mium for the loan granted to the defendant, and certificate No. 4,382 for 20 shares is assigned as collateral security for said loan. There is a provision in each of the certificates that the shareholder agrees to pay 60 cents monthly on each share until said share matures or is withdrawn, and this monthly installment is due and must be paid on the second Tuesday of each month. Fifty-three cents of each monthly payment on each share and all fines shall be paid by the treasurer to the trustee on account of the loan fund, and the other seven cents of each installment shall go to the expenses. There is also a provision that there should be a fine of 10 cents due and payable on each share, if not paid when due, and a fine of 15 cents on each share for each subsequent monthly default.

The bill alleges that the contract between the parties was intended to be and is governed by the laws of Minnesota, and that by the Minnesota law any premium for a loan is not to be considered as usury, nor to be counted as interest. It appears from the allegations of the bill and the exhibits that the complainant has agreed to pay more than $75 for this foreclosure of the mortgage, and he claims a lien therefor. It also appears that by a resolution of complainant's board, not dated, but alleged to have been on the ——— day of April, 1895, this debt was declared matured, defaulted interest as alleged being then payable for a period of 28 months; and directed the principal of said note and mortgage which was in default to be foreclosed, and that the stock which had been assigned to the company as collateral for the repayment of said loan be canceled, as provided in the by-laws of said company, and credit be given of such amount as would appear to be the withdrawal value of such stock after cancellation of same.

The accounts filed for the payment of interest on said note show that the monthly installments were paid, with the exception of one of the months, up to April, 1893, the last payment being $60, made December 3, 1892. It also shows that there was paid on certificate of stock No. 4,382, $492.34, the last payment being made December 3, 1892, and the amount $84.34; and on certificate No. 22,121 the installments paid amounted to $456, the last payment being on the 3d of December, 1892, for $72. The total is rendered thus:

Amount of loan		$2,000 00
Ctf. 4,382,	stock	323 66
" "	fines	80 00
" 22,121,	premium	336 00
" "	fines	83 00
" "	interest	280 00
		$3,102 66
Less book value Ctf. 4,382, 20 shrs		979 60
		$2,123 06

In this statement there is a balance claimed of $2,153.06,—more than enough to give this court jurisdiction. But in this account the installments of dues as charged do not stop with the month of April, 1893, but run down to and include the month of September, 1895, on both the certificates of stock, thus including five monthly

installments after the resolution of April, 1895, declaring the stock canceled. There is debited in this account, it will be seen, $280 interest on the loan, which is the balance after giving credit for $380 paid; but in this account there is interest charged up to and including September, 1895,—five or six months after the debt is declared to be matured. We think these installments of dues, after April, 1895, and the monthly installments of interest, are not justified by any construction that can be placed upon either the contract of the parties or the resolution of complainant's board. But, beyond this, we think that by the terms of the contract between the parties that, if they elected to mature the debt, it must be as of the date of three months after default, as it will be observed, the language of the note itself is that, "if the maker hereof fails to make any monthly payment on said stock, or to pay any installment of interest for a period of three months after the same is due, then the whole amount of said note shall become due and payable"; and, while the election is given in the mortgage to the mortgagee to mature or not to mature for such default, we see nothing in the language which changes the time at which the default shall be considered when the election is made. We do not think that the election must be made at the end of the three months, but that, when made, it must take effect as of that date, and settlements made accordingly.

We have not overlooked the fact that there is another provision of this mortgage and of the note under which a fine can be fixed for nonpayment, which fine can be inflicted for six months, and it may be that the election must be after the three months and within six months after default. This, however, we do not conceive to be the proper construction, but rather that the right to declare the maturity of the debt continued after the six-months default; but it seems to us that the equitable and fair and just construction of the provisions of the note and mortgage require that when the maturity is declared it should be as of at the end of the three months after default. If this be the correct construction of this provision of the contract of the parties, then all charges for dues after three months' default, made in the fall of 1893, as well as monthly installments of interest charged thereon, are incorrect, and the balance due the plaintiff must be much less than $2,000,—the sum requisite to give this court jurisdiction,—even if we add to such balance the counsel fee of $75, which the defendant agreed to pay the complainant as costs of the foreclosure. We are strongly inclined to think that this $75 is proper to be considered on the question of jurisdiction, and to be estimated in making up the requisite sum, as it is not costs, within the meaning of the act of 1887–88, but a liability based upon the contract of the parties. See MSS. opinion of this court in Rogers v. Riley, 80 Fed. 759.

If we are correct in our construction as to the time when the withdrawal value of the 20 shares represented by certificate No. 4,382 should be determined, it is quite clear that the court has no jurisdiction. I do not perceive, from anything in the exhibits or the allegations in the bill, how the withdrawal value of this stock, $979.60, was *arrived* at; but I have assumed that that was the correct value

at the end of the three months after the default under which the maturity of the debt was declared, and the cancellation had. If I am in error as to this, it may be corrected by an amendment to the bill. The demurrer must, therefore, be sustained, but I will not, at present, make an order dismissing the bill, but shall give the complainants until the October rules to tender an amendment, if they so desire. If none is filed, the bill will be dismissed.

See statement below.

The amount of default should be declared as of the end of the three months after the latest default, which would be, say, October 12, 1893, and would be about thus, viz.:

Amount of loan	$2,000 00
" " dues, stock, No. 4,382	48 00
" " fines	16 00
" " dues, stock, No. 22,121	60 00
" " fines	19 00
Interest on loan May 12th to October 12th	50 00
	$2,193 00
By book value, 20 shares, No. 4,382	979 60
Total due October 12, 1893	$1,213 40
Add the attorney's fee	75 00
	$1,288 40

GUARANTEE CO. OF NORTH AMERICA v. MECHANICS' SAV. BANK & TRUST CO.[1]

(Circuit Court of Appeals, Sixth Circuit. October 5, 1896.)

1. FIDELITY INSURANCE—JOINT OBLIGATION.
Where a bank cashier for whom a fidelity insurance bond is executed to the bank joins in the bond merely to enter into certain obligations to the insurance company, their liability is not joint.

2. REMOVAL OF CAUSES.
A suit in a state court upon a joint and several bond cannot, against the objection of plaintiff, be removed by one of two defendants to the federal court, on the ground of diverse citizenship, on the idea that there is a separable controversy, though plaintiff might have sued the defendants separately.

3. SAME.
A suit having, without objection, been removed to the federal court by one of two defendants sued upon a joint and several obligation, plaintiff, by proceeding to trial without protest, and taking judgment against the defendant on whose petition the removal was made, consented to a severance of the joint action into two several actions, as he had a right to do.

