

him the money, but simply said to him, "You make payment, and I will settle with you afterwards." The case is one where the insured never has paid, and where the company has never received, the money, and where there is no showing of such reasonable diligence as excuses the party from non-payment. That was my impression yesterday morning, and I studied it over in the afternoon, and examined the authorities cited by counsel this morning, and still adhere to that belief, and so shall instruct the jury to bring in a verdict for the defendant. You may prepare and submit a verdict for the jury.

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**LEIBRANDT & McDOWELL STOVE CO. v. FIREMAN'S INS. CO. OF  
BALTIMORE.**

(Circuit Court, D. Maryland, May 17, 1888.)

**INSURANCE—CONTRIBUTION—PRO RATA CLAUSE—AVOIDANCE OF PRIOR POLICY—  
INCREASE OF RISK.**

The goods destroyed were stored in warehouses, the rear of which, at the time the prior insurance was taken out, was connected by an iron door on the fourth floor with two buildings occupied by a candy manufacturer, who also made use of the fourth floor in rear of the warehouses. Appliances were afterwards put into these two buildings for the purposes of a steam bakery, and communications made with adjoining premises. The insurance company having refused to issue a policy allowing this occupation, the assured applied to another company, which took the risk, and issued a policy containing the usual contribution proviso as to additional insurance, prior or subsequent. This policy, in describing the premises, referred to the steam bakery, and the premium charged in it was double that of the prior policy. Fire spread to the warehouses, and the goods were destroyed. *Held*, that the first policy was avoided by the alteration, and that there was, therefore, no double insurance within the terms of the second.

At Law.

*Marshall & Hall*, for plaintiff.

*George Hawkins Williams*, for defendant.

**BOND, J.** This is a suit at law upon a fire insurance policy, submitted to the court without the intervention of a jury. The issuing of the policy, and the loss by fire of the goods insured to the amount underwritten by the defendant, are admitted. The policy contains the usual clause providing that if there be other insurance the company issuing it would not be responsible for a greater proportion of the loss than the sum insured by its policy bore to the whole amount of insurance, whether prior or subsequent thereto. And the defense to this action is that there was other insurance at the time of the loss by fire.

To sustain this plea the defendant produces a policy of insurance issued by the Orient Insurance Company of Hartford, Conn., on the 30th of April, 1886, for \$2,500, which, by a renewal certificate, it appears

was continued in force until the 11th day of August, 1887, at noon. The fire occurred on the morning of the 4th day of August, 1887, not originating in the premises where the property insured was situated, but spreading thereto from other buildings a short distance from them. Each of these policies insured stoves, castings, tin-ware, and other articles in the line of business of the plaintiffs contained in warehouses, described similarly in each, except that defendant's policy describes the rear building on the premises as "communicating with building Nos. 21 and 28 East Pratt street, and together are occupied by a candy manufacturer and steam bakery," while the policy of the Orient Company describes it as communicating by an iron door on the fourth floor with buildings Nos. 145 and 147 Pratt street; occupied by a candy manufacturer, who occupies also the fourth floor of said rear building. Nos. 145 and 147 are the same premises as Nos. 21 and 23 in defendant's policy. It will be seen from this statement of the material parts of the policy that the rear building was connected with Nos. 21 and 23 in the Orient's policy upon its fourth floor only, and that it was occupied by a candy manufacturer on that floor, while under the defendant's policy it was not only so occupied, but likewise by a steam bakery. Application was made to the Orient to issue a policy allowing this occupation, but it was refused.

The premium charged by the defendant company upon the risk it assumed was at the rate of \$1.50 per \$100, while that premium which the Orient charged, prior to such occupation by a steam bakery, was at the rate of 75 cents per \$100. To consider the Orient's policy additional insurance under these circumstances would do violence to the facts. To constitute double insurance, not only must the thing insured and the parties be the same, but the same risk must be assumed. It is clear that the rear building occupied by a candy manufacturer on the fourth floor, while the other floors are occupied as places of storage, does not offer the same risk of fire as it does when it becomes a steam bakery, with the necessary accompaniment of ovens for baking, which the evidence shows were placed in this. And though it be true that no bread or cakes had been baked on the premises up to the time of the fire, yet other communication had been made with adjoining premises, and fire had been made in the bakery oven to dry it before use. And though it is likewise true that the fire which occasioned the loss did not originate in this rear building, that is not necessary to avoid the policy. The change in the occupation of the building was material to the risk. It increased it, of which fact the premium charged by defendant, while not conclusive, is significant, evidence; and, whether the fire occurred by reason of the increased risk or not, the policy of the Orient did not assume it, and was void the moment the change in occupation took place. With this view of the evidence and finding of facts the court is of opinion there was no insurance on the goods and merchandise belonging to the plaintiff lost on the morning of the 4th of August, 1887, other than that of the defendant.

Judgment will be entered for the plaintiff for the whole amount of the loss as ascertained by the adjusters mentioned in the policy of the Fire-

man's Insurance Company, and a credit given for the amount already paid by it as a contributing insurer and accepted by plaintiff without prejudice to his recovery of the whole amount of the policy.

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### HILL v. CITY OF KAHOKA.

(Circuit Court, E. D. Missouri, E. D. May 14, 1888.)

#### 1. RAILROAD COMPANIES—MUNICIPAL AID—LIABILITY.

The town of K. was incorporated by two orders of the county court, made, respectively, June 8, 1869, and November 14, 1872, pursuant to 2 Wag. St. Mo. c. 134. The charter was forfeited for non-user, October, 1886; the creditors of the town not being made parties to the proceedings. In the mean time the town had exercised corporate functions, electing trustees, levying and collecting taxes for municipal purposes, bringing and defending suits, and issuing railroad aid bonds. In November, 1886, the city of K. was incorporated, embracing substantially the same population and territory as the old town of K. *Held*, that the city was liable on the bonds.

#### 2. MUNICIPAL CORPORATIONS — DEFECTIVE INCORPORATION — RAILROAD AID BONDS.

The county court in granting incorporation of a town under the Missouri act of February 8, 1871, (2 Wag. St. Mo. p. 1314,) acts judicially, and although its decree erroneously embraces as a "common" some 40 acres of agricultural land not subdivided into town lots, the decree is not rendered void thereby, but voidable only; and such error, so long as the state has instituted no proceedings to revoke the charter on that ground, is no defense to an action on railroad aid bonds, otherwise valid, issued by such town.

#### At Law.

Action upon certain railroad aid bonds issued by the town of Kahoka. The town was incorporated under the act of February 8, 1871, (2 Wag. St. Mo. p. 1314,) the first section of which, in part, is as follows: "Whenever two-thirds of the inhabitants of any town or village within this state shall present a petition to the county court of the county, setting forth the metes and bounds of their village and commons, and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such town or village, and the court shall be satisfied that two-thirds of the taxable inhabitants of such town or village have signed such petition, and that the prayer of the petitioners is reasonable, the county court may declare such town or village incorporated, designating in such order the metes and bounds thereof; and thenceforth the inhabitants within such bounds shall be a body politic and corporate by the name and style of 'The inhabitants of the town of ——' (naming it) etc." The supreme court of Missouri, in construing this statute, in *State v. McReynolds*, referred to in the opinion, where over 900 acres of farming lands were included in the town as incorporated, held that "the word 'commons' as used in that statute, meant lands included in or belonging to a town, set apart for public use, and that the county court had no