thousand acres—his requisition of a seizure of the whole of those lands in satisfaction of the sum of thirty-nine dollars—his inflexible demand upon the sheriff, under threats of prosecution, to expose to sale the entire levy—his purchase of all these lands for the sum of nine dollars and thirteen and a half cents—and his refusal after the sale and purchase to accept, in redemption of these lands so sacrificed, a sum of money tendered to him much more than equal to the costs, with all the expenses incident to the judgment: when all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation; to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice.

Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules either of legal or moral justice. We accordingly approve the decision of the Circuit Court in so regarding it, and order that decree to be affirmed.

OLIVER AND DANIEL R. GARRISON, APPELLANTS, *v.* THE MEMPHIS INSURANCE COMPANY.

Where bills of lading for goods, shipped on board of a steamboat in the river Mississippi, mentioned that the carrier was not to be responsible for accidents which happened from the "perils of the river," these words did not include fire amongst those perils; and the carrier was responsible for losses by fire, although the boat was consumed without any negligence or fault of the owners, their agents, or servants.

The evidence of a witness was not admissible, who offered to testify that he had not known a case where the omission of the word "fire," in the exceptions mentioned in the bill of lading, was considered to give a claim against the boat on account of a loss by fire.

There is no ambiguity which requires to be explained, and the evidence fails to establish a usage.

An insurance company, which paid these losses, had a right to seek relief from the owners of the boat.

This relief could be sought in equity, not only upon the general principles of equity jurisprudence, but also because, in this case, a number of shipments were joined in the same bill, and thus a multiplicity of suits was avoided.

THIS was an appeal from the Circuit Court of the United States for the district of Missouri, sitting in equity.

The bill was filed by the Memphis Insurance Company, a corporation created by the laws of Tennessee, and whose stockholders were citizens thereof, against the owners of the steamboat Convoy. In February, 1849, they received on board of their boat a large amount of cotton, to be carried from Memphis to New Orleans. The boat and cargo were destroyed by fire on the downward voyage, without any fault or negligence of the owners, their agents, or servants. The insurance company paid the owners of the cotton the amounts of their several insurances, and then filed this bill to recover such sums from the owners of the boat. The facts are more particularly stated in the opinion of the court. The Circuit Court held the owners of the boat liable, and rendered a decree against them for the amounts paid by the insurance company.

There were fifteen different bills of lading mentioned in the bill. The first five, covering three hundred and eighty-eight bales of cotton, stipulated for the delivery at New Orleans, "the dangers of the river only excepted." In the sixth, seventh, and eighth, covering one hundred and twenty-one bales, "the dangers of the river and unavoidable accidents only" are excepted. In the ninth, fourteenth, and fifteenth, covering two hundred and seventy-four bales, "the unavoidable dangers of the river and fire only" are excepted; and in the tenth, eleventh, twelfth, and thirteenth, "the dangers of the river and fire only" are excepted. The ground upon which the owners of the boat were claimed to be liable upon those bills of lading, where "fire" was excepted, was, that the fire arose from carelessness. But in the progress of the trial this branch of the claim was given up, and the claim of the plaintiffs was declared to rest upon the construction to be given to the bills of lading, in which the vessel was merely exempted from "the dangers of the river," or "the dangers of the river and unavoidable accidents."

The Circuit Court decreed that the owners of the boat were liable upon those bills of lading which contained the exception only of "the dangers of the river," being the first five mentioned in the bill, and dismissed the bill as to the relief sought in respect to the bills of lading in which "the dangers of the river and unavoidable accidents" are excepted, being the sixth, seventh, and eighth, mentioned in the bill. The owners of the boat appealed to this court.

The case was argued by *Mr. Ewing* for the appellants, and *Mr. Geyer* for the appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed a bill in the Circuit Court against the appellants, the owners of the steamboat Convoy, a vessel formerly employed in the navigation of the Mississippi river, and which, in 1849, was consumed by fire, with a cargo of cotton.

The appellee is an insurance corporation of Memphis, Tennessee, and insured eleven hundred and fifty-two bales of the cotton belonging to this cargo from loss by fire; this insurance was effected upon fifteen distinct parcels, and shipped mostly from Tennessee to a number of consignees in New Orleans. The company adjusted the losses with the assured on their policies, and bring this suit for reimbursement, by enforcing the claims of the shippers against the owners. *These* answer the bill by a denial of their legal responsibility for the loss. They maintain that fire is one of the perils of the river Mississippi; that all the bills of lading that exempt the carrier from a loss by perils of the river, imply fire as one of those perils; that the variations in the bills of lading, some including "fire," and "unavoidable accidents" as well as fire, are referable to the fact that they are preferred by different shippers, who have different forms for expressing the same legal consequence. That they all understand that a carrier is exempt from a liability for fire on a bill of lading exonerating him from the risks of the river.

