ALBION LEAD WORKS *v.* WILLIAMSBURG CITY FIRE INSURANCE COMPANY.

Circuit Court, D. Massachusetts. May 7, 1880.

INSURANCE—ORAL APPLICATION—FORCE-PUMP—CONTINUING WARRANTY. True construction of the insurance policy in this case *held* to be an agreement to insure, according to the policy, and not the plan, the building shown upon a written plan used and referred to in making an oral application for insurance; and the fact that a force-pump was marked on such plan did not create a continuing warranty that any particular kind of pump should always be maintained ready for use.

SAME—CONTINUING WARRANTY.—To make words used in an application for insurance in the present tense a continuing warranty for the future, it would seem from the weight of authority that the fact referred to should be an important one, as the employment of a watchman, and if it is not important it will not be deemed such warranty.

SAME—SAME—ORAL STATEMENT OF FACT.—Where the contract of insurance is in writing it would seem that an oral statement of fact in regard to the risk in the application could not be construed into a continuing warranty.

INSURANCE—INCREASE OF RISK.—If there is a single change in a building the jury are to say whether there is an increase of risk; but where there are two or more changes, one of which increases the risk, it is no answer to the forfeiture provided in case of increase of risk, to say that something else diminishes it.

SAME—SAME.—An insurance policy provided that the policy should be void if there was any increase of risk from means within the control of the insured. *Held,* that such condition referred to some permanent change purposely undertaken, and not to something the result of mere negligence on the part of the assured, such as neglecting to have a pump repaired, etc.

SAME—MILL—BUILDING BECOMING UNOCCUPIED.—A condition in an insurance policy upon a mill providing that the insurance shall be void if the premises become unoccupied, refers to something more than a mere temporary suspension of work in the mill;

and where, in such case, work had been stopped for five days, the mill; in the meantime, being used for the storage and delivery of goods requiring daily visits by one or two persons, *held,* that the policy was not void.

Action at law to recover for a loss by fire of the lead works and other property of the plaintiff corporation. The policy was dated May 26, 1875, and was renewed from year to year; the fire occurred May 2, 1878. The jury having found a verdict for the plaintiffs for $3,838.81, a new trial was moved for on the law and the facts. The facts material to the motion were as follows:

Mr. Robbins, an insurance broker in New York, was applied to in 1873 by one of the directors of the company to procure insurance upon their property, and went to Dighton, in Massachusetts, where the works were situated, examined the premises, and made such inquiries as he thought fit of one of the persons employed there. On his return to New York he drew out in ink a sketch of the building which he had made on the spot, and wrote at the bottom a statement of certain facts connected with the risk in these words: "Building two stories high; first story brick, second story frame; roof, shingles laid in mortar. No fire in the building except under the boiler and lead furnace. Lighted with mineral sperm oil. Watchman day and night. Water runs all the time. Tanks filled with water, with hose covering the floor below; 50 fire buckets. On second floor, ores, drying pans; all the settling tanks, filled with water; 13 tanks—hold 1,000 gallons each. Second floor, storage. The nearest building to the works is a small store-house, 40 feet distant; no other building within 85 feet. Lead ground in oil and water. Nothing used in the works of an explosive nature."

He procured insurance in 1873, but not with the defendants. When he applied to the defendants for insurance, in 1875, he carried this paper in his hand, and answered questions about the risk in part from the

paper and in part from memory. The president of the defendant company said he

would take the risk, if Mr. Robbins would send him a copy of the plan and of what he had told him. He sent a copy of the plan and of what was written upon it, as above quoted, and nothing more. The policy sued on was then issued. The parts of it relied on by either party were as follows; the words in italics being written, and the others engraved or printed:

"The Williamsburgh City Fire Insurance Company, in consideration of sixty-two 50–100 dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure *Albion Lead Works* against loss or damage by fire to the amount of *five thousand dollars: $1,920 on the two-story brick and frame building situate on the south side of the main road leading from the depot to the village in the town of Dighton, Bristol Co., Mass., as per plan in the office of M. P. Robbins & Co., New York city, a copy of which is filed, No. 168,732, in this office; $2,300 on engine, boilers, steam and water pipes, machinery, shafting, belting, pulleys, hangers, apparatus, tools, implements and fixtures; $770 on stock, manufactured, unmanufactured, or in process of manufacture,—all contained in above building."*