4. EQUITY—WAIVER OF OBJECTION TO JURISDICTION.
Where a case is of a class usually cognizable in equity, but lacking only in some one element necessary to justify that jurisdiction, as in the case of a complicated account, in which the defendant's credit items are not numerous enough to make it strictly a case of mutual accounts, a party who has not objected to the forum below cannot urge the want of equity jurisdiction on appeal.

5. FIDELITY INSURANCE—CONSTRUCTION OF CONTRACT.
As the general purpose of a contract of fidelity insurance is full indemnity, and this should not be defeated except by clear and unambiguous limitations

[1] Rehearing denied July 6, 1897.

assented to by the parties, all ambiguities of expression, as in contracts of fire or life insurance, will be construed most favorably to the assured.

6. SAME.
The insurer and insured in a fidelity insurance bond being upon a plane of equal opportunity for information, the insured is not held strictly to the duty of disclosing all the conditions material to the risk, as in the case of ordinary insurance.

7. SAME—NEGLIGENCE OF INSURED.
The obligor in such a bond is not released from liability by the want of even ordinary prudence on the part of the assured in lessening the risk, unless he expressly stipulates therefor.

8. SAME—STIPULATION AS TO SUPERVISION.
A fidelity insurance bond executed to a bank, indemnifying it from loss by the dishonesty of its teller, stipulating that the bank shall observe "all due and customary" diligence in the supervision of the employé for the prevention of default, does not bind the bank to comply with a general banking custom as to taking trial balances from the individual ledgers. 68 Fed. 459.

9. SAME—CUSTOM AS TO SUPERVISION.
The "custom" of the bank as to the character and frequency of inspections, as disclosed by answers to written questions asked by the company in its preliminary investigation, was the "due and customary" diligence in supervision stipulated for, and no other supervision was required. 68 Fed. 459, affirmed.

10. SAME—RENEWAL OF INSURANCE—REPRESENTATIONS AS TO EXAMINATION OF ACCOUNTS.
A certificate, made previously to the renewal of the teller's bond, that his books and accounts had been "examined and found correct," is to be taken as true, however careless the examination may have been, if made in good faith, and the examiners believed the accounts correct.

11. SAME—NEGLIGENT METHODS.
The fact that certain trial balances were discontinued by the teller, as part of his scheme to defraud, does not release the insurance company.

12. SAME—LIMITATION AS TO DATE OF DISCOVERY OF LOSS.
A provision in the bond limiting the risk to a loss sustained "and discovered during the continuance of this bond, and within six months from the employé ceasing to be in the said service," does not bind the company for any loss discovered more than six months after the expiration of the bond, whether the employé had then quitted the service of teller or not.

13. SAME—EMPLOYER'S KNOWLEDGE OF SPECULATIONS.
A condition in the bond, "that the employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling," was not violated by the failure of the president of the bank to notify the company upon hearing that the teller had engaged in speculative gambling to a small extent, but had stopped; the president acting in good faith. 68 Fed. 459, affirmed.

14. SAME—WARRANTIES.
A fidelity insurance company, previous to issuing to a bank a bond indemnifying it from loss by the dishonesty of its cashier, asked the president the question: "Have you known or heard anything unfavorable as to his habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the company to make inquiry?"—to which he answered "No," the answer being made to the best of his knowledge and belief. The president had been informed that the employé had engaged in speculative gambling to a small extent, but had stopped. *Held* that, though the answer of the president be regarded as a warranty, there was no breach of it. 68 Fed. 459, affirmed.

15. APPEAL—OBJECTIONS WAIVED.
It is too late to object upon appeal that judgment upon a fidelity insurance bond includes an item of "overdrafts allowed and not authorized," in the absence of proof showing the facts, as embezzlement or larceny may be committed by overdrafts.

16. SAME—INTEREST.

Under a fidelity insurance bond, interest should be allowed, independent of statute, from the date of embezzlements, or from the end of each year, if the jury or the chancellor choose, to the filing of the proofs of loss; but on this amount there can be no interest for three months after that time, where by the terms of the contract the loss is not due until three months after filing proofs of loss.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a bill in equity filed in the chancery court of Davidson county, Tenn., by the assignee for the benefit of creditors of the Mechanics' Savings Bank & Trust Company against the Union Bank & Trust Company, administrator of John Schardt, deceased, a corporation of Tennessee, and the Guarantee Company of North America, a corporation of Canada, to state an account between the bank and John Schardt, its deceased cashier and teller, to obtain a decree properly applying certain credits to the debt in favor of Schardt, and to recover the balance found to be owed by Schardt to the bank from the guarantee company, on two bonds or fidelity insurance contracts entered into by Schardt and the guarantee company with the bank, indemnifying it from loss by the dishonesty of Schardt; one covering his dishonest acts while he was teller of the bank, and the other for his dishonest acts while he was its cashier. The guarantee company removed the cause to the court below on the ground that there was in the case a separable controversy between the complainant, a citizen of Tennessee, and the guarantee company, an alien corporation. The bonds sued on were joint and several obligations of Schardt and the guarantee company. Schardt's administrator demurred to the bill for want of equity in the state court, and the record shows no further proceeding against it. No motion to remand was made, and the cause proceeded in the court below against the guarantee company alone; the two parties stipulating that the cause should be heard in equity, or, if removed to the law docket, that a jury should be waived, and trial had to the court.

Schardt was teller of the bank from January 16, 1888, until January 1, 1893. He was cashier from January, 1893, until his death, April 17, 1893. The bond covering his acts as teller was given in 1888 for a year, and was renewed from year to year until January, 1893, when a new bond covering his acts as cashier was given. The teller's bond recited that the bank had delivered to the guarantee company a certain statement, and that it was agreed and understood that the statement constituted an essential part of the contract of indemnity. In consideration of $100 a year, the company then agreed to make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the fraudulent acts of the employé in connection with the duties of his said office or position, or with any other duties assigned to him by the employer in the said service, committed by him and discovered during the continuance of this bond, and within six months from the employé's ceasing to be in the said service. The bond provided further that: "The following provisions are also to be observed and binding as a part of this bond: That this bond is issued and renewed on the express understanding that the employé has not, within the knowledge of the said employer, at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty. That the employer shall observe or cause to be observed all due and customary supervision over the said employé for the prevention of defaults; and if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in his service, without notification to the company, the said company will not be responsible hereunto for any default which may occur subsequent to said act or default of said employé so condoned. That the employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits. That there shall be an inspection or audit of the accounts or books of the employé, on behalf of the employer, at least once in every twelve months from the date of this bond. That the company shall not in any wise be responsible to the employer

under this bond to a greater extent than ten thousand dollars." By another provision, Schardt agreed to keep the company harmless from any payment it might have to make under the bond. The bond is signed by Schardt, the guarantee company, and the bank.

