No. 13683

Supreme Court of Illinois

Herron

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vs.

Peoria Ins.Co.

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 80.

Herron
vs
Peoria Ins Co

186[illegible]

Filed Apr 3 1883

In the Supreme Court. April Term 1862.

William A. Herron
vs
The Peoria Marine & Fire Insurance Company } Error to Peoria.

Argument for Plaintiff

This was an action of covenant on a sealed policy of Insurance. The defendant interposed a demurrer to the whole declaration which was sustained and the case comes into this court upon the sole question as to the sufficiency of the declaration. If the declaration contains a single count which is unobjectionable the judgment of the court below must be reversed. This has so often been adjudged to be the law that a reference to authority upon this point is wholly unnecessary. We desire only to call attention to the amended second count in the declaration

1. The first point made by the defendant is that the action of covenant is improper in the case because the time for which the insurance was made was extended by a subsequent parol agreement and therefore

assumpsit would have been the proper form of action. By an examination of the count it will be found that this objection is founded upon a total misconception of the terms of the policy sued on. The counts contain no allegations whatever from which it might be inferred that there had been any increase of risk or change in the terms of the original policy by any subsequent agreement or contract whatever. It simply avers that by the payment of the premium and the giving of a renewal receipt according to the thirteenth condition attached to the policy, the policy itself was continued in force until the time of the loss by fire. It is true the period for which the original insurance was effected was for one year; but it must be observed that the policy did not lose its vitality at the expiration of that year provided the insured complied with certain conditions precedent. It was a continuing contract liable to become inoperative at any time when the insured failed to comply with these conditions. It is very similar to the old forms of policies which were good from year to year just so long as the insured paid his premiums

and complied with the other conditions of the policy. In such cases it was usual to allow the insured fifteen days after the expiration of the policy to pay his premium, and having paid it the insurance was continued upon the original policy.

Angell on Insurance Sec. 87.

Ellis on Insurance p. 118: et seq.

In all the cases cited in these authorities the question seems to have been upon the liability of the company after the expiration of the year and ~~the~~ before the expiration of the fifteen days, the premium remaining unpaid, there seems to have been no doubt that if the premium had been paid the company would have been liable, not upon a new agreement or contract but upon the original policy.

The case of Luciani vs the American Fire Insurance Company 2. Mart: 172. cited by the defendant is not a case exactly in point. The question in that case arose upon the application of the plaintiff for leave to file an amended declaration counting upon a policy which had been extended by parol agreements indorsed upon it

The Court very properly refused the applica=
tion for the reason that the parol agree=
ments were a variation from the terms
of the policy. They did not of their own
force continue the policy as a specialty
for the reason that the policy contained
no covenant to that effect. It provided
that the insurance should be continued
upon the payment of the premium with=
out any charge for the new policy; plain=
ly indicating that the insurance was to
be continued by a new policy. And
the Court remark that an action of
covenant could have been maintained
upon the policy for a refusal to grant
a new one upon the payment of the
premiums.

This policy provides that the insurance
may be continued; not by the execution
of a new policy but simply upon the
payment of the premium a receipt being
given therefor. It is simply the fulfil=
ment of a condition precedent by the
insured by means whereof the vitality of
the old policy is preserved. The receipt
refers to the policy by its number. The
money is paid and the receipt given in

Compliance

with the terms of the original policy. Through their authorized agent they propose to be continuing the insurance upon the original policy, and they should not now be heard to dispute its obligatory force. It is a complete estoppel in pais to say the least of it. The case cited by defendant is not a parallel case with the present. It is rather an authority in favor of the plaintiff. Franklin Ins. Co vs Massey 33. Penn's State Reports 221 is decisive of this question # (See next page of this sheet)

2. The next objection to the declaration is that the original representation is not set out; that that is a condition precedent; a warranty and therefore should have been set out as a condition precedent. We presume this is the first time it has ever been seriously contended that a warrantor was bound to set out his warranty and show a compliance with its terms in order to entitle him to recover in any form of action. The breach of warranty is always a matter of defense unless the action is brought for damages resulting from a breach of warranty. If the insured makes a false representation we can easily

The case of The Franklin Ins. Co. vs Massey 33 Penna. State Reports 221. was an action of debt on a policy which had expired and had been renewed several times by indorsements pursuant to the terms of the policy. The same question was raised as in this case and the court held the action to have been properly brought.

conceive how his right of recovery might be defeated upon a proper plea to that effect. But the defendant must show the falsity of the representation in order to defeat the plaintiff's right of recovery.

Lounsbury vs Protection Ins Co
8 Conn. 459.

But these representations are not warranties
3 Wood & Minot 529
Ellis on Insurance 31 side paging
Angell " sec 147.

3 The third point made by defendant is likewise untenable. The Count avers that within sixty days after the loss and more than sixty days prior to the commencement of suit the plaintiff gave notice to the Company at their office in Peoria. The policy on its face shows that the place of business of the Secretary of the Company was in the City of Peoria and State of Illinois. An averment therefore that the notice was given and received by the Company at their office in Peoria is a substantial compliance with the terms

of the policy. It is even stronger than the terms of the policy require. Notice to the Company is notice to their Secretary. The eleventh condition attached to the policy ~~to~~ does not require the notice to be given to the secretary. The notice may be given to an agent.

Argyll on Insurance Sec. 248.
" " Sec 239

4. The defendant further objects to the count for the reason that there is no averment that the proof was made by the nearest notary. The averment is that the premises were located in Peoria and that the proof was made by a notary residing in Peoria. The premises were located within a few rods of the office of the defendant; a half dozen notaries were within a stone's cast of the same. The intent of the policy was that the proof should be made by a notary well acquainted with the circumstances of the loss: the location of the premises &c. It was not necessary that he should

be the nearest notary; it was not
com necessary to aver that he was
not concerned in the loss or related
to the plaintiff; circumstances of much
more importance than the mere ac=
cident of his residence.

Lounsbury vs Protection Ins. Co.
8. Conn. 459
7. Conn 366.
Angell on Insurance sec. 229
According to these decisions the
declaration is full to prolixity.

We cannot conceive of a more fla=
grant outrage upon justice than to
allow this Company to continue to
pocket the premiums of those whom
they are pretending to benefit, whilst
they do not give them any insurance
upon their property whatever. It is
difficult to conceive wherein an action
of assumpsit would lie upon this
subsequent agreement if it is to be
called such, unless it would be to
recover back the premium paid.
The Company are bound to do nothing

by it. The Secretary has no right to make insurances except by sealed policies. How then can an action of assumpsit lie to recover the value of the premises destroyed. The case seems too plain to require further argument.

Manning & McCulloch
Attys for Plff.

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William A. Simon

vs

Penn'a Mutual Life

Insurance Company

Argument for Plff.

Filed Apl. 25, 1862

L. Leland

Clk.

Manning & Wilcox atts

In the Supreme Court of Illinois, April Term, 1862.

WILLIAM A. HERRON,
Plaintiff in Error,
vs.
THE PEORIA MARINE AND FIRE INSURANCE COMPANY.
Defendant in Error.

Error to Peoria.

This was an action of covenant, brought on a sealed policy of insurance. The only question in the case is the sufficiency of the amended second count in the declaration, to which a demurrer was sustained in the court below.

The count is set out at length in the abstract with the exception of such of the conditions attached to the policy as are wholly immaterial to the case. It alleged that defendants made their certain policy of insurance for the period of one year subject to certain conditions thereunto attached; one of which conditions provided that insurance once effected might be continued for such time as might be agreed on, the premium being paid by the insured and a renewal receipt being given therefor; that in pursuance of such condition the policy sued on was by the payment of the premium, and the granting of the renewal receipt continued in force until the time of the destruction of the insured premises by fire; that the plaintiff was interested in the premises when burned; that the fire did not happen in such a way as to bring it within any of the exceptions of the policy, all of which are specifically enumerated; that plaintiff has complied with each and all of the conditions precedent, which are also specifically set forth, and that the defendants have failed to perform their covenants.

