No. 13302

Supreme Court of Illinois

Atlantic Ins.Co.

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vs.

Wright

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ILLINOIS SUPREME COURT.

THIRD DIVISION.

APRIL TERM, 1859.

ATLANTIC INSURANCE COMPANY,
Appellant.
vs.
EDWARD WRIGHT,
Appellee.
} *Appeal from Cook Circuit Court.*

RECORD.

1 This is *assumpsit* on a fire insurance policy of $5,000. Declaration has *three*
2 *counts;* two on the policy—*one* for money. *First* count states the *appellant*, on 24th March, 1857, by its policy, *insured* the *appellee* against loss by *fire* on *his* five story brick, stone front, building, (describing it,) setting out the policy in *hæc verba*, which policy refers to *application* and *diagram* and makes them *part* of the policy, by which the *appellee represents* the building as "*his*" property. Also therein *represents he was insured* thereon in three other companies (describing them) of $5,000 each.
3 The loss, if any, should be estimated at its cash value, and to be paid in sixty days *after* due notice and proofs, to be made *in conformity* with the *conditions annexed.*

5 These *terms* and *conditions* are then set out, viz:

11 1st. The application must be in writing, &c., and "if *any* person shall make
12 *any misrepresentation* or *concealment*," &c., "*such* insurance shall be *void* and of no effect."

2nd. No insurance binding *till premium paid.*"

3rd. Property held in *trust* must be insured *as such*, or it is not covered by the policy. In case of loss, the names of *respective* owners shall be set forth in the preliminary proofs of loss, with their respective *interests therein.* If the *interest* be a leasehold, or *other interest not absolute, it must* be so *represented* and *expressed in the*
13 policy, otherwise the insurance *shall be void.*

4th. Pro rata payment only of all insurances thereon.

15 9th. To give notice of loss; its cash value; and what was *their interest therein*, with certificate, &c.

18 Note 3rd. All *fraud* or *false* swearing forfeits claim; bar, &c.

18 Note 10th. The right to *replace* loss reserved to company.

19 All insurance made on *original representation* is *made part* of the policy and *warranted by the assured.*

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It is then averred the building was destroyed by fire, October 19th. Gave notice thereof 21st, with *full* proofs of *full* particulars of "*his*" loss. Signed *with his* name and verified by *his* oath, duly certified by Hosmer, stating what *his interest*, &c. He then avers he was the *absolute owner* thereof, and that his proofs were satisfactory to the company; that he fulfilled all things on his part according to the *terms* and *conditions* of said policy, yet, &c.

Second count states the making of the insurance as "*is set forth in the first count*," *and refers to it* for greater certainty; the loss and notice; proof of *value satisfactory*, verified by Peck's oath *as agent*, certified by H.

That he performed all things for him to do, yet, &c., nevertheless, &c.

1st Plea—*non-assumpsit.*

2nd Plea—Appellee was not the owner.

3rd Plea—Policy obtained by falsely representing himself to be the owner of said real estate.

4th Plea—That he was not the owner.

5th Plea—He had no *insurable interest* in the property, which he well knew, but fraudulently concealed the fact. [*This plea has no answer.*]

Reply to 2nd, 3rd and 4th pleas only.

Jury sworn.

Verdict, and motion for new trial. [See *causes* at page 89.]

This motion overruled, excepted to, and judgment on verdict.

Bill of exceptions.—Policy copied (from p. 34 to 50 inclusive, as set out in the declaration as already above stated.)

Witness—Carter's evidence; *question* objected, &c.

Witness—C. H. Peck's evidence.

Admitted (*to save copying*) the contract and receipts showed that appellee built the house and paid for the work thereof, &c.

Notice of loss read in evidence, dated October 19, 1857.

C. H. Peck's evidence continued; *question* asked and objected, &c.

Cocks *not satisfied* with proof of appellee's interest. This was a *few days after* the fire he so stated.

Peck paid Van Buren *difference* between another and this policy in *exchange*.