Below were many stipulations, of which a part of the first is as follows:

"1. The application, survey, plan or description of the property herein insured, referred to in this policy, shall be considered a part of this contract, and a warranty by the assured during the time this policy is kept in force. Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have

or shall hereafter make any other insurance on the property hereby insured, or any part thereof, whether valid or not, without the consent of this company written hereon; or if the above-mentioned premises shall, at any time, be occupied or used so as to increase the risk, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured; or if the premises

became unoccupied without the assent of the company indorsed thereon; or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night without special agreement indorsed on this policy; or if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust; or if the property insured be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, except in case of succession in consequence of the death of the assured, whether by legal process or judicial decree, or voluntary transfer or conveyance; or if this policy be assigned before a loss without the consent of this company indorsed hereon; or if the interest of assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in this policy; or if the assured keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid composed in whole or in part of petroleum, or any of its products, or any chemical oils, without written permission in the policy, then, and in every such case, this policy shall be void."

There was evidence that the processes of manufacture, when the works were in operation, consisted of corroding pig lead in vats by means of

acids, and afterwards grinding the corroded lead with oil and water by steam power. The pump was fitted to run by the power, but had been broken some three months or more before the second of May, 1878, the day of the fire. The manufacture of the red and white lead had been stopped April 27, 1878, and all the persons employed in it, except the superintendent and one hand, had been discharged, and the watchman had been discontinued. There were from 150 to 200 tons of lead in the corroding vats, and a good deal of manufactured lead stored for sale. The corroding vats were not in the insured buildings. The superintendent and man had occasion to visit the premises daily, and had delivered several tons of lead to a purchaser

on the first of May. The fire was at night, and was supposed to have been purposely set.

There was no evidence that any of the representations or statements made to the defendants when the insurance was effected were untrue, but they insisted that there was a warranty that a watchman and an effective pump should be kept; that the risk had been increased, and that the premises had "become unoccupied."

The judge ruled, for the purpose of the trial, that the words written upon the paper, called a plan, were not a part of the contract; that no continuing warranty or stipulation, in respect to the pump or the watchman, was made by the assured; that the jury must decide whether the risk had been increased, and, in so doing, might take into consideration the whole state of things at the time of the fire, setting diminution against increase, if there were both; that the provision avoiding the policy, if the premises became unoccupied, did not necessarily mean if the manufacturing was stopped, but if the premises considered as lead works were unoccupied.

G. W. Parsons and *R. D. Smith,* for defendant.

G. Allen and *J. Fox,* for plaintiff.

LOWELL, C. J. This case has been very carefully argued, and I have examined all the cases cited by counsel. One of the principal questions is whether there is a continuing warranty or stipulation on the part of the plaintiff to keep a watchman and an effective pump. The first printed condition, or set of conditions, makes the "application, plan, survey or description" of the property a part of the contract, and a warranty, by the assured, so long as the policy is kept in force. No languages could more fitly describe a continuing warranty, or at least one renewed every year; but being in print, and intended for all cases, it must be fitted to each risk according to its particular circumstances.

A careful study of the cases will show, what was likewise testified by experts on the stand, that "plan," "application," and "survey" are often used in the contracts as meaning the same thing. "Survey" is the word employed most commonly, and it is not difficult to discover how it came to be used 484 instead of "application." When a person wrote to a company for insurance upon his house or mill, his letter was an application, but not often a full and satisfactory one, and the company would send back a form for a more full application. This paper usually had a caption, stating that it was to be the basis for the insurance, and contained printed questions, with directions how they should be answered. This paper was filled out and signed by the assured, or by his agent, or by the agent of the company, and was the final application; but to avoid misunderstanding it came to be called a survey, as, in many cases, the original letter might be called an application.