It is necessary to aver specifically the performance by plaintiff of every condition precedent. This has been done. Averments are also necessary to show that the fire did not happen within any of the exceptions of the policy. Such averments are made, covering every exception in the policy.

The main point is whether or not the action of covenant will lie on the case made in the count. Writers on pleading, all agree that the action of covenant is a proper action on a sealed policy. The question in this case arises upon the averments, that the policy sued on was continued from time to time by the payment of the premium, and the giving of renewal receipts. The defendant contends that the action should have been ASSUMPSIT on the

parol agreements to continue the insurance after the expiration of the original limitation of the policy.

1. The policy provides for its own continuation. The conditions attached form part of the policy. The 13th condition provides that "insurance once made may be continued for such further term as may be agreed on; the premium being paid and a renewal receipt given for the same, and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make, when the risk has been changed either within itself, or by surrounding or adjacent buildings." This is equivalent to the old forms of policy, where the policy was good from year to year, just so long as the insured paid his premium, and complied with the other conditions of the policy.

Angell on Insurance, Sec. 51.

In all cases here cited, the question arose upon the company's liability, for loss happening after the expiration of the year, and before the payment of the premium for the succeeding year. Had the premiums been paid as in this case, no doubt could have arisen.

2. Had the policy not provided for its own continuation by a renewal receipt, a new policy would, in all cases, have been necessary to renew the insurance.

2 Wharton 167.

In that case the court put their decision expressly on the ground, that by the terms of the conditions annexed to policy, the company were bound to give a RENEWED POLICY. Why a renewal receipt if the old policy is not still continuing in force.

3. The policy is still in force, or no insurance is affected. A receipt is no policy of insurance. If an insurance is thereby effected, it is upon the terms of the original policy. The receipt refers to the policy by its number. If a new contract is entered into at all, the policy is adopted as that new contract as an entirety; and in adopting it, they adopt the seal along with the rest.

4. The receipt is no new contract. It is simply an evidence of the performance of a condition precedent by the assured. Without it the insurance is at an end; with it the assured is protected by the original policy.

With regard to the matter necessary to be stated in a declaration, in covenant, or in setting forth the facts, the count seems to be full almost to superfluity.

The court therefore erred in sustaining the demurrer.

MANNING & McCULLOCH.
Attorney's for Plaintiff.

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William A Herron

vs

The Peoria Marine

and Fire Insurance

Co

Brief

Filed April 25 1861

S. Leland

Clk.

ABSTRACT.

In the Supreme Court of Ill., 3d Grand Division.

WILLIAM A. HERRON,
Plaintiff in Error,
vs.
THE PEORIA MARINE AND FIRE INSURANCE COMPANY.
Defendants in Error.
} Error to Peoria.

This was an action of covenant brought by plaintiff in error against defendants in error, to recover damages for the breach of the conditions of a certain policy of insurance executed by defendants to plaintiff on a certain building in Peoria, which was destroyed by fire.

At the November Term, A. D. 1859, defendant demurred to plaintiff's declaration which contained two counts; the demurrer was sustained to the second count, whereupon plaintiff took leave to amend, and the cause was continued.

At the March Term, A. D. 1860, defendant demurred to the amended declaration and the demurrer was sustained.

The amended second count is in substance as follows:

And for that whereas, heretofore, to wit: on the first day of September, A. D. 1855, to wit: at the County aforesaid, said defendants made their certain deed-pole, or policy in substance as set out in the count to which this is an amendment, and which, so far as the said policy is therein set out, is hereby referred to and made part hereof.

COPY OF POLICY SET OUT IN SECOND COUNT.

Peoria Marine and Fire Insurance Company, $1000.

By this policy of insurance the Peoria Marine and Fire Insurance Company in consideration of ten dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure William A. Herron, Esq., against loss or damage by fire, to the amount of one thousand dollars on his two buildings of brick, one story high, used as Drug store and Confectionery, situated on Main street, Peoria, opposite Court House, as described in application No. 231, on file in this office. 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 happen by fire to the property as above specified, from the first day of September, one thousand eight hundred and fifty-five, (at 12 o'clock at noon) unto the first day of September, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty 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 or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and 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 his assigns shall hereafter make any other insurance on the same property and shall not 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 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

L. S.

loss or damages 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 premises 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, or vocation denominated hazardous, extra-hazardous, or included in the memorandum of special rates in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise in the conditions aforesaid denominated hazardous, 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, or used, 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 lands, bills, notes, nor 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 Peoria Marine and Fire Insurance Company have caused these presents to be signed by their President, and attested by their Secretary in the city of Peoria and State of Illinois, this first day of September, 1855.

ISAAC UNDERHILL, President.

C. HOLLAND, Secretary.

Which said policy was sealed with the Corporate seal of said company, and by said defendants, delivered to said plaintiff, and was subject to certain conditions thereunto attached, which are in substance set forth in the first count of this declaration, which is also so far as the conditions of said policy are therein set out, referred to, and made part hereof.

SUMMARY OF THE CONDITIONS SET OUT IN SAID FIRST COUNT.

1. Enumerates what goods are not hazardous, such as dry goods and generally such as are not combustible.

2. Enumerates trades and occupations, goods, wares and merchandise denominated hazardous.

3. Enumerates trades and occupations, goods, wares and merchandise which are extra-hazardous, among which are Confectioner's stock and Druggist's and Apothecaries. It also contains a memorandum of such as are to be insured at special rates and such as are not to be insured at any rate whatever.

4. Directs what shall be specified in the application, provides for false descriptions, omissions, over-valuations, etc., increase of risks, subsequent insurances.

5. "No insurance, whether original or continued, shall be considered binding, until the actual payment of the premium."

6. Provides for insurance upon goods held in trust.

7. Provides for assignments and tranfers of policies.

8. Provides for lightning, explosions of steam boilers, keeping of gun powder, lighting by camphene etc.

9. Excludes jewels, watches, plate, musical instruments, etc.

10. Obligates the assured to use due diligence in case of fire.

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

dise, or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when, and how the fire originated, so far as they know and 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 statement, and knows, or verily believes that he, she, or they really and by misfortune, and without fraud or evil practice, 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 said 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 examination, 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 insured shall forfeit all claim under this policy. Damage to buildings not totally destroyed, shal lbe 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 kind, 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 fees to be paid by the insurers. A copy of the written portion of the policy, to be given in the affidavit of the claimant in all cases.

12. Provides that payment shall be made in sixty days after proof of loss to the secretary, and in case no notice is received in sixty days

after loss, it shall be optional with the company to reject or allow the same. It also provides in what cases the company may replace the property.

13. Insurance once made may be continued for such further term as may be agreed on; the premium being paid, and a renewal receipt given for the same, and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings.

14. Provides for policies made upon surveys.

15. Provides for damage sustained by the removal of goods from an exposed building.

16. Has reference to chimneys, and police regulations concerning fires.

17. Limits the time of the commencement of the action for recovery of any claim to twelve months from the time of loss.

And said plaintiff avers that afterwards, to wit: on the first day of September, A. D. 1856, in pursuance of the thirteenth condition attached to said policy, and in consideration of the sum of ten dollars, paid by said plaintiff to said defendants, as premium for the continuance of the insurance of the premises described in said policy, and of the covenants of said defendants to be by them performed, according to the terms of said policy, it was mutually agreed by, and between said plaintiff and said defendants, that said policy of insurance should remain in full force and effect from the first day of September A. D. 1856, to the first day of September, A. D. 1857; and said plaintiff avers that in pursuance of said thirteenth condition, he did, at the time of the making of said last mentioned agreement, pay to the said defendants the sum of ten dollars, as premium for the continuance of said insurance for the term aforesaid, and the said defendants gave to said plaintiff a renewal receipt for the same in writing, whereby the said defendants in consideration of ten dollars, to them paid by said plaintiff, who was therein described as the holder of