Preliminary proofs here read in evidence by defense and is set forth; made by *C. H. Peck, attorney in fact*, (and not by appellee, as averred); gives account of the fire, and says *the loss* was $20,000, [he does not say *whose* loss it was, or whose property it was, or that appellee had any *interest* whatever in it.] Hosmer certifies thereto, under date October 23, 1857, [and not 21st, as averred.]

The deed from *appellee* to the *trustees* was here read to the jury; is dated 23rd November, 1854, reciting his desire to make provision for his wife, Sarah, that she might enjoy the rents and profits, &c., therefore conveyed the premises to the trustees, with the *tenements, reversions, remainders, rents, issues and profits thereof*, and also, *all* the *estate, right, title and interest, property, possession whatever in law and equity* of him in and to the said lot and *every part* thereof, *with the appurtenances, to have and to hold*, &c., in *trust*, 1st, To lease the same, collect the rents, keep the premises in good order and repair, and *properly insured*, to pay taxes and assessments; 2nd, In *trust* to pay *residue* of the rents, &c., to his wife Sarah, on her

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64 receipt, to the intent she may enjoy, possess and have the same, *free from his control, interference and liabilities, during his and her lives*; 3rd, In *trust* to convey it in *fee absolute* to her, her heirs and assigns, upon his death, in lieu of dower; in case she dies first, then to *revert* to him.

65 C. Peck stated that the building covered the ground described in the deed. The application states the building has a basement in the ground.

66 Here read in evidence to the jury the preliminary proof made by E. Peck, *trustee*, to and for the Liverpool and London Insurance Company, mentioned in the appellee's *policy:* it is the same in substance (as to the fire) as that made by C. H. Peck, (his son,) in this case, except this, the insurance by the Liverpool and London Company runs to the *trustees*, and he states in his proof "that *he holds the said property*, with
67 Timothy Wright, as trustees of Sarah." This was sworn to on 23rd October (the same date of the *other*,) and H. certifies to *their* loss of $20,000, by the burning of said house.

68 C. Peck recalled, and said "the insurance money was paid to appellee (to *rebuild.*) That he, witness, had renewed those policies out of the rents. He found the policies in the safe, after the appellee left for Europe; don't know who put them there, or
69 who obtained them. These policies were insurance on the same building."

70 (Here question asked, allowed and excepted.)

72 Witness said Cocks told him the building could be rebuilt for $18,000 and he was *unwilling* to pay anything till trust deed (interest) question was settled.

73 *Van Buren* testified he made the diagram and application in this case, as broker, and sent them, for this policy, as such broker; that he was not appellant's agent; submitted the risk to it for appellee; he delivered policy, received premium, but has never paid it over to appellant.

74 The application and diagram here read in evidence to the jury. (See it here.)

76 Also, Secretary Dorr's letter of December 4, 1857.

77 Appellee's reply thereto, December 14.

78 Dorr's reply to it, of 18th December, requiring *new* proof, and pointing it out.

79 Appellee's reply thereto, 28th Dec., professing ignorance of what was wanted.

80 (Here evidence closed.) "*This was all the evidence.*"

Instructions asked by appellee and given by the court to the jury as asked.

81 The substance is—

1. If he built the house "*for the purpose of trade*," and leased it out, received the rents to *his use* and the insurance money, without the objection of the trustees, then it was *his house:* unless he *intended* to build it there for the *trust* named in the deed.

81 2. But (after reciting part of the evidence, says,) if they believe he built the house with his money, with the *intention* it should be his property, then he is the owner thereof, and they will so find.

82 3. If they believe the preliminary proofs were acknowledged by the agent and President to be satisfactory, it was the duty of appellant to *request* further proof, if desired, in a reasonable time, and point out what was wanted; a failure so to do precludes it now from making any objection to it. (All excepted to.)

82–88 Appellee's instructions will be found on pages 82 to 88.