The statement referred to in the bond contained twenty questions and answers concerning the bank's knowledge of Schardt's integrity and past business life, the character of supervision to which he was subjected in discharging his duties, and the salary paid him. Of these, the following only are material here: "(7) When was the last inspection of the office at which he was stationed made? A. December 24, 1887. (8) What is your custom in regard to the frequency of inspections? Are they at stated periods, or irregular, and what is the longest time allowed to elapse between inspections? A. Every quarter. (9) Has the bank a duly appointed and authorized inspector or inspectors? If not, by whom are the inspections made? A. The finance committee." "(18) In the event of the employé filling the post of teller, how often, and by what officer, will the teller's cash be checked and counted? A. By the finance committee; quarterly." At the end of each year of the bond the bank received the following notice: "It is necessary, before the bond can be renewed, that you obtain the certificate on the back hereof by your president or cashier, and on its return with the remittance of the premium, the renewal can be immediately effected." The certificate was accordingly filled up and signed by the cashier of the bank at each renewal. Among other things, it stated that the accounts of Schardt, the teller, had been examined and verified by the finance committee of the bank. On such certificate the bond was renewed.

The cashier's bond was given in January, 1893. By its terms, Schardt and the company (the latter relying on a certain guaranty proposal signed by the president of the bank, and on its strict performance and observance thereafter) bound themselves, jointly and severally, in the sum of $20,000, to reimburse the bank to the extent of $20,000 for any loss sustained through Schardt's act or fraud in connection with his duties as cashier, and constituting embezzlement or larceny. The bond was made subject to certain conditions indorsed on it, among which were the following: "(1) Any misstatement of a material fact in the declaration within mentioned, or in any claim made under this bond, will render this bond void from the beginning. (2) That the said employer shall use all due and customary diligence in the supervision of said employé for the prevention of default, and to that end shall cause an inspection of his accounts to be made at least once within twelve months." The guaranty proposal contained 19 questions concerning Schardt, and circumstances of supervision, etc. Of these only the following are material: "Q. 4. Have you known or heard anything unfavorable as to his habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the company to make inquiry? A. No." "Q. 12. Has there been any default in the bank by any employé in applicant's position? A. No. Q. 13. When were applicant's books and accounts (including cash, securities, and vouchers, if any) last examined, and by whom? A. December 31, 1892, by finance committee of bank (Were they found correct?), and found correct. Q. 14. In case of applicant handling cash or securities, how often will the same be examined, and compared with the books, accounts, and vouchers, and by whom? A. Not less than quarterly, and often monthly, by finance committee. * * * The above answers and representations are true, to the best of my knowledge and belief." This was signed by the president of the bank. While Schardt was teller, he kept the general ledger and the cash book, and made the daily statement of the bank. A clerk kept the individual ledger. The individual ledger was correctly kept. Whenever Schardt abstracted money from the deposits, he would place the items correctly in the cash book; but he would make false totals, less by the amount he had taken than the true total, and these false totals he would transfer to the individual deposit account on the general ledger. Until 1890 it had been the practice in the bank every month to take trial balances of the individual ledger accounts, and verify the balances thus shown with those of the general ledger. Schardt directed the clerk to discontinue this, and thereafter, from 1890 until the collapse of the bank, no balance was ever taken from the individual ledger, and no comparison was ever made between Schardt's balances as shown by the general ledger and those which could have been shown by the individual ledger. These two ledgers were out of balance $2,098 January

16, 1891; $19,600 January 1, 1892; and $69,700 January 1, 1893. The discrepancies were caused by Schardt's embezzlement of the deposits. In addition to this amount Schardt embezzled $3,765.44 in the year between January, 1891, and January, 1892, and $4,015.44 in the year between January 1, 1892, and January 1, 1893, of money received by him from the proceeds of notes due the bank, and in his custody for collection. The finance committee of the board of directors of the bank made quarterly examinations of the bank. These examinations consisted of checking over a statement made by Schardt of the condition of the bank, with the notes and securities and cash, which he produced, and with statements from other banks of credit balances. There is some doubt as to whether the finance committee saw the cash book, or what purported to be a copy of a statement taken from it. The evidence of the experts is that the account of bills payable shown on the cash book and ledger is correct,—indeed, that every account except the individual deposit account on those books is correct. Neither the finance committee nor the cashier ever asked for a trial balance from the individual ledgers. After January 1, 1893, when Schardt became cashier, he continued his thefts, and between that date and April 17, 1893, the date of his death, he stole $22,964.17 more; so that his total stealings amounted to more than $100,000, or double the entire capital of the bank. It was in evidence that it was the universal banking custom in banks, large and small, to take trial balances from the individual ledgers at least once a month, and often every two weeks, and to compare these balances with those of the general ledger. A trial balance of the individual ledgers might have been taken by a clerk in one or two days. It is in evidence that information came to the president and directors of the bank, through their cashier, that Schardt was a partner in what is called "a bucket shop,"—an agency for promoting speculation in small amounts upon the fluctuations of stocks, grain, cotton, and other commodities, in which speculative gambling is done,—and that he was himself speculating. When charged with this, Schardt admitted that he had taken an interest in such a partnership, but that he had sold out. He called his former partners to confirm his statement in this regard. He also admitted, according to one of the witnesses, at another time, that he had speculated to some extent, but asserted that he had always made gains, and had seen the error of his ways and had stopped. Subsequently the cashier received an anonymous letter stating that Schardt was still speculating. He informed the president of the bank. Schardt said it was a lie, and no more attention was paid to it. All this occurred prior to the time when the president signed the guaranty proposal for the cashier's bond referred to. As a matter of fact, Schardt was speculating all the time, and lost the $100,000 he had stolen in gambling in futures.

Wm. L. Granbery, for appellant.