policy No. 231, the receipt whereof the said defendants thereby acknowledged, did thereby consent to the continuance of the risk originally assumed in policy No. 231, (which policy plaintiff avers to be the same as that herein-before set forth and described), from the first day of September, A. D. 1856, to the first day of September, A. D. 1857, whereby the said policy of insurance was continued in force, and the said defendants continued by virtue of the same to be the insurers of the aforesaid premises against loss by fire, according to the terms of said policy, until the first day of September, A. D. 1857, to wit: at the County aforesaid. And said plaintiff further avers, that afterwards, to wit: on the first day of September, A. D. 1857, in consideration of thirteen dollars to be paid by said plaintiff of the one part, to said defendants as premium for the continuance of said policy of insurance for the period of one year from the said first day of September, A. D. 1857, and of the covenants to be performed by said defendants of the other part, it was mutually agreed by and between said plaintiff and said defendants, that the said policy of insurance should remain in full force and virtue, from the first day of September, A. D. 1857, until the first day of September, A. D. 1858; and said plaintiff further avers, that he did at the time of the making of the said last mentioned agreement, pay to the said defendants, the said sum of thirteen dollars, as premium as aforesaid, and the said defendants gave to said plaintiff a renewal receipt for the same in writing, whereby said defendants in consideration of thirteen dollars to them paid by said plaintiff, who was therein described as the holder of policy No. 231, the receipt whereof was thereby acknowledged, did thereby consent to the continuance of the risk originally assumed in policy No. 231, from the first day of September, A. D. 1857, to the first day of September, A. D. 1858, whereby the said policy of insurance was continued in full force, and the said defendants continued to be the insurers of the aforesaid premises against loss by fire, according to the terms and conditions of said policy until the first day of September, A. D. 1858. And the said plaintiff further avers that at the time of making said policy, and the said several continuances thereof and to the time of the loss by fire hereinafter mentioned, said plaintiff was, and continued to be the owner of the property described in said policy, and interested therein to a large amount, to wit: five thousand dollars, to wit: at

the County aforesaid. And afterwards to wit: on the fifth day of July, A. D. 1858, to wit: at the County aforesaid, one of said buildings, to wit: the building described in said policy as being used as a confectionery was burnt down, consumed and destroyed by fire, which did not happen by means of any invasion, insurrection, riot, or civil commotion, nor of any military, or usurped power, whereby said plaintiff then and there sustained damage and loss to a large amount, to wit: the sum of one thousand dollars so assured on the said premises and building so burnt and consumed as aforesaid. And the said plaintiff further avers that the said premises and buildings in said policy mentioned, at the time of the making of said policy were not, nor at any time since the making of the same, have been insured in any other office than that of said defendants, for any amount whatever. And said plaintiff further avers, that the said premises describes in the said policy, were by the terms and conditions thereof, insured by said defendants, as buildings containing articles denominated in the conditions of said policy, as extra-hazardous, and as used for the purpose of carrying on an extra-hazardous occupation, and that the said premises were not, during the continuance of said policy, at any time appropriated, applied, or used to, or for the purpose of carrying on, or exercising therein any trade, business, or vocation included in the memerandum of special rates, in the conditions attached to said policy, nor for the purpose of storing, or vending therein, any of the articles, goods, or merchandise, in the said conditions included in the memorandum of special rates. And said plaintiff further avers that the premium for the said insurance, was at the time of the making of said policy, and at the times of the making of said several renewals thereof, until the time of the loss hereinbefore mentioned, duly paid to, and accepted by said defendants, and that the said deed-poll, or policy, at the time of said loss remained in full force and virtue, to wit: at the County aforesaid. And said plaintiff furthermore avers that he did, forthwith, after the said loss and damage, to wit: on the sixth day of July, A. D. 1858, to wit: at the County aforesaid, give notice to said company of said loss, at their office in Peoria, according to the terms and conditions of said policy, which said notice was received by said company within sixty days next after the accruing of said loss or damage, and more than sixty days next

preceding the commencement of this suit. And said plaintiff further avers that as soon as possible, after the said loss, to wit: on the first day of August, A. D. 1858, he delivered to said defendants a particular account of such loss, signed with his own hand, and verified by his own oath, in which said account so verified with his oath as aforesaid; he stated whether any, and what other insurance had been made on said premises, what wasthe whole value of said premises, what was his interest therein, what was the general manner the said premises, and the several parts thereof, were occupied at the time of the said loss, who were the occupants of said premises, and when, and how, to the best of his knowledge and belief, the said fire originated. And said plaintiff further avers that he procured a certificate under the hand and seal of Bernard Bailey, a notary public, within, and for the County of Peoria, aforesaid, residing in the city of Peoria, who was not concerned in said loss, as a creditor or otherwise, nor related to said plaintiff, that he, the said Bailey, was acquainted with the character and circumstances of said plaintiff, and had made diligent inquiry into the facts set forth in plaintiff's said statement, and that he verily believed that said plaintiff had really, and by misfortune, and without fraud or evil practice, sustained by such fire, loss and damage, to the amount mentioned in plaintiff's said statement. And said plaintiff further avers that he has at all times been ready to produce his books of account, and such other vouchers as said defendants might reasonably require, and to submit to examination under oath, touching his knowledge of anything relating to said loss, or to his claim thereupon. And said plaintiff further avers that the said proofs, declarations, and certificates were delivered to, and received by said defendants, more than sixty days prior to the commencement of this suit; and that although he hath, in all things, conformed to, and observed the said articles, stipulations, matters and things, which, on his part, were to be observed, according to the form and effect of said policy, and of the conditions thereunto attached. Yet the said defendants have failed to pay, and make good to said plaintiff his loss, and damage aforesaid, and each and every part thereof, and the same, and every part thereof are wholly unpaid and unsatisfied, to wit: at the County aforesaid, contrary to the force and effect of the said policy, and of the covenants of the said defendants, therein in that behalf made as aforesaid, to wit: at the County aforesaid,

And so the said plaintiff, in fact, saith that the said defendants, although often requested so to do, have not kept their said covenants so made by them as aforesaid, but have broken the same, and to keep the same with said plaintiff have wholly neglected and refused, and still do neglect and refused, to the damage of said plaintiff, of one thousand dollars, and therefore he brings suit, etc.

Demurrer to the declaration and to the several counts, and amended counts thereof, for the following causes.

1. The action of covenant cannot be maintained upon the case made in the several counts.

2. The action is misconceived.

3. The declaration does not sufficiently set forth the facts.

4. The declaration does not sufficiently set out the condition annexed to the policy, nor does it show a compliance with the several conditions.

5. Other reasons.

Demurrer sustained, and plaintiff abides by his declaration.

Judgment against plaintiff for costs.

ERRORS ASSIGNED.

1. The Court erred in sustaining the demurrer to the declaration.

2. The Court erred in sustaining demurrer to first count.

3. The Court erred in sustaining demurrer to second count.

4. The Court erred in sustaining the demurrer to the second amended count.

5. Said Court erred in rendering judgment on demurrer in favor of said defendant.

MANNING & MERRIMAN,
Attorneys for Plaintiffs.

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80-21

Wm A. Hamon

vs

The Peoria Marine & Fire Insurance Company

Abstract

Filed Apr. 22nd 1861.

Lorenzo Leland

Clerk.

In the Supreme Court of Illinois, April Term, 1862.

WILLIAM A. HERRON,
Plaintiff in Error,
vs.
THE PEORIA MARINE AND FIRE INSURANCE COMPANY.
Defendant in Error.

Error to Peoria.

This was an action of covenant, brought on a sealed policy of insurance. The only question in the case is the sufficiency of the amended second count in the declaration, to which a demurrer was sustained in the court below.

The count is set out at length in the abstract with the exception of such attached to the policy as are wholly immaterial [redacted]

It is necessary to aver specifically the performance by plaintiff of every condition precedent. This has been done. Averments are also necessary to show that the fire did not happen within any of the exceptions of the policy. Such averments are made, covering every exception in the policy.

The main point is whether or not the action of covenant will lie on the case made in the count. Writers on pleading, all agree that the action of covenant is a proper action on a sealed policy. The question in this case arises upon the averments, that the policy sued on was continued from time to time by the payment of the premium, and the giving of renewal receipts. The defendant contends that the action should have been ASSUMPSIT on the

parol agreements to continue the insurance after the expiration of the original limitation of the policy.