86 The court refused to give Nos. 6, 13, 20, 21 and 23, and defendant below excepted.

89 The court refused to give Nos. 3, 5, 9, 10, 15, 16 and 18 as asked for, but altered the same by striking out and inserting other matter in each one. To the

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opinions of the court in refusing to give them as asked, and giving them as altered by the court, the appellant severally excepted.

89 The jury returned the following verdict: "*We the jury* find for the plaintiff, and assess the damage at $5,166.33.

(Signed) A. P. HAYWOOD, *Foreman.*"

90 See grounds of new trial at pages 89 and 90. That the verdict was against the law and the evidence; that the court erred in giving appellee's instructions as asked, and in refusing to give appellant's as asked, and in giving those *altered* by him, &c.

Motion for new trial overruled, and exceptions taken.

RECORD.

The said Atlantic Insurance Company, assigns for error to its prejudice in the foregoing and annexed record, as follows, to wit:

29–30 *First.* The circuit erred in proceeding to trial, verdict and judgment thereon, leaving the appellant's fifth plea unanswered and undisposed of in any way by the court, and judgment thereon should have been rendered for the appellant, in bar of the action.

89 *Second.* The said court erred in giving judgment upon the verdict, it being defective, not found in the words of the issues, nor responsive thereto.

51 *Third.* The said court erred in allowing witness, Carter, to answer the question, viz: "*Who built the house in question?*" The avowed object was to prove title thereto.

54 *Fourth.* The said court erred in allowing witness, Peck, to answer the question, viz: "*What did the agent, Atwater, say about the proofs at the time of the delivery of them?*"

69 *Fifth.* The said court erred in allowing witness, Peck, to answer the question, viz: "*State whether or not this building was put upon the lot with the knowledge and consent of the trustees.*"

80–82 *Sixth.* The said court erred in the *instructions* given to the jury, as asked by the *appellee*, and in every member, branch, and part thereof.

82–86 *Seventh.* The said court severally erred in refusing to give to the jury the *several* instructions, as asked by the *appellant*, and in each of them severally.

86–89 *Eighth.* The said court erred in refusing to give to the jury the third, fifth, ninth, tenth, fifteenth and sixteenth instructions, as asked by the *appellant*, without the *alterations* and *modifications* thereof made therein by the court, (*as written in red ink*) and the court erred in each and every of its alterations and modifications therein made, and in giving the same to the jury so altered and modified, and in each and every branch and part thereof.

Ninth. The said court erred in overruling the *appellant's* motion for a new trial, and in giving judgment upon the verdict for the *appellee*.

Wherefore the *appellant* prays that said judgment may be reversed, with costs, &c.

POINTS AND ARGUMENT.

I. POINT.

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29–30 *First.*—The court erred in proceeding to trial and judgment, leaving a good 5th plea unanswered and undisposed of in any way.

5 Monroe, 94.
12 Ill. 372–3.

II. POINT.

89 *Second.*—The court erred in giving judgment on the *verdict*, which was not found in the words of the issues; *nor was it responsive thereto.*

2 Tidd's Practice, 798.
1 Paine & Duer Pr. 544.

III. POINT.

51–69 *Third and Fifth* Errors may be considered together. Mr. Carter was asked, "*who built the house in question?*" and Mr. C. H. Peck was asked to "*state whether or not this building was put upon the lot with knowledge and consent of the trustees.*" The avowed object was to show title to the *realty in* appellee, *by parol*, in direct conflict with the *law* and his own *deed*, by which he conveyed the lot to trustees for the sole and separate use and benefit of his wife; by showing he built the house without *objection*, therefore their consent *implied*, as they did not forbid him; he rented it out and collected the rents, which he had conveyed by deed to her. These several questions were improperly allowed to be answered by the ruling of the court. [See deed at page 60.] Now, where possession and acts of ownership is relied on in the absence of paper title, it should, in the language of the law, be a *pedis possessio*, an *actual* and exclusive occupancy, by the party.