It was admitted on the hearing that the boat was consumed, without any negligence or fault of the owners, their agents, or servants. The Circuit Court excused the owners from losses, where the bills of lading contained an exception of fire or unavoidable accidents, but condemned them on the others, to satisfy the demand of the company.

It cannot be denied that the appellants are responsible, according to the strictness of the common-law rule determining the carrier's liability, unless an accidental fire is one of the exceptions included in the term "perils of the river." These words include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade. (Jones *v.* Pitcher, 3 S. and P., 136; 4 Yerg., 48; 5 Yerg., 82; Schooner Reeside, 2 Sum., 568.)

They exonerate a carrier from a liability for a loss arising from an attack of pirates, or from a collision of ships, when there is no negligence or fault on the part of the master and crew. Latterly, the courts have shown an indisposition to extend the comprehension of these words. The destruction of a

vessel by worms at sea is not accounted a loss by the perils of the sea; nor was a damage from bilging, arising in consequence of the insufficiency of tackle for getting her from the dock; nor was damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused, as falling within that exception. In Laveroni *v.* Drury, (8 Ex. R., 166,) a question arose whether a damage to a cargo of cheese, occasioned by rats, was within the exception of the dangers or accidents of the sea and navigation; and the Continental and American authorities were cited to the Barons of the Exchequer, to show that it was, and that the carrier was excused, he having taken the usual and proper precautions against them.

That court decided otherwise, and say "the exception includes only a danger or accident of the sea or navigation, properly so called, (viz: one caused by the violence of the winds and waves, *a vis major*, acting upon a seaworthy and substantial ship,) and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." And the court conclude "that the liability of the master and owner of a general ship is *prima facie* that of a common carrier; but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one; and that the question, whether the defendant is liable or not, is to be ascertained by this document when it exists." The principle of these cases establishes a liability against a carrier for a loss by fire arising from other than a natural cause, whether occurring on a steamboat accidentally, or communicated from another vessel or from the shore; and the fact that fire produces the motive power of the boat does not affect the case. (New J. S. N. Co. *v.* Merchants' Bank, 6 How., 344, 381; Hale *v.* N. J. S. N. Co., 15 Conn., 539; Singleton *v.* Hilliard, 1 Strab., 203; Gilmore *v.* Carman, 1 S. and N., 279.)

In this suit, a witness was introduced, who claims to have been long familiar with the usages of the navigation and the river insurance risks of the Mississippi, and competent to testify in reference to the perils of that river. He says, "those are, sinking, by coming in collision with rocks, snags, or other boats or vessels, and fire; that the most common form of bills of lading contains the exceptions, perils of the river and fire; but that in many instances the word fire is omitted, and he has not known an instance where the want of that word has created a difficulty in adjusting a loss, or was considered to give a claim against a boat on account of a loss by fire." The first inquiry

is, whether this evidence is admissible. In mercantile contracts, evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import, and to annex incidents to written contracts, in respect to which they are silent, but which both parties probably contemplated, because usual in such contracts.

But although it is competent to explain what is ambiguous, and to introduce what is omitted, because sanctioned by usage, it is not competent to vary or contradict the terms of the contract. The exceptions in the bills of lading under consideration have been in use in policies of insurance and contracts of affreightment for a long period, and have acquired a distinct signification in the customs of merchants, and the opinions of professional men and courts. It would be surprising if any particular or artificial meaning was attached to them in the customs of the Mississippi river, contrary to, or distinguishable from, that which existed elsewhere in the community of shippers and merchants. In this case, the evidence fails to establish any peculiar sense of these words, as appropriate to the locality where the parties to this contract reside and made their contract. The evidence rather serves to show that the witness did not recognise the liability of a carrier, as it exists in the common law, and was ready to acquit him of responsibility for losses to which he did not contribute, by the negligence or fault either of himself or his agents. In Turney *v.* Wilson, (7 Yerger, 340)—a case decided in the State from which the shipments described in the bill were chiefly made—evidence was offered to show there was an implied contract recognised in the usages of shippers and merchants, which had prevailed from the first settlement of the country, to exempt the carrier from losses, except those proceeding from negligence or dishonesty to explain or construe a bill of lading of the common form. The court decided, that the dangers of the river were such as could not have been prevented by human skill and foresight, and were incident to river navigation. That all evidence was irrelevant that did not show that the loss was occasioned by the act of God, the enemies of the country, or dangers of the river; that the custom could not affect or in anywise alter the written contract of the parties, as contained in the bill of lading, as the language had a definite legal meaning which this custom could not change. A similar question arose in the case of the Schooner Reeside, (2 Sum., 568,) where Justice Story condemns, in pointed language, the habit of admitting loose and inconclusive usages and customs

