(29) 1089

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Notice of Appeal.

(Filed May 31, 1928.)

New Jersey Supreme Court

10

VICTOR LEVIN and SAMUEL PETROFSKY,
Plaintiffs-Appellants,

HIGHLAND TRUST COMPANY,
Plaintiff-Respondent,

20

vs.

STATE ASSURANCE COMPANY, LTD.,
Defendant-Respondent.

TO MESSRS. LUM, TAMBLYN & COLYER,
Attorneys for Defendant-Respondent, and

30

TO MESSRS. BAUER & RANKER,
Attorneys for Plaintiff-Respondent.

TAKE NOTICE that the appellants Victor Levin and Samuel Petrofsky hereby appeal to the Court of Errors and Appeals of the State of New Jersey from that part of the judgment entered in this cause, wherein and whereby a nonsuit was granted and entered against the appellants and in favor of the defendant as to the second count of the plaintiffs' complaint, and wherein and whereby it was ad-

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judged that said second count be dismissed, and that the grounds for said appeal are as follows, viz.:

1. The trial court directed a judgment of nonsuit against the plaintiffs and in favor of the de-
10 fendant as to the second count of the plaintiffs' complaint and adjudged that said second count be dismissed when thereunto moved by counsel for the defendant, and a judgment of nonsuit was thereon entered as to said second count and adjudged that said second count be dismissed, whereas said court should have submitted to the jury for decision the questions involved in the issues.

The following questions were overruled:

20

2. To the witness Victor Levin: "Q. What did you do?"

3. To the witness Joseph M. Henehan: "Q. And did you make any promise to him as to what you would do as agent for the company?"

4. To the witness Joseph M. Henehan: "Q. And after he had told you about the contract did you promise to do anything about it?"

30

Dated, May 25, 1928.

KELSEY & LUDWIG,
Attorneys for Plaintiffs-Appellants Victor Levin and Samuel Petrofsky.

40

Record.

(Filed June 17, 1927.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

VICTOR LEVIN, SAMUEL PETROFSKY and HIGHLAND TRUST COMPANY, a corporation, Plaintiffs, vs. THE STATE ASSURANCE COMPANY, LTD., a corporation, Defendant.	Action at Law. JUDGMENT RECORD.

10

20

KELSEY & LUDWIG,
Attorneys for Plaintiffs
Victor Levin and Samuel Petrofsky.

BAUER & RANKER,
Attorneys for Plaintiff
Highland Trust Company.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant.

30

The State Assurance Company, Ltd., a corporation, the defendant in this suit, was summoned to answer unto Victor Levin, Samuel Petrofsky and Highland Trust Company in an action at law upon the following complaint:

40

Complaint.

(Filed July 19, 1925.)

Plaintiffs Victor Levin and Samuel Petrofsky, residing in Union City, in the County of Hudson and State of New Jersey, and Highland Trust Company, a corporation of New Jersey, having its principal office and place of business at said Union City, say that:

10

First Count.

1. Plaintiffs Victor Levin and Samuel Petrofsky were the owners of a dwelling house known as No. 1200 Summit Avenue, in Jersey City, in the County of Hudson and State of New Jersey, at the time of its insurance and of the fire herein stated.

20

2. The plaintiffs Victor Levin and Samuel Petrofsky, and their wives, executed a mortgage covering said lands and premises and other lands and premises to and in favor of the plaintiff Highland Trust Company, which mortgage is dated April 4, 1923, and was given to secure the payment of a bond for $5,000 and the interest thereon. The principal sum of said bond and mortgage remains wholly unpaid.

30

3. On April 4, 1923, defendant was, and still is, a corporation duly incorporated, with power to insure risks by fire in the State of New Jersey.

4. On that day, in consideration of $22.19 to it paid, defendant executed to plaintiffs Victor Levin and Samuel Petrofsky a policy of insurance on said house, a copy of which, marked "Schedule A," is hereto annexed, which policy contains a clause whereby the loss or damage thereunder should be payable to the plaintiff Highland Trust Company as first mortgagee as interest might appear.

40

5. On July 26, 1924, said house was greatly damaged by fire.

6. Plaintiffs' loss thereby was $500.

7. The plaintiffs have duly performed all the conditions of said policy on their part. 10

8. Defendant has not paid said loss.

SECOND COUNT.

1. Plaintiffs Victor Levin and Samuel Petrofsky were the owners of a dwelling house known as No. 1198 Summit Avenue, in Jersey City, in the County of Hudson and State of New Jersey, at the time of its insurance and of the fire herein stated. 20

2. The plaintiffs Victor Levin and Samuel Petrofsky, and their wives, executed a mortgage covering said lands and premises and other lands and premises to and in favor of the plaintiff Highland Trust Company, which mortgage is dated April 4, 1923, and was given to secure the payment of a bond for $5,000 and the interest thereon. The principal sum of said bond and mortgage remains wholly unpaid. 30

3. Plaintiffs repeat paragraph 3 of the first count.

4. On that day, in consideration of $50.63 to it paid, defendant executed to plaintiffs Victor Levin and Samuel Petrofsky a policy of insurance on said house, a copy of which, marked "Schedule B," is hereto annexed, which policy contains a clause whereby the loss or damage thereunder should be payable to the plaintiff Highland Trust Company as first mortgagee as interest might appear. 40

5. On July 26, 1924, said house was totally destroyed by fire.

6. Plaintiffs' loss thereby was $4,500.

10 7. The plaintiffs have duly performed all the conditions of said policy on their part.

8. Defendant has not paid said loss.

Plaintiffs demand $500 damages on the first count and $4,500 damages on the second count.

KELSEY & LUDWIG,
Attorneys for Plaintiffs Victor Levin and Samuel Petrofsky.

20

BAUER & RANKER,
Attorneys for Plaintiff Highland Trust Company.

30

40

Exhibit.

"SCHEDULE A."

THE STATE ASSURANCE COMPANY

(LIMITED)

OF LIVERPOOL, ENGLAND 10

United States Branch, New York, N. Y.

Amount $2,500. Rate .8875 Premium $22.19

IN CONSIDERATION of the Stipulations herein named and of twenty-two and 19/100 DOLLARS PREMIUM Does Insure Victor Levin and Samuel Petrofsky for the term of 3 years from the fourth day of April, 1923, at noon to the fourth day of April, 1926, at noon, against all direct loss or damage by fire, except as hereinafter provided, To an 20 amount not exceeding twenty-five hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere to wit:

Private Dwelling, Barn and Furniture
(Unprotected).
(Not exceeding two families)

$2,500.00..On the two story tin roof frame building, additions and extensions thereto, 30 and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work connected therewith, while occupied exclusively for dwelling purposes by not exceeding two families, situated #1200 40 Summit Avenue, Jersey City, N. J.

Nil.......On Household furniture, useful and ornamental, including beds, bedding, linen, wearing apparel, plate and plated ware, printed books and music; pictures, paintings and engravings and their
10 frames, bronzes, statuary and other works of art and objects of virtue (at not exceeding cost price); all musical and scientific instruments, sewing machines, mirrors, jewelry and precious stones in use, fuel and family stores and supplies, tools, toys, bicycles, guns and other sporting goods and utensils the property of the insured or any member of the family, all while contained in the
20 above-described building.

It is understood and agreed that the ....item of this policy also covers awnings, door and window screens, and storm doors and windows, while attached to above-described building, or in amount not to exceed $200 while stored in outbuildings upon the above-described premises.

Nil.......On......Story......roof.... building,
30 additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, while occupied as a private stable or barn, and situated on the above-described premises.

Nil.......On Horses, in case of loss no one horse to be valued at over $........, while contained in the above-described stable or barn.

Nil.......On Vehicles (excluding gasoline motor
40 vehicles of every description), robes, horse and carriage equipments, hay,

grain and feed, barn and garden tools, while contained in the above-described stable or barn.

Nil.................... ....

Privilege granted to use steam, coal stoves, hot air furnaces or grates for heating; to use public or municipal gas or kerosene oil for light, heating or cooking purposes; to remain unoccupied for not exceeding eight consecutive months at any one time in any one year; to remain vacant during any change of tenant or while awaiting a tenant not exceeding sixty consecutive days at any one time in any one year; and to use not exceeding one quart of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment. 10 20

Other insurance permitted without notice until required.

MECHANICS' PRIVILEGE.—Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises, but this shall not be held to include the constructing or reconstructing of the building or buildings, or additions, or the enlargement of the premises.

Privilege to use electric current for light, heat or power. 30

LIGHTNING CLAUSE—New Jersey Standard.—This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term "Lightning," and in no case to include loss or damage by cyclone, tornado, or wind-storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if 40

there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

10 Attached to and made a part of Policy No. 382991 of the State Assurance Co. Limited Insurance Company, issued at its West Hoboken, N. J. Agency.

McCourt & Henehan Agent
165 Summit Ave.,
West Hoboken, N. J.

The State Assurance Company Ltd.

Loss or damage, if any, under this policy, shall be
20 payable to Highland Trust Company as first mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous
30 than are permitted by this policy, Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trus-
40 tee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case the policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement. 10

In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. 20

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow 30 due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all of such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim.

McCourt & Henehan
Agent

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Attached to and forming a part of Policy No. 382991

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

PROVISION required by law to be stated in this policy.—This policy is in a stock corporation and it is hereby expressly agreed and declared, and the true intent and meaning hereof is, that the Capital Stock and Fire Funds of the said THE STATE ASSURANCE COMPANY, LTD., shall alone be answerable under this policy; and that no holder or holders of any share or shares in the said Capital Stock shall be liable beyond his or their shares thereof, anything contained in this policy to the contrary notwithstanding.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at West Hoboken, N. J.

William Hare 10
Manager.

Countersigned at West Hoboken, N. J. this 4th day of April, 1923.