E. H. East, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

HAMMOND, J. (after stating the facts). The first question which arises on this record is one of jurisdiction. Was there a separable controversy between the plaintiff, a citizen of Tennessee, and the guarantee company, an alien corporation? The contracts upon which the action was founded were somewhat different in form. In the bond for Schardt as cashier there is no provision by which Schardt assumes an obligation directly to the bank for his own defalcations. He seems to be made a party merely that he may enter into certain obligations to the guarantee company in case of his defalcation. It can hardly be said, therefore, that the guarantee company's liability to the bank is joint with that of Schardt. In the teller's bond, however, the obligation of Schardt and the guarantee company is joint and several. In suit upon the latter, therefore, the bank and its assignee had the option to begin its action against the obligees jointly

or separately, and the obligee could not control the form of the action in this regard. Therefore it could not be removed as a separable controversy by the guarantee company, when Schardt was its co-defendant, against the objection of the plaintiff. Of course, the plaintiff could, if it chose, at any time dismiss Schardt's representatives from the suit, and make it a several suit against the company. By making no objection to the removal, by making no motion to remand, and by proceeding to trial without protest, and taking a separate judgment against the guarantee company, we must hold that it consented to a severance of the joint action into two several actions,—one against Schardt, which seems to have remained in the state court, or to have been dismissed, and the other against the guarantee company, of which the court below might properly take jurisdiction on the ground of diverse citizenship. Of course, consent cannot give jurisdiction to the federal court over an action not cognizable therein; but when it is cognizable, as its form is joint or several, and a party has the option to treat it as either, we think, in order to maintain the jurisdiction when it has been exercised without objection from him, that he should be held to have elected to treat the action as several as of the time when the removal was effected. Where a petition for removal is filed after the time required by law, and no objection is made before trial, the defect is waived. Martin's Adm'r v. Railway Co., 151 U. S. 673, 14 Sup. Ct. 533. By analogy, in such a case as this, where it is completely within the power of a party to frame or change his action so as to be cognizable in the federal court, and by his silence and affirmative conduct he avoids any question of the jurisdiction, and proceeds to trial, he does thereby elect to change his action to one within the court's jurisdiction.

The next question is also one not raised by the parties, but one to which the court must refer. This is a bill in equity to recover on a contract of fidelity insurance. Equitable jurisdiction was asserted in the bill on the ground that the determination of the liability of the defendant involved the examination of a complicated account, not conveniently to be examined in a court of law, and also on the ground that there were quite a number of credits to be allowed the defendant in the account, the proper mode of applying which required the action of a chancellor. A stipulation filed in the case above shows that both parties preferred the equity jurisdiction, and no objection is made to it in this court. It may be doubtful whether, if the point had been sharply contested by demurrer below, the equity of the bill could have been maintained. It is true that there is a concurrent jurisdiction of matters of account in law and equity. 1 Story, Eq. Jur. § 443. But it is laid down that where all the items of the account are on one side, and no discovery is asked, there is no equity jurisdiction. 1 Daniell, Ch. Prac. 551; 1 Story, Eq. Jur. § 459; Fowle v. Lawrason, 5 Pet. 495. It is true that there are a few large items of credits, but it is not clear that they would make the account a mutual one, in the sense in which it is understood in equity. However this may be, we think it our duty to proceed to consider the cause on the merits, under the rule laid down by this court in Reynolds v. Watkins, 9 C. C. A. 273, 60 Fed. 824, and McConnell v. Society,

16 C. C. A. 172, 69 Fed. 113. In those cases we held (following the decisions of the supreme court) that, where a case with no trace in it of a ground for equitable jurisdiction of it came before the appellate court, it was the duty of this court to reverse the decree and remand the case to the lower court, with instructions to redocket the cause on the law side, but that where the case was of a class of cases usually cognizable in equity, but lacking only in some one element necessary to justify that jurisdiction, it was too late for a party who had consented or not objected to the forum below to urge the objection in this court. We followed in these cases the distinctions shown in the decisions of the supreme court of the United States in the following cases: Reynes v. Dumont, 130 U. S. 355, 9 Sup. Ct. 486; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594; Lewis v. Cocks, 23 Wall. 466, Oelrichs v. Spain, 15 Wall. 211. The feature of the complicated account is certainly present in the case at bar, and thus it is of a class of cases cognizable in equity, and though in fact the defendant's credit items are not numerous enough to make it strictly a case of mutual accounts, we think it within the rule which requires us to enforce a waiver of the question of equitable jurisdiction against a party objecting for the first time in the appellate court, and which a fortiori requires us to maintain the jurisdiction when, as in this case, no objection is made even here. See, also, Waite v. O'Neil, 72 Fed. 348.

The defenses to this action involve a proper construction of the language of the bonds, rather than any conflict about the facts. While, in contracts like this, the more natural attitude of a "surety" is assumed by the form, it is, in effect, one of insurance; and whatever indefiniteness of language or ambiguity of expression there may be should be resolved most favorably to the assured, not only because it is the language of the insurer, but also because the general purpose of the contract is full indemnity, and this should not be defeated except by clear and unambiguous limitations assented to by the parties. Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379; Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019; National Bank v. Insurance Co., 95 U. S. 673, 678, 679; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co., 11 C. C. A. 96, 63 Fed. 48; Tebbets v. Guarantee Co., 19 C. C. A. 281, 73 Fed. 95, 96; Indemnity Co. v. Wood, 19 C. C. A. 264, 73 Fed. 81, 88. And the safeguarding of this rule against any abuse of its application is nowhere better done than by Mr. Justice Jackson when he says:

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." Imperial Fire Ins. Co. v. Coos Co., supra.

It is a familiar rule of interpretation that we shall look to the general purpose of the parties to the contract, to see what they intend to provide. Waite v. O'Neil (Ct. App., 6th Cir., Oct. Term, 1896) 22 C. C. A. 248, 76 Fed. 408. The old-fashioned bond to secure fidelity of trust administration being a contract of suretyship, strict-

ly, and not of indemnifying insurance, in the expansion of the modern contrivance of organizing incorporated companies to furnish a guaranty of fidelity these contracts naturally took the form of a bond, as these do, rather than that of a policy of insurance. But as to this subject-matter of indemnity, as well as to the multitude of others formerly covered by bonds to which the principle of insurance is being so comprehensively applied, the general object is that of a protection as broad at least as that afforded by the old-fashioned bond, the form of which has been assumed, and for which the modern contrivance is intended to be a substitute. Marine, fire, or life insurance against the destructive forces of nature is not quite the same thing as an insurance against the dangers of dishonesty; and, the risk being of an entirely different nature, the courts must interpret the contract in view of this difference, applying the words used to the purpose of covering the peculiarities of the risk assumed on the one hand, and on the other intended to be discarded or shifted to others. And if these new contracts, whatever their form, are to be turned into contracts of insurance, the courts will be careful not to again perplex themselves with regrettable technicalities of law such as have sometimes crept into the older contracts of insurance, and have required statutes for their removal. In marine, fire, and life insurance, it is not an unreasonable assumption that the owner knows more intimately than others can know the conditions which are material to the risk assumed, and it is therefore not unreasonable to require him to disclose those conditions to the insurer, and to hold him strictly to that duty. But in an insurance like this the insurer and the insured deal at arm's length with each other, and upon a plane of equal opportunity for information. Indeed, the risk does not depend so much on conditions of fact as upon a mere judgment about human character in the subject of the insurance,—his individuality of moral qualities. About this the insurer can inform himself, and the assured is not presumed to know anything, as in the case of the owner of a property or a life which has been insured. Hence it is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls fairly within the employment of the person whose honesty is guarantied, and to permit no escape except by lines of retreat or avenues of deliverance clearly defined, well marked, and mutually understood as part of the contract, evidenced by the use of unambiguous language for that purpose. It would be contrary to public policy to inconsiderately allow the protection afforded by this new insurance to the vast business interests of the country, in public administration, as elsewhere, to be endangered by any lesser indemnity than that of the old form by bond, which is being so rapidly displaced, the new contracts being offered by the companies as superior to the old in safety. The courts should interpret them with a view of accomplishing what the companies propose to secure, by adhering strictly to the rule we have quoted in the language of Mr. Justice Jackson. And we wish further to remark that the business honesty or fidelity insured by such contracts as these is not that kind of enforced honesty which comes of a want of opportunity to be dishonest, but that which

