power of contracting indebtedness by counties where there has been no vote of the qualified electors authorizing the creation of specific indebtedness, and not only limits the aggregate amount of indebtedness that can be incurred for all purposes and in all forms, but also limits the amount of indebtedness by loan that can be created in any one year. The second clause, following the preposition "unless," provides for a changed and different condition, in which a county, by vote of a majority of its qualified electors, upon a proposition submitted to them at a general election, has been authorized to create a specific indebtedness. In that case a single and different limitation is prescribed, namely, that the aggregate debt of the county shall not be made to exceed twice the amount limited in the other case, and a provision (contemplating debt by loan) that the bonds, if any be issued therefor, shall not run less than 10 years. But there is no limitation in such case as to the amount of the indebtedness so authorized which can be created in any one year. It would be singular, indeed, if, after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings by requiring that the long-time bonds authorized should only issue and be sold in small annual installments; making the county wait, perhaps, a series of years before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the meantime interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with. Neither the grammatical construction of the section nor any sound reason justifies the importation into the last clause of the section of the restriction in the first clause as to the amount of debt by loan which can be created in any one year. It may be added that the legislative construction of this section of the constitution, as shown by section 21 of the act of March 24, 1877, under which these bonds were issued, conforms to the views here expressed, and that the supreme court, in Sutliff v. Commissioners, 147 U. S. 230, 234, 13 Sup. Ct. 318, refers to this statute as being, in respect to limitations, in conformity with the constitution.

4. The county of Lake received full consideration for these bonds. Most of them were taken directly by the contractor who erected the public buildings for which they were issued. They passed immediately to bona fide holders for full value. The county acknowledged and ratified them by paying the interest upon them, as it matured, for several years. If it were conceded that after the board of county commissioners of Lake county had been, by vote of the qualified electors, empowered to create a debt of $50,000 to erect necessary public buildings, they were required to execute that power by issuing not more than $16,500 of the $50,000 in any one year, and they issued the whole $50,000 at once, instead of issuing the same in yearly installments, the case would not be one of lack of power to issue all the bonds, but a case where the power existed, but was irregularly exercised. In such case the payment of interest on the bonds for several years estops the county from asserting such irregu-

larity as a defense. Supervisors v. Schenck, 5 Wall. 772; County of Clay v. Society for Savings, 104 U. S. 579; Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. 433; Moulton v. Evansville, 25 Fed. 382; McKee v. Vernon Co., 3 Dill. 210, Fed. Cas. No. 8,851; Bank v. Springfield, 4 Fed. 276. The circuit court erred in directing the jury to return a verdict for the defendant. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

THAYER, Circuit Judge (dissenting). I am unable to concur in the views expressed by my associates in the foregoing opinion. My disagreement with them arises out of the fact that I am not able to read section 6, art. 11, of the constitution of Colorado, quoted in the statement, as they have seen fit to construe it. Without going into the subject at length, it will suffice to say that in my judgment the first paragraph of section 6, art. 11, of the constitution of Colorado, fixes an absolute limit to the amount of indebtedness created by loan which a county may contract in any one year, either with or without the sanction of a popular vote; such limit being $1.50 per $1,000 of the assessed valuation of taxable property in counties where such valuation exceeds $5,000,000. This was the construction of the constitutional provision in question which seems to have been adopted in Lake Co. v. Rollins, 130 U. S. 662, 669, 9 Sup. Ct. 651, and in People v. May, 9 Colo. 80, 86, 87, 10 Pac. 641; but in the absence of these adjudications I should entertain the same view, founded upon the language of the statute and the probable motive of the lawmaker. The framers of the Colorado constitution intended, as I think, to impose such restrictions upon counties as would compel them to act prudently, no matter what might be the will of the people, and such restrictions as would prevent them, as far as possible, from exhausting their power to contract debts by overborrowing in a single year. To this end they prohibited counties absolutely from borrowing money, except for one purpose, and limited the amount that might be borrowed even for that purpose during a single year. Such being my interpretation of the constitutional provision in question, it follows therefrom that the trial court acted properly in directing a verdict for the defendant, because each bond showed on its face that the aggregate debt thereby created in a single year was $50,000, and because the purchasers of the bonds were bound to take notice of the amount of the assessed valuation, which valuation did not authorize the creation of a debt by loan in a single year to an amount exceeding $16,500. Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315; Hedges v. Dixon Co., 150 U. S. 182, 14 Sup. Ct. 71; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654. The plaintiff below was not an innocent purchaser of the bonds in suit, but was affected with knowledge of a want of power in the county to issue the bonds, which rendered the same void. My associates apparently agree with me that the debt evidenced by the bonds in suit was a debt contracted by loan, so that nothing need be said on that point. The judgment being, in my opinion, for the right party, on uncontradicted facts disclosed by the record, I think it should be affirmed.