1. The policy provides for its own continuation. The conditions attached form part of the policy. The 13th condition provides that "insurance once made may be continued for such further term as may be agreed on; the premium being paid and a renewal receipt given for the same, and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make, when the risk has been changed either within itself, or by surrounding or adjacent buildings." This is equivalent to the old forms of policy, where the policy was good from year to year, just so long as the insured paid his premium, and complied with the other conditions of the policy.

Angell on Insurance, Sec. 51.

In all cases here cited, the question arose upon the company's liability, for loss happening after the expiration of the year, and before the payment of the premium for the succeeding year. Had the premiums been paid as in this case, no doubt could have arisen.

2. Had the policy not provided for its own continuation by a renewal receipt, a new policy would, in all cases, have been necessary to renew the insurance.

2 Wharton 167.

In that case the court put their decision expressly on the ground, that by the terms of the conditions annexed to policy, the company were bound to give a RENEWED POLICY. Why a renewal receipt if the old policy is not still continuing in force.

3. The policy is still in force, or no insurance is affected. A receipt is no policy of insurance. If an insurance is thereby effected, it is upon the terms of the original policy. The receipt refers to the policy by its number. If a new contract is entered into at all, the policy is adopted as that new contract as an entirety; and in adopting it, they adopt the seal along with the rest.

4. The receipt is no new contract. It is simply an evidence of the performance of a condition precedent by the assured. Without it the insurance is at an end; with it the assured is protected by the original policy.

With regard to the matter necessary to be stated in a declaration, in covenant, or in setting forth the facts, the count seems to be full almost to superfluity.

The court therefore erred in sustaining the demurrer.

MANNING & McCULLOCH.
Attorney's for Plaintiff.

21 80

William A. Norrow

vs

The Peoria Marine and Fire Insurance Co

Brief of Plff in Error

Filed April 25 1861

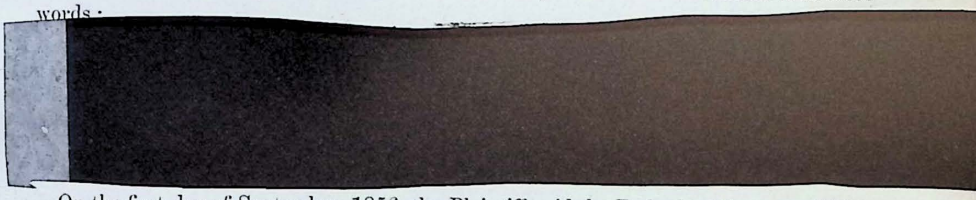
L. Leland
Clk.

IN THE SUPREME COURT.

WILLIAM A. HERRON,
vs.
THE PEORIA MARINE AND FIRE INSURANCE COMPANY.

DEFENDANT'S BRIEF AND POINTS.

On the first day of September, A. D. 1855. The Defendant executed to the Plaintiff a Policy of Insurance. The Policy was sealed with the corporate seal of the Defendant. The Policy contained several conditions, of which the thirteenth is in these words:



On the first day of September, 1856, the Plaintiff paid the Defendant the sum of $10, and the risk was extended for one year, and the Defendant executed to the Plaintiff a receipt.

There is no averment that the receipt was under seal.

On the first of September, 1857, the Plaintiff paid $13 as premium, and Defendant executed a receipt, extending the risk one year.

There is no averment that this receipt was under seal.

On April 11th, 1857, an additional insurance of $300 was effected and written in the body of the Policy. (See Policy set out in first Count.)

These receipts were not under seal. The first question we desire to present is: will covenant lie? Chitty states the rule to be at follows: "And where a contract under "seal has afterwards been varied in the terms of it by a distinct simple contract made "upon a sufficient consideration, such substituted or new agreement must be the sub-"ject of an action of assumpsit, and not of an action of covenant."

1, *Chitty's Pleadings*, 105, side paging.

Here were three new and distinct agreements, enlarging and extending the risk and time.

See Luciani vs. The American Fire Insurance Company.
2, *Wharton's Penna. Reports* 172.

The sylabus is in these words:

endorsements did not continue the instrument as a speciality; and therefore that the action of covenant would not lie to recover for a loss incurred after the expiration of the first term.

2 The Plaintiff might have demanded a Policy in conformity with the clause, and have maintained an action for the breach of it, or he might, perhaps, maintain assumpsit on the contract remaining in parol."

The case runs on all fours with the one at Bar.

There is no weight in the argument that because the thirteenth condition of the Policy provided for a continuance of the insurance, that, therefore, covenant will lie on the new contract.

That condition was not obligatory or binding on either of the parties. The term of renewal was to be agreed on; the premium was to be paid; a renewal receipt was to be given.

The rights and obligations of the parties were precisely the same without the condition.

The same argument is considered by the Court in *Luciani vs. The American Insurance Company*, 2, *Wharton* 167, see the case and opinion of the Court.

See the case referred to in *Angell* on insurance, page 98, § 52.

This point is considered as settled by Angell.

II This is an action on a Policy under seal, which upon its face shows was issued upon an application of the Plaintiff. The conditions annexed to the Policy makes this application a warranty. The truth of the warranty is a condition precedent to the Plaintiff's rightof recovery. The declaration is defective in not setting out the application.

Angell lays down the rule. *Angell on Insurance*, 437, § 366, as follows:

"In a declaration upon a Policy under seal, its contents are much the same as that in assumpsit, except in matter of form essential to the declaration upon a Policy under seal, in a declaration upon which the policy should be recited *verbatum*, together with all the proposals and conditions to which it refers, constituting a condition precedent; and any material variance or omission will prove fatal."

Ellis on Fire and Marine Insurance lays down the same rule.

Ellis on Fire and Marine Insurance, page 175.

III The twelfth condition of the Policy provides that the money shall not be deemed payable until sixty days after the proofs of loss and other insurance is delivered to the secretary of the Defendant. There is no averment that such proofs were furnished to the secretary. The object of this condition is to enable the proper officers of the Defendant to pass upon the claims for loss. The Defendant is doing business in several States and the averment in the declaration would be sustained on proofs of loss being furnished to any agent of the Defendant.

IV The printed abstract only sets out the amended second count from which it is inferred that the Plaintiff only relies on said count in this Court. That count does not allege that the notary whose certificate was procured was the nearest notary or magistrate.

V The several counts are in other respects insufficient.

H. GROVE, *for Deft.*

Petition
of
Peoria Bridge
& Fire Insurance
Co —

Print & argument
of Deft. in Error

Filed April 23. 1862

Pleas before the Circuit Court within and for the County of Peoria in the State of Illinois on the 13th day of March in the year of our Lord One thousand eight hundred and sixty. Present the Honorable Elihu N. Powell, Judge of the sixteenth judicial Circuit John Bryner Sheriff and Enoch P. Sloan Clerk to wit:

State of Illinois
Peoria County } Be it remembered that heretofore to wit on the 1st day of July in the year of our Lord one thousand eight hundred and fifty nine there was issued out of the Clerks office of the Circuit Court within & for the County of Peoria in the State of Illinois under the seal thereof a Summons directed to the Sheriff of Peoria County which is in the words & figures following to wit:

Summons "The People of the State of Illinois to the Sheriff of Peoria County Greeting: We command you to summon the Peoria Maride and Fire Insurance Company if it may be found in your County to appear before our Circuit Court on the first day of the term thereof to be held at Peoria within and

for the said County of Peoria on the third Monday of November next then and there in our said Court to answer unto William A. Herron of a plea of covenant to his damage one thousand dollars as he says and make return of this writ with an endorsement of the time and manner of serving the same on or before the first day of the term of said Court to be held as aforesaid. Witness Enoch P. Sloan Clerk of our said Court and the seal thereof at Peoria this 1st day of July in the year of our Lord one thousand eight hundred and fifty nine

E. P. S.

Enoch P. Sloan, Clerk"

Which summons was afterwards returned into said Clerks office endorsed as follows to wit:

Return

"State of Illinois
Peoria County } I have duly served this writ by leaving a true copy of same with Charles Holland, Secretary of said Company at their office July 2nd 1859

John Bryner, Sheriff
per T. M. Easly, Dep.:"

And afterwards to wit on the 10th day of October A.D. 1859 there was filed in the Clerks office of said Court a declaration in the above cause which is in the words and figures following to wit:

Declaration

"State of Illinois
Peoria County } ss In Peoria Circuit Court, November term A.D. 1859.