The printed condition or stipulation, making the survey or plan or application a warranty, is found in a great many of the reported cases, and is often in substantially this form: "If the insurance is made upon a written plan, survey, or application, the same shall

form a part of the policy, and be a warranty," etc. See, upon both these points, *Glendale Mfg. Co.* v. *Protection Ins. Co.* 21 Conn. 19; *Sheldon* v. *Hartford Fire Ins. Co.* 22 Conn. 235; *May* v. *Buckeye Mut. Ins. Co.* 25 Wis. 291; *First Nat. Bank* v. *Ins. Co. N. A.* 50 N. Y. 45; *Garcelon* v. *Hampden Fire Ins. Co.* 50 Me. 580. These are samples of the cases, and the meaning is substantially the same in all, that the written application, by whatever name it may be called, shall be a warranty. In this case the application was oral. There is no conflict of evidence upon this point. Mr. Robbins went to the defendant's with a paper in his hand and described the risk and answered questions. I suppose he answered them as they stand upon the memorandum, so far as that goes; but it contains nothing about a pump, or about some other matters concerning which there were oral representations. Whether he read from his memorandum, or not, or whether he read correctly or not, is immaterial, because it was what he said that was the foundation of the contract. Nor do I understand that the president asked for a written application. He said: "Send me a copy of the plan and your statements, and I will insure." He did not ask for a written statement, as an 485 application, but, an oral application having been made, he asked for a copy of it. At any rate, if he asked for a written application he did not receive one. The plan, with its memorandum, does not purport to be, and has none of the *indicia* of, such a document. The memorandum is a memorandum, and nothing more. There is in this case, therefore, no such plan, survey or application as this printed condition mentions.

The reference to the plan in the written part of the policy is, in its form, like the ordinary reference in a deed, for the purpose of identifying the subject-matter, and has a similar meaning. The true construction of the policy is not that the company agree to insure "as

per plan" but they agree to insure according to the policy, and what they insure is the building shown on the plan. A force-pump is shown on the plan, but this cannot be considered as a warranty that any particular kind of a pump shall always be maintained, ready for use. One would wish to know the character of the pump, and how it was worked, etc., as to all which there is no information. If it depended upon the steam which carried the works, it would probably not be useful on Sundays and holidays, not when the mill was stopped, and there is surely no warranty that the mill shall never be stopped. It is impossible to reconcile the decisions upon this question of continuing warranty. When an underwriter asks about the particulars of a risk he probably takes for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided. The result, as far as I can gather it, is that when the fact appears to the courts to be a very important one, such as employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in a store, it is not of that character.

There is great objection to these continuing warranties when they are conventional, or made up from words which do 486 not purport a future warrant, because, if the attention of the assured had been called to them as continuing covenants, they might have been qualified. Thus, in the important case of *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 136, which is in accordance with the weight of authority, if the assured had been asked whether he agreed to have a watchman every night, he would probably have excepted Saturdays; but, being asked, generally,

whether a watchman was employed at night, he said "Yes." There are other objections to construing similar words in the same paper as representations of the present or covenant for the future upon an arbitrary standard of the importance of the particular subject. In all these cases, on either side, there was no written statement upon the subject-matter of the supposed warranty. Here, then, was an oral statement that a watchman was at the mill "day and night," and there was an oral description of the force pump. These statements were true at that time, and true at each renewal of the policy, and therefore it is of no consequence whether they are called warranties or representations.

I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing. *Clark* v. *Manufacturers' Ins. Co.* 2 Woodb. & M. 472; 5 How. 235, merely decide that parol evidence might be introduced to identify the written application referred to in a policy. That covenants cannot be imported into or taken out of a written contract by parol, is an elementary rule, applicable to contracts for insurance as to others. See *Abbott* v. *Shawmut Mut. Fire Ins. Co.* 3 Allen, 213; *Schmidt* v. *Peoria Mut. Ins. Co.* 41 Ill. 295; *Higginson* v. *Dall,* 13 Mass. 96; *Kimball* v. *Ætna Ins. Co.* 9 Allen, 540. The judgment in the case last cited reviews the authorities, and decides that an actual promise, if oral, cannot be given in evidence to defeat a policy which has once attached. Here there is no contention that an oral promise was made, but only that the court ought to infer one from the oral statement of a fact.