McCourt & Henehan
Agent

This company shall not be liable beyond the actual cash value of the property at the time any 20 loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus 30 determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a 40 reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its

intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance con-
10 cerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance,
20 whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any
30 one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other
40 than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase

of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement endorsed hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal,

this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee 10 or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in 20 excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the propor- 30 tion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the 40 quantity and cost of each article and the amount claimed thereon; and, within sixty days after the

fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the in-
10 sured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occu-
20 pied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary pub-
30 lic shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be
40 designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. 10

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. 20

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon. 30 40

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the
10 insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" oc-
20 curs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended
30 hereto.

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Exhibit.

"Schedule B."

THE STATE ASSURANCE COMPANY
(Limited)

of Liverpool, England 10

United States Branch, New York, N. Y.

Amount $2500. Rate 2.025 Premium $50.625

In consideration of the Stipulations herein named and of fifty and 63/100 Dollars Premium Does Insure Victor Levin and Samuel Petrofsky for the term of 3 years from the fourth day of April, 1923, at noon to the fourth day of April, 1926, at noon, against all direct loss or damage by fire except as hereinafter provided, To an amount 20 not exceeding twenty-five hundred dollars, to the following described property while located and contained as described herein, and not elsewhere to wit:

Private Dwelling, Barn and Furniture
(Unprotected).
(Not exceeding two families.)

$2,500.00. .On the two story tin roof frame building, additions and extensions thereto, 30 and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work connected therewith, while occupied exclusively for dwelling purposes by not exceeding 40 two families, situate #1198 Summit Avenue, Jersey City, N. J. occupied as store and dwelling.

Nil.......On household furniture, useful and ornamental, including beds, bedding, linen, wearing apparel, plate and plated wire, printed books and music; pictures, paintings and engravings and their
10 frames, bronzes, statuary and other works of art and objects of virtue (at not exceeding cost price); all musical and scientific instruments, sewing machines, mirrors, jewelry and precious stones in use, fuel and family stores and supplies, tools, toys, bicycles, guns and other sporting goods and utensils the property of the insured or any member of the family, all while contained
20 in the above-described building.

Nil.......On......story......roof.....building, additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto while occupied as a private stable or barn, and situated on the above-described premises.

Nil.......On horses, in case of loss no one horse to be valued at over $........, while contained in the above described stable
30 or barn.

Nil.......On Vehicles (excluding gasoline motor vehicles of every description), robes, horse and carriage equipments, hay, grain and feed, barn and garden tools, while contained in the above-described stable or barn.

Nil.................. ....

Privilege granted to use steam, coal stoves, hot
40 air furnaces or grates for heating; to use public or municipal gas or kerosene oil for light, heating or cooking purposes; to remain unoccupied for not exceeding eight consecutive months at any one time

in any one year; to remain vacant during any change of tenant or while awaiting a tenant not exceeding sixty consecutive days at any one time in any one year; and to use not exceeding one quart of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment. 10

Other insurance permitted without notice until required.

Mechanics' Privilege—Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises, but this shall not be held to include the constructing or reconstructing of the building or buildings, or additions, or the enlargement of the premises.

Privilege to use electric current for light, heat or power. 20

Lightning Clause—New Jersey Standard—This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term "lightning," and in no case to include loss or damage by cyclone, tornado, or wind-storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there 30 shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and made a part of Policy No. 382990 of the State Assurance Co. Limited Insurance Company, issued at its West Hoboken, N. J. Agency.

McCourt & Henehan, 40
Agent,
165 Summit Ave.,
West Hoboken, N. J.

THE STATE ASSURANCE COMPANY LTD.

Loss or damage, if any, under this policy, shall be payable to Highland Trust Company as first mortgagee (or trustee) as interest may appear,
10 and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, PROVIDED, that in case the mortgagor or owner shall neglect
20 to pay any premium due under this policy, the mortgagee (or trustee) shall on demand, pay the same.

PROVIDED also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for
30 such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case the policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.
40
In case of any other insurance upon the within described property, this company shall not be liable

under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. 10

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whoe principal due or to grow 20 due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all of such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim.

McCourt & Henehan
Agent.

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Attached to and forming a part of Policy No. 382990

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specifically referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and 40 no officer, agent or other representative of this Company shall have power to waive any provision

or condition of this Policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed
10 or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

PROVISIONS required by law to be stated in this policy.—This policy is in a stock corporation and it is hereby expressly agreed and declared, and
20 the true intent and meaning hereof is, that the Capital Stock and Fire Funds of the said THE STATE ASSURANCE COMPANY, LTD., shall alone be answerable under this policy; and that no holder or holders of any share or shares in the said Capital Stock shall be liable beyond his or their shares thereof, anything contained in this policy to the contrary notwithstanding.

IN WITNESS WHEREOF, this Company has exe-
30 cuted and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at West Hoboken, N. J.

WILLIAM HARE
Manager.

Countersigned at West Hoboken, N. J. this 4th day of April, 1923.

MCCOURT & HENEHAN
40 Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed 10 what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by 20 this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. 30

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by 40 agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter

make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than
10 ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the sub-
20 ject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether legal process or judg-
30 ment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-
40 glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States stand-

ard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days. 10

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. 20

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; 30 40

nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notive of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by

whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or dam-
10 aged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that
20 remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

30 In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire and the award in writing of any two
40 shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively

selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or if the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor

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unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Amended Answer.

(Filed March 4, 1926.)

The defendant answered as follows:

The defendant, State Assurance Company, Ltd., a corporation organization to transact business in the State of New Jersey, says that:

ANSWER TO FIRST COUNT.

FIRST DEFENSE.

1. Defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraphs 1 and 2 of the first count.

2. Defendant admits the allegations in paragraph 3 of the first count.

3. Defendant admits that it issued a certain policy of insurance to the plaintiffs as alleged in paragraph 4 of the first count, but requires the pro-

duction of the original thereof as to its true terms and conditions.

4. Defendant denies the allegations in paragraphs 5, 6 and 7.

SECOND DEFENSE. 10

Under the terms and conditions of the policy sued upon there is nothing due to the plaintiffs Victor Levin and Samuel Petrofsky.

THIRD DEFENSE.

1. The insurance policy sued upon amongst other things provides:

> "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

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30

2. The plaintiffs did not comply with this provision of the policy of insurance and did not appoint a disinterested appraiser as provided for therein.

FOURTH DEFENSE.

1. That there was attached to each policy of insurance mentioned in the complaint and forming part thereof a standard mortgagee clause, wherein it was provided that the loss or damage, if any, 40

under each of said policies should be payable to Highland Trust Company as mortgagee as its interests may appear.

2. It was further provided in and by said mortgagee clause that whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that as to the mortgagor or owner no liability existed therefor, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at his option, pay to the mortgagee (or trustee) the whole principal sum due or to grow due on the mortgage with interest, and shall thereupon receive the full assignment and transfer of the mortgage and of all such other securities.

3. At the time of the fire alleged in the foregoing complaint the said Highland Trust Company held a mortgage upon the lands and buildings mentioned in said policies of insurance, and that there was due thereon the sum of five thousand dollars ($5,000) of principal money besides interest; that thereafter and on or about the fifth day of November, 1925, this defendant paid to the said Highland Trust Company the sum of twenty-five hundred dollars ($2500), representing the extent of the loss or damage suffered by said mortgagee under said policies, and at the time of said payment to said mortgagees this defendant did claim that as to the mortgagor or owner thereof no liability therefor existed, and that thereupon pursuant to the terms of said mortgagee clause this defendant became to the extent of such payment legally subrogated to all the rights of the said Highland Trust Company

under said mortgage held as collateral to the mortgage debt.

ANSWER TO SECOND COUNT.

First Defense.

1. Defendant has no knowledge sufficient to form a belief as to paragraphs 1 and 2 of the complaint. 10

2. Defendant admits the allegations in paragraph 3.

3. Defendant admits that it issued a certain policy of insurance as alleged in paragraph 4, but demands the production of the original as to its true terms and conditions.

4. Defendant denies the allegations in paragraphs 5, 6 and 7 of the second count. 20

Second Defense.

1. Defendant repeats the second defense to the first count.

Third Defense.

1. Defendant repeats the third defense to the first count. 30

Fourth Defense.

1. Said policy amongst other things provided:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance * * *; or if the hazard be increased by any means within the control or knowledge of the insured * * *; or if the 40 interest of the insured be other than the unconditional and sole ownership; or if the sub-

ject of insurance be a building on ground not owned by the insured in fee simple * * *; or if any change other than by default of the insured take place in the interest, title or possession of the subject of insurance whether by
10 legal process or judgment, or by voluntary act of the insured; or otherwise."

2. The hazard was increased by means within the control and knowledge of the insured, and although the description in said policy issued by the defendant stated that said building was "occupied as store and dwelling," the said plaintiffs increased the hazard by maintaining or permitting to be maintained a manufacturing establishment in said building for
20 the purpose of manufacturing bedding, etc.

FIFTH DEFENSE.

1. Defendant repeats the first paragraph of the fourth defense.

2. The interest of the insured was other than the unconditional and sole ownership and there was a change in the interest, title and possession of the subject of insurance other than by default of
30 the insured.

SIXTH DEFENSE.

1. Defendant repeats the fourth defense to the first court.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant.

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Reply to Amended Answer.

(Filed September 19, 1926.)

The plaintiffs replied as follows:

The plaintiffs, by way of reply to the amended answer of the defendant, say that: 10

Reply to Second Defense to First Count.

1. On the trial of this cause the plaintiffs will move to strike out said second defense on the ground that it discloses no defense to the first count of the complaint, and on the further ground that it does not specify any condition precedent the performance of which the defendant intends to contest.

First Reply to Third Defense to First Count. 20

1. Plaintiffs admit paragraph 1.

2. Plaintiffs deny paragraph 2.

Second Reply to Third Defense to First Count.

