

It clearly appears from the evidence that the party insured, as well as the insurance company, regarded the contract as a "builder's risk," and that a readjustment of the rate was to be made when the assured was ready to manufacture, or, if that was not done, that new policies were to be secured. It was shown that new policies were obtained by the assured, on the same property, in other companies, which were to go into effect on the 1st day of August, 1892, and that the assured notified its agents to have the policy now in suit canceled and the return premium remitted. The evidence also discloses that the insured company, after the date of the policy in suit, and without the assent of the insurance company, erected a building of pine timber, 60 by 25 feet in size, called a "Buffing Room," one corner of which was located 5 feet and 4 inches from the main building insured, and the uncontradicted testimony of the insurance experts who were examined before the jury was that this additional building did materially enhance the danger of destruction by fire of the buildings and contents thereof, as insured in the policy now in controversy. The testimony also shows that the said Franklin Brass Company, on the 4th day of August, 1892, after having secured the new insurance mentioned, caused the fires in the furnaces located in the insured buildings to be started, and this without having notified the insurance company, the defendant below. On this point we quote from the opinion rendered by this court in this case, to which we have before referred:

"By the 20th August, some ten or more operatives living in and around Buchanan were employed. The machinery was put in motion daily at the sounding of the whistle at seven o'clock in the morning. These operatives went to work, working until dinner time; then, after a short recess, worked until the factory closed for the night. They were paid off by the week. There is testimony tending to prove that at the time of the fire there were as many as 30 people employed in and about the factory. As many as 700 brass balls, which had been brought to the factory from the north in a partially completed state, were manufactured and sold upon order. Some thousands of brass hinges, one of the principal products of the works, were made, and only required to be polished in the buffing room—which was just about completed at the hour of the fire—to make them marketable goods. Several employes testify they had been working continuously day after day at the same presses, in the manufacture of the same class of goods, which presses were propelled by steam. While so engaged, the fire, which originated from the boiler, occurred, and the property was destroyed."

Under the circumstances thus set forth, can the plaintiff below—under the well-established rules of law applicable to insurance policies—recover on the contract set up in its declaration, and is there such conflict in the evidence as makes it necessary for the jury to pass on the fact? A careful examination of the case compels us to answer these questions in the negative. We do not find in the record such evidence as would have justified a verdict for the plaintiff, and we think it would have been the duty of the trial judge to have set aside such a verdict had one been returned.

While it is true that the written portion of the policy must govern, where there is a conflict between it and the printed provisions thereof, it is also true, we think, that there is no such conflict in the contract we are now considering; in other words, we

hold that the printed conditions of the policy, prohibiting an increase of the risk by the party assured, continued of binding force and effect, and that the written stipulations were not intended to and did not either modify or set them aside. This was in substance announced as the proper construction of the policy now in suit, when this case was formerly before this court, and now, after reargument by counsel, re-examination of the cases in point, and consideration of all the clauses and conditions of the contract, we are satisfied with the conclusion then reached, and announce our adherence to it. To construe the policy, as contended for by plaintiff in error, would be for the court, in effect, to make a new contract for the parties. That, the courts cannot do, but they must enforce the agreements duly made by parties competent to contract, and not permit the terms and conditions of the same to be violated or set aside. The terms of this policy are those usual to risks of the character described in it, they were agreed to by parties entitled under the law to so contract and bind themselves, and, while they may seem harsh, still they can be easily complied with, and long business experience has demonstrated that they are essential to the proper management of insurance companies, and that their enforcement is necessary in the interest of the assured as well as of the party insuring.

We think that the testimony conclusively proves that the Franklin Brass Company did commence manufacturing without having notified the insurance company of its readiness to do so, and without having had the rate of the risk occasioned thereby adjusted; and also that the terms of the policy were violated by the assured, when it caused an additional building to be erected very near the property insured, the assent of the insurance company not having been obtained and indorsed on the policy. This was so plainly shown at the trial that it was the duty of the judge presiding to direct a verdict for the insurance company, and his action in so doing is approved of by this court. The decisions are many and of the highest authority that, in cases where the testimony is of the character of that submitted to the jury in this case, it is not only proper, but it is the duty of the court, to direct a verdict, and in this case we think the conclusion follows, as matter of law, that the plaintiff below cannot recover, upon any view which can be properly taken of the facts that the evidence submitted to the jury tends to establish. Upon this proposition the following authorities are referred to: *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. 382; *Gunther v. Insurance Co.*, 134 U. S. 110, 10 Sup. Ct. 448; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619. It will not be necessary to further consider the questions

raised by the assignments of error, as the same are in substance involved in the action of the trial judge in directing the verdict for defendant below; and as we hold that it was his duty, under the circumstances shown in this case, to so direct, it follows that the judgment complained of must be affirmed.

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CAMPBELL v. UNITED STATES.<sup>1</sup>

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 445.

1. MARSHAL'S FEES—PER DIEM ALLOWANCE—SUNDAYS.

A marshal is not entitled to per diem compensation for attendance in the federal courts on Sundays, during the terms thereof, when neither is open for business, under Rev. St. § 829, allowing him a per diem for attendance when either is in session.

2. SAME—MEALS FURNISHED JURORS.

It is one of the incidental powers of the circuit and district courts of the United States to direct the marshal to furnish meals for jurors while they are deliberating upon their verdicts, and this power may be exercised in any case whether the United States is a party to the action or not. The disbursements made by the marshal in paying for these meals are expenses necessarily incurred for some of the "other contingencies" referred to in section 829, Rev. St.

3. SAME—SUMMONING JURORS—ADJOURNED TERM.

An adjourned term of court is not the same court as the original term, within Rev. St. § 829, providing that the marshal's fees for summoning jurors shall not at any court exceed \$50.

4. SAME—MILEAGE—TAKING PRISONER TO PLACE OF CONFINEMENT.

Where a marshal is paid 50 cents for each commitment of a prisoner, and 10 cents a mile for himself and each prisoner, and necessary guard for transportation of prisoners to the place of confinement, as provided by Rev. St. § 829, he will not be allowed mileage for travel to serve or fees for serving the warrants of commitment of the prisoners on the keeper of the prison.

5. SAME—SERVICE OF SEVERAL WRITS ON SAME TRIP.

Section 829, Rev. St., does not authorize the marshal, after he has received his actual expenses upon one writ for making a trip on which he serves several writs in favor of the government upon different persons, to thereafter recover his mileage upon the other writs so served.

6. SAME—SUMMONING SAME WITNESS IN DIFFERENT CASES.

Under Rev. St. § 829, providing that when more than two writs required to be served, in behalf of the same party, on the same person, might be served at the same time, the marshal shall be entitled to compensation for travel on only two of the writs, he should be allowed mileage on two, and only two, subpoenas, where on the same trip he serves several subpoenas for the government, in different cases, on the same person.

Error to the Circuit Court of the United States for the District of Minnesota.

Action by William M. Campbell against the United States. Certain claims were disallowed, and he brings error.

George N. Baxter, for plaintiff in error.

Edward C. Stringer, U. S. Atty.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

<sup>1</sup> Rehearing pending.