William A. Herron

vs

The Peoria Marine & Fire Insurance Company

In Covenant

Damages $1000.

William A. Herron plaintiff in this suit by Manning & Merriman his attorneys complains of the Peoria, Marine and Fire Insurance Company of a plea of breach of covenant: For that whereas heretofore to wit on the first day of September in the year of our Lord one thousand eight hundred and fifty five at the County of Peoria aforesaid by a certain deed poll or policy of Insurance then and there made and sealed with the corporate seal of the said defendants and now to the Court here shown in consideration of ten dollars to them paid by said plaintiff the receipt of which was in the said deed poll or policy acknowledged, did insure the said plaintiff against loss or damage by fire to the amount of One thousand dollars on his two buildings of brick one story high, used as drug store and confectionary situated on Main street in Peoria opposite the Court house to wit at the County aforesaid as described in application number two hundred and thirty one, then on file in the office of said Company. And said defendants did in and by said policy covenant promise and agree to and with said plaintiff to make good unto said plaintiff his executors, administrators and assigns all such immediate damage or loss not exceeding in amount the sum is insured to wit: the sum of One thousand dollars as should happen by fire to the property so specified as aforesaid from the first day

of September one thousand eight hundred & fifty five (at 12 o'clock at noon) unto the first day of September one thousand eight hundred and fifty six (at 12 o'clock at noon) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same should happen and to be paid within sixty days after notice and proof thereof made by said plaintiff, in conformity to the conditions annexed to said policy provided always and it was by said policy declared, that said defendants should not be liable to make good any loss or damage by fire, which might happen or take place by means of any invasion insurrection riot or civil commotion or of any military or usurped power or any loss by theft at or after a fire, and provided further that in case the assured should already have any other insurance against loss by fire on the property aforesaid and not notified to said defendants, and mentioned in or endorsed upon said policy, then the said insurance should be void and of no effect; and if the said plaintiff or his assigns should thereafter make any other insurance upon the same property and should not give notice thereof to said defendants and have the same indorsed upon said policy or otherwise acknowledged by them in writing then the said policy should cease and be of no further effect And in case of any other insurance upon said property whether prior or subsequent to the date of said policy the said plaintiff should ~~not~~ not, in case of loss or damage be entitled to demand or recover of said defendants any greater portion of the loss or damage sustained, than the

amount insured by said policy should bear to the whole amount insured thereon. And it was further agreed and declared in and by said policy to be the true intent and meaning of the parties thereto that in case the above mentioned premises should at any time after the making and during the continuance of said insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous extra hazardous or included in the memorandum of special rates in the conditions annexed to said policy or for the purpose of storing or vending therein any of the articles, goods or merchandize in the conditions aforesaid denominated hazardous, extra hazardous or included in the memorandum of special rates, unless therein otherwise specially provided for, or thereafter agreed by said defendants in writing and added to or indorsed upon said policy, then and from thenceforth, so long as the same should be so appropriated, applied or used, said policy should cease and be of no force and effect. And it was further declared in and by said policy that said insurance was 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 said policy was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not in said policy otherwise provided for, which said conditions were

in substance as follows to wit:

Copy of Conditions

1. Goods not hazardous are such as are usually kept in Dry Good stores, including coffee flour, household furniture and linen, indigo rice, spices sugar teas and other articles not combustible.

2. The following trades and occupations goods wares and merchandize are denominated hazardous viz: Alcohol bucket-sellers, Brush makers stock, cabinet furniture, china earthen or glassware or plate 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, jeweller's stock liquor in glass unpacked, looking glasses in boxes manila grass in bales, paints ground in oil, paper hangings, porter houses, potash, pocket-book makers stock, printers of newspapers, rags in packages, sail makers, ship-chandlers spirituous liquors, segar makers Stationers stock, snuffmakers threshed grain, tin or sheet iron workers victualling houses, watch makers stock & tools wine in glass in packages windows or plate glass in packages

3. The following trades and occupations goods wares and merchandize are denominated extra hazardous viz: Basket-makers straw bleachers, booksellers stock, blacksmiths, boat-builders, brass founders, china earthen or glassware or looking glasses unpacked confectioners stock cotton unpacked, coopers Copper smiths, Druggists & Apothecaries, fur 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, Milliners stock, morocco manufacturers, optical and mathematical instrument-

makers, painters' stock, perfumers' stock, Phosphorus pictures and prints, printers of books and jobbing, plates and plated ware manufactories, pocket-book makers, plumbers and pewterers saltpetre, silver smiths, stables (private) spirits of turpentine stove manufacturers, tobacco manufactories, toy keepers stock type or stereotype manufacturers, varnish and window and plate glass unpacked—Wms. Bakers, bark mills, blind makers breweries, book binders, blacksmiths, boat-builders, cabinet-makers, carpenters, joiners, chair or coach makers' workshops chemists, cotton mills, Dyers, forges fences frame makers, furries, fulling mills, grist mills, hat-manufactories, house building or repairing, ink or ivory black or lampblack manufactories livery stables lumber or mahogany yards, malt-houses metal & other mills of all kinds musical instrument-makers, oil makers and Block makers shop, paper mills, rope makers, saw mills ship builders stock in the yard, ships or other vessels in port or their cargoes, or when building or repairing steam engines or boats, sugar refiners tanneries, tallow melters or chandlers, timber yards, woolen 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 &c. The following are not to be insured at any rate of premium viz: Brimstone works Distilleries, Flax mills, Gun powder, Oil boiling houses Oakum factories, panoramas or other scenic paintings, patent leather manufactories sash or sash and blind manufactories, snuff mills steam planing mills tar boiling houses theatres, turpentine manufactories and varnish makers.

Application for insurance must specify the construction and materials of the building 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 building and their construction and materials whether any manufactory is carried on within or about it and in case of goods and merchandize, whether or not they are of the description denominated hazardous extra hazardous or included in the memorandum of special rates.

And a false description by the assured of a building or its contents or the omission to make known any fact material to the risk or in a valued policy an over valuation shall render absolutely void a policy issued upon such description or valuation. But the office will be responsible for the accuracy of surveys and valuation made by its agents.

If after insurance is effected either by the original policy or by the renewal thereof the risk be increased by any means within the control of the assured, occupied in any way so as to render the risk more hazardous ~~than~~ than at the time of insuring such insurance shall be void and of no effect: If during the insurance any subsequent insurance should be made upon the property hereby insured or the risk be increased by the erection of buildings or by the use or occupation of neighboring premises or otherwise or if for any other cause the Company shall so elect it shall be optional with the Company to cancel this policy in which case the company will refund the premium of the unexpired time.

5 No insurance whether original or continued shall be considered as binding & until the actual payment of the premium

6. Goods held in trust or in 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 ~~&~~ Goods on storage must be separately and specifically insured.

7 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 such transfer or change of title in the property insured by this Company, or of any undivided interest therein, such insurance shall be void and cease.

8. This Company will not be liable for damages to property by lightning, aside from fire, nor for damages occasioned by the explosion of a steam boiler, nor for damages by fire resulting from such explosion unless otherwise expressly provided. The keeping of gunpowder for sale or on storage upon or in the premises insured or by lighting the same by camphene or Spirit gas, without written permission in the policy shall render it void, and this company will not be liable for any loss caused by the gross wanton misconduct or culpable negligence of the assured, or by means of his intoxication.

9. Jewels, watches, plate musical instruments, paintings, statuary, sculptures and curiosities are not deemed to be included in any insurance unless an inventory thereof accompany the application for insurance or is inserted in the policy.

10. In case of fire or loss or damage thereby or of 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 to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect: and there can be no abandonment of the premises.