1. On the trial of this cause the plaintiffs will move to strike out said third defense on the ground that it discloses no defense to the first count of the complaint, and on the further ground that it discloses no defense to the action by the plaintiff Highland Trust Company. 30

Third Reply to Third Defense to First Count.

1. In addition to the clause set forth in paragraph 1 of said third defense, the insurance policy sued upon amongst other things provides:

> "And the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, 40

including an award of appraisers when appraisal has been required."

2. No appraisal as to the amount of said loss was ever required by the defendant, nor was any demand ever made by the defendant of the plaintiffs, or of any of them, for an appraisal or for an arbitration as to the amount of said loss.

FOURTH REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. Plaintiffs repeat paragraph 1 of the foregoing third reply to the third defense to the first count.

2. The defendant failed to demand an appraisal or arbitration within a reasonable time after the fire that caused said loss.

FIFTH REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. There never was any disagreement between the defendant and the plaintiffs as to the amount of said loss.

2. On November 11, 1924, the defendant promised plaintiff that it would adjust the said loss and to pay the amount thereof.

SIXTH REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. Subsequent to the occurrence of the fire that caused said loss, the defendant denied any liability on its part under said policy.

2. Said denial operated as a waiver of the right of the defendant under the terms of said policy to an appraisal or arbitration.

SEVENTH REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. Subsequent to the occurrence of the fire that caused said loss, the plaintiffs Victor Levin and

Samuel Petrofsky gave notice of same to the defendant.

2. After the giving of said notice the plaintiffs Victor Levin and Samuel Petrofsky demanded in writing of the defendant an appraisal and arbitration of the amount of said loss, and the defendant declined to enter into an appraisal or arbitration. 10

EIGHTH REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. Subsequent to the occurrence of the fire that caused said loss and the commencement of this action, to wit, on or about November 5, 1925, the defendant paid the sum of $2,500 to the plaintiff Highland Trust Company, claiming that said sum represented the amount of loss suffered by said Highland Trust Company under the policies upon which this action was brought. 20

2. Said payment to the Highland Trust Company operated as a waiver of the right of the defendant under the terms of said policy to an appraisal or arbitration.

FIRST REPLY TO FOURTH DEFENSE TO FIRST COUNT. 30

1. Plaintiffs admit paragraph 1.

2. Plaintiffs deny paragraph 2.

3. Plaintiffs admit that portion of paragraph 3 which alleges that at the time of the fire alleged in the foregoing complaint the said Highland Trust Company held a mortgage upon the lands and buildings mentioned in said policies of insurance, and that there was due thereon the sum of five thousand dollars ($5,000) of principal money besides interest, and deny the remaining allegations of said paragraph 3. 40

SECOND REPLY TO FOURTH DEFENSE TO FIRST COUNT.

1. On the trial of this cause the plaintiffs will move to strike out said fourth defense on the grounds that it discloses no defense to the first count of the complaint, that it discloses no defense to the action by the plaintiff Highland Trust Company, that the payment of damages to said Highland Trust Company was in fact and in law a payment on account to the plaintiffs Victor Levin and Samuel Petrofsky for which the defendant did not become subrogated to any rights of said Highland Trust Company, and on the additional ground that questions and matters of subrogation are purely equitable in their nature and not cognizable by a court of law.

REPLY TO SECOND DEFENSE TO SECOND COUNT.

1. On the trial of this cause the plaintiffs will move to strike out said second defense on the ground that it discloses no defense to the second count of the complaint.

FIRST REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. Plaintiff admits paragraph 1.

2. Plaintiff denies paragraph 2.

SECOND REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. On the trial of this cause the plaintiffs will move to strike out said third defense on the ground that it discloses no defense to the second count of the complaint, and on the further ground that it discloses no defense to the action by the plaintiff Highland Trust Company.

THIRD REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. Plaintiffs repeat the third reply to the third defense to the first count.

FOURTH REPLY TO THIRD DEFENSE TO SECOND COUNT. 10

1. Plaintiffs repeat paragraph 1 of the third reply to the third defense to the first count.

2. Plaintiffs repeat paragraph 2 of the fourth reply to the third defense to the first count.

FIFTH REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. There never was any disagreement between the defendant and the plaintiffs as to the amount 20 of said loss.

SIXTH REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. Subsequent to the occurrence of the fire that caused said loss, the defendant informed the plaintiffs that there was no liability on its part under said policy.

2. Said denial of liability operated as a waiver of the right of the defendant under the terms of said 30 policy to an appraisal or arbitration.

SEVENTH REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. Plaintiffs repeat paragraph 1 of the seventh reply to the third defense to the first count.

2. After the giving of said notice, and on or about June 18, 1925, the plaintiffs Victor Levin and Samuel Petrofsky made demand in writing of the de- 40 fendant for an appraisal and arbitration of the

amount of said loss, and the defendant made no answer to said demand.

Eighth Reply to Third Defense to Second Count.

10 1. Plaintiffs repeat the eighth reply to the third defense to the first count.

First Reply to Fourth Defense to Second Count.

1. Plaintiffs admit paragraph 1.

2. Plaintiffs deny paragraph 2.

Second Reply to Fourth Defense to Second Count.

20 1. On the trial of this cause the plaintiffs will apply to the court to strike out said fourth defense on the ground that it discloses no defense to the second count of the complaint, and on the further ground that it discloses no defense to the action by the plaintiff Highland Trust Company.

Third Reply to Fourth Defense to Second Count.

30 1. McCourt & Henehan, the agents who issued the said policy on behalf of the defendant, were the general agents of the defendant with power to waive conditions contained in said policy.

2. Any increase of hazard, if increase of hazard there was, was reported by the plaintiffs to said general agents of the defendant, who thereupon stated to the plaintiffs that it would not be necessary to make any change in the said policy of insurance on account of said increase of hazard until
40 they were writing the renewal of same, but promised the plaintiffs to do whatever was necessary and

requisite to continue said policy in full force and effect notwithstanding such increase of hazard.

3. Thereafter said general agents of the defendant informed the plaintiffs that everything necessary to continue said policy in full force and effect had been attended to. 10

4. Said report of plaintiffs and promise and representation of said general agents operate as a waiver of the right in the defendant to forfeit said policy because of a breach of the condition therein contained which provided that said entire policy should be void if the hazard be increased by any means within the control or knowledge of the plaintiffs.

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FOURTH REPLY TO FOURTH DEFENSE TO SECOND COUNT.

1. Any increase of hazard under said policy of insurance, if increase of hazard there was, was reported by the plaintiffs to said defendant, and said defendant thereupon agreed with the plaintiffs to continue said policy in full force and effect regardless of any such increase of hazard.

FIFTH REPLY TO FOURTH DEFENSE TO SECOND COUNT. 30

1. Subsequent to the occurrence of the fire that caused said loss, and with full knowledge of said supposed breach of condition alleged in the said fourth defense, the defendant appointed adjusters to meet with adjusters appointed by the plaintiffs for the purpose of estimating the amount of the damage caused by said fire. Said adjusters appointed by the defendant and plaintiffs visited the 40 insured premises and calculated the amount of said loss, and at the request of the said adjusters ap-

pointed by the defendant the plaintiffs furnished them with written estimates of the cost of rebuilding the building destroyed by said fire.

2. By reason thereof defendant is estopped from claiming a forfeiture of said policy because of said supposed breach of condition.

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Sixth Reply to Fourth Defense to Second Count.

1. Plaintiffs repeat paragraph 1 of the eighth reply to the third defense to the first count.

2. By reason thereof defendant is estopped from claiming a forfeiture of said policy because of said supposed breach of condition.

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First Reply to Fifth Defense to Second Count.

1. Plaintiffs admit paragraph 1.

2. Plaintiffs deny paragraph 2.

Second Reply to Fifth Defense to Second Count.

1. On the trial of this cause the plaintiffs will move to strike out said fifth defense on the ground that it discloses no defense to the second count of the complaint, and on the further ground that it discloses no defense to the action by the plaintiff Highland Trust Company.

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Third Reply to Fifth Defense to Second Count.

1. McCourt & Henehan were the general agents of the defendant for the issuance of said policy and in the dispensing with or varying the terms and conditions thereof and with power to waive conditions contained therein.

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2. Any change in the interest, title or possession of the subject of said insurance, if change there was, was reported by the plaintiffs to said McCourt & Henehan, and they promised the plaintiffs to do whatever should be necessary and requisite to continue the said policy in full force and effect. 10

3. Thereafter said general agents of the defendant notified the plaintiffs that they had done everything that was necessary in order to continue said policy in full force and effect.

4. Said report by the plaintiffs and promise and representations of said agents estop the defendant from forfeiting said policy because of the supposed breach of the condition therein contained which provided that said entire policy should be void if 20 any change other than by default of the insured took place in the interest, title or possession of the subject of insurance, whether by legal process or judgment or by voluntary act of the insured or otherwise.

FOURTH REPLY TO FIFTH DEFENSE TO SECOND COUNT.

1. Any change in the interest, title or possession of the subject of said insurance, if change there 30 was, was reported by the plaintiffs to said defendant, and said defendant thereupon agreed with the plaintiffs to continue said policy in full force and effect regardless of any such change.

FIFTH REPLY TO FIFTH DEFENSE TO SECOND COUNT.

1. Subsequent to the occurrence of the fire that caused said loss, and with full knowledge of said supposed breach of condition alleged in said fifth 40 defense, the defendant appointed adjusters to meet with adjusters appointed by the plaintiffs for the

purpose of estimating the amount of the damage caused by said fire. Said adjusters appointed by the defendant and plaintiffs visited the insured premises and calculated the amount of said loss, and at the request of the said adjusters appointed by the defendant the plaintiffs furnished them with written estimates of the cost of rebuilding the building destroyed by said fire.

2. By reason thereof defendant is estopped from claiming a forfeiture of said policy because of said supposed breach of condition.

SIXTH REPLY TO FIFTH DEFENSE TO SECOND COUNT.