HUBBARD v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. Rhode Island. May 10, 1897.)

1. LIFE INSURANCE—FALSE REPRESENTATIONS—WAIVER BY COMPANY.
A notification by the insurer to the beneficiary that payment of the policy will be made in full is not a waiver of a defense founded upon alleged false statements in the application, where, at the time, the insurer had no reason to suspect that such statements were false.

2. SAME—ESTOPPEL BY DELAY.
An insurance company which, several months after receiving proofs of loss, notifies the beneficiary that the claim has been approved, and will be paid, is not precluded by the delay from thereafter setting up the falsity of representations made in the application, where nothing had come to its knowledge putting it upon inquiry as to the truth of the representations. This is especially true where the beneficiary has taken no action in reliance upon the notice of approval, and has been in no way prejudiced thereby.

3. SAME—COMPROMISE.
A notice by a life insurance company to the beneficiary that the policy will be paid in full is not an adjustment of liability, or a compromise, which will preclude it from setting up false representations in the application.

4. SAME—PROMISE WITHOUT CONSIDERATION.
A notice by a life insurance company to the beneficiary that the policy will be paid in full is not a binding promise, which will preclude it from subsequently setting up false representations, which render the policy void ab initio; for in such case the promise would be without consideration.

5. PLEADING—SPECIAL TRAVERSE.
The inducement of a special traverse should be an indirect denial, and, if it consists of a direct denial, the special traverse is improper.

6. LIFE INSURANCE—APPLICATION—AGREEMENT AS TO AGENCY.
An agreement contained in the application that the person taking the application, and also the medical examiner, are the agents of the applicant, and not of the insurance company, is binding on the insured; and he cannot, by parol evidence, show the fact to be otherwise.

7. SAME—WAIVER OF DEFENSES—REASONS FOR REFUSAL TO PAY.
The company is not restricted in its defense to the reasons set forth in its notice to the beneficiary of its refusal to pay, when it does not appear that the beneficiary has been misled or influenced by the omission to set forth other reasons.

Bassett & Mitchell, for plaintiff.
Edwards & Angell, for defendant.

BROWN, District Judge. This is an action on a policy of insurance issued by the defendant corporation upon the life of George W. Hubbard. The policy was issued upon a written application made by the insured. The insured agreed, in the application, that the answers and statements therein contained, whether written by him or not, were warranted to be full, complete, and true, and that this agreement and the constitution and by-laws of the defendant association, together with the application, were thereby made a part of any certificate or policy that might be issued thereon; that, if any of such answers and statements were not full, complete, and true, then the certificate or policy issued thereon should be null and void; and that the person taking said application, and also the medical examiner, should be and were the agents of the applicant, and not the

agents of said association, as to all statements and answers in the application; and that no statements or answers made or received by any person or to the association should be binding on the association unless reduced to writing, and contained in the application. The insured, in said application, further warranted that the answers as written to the questions put in the medical examiner's report forming part 2 of the application were his answers, and were full, complete, correct, and true, and that the same should be made part of the contract of his certificate of membership or policy of insurance. In and by the certificate of membership or policy of insurance, and in and by the constitution or by-laws of the defendant corporation, the answers and statements contained in the application were made part of said certificate or policy. The defendant pleads that certain answers and statements made by the insured in the application were untrue; that a false statement was made by the insured to the medical examiners; that satisfactory proofs of death have not been presented to or accepted by the defendant, as required by the policy as a condition precedent to recovery; that the policy was never delivered to the insured while in good health, as required by the policy; that the policy was issued subject to the provisions of the constitution or by-laws of the defendant association; and that the insured never became a member of the association in accordance with these provisions. To these defenses the plaintiff replies in the second replication that the defendant association received the proofs of loss December 31, 1893, and thereafter approved the claim founded thereon, and of this action gave notice to the plaintiff April 5, 1894, and May 2, 1894, also notified her again of the approval of the claim, and that she might expect payment within a few days of June 1, 1894; that during all this time the defendant had ample opportunity to determine the truth or falsity of said representations and statements, as it ought to have done if it relied upon the same; and that said acts and failure to act, on the part of the association, constitute a waiver of the defenses set forth in the pleas, and estop the defendant from pleading the same in bar.

The first question for consideration is raised by the demurrer to the second replication, and is whether the facts therein set forth constitute a waiver of the defenses set forth in the pleas. There is no averment that, at the time of approval of the claim and of the notification of the company to the plaintiff that she might expect payment, the company had knowledge that there was a forfeiture of the policy on account of the alleged false statements contained in the application. Since waiver is the intentional relinquishment of rights, knowledge of the existence of the rights is a necessary element, and should be averred.

In Bennecke v. Insurance Co., 105 U. S. 355, the rule of law is thus stated by Mr. Justice Woods:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but when it is sought to deduce a waiver from the conduct of the party."