In respect to increase of risk I understand the law to be 487 that if there is a single change, such as a new use of the building, or an alteration in them, the jury are to say whether, upon the whole, the risk is greater or less. If, however, there are two or more changes,

unconnected with each other, and one has increased the risk, it is no answer to the plea of forfeiture to say that something else has diminished it. *Curry* v. *Com. Ins. Co.* 10 Pick. 535.

In that case numerous witnesses testified that an enlargement of the insured dwelling-house, and a contemporaneous removal, of the uninsured barn to a greater distance from the house, did not increase the risk, and the verdict for the plaintiff was sustained. See, also, *Jones Mfg. Co.* v. *Mfrs.' Ins. Co.* 8 Cush. 82, and *Date* v. *Gove Dist. Mut. Co.* 15 U. C. (C. p.) 175, as to single and contemporaneous changes; and, as to others, *Heneker* v. *Brit. Am. Assn.* 13 U. C. (C. P.) 99. and *Lomas* v. *Brit. Am. Assn.* 22 U. C. (213) 310. Within this rule it was proper for the jury to inquire whether stopping the mill was, upon the whole, considering the decrease of risk from accidental fires, and the increase from the discharge of the watchman and want of power for the pump, such a change in the use or occupation of the premises as to increase the risk.

There is another question which has impressed me more forcibly during and since the argument of the motion than it did at the trial. The steam-chest of the pump was broken some weeks before the mill was stopped, and was not repaired. It is a fair question whether any one in authority at the plaintiff's works was informed of this fact; but it is clearly a matter "within the control of the assured," and, therefore, if the neglect to repair the pump was an increase of the risk within this covenant, that part of the case should have been left to the jury by itself, and not as part of the general change of use and occupation which took place afterwards.

I am of opinion, upon consideration of this condition, and construing it with the context, that it does not refer to mere negligence of the assured, however gross, or however it may increase the risk; but

to some permanent change, purposely 488 undertaken, in the structure, use or occupation of the insured premises. For instance, if the assured neglected to lock his doors at night, the risk might be largely increased; but, though he had done this for a week together, it would not be such a change as is contemplated by this condition. The failure to repair this pump was a bit of negligence, great in degree, perhaps, and upon an important matter, but still a piece of negligence by the servants of the assured, or by themselves, in the conduct of their business, and the care of their property, against which they are insured.

I have examined many decisions upon this subject, and have not found one in which the point has been taken that a neglect of this sort was within the covenant. There are many in which a temporary use permitted things, from heedlessness or good nature, increasing the risk and causing the loss, have been held not to be within it, but in none of them was the negligence so long continued as in this case. *Dobson* v. *Sotheby,* M. & M. 86; *Shaw* v. *Robberds,* 6 A. & E. 75; *Gates* v. *Madison County Ins. Co.* 5 N. Y. 469; *Loud* v. *Citizens' Mut. Ins. Co.* 2 Gray. 221. In one a house was vacant for several weeks, and the court held that, if there was no intentional abandonment of the occupation of the house, but the insured was using reasonable diligence to obtain a tenant, there was no forfeiture. *Gamwell* v. *Merchants' Ins. Co.* 12 Cush. 167. That case differs from this, because here there was no evidence of reasonable diligence; but, upon general principles of the law of insurance, the ruling must have been the same, without that element, so long as the assured had not purposely given up the use of his house. Diligence does not come into question in this connection; its presence will not save a forfeiture if the risk is changed, nor will it if it is not.

The condition avoiding the policy, if the premises "become unoccupied" without the consent of the

company, must likewise refer to something more than a temporary suspension of work in a mill. The works had been stopped for five days, and how soon it would have been renewed is uncertain. But I think they were not unoccupied, within the meaning of this 489 clause, while used for the storage and delivery of goods requiring daily visits by one or two persons. I am confirmed in this by the fact that, since the policy was issued, the defendant company has added a clause in this connection avoiding a policy if work in a factory is stopped.

The result is that the rulings are sustained, and there must be judgment on the verdict.