1 Gilman, 266.

Where he claims as "*owner*" he must show *paper title in fee:* it is no hardship in this country.

1 Gilman, 267.

IV. POINT.

2 1st. A *breach* of the *warranty* of title to the building.

2nd. A *breach* of the warranty of his title to the *three* other insurances, and that they were insurances upon his interest in said property to him.

3rd. The *misrepresentation* of his title to the real estate, or his *concealment* thereof.

4th. The *misrepresentation* of his title to the three other insurances, and of there being insurances upon *his* estate, or the *concealment* of the *nature* and *extent* of his title in them, and *whose* interest was insured thereby.

A breach of warranty consists in the *falsehood* of an *affirmative* matter as existing at the time, (Angell on Insurance, § 145,) such as calling it "*his*" property, &c., "*his*" insurance, &c., on "*his*" interest, &c.

1 Gilm. 266, and authorities cited.

An express warranty in the law of insurance is a stipulation *inserted* in a writing *on the face* of the policy, and upon the *literal* truth of which the *validity* of the entire contract depends. The stipulation is considered to be *on the face* of the policy when it is referred to in the policy, and made part thereof by express words therein.

Angell on Insurance, §§ 140, 141.
5 Hill (N. Y.) R. 190, in *point.*

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The warranty in this case consists in the appellee's *affirmative* statement of "*his* five story, stone front, building"—that is, "*his*" estate in fee; and the breach consists in the *falsehood* of that assertion of title to the property.

Angell on Insurance, 145, and the authorities there cited.

"It is simply *sufficient*, and ought to be sufficient, to *avoid* the policy, that only *one* thing warranted *is not true*."

Angell, 142.

"This warranty *operated* as a *condition precedent* to the assured's *right of recovery*."

1 Gilm. 265.
Angell, 145, 144.

All express warranties and *affirmative averments* must be *strictly proved*.

2 Greenleaf's Ev. §§ 383, 392.

This being the law of warranty, now for the *facts*.

The policy in question not only *refers* " to the *application* and diagram as No. 29,991, on file in this office *to which this insurance refers*," but it also expressly
4 states, "*which are hereby made a part of this policy*." And that he gave notice of three other insurances thereon, of $5,000 each. "And this policy *is made* and *accepted* in reference to the *terms and conditions hereto* annexed, which are to be used
11 and resorted to in order to *explain the rights and obligations* of the parties hereto, in *all cases* not herein otherwise specially provided for." And by article 1st of these *conditions* annexed, it is declared that "applications for insurance on *property* must be in writing," &c. And "if *any* person insuring *any building* in this office shall make *any misrepresentation* or *concealment*," &c., "*such insurance shall be void and of no effect*."

12 *Article* 3rd. Property *held in trust*, or on sale or commission, *must be insured as such*, otherwise the policy *will not cover such property*. "If the *interest* in the property to be insured, be a *leasehold interest* or *other* interest *not absolute*, *it must be so represented* to the company and *expressed in the policy in writing*, otherwise the insurance *shall be void*."

13 *Article* "5th. Notice of all previous insurances *upon property* insured by this company, shall be given to them and indorsed on this policy." And "liable *only* for such ratable proportion of the loss," &c., "bear to the whole."

18 *Article* "13th. When a policy is made and issued upon a survey and description
19 of certain property, such survey and description *shall be taken and deemed to be a part* and portion of *such policy and warranty* on the part of the *assured*."

21 "And the said plaintiff avers" [in his declaration] "that *he was the absolute owner* of the said building, so lost and destroyed as aforesaid," &c.