1. Plaintiffs repeat paragraphs 1 and 2 of the sixth reply to the fourth defense to the second count.

FIRST REPLY TO SIXTH DEFENSE TO SECOND COUNT.

1. Plaintiffs repeat the first reply to the fourth defense to the first count.

SECOND REPLY TO SIXTH DEFENSE TO SECOND COUNT.

1. Plaintiffs repeat the second reply to the fourth defense to the first count.

KELSEY & LUDWIG,
Attorneys of Plaintiffs Victor Levin and Samuel Petrofsky.

BAUER & RANKER,
Attorneys of Plaintiff Highland Trust Company.

Rejoinder.

(Filed September 25, 1926.)

The defendant by way of rejoinder says:

Rejoinder to Third Reply to Third Defense of First Count.

Defendant denies the allegations set forth in said reply. 10

Rejoinder to Fourth Reply to Third Defense of First Count.

Defendant denies the allegations set forth in said reply.

Rejoinder to Fifth Reply to Third Defense of First Count.

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Defendant denies the allegations set forth in said reply.

Rejoinder to Sixth Reply to Third Defense of First Count.

Defendant admits paragraph 1 and denies the other allegations in said reply.

Rejoinder to Seventh Reply to Third Defense of First Count. 30

Defendant denies the allegations set forth in said reply.

Rejoinder to Eighth Reply to Third Defense of First Count.

1. Defendant admits the payment of twenty-five hundred dollars ($2500) to the Highland Trust Company, but alleges said payment was made for the purposes as set forth in the defendant's an- 40
swer.

2. Defendant denies the allegations of paragraph 2.

REJOINDER TO THIRD, FOURTH, FIFTH, SIXTH, SEVENTH AND EIGHTH REPLIES TO THIRD DEFENSE OF SECOND COUNT.

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Defendant repeats the allegations in reference to the same defenses of first count.

REJOINDER TO THIRD REPLY TO FOURTH DEFENSE OF SECOND COUNT.

Defendant denies the allegations therein and alleges that McCourt & Henehan had no power or authority to bind the defendant and that the conditions of the contract of insurance could not legally be waived, altered or changed as alleged in said reply.

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REJOINDER TO FOURTH REPLY TO FOURTH DEFENSE OF SECOND COUNT.

Defendant denies the allegations therein set forth.

REJOINDER TO FIFTH REPLY TO FOURTH DEFENSE OF SECOND COUNT.

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Defendant denies the allegations therein set forth.

REJOINDER TO SIXTH REPLY TO FOURTH DEFENSE OF SECOND COUNT.

Defendant denies the allegations therein set forth.

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REJOINDER TO THIRD REPLY TO FIFTH DEFENSE OF SECOND COUNT.

Defendant denies each and every allegation therein and alleges that McCourt & Henehan had no

power or authority to bind the defendant and that the terms and conditions in said contract of insurance could not be waived, altered or changed as alleged in said reply.

REJOINDER TO FOURTH REPLY TO FIFTH DEFENSE OF SECOND COUNT.

10

Defendant denies the allegations set forth therein.

REJOINDER TO FIFTH AND SIXTH REPLIES TO FIFTH DEFENSE OF SECOND COUNT.

Defendant denies the allegations therein set forth.

20

REJOINDER TO FIRST AND SECOND REPLIES TO SIXTH DEFENSE OF SECOND COUNT.

Defendant denies the allegations therein set forth.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause, as the same remain on file in my office.

30

In testimony whereof, I have hereunto set my hand and seal of the said Court, at Trenton, this 15th day of May, A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

40

Postea.

(Filed June 17, 1927.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

VICTOR LEVIN, SAMUEL PETROFSKY and HIGHLAND TRUST COMPANY,
Plaintiffs,

vs.

THE STATE ASSURANCE COMPANY, LTD.,
Defendant.

Action at Law.

20

This case was tried before Judge Henry E. Ackerson, Jr., with a jury, at the Hudson Circuit, on June 1, 1927.

The said judge ordered a nonsuit in favor of the defendant and against the plaintiffs Victor Levin and Samuel Petrofsky on the second count of the plaintiffs' complaint, and by consent of the attorneys for the defendant directed the jury to return a verdict against the defendant and in favor of the said plaintiffs, Victor Levin and Samuel Petrofsky, for the sum of one hundred and thirty-five dollars, on the first count of the plaintiffs' complaint, and the jury did accordingly return a verdict against the defendant and in favor of the plaintiffs Victor Levin and Samuel Petrofsky for the said sum of one hundred and thirty-five dollars on said first count of the plaintiffs' complaint.

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HENRY E. ACKERSON, JR.,
Judge.

Rule for Judgment.

(Filed June 17, 1927.)

This action was tried before Judge Henry E. Ackerson, Jr., with a jury, at the Hudson County Circuit, on June 1, 1927.

The said judge directed that a judgment of non-suit as to the second count of the plaintiffs' complaint be entered; and the attorneys for the defendant having consented that a judgment in favor of the plaintiffs Victor Levin and Samuel Petrofsky and against the defendant for the sum of one hundred and thirty-five dollars on the first count of said complaint be rendered, and the said judge having directed the jury to return a verdict in favor of said plaintiffs, Victor Levin and Samuel Petrofsky, and against the said defendant for said sum of one hundred and thirty-five dollars on said first count of the complaint, and the jury having rendered a general verdict in favor of said plaintiffs, Victor Levin and Samuel Petrofsky, and against the said defendant for the sum of one hundred and thirty-five dollars on the said first count of the plaintiffs' complaint;

WHEREUPON it is adjudged that the said second count of the plaintiffs' complaint be dismissed, and that the plaintiffs Victor Levin and Samuel Petrofsky recover of the defendant the sum of $135 on said first count of the plaintiffs' complaint and their costs, which are taxed at the sum of $63.89, making in the whole the sum of one hundred and ninety-eight dollars and eighty-nine cents ($198.89).

Rule entered June 17, 1927, on motion of:

KELSEY & LUDWIG,
Attorneys for Plaintiffs Victor Levin
and Samuel Petrofsky.

10 20 30 40

Judgment.

(Entered June 17, 1927.)

WHEREUPON it is adjudged that the second count of the plaintiffs' complaint be dismissed, and that the plaintiffs Victor Levin and Samuel Petrofsky recover of the defendant, the State Assurance Company, Limited, on the first count of the plaintiffs' complaint, the sum of one hundred and thirty-five dollars and their costs, which are taxed at the sum of sixty-three dollars and eighty-nine cents, making in the whole the sum of one hundred and ninety-eight dollars and eighty-nine cents ($198.89).

Judgment entered June 17, 1927.

WM. S. GUMMERE,
C. J.

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Testimony.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

VICTOR LEVIN et al. vs. STATE ASSURANCE CO., LTD.	Before: HON. HENRY E. ACKERSON, J., and a Jury.

10

Jersey City, N. J., June 1, 1927.

APPEARANCES:

KELSEY & LUDWIG, Esqs. (by MR. KELSEY), attorneys for the plaintiff.

20

LUM, TAMBLYN & COLYER, Esqs. (by MR. WACHENFELD), attorneys for the defendant.

Mr. Kelsey: It is admitted by the defendant, at the request of the plaintiff, that the ownership of 1198 and 1200 Summit Avenue, Jersey City, was in the plaintiffs at the time of the issuance of the policy in suit and at the time of the loss.

30

Mr. Wachenfeld: I cannot admit that as to the time of loss. I think we can stipulate that at the time of the occurrence of the fire, the legal title to said premises were in the plaintiffs, subject, however, to a contract of sale made between the plaintiffs and their respective wives to Samuel Rubin,, dated May 23rd, 1924, wherein and whereby the plaintiffs agreed to sell the said premises known as 1198 Summit Avenue to the said Rubin for the sum of $6,175, title to pass on or before the 15th day of January, 1925.

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Mr. Kelsey: To make certain as to the contents of the contract of sale, I will offer the contract in evidence.

Mr. Wachenfeld: No objection.

(Marked Exhibit P-1.)

Mr. Kelsey: I have given notice to the defendant to produce at the trial the original policy of fire insurance in the case.

Mr. Wachenfeld: We have not got them.

Mr. Kelsey: If your Honor please, I will then have to offer secondary proof of the contents of the original policies to show that they were lost.

Mr. Wachenfeld: As far as I know, the copies attached to the pleadings are accurate copies, excepting, of course, I have not taken time to compare them with the original, and if any discrepancies arise, your Honor may strike them out.

Mr. Kelsey: Then it is admitted that unless there is some objection later, that the copies of the policies annexed to the complaint in this case are copies of the original policies.

Mr. Wachenfeld: That is stipulated.

Mr. Kelsey: I might say I have here the treasurer of the Highland Trust Company, who held these policies, to show that he made a search for the originals and has been unable to find them. We will trace by another witness the policies into the hands of the Highland Trust Company.

Mr. Wachenfeld: We can save all that time.

The Court: Is it denied that one of these insurance policies was for $2500, that payment of $2500 was made to the Highland Trust Company, which held a mortgage on one of these buildings?

Mr. Kelsey: After the fire and since the beginning of this suit, the insurance company, the defendant, paid the Highland Trust Company $2500

and took an assignment of one-half of the $5,000 mortgage which covered both pieces of property.

Mr. Wachenfeld: May I show you this contract of assignment? In case there is any dispute about it, I will have to ask the officer of the Highland Trust Company to stay here. 10

The Court: If it is claimed that the mortgage is extinguished to the extent of $2500, that is all there is to it, but I understand the defendant claims that the mortgage still stands to the full extent of $5,000.

Mr. Wachenfeld: That is true.

VICTOR LEVIN sworn. 20

Direct examination by Mr. Kelsey.