11. All persons being insured by this Company and sustaining loss or damage by fire are forthwith to give notice thereof to the Company or its agent & as soon after as possible to deliver in a particular account of such loss or damage signed by their own hands and verified by their oath or affirmation: they shall also declare on oath whether any and what other insurance ~~company~~ 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 merchandize or otherwise) the building insured or containing the subject insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know and 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 statement and knows or verily
believes that he she or they really and by misfortune and
without fraud or evil practice hath or have sustained by
such fire loss and damage to the amount therein mentioned
And also if required shall produce their books of account and
other proofs 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 examination
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 insured 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 merchandize 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 Kind 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 fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases.

12. Payment of losses shall be made in sixty days after sufficient proof has been received by the Secretary in writing and in case differences shall arise touching any loss or damage 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 or damage to the property insured it shall be optional with the company to replace the articles 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 the preliminary proofs shall have been received at the office of the Company. And if no notice is received by the Company of a loss within sixty days after it occurred it shall be optional with the Company to reject or allow the claim or any part thereof.

13. Insurance once made may be continued for such further term as may be agreed on, the premium being paid and a renewal receipt being given for the same, and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make, when the risk

has been changed either within itself or by the surrounding or adjacent buildings.

14. When a policy is made and issued upon a survey and description 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.

15. When property insured by this company is damaged by removal from a building in which it is exposed to fire, said damages shall be borne by the insured and the insurers in such proportion as 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.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stove or brick chimney or in consequence of neglect or deviation from the laws or regulations of policy made to prevent accidents by fire in places where laws and regulations on the subject exist.

17. It is furthermore hereby expressly provided that no suit or action 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 within the term of twelve months next after any loss or damage shall occur And in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have accrued the lapse of time shall be taken and deemed

as conclusive evidence against the validity of the claim thereby attempted to be enforced. And said plaintiff avers that afterwards to wit on the first day of September A.D. 1856, in the furtherance of the conditions attached to said policy and in consideration of the sum of ten dollars paid by said plaintiff to said defendants as premiums for said insurance and of the covenants to be performed by said defendants it was agreed by and between said plaintiff and said defendants that said policy of insurance should remain in full force and effect from the first day of September A.D. 1856 to the first day of September A.D. 1857 and in furtherance of said agreement said defendants issued in writing their certificate of such consent to said plaintiff and thereby acknowledged the receipt of the premiums aforesaid and thereby became & continued to be the insurers of the property described in said policy against loss by fire from the said first day of September A.D. 1856 to the first day of September A.D. 1857 according to the terms of said policy and the conditions thereunto attached to wit, at the County aforesaid.

And afterwards to wit: On the eleventh day of April A.D. 1857 in consideration of the sum of one and fifteen one hundredths dollars paid by said plaintiff to said defendants as premium for the insurance of the same said defendants declared a further insurance upon the fixtures contained in the drug store aforesaid to the amount of three hundred dollars and inserted said declaration in the aforesaid policy of insurance in substance as follows

Copy of further declaration of Insurance

to wit:

"Peoria April 11th 1857 Farther insurance is hereby declared on fixtures in the drug store to the amount of three hundred dollars to expire with this policy, premium received for same one 15/100 dollars

C. Holland Sy."

and thereby became the insurers upon the said policy in the additional amount of three hundred dollars upon the fixtures aforesaid according to the terms of said policy and the conditions thereunto attached and so continued to be the insurers against loss by fire of the said property described in said policy and also of the fixtures last aforesaid according to the terms and conditions of said policy until the first day of September A.D. 1857.

And said plaintiff further avers that afterwards to wit: on the first day of September A.D. 1857 to wit at the County aforesaid, in pursuance of the conditions of said policy and in consideration of the sum of thirteen dollars by said plaintiff paid to said defendants as premium for the further continuance of said policy and of the insurance thereby to be continued upon said premises described in said policy, it was agreed by and between said plaintiff and said defendants that the insurance upon the property described in said policy and upon the fixtures last aforesaid should be continued from the first day of September A.D. 1857 to the first day of September A.D. 1858 and in pursuance of said agreement said

defendants issued to said plaintiff their certificate of renewal and consent to the continuance of said policy in writing and thereby acknowledged the receipt of the premium last aforesaid and thereby became and continued to be the insurers against loss by fire of the premises described in said policy and the fixtures last aforesaid from the first day of September A.D. 1857 to the first day of September A.D. 1858 according to the terms of said policy and the conditions thereto attached and so continued to be the insurers of said property at the time of the loss by fire hereinafter mentioned. And the said plaintiff further says that at the time of the making of said policy and said several renewals & continuances of said policy and to the time of the loss by fire hereinafter mentioned said plaintiff was and continued to be the owner of the property described in said policy and interested therein to a large amount to wit: five thousand dollars to wit at the County aforesaid, and afterwards to wit on the fifth day of July A.D. 1858 to wit at the County aforesaid one of said buildings used as a confectionary as described in said policy was burnt down and consumed and destroyed by fire, which did not happen by means of any invasion insurrection, riot or civil commotion nor of any military or usurped power whereby said plaintiff then and there sustained damage and loss to a large amount to wit: to the amount of said sum of One thousand dollars so assured on the said premises and building so burnt and consumed And the said plaintiff further avers that the said premises

and buildings in said policy mentioned at the time of the making of said policy were not, nor at any time since have been insured in any other office for any amount whatever.

And said plaintiff further avers that the said premises were by the terms and conditions of said policy insured by said defendants as buildings containing goods wares and merchandize and used for the purpose of carrying on business denominated in the conditions attached to said policy as extrahazardous and that said premises were not used for the purpose of storing or vending any articles nor for the purpose of carrying on any business included in the memorandum of special rates in the conditions of said policy.

And the said plaintiff further avers that the premium for the said insurance was at the time of the making of said policy and at the times of the making of said several renewals thereof until the time of the loss hereinbefore mentioned duly paid to and accepted by said defendants and that the said deed poll or policy at the time of said loss remained in full force to wit at the County aforesaid.

And said plaintiff further avers that he did forthwith after the said loss and damage to wit on the sixth day of July A.D. 1858 to wit at the County aforesaid give notice thereof to said Company at their office in Peoria according to the terms and conditions of said policy which said notice was received by said Company within sixty

days next after the accruing of said loss & damage and more than sixty days next preceding the commencement of this suit.

And said plaintiff further avers that afterwards to wit on the day and year last aforesaid, at the County aforesaid said defendants wholly waived, relinquished released and discharged said plaintiff from the observance and performance of all other provisions contained in the eleventh of said conditions attached to said policy; and said plaintiff further avers that he has at all times been ready and willing to submit to an examination under oath and to answer any and all questions touching his knowledge of any thing relating to said loss or damage and has at all times been ready to produce his books of account and such other vouchers as said defendants might reasonably require and the said plaintiff further saith that although he hath in all things conformed himself to and observed the said articles stipulations matters & things which on his part were to be observed and performed according to the form and effect of said policy & of the conditions thereto attached except such as were waived by said defendants as aforesaid, and that although the said defendants from the time of the making of said deed or policy hitherto have been and yet are able to pay said plaintiff the said loss & damage sustained by fire to wit at the County aforesaid, yet the said plaintiff further saith that he has not been paid or made good his said damage & loss or any part thereof but the same and every part thereof are wholly unpaid

& unsatisfied to wit at the County aforesaid contrary to the force and effect of said policy and of the covenant of said defendants therein in that behalf made as aforesaid to wit at the County aforesaid.

And for that whereas heretofore to wit on the first day of September A.D. 1855 to wit at the County aforesaid said defendants made their certain other deed poll or policy in substances as follows to wit:

Copy of Policy

Peoria Marine & Fire Insurance Company.