61 It is not *denied*, the evidence shows the title in fee of the land as against him, was
62 and is in the trustees for the sole use of the wife, on which the husband erected the house and rented it out. To fulfill the *law*, the *contract*, and the *averment* in the
51 declaration, the *interest* of the assured in the freehold estate *constituted the subject* of
52 the insurance in this case, and this, as *represented*, is a *substantial ownership* or *title in*
61 *fee;* whereas in fact nothing appears from the *parol* evidence relied on by him but a
71–3 *naked pretense*—a mere *false color* of a *pretended legal title* by building thereon and leasing *it* out. The trustees holding the legal estate and the wife holding the *entire*
72 equity thereof. If any *technical* estate existed in him, constituting an *insurable*
73 *interest* therein, yet its *quality* and *quantity* literally *differs from that* which he has
21–73 alleged in *his declaration*, or that set forth *in his application*, and it was either *pos-*
74–5 *itively misrepresented* by the *assertion* of an *unqualified* ownership and *proprietary* right thereof, or it was *concealed* when a particular disclosure was demanded of him
14 by the very terms and conditions of the contract, of the *nature* and *quantity* of his interest. Therefore, whether a total *defect* of interest appeared or not, its essential
74 *attributes* were clearly *misrepresented* or *concealed:* or his *failure* in proving the
14 averments in his declaration, which by law is required of him to be *in writing*, called a paper title.

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In *Jackson* v. *Babcock*, (4 John. R. 418,) it was held that where A, by a writing under seal, gave B the *privilege* to occupy certain land of his, to build thereon and reside therein at will, this was a mere *license*, a *personal privilege* to occupy, and it did not vest in B *any estate*. His attempt to *convey* it to another was an act terminating the *license*.

The trustees did not protest against the appellee's acts of improving the estate for the benefit of his wife: of course not. But that did not give him any title to the estate whatever. That did not destroy the trustees' legal title or the wife's equitable estate *in the property*. If, then, they held the legal title and she the entire equity therein, it does seem to me there was nothing left for the husband but a naked pretense.

It does appear to me, therefore, that the first and second instructions given by the court, as asked by the appellee, were clearly erroneous, and the court should have granted the new trial asked for.

2nd. A *misrepresentation* or *concealment* by the *assured* of his title or interest in or to the property insured, and also of *his title* or *interest* in the three insurances, avoids the policy. A *representation* of ownership is a material fact stated; and a *misrepresentation* of such title or ownership is the *statement* of such fact. A material fact is one that shows the *nature* and *extent* of the title and risk, which may have *induced* the insurer to enter into the contract of risk; and the true *test* is, the *probable influence* of that statement or representation, on the mind of the insurer.

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37 The policy in this case states that "this policy is made and accepted in reference to the *terms* and 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."

He was required, by these terms and conditions annexed to the policy, to make
11 his application for insurance in writing, which he did. Next he was informed by those terms and conditions, to which he assented, that "if *any* person insuring *any* building, or goods, in this office, shall make any *misrepresentation* or *concealment*, &c., *such* insurance shall be *void* and of *no effect*."

12
14 "3rd. Property held in *trust must* be insured as such," and "if the *interest* in the property to be insured be a leasehold interest, or other interest *not absolute*, it *must be so represented* to the company, and expressed in the policy, in writing, otherwise the insurance *shall be void*."

3 "5th. Notice of all previous insurances upon the property insured by this company, shall be given to them and indorsed on this policy."

To all this, the assured stated in his application that said property was "*his*," and that *he* had three several insurances thereon of $5,000 each, naming them, meaning that they were taken out and perfected in his name on *his* said property; whereas
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61 in fact he was not the owner in fee of said property or real estate, nor were said three insurances upon his said property or interest therein, or perfected in his name, as he well knew at the time.

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11 But if he had any *insurable interest* in said real estate, the same was a *less* interest than an *absolute* ownership; and the *nature* and *extent* thereof he did not *disclose* to the appellant at the time, as he was bound to do by the very terms and conditions of said policy. But he *falsely represented* or concealed his title or interest in said property, (if any he had), and by reason thereof, and by the terms of his said contract, said policy was and still is void.

All the authorities concur in the position that such false representation or concealment avoids the policy. And it is so whether it occurred by accident, mistake or inadvertence, it is equally fatal.

Angell, § 175.
20 Ohio R. 174.
5 Hill (N. Y.) 190.

