inland bill of exchange drawn and accepted in that state was not entitled to recover against the indorser, unless the bill had been regularly protested for non-payment. This decision was made before the case of *Bailey* v. *Dozier*, reported in 6 How., 23, came before this court. In that case the court held, upon full consideration of the question, that, under the statute of Mississippi, the holder of an inland bill of exchange was entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice; and that the protest was necessary only for the purpose of enabling him to recover the five per cent. damages given by the act. The case of *Bailey* v. *Dozier* must govern this, and the judgment in the Circuit Court is therefore reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

ELI CLARK, WILLIAM GREEN, AND HUGH MCGILL, PLAINTIFFS IN ERROR, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MANUFACTURERS' INSURANCE COMPANY, DEFENDANTS.

Where an action was brought upon a policy of insurance against fire, by the assignees of the person originally insured, and in the policy it was said that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," it was proper to prove by parol testimony that the representations alleged to have been made by the party originally insured were actually made by him.

And if the assignees, by their acts, adopted these representations, when renewing the policy from time to time, the evidence was equally admissible, because the subsequent policies had reference to the one first made.[1]

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[1] An agreement to renew a policy of fire insurance, in the absence of evidence that any change was intended, implies that the terms of the existing policy are to be continued. *Hay* v. *Star Fire Ins. Co.*, 77 N. Y., 235, 239.

To constitute an application a part of a policy of fire insurance, there

Therefore, where the representation upon which the original policy was founded was, that "the picker is inside of the building, but no lamps used in the picking-room," it was a correct instruction to give to the jury, that the use of lamps in the picker-room rendered the policy void.[2]

But if no representations were made or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picking-room, although the risk might have been thereby increased, unless the use of them in that way was unusual.[3]

*236] THIS case was brought up, by writ of error, from the Circuit *Court of the United States for the District of

must be some reference to it in the policy which evinces that the parties understood and accepted it as such. *Vilas* v. *New York Central Ins. Co.*, 72 N. Y., 590; *affirming* 9 Hun, 121.

[2] The misrepresentation or suppression of a fact material to the risk known to the insured, and which the insurer is not bound to know will, in general, avoid the policy. *Roth* v. *City Ins. Co.*, 6 McLean, 324; *Carpenter* v. *American Ins. Co.*, 1 Story, 57; *Bulkley* v. *Protection Ins. Co.*, 2 Paine, 82; *Prudhomme* v. *Salamander Fire Ins. Co.*, 27 La. Ann., 695; *Mers* v. *Franklin Ins. Co.*, 68 Mo., 127; *Whittle* v. *Farmville Ins. &c. Co.*, 3 Hughes, 421; *Mullin* v. *Vermont Mut. Fire Ins. Co.*, 54 Vt., 223. But where the misrepresentation or concealment relates to something immaterial to the risk, (*Mobile Fire Dept. Ins. Co.* v. *Coleman*, 58 Ga., 251; *Same* v. *Miller*, Id., 420); or respecting which the insurer is charged with notice, or is bound to inquire (*Kohne* v. *Ins. Co. of No. America*, 1 Wash. C. C., 93; s. c. Id., 158; *Nicoll* v. *American Ins. Co.*, 3 Woodb. & M., 530; *Andes Ins. Co.* v. *Fish*, 71 Ill., 620. But see *Texas Banking & Ins. Co.* v. *Hutchins*, 53 Tex., 61; s. c. 37 Am. Rep., 750; *Hansen* v. *American Ins. Co.*, 57 Iowa, 741) it will not avoid the policy.

If the representation is a mere expression of opinion by the assured, *e. g.* as to valuation, the insurer should inquire into the grounds of such opinion. *Classon* v. *Smith*, 3 Wash. C.C., 156; *Harrington* v. *Fitchburg Mut. Fire Ins. Co.*, 124 Mass., 126; *Citizens' Fire &c. Ins. Co.* v. *Short*, 62 Ind., 316; *Carson* v. *Jersey City Fire Ins. Co.*, 14 Vr. (N. J.), 300; s. c. 39 Am. Rep., 584. Thus a clerk of the agent of the insured stated to the agent of the company with whom the insurance was effected, that another company had accepted a risk on the premises sought to be insured in the defendant company. This statement was untrue. The clerk did not know it to be so, but his employer did. In an action upon the policy, the falsity of this statement was insisted upon as a defence. The judge instructed the jury that if the clerk made the statement absolutely as a fact, the policy was void; but if he stated it merely as a matter of opinion, the policy was valid. *Held*, correct. *Standard Oil Co.* v. *Amazon Ins. Co.*, 14 Hun (N. Y.), 619; s. c. 79 N. Y., 506.