Q. You are one of the plaintiffs in this action? A. Yes, sir.

Q. And you and Samuel Petrofsky were partners under the name of Levin & Petrofsky? A. Yes, sir.

Q. And you and he were the owners of the property 1198 and 1200 Summit Avenue, Jersey City? 30 A. Yes, sir.

Q. And do you remember taking out these policies at the time you secured the loan from the Highland Trust Company? A. Yes.

Q. You took them out through what agent? A. McCourt & Henehan.

Q. And they signed their names at the bottom of the policies and they, McCourt & Henehan, turned them over to you? A. Yes.

Q. And you turned them over to the Highland 40 Trust Company? A. Yes.

Q. And you kept these two certificates—these were obtained by you? A. Yes.

Q. That was on or about April 4th, 1923, was it? A. Yes.

Q. What sort of houses were these? A. Frame buildings.

10

Q. Well, what sort? A. A store and rooms.

Q. Which building had the store on the lower floor? A. 1198 Summit Avenue.

Q. And what was above that? A. A couple of rooms upstairs.

Q. For dwelling purposes? A. Yes.

Q. And how about the house next door? A. A private house.

Q. A dwelling house? A. Yes, sir.

20

Q. Do you know a man by the name of Samuel Rubin? A. Yes.

Q. You made this agreement with him that has been marked Exhibit P-1? A. Yes, sir.

Q. Under this agreement Samuel Rubin was to become your monthly tenant? A. Yes.

Q. Of the premises 1198 Summit Avenue?

> Mr. Wachenfeld: I object to that question. The contract speaks for itself.
>
> The Court: Sustain the objection.

30

Q. Did Samuel Rubin, after he made this contract, take possession of the property? Did he go into possession of this property? A. Yes.

Q. And did he pay you the rent then? A. Yes.

Q. $50 a month? A. $50 a month.

Q. Commencing June 1st, 1924? A. Yes.

Q. And then did he have the rooms upstairs, too? A. Yes.

40

Q. Now, is that building still standing, at 1198? A. No.

Q. What happened to it? A. We had to tear it down.

Q. Did anything happen to it first? A. Oh, it was burned down.

Q. When was that? A. That was July 26th.

Q. What year? A. In 1924, about three years ago. 10

Q. So that the tenancy was to begin on June 1st, 1924, and the fire occurred on July 26th, 1924, is that right? A. Yes.

> The Court: What was this contract of sale, from whom to whom?
>
> Mr. Kelsey: A contract between Victor Levin and his wife and Samuel Petrofsky and his wife to Samuel Rubin, to sell and convey—— 20
>
> The Court: What date?
>
> Mr. Kelsey: The date is May 23rd, 1924, to convey on or before January 15th, 1925, these premises, 1198 Summit Avenue, Jersey City, subject to a monthly tenancy held by said Samuel Rubin, who was paying $50 a month, commencing June 1st, 1924, it being understood that said Samuel Rubin shall occupy said premises as a monthly tenant from June 1st, 1924, at the monthly rental of $50 until taking of title. It contains a clause that the risk of loss or damage to said premises by fire or otherwise until delivery of said title is assumed by the party of the first part, Levin & Petrofsky. The contract price is $6,175, $150 having been paid upon the execution, balance to be paid as customary. 30

40

Q. Now, after the fire occurred, did you have the damages appraised? A. Yes.

Q. By whom? A. By Jacob Maloyfsky.

Q. The gentleman sitting here? A. Yes.

Q. And did he give you a written estimate of the damages? A. Yes.

Q. Do you know whether the defendant company had made an examination of the property? A. Yes.

Q. They determined the loss also? A. Yes, sir, they examined the loss.

Q. Did you go with them? A. Yes, sir.

Q. Do you know the man's name that came from the company to examine the property? A. I don't remember that.

Q. Did he give you anything in writing showing what he found to be the amount of damages? A. No.

Q. How long was this after the fire? A. That was about three or four weeks after the fire.

Q. When you made this agreement with Mr. Rubin, did you have any agreement with McCourt & Henehan about this agreement? A. Yes.

Q. What did you do? A. I told them I rented—

> Mr. Wachenfeld: I object to what he said to McCourt & Henehan.
>
> The Court: How would that be material?
>
> Mr. Kelsey: In this respect: Of course, putting in evidence this agreement is somewhat out of the line of my proof. It is put in on the question of ownership principally, and it will show a situation that the place had been rented to this party. They claim that change in possession——
>
> The Court: No, as I understand their claim, they insist that there was an equitable interest arose, an interest in Rubin.
>
> Mr. Wachenfeld: Yes.

The Court: And that therefore the policy is voided.

Mr. Kelsey: I want to show by this witness that the agent who issued the policy and who had authority to waive objections of that sort, that this witness went to him and explained this situation and they entered into a certain arrangement with them——

10

The Court: Is that the reason for the objection?

Mr. Wachenfeld: My objection, if your Honor please, is—the policies attached to the pleadings are true copies of the actual policies issued—those policies, if the Court please, were accepted subject to this stipulation: "No officer, agent or other representative of this company shall have power to waive any condition or provision of this policy, etc."

20

The Court: Objection sustained.

Mr. Kelsey: Exception.

Q. Which one of the firm did you talk to? A. Henehan.

Q. Is he the Mr. Henehan who was one of the partners of the firm that issued the policies? A. Yes.

30

Q. Now, did Mr. Henehan do anything for you in the way of intervening or assisting you with this company, this defendant company, to make a settlement of this case?

Mr. Wachenfeld: I object, incompetent, irrelevant and immaterial and not binding upon the defendant. In addition to that it is too broad.

40

Mr. Kelsey: Of course I do not want to ask him a leading question. I want to avoid that as far as possible.

The Court: It might bring forth a perfectly proper answer and on the other hand
10 it might be improper.

Q. Did you ever write to the defendant company about this loss, or did you have anyone else write for you? A. Henehan.

Q. How long was this after the loss? A. It was about a couple of weeks.

Q. Did Mr. Rubin ever carry out this agreement and buy the property?

20 Mr. Wachenfeld: Objected to as incompetent, irrelevant and immaterial.

The Court: Yes. This was after the fire. It would make no difference. Sustain the objection.

Q. Did you ever receive any of the damages occasioned by this fire, from this company? A. No.

Mr. Kelsey: That is all.

30 *Cross-examination by Mr. Wachenfeld.*

Q. Mr. Levin, where did you live at the time that Rubin first went to your premises, 1198 Summit Avenue, as a tenant? A. 101 Summit Avenue.

Q. And you knew what business Mr. Rubin was in? A. No.

Q. You didn't? A. No.

Q. Did you go to these premises after Mr. Rubin moved in? A. I think, yes, one time.

40 Q. How often did you go there? A. Once or twice, that is all.

Q. Did you see a name on the front window which was not there before Rubin moved in? A. No.

Q. You didn't see that? A. No.

Q. Didn't you see the name Ideal Mattress Factory on the front window? A. I didn't see it. 10

Q. You are pretty sure about that? A. I am sure.

Q. You walked into this front door a couple of times after Rubin was there? A. Not a couple of times, once or twice.

Q. Was there any name on the window before Rubin moved in? A. No.

Q. Was there a name after Rubin moved in? A. I didn't notice.

Q. You walked right past there at least a couple of times, didn't you? A. I didn't walk past. 20

Q. You rented this property to Rubin, didn't you? A. Yes, sir.

Q. Did you ask him what he was going to use the place for? A. No.

Q. You didn't know whether it was going to be a fish market or a department store, is that right? A. No.

Q. And you didn't care? A. No.

Q. Isn't it a fact that Mr. Rubin told you what he was going to use it for? A. He told me he was going to use it for selling beds and springs. 30

Q. Did he tell you anything about making them? A. No.

Q. Were you there after the fire? A. After the fire?

Q. Yes. A. Yes, I went there after the fire.

Q. Did you see the machinery in the place after the fire? A. I didn't see no machinery.

Q. Did you go through the place after it was burned? A. Yes. 40

Q. Did you see any machinery? A. Any machines?

Q. Yes. A. No machinery; I didn't see any machinery there.

Q. You are sure about that? A. No machinery,
10 no.

Q. Did you see any machinery before the fire? A. No.

Q. Now, when you went to see Mr. Rubin on these two occasions after he went there as a tenant, did you see him? A. I don't remember.

Q. You don't remember whether you saw him or not on these two occasions? A. No, I don't remember.

Q. You don't remember whether you saw him or
20 not? A. I just passed by and I stepped in, that is all I know.

Q. Did you step in to see him? A. I passed by and I stopped in.

Q. Which did you do, did you pass by or did you stop in? A. I stopped in.

Q. So that you did not pass by on these two occasions before you stopped in, is that right? A. No.

Q. When you stopped in there, what did you do?
30 A. When I stepped in, I went out.

Q. You stepped in and you went out, is that right? A. Yes.

Q. Did you say anything before you stepped out? A. I want to tell you the truth, I don't remember. Maybe I said something, maybe I didn't, I don't remember, but I think I was there a couple of times, once or twice, that is all.

Q. Did you see Mr. Rubin there on either one of these occasions? A. No, I don't remember if I seen
40 him or not.

Q. Did you see anybody else there? A. I don't remember. The store was open. Maybe somebody was there, maybe his wife was there.

Q. You remember you stepped in, don't you? A. Yes.

Q. And you remember you stepped out? A. Yes. 10

Q. You can remember that distinctly? A. Maybe somebody was there, maybe somebody didn't was there.

Q. If you remember these two steps, why can't you tell me what happened in between your stepping in and stepping out? A. I didn't pay any interest, I cannot tell you anything.

Q. What do you mean by that? A. What do I mean?

Q. Yes, what do you mean by that, do you mean that you didn't see anything? 20

> Juror No. 4: Was it dark or was it daylight when you went in there?
>
> The Witness: It was daytime, I think.