is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and, in the absence of evidence to the contrary, presumably that which is bargained for in each instance; a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, perhaps indulged because of reliance upon the insurance which has been accepted as a protection. An employer would need no insurance against that close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness except that which he has contracted to use, in plain words, for the benefit of the insurer. The old form of bond and security was usually without covenants for watchfulness or inspection by the employer, or other obligee, and, as that is the highest measure of liability of which the business is capable, it is that which the obligee would naturally seek for his protection, always desiring, presumably, to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implied or general limitations upon the guaranty against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any by mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness. The insurer gets what he contracts for in respect of that, and nothing more; and he must provide by express stipulation for even ordinary prudence on the part of the assured in taking measures for minimizing or lessening the broad risk we have indicated as that most desirable to the assured, and, therefore, that which is intended to be covered by the words of insurance in these contracts, except so far as the "provisos and conditions hereinafter contained" shall have limited that broad liability. Nothing is to be implied not necessarily indicated by the words used, as might be in other examples of insurance, where the relation of the parties and the character of the risk are different, and where those relations properly breed implications that would import a meaning not admissible when the thing guarantied is so far disassociated from any duty owing by the assured to the insurer as we find in the subject-matter of insurance here.

Coming now to a critical examination of these contracts, we find that one of them provides "that the employer shall observe, or cause to be observed, all due and customary supervision over the said employé for the prevention of default"; the other, that "the said employer shall use all due and customary diligence in the supervision of said employé for the prevention of default," etc. Much proof was taken to show what kind of supervision is ordinarily and prudently taken by other banks, and generally in the banking business, to prevent default; it being assumed that there was a contract here for that kind of supervision, or at least that which ordinary prudence in any business would require. Certainly these

words may mean that, but not necessarily. They may mean less; for example, they may mean that "due and customary supervision" which obtained in this particular bank, not over all employés, but over the teller; not over all its business in every direction, but only over that which he did. It may mean that which was in vogue when the contract was made, or that coming subsequently into use as affording a better mode of detection. If that supervision which it was customary for the authorities of this bank to keep over the teller was careless and ineffective for detection, it would be none the less "due and customary," and that which they took "to prevent default." The point is argued here as if this were a contract for effective supervision; indeed, as if it were a sort of guaranty by the assured that the insurer should not suffer loss, because he would take care of him by that kind of effective supervision which would be sure to prevent it, thus reversing the real relation of the parties. And we are told in the proof and in the argument how readily the default could have been detected if other supervision had been given than that which was made. After the fact, we can see how easily these frauds could have been prevented if those who were the victims had suspected Schardt, and had watched him and his books, instead of relying on his honesty and these policies guarantying it. But all this is beside the question, which is whether the words of the contract required any other supervision than such as was given. The words of either of the bonds we have quoted are ambiguous, and may embrace any degree or acts of supervision, from the highest and most certainly effective to those which are least so, as long as they were "customary" or "due." The standard of excellence or efficiency is not definitely mentioned, nor is any rule or custom definitely prescribed, whether of this bank or of all banks, or of any business in which cashiers and tellers are employed. By the rule we have laid down, the defendant company should have been more specific in defining the supervision they required; and the contract should have added, if that was the intention, all due and customary supervision in use in the best-managed banks, or generally in use by banks conducted with ordinary prudence and skill, or some words sufficiently designating the general custom now sought to be relied on, if there were at that time any such general custom prevailing in the management of banks,—not words applicable to any prudent supervision in many differing ways, but those pointing out a custom of supervision in the particular way now insisted upon. We might rest the point here, but there are facts in the case which indicate quite satisfactorily what was meant by these words.

The defendant company in its preliminary investigations undertook, by examination with written questions and answers, to inform itself of the "custom" of this bank in regard to frequency of inspections, and it was fully informed by the answers of that "custom." It is, in our opinion, in accordance with familiar, general rules of technical interpretation to read these words by the light of that fact, and to hold that this was the "due and customary" diligence in supervision referred to in these bonds and provided for

by the contracts; and, by the particular rule we have already announced, if any more diligent or other customary supervision was embraced it should have been specified by apt words showing that intention. Courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract; view the circumstances as they viewed them, "so as to judge of the meaning of the words, and of the correct application of the language to the thing described." Goddard v. Foster, 17 Wall. 123, 143. Here, on the face of this policy, the parties were making these particular inquiries and answers a part of the contract, and presumptively they were referring to these particulars in the phraseology to which naturally they might be applied. "When we have satisfied ourselves," says Mr. Justice Miller, "that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." Again:

"An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications properly arising in the absence of positive expressions of intention to control, vary, or contradict the most formal and deliberate written declarations of the parties." Insurance Co. v. Wright, 1 Wall. 456, 470.

Here, as there, the argument made goes upon the assumption that all that was indicated by these questions and answers, and which fixes, ascertains, or suggests the kind of supervision in contemplation, is nugatory, and that the whole field is open, and the power placed in the hands of one of the parties to dictate the extent of supervision by some other custom more efficient to have prevented this loss. We think this cannot be done.