A policy provided that the insurer should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or out-building. In an action upon the policy—*Held*, 1. That the condition was not simply a provision against the habitual use of the oil, but that its use upon a single occasion, if it caused a loss, *i. e.*, if loss would not have resulted if other oil had been used, forfeited the policy. 2. That the condition contemplated and provided against the danger resulting from the upsetting or breaking, by some intervening accident, of a lamp filled with the oil named, as well as to a direct and immediate effect therefrom, such as an explosion. *Matson* v. *Farm Buildings Ins. Co.*, 73 N. Y., 310; *reversing* 9 Hun, 415.

A clause in a policy, declaring the policy void if "camphene, burning fluid, or refined coal or earth oils" are "used" on the insured premises, will not be construed to intend the ordinary use of kerosene oil for illuminating purposes. *Bennett* v. *North British &c. Ins. Co.*, 8 Daly (N. Y.), 461.

[3] The applicant has a right to suppose that the insurer, in making inquiries as to certain facts, waives information as to all others. *Browning* v. *Home Ins. Co.*, 71 N. Y., 508.

Massachusetts.[1] It was an action upon a policy of insurance against fire. The plaintiffs in error, who were also plaintiffs below, resided at Malone, in the county of Franklin and state of New York, and the insurance company was at Boston, in Massachusetts.

The property insured was a cotton factory in Malone, owned originally by Jonathan Stearns, who applied for insurance on the 28th of April, 1834.

There were fifty questions asked by the insurance company, and answered by Stearns. The thirty-fourth question and answer were as follows:—

"34. Is the picker inside the building? If within, state where situated and how secured; if in a separate building, state if the passage-way communicating with the factory is secured by an iron door at each end, or how otherwise secured."

"34. The picker is inside of the building, but no lamps used in the picking-room; the doors are wood, and not covered."

The following was written in pencil at the close of the application by the agent at Pittsfield:—

"The assured warrants that the waste shall be removed as often as once in forty-eight hours to a safe distance from the mill, and that the lamps in the carding-rooms shall be inclosed in glass. (This condition is required.)"

A policy was issued to Stearns from July 1, 1834, for one year, for $3,000, on the factory-building and fixtures, including water-wheel, drums, shafts and gearing; $11,000 on the movable machinery, and $1,000 on the stock in the various stages of manufacturing.

On the 8th of July, 1834, Stearns assigned the policy to the Ogdensburg Bank, to which the company assented.

On the 17th of June, 1835, the cashier wrote to Mr. Hall, the agent of the insurance company, inclosing a check for $263, and requesting a continuance of the policy for one year; and in August, 1836, a similar letter, requesting a renewal or continuance of the policy.

In August, 1837, the cashier of the bank inclosed a draft for $263, and requested a new policy. One was accordingly issued, containing the same clauses as the preceding.

On the 13th of August, 1838, Stearns informed Mr. Hall, the agent, that the property insured had passed out of his hands into those of the bank.

On the 25th of August, 1838, the cashier wrote to Mr.

[1] Reported below, 2 Woodb. & M., 472.

Hall, requesting a continuance of the policy, but omitting the $1,000 on stock, as the mill was not then in operation.

In August, 1839 and 1840, similar letters were written. In *237] the policy issued in 1840, the following clause was inserted:—*"It is understood that the factory is not in operation, and that the assured have liberty to put the same in operation, agreeably to the representation heretofore made by Jonathan Stearns." Upon the receipt of this policy, the cashier returned the following answer:—

"*Ogdensburg Bank, August 27th*, 1840.