Q. Did you see anybody when you stepped in? A. I don't remember.

Q. Do you know why you stepped out? A. I just was passing by. I opened the door and I stepped in. I didn't have any business with that man. 30

Q. What did you step in there for?

> The Court: What did you go inside the building for?
>
> The Witness: Just to see how is the business, what business he got, that is all.
>
> The Court: Did you see?
>
> The Witness: Well, I seen there is something, beds and mattresses inside, that is all.

40

Q. Where inside did you see the beds and mattresses? A. In the store.

Q. In what part of the store? A. What part? The store was a small store.

Q. All right. Did you go to the back part of the store? A. No.

Q. How far in the store did you go? A. I opened
10 the door and I went out, that is all.

Q. Do you remember whether you saw anybody in the store at the time? A. I don't remember.

Q. Do you remember whether you talked to anybody there? A. I don't remember.

Q. When did Rubin first go in as your tenant? A. About June the 1st.

Q. June 1st, 1924? A. Yes.

Q. How long after the 1st of June was it you first went to see him? A. About two weeks.

20 Q. How long was it before the second time you went to see him? A. About the same time, that is all.

Q. A day or two apart? A. Yes.

Q. Well, you can remember that thing pretty well, can't you remember a little what you did when you got in there? Can you remember how long you stayed there? A. I didn't do anything there.

Q. Do you remember how long you stayed, when
30 you stepped in, before you stepped out? A. I went in and I went out, that is all.

Q. How long did you stay? A. A minute or a couple of minutes.

Q. But you cannot remember whether you saw anybody or spoke to anybody? A. No.

Q. Isn't it a fact when Mr. Rubin entered into negotiations with you, he told you that what he was going to conduct in those premises was a mattress factory? A. He didn't tell me anything.

40 Q. Isn't it a fact that after he went in there, there was a name put on the window in large let-

ters, Ideal Mattress Factory? Is that a fact or isn't it? A. I didn't see it.

Q. Did you know it was there? A. I didn't know it, no.

Q. You did not know it was there? A. No.

Q. Did anybody ever tell you about it? A. No. 10

Q. Now, in addition to walking in there twice, you walked by quite a number of times before the fire? A. Yes, I walked by.

Q. It was your property? A. My property, sure.

Q. You never noticed what name was on the window? A. No.

Q. Never saw that name? A. No.

Mr. Kelsey: What name is this?

Mr. Wachenfeld: Ideal Mattress Factory. 20

Q. And isn't it a fact that Mr. Rubin told you that he was going to manufacture mattresses there? A. No, he didn't tell me.

Mr. Wachenfeld: That is all.

Redirect examination by Mr. Kelsey.

Q. Did you know Rubin had a factory in some other location? A. No. 30

Q. Was anything said to you by Rubin when he came in there that he was going to run a mattress factory there? A. No, he didn't tell me.

Q. He went there on June 1st? A. Yes.

Q. And the fire occurred July 26th? A. Yes.

Q. Within two months? A. Within two months.

Mr. Kelsey: That is all.

Recross-examination by Mr. Wachenfeld. 40

Q. On the 1st of June he paid you $50 for the month's rent for June? A. Yes.

Q. How did he pay you that, cash or check? A. I don't remember, I didn't collect the money, my partner collected. I didn't bother with it.

Q. How did he pay you on the 1st of July? A. I didn't bother with it, I didn't collect it.

10 Q. Who collected it? A. My partner.

Q. Mr. Petrofsky, that is your partner? A. Yes, sir.

Q. How did he collect it? A. I think he brought it to the house.

Q. Who do you think brought it to the house? A. Rubin.

Q. Rubin brought it to Petrofsky's house? A. I don't know exactly.

20 The Court: Is Mr. Petrofsky here?

The Witness: Yes.

Juror No. 4: Did you know Rubin before he moved into your place?

The Witness: No.

By Juror No. 4.

Q. Never saw him before? A. No.

Q. You didn't know he had a factory in your store? A. Didn't know it before.

30 Q. Was there any partition in the store? A. Yes, sir.

Q. How many? A. Oh, like rooms.

Q. And you never saw any machinery in there or anything? A. No.

Q. No names on the window? A. No.

Q. Well, how did he sell his merchandise? A. I don't know exactly.

Q. He certainly must have had some kind of a window, didn't he? A. I didn't notice that, I will

40 tell you the truth.

Q. That is what we want to hear, the truth. A. I didn't care much about the property because I didn't take care of it.

Q. Did he have the word "mattresses" without the factory name on there? A. I don't know, maybe he had, maybe he didn't. I didn't notice that. 10

Q. Could he have "Rubin's store for mattresses"? A. I didn't notice that.

Q. Without the factory name? A. I didn't notice that. Of course, I was maybe a week or two in June when I was there. I was not long there.

Redirect examination by Mr. Kelsey.

Q. Is there anything in this agreement that he was to rent it as a mattress factory? 20

Mr. Wachenfeld: I object; the agreement speaks for itself.

The Court: Sustain the objection.

Mr. Kelsey: That is all.

JOSEPH M. HENEHAN sworn. 30

Direct examination by Mr. Kelsey.

Q. You were the agent, you and your partner McCourt were the agents who issued the policies? A. Yes, sir.

Q. You had blank forms in your hands to issue, did you? A. Yes, we always kept our policies right there and wrote them up as they came in.

Q. You put your name at the foot of the policies? A. Yes. 40

Q. And you issue them that way? A. Yes.

Q. They were delivered to you in blanks, in that form, were they? A. Yes, they always came in blank, all policies came in blank.

Q. With the name or the signature of the company at the foot? A. Yes.

10 Q. And you would fill that in and attach the riders and issue them? A. Yes, and sign them as agents.

Q. Did you have authority from the company to do that? A. Yes.

The Court: To do what?

The Witness: We had authority as agent to sign on the bottom of the policy.

Q. And collect the premiums? A. Yes.

20 Q. And you remember this man Rubin who went in there, Samuel Rubin? A. I don't remember this man Rubin. I know that Mr. Levin told me he had rented the place——

Mr. Wachenfeld: I object.

The Court: Strike it out.

Q. Did you know Rubin? A. No, sir, I didn't.

Q. Did you ever see this agreement marked Exhibit P-1? Did you ever see that before the fire
30 occurred? A. No, sir.

Q. Never saw that? A. No, sir.

Q. Did Levin ever talk to you about this agreement with Rubin? A. Yes, sir.

Q. And did he talk to you prior to the fire? A. Yes.

Q. And did you make any promise to him as to what you would do as agent for the company?

40 Mr. Wachenfeld: I object, calling for a conclusion.

The Court: Sustain the objection.

Mr. Kelsey: Exception.

Q. Now, after this fire occurred, did you enter into any negotiations or any communications with your principal, the State Assurance Company, Ltd., concerning the loss? A. Yes, sir.

Q. How did you do that, through letters or verbal communication? A. I wrote the company several letters, asking them for the adjustment on this fire. 10

Mr. Kelsey: I will ask you, Mr. Wachenfeld, to produce letters signed by Mr. Henehan.

Q. I show you copy of a letter dated August 15th and ask you if that was the first letter that you sent to the company, if you recollect? A. That is the first letter I wrote, around August 15th. I don't know the date of the fire exactly. 20

Q. The fire was July 26th. A. That is about the first letter.

Q. The first letter? A. I could not say if it is the first or the second. I sent three or four letters.

Mr. Kelsey: Now I ask for the production of the letter from McCourt & Henehan of August 30th.

Q. I show you another copy of a letter and ask you if that is one of the letters you sent to the company, the one of August 30th? A. Yes. 30

Q. Did the company make any response to that?

Mr. Wachenfeld: Are you offering those letters?

Mr. Kelsey: I will offer this letter of August 15th and this letter of August 30th.

(Marked in evidence Exhibit P-2 and P-3.) 40

Q. I show you a letter from William J. Decker, general adjuster, to you, dated September 2nd, and ask you if that was received by you in answer to your letter of August 30th? A. Yes, sir.

Mr. Kelsey: I offer this letter in evidence.

10

(Marked Exhibit P-4.)

Mr. Kelsey: Now I ask for the production of the letter of November 10th.

Mr. Wachenfeld: I have the original of that.

Mr. Kelsey: I would like to offer it.

Mr. Wachenfeld: I would like to cross-examine on that letter. My contention is, if your Honor please, that it is a self-serving declaration written by Henehan as agent for the plaintiff, not as agent for the defendant. For that reason I would like to cross-examine the witness at this time.

20

The Court: I do not see that it has any bearing, anyhow.

Mr. Kelsey: Well, it shows the efforts of the agents to induce his principal to pay this claim, and the same thing was done in the case in 131 Atlantic, and there it was held that the company was bound by what their agent did, because the agent by doing these things was assuring the assured all the time that he was going to get his money.

30

The Court: It is nothing more than asking them to pay.

Mr. Wachenfeld: Mr. Kelsey has stated the contents of the letter so well that it might just as well be in evidence. I will withdraw my objection to the letter.

40

(Marked in evidence Exhibit P-5.)

Mr. Kelsey: I ask for the production of the letter of November 14th.

Mr. Wachenfeld: Here it is.

Mr. Kelsey: I offer this letter of November 14th in evidence.

Mr. Wachenfeld: No objection. 10

(Marked Exhibit P-6.)

Q. I show you a letter received by you from the State Assurance Company, Ltd., dated November 11th. Did you receive that letter from them? A. Yes.

Q. These pencil notations, are they in your handwriting? A. Yes.

Q. They were put on there after you received the letter? A. Yes. 20

Mr. Kelsey: I will ask to have this letter marked in evidence.

(Marked Exhibit P-7.)

Q. I offer in evidence letter dated November 19th, 1924.

Mr. Wachenfeld: No objection.

(Marked Exhibit P-8.) 30

Q. You have mentioned in your letter something to the effect that some adjuster or appraiser for the company called on you and examined the property and appraised it? A. Yes.