Precisely the same consideration disposes of the alleged misrepresentation founded on the use of the words "examined" and "verified," as contained in the certificate made previously to the renewal of the teller's bond, that his books and accounts as teller had been "examined and found correct," and upon like words as stated in the proposal or statement made on application for the cashier's bond when Schardt was promoted to that employment. As before, the argument proceeds upon the same assumption that an ordinary, prudent, and careful examination would have developed the stealings that Schardt had covered up. This may or may not be so, for we know that such defaulters are very expert in covering up by false entries and appearances, and often none but the most expert examinations and examiners discover the frauds; and we must, in looking at these certificates, take the appearances as then existing, and not as now uncovered after the discovery by such experts. The defendant company was competent to pursue such an investigation. It had a manager or agent at Nashville for the purpose of keeping up and procuring information,

and yet was contented to rely, for reasons we will presently suggest, upon these vague and indefinite representations as to that which was done. Now that it appears that the accounts concealed a fraud which close scrutiny behind their face would have developed, we are asked to imply that these words were used to represent that such a close scrutiny had been made in fact, which representation, it is argued, must have been false, because the frauds were not discovered. This is substantially construing the contract as a guaranty to the defendant company against the bank's carelessness in making the examinations, or that of its agents. However careless the examination may have been, if made in good faith, and the examiners believed the accounts correct, they might truthfully so represent them, albeit they were not correct. The position of the defendant company leaves no margin here, and holds the bank to absolute truthfulness, not of the fact of examination made in good faith, and a belief in correctness, but of the soundness of Schardt's entries and accounts, and their freedom from fraud, no matter how skillfully a fraud may have been concealed by him. The facts do not show any such intentional representation, and the words do not define such a complete assurance. The words "correct" and "verified" may mean that, but also less in any degree. One "verifies" an account by merely adding up or doing the other work of mathematical calculation, and finding the figures correct, or by such comparison of entries and items as one may make and find "correct," and any extent of this is "examination," however superficial. These representations do not say that the examination was skillful or extensive, or by comparison of books and trial balances, but only that such examination as was made disclosed no error or fraud; and if this was done in good faith, as there is no doubt it was, it fully meets the representations made, unless we are to imply that the parties intended such a thorough examination as would save the insurer harmless; and this, we think, was not contracted for in plain and unambiguous language, as it might have been, if intended. As was remarked by the learned judge at the circuit, "So long as the bank officers and the committee acted in good faith, such examination as the appointed committee thought proper and sufficient for the protection of the bank and its stockholders would satisfy the requirements of this contract as made," and, we may add, would be truthfully within these representations; and, "if anything more was wanted, it was a matter for specific agreement."

It is to be observed that the inquiries made by the defendant company did not explore the bookkeeping processes of the bank, nor inquire as to the method employed in the bank; and yet the defendant urges persistently that any departure from the method in use, and any carelessness in bookkeeping, whereby Schardt was enabled to conceal his frauds, is conclusive evidence that the examination and supervision stipulated for was not that which was due and customary, which is to say again that, with proper supervision, stealing is impossible, and which must come at last to mean that the defendant company did not in fact assure anything. It

is also said that Schardt, as part of his scheme to defraud, had ordered certain trial balances to be discontinued, and that they were not taken, as they ought to have been, and that by a comparison of different books and original entries and trial balances the frauds were afterwards, and might have been before, discerned. It is a sufficient answer to all this to say that these contracts did not specifically bind the bank to this efficient bookkeeping, and that it is the common plan of these defaulters to adjust the bookkeeping to the service of their concealment. It is the kind of fraud insured against. Schardt had authority, or usurped it, to order this discontinuance of trial balances; and it was as much a method of his stealing as the false entries, or the putting of the money in his pocket, and in itself was an act of spoliation like the rest. If it had been the policy of the bank to rely on this vigilance as its sole protection, it would need no bonds or insurance; and, if it had been the policy of the insuring company to protect itself by that eternal vigilance in bookkeeping which is the price of safety, it could easily have stipulated for it as a condition of its insurance, not by dragnet generalities to catch any misprisions, but by determinate regulation. It did not do this. And there is a reason for it. If these new companies engaging in this new line of insurance should insist on perfect protection against loss, and demand a stringent, efficient, and unceasing vigilance that would make these frauds next to impossible, they could do no business, and there is no reason why they should exist, or why any one should pay premiums for such limited risks. Business would prefer the old style of bonds, which ask no questions and give a broader indemnity. Hence these solicitors for the new insurance use these vague, indefinite, ambiguous and—tested by the implications now demanded—misleading words and phrases, that customers may not be deterred by too much visible limitation on the risk; and thus they become what Mr. Circuit Judge Lacombe, in one of the cases we have cited, quoting from the books, calls "a snare for the unwary." The law does not tolerate the spreading of the net, nor help it to enmesh its victims.

If we were to concede that the officials of this bank could not have failed, by ordinary prudence, to have discovered these frauds, or that without some negligence the losses could not have occurred, it would not follow from this that this company, which has guaranteed to the bank and its stockholders the fidelity of the teller and cashier, can escape its liability because of such negligence. It has not limited its risk to one arising only when the bank officials act without negligence. If it wishes to do that, it should use apt words in its policy, and say so in plain and unambiguous terms, and then its customers would know that they were paying for insurances against losses that could not occur, for "due and customary" diligence, in the sense of the argument we are considering, means that kind which always brings discovery the moment the stealing begins. We hold that the proof shows, in respect of this, that all was done which the contract stipulated should be done, and possibly more, since the policy only stipulated for "an inspection or

audit" to be made "at least once in twelve months," and those stipulated to be customary in this bank were made quarterly, as the insurer was informed. Possibly the one enlarges the other, but that point is immaterial, since the greater number of inspections includes the less, and either is thus satisfied.

A separate defense is made on the teller's bond, that it limits the risk to a loss sustained "and discovered during the continuance of the currency of this bond, and within six months from the employé ceasing to be in the said service." By manifest misprision of counsel, there is here a misquotation, by the insertion of the words "of the currency" after "continuance." Whatever the force of this misprision may be, as the bond is written it plainly covers any discovery within the next ensuing six months after Schardt had ceased to be teller, provided, of course, the default occurred while the bond was current. The liability on the bond would cover only such thefts as occurred while he was teller under the bond, and when he quit that employment the "said service" would cease. No other service can be meant, or applicable to the contract, except a service as teller under the bond. If the 12 months of the bond expire, and the teller continue in the employment of teller without a renewal of the bond from this company, yet, in contemplation of this contract, "said service" has ceased; for it means that service which has been insured by this bond and its renewals, and no other service, either as teller or otherwise. That ceases whenever the bond ceases. This relieves the absurdities suggested in the argument based on the misquotation of the bond, and a misconception that the discovery must be made while the bond is current, and also prevents the suggested prolongation of the limitation as to time. Whether, if the teller should leave the position of teller so early during the 12-months duration of the bond that the 6 months allowed for discovery would expire before the bond itself expired, the time for discovery would, nevertheless, by the terms of the bond, continue to the end of the bond, we need not decide. But, if he leave so late that the 6-months limitation would continue beyond the duration of the bond, we have not the least doubt that a discovery made within six months from his actual quitting would be within the limitation. Schardt was elected cashier January 1, 1893. The teller's bond expired January 16, 1893, and the discovery was made in April, 1893. Whether we count the 6 months from January 1st or January 16th seems immaterial, on any facts we know, for either would be within the limitation by a discovery in April next ensuing. If, after his election as cashier, he continued to act as teller, and fraudulently appropriated any money before January 16th, the defendant company would still be liable, but not for any default as teller after that date. The discovery must have been made within 6 months from that date, at the very latest, whether he had then quitted the service of teller, in fact, or not. He had then quitted the service which had been insured, and the bond should read as if it had been written "within six months from the employé's ceasing to be in said service under this bond or its renewals." Perhaps we should notice that the