"PARKER L. HALL, ESQ., *Agent, &c.*

"Dear Sir,—Will you do me the favor to send me a copy of the original survey and application, as made by Jonathan Stearns, at the time Stearns effected an insurance on the cotton factory, &c., at Malone, as I observe that the first policy made out for us specifies 'agreeably to the representations heretofore made by Jonathan Stearns.' This institution does not know what those representations are, and as the factory is soon to be put in operation by Stearns, we having leased the same to him for one year, we wish you to send us a copy of the survey and application, in order to have Stearns act within those representations. We also wish you to send us your abstract of having the factory put in operation by Jonathan Stearns, under the policy that will take effect on the 30th instant, for one year from that time. If, on receipt of a copy of survey and application, it shall not be found sufficiently correct, you will be notified, and we shall expect you will consent to have the policy adapted to the corrected application, &c. In the policy of 1839 you say, 'contained in their application.' I am not aware that this institution has made any specific application, and suppose you intended the one given as to details by Stearns. Yours, &c.,

"JOHN D. JUDSON, *Cashier.*"

The reply of the agent was as follows:—

"*Pittsfield, 31st August*, 1840.

"JOHN D. JUDSON, ESQ., *Cashier.*

"Dear Sir,—Herewith I inclose to you a renewed policy, No. 622, on cotton factory, &c.; I have inserted the clause agreeably to your direction.

"Dear Sir,—I had deposited this letter in the post-office when I received your favor of the 27th instant. The policy is made out by inserting liberty of putting it in operation, as requested. The original survey I have not in my possession.

It is in the office at Boston. Perhaps Mr. Stearns may have kept a copy; if so, you will be able to obtain it of him; if not, I may procure for you a copy at Boston. You will, of course, see to it that the waste is removed according to the warranty, and that the lamps be inclosed in glass.

"Respectfully, P. L. HALL."

*It appeared that the cashier then wrote to Stearns [*238 for a copy of his representation, but Stearns replied that he had none. No further inquiries were made about it.

In August, 1841, the cashier wrote to the agent, saying,—"Please send me a new policy or a renewal receipt for the continuance of the same policy for one year from 30th instant. The factory is now and has been in operation the last year, under a lease to Colonel Jonathan Stearns. His lease will expire soon, and whether the bank will lease it again is more than I can say at present; but still we wish the same clause in the new policy that is in the present one, viz., that we have the right to put the mill in operation, &c., should we wish."

A policy was issued according to the above request, containing amongst other things the following:—"It is understood that the mill is under lease to Jonathan Stearns, and may again be leased to him or some other tenant, the assured being answerable for the warranty as above."

On the 18th of March, 1842, an indorsement was made upon the policy, that the assured had made a contract of sale, and given possession of the property to Eli Clark, William Green, and Hugh McGill, to which the approbation of the company was requested; which was given by Mr. Hall.

On the 19th of August, 1842, the cashier wrote again for continuance of policy No. 704 P, and requested a new policy to be made out in the names of Clark, Green, and McGill; in case of loss, the money to be paid to the bank. The policy was issued accordingly, containing the same clauses as before, with this remark added:—"This policy is issued upon the representation formerly made by Jonathan Stearns, the former owner, which representation is binding on the assured."

In August, 1843, 1844, and 1845, similar letters were written by the cashier, and similar policies issued, except that the last remark above quoted was not attached to them.

In March, 1846, the property was destroyed by fire, and soon afterwards notice thereof given to the company.

In October, 1846, the insured brought an action of assumpsit against the company, counting on the policy, and also containing the common money counts; under which a judgment

was obtained for a return of premiums, to the amount of $1,200.

In October, 1847, the case came up for trial, upon a plea of *non assumpsit* and issue. The plaintiffs offered in evidence the policy, the contract between the bank and Clark, Green, and McGill, and the payment of part of the purchase-money by the latter.

*239] The plaintiffs also proved the loss of the property by fire, notice *of the loss, that the waste was removed, and that the lamps in the carding-room were inclosed in glass, as required by the policy. Everything was proved or admitted that was necessary to make out a *primâ facie* case for the plaintiffs.