Van Buren (the Broker) was the assureds agent in making the application & contract of insurance, and not appellants agent. Angell on Ins. 467. 468. 7 M. & Welsb. R. 151. Acey v. Fernie

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Nor can he recover under an averment of an *entire* interest in himself if the proof show a *joint* or *common interest.*

Angell, § 82.
1 Wend. 561.

In Phillips' case, (20 Ohio, 175,) where the stockholders of a corporation procured a policy of insurance on their buildings in the individual names of the directors, as *their* property, sued thereon to recover loss by fire; held, they could not recover. Their policy referred to the law incorporating the insurance company, requiring applicants for insurance who held a less estate than a fee simple interest to set forth their *title or interest*, and in *default*, the policy was void. The court say, "if the law (or contract) declares a contract void, how can the court declare it legal?" "It is not the plaintiffs' property. In fact they had no insurable interest in it." "If they had any it was in their stock. The buildings were the property of the corporation."

See 1 Gilm. 264 to 267, to same effect.
5 Hill (N. Y.) R. 190 to 193, *in point.*

In 5 Hill, 190, the court say, that the parties have *by their contract*, placed a *misrepresentation* or *concealment* in relation to particular facts upon the same *footing* as a warranty. They have *agreed* that a *misrepresentation* or *concealment shall* avoid the policy; and we have nothing to do with the *inquiry*, whether the *fact* misrepresented or concealed was *material to the risk or not.* See also Angell on Insurance, 151, to the same point.

4th. His *representation* that he had *three insurances upon his* said property, of $5,000 each—meaning that he had taken them to himself on his interest—*were untrue*, as is clearly shown by the evidence. This representation was a *material* fact, as the Garden City Insurance Company, of Chicago, was presumed to know the said property and the appellee, and because the terms and conditions of the contract required such information. But whether *material* or not in point of *fact*, it is *enough* that the parties by their contract made it material.

If the *parol* evidence of title by possession of tenants *imports prima facie* title of *insurable interest* in a landlord as to *third* persons, this *presumption* was *repelled* by the deed and other evidence by the appellant, which clearly showed the legal title as stated by the appellee, was not in him, therefore he could not recover on the issues as made. As to *concealment*, see Angell on Insurance, 175, in point.

An *expected* estate is not an insurable interest. A mere *moral* title will not sustain an insurance.

Angell, 68, 69.

V. POINT.

The *third* instruction as asked by the appellee and given to the jury by the court, was also erroneously given. 1st. Because there was no legal evidence before the jury *tending* to show a *waiver* of the objection *by the appellant* to the preliminary proof, that it did not show any *title* or *interest* of the appellee in or to the property in question. 2nd. It was not waived by *delay*, because their witness, Peck, stated to the jury
55 that when President *Cocks* was here, and said he had "no fault to find with the proof, *but he was not satisfied* with the *question* about the *trust* deed." "*This was several days after the fire.*" Again, Cocks at the same time further stated the building could
72 be put up again for $18,000, and that "*he was unwilling to pay any thing till the trust deed was settled.*" *All this was* said at the *interview* the witness and appellee had with Cocks; and about what? It was the very question of the appellee's *title* or *interest* in the property which was omitted to be stated in the preliminary proofs, and Cocks *twice* told them he was not *satisfied* about. Again, in answer to the first letter
77 written by appellee to the appellant after the *interview* aforesaid, and after the ob-
78 jection had been pointed out by Cocks, as aforesaid, the appellant replied it had received "what purports to be your proofs of loss," which is not clear, nor are they in accordance with the *requirements* of our policy. We ask new proof, to be made in accordance with article 9th of the *conditions* here *inclosed* for your *guidance*. We *find your proofs to the Liverpool and London, Garden City and Ætna* companies were made out *differently* from *ours*. These have *settled*, not deeming *us co-insurers*. Dated New York, *Dec.* 18, '57.

