

## Statement of the case.

affirmed in the Court of Appeals. It appeared that Ward was not in jail. The case being now here on writ of error this motion was made to advance the hearing of it.

Mr. Justice CLIFFORD delivered the opinion of the court.

Motion to advance the cause filed by the plaintiff in error. Indictment. The parties agreed that the defendant on the day and at the place named in the indictment did sell the articles of merchandise therein named without obtaining a license, as required by the laws of the State. Plea not guilty. Issue tried by court. Finding for the State. He moves the court to advance the cause.

Clearly the motion is not within the act of Congress of the thirtieth of June, 1870, as the motion is not filed by the State, nor by a party claiming under the laws of the State.\*

Probably it is made under the thirtieth rule of the court, which provides that criminal cases *may* be advanced by leave of the court on motion of either party. Under that rule the motion is addressed to the discretion of the court, and inasmuch as it appears that the defendant is not in jail, the court fails to see any reason for granting the motion.

MOTION DENIED.

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INSURANCE COMPANY v. HUCHBERGERS.

Judgment affirmed under Rule 23d, with ten per cent. damages in addition to interest; the court believing that the writ of error had been brought for delay.

ERROR to the Northern District of Illinois.

L. & M. Huchberger brought suit against the Merchants' Insurance Company of Providence, R. I., declaring upon a contract to insure them for one year from September 14th, 1866, against loss by fire on their goods "contained in the brick building No. 173 Lake Street, Chicago." The narr

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\* 16 Stat. at Large, 176

## Argument for the defendant in error.

also set out that it was provided in the policy that if the *situation of the property* should during the existence of the policy be *changed by the assured*, the policy should be void; and also it should be void, unless countersigned by the agents of said Merchants' Insurance Company.

After the averment of interest in the property insured, the *narr* continued:

"And the said plaintiffs aver that afterwards, to wit, on the 2d of March, A. D. 1867, the said property in the said policy of insurance mentioned was burnt, and destroyed by fire. *And that the situation of the property has not been, during the existence of the said policy, altered or changed by the said plaintiffs.*"

The company pleaded the general issue; and a trial having been had on the evidence a verdict was given for the plaintiffs. The defendants then moved an arrest of judgment on the grounds:

1. That the *narr* did not aver that the goods were burned at the particular place mentioned in the contract, to wit, "the brick building, No. 173 Lake Street, Chicago."

2. That the countersigning of the policy by the agents of the insurance company, was a condition precedent, and ought to have been averred in the *narr*.

This motion being overruled and judgment given for the plaintiff, the company brought the case here on the sufficiency of the *narr*.

No counsel appeared personally for the insurance company, the plaintiff in error. A brief was, however, filed by *Mr. O. B. Sansum in its behalf*, arguing that the contract was to insure goods in a particular place only, while for aught that appeared they had been burned elsewhere. Neither, as the brief argued, was the policy to be of effect unless countersigned, yet there was no averment that it had been. Accordingly no title to sue had been shown, and for this want of title shown, judgment should have been arrested.

*Mr. Lyman Trumbull, contra:*

1st. The inference from the allegations which are made is

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Judgment of the court.

clearly enough that the goods were burned in the building where they were insured; but if it were not so, the declaration in this respect is as specific as the policy. If the one does not allege where the goods were burned, neither does the other limit the liability to a burning at any particular place.

2d. As to the objection of a want of averment of a countersigning, the declaration alleges that the insurance company "made and executed to the plaintiffs a certain policy of insurance in writing, whereby, &c." This was sufficient. If not executed so as to bind the company, the policy was not the instrument declared on, and the plaintiffs must have failed in their proof. After verdict, the court will presume that every material fact inferable from what is alleged was proved on the trial.

The writs of error have obviously been prosecuted for delay. We ask damages, as provided by the 23d Rule of court, which declares that:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of *ten per cent.*, in addition to interest, shall be awarded on the amount of the judgment."

**The CHIEF JUSTICE:** The court is of opinion that this writ of error can have been taken out only for delay. We affirm the judgment below with ten per cent.

DAMAGES IN ADDITION TO INTEREST.

**NOTE.**—Two other judgments, given under like circumstances, were affirmed with the same penalty.