$1000. By this Policy of Insurance the Peoria Marine & Fire Insurance Company in consideration of ten dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged do insure William A. Herron Esq. against loss or damage by fire to the amount of One thousand dollars on his two buildings of brick, one story high, used as a drug store and confectionery, situated on Main street, opposite Court-house as described in application No. 231 on file in this office. 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 happen by fire to the property as above specified from the first day of September one thousand eight hundred and fifty five (at 12 o'clock at noon) unto the first day of September One thousand eight hundred and fifty six (at 12 o'clock at noon) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same

shall happen and to be paid within sixty 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 or damage by fire which may happen or take place by means of any invasion insurrection riot or civil commotion, or of any military or usurped power or any loss by theft at or after a fire. And provided further that in case the assured shall have already any other insurance against loss by fire on the property hereby insured and not notified to this Company and mentioned in or endorsed upon this policy, then this insurance shall void and of no effect. And if the said assured or his assigns shall hereafter make any other insurance on the same property and shall not 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 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 premises 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 or vocation denominated hazardous extra hazardous or included in the memorandum of special rates in the conditions annexed to this policy or for the purpose of storing or vending therein any of the articles goods or merchandize in the conditions aforesaid denominated Hazardous, Extrahazardous or included ormemorandum 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 thenceforth so long as the same shall be so appropriated applied or used 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 or 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 Peoria Marine & fire insurance Company have caused these presents to be signed by their President and attested by the Secretary in the City of Peoria and State of Illinois this 1st day of September 1855

Isaac Underhill. President.

C. Holland, Secretary.

Which said policy was sealed with

the Corporate Seal of said Company and by said defendants delivered to said plaintiff and was subject to certain conditions thereunto attached a copy whereof is set forth in the first Count of this declaration and is hereby referred to and made part of this Count.

And said plaintiff further avers that in pursuance of the conditions of said policy by certain agreements between said plaintiff and said defendants said policy was continued in force from the said first day of September A.D. 1856 until the first day of September A.D. 1858 in consideration of the payment by said plaintiff of the premises demanded therefor by said defendants and by said plaintiff paid to said defendants for the continuance of said policy as aforesaid whereby the said defendants became liable to pay to said plaintiff such loss or damage by fire not exceeding the said sum of one thousand dollars as might occur to said property described in said policy during the continuance of said policy to wit: from the first day of September A.D. 1855 during and until the first day of September A.D. 1858 to wit at the County aforesaid.

And the said plaintiff further avers that afterwards and during the continuance of said policy to wit: on the fifth day of July A.D. 1858 one of said buildings described in said policy to wit the building described as a confectionary was wholly burned consumed & destroyed by fire which did not happen or take place by means of any invasion, insurrection, riot or civil commotion or of any military or usurped power whereby the said plaintiff sustained loss and damage to wit:

the amount of One Thousand Dollars to wit at the County aforesaid, and although said plaintiff hath in all things conformed himself to and observed the said articles, stipulations matters and things which by the terms of said policy & the conditions thereto attached were to be observed and performed by him and hath at all times been ready to do and perform all other matters and things which by the terms of said policy & the conditions thereto attached he might by said defendants be required to do & perform, and although the said defendants have often been requested to pay & make good unto said plaintiff his loss so sustained by fire as aforesaid to wit at the County aforesaid, yet the said plaintiff further saith that he has not been paid or made good his said loss & damage or any part thereof but the same and every part thereof are wholly unpaid & unsatisfied to wit: at the County aforesaid contrary to the force and effect of said policy and of the covenant of said defendants therein in that behalf made as aforesaid to wit at the County aforesaid.

And so the said ~~defendant~~ plaintiff in fact saith that the said defendants (although often requested so to do) have not kept their said covenants so made by them as aforesaid but have broken the same and to keep the same with said plaintiff have wholly neglected & refused & still do neglect & refuse to the damage of the said plaintiff of One Thousand dollars & therefore he brings suit &c

Manning & Merriman

Attys for plff.

A copy of the body of the policy is contained in the 2nd

count; a copy of the conditions & further declaration of insurance are contained in the first count.

And afterwards to wit on the third day of March A.D. 1860 the plaintiff filed in the Clerks office of said Court his amended second count in the above cause which is in the words and figures following to wit:

Amended 2nd count

State of Illinois } ss In the Circuit Court
Peoria County } March term A.D. 1860

William A. Herron

vs Covenant

The Peoria Marine & Fire Insurance Company

Amendment to 2d Count of Declaration

And for that whereas heretofore to wit on the first day of September A.D. 1855 to wit at the County aforesaid said defendants made their certain deed poll or policy in substance as set out in the Court to which this is an amendment and which so far as the said policy is therein set out is hereby referred to and made part hereof. Which said policy was sealed with the corporate seal of said company and by said defendants delivered to said plaintiff and was subject to certain conditions thereunto attached which are in substance set forth in the first count of this declaration which is also so far as the conditions of said policy are therein set ~~forth~~ out referred to and made part hereof. And said plaintiff avers that afterwards to wit, on the

first day of September A D. 1856 in pursuance of the thirteenth condition attached to said policy and in consideration of the sum of ten dollars paid by said plaintiff to said defendants as premium for the continuance of the insurance of the premises described in said policy and the covenants of said defendants to be by them performed, according to the terms of said policy, it was mutually agreed by and between said plaintiff and said defendants that said policy of insurance should remain in full force and effect from the first day of September A D. 1856 to the first day of September A D. 1857 and said plaintiff avers that in pursuance of said thirteenth condition he did at the time of the making of said last mentioned agreement pay to the said defendants the sum of ten dollars as premium for the continuance of said insurance for the term aforesaid and the said defendants gave to said plaintiff a renewal receipt for the same in writing whereby the said defendants in consideration of ten dollars to them paid by said plaintiff who was therein described as the holder of policy No. 231. the receipt whereof the said defendants thereby acknowledged did thereby consent to the continuance of the risk originally assumed in policy No. 231 (which policy plaintiff avers to be the same as that hereinbefore set forth and described) from the first day of September A D. 1856 to the first day of September A D. 1857 whereby the said policy of insurance was continued in force and the said defendants continued by virtue of the same to be the insurers of the aforesaid premises against loss by fire according to the terms of said

policy until the first day of September A.D. 1857 to wit at the County aforesaid. And said plaintiff further avers that afterwards to wit on the first day of September A.D. 1857 in consideration of thirteen dollars to be paid by said plaintiff of the one part to said defendants as premium for the continuance of said policy of insurance for the period of one year from the said first day of September A.D. 1857 and of the covenants to be performed by said defendants of the other part it was mutually agreed by and between the said plaintiff and said defendants that the said policy of insurance should remain in full force and virtue from the first day of September A.D. 1857 until the first day of September A.D. 1858; and said plaintiff further avers that he did at the time of the making of said last mentioned agreement pay to the said defendants the said sum of thirteen dollars as premium as aforesaid, And the said defendants gave to said plaintiff a renewal receipt for the same in writing whereby said defendants in consideration of thirteen dollars to them paid by said plaintiff who was therein described as the holder of policy No. 231, the receipt whereof was thereby acknowledged, did thereby consent to the continuance of the risk originally assumed in said policy No. 231. from the first day of September A.D. 1857 to the first day of September A.D. 1858 whereby the said Policy of Insurance was continued in force and the said defendants continued to be the insurers of the aforesaid premises against loss by fire according to the terms and conditions of said policy until the first day of September

AD. 1858. And the said plaintiff further avers that at the time of the making of said policy and the said several continuances thereof and to the time of the loss by fire herein after mentioned said plaintiff was and continued to be the owner of the property described in said policy and interested therein to a large amount to wit: five thousand dollars to wit at the County aforesaid; and afterwards to wit: on the fifth day of July AD. 1858 to wit at the County aforesaid one of said buildings to wit: the building described in said policy as being used as a confectionary was burnt down consumed and destroyed by fire, which did not happen by means of any invasion, insurrection riot or civil commotion nor of any military or usurped power, whereby said plaintiff then and there sustained damage and loss to a large amount to wit: the sum of one thousand dollars so assured on the said premises and building so burnt and consumed as aforesaid And the said plaintiff further avers that the said premises and buildings in said policy mentioned at the time of the making of said policy were not, nor at any time since the making of the same have been insured in any other office than that of said defendants for any amount whatever.