The evidence showed, likewise, that the fire originated in the picking-room, which was situated in the centre of the building, and in which a glass lamp was frequently suspended from the ceiling, and into which room a glass lantern was carried that evening, and placed by the workman on the window-sill while the picker was in operation; around the top of this lantern he first saw the light and fire, as if the cotton-dust had become ignited through the air-holes, and the fire was communicated with such rapidity to the whole cotton he was unable to distinguish it. The evidence showed further, that when the picking-room had been occasionally used to work in during the night-time, this lantern, or one like it, had for three years been carried in, and that the globe lamp had been long used there suspended, with a reflector over the top, and was lighted when they worked at night in the picking-room, as well as the lantern. This appears to have been the practice soon after 1834 or 1835, but no evidence was offered that it had been before. When the plaintiffs bought the property in 1842, they found the lamp hung and ready for use, and they continued to use it as it had been used before.

The defendants then offered in evidence the application of Stearns for insurance, his written answers to the fifty questions, and the policies and letters above mentioned.

The defendants then called Parker L. Hall, who testified that, prior to the first policy to Stearns, he was agent of the defendants in Pittsfield, and that his authority did not extend to the taking of new risks on this species of property.

It was admitted that such a use of lamps in the picker-room as appeared in this case, enhanced the danger of fire, and was material to the risk.

To the admission of all this evidence the counsel for the plaintiffs then and there objected, on the ground that the policy contained no representations made by Jonathan Stearns,

and had no reference whatever to any such representations, and that to admit extrinsic evidence of the representations of the said Stearns, and other extrinsic evidence to connect the plaintiffs with those representations, and thus affect their rights by such representations, was not only to vary, enlarge, or modify the contract, as contained in the policy, but was in fact to set up and show, by extrinsic evidence, a distinct and different contract from that contained in the policy, and of which the policy *is the written evidence on [*240 which the parties relied; and, as the printed clause in the policy referred only to representations of the assured, representations in form by the assured were the only representations which could legally be shown, and evidence that the parties did not mean the representations in form by the assured, or expressed in the policy, but meant representations of Stearns, was not admissible, because that would clearly be to enlarge or change the contract in the policy, or rather to set up a distinct and different contract.

But the court admitted all the evidence as proper and legal, and to this ruling and decision of the court the counsel for the plaintiffs excepted.

The plaintiffs also proved that it was customary for these defendants, and other insurance companies in Boston, to issue policies on property, with which the underwriters were acquainted, in the printed form, like that in this case, with the clause referring to the "representation of the assured, contained in their application, to which reference is to be had," where no written application has in fact been made by the assured, and where there is no written representation to which reference can be had. The counsel for the defendants objected to the admissibility of the evidence by which these facts were proved.

The counsel for the plaintiffs requested the honorable justice who presided at the trial to instruct the jury,—

1. That whether the printed clause in the policy—"that this policy being made and accepted upon the representation of the said assured, contained in their application therefor (to which reference is to be had)"—was to be taken as referring to the representation of Stearns, in 1834, was matter of law to be determined by the court, the construction and application of written contracts and instruments being wholly within the province of the court.

2. That, in the opinion of the court, the said clause was not to be taken as referring to the said representation of the said Stearns; that these representations are not to be taken as a part of the said policy, or as in any way binding on the

plaintiffs, whose right to recover in this case could not be in any way affected by said representation.

3. That the evidence introduced by the defendants was not sufficient in law to bar the plaintiffs' right to recover.

But the honorable justice declined giving these instructions to the jury, and instructed them that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy; that, if those representations were adopted by the plaintiffs, *241] they formed *a part of the present policy in the same manner as if incorporated into it, and the use of lamps in the picker-room, in the manner testified to, in violation of these representations, rendered the policy void, and the plaintiffs would not be entitled to recover, except for a return of the premiums paid for the last four years. And the jury were further instructed, that if they found the policy declared on did not refer to the said representations of Stearns, and that no representation was in fact made or adopted by the plaintiffs respecting the use of lamps in the picker-room, they would then take the law to be, that, as it was agreed by the parties that the use of lamps in the picker-room in the manner found was material to the risk, it was the duty of the plaintiffs to disclose the fact of such use to the defendants, or their agent, when the policy was applied for, provided such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and occasioned the loss in question; and that each failure of the plaintiffs, even without any fraudulent intent on their part, to make this fact known to the defendants, would avoid the policy. Thereupon the jury returned a verdict for the plaintiffs, for a return of four years' premium.