Q. Do you know the name of that man? A. I think it is Mr. Mooney, this gentleman sitting here.

Q. The gentleman at the end of the table? A. I think so.

Mr. Wachenfeld: That is not Mr. Mooney, that is Mr. Decker. 40

The Witness: Yes, sir, Decker is the name.

Q. Is he the gentleman that called? A. Yes, sir.

Q. Did you go to the property with him? A. Yes.

Q. Now, how far from the premises 1198 and 1200 Summit Avenue is your office? A. It was about three blocks away at that time.

10

The Court: Let me ask here: This policy that covers the adjoining property, 1200 Summit Avenue, it seems to be suggested that there was a slight loss there. Is it involved in this suit?

Mr. Wachenfeld: It is involved in the suit, but the loss is very slight. It is simply a question of the amount of it, that is all.

The Court: In other words, these defenses that are now being considered does not apply to this other policy?

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Mr. Wachenfeld: No. 1198 Summit Avenue is the property in question. It was practically totally destroyed by the fire.

Mr. Kelsey: That is all.

Mr. Wachenfeld: No cross-examination.

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JACOB MALOYFSKY sworn.

Direct examination by Mr. Kelsey.

Q. What is your business, Mr. Maloyfsky? A. I am a builder and carpenter.

Q. And were you such in July, 1924, and August, 1924? A. Yes, sir.

Q. And were you called in by Levin and Petrofsky to make an appraisal of the amount of damages to the two houses, 1198 and 1200 Summit Avenue, Jersey City, after the fire that occurred there? A. Yes, sir.

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Q. And did you make this appraisal? A. Yes, sir. I figured for the job at 1198, it was about $3100.

Q. I didn't ask you that. I want to first show you a statement. You rendered these statements to Mr. Levin after your appraisal at the time, did you? A. Yes. 10

Q. Showing the amount of loss? A. Yes.

Q. Did these statements show the amount of loss as you found it? A. Yes, sir.

Q. $3,000 on 1198 and $135— A. About $135 on the corner house.

The Court: What was the loss on the house 1198?

The Witness: Was $3,000 loss.

The Court: And as to 1200? 20

The Witness: There was $135 loss.

Q. Now, 1198 was destroyed, was it? A. Yes, it was very destroyed.

Q. No more value in that property? A. No.

Q. You made a true appraisal——

Mr. Wachenfeld: There is no use going into that, because as to 1198 we admit the actual loss exceeds the amount of the policy. 30 The policy was only for $2500.

Mr. Kelsey: Then that is all.

Cross-examination by Mr. Wachenfeld.

Q. Now, in reference to what you call the corner property, 1200 Summit Avenue, and which you say was damaged to the extent of $135, what was the damage? A. Around the weatherboards was damaged. 40

Q. The weatherboards were burned a little, were they? A. No, the windows was broken, the glass, I looked it all over, everything around there.

Q. Here is the estimate for the corner property, $135, what did that include? A. It included to fix
10 everything around that house.

Q. Now, tell us what everything was. A. That was weatherboards, to fix up, and the windows.

Q. How many windows? A. Well, there was about seven windows there.

Q. Do you remember the size of them? A. I could not remember.

Q. How much per window? A. Well, I forget that.

Q. I am trying to find out how you arrived at
20 this figure, how much for each window? A. For each window? I could not figure that, I figured it altogether.

Q. In other words, you just looked at it and figured $135? A. Yes.

Q. You figured that that would certainly cover all the damage and a little more? A. No, I figured it will cost me about $100 and $35 for my time.

Q. Can you tell us how you figured it would be $100? A. I figured a man to go to work and ma-
30 terial would come to $100, maybe $5 more or $5 less, you could not know that.

Q. You say there were seven windows broken; how much a window did you figure? A. The seven windows I could not figure. Some windows were broken bad, and some windows not so bad.

Q. All right, take the ones that were broken altogether, how much? A. If a window is all broken, it is not much more, we got to take it out. Some windows was only the sash alone.
40
Q. How long were you at the corner property, 1200? A. I was there about two hours looking over it.

Q. Did you actually repair the corner property? A. No.

Q. You did not do that? A. No.

Q. So that you did not get this job for $135? A. No.

Q. Do you know who did the work? A. I do not know.

Q. Do you know how much he got for doing the work? A. I could not know what another man did it for. That was what I figured.

Mr. Wachenfeld: That is all.

Mr. Kelsey: That is our case. I offer all of the policies, copies of which are annexed.

Mr. Wachenfeld: That was covered by the stipulation.

Mr. Kelsey: All right.

Mr. Wachenfeld: In reference to the second count of the complaint, which is that count covering the premises known as 1198 Summit Avenue in Jersey City, I ask for a nonsuit on the following grounds: First, because there was a change in the interest or possession of the plaintiff as evidenced by Exhibit P-1, which is a contract for the sale of said premises made between the plaintiffs and their respective wives and one Rubin, dated May 23rd, 1924, which contract provides, among other things, a purchase price, time of passing of the title, consideration paid and the terms and conditions upon which the balance is to be paid.

The Court: Call the witness Henehan back to the stand.

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Joseph M. Henehan recalled.

By the Court.

Q. This morning you stated you were given au-
10 thority to sign your name at the bottom of policies and attach certain riders to the policy? A. Yes, sir.

Q. What did that include? A. Well, there is a white form on a policy—I think we have some of them here.

Q. Never mind that. A. This is the white form on which you describe the premises and the type of property.

Q. And in your agency with this defendant com-
20 pany, what occurs when there is a change of ownership? A. On a change of ownership you are supposed to notify——

Q. Not what you are supposed to do. A. Make out an endorsement covering the change.

Q. Who signs it? A. I do.

Q. You were given that authority? A. On all companies, yes, your Honor.

Q. With respect to this company? A. Yes, your Honor.

30

Redirect examination by Mr. Kelsey.

Q. Well, now, there is something in one of the letters that you wrote to the effect that this contract with Rubin was brought to your attention, and I would like to ask you now whether it is a fact or it is not a fact that the contract was brought to you by Mr. Levin? A. Why, Levin came to the office and he told me that he had rented the place——

40

Mr. Wachenfeld: I object.

The Witness: I know Levin had a contract with him.

The Court: Just wait until he asks you a question and then give a direct answer.

Mr. Kelsey: I am referring to this paper here, Exhibit P-1. 10

The Court: What is the question?

Mr. Kelsey: The question is whether Levin brought this contract to him, showed it to him before this fire.

Mr. Wachenfeld: The question has already been asked and answered by the witness.

The Court: Did he show it to you?

The Witness: He had a contract, but I could not say whether it was this contract or not. This was three years ago. 20

Q. Did he tell you about this contract? A. Yes.

Q. And after he had told you about the contract did you promise to do anything about it?

Mr. Wachenfeld: I object on the ground that it is not binding, on the ground that the policy itself limits the power and authority of this witness, and whatever he said or whatever he promised was not binding upon the defendant company unless it was in accordance with the terms of the contract, which provide it must be in writing, attached to the policy. 30

(Argued.)

The Court: Objection sustained.

Mr. Kelsey: Exception. That is all.

(Witness excused.)

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Mr. Wachenfeld: I now respectfully ask for a nonsuit as to the second count of the complaint, on the grounds already urged.

(Argued.)

The Court: A nonsuit will be ordered as to the second count of the complaint, and a judgment for $135 will be entered on the first count of the complaint.

Mr. Kelsey: I respectfully request an exception as to the nonsuit.

Exhibit P-1.

ARTICLES OF AGREEMENT, made the 23rd. day of May, in the year of Our Lord One Thousand Nine Hundred and twenty-four, BETWEEN VICTOR LEVINE and FRIEDA LEVINE, his wife, and SAMUEL PETROFSKY and FANNIE PETROFSKY, his wife, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the first part, AND SAMUEL RUBIN, of the Town of West Hoboken, in the County of Hudson and State of New Jersey, party of the second part; WITNESSETH, That the said party of the first part, for and in consideration of the sum of Six thousand, one hundred and seventy-five dollars ($6175.) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of full covenant & warranty free from all encumbrances, except as hereinafter

stated, on or before the fifteenth day of January, 1925, next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and being commonly known by street number as #1198 Summit Avenue, Jersey City, New Jersey, which premises are 23.83 feet wide in front and 24.33 feet wide in rear, and 100 feet in depth thru'out; together with all the building and buildings now located on said premises. 10

THE parties of the first part agree to convey the said premises above mentioned with the dimensions above stated by metes and bounds in the deed that is to be delivered according to this contract. 20

SUBJECT to a monthly tenancy held by Samuel Rubin, who is paying $50 a month commencing June 1st, 1924; being understood, that said Samuel Rubin shall occupy said premises, as a monthly tenant from June 1st, 1924, at the monthly rental of $50 until taking of title.

IT being understood and agreed, in the event this title or deal covered by this contract cannot go through for any legal reason, that then the party of the second part shall be entitled to a lease for the term of two years commencing January 15, 1925, on the above described premises, at a yearly rental of $600 per year, payable in equal monthly instalments of $50 on the first day of each and every month in advance; and the parties of the first part do hereby grant such a lease to the party of the second part in the event the title does not go thru' for any reason. In the event of lease, the building is leased in the condition as it is. 30

The parties of the first part shall not be responsible for the making of any repairs to the build- 40

ing, and the building is sold in its present condition, free and clear of all encroachments.

It is understood and agreed, however, if the party of the second part cannot raise said first mortgage of $3000. that then the parties of the first part shall have the right to raise such first mortgage of $3000 for not less than two years, with interest at six per-cent. payable quarterly for the party of the second part at an expense not exceeding $150. including commissions, search fees and all other expenses therefor; and said parties of the first part will then take a mortgage for the difference on the terms above mentioned.

It being further understood & agreed parties of the first part shall have the right to raise a mortgage of not less than $2000 or more upon said premises for at least two years with interest at rate of 6% payable quarterly at an expense not exceeding $150 including search fees, commissions and all other expenses and whatever the difference will be of the amount so raised on first mortgage, plus amount of cash paid them, shall be a second mortgage upon the same terms and conditions herein stated.

