of $5000, insurance on a policy executed and delivered by the defendant to the plaintiff, covering a certain stock of foreign and domestic liquors.

The policy contained this clause, "if the said insured, or assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to the company, and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect"

The defence relied upon was that after the issuance of the policy by

the company, the insured procured further insurance without notifying the company of the fact, or having it indorsed upon the policy.

The facts as they appear from the record, are that one Berg, who was the agent for the defendant, went to the plaintiffs office, and the plaintiff informed him that he wanted insurance for $10,000 on his stock of liquors. Berg told plaintiff that his company never took more than $5,000 on any stock of goods, but that he would get the other $5,000 in some other company. Plaintiff then signed the application which was made out by the agent Berg, and the premium was agreed upon for the whole $10,000 if he should effect the other insurance. Berg then took the application and handed it in at the office of the company, and informing the company at the same time that he had agreed to get $5,000 more as the plaintiff wanted $10,000. To this it does not appear that the company made any object

-ion, but accepted the risk, issued the policy, and received the premium. The next day in compliance with his agreement, Berg effected the additional $5,000 insurance in the Western Ins. Co, and told the President and Secretary of the defendant that he had succeeded in getting the remaining insurance for the plaintiff. The policy issued by the defendant was delivered to plaintiff in an envelope which he never opened till after the loss occurred by fire, and no endorsement of approval was ever made on it by the defendant.

The defendant asked the Court to declare the law to be, that under the evidence in the case, "it was the duty of the plaintiff upon the procurement of additional insurance, to have so informed the defendant with a view of giving actual notice thereof and of obtaining its consent thereto by writing by endorsement upon the policy, without which the plaintiff cannot recover"

The court gave the declaration but appended the following addition: "But if the defendant was notified that its own agent was procuring the additional insurance of $5,000 for plaintiff, and that after it was obtained said agent notified the defendant of the fact, then it was the duty of the defendant to endorse such additional insurance on plaintiffs policy, or to notify plaintiff of its refusal to do so and until such refusal was notified the defendant is estopped from setting up as a defense that such additional insurance was not endorsed on its policy"

The judgment was for the plaintiff

Where the terms of a policy provide that it shall be void in case of any other insurance not mentioned or endorsed on the policy, or in case of any subsequent insurance without notice to the insurer and endorsed upon the policy, or the notice acknowledged in writing; such stipulations have uniformly been held as

conditions precedent to any right of recovery on the policy, (Hutchison vs Western Ins Co, 21 Mo 97; Deitz vs Mound City Mut, Fire & Life Ins Co, 38 Mo 85)

But it is not questioned, that the conditions may be waived by the company, and such waiver may be made as well by acts as by positive declarations.

The company may also be estopped under certain circumstances, where by a course of dealing, or its other actions it has induced the ~~other~~ insured, to pursue a policy to his detriment; Now what were the terms of the contract; Why that the plaintiff wanted $10,000 insurance on his stock, and that the defendants agent agreed to procure it for him.

This agreement was notified to the company, and no objection was made, its own rules or custom forbade it taking more than $5,000 but it was the common practice in negotiating for policies, for the agent to get what was wanted

above that amount in other companies. The company knew that the agreement made by its own agent was for $10,000 and it also knew that he had obtained the additional $5,000, the whole matter formed one continuous transaction, and while a mere verbal notice given by a party other than the insured would not be a sufficient compliance with the condition, yet here it entered into the contract so halfway with the implied assent and acquiescence of the company that to hold it not bound would be sanctioning the most manifest injustice. By the express agreement, of which the company was entirely cognizant, the insured was lulled into security, having an abiding confidence that his contract would be carried out in good faith. It is very true that a written contract, should not be altered, varied, or impaired by parol evidence, but this rule only

applies where the writing constitutes the mutual agreement of the parties; When the policy was issued the company was apprized of the agreement that its agent had made, and when the agent secured the further insurance, carrying out the whole contract, it did not repudiate the transaction, or offer to cancel the policy. Under the circumstances if it did not intend to be bound it was its duty to speak and act.

This case differs essentially from those cited in the books where the only questions were as to the validity of the notice.

The defendant receiving the premium with a full knowledge of all the facts, and it ought not to be permitted to gainsay its acts when it will have the effect of defrauding the other contracting party.

Let the judgment be affirmed.

The other judges concur.

David Hagner

C

Harry Horwitz
v
The Equitable Mut
Ins, Co,

Opinion of the
Court, Hagner

Filed May 20th 1867
O T Fishback Clk
per E M Craig Dep

Affirmed