To these instructions, and to the said refusal to instruct, as well as to the admission of the said evidence, the plaintiffs then and there excepted; and prayed that their exceptions might be allowed and sealed by the said justice, and the same were allowed and sealed accordingly.

In witness whereof I have hereunto set my hand and affixed [SEAL.] my seal, this 10th day of November, A. D. 1847.

LEVI WOODBURY,
Associate Justice Supreme Court U. S.

Upon these exceptions the case came up to this court.

It was submitted on printed arguments by *Mr. Gillet*, for the plaintiffs in error, and *Mr. Curtis* and *Mr. D. A. Hall*, for the defendants in error.

It is only possible to give a brief sketch of the points taken respectively by the counsel.

Mr. Gillet, for plaintiffs in error.

The first question presented by the record for the consideration of the court is, whether the evidence offered by the defendants was legally admissible.

The policy of insurance which is the foundation of this action is in the ordinary form, most of it being in print, and is *plain, unambiguous, and complete in [*242 itself. It is susceptible of but one construction, and is as definite as any contract can be made. The defendants, for the purpose of defeating our claim upon it, were allowed to introduce twenty-eight distinct pieces of evidence, with the view of tacking to the contract certain representations made by a former owner of the property, more than eleven years previous to its date. What the object of this evidence was appears from the charge of the learned judge who tried the cause. He instructed the jury, "that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy, that if those representations were adopted by the plaintiffs, they formed a part of the present policy, in the same manner as if incorporated into it." Thus the jury were left to decide, as a question of fact, whether the representations of Stearns were defunct and obsolete, or a living member of the defendants' contract of insurance. And thus a perfect written contract was nullified and destroyed by a mass of parol evidence of facts, which occurred mostly between other parties, long prior to its execution.

The general principles of law excluding parol evidence when offered to vary, add to, or modify written contracts, are laid down in 1 Greenl. on Ev., part 2, ch. 15, where many cases are also collected. The case of *Miller* v. *Travers*, 8 Bing., 244, is strongly in point. This rule has always been applied in cases on policies of insurance, and often when it operated with great hardship. It was so applied in *Finney* v. *Bedford Commercial Ins. Co.*, 8 Metc. (Mass.), 348; *Bryant* v. *Ocean Ins. Co.*, 22 Pick. (Mass.), 200; *Alston* v. *Mechanics' M. Ins. Co.*, 4 Hill (N. Y.), 329; *New York Ins. Co.*, v. *Thomas*, 3 Johns. (N. Y.) Cas., 1; *Higginson* v. *Dall*, 13 Mass., 96; *Dow* v. *Whetten et al.*, 8 Wend. (N. Y.), 160; *Cheriot* v. *Barker*, 2 Johns. (N. Y.), 346; *Jennings* v. *Chenango Ins. Co.*, 2 Den. (N. Y.), 75; and rigidly and harshly was it adhered to in *Ewer* v. *Washington Ins. Co.*, 16 Pick. (Mass.), 502. Mr. Duer, in the first volume of his Treatise on Insurance, p. 71.

says, the policy from the time of its execution constitutes the sole evidence of the agreement of the parties, and that no previous letters or communications between them, not even the written application or agreement, can be used to vary or control its interpretation. Now, according to this rule, if the parties had agreed in writing to be bound by Stearns's representations, and the fact had been omitted in the policy, it could not be proved by reference to the prior written agreement.

II. The next question to be discussed is the effect of the evidence, supposing it admissible. (The counsel then commented upon the different terms in the policies.)