Further, as said by Mr. Justice Field in Insurance Co. v. Wolff, 95 U. S. 326:

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct, and enforce the conditions. To a just application of this doctrine, it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts."

The replication avers merely that from December 31, 1893, to the date of the notification that payment might be expected, May 2, 1894, "there was ample opportunity to investigate and determine the truth or falsity of all said representations and statements in said various pleas represented to be untruthfully made by said Hubbard, as said defendant corporation ought to have done had it relied upon the same." To hold that such a duty existed would be tantamount to holding that in such cases a presumption of fraud exists, casting upon the company the duty of inquiry, whereas the true rule is that the company is entitled to rely upon the statement of the assured, and can rescind for fraud whenever it is brought to its knowledge. In the absence of an averment of actual knowledge or of facts sufficient to put the company upon inquiry, there was, so far as appears from the pleadings, no obligation upon the company to suspect the validity of the statements of the assured, or to instigate an inquiry from mere suspicion. Furthermore, as the doctrine of estoppel can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and as it does not appear that the plaintiff was in any way prejudiced by the approval and notice, the replication is also in this respect defective. The promise to pay, therefore, was a mere naked promise, without consideration, and without prejudice to the plaintiff. There was no adjustment of a disputed claim, and no mutual concession of rights as a consideration for the promise. The fact that the notice was of an intention to pay the full amount of the policy precludes the contention of the plaintiff that the promise amounts to an adjustment of liability, since the essential element of an adjustment—a dispute as to the fact of liability or as to the amount of liability—was lacking. The difference between this case and the case of an open policy of fire insurance, where the sum to be paid must be determined by the parties or proved by the assured, is obvious. It is also apparent by the pleas that the assured agreed in the application "that, if any of the answers or statements made are not full, complete, and true, * * * then the policy issued hereon shall be null and void." Assuming the truth of the facts stated in the pleas, then the policy was void ab initio, and the notice must be held the making of a new promise, for which the replication discloses no consideration. For the foregoing reasons, therefore, the demurrer to the second replication must be sustained.

The second inquiry arises upon demurrers to the sufficiency of the replications numbered 3 to 13, inclusive. Each of these replications is in form a special or absque hoc traverse, and contains a direct and unqualified denial of what is averred in the plea to be the true fact,

and the contrary of a certain answer or statement made by the assured, with a denial under the absque hoc that said answer and statement were made a warranty. For example, the second plea alleges that in and by the application it was inquired of the assured: "State fully your occupation, profession, or trade. State kind of business and duties." To which George W. Hubbard answered as follows: "Banker and broker." "Whereas the defendant avers that in truth and in fact the occupation, business, and trade of said George W. Hubbard was not, at the date of said application, that of a banker and broker," etc. The replication which is an example of the remaining replications covered by the demurrers is as follows: "And the said plaintiff saith that for everything by the said defendant corporation secondly above pleaded precludi non, because she says that the occupation, profession, and trade of said Hubbard at said time was that of a banker and broker (without this said answers are by said certificate of membership or policy of insurance warranties on the part of said Hubbard), and of this the said plaintiff puts herself on the country." The replications (with one exception) do not deny the making of the statements, but substantially deny their falsity, and furthermore deny that the answers or statements were made warranties. As the inducement of a special traverse can properly be of no other nature than an indirect denial, and as in this case it consists of a direct denial, the special traverse must be held improper. Steph. Pl. p. 184.

The defendant contends that the denial under the absque hoc is insufficient in law. If so, then, although in such case the inducement may be traversed, the replication, without a proper denial under the absque hoc, is merely a common traverse in effect, and should be so pleaded. If, on the other hand, the denial under the absque hoc is sufficient in law, then the inducement can neither be traversed nor confessed and avoided. Steph. Pl. p. 188. There is, as defendant's counsel contend, a practical difficulty in attempting to rejoin to these replications. If defendant files a similiter, and the denial under the absque hoc is good in law, then the only issue is whether the answers were warranties. But there are also, upon the face of the pleadings, material and contradictory averments upon which, according to the rules of pleading, no issue can be reached. Although the pleadings show the substantial dispute to be whether the statements of the assured were true or false, the only issue reached is whether they were warranties; thus defeating the purpose averred by the plaintiff's counsel upon his brief, and manifest throughout the pleadings, as well as violating well-established principles of pleading. The facts of the plea constitute but one connected proposition or entire point, and, on examination of the whole record, the first fault is not with the defendant, but with the plaintiff.

The third inquiry is as to the validity of the agreement of the insured that the person soliciting or taking the application, and also the medical examiner, should be the agents of the applicant, and not of the company, and that no statements or answers should be binding on the company unless reduced to writing, and contained in the application. The counsel for the plaintiff says on the brief: "All of