And the said party of the second part, for himself and for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Six thousand, one hundred and seventy-five dollars ($6,175.) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Exhibit P-1.

On Execution of this agreement for which this is also a receipt..................	$150.
On delivery of deed, cash................	$600.
By the party of the 2nd. part raising a 1st. mtg. on the above described premises at the time of closing of title for not less than 2 yrs. with interest at rate of 6% payable quarterly, which shall be a first lien on the above described premises in a sum not exceeding $3000. and said mtg. shall be raised by the party of the second part at his own expenses..............	$3000.
On second Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six % payable quarterly for three years.........................	$2425.

10

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which mtg. shall be a 2nd. mtg. and subsequent to a first mtg. of $3000 to be raised by party of 2nd. part as above stated; said 2nd. bond and mtg. shall contain a clause the party of 2nd. part shall pay on account of the principal thereof the sum of $50 every month from and after the date of closing of title, with int. on the unpaid balance for a period of the first 15 months of said mtg. and then said instalments shall cease, and the balance shall be payable at the due date of said bond & mtg. which will be 3 yrs. from the date of closing of title. Said bond & mtg. shall contain a subrogation clause, subrogating said mtg. to a first mortgage of $3000. at any time on the above described premises.

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TOTAL	$6175.

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the first part hereby agrees 10 to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of .

And it is further Agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said 20 land and premises on the 15th day of January, 1925, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And it is further Agreed, by the parties hereto, that the said Deed of full covenant and warranty, and second bond and mortgage shall be delivered and received at the office of Counsellor Samuel Harber, 12 Bergenline Ave., Union Hill, N. J., between the hours of nine in the forenoon and six 30 o'clock in the afternoon on the said fifteenth day of January, 1925, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other per- 40 sonal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated except as herein stated. 10

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 20

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments. 30

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and dis- 40

charged by the seller thereof, upon the delivery of the deed.

And for the performance of all and singular the covenants and agreements aforesaid, the said par-
10 ties do bind themselves and their respective heirs, executors and administrators and assigns.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

VICTOR LEVINE (L. S.)
her
FRIEDA + LEVINE (L. S.)
mark
20
SAMUEL PETROFSKY (L. S.)
FANNY PETROFSKY (L. S.)
SAMUEL RUBIN (L. S.)

Signed, Sealed and Delivered
in the presence of

Samuel Harber

30

40

STATE OF NEW JERSEY, } ss.:
COUNTY OF HUDSON, }

BE IT REMEMBERED, That on this 26th day of May, in the year of our Lord One Thousand Nine Hundred and twenty-four, before me, the sub- 10 scribed, A MASTER IN CHANCERY OF N. J., personally appeared FRIEDA LEVINE, wife of Victor Levine, and FANNIE PETROFSKY, wife of Samuel Petrofsky, who, I am satisfied, are two of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20

SAMUEL HARBER,
A Master in Chancery of N. J.

STATE OF NEW JERSEY, } ss.:
COUNTY OF HUDSON, }

BE IT REMEMBERED, That on this 23 day of May, in the year of our Lord One Thousand Nine Hundred and twenty-four, before me, the subscriber, 30 A MASTER IN CHANCERY OF N. J., personally appeared VICTOR LEVINE and SAMUEL PETROFSKY, who, I am satisfied, are two of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

SAMUEL HARBER, 40
A Master in Chancery of N. J.

Exhibit P-2.

G Aug. 15th, 1924.

State Assurance Co. Ltd.,
#100 Maiden Lane,
New York City.

10

Re: #382990 }
#382991 } V. Levine and S. Petrofsky

Gentlemen:

About three weeks ago, loss was reported to your company on premises #1198-1200 Summit Ave., Jersey City, N. J., covered by the above numbered policies and to date we have heard nothing regarding a settlement or what is to be done about same.

We would appreciate it very much if you would get in communication with us either by phone or mail at once as our client asks for a settlement and we are not in a position to advise him without word from you.

20

Trusting to hear from you, we are

Yours very truly,

McCOURT & HENEHAN
Per: J. M. HENEHAN

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JMH:ART

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Exhibit P-3.

Aug.
30th
1924

State Assurance Co. Ltd.,
100 Maiden Lane, Att: CLAIM DEPT.
New York City. 10

Re: Loss at 1198-1200 Summit Ave.,
Jersey City, N. J. Levine.

Gentlemen:

In reference to the above loss beg to state that the writer personally appraised the property when the insurance was solicited, and it was the opinion of several appraisers at the same time that enough insurance was granted on the property, therefore, a greater amount was not written. 20

We would appreciate your advice in regard to this claim, in view of the fact that this has been long pending and we have not heard from you. Our client is very anxious at this time about same.

Respectfully yours,

MCCOURT & HENEHAN.
Per: J. M. HENEHAN 30

JMH:ART

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Exhibit P-4.

THE STATE ASSURANCE COMPANY, LTD.
100 Maiden Lane
New York

September 2nd, 1924

10

Messrs. McCourt & Henehan,
165 Summit Ave.,
West Hoboken, N. J.

Gentlemen:

Re: Policy #382990—Victor Levin et al

This will acknowledge receipt of yours of the 30th ultimo in reference to the above.

We have made a copy of your letter and sent it

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to the adjusters, Messrs. Decker & Smith, for their consideration.

Very truly yours,

WM. J. DECKER
General Adjuster

WJD/T

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Exhibit P-5.

Nov.
10th
1924

The State Assurance Co. Ltd.,
#100 Maiden Lane,
New York City.

10

Gentlemen:

Re: #382990-382991, V. Levin and S. Petrofsky.

The claim on the above policies is approximately two months old. These gentlemen are very good customers of ours and they give us a large amount of their insurance business. I would like very much if you would consider settling this claim at your earliest convenience.

20

I do not see why you people have not done something along these lines much sooner as I know this man is a good, straight-forward business man and his standing in this community means a lot to me.

I sincerely hope you will be kind enough to let me know what disposition you will make on this case and that you will make a fair settlement on same.

Yours very truly,

30

J. M. HENEHAN

JMH:ART

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Exhibit P-6.

Nov.
14th
1924

The State Assurance Co. Ltd.,
#100 Maiden Lane,
10 New York City.

Gentlemen:

Re: Policy #382990—Levine & Petrofsky, Assured.

In reference to yours of the 11th inst., it seems to me from your letter of that date that you claim you never have been officially informed of this fire. In another adjoining building covered by policy
20 #382991, you say you have notified your Adjusting Department to settle this claim. For your information, we would advise that you were notified at one time of the loss on both policies due to the fact that the fire affected both buildings. This refers to the 2nd paragraph of your letter.

In the 1st paragraph of your letter you state that the building had been sold. This is absolutely untrue. The fact of the case is that Messrs. Levine & Petrofsky made a contract with Mr. Samuel Rubin
30 to deliver this property to him on or about Jan. 1st, 1925 and he, Mr. Rubin, was to act just as a monthly tenant paying $50.00 per month until that time. If there seems to be any question about this I can forward the contract to you as I have it at my office at this time. You will see, therefore, that this loss has nothing to do with Mr. Rubin, only dealing directly with Messrs. Levine & Petrofsky.

Re: the 3rd paragraph of your letter: Mr. Levine did not lease this place for a mattress factory, but
40 for store and dwelling to be used as a show room and salesroom and he did not know that they would

manufacture mattresses on the premises. He also informed me that he had rechanged the occupancy at this building and I did not think it was necessary to make any change in the policy until we were writing the renewal of same.

At the time your Adjuster came to Jersey, he, Mr. Levine and myself were in conversation about different figures quite a few times and it appeared to me at that time that you people were going to make some settlement. Mr. Levine figured the same way. Your Adjuster figured dollar for dollar and had Mr. Levine furnish him with estimates of rebuilding at two different times. I sincerely hope that you will see this in the right way. 10

I know that if you were to meet the assured you would see that he is a very honest, upright business man, and that you will be kind enough to reconsider your letter and make some settlement as it will benefit both your Company and ourselves in the future. 20

Hoping to hear from you again with reference to this matter, I remain

Respectfully yours,

J. M. HENEHAN 30

JMH:ART

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Exhibit P-7.

THE STATE ASSURANCE COMPANY, LTD.
100 Maiden Lane
New York

November 11th, 1924

10

Messrs. McCourt & Henehan,
122 Paterson Plank Road,
West Hoboken, N. J.

Dear Sirs:

Policy 382990—Victor Levin and Samuel Petrofsky

I personally acknowledge receipt of your letter of the 10th inst. I think that it is due you as agents of the Company that you should be informed officially and frankly what has been developed in connection with the property described in the above policy.

20

1st. It seems to be rather established that before the fire, which happened on the 26th day of July last, Messrs. Levin & Petrofsky sold this property to Mr. Samuel Rubin. It would appear therefore that the loss would fall on Mr. Rubin who is not recognized or named in any way whatsoever in the above policy.

30

2nd. The loss has not been proved nor indeed any formal claim filed with us.

3rd. The property in our policy is described as a store and dwelling but it has been established that it was actually occupied for a mattress factory and we were paid in accordance with first hazard.

40

Now we do not write mattress factories and if we had known that this policy was written to cover a building used for that purpose we would have promptly cancelled it.

Exhibit P-7.

There is a mortgagee clause on our policy and we recognize liability to the mortgagee, the Highland Trust Company. If their lien was in existence at the time of the fire if we should be called upon to pay them anything for this damage under the mortgagee clause we would take subrogation to the extent of the payment and enforce our rights against the land.

It is our intention to treat our policy holders and claimants with the utmost liberality but we cannot in justice to the Corporation insure a store and dwelling and pay for a mattress factory, it is quite out of the question not to speak of the fact that the beneficiary if the loss were paid would be one not named in our policy.

Policy 382991