*243] *Each policy was a separate and distinct contract. Neither could be modified by another. If the defendants intended to make the last policy like that of 1842, by binding the plaintiffs to the representations of Stearns, and omitted it by mistake, such mistake cannot be corrected on the law side of the court. Nor would this court, sitting in equity, modify the policy by inserting Stearns's representations in it. If the omission of all reference to Stearns in this policy was at the request of the plaintiffs, such omission forms a part of the contract; if it was the voluntary act of the defendants, they are bound by it; and if it was done by their mistake, the plaintiffs are not responsible for the results of their slovenly mode of doing business. *Andrews* v. *Essex F. and M. Ins. Co.*, 3 Mason, 6; *Hogan* v. *Delaware Ins. Co.*, 1 Wash. C. C., 419; 1 Duer on Ins., 132, note xi.; *Graves* v. *Boston Marine Ins. Co.*, 2 Cranch, 419.

III. The representations of Stearns form no part of this policy, because they are not incorporated into it, nor are they in any way referred to in the policy as forming a part of it. *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.), 72; *Snyder* v. *Farmers' Ins. and Loan Co*, 13 Id., 92; *Farmers' Ins. and Loan Co.* v. *Snyder*, 16 Id., 481; 3 Kent. Com., 373; *Alston* v. *Mechanics' Mutual Ins. Co.*, 4 Hill (N. Y.), 329. In the case of *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.*, 8 Metc. (Mass.), 114, it was held that the representations of the assured were legally adopted and embodied into the policy as a part of the contract. But in that case the representations were annexed to the policy, and the court say, that "the policy, by the manner in which it refers to the application and representations, does legally adopt and embody them as a part of the contract." But in this case there is no reference whatever in the policy to Stearns's representations.

IV. There being no written agreement by the plaintiffs to adopt Stearns's representations, it was only a verbal promise

to make them good. But this is contrary to 4 Hill (N. Y.), 329, and 22 Pick. (Mass.), 200.

V. There was error in the last instruction of the court to the jury.

The counsel for the defendants in error argued in support of the following points:—

1st. That the insured had made certain representations, which were to be deemed part of the contract, and which being false, and the loss occurring by means of their falsehood, no recovery could be had.

2d. That the insured failed to make known to the [*244 underwriters, *when the policy was obtained, a fact material to the risk, known to the assured and unknown to the underwriters, and which was the cause of the loss, and therefore the policy was void.

I. The first proposition was subdivided into the following three branches:—

1. That the plaintiffs, by accepting the policy of August, 1842, made Stearns's representation their own, so that it might be, and in fact was, afterwards correctly described in the renewal policy declared on as the representation of the assured.

2. That by applying for a continuance of the policy, which was based solely on these representations, they did, in legal effect, adopt these representations into, and make them a part of, their application; so that it might be, and in fact was, correctly said in such renewal policy, that the representation was contained in the application.

3. That it clearly appearing, by the policy itself, that the original policy to the plaintiffs was issued upon the representation of Stearns, which thereafter was to be binding on the plaintiffs, and was referred to therein as the representation of the assured, and that the subsequent policies, including the one declared on, were merely continuations of that contract; and it further appearing that no representation was ever made except the one made by Stearns, and that therefore this important clause in the policy could refer to no other, and is senseless and void unless it refers to that; the jury were rightly instructed that they would be warranted in finding that the plaintiffs had adopted the representation of Stearns as a part of this policy. It may be, that, upon the actual posture of the evidence, it was not a question for the jury, because there was no fact in controversy; but this is wholly immaterial if the jury have found, under the instructions of the court, a verdict, right in point of law; the only difference being that

they were instructed they might so find, instead of being told they must so find.

II. Upon the second ground of defence. This seems too clear to require much argument. The case in this aspect is, that the assured make no disclosure respecting the fact that lamps were used in the picker-room; that such use was a fact material to the risk; that such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and that it occasioned the loss. A policy made under such circumstances is void. It is not necessary to show that a contract of sale, or any other contract, would be void for a similar cause. It *245] is enough that a contract *of insurance is thus avoided. 1 Wash. (Va.), 161; 1 Phil. on Ins., 214; 2 Duer on Ins., 380, 506; 6 Cranch, 279, 338; 1 Pet., 185; 2 Id., 25, 49; 10 Id., 507, 512; 16 Id., 496.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was assumpsit by the plaintiffs in error on a policy of insurance, made August 13, 1845.