And said plaintiff further avers that the said premises described in said policy were by the terms and conditions thereof insured by said defendants as buildings containing articles denominated of ~~no~~ in the conditions of said policy as extra-hazardous and as used for the purpose of carrying on an extra-hazardous occupation; and that the said premises were not

during the continuance of said policy at any time appropriated applied or used to or for the purpose of carrying on or exercising therein any trade business or vocation included in the memorandum of special rates in the conditions attached to said policy nor for the purpose of storing or vending therein any of the articles goods or merchandize in the said conditions included in the memorandum of special rates.

And said plaintiff further avers that the premium for the said insurance was at the time of the making of said policy and at the times of the making of said several renewals thereof until the time of the loss hereinbefore mentioned duly paid to and accepted by said defendants, and that the said deed poll or policy at the time of said loss remained in full force and virtue to wit: at the County aforesaid

And said plaintiff further avers that he did forthwith after the said loss and damage to wit on the sixth day of July A.D. 1858 to wit at the County aforesaid give notice to said Company of said loss at their office in Peoria according to the terms and conditions of said policy, which said notice was received by said Company within sixty days next after the accruing of said loss and damage and more than sixty days next preceding the commencement of this suit; and said plaintiff further avers that as soon as possible after the said loss to wit: on the first day of August A.D. 1858 he delivered to said defendants a particular account of such loss, signed with his own hand and verified with his own oath, in which said account so verified by his oath as aforesaid

he stated whether any and what other insurance had been made on said premises; what was the whole value of said premises, what was his interest therein; in what general manner the said premises and the several parts thereof were occupied at the time of said loss; who were the occupants of said premises, and when and how to the best of his knowledge and belief the said fire originated.

And said plaintiff further avers that he procured a certificate under the hand and seal of Bernard Baily a Notary Public within and for the County of Peoria aforesaid, residing in the City of Peoria, who was not concerned in the said loss as a creditor or otherwise nor related to said plaintiff, that he the said Baily was acquainted with the character and circumstances of said plaintiff and had made diligent inquiry into the facts set forth in plaintiffs said statement and that he verily believed that said plaintiff had really and by misfortune and without fraud or evil practice sustained by such fire loss and damage to the amount mentioned in plaintiffs said statement. And said plaintiff further avers that he has at all times been ready to produce his books of account and such other vouchers as said defendant and ants might reasonably require and to submit to an examination under oath touching his knowledge of any thing relating to said loss or to his claim thereupon. And said plaintiff avers that the said proofs, declarations and certificates were delivered to and received by said defendants more than

fifty days prior to the commencement of this suit, and that although he hath in all things conformed to and observed the said articles, stipulations matters and things, which on his part were to be observed and performed according to the form and effect of said policy and of the conditions thereunto attached, yet the said defendants have failed to pay and make good to said plaintiff his loss and damage aforesaid and each and every part thereof, and the same and every part thereof are wholly unpaid and unsatisfied to wit, at the County aforesaid, contrary to the force and effect of the said policy and of the covenants of said defendants therein in that behalf made as aforesaid to wit, at the County aforesaid.

And so the said plaintiff in fact saith that the said defendants (although often requested so to do) have not kept their said covenants so made by them as aforesaid but have broken the same and to keep the same with said plaintiff have wholly neglected and refused & still do neglect and refuse to the damage of the said plaintiff of One thousand dollars & therefore he brings suit &c

Manning & Merriman

Attys for Plff.

And afterwards to wit on the 9th day of March A.D. 1860 the defendant filed in the above cause its demurrer to plaintiffs declaration & to the amendment of the second count thereof which is in the words and figures following to wit:

State of Illinois } In the Circuit Court of Peoria County
Peoria County } ss To March Term 1860
William A. Herron

vs

The Peoria Marine &
Fire Insurance Company

In Covenant.

And the said defendant comes and says that the matters and things contained in the said declaration of the said plaintiff & the amendment to the second count thereof are not sufficient in law for the said plaintiff to have and maintain his action aforesaid against the said defendant wherefore said defendant doth demur to the said declaration and to each count and to the amended counts specially & specially & for cause of demurrer shows the following

1. The action of covenant cannot be maintained upon the case made in the several counts.
2. The action is misconcieved.
3. The declaration does not sufficiently set forth the facts
4. The declaration does not sufficiently set out the condition annexed to the policy, nor does it show a compliance with the several conditions.
5. Other reasons

Grove for defl.

Proceedings at a term of the Circuit Court began and held at the Court house in the City of Peoria in said County and State of Illinois on the third Monday in the month of November in the year of our Lord One thousand eight hundred and

fifty nine it being the twenty first day of said month. Present the Honorable Elihu N. Powell judge of the 16th Judicial Circuit in said State, John Boyner Sheriff and Enoch P. Sloan Clerk to wit:

Tuesday November 29th A.D. 1859

William A. Herron

vs

Peoria Marine & Fire Insurance Company

This day this cause came on to be heard on defendants demurrer to plaintiffs declaration herein and the Court being fully advised in the premises do sustain said demurrer. On motion leave is given to plaintiff to amend his declaration.

Proceedings at a term of the Circuit Court began and held at the Court house in the City and County of Peoria and State of Illinois on the first Monday in the month of March in the year of our Lord one thousand eight hundred and sixty, it being the fifth day of said month. Present the Honorable Elihu N. Powell Judge of the 16th Judicial Circuit in the State of Illinois, John Boyner Sheriff and Enoch P. Sloan Clerk to wit:

Monday March 12th A.D. 1860

William A. Herron

vs

Peoria Marine & Fire Insurance Company

This day com the defendant by Grove its attorney and this cause come on to be heard on the demurrer of defendant to plaintiffs amended declaration and the Court having heard the argument of counsel and not being fully advised in the premises takes time to consider.

Tuesday March 13th A.D. 1860

William A. Herron

vs

Peoria Marine & Fire Insurance Company This day this cause come on to be heard on the defendants demurrer to plaintiffs amended declaration and the Court now being fully advised in the premises are of the opinion that the said amended declaration and the matters and things therein contained are not sufficient in law to maintain the action of the said plaintiff. Whereupon the said plaintiff by his attorney says he will abide by his demurrer. Therefore it is considered by the Court that the said defendant have and recover of the said plaintiff its costs and charges by it about its defense in this behalf expended and that execution issue therefor.

State of Illinois
Peoria County } ss I Enoch P. Shaw, Clerk of the Circuit Court within and for the County of Peoria in the State of Illinois do hereby certify that the foregoing is a full and correct transcript of papers filed

and of the proceedings had in our said Court in a certain cause wherein William A. Herron against The Peoria Marine & Fire Insurance Company, as the same remain on file and of record in my office.

Given under my hand and the seal of said Court at my office in Peoria this 16th day of April 1860

Ernest A. Sloan, Clerk

State of Illinois

Supreme Court

Third Grand Division

April Term A.D. 1860

William A Herron } Error to
The Peoria Marine and } Peoria Circuit
Fire Insurance Company } Court

And now comes the said William A Herron and says that in the record and proceedings of the said Circuit Court in the said cause there is manifest and manifold error in this;

1 The said Circuit Court erred in sustaining the said defendants demurrer to the said plaintiffs declaration

2. Said Court erred in sustaining said demurrer to the first count of said declaration.

3 Said Court erred in sustaining said demurrer to the second Count of said declaration.

4 Said Court erred in sustaining said demurrer to the second amended count of said declaration

5. Said court erred in rendering judgment on demurrer in favor of said defendant.

All which the William is ready to verify before the Court here. Wherefore for said errors, he prays that said judgment of said circuit Court may be annulled reversed and for nought held.

Manning Allerton, Attys for Plf.

William A Herron
Plff in Error
v
The Peoria Marine
& Fire Insurance
Company

In Supreme
Court
August Term
1861

And the said defendant in error comes and says in Error says there is no error in the Proceedings record or Suit in this Cause & prays this Court that said Judgt below may be affirmed

Brown
atty for Defts
in Error

William A. Herron

vs

The Peoria Marine

& Fire Insurance

Company

Error to Peoria

Record

Filed Apr. 23rd 1861

L. Leland

Clerk