insuring terms of the bond immediately preceding the above-quoted clause cover defaults "in connection with the duties of said office or position, or with any other duties assigned to him by the employer in the said service." But obviously this does not affect the ruling we have made. It does not enlarge the import of the words "said service" in the limitation clause, as we have construed it. Whether he acts as "teller," strictly so-called, or is assigned to "other duties," no matter what, they, being all covered by the bond, are within the service under the bond, and any acts of any character constitute "said service"; but in either clause, as used, these words do not mean the general service as employé at any and all times whatever, but only that general service as an employé of the bank, in any kind of duty assigned to the "teller and collector," during the 12 months covered by the bond,—that 12 months of service being the "said service" meant in either of these stipulations. It might be difficult, under the terms of the bond, to start the running of the 6 months by any "ceasing of said service," while the employé remained at work in the bank in any capacity, because of the very broad insurance of all duties assigned to him; and possibly all that the defendant company can certainly claim under the words the company itself has chosen to define the limitation for its protection, as applied to the facts of this case (and to them we confine our judgment), is that the 6 months shall commence not later than the expiration of the bond, and they shall be bound for no discoveries after 6 months from that date. Again it is obvious that, under the rules of interpretation we have been applying in this case, it was the duty of the insurer by plain and unambiguous words to have fixed any other limitation it intended than this, which is most favorable to the assured on the words that are used, and most consistent with the general purpose both parties had in view, namely, to protect 12 months of the service of Schardt in this bank, giving a reasonable time for terminating that liability by a limitation fixed by the contract, and not depending on the ordinary statute of limitations, based on public policy, and measuring that limitation of time from the discovery of the frauds, and not from the date of their commission and concealment of the fact. On the one hand, it might be unreasonable to so construe the words "ceasing to be in said service" as to include a service after the bond had expired, thereby prolonging the limitation on discovery indefinitely in its relation to the termination of the 12 months covered by the bond, and on the other to so construe the words "discovered during the continuance of this bond, and within six months from ceasing to be in said service," as including only a discovery within the 12 months, thereby cutting off any possible liability for a fraud committed within the last minute of the duration of the bond, or so late as to furnish no time for investigation; but it is an entirely reasonable construction, which, consistently with the words, avoids either of these extremes, and fairly requires the assured, at the very latest, to find the frauds within 6 months from the termination of the bond. Counsel for the plaintiff denounce these perplexing stipulations as designed to mislead, and they are

clearly not definite, open, and unequivocal, as they should be to express a distinct purpose; but we may point to the fact that our construction is analogous to similar provisions in the ordinary contracts of insurance, and conforms to similar stipulations of this very contract, giving three months for discovery after cancellation, and to one of the cashier's bond, terminating the liability within three calendar months from "the expiring of this bond."

The next defense to be considered is that relating to the "bucket-shop speculations" of Schardt, as it is designated in argument. It applies to both bonds, but in a somewhat different form. The language of the condition in the teller's bond is that of a stipulation to notify the insurer of such conduct, and that of the cashier's bond is a representation, or rather the defense is that of the misrepresentation, of a fact. It is somewhat difficult, without displaying all the proof, with a commentary on the credibility of the witnesses and their opportunities of knowledge, to exhibit the fullest justification of our impression that this defense rests on circumstances comparatively inconsequential, which have become formidable only because of the subsequent developments of Schardt's vast gambling in exchanges called "futures," the knowledge of which he concealed from all who were interested, including the agent of the defendant company, who was one of the community where these transactions took place, and who was there to watch the "habits and associations" of customers of defendant company, like Schardt. But we cannot take the space here to do this, and therefore forego it. There is no proof that Schardt ever confessed to speculation or gambling, except that of Sykes, who is somewhat discredited because he has a litigation with the bank, and an apparent animosity towards it. He is also quite indefinite as to time and circumstances, and does not impress us with the certainty of his recollection, although he uses the language of positive statement. He may confuse what Schardt did admit with what he thus testifies as to his admissions. All the witnesses were speaking about long-past circumstances, which evidently did not make a serious impression commensurate with that importance which these circumstances now assume in the light of Schardt's defalcations. Sykes recommended him to be cashier in succession to himself, and asked for renewals of his bond; and evidently, if he be an honest man, these admissions and circumstances did not affect his own belief in Schardt's freedom from serious objection in this employment. There is not the least evidence of any bad faith on the part of any of these officers of the bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment, in not being more considerably affected by their information. It may be conceded that it was negligence on the part of the officials of this bank, when they first heard of what they did hear, and knew what they did know, not to investigate Schardt's books and accounts with the most rigid scrutiny; and not to have immediately discharged him, unless such an investigation should justify his retention, may have made them and the bank liable to those of their customers who suffered by him; and that to be

a broker for those who speculate and gamble, even in so small a way as Schardt confessed that he was a broker, or to be a partner of such a broker, or to be interested in a "bucket shop" if we please, in any way, as a broker or customer, is for all bank employés a discrediting "habit and association." We agree to all that is said about this in the cases cited. Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162; Prather v. Kean, 29 Fed. 498; Scott v. Bank, 72 Pa. St. 479. But this defendant company had not contracted for such a guaranty against negligence as had the depositors and bailees who sustained an action of damages in those cases, and this suggested analogy is neither a legal nor a fair test of the contract duty of the bank to its insurer against Schardt's dishonesty in the premises. Here, again, it must be strictly limited to the words it has used in defining that duty, and none is owed beyond the words by any kind of implications energized by any indignation at the negligence of the bank in not protecting itself, or indignation at the immoral conduct of Schardt. This insurer was insuring the bank for its protection in just such emergencies and against just such neligence, unless the words of this policy speak to the contrary, and had received the consideration for it, while the depositors of the bank, in the cases cited, had contracted for either common prudence, ordinary vigilance, or against gross negligence. It is a reversion of the attitude we have here, and it is a perversion of that principle to apply it here.