From the detailed statement of the facts, it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834, by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names,—stipulating that any loss should be paid to the bank.

In April, 1834, when application was first made for insurance, the defendants, doing business in Boston (Mass.), put numerous written interrogatories to Stearns, who lived in Malone (New York), where the factory was situated, and to one of them he replied, that no lamps were "used in the picking-room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," &c., &c.

No new representations appear to have been made at the

different renewals, but only a general reference to representations, like that just named; and in three or four instances, when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiff objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court, that, if they were adopted by the plaintiffs, the present policy as well as the original one must be considered as founded on them and void, if they were not true.

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered.

*Without meaning to impugn the great elementary [*246 principle, that written instruments are not to be varied or contradicted by parol, it suffices to say here that this testimony was not admitted to vary or contradict any portion of what had been written. See *Phillips* v. *Preston*, 5 How., 291.

It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. 13 Wend. (N. Y.), 92; *Jennings* v. *Chenango Ins Co.*, 2 Den. (N. Y.), 82; Phillips on Ins., 47; 16 Pick. (Mass.), 502; 1 T. R., 343; 2 Brod. & B., 553; 4 Russ., 540; 20 Pick. (Mass.), 121; 1 Paige (N. Y.), 291; 8 Metc. (Mass.), 114, 350; 4 How., 353; 3 Barn. & Ald., 299; Wigram on Ext. Ev., 54, 55; 1 H. Bl., 254; 2 Id., 577; 6 T. R., 710; 1 Duer on Ins., 74.

It added to what was written nothing, it subtracted nothing, it changed nothing, and we think its admission was legal.

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction. If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to these; if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used in all of them, it surely must comport with justice, as well as law, to have them govern.

The cases of like subsequent adoptions and ratifications of what had been done before by others are very numerous. Among them see those collected in Story on Agency, §§ 252, 253. Even "slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." *Ward* v. *Evans*, 2 Ld. Raym., 928; 3 Wash. C. C., 151; 13 Wend. (N. Y.), 114; 3 Ch. Com. L., 197.

This view of the case, standing alone, would entitle the defendants to be discharged, for the picking-room, contrary to these representations, had a lamp, and indeed lamps, in it; and their use was proved to be the cause of the fire which destroyed the factory.

We should, therefore, affirm the judgment below without further inquiry, did not the bill of exceptions disclose another ruling, which, as the record now stands, requires considera-
*247] tion. When the judgment below is, as here, well sustained by the *opinion entertained on a decisive point, it is usually of no consequence whether another point was correctly ruled or not. But as the bill of exceptions in this case was drawn up by the plaintiffs, it states that the jury were instructed to find a verdict for the defendants on the last ground, if on the facts the first one failed; and hence, looking to the record, the last ground may have been passed on by the jury, and have influenced their verdict. To be sure, the report of this case below (in 2 Woodb. & M., 472) shows that a verdict was taken by agreement of parties, or only *pro forma*, in order to bring the questions of law to the Supreme Court; and therefore, that no jury could in truth in this case have been thus influenced or misled. Yet this fact not appearing on the record brought here, the case, till revised and corrected below in this particular, must be considered as if the jury had actually examined both grounds, and had really decided upon them. But even on that hypothesis, if the second point was properly ruled, no occasion would exist for sending the case back for correction in the statement as to the verdict, in connection with the first point.

Whether it was properly ruled or not involves a question of much novelty, being in one aspect of it a case, perhaps, of the first impression, and without any precedent to govern us, and is of so much importance in insurances as to deserve great caution in settling it. From the report of the case below, before referred to, the Circuit Court, though alluding to the last point, do not appear to have gone into any critical discussion and opinion on it.

But the bill of exceptions being so drawn up as to exhibit a positive instruction given on it by that court to the jury, it is

necessary for us to examine with care whether an instruction like that presented here could legally be given.

First, then, what is the substance of that supposed instruction?