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The appellant had supposed from the *silence* of the appellee, after the *interview* with Cocks, that he had abandoned his alleged claim, not having heard anything further from him. For it was *plain* neither the appellee or his agent, Peck, would swear *he had any interest* or *title* to the property. In fact, both refused, for they well understood what was wanted, as *all the proofs* were *made at the same office, the same time*. Mr. Hosmer certifies to the loss of the trustees of $20,000, and the *like sum* as loss to the appellee, making $40,000 for the building of $25,000, although C. H. Peck does not swear that the appellee had any loss. He has left it to be *inferred*. They ask the jury to *infer* what the appellee and agent dared not swear to. But the declaration in this case *avers* a *compliance* with the 9th article of the "*conditions*," by making *full* preliminary *proof;* and under that averment he had no *right* to offer, or show, an *excuse* or *dispensation*. It being a *material* averment, it was equally important to prove it as alleged, as it was to *allege it*. Both at law and in equity, the *allegata* and *probata* must agree. The Court, therefore, erred as well in giving the appellee's *third* instructions, as in refusing to give the appellant's tenth and fifteenth instructions, as asked, and also erred in giving the said tenth and fifteenth instructions as altered and modified by the court. 2 Peters R., 53, (Lawrence case,) on this point the court say: "*We* know of no *principle* or *usage* which *requires* underwriters to *specify* their objections, or which justifies the *inference* that *any* objection is *waived*. We know of *no principle* by which *this preliminary proof* should be *separated* from the other proofs which are required to *sustain* the claim, and its *sufficiency* be remarked to the assured."

In 1 *Gilm.* 260, it is said: "Under the plea of the general issue and notice," the defense "had the right to avail" itself "of any matter of defense arising from the *illegality* of the insurance, *from a non compliance* with some *express* or *implied warranty* or *condition*, *from* the want of a *proper interest*, *from misrepresentation*, or *concealment*, or *from* a performance on their part of the *terms* of the policy."

Again, p. 260: "it is incumbent to state in the declaration and to prove a *substantial* interest; so that if the *averment* of *interest* should be stricken out, there would be no foundation for the action." "A less estate than a fee simple in the land upon which the buildings were erected, was not stated in the applications according to the act (or contract) *a fee simple estate will be intended*, as otherwise the policies would be void." Ib. 265. So, too, whether a mistake or omission was willful or not, it avoids the policy. And so with a warranty, 265, 266. Woodworth in that case testified that the assured "*were the owners of the property insured*," but not the land; this was held not to be sufficient, under their application and policies. It
80 follows that the court below erred in giving the appellee's first and second instruc-
84 tions, also erred in refusing to give the appellant's twentieth, twenty-second, third and eighteenth instructions, as asked.

Appellee's first instruction is—

80 "If the jury believe, from the evidence, that the plaintiff, with the consent of the trustees, took possession of the land for the purposes of trade, built and paid for the building with his own money, and upon its completion took possession of the building, and leased the same in his own name, and thereafter received the rents to his own use; and that all of these acts were done with the previous and continued knowledge and consent of E. Peck and Timothy Wright, the trustees, and without objection or interference on their part, to the time the building was burned, they will be at liberty to find that the plaintiff was owner of the building. Unless they further believe that said building was erected with an *intention* that it should be for the benefit of the trust created by the deed of the plaintiff to Peck & Wright for the benefit of Sarah L. Wright.

81 Second. That in determining whether the building was erected with an *intention* that it should be the property of the trustees, or his own property, the jury may take into consideration evidence tending to show whether the building insured was *built and paid for with his money, and whether upon its completion he took possession of the building, and leased the same in his own name, and received the rents to his own use, and whether after the fire he received the insurance money thereon*, and all other evidence in the case, *if any*, conflicting with *these facts*, and tending to establish the the contrary, and if from the evidence the jury shall believe that the plaintiff built

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the building with an *intention* that it should be *his own property*, and that the trustees *knew* of *this intention*, and *consented* to his taking possession of the land, and made no objection to the acts of the plaintiff, but consented thereto, and *approved* thereof down to the time of the fire, they will find that the plaintiff *was owner* of the building insured and *was seized of some interest* in the land, sufficient to enable him to assert his claim to the building as his property."