If Sykes ever told Baxter, the president, that Schardt had admitted in 1892 that he had been speculating in a small way, but had stopped it, as the learned judge at the circuit remarks, that was "a past event"; and as, by the same story, he had stopped it, the president may have thought it in itself unimportant, and dismissed it, as the cashier, Sykes, himself did. It may have been gross negligence to the depositors of the bank to so treat the information; but as he was not then "engaged in speculation or gambling" (according to the information, but not according to the stupendous fact, as we now know it), or was not then "indulging in any disreputable habits or pursuits" (if these words apply to "gambling" habits that before were so fully provided for by the stipulation, which may be doubtful), there was no obligation, under the stipulation of the teller's bond, to report it to defendant company, whatever may be thought of the obligation to protect the bank in the future by investigating Schardt, and discharging him, as a duty to depositors, who otherwise might sue for negligence. If that which was told was, as Eatherly states it, that Schardt had put $200 in the bucket shop, as one of the partners or stockholders, that was not "speculation or gambling," or engaging in it, in a strict construction, such as we must make here, but only being the agent of those who were speculating and gambling. It may be considered a "disreputable" habit or pursuit, but however regarded, and whether it be broadly and liberally interpreted as "gambling" or not, it was, too, "a past event" when the bank became "aware" of it, and the habit had been abandoned,—again according to the information, but not the fact, unfortunately for all concerned.

If, also, that which Sykes tells was told to Baxter, the president, it is to be now considered in its relation to the representation made preliminary to the cashier's bond. We have an impression that Sykes is mistaken, and confuses or enlarges what was known and done after the anonymous letter; but take it as he tells it, and it does not appear that Baxter in bad faith withheld the information. He was answering "to the best of his knowledge and belief," and the warranty is not absolute, with such a limitation, and cannot be, necessarily. If, in good faith, he did not believe what he heard to be "unfavorable," because Schardt had ceased to deal in the "bucket shop," or, in like good faith, did not "deem it advisable" that the insuring company should make inquiry, surely his answer was true, because he is made the judge of what is "unfavorable" or what was "advisable," at least within the limits of what reasonable men might think about it. Moreover, it is to be observed that, unlike that which appears in the teller's bond, which we have just considered, no mention is made of "gambling" or "speculation" in this question. It is "habits or associations," past or present, that are called to mind; and we doubt if "dealing in futures" had come to be considered "gambling," in that "plain, ordinary, and popular sense" of which Mr. Justice Jackson has spoken in the quotation we have made, so as to bring it within the common thought expressed in "habits and associations," as gambling at cards, for instance, surely would be, or if "speculation" had come to be considered "unfavorable." A bank president surely should know that "dealing in futures" was unfavorable, but non constat that a single dealing, or small and insignificant dealing, which had ceased, was "a habit," or that it was advisable for the insurer to inquire about it if it had ceased, and he was informed it had. If the information he got was as Eatherly described it, going only to show that Schardt had been a partner in the brokerage agency, then what we have said about the other applies with greater force. Possibly a reasonable man might limit this inquiry to such "habits and associations" and "matters" as the moralists ordinarily condemn as involving turpitude, or as disgraceful and opprobrious, and not include the business sin of wasting one's own money in speculative trading, even in a "bucket shop." If the money be one's own, and not fiduciary money, as to which there was no information, it is still ordinarily, by those not casuists, regarded as more excusable than the common games of chance. At all events, any indefiniteness or uncertainty of language used is to be resolved in favor of the assured and against the insurer; and certainly this "warranty," whatever force it has, leaves the quality of being "unfavorable" or "advisable" to some kind of construction by the mind of him who is answering the question. It is not precisely within the rulings in Insurance Co. v. Gridley, 100 U. S. 614, nor in National Bank v. Insurance Co., 95 U. S. 673, because it does not depend wholly on the knowledge of the facts, as there, but is a representation as to what has been "heard" by the one answering. Yet, considering the subject-matter, the principle decided is analogous since the respondent is left to exercise

his own judgment about what he has heard, and there is no warranty that that judgment shall be of the best, or an absolutely correct judgment, and that is what we are asked to include within the warranty by this defense. On the authority of Moulor v. Insurance Co., 111 U. S. 341, 4 Sup. Ct. 466, and Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, the learned judge at the circuit doubted whether, under the strict rule, this contract should be taken as a warranty, but did not decide that point, as we do not, since we find that, being treated as a warranty, there has been, when properly construed, no breach of it. Baxter, the president of the bank, had heard what we can now see was unfavorable, and that it would have been advisable for the company to inquire about it; but, under the then circumstances, it cannot be said that he reasonably should have known that it was unfavorable, or advisable to make inquiry, and this was left to his determination by the contract. This was a limitation on the warranty itself, and lessened its scope otherwise. We may add to what the learned trial judge said, that under the rulings in Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 19 C. C. A. 286, 72 Fed. 413, the strict rule as to disclosures which has been imported from the marine insurance law, and which statutes so often have abrogated as unjust, should not be extended to these new policies; and on this ground all the courts have held that the warranties shall be strictly construed, as we do this.

After the anonymous letter was received, and Schardt had been called before the bank officials, and, denying the charge that he had been speculating, had produced witnesses to disprove it, there may have been rumors afloat, as the witnesses testify, perhaps all traceable to that source; but there was no duty on the bank to run down this kind of information, or to report it. It had not assumed the business of a detective agency by the contract. It was held in Surety Co. v. Pauly, 18 C. C. A. 644, 72 Fed. 470, 476, under a policy similar to this, but under another clause, which is also found in this, requiring notice in writing of any act which may involve a loss coming to the knowledge of the employer, that "knowledge" and "suspicion" are not synonymous terms; that the bond does not call for notice of suspicions, but only of a knowledge of some specific fraudulent or dishonest act. The same rule is applicable to the disclosure required under the clause we have in hand, so far as it calls for "knowledge," and to the clause in the teller's bond requiring notice on "becoming aware" of speculation and gambling. Mere rumors and suspicions are not included, certainly, in the teller's bond, and, for the reasons we have indicated, we think not in the other, although it is broader, in requiring notice of things "heard" as well as things known. It is not everything heard that is required to be told, but only unfavorable habits and associations, or matters important enough for inquiry. We have already stated why these are not included, and the proof shows nothing more formidable than what we considered in that connection. In the case of Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. (before cited) 11 C. C. A. 96,