"to outweigh the well-known and well-settled principles of law." And in Rogers *v.* Mechanics' Insurance Co., (1 Story, 601,) he denies the authority of a usage of a particular port, in a particular trade, to limit or control or qualify the language of mercantile contracts, such as a policy of insurance. A usage such as is pleaded in this suit, if existing, must be notorious and certain, and have been uniform in its application and long established in practice. It must have been exhibited in the transactions of the individuals and corporations concerned, in conducting the business of shipments, transportation, and insurance, through the Mississippi valley.

If the evidence had established that policies of insurance there did not designate fire among the risks assumed; that the words "perils of the river" were used to include that risk, and losses by fire had been uniformly settled under that clause in the policy; that contracts of affreightment had been made and losses adjusted on the same conditions; that these usages had received the sanction of professional and judicial opinion in the States bordering that river—the cause of the appellants would have presented different considerations. The record contains nothing to exempt them from the legal rule of liability, as established by the common law. Seven of the bills of lading produced contain the exception, "perils of the river and fire;" three others add to the perils of the river, "unavoidable accidents;" and in these cases the Circuit Court exonerated the appellants from responsibility.

The appellants further contend that the insurance company is not subrogated to the claims of the shippers of the cotton, whose losses have been adjusted on their policies of insurance; or, if this is so, still their suit should have been at law, in the name of the assured—the remedy being adequate and complete. In Randell *v.* Cochran, (1 Vesey, sen., 98,) the chancellor replied to a similar objection, "that the plaintiff had the plainest equity that could be." The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. And in White *v.* Dabinson, (14 Sim., 273,) an insurer enforced a lien on a judgment recovered by the assured for a loss, where the loss had been partially settled by him, on the policy. (Monticello *v.* Morrison, 17 How., 152.) These cases also show that an insurer may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured.

The bill discloses fifteen different contracts of affreightment, of a similar character, which have been adjusted by the appellees, and which form the subject of this suit.

They have been joined in the same bill, and much incon-

venience and vexation have been prevented. Without further inquiry, we think a sufficient ground for a resort to equity is disclosed.

Decree affirmed.

THE COMMERCIAL MUTUAL MARINE INSURANCE COMPANY, APPELLANTS, *v.* THE UNION MUTUAL INSURANCE COMPANY OF NEW YORK.

Where application for reinsurance was made on Saturday, upon certain terms, which were declined, and other terms demanded, and on Monday these last-mentioned terms were accepted by the applicant, and assented to by the president, but the policy not made out, because Monday was a holyday, the agreement to issue the policy must be considered as legally binding.

The law of Massachusetts is, that although insurance companies can make valid policies only when attested by the signatures of the president and secretary, yet they can make agreements to issue policies in a less formal mode.

By the common law, a promise for a valuable consideration to make a policy is not required to be in writing, and there is no statute in Massachusetts which is inconsistent with this doctrine.

Where the power of the president to make contracts for insurance is not denied in the answer, or made a point in issue in the court below, it is sufficient to bind the company if the other party shows that such had been the practice, and thereby an idea held out to the public that the president had such power.

It is not essential to the existence of a binding contract to make insurance, that a premium note should have been actually signed and delivered.

THIS was an appeal from the Circuit Court of the United States for the district of Massachusetts, sitting in equity.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Curtis* for the appellants, and *Mr. Goodrich* for the appellees.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Massachusetts, in a suit in equity, to compel the specific performance of a contract to make reinsurance on the ship Great Republic. The Circuit Court made a decree in favor of the complainants, and the respondents appealed.

It appears that the complainants, a corporation established in New York, having made insurance of the ship Great Republic to a large amount, authorized Charles W. Storey, at Boston, to apply for and obtain from either of the insurance companies there reinsurance to the extent of ten thousand dollars. Pursuant to this authority, on the 24th December, 1853, Mr. Storey made application to the president of the defendant