These are erroneous—see 1 Gilm. 260. Must be a *substantial interest*, title in fee, 265 and 266. A *precarious title*, depending on a contingency, not sufficient. 2 *Peters*, 50.

3rd. "That if the jury believe, from the evidence, that the plaintiff furnished preliminary proofs of *the loss* [and not *his loss*] and that such preliminary proofs
82 were acknowledged by the agent and president of the defendant to be *satisfactory*, it was the duty of the defendant, if it desired further preliminary proofs, to request the plaintiffs to make the same within a *reasonable time*, *and to point out specifically* the further proofs required, and if the evidence shows a failure on the part of the defendant in this respect, the *law precludes* the defendant from making *any* objection to the *sufficiency* of preliminary proofs." This is clearly erroneous. See 2 Peters' U. S. R., 53.

The *title* proved at the trial does not *agree* with the *title* stated in the *application* for insurance. The case *must* go back for new trial.

2 Peters, 54 and 57.
1 Gilm., 160, 165.
5 Hill, (N. Y.) 190, 193.
20 Ohio R., 175.

The appellee's *two* first instructions, base his title to the building upon the *parol* evidence of his having erected it upon the land with the *intention* that it should be *his own property;* and the trustees knew this, made no objections, but assented thereto, and that *this intention* was manifested by acts of building, renting and collecting rents thereof for himself, &c., "Then the jury will find" he "*was the owner*," and was "seized of some interest in the land *sufficient* to enable him to assert his claim to the building as *his property*."

This *reciting* a *part* of the evidence *three* times over, and concluding if the jury believe it, "*then they will find he is the owner*." All the jury had to do was to put the *finding* of the court in the *shape* of a verdict.

But, if this *intention* be manifested by *parol* evidence of *acts*, gives a *better* title to real estate in this State than a "*paper title*," demanded by our laws, I think it is time we should have, "and thus saith the" Supreme Court of Illinois, that all the world may know it.

Whenever *the title* comes in question, even in a *ship*, no *claim* can be *received* in opposition to the *modes* of conveyance *required by law*." 2 Greenleaf's Ev., § 378; 1 Gilm. 265, 267, as to real estate.

86 The 3rd, 16th and 18th instructions, as asked, [without the alterations by
88 the court in red ink] severally present the question, that if the assured had a *less*
89 *estate* in the property than the *absolute ownership* therein, and the same was not disclosed by his application to the company, then the jury ought to find for appellant.

They were founded upon the express terms of the contract set forth in the declaration, that "If the interest to be insured be a *leasehold* interest, or *other* interest *not absolute*, *it must* be *so represented* to the company, and expressed in the policy

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in writing; otherwise the insurance *shall be void.*" And, "If any person shall make a *misrepresentation* or *concealment*," &c., "such insurance shall be void and of no effect." So, "property held in *trust* must be insured as such; otherwise the policy will not cover *such property.*"

See 5 Hill (N. Y.) R. 190, 193, in point.
20 Ohio R. 175.

54 The fourth error assigned is, in allowing witness to answer this question: "What did the agent, Atwater, say about the proofs at the time of the delivery of them?"

Atwater's agency was to receive and forward the proofs to the company. His opinions of the sufficiency or insufficiency of proofs was not within the scope of *his authority.* So, too, with the president. 6 Littell (Ky.) R. 411; 2 Peters 52, 53.

The court erred in refusing a new trial, for the reasons aforesaid, to the appellant, wherefore he asks that said judgment be reversed, &c.

B. S. MORRIS,
For Appellant.

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Atlantic Ins. Co

v.

Edward Wright

Abstract

of Appellant's

13302

Filed April 27, 1839

L. Lellman

Clerk

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