It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover, if lamps were in truth used in the picking-room, which were conceded to be material to the risk, and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued, and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists, that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking-room, where one or more was in truth used, [*248 makes the policy void, not only *for misrepresentation, but misdescription and concealment. 1 Marshall on Ins., 481; Ellis on Fire and Life Ins., 58; *Dobson* v. *Sotheby*, 1 Moo. & M., 90; 6 Cow. (N. Y.), 673; 4 Mass., 337.

A false representation avoids the policy, because it either misleads or defrauds. *Livingston et al.* v. *Mar. Ins. Co.*, 7 Cranch, 332.

In such a state of things, also, the insured—knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and if so, at what premium—must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself, and will be forced to act in the dark more than himself, and probably to misjudge. 1 Marshall on Ins., 473, 474, note, *Lynch* v. *Dunsford*, 14 East, 494; *Maryland Ins. Co.* v. *Ruden's Ad.*, 6 Cranch, 338, and *Livingston* v. *Mar. Ins. Co.*, Id., 279; *Columbian Ins. Co.* v. *Lawrence*, 10 Pet., 516; *McLanahan* v. *Universal Ins. Co.*, 1 Id., 185; 2 Id., 59; 2 Duer on Ins., 388, 379, 411; 2 Cai. (N. Y.), 57; 1 Wash. C. C., 162.

Concealment thus would operate in some cases as a fraud, and in all will make the risk very different from what the insurer knew and agreed to. 3 Burr., 1905; Ellis on Fire and Life Ins., 38.

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not, in the state of facts exhibited in the record, meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known

whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet., 49; S. C., 10 Id., 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & C., 693.

It is fair to presume, that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." (1 Marsh. on Ins., 450.)

*249] But the relation of the parties seems entirely changed, if the *insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this,—it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. 8 Pet., 582.

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade,—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. *Hazard's Ad.* v. *New England Mar. Ins. Co.*, 8 Pet., 557; 2 Duer on Ins., 379, 478; 3 Kent. Com., 285, 286; *Green* v. *Merchants' Ins. Co.*, 10 Pick. (Mass.), 402; 4 Mason, 439; *Buck et al.* v. *Chesapeake Ins. Co.*, 1 Pet., 160. Nor on any special usage proved, as in *Long* v. *Duff*, 2 Bos. & P., 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in

principle,—"With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself," &c. 1 Marsh. on Ins., 481, 482; *Carter* v. *Boehm*, 3 Burr., 1905.

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. 1 Har. & G. (Md.), 295; *Burrit* v. *Saratoga M. F. Ins. Co.*, 5 Hill (N. Y.), 192.

It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists *enhancing the risk; and hence, as [*250 in this case, if lamps are used in the picking-room, which do enhance it, he must show that their use in the manner practised was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injurious as *suggestio falsi*. *Livingston* v. *Mar. Ins. Co.*, 6 Cranch., 281.

So if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. *Bufe* v. *Turner*, 6 Taunt., 338; *Walden* v. *Lou. Ins. Co.*, 12 La., 134. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits; because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants

would be entitled to be discharged under the second point on the ground, which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made, according to what is hypothetically suggested in the record. The judgment below must, therefore, be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On
*251] consideration whereof, it is now here ordered and adjudged by this *court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, for the purposes of correcting what is defective in the manner of stating how the verdict was taken, and how the last question stood by itself on the facts proved, and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

Nathaniel Lord, Plaintiff in error, *v.* John W. Veazie, Defendant.

Where it appears to this court, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered *pro forma* is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed.[1]

Such an action is not an "amicable action" as those words are understood in courts of justice.

It seems that to obtain the opinion of the court, affecting the rights of third persons not parties to such suit, is punishable as a contempt of court.

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[1] Applied. *Cleveland* v. *Chamberlain*, 1 Black, 419, 425; *Wood-paper Co.* v. *Heft*, 8 Wall., 336. Distinguished. *Farmers' Loan & Trust Co.* v. *Green Bay &c. R. R. Co.*, 10 Biss., 215; s. c., 6 Fed. Rep., 112. Followed. *Amer. Middlings Purifier Co.* v. *Vail*, 4 Bann. & A., 3, 4; *Gaines* v. *Hennen*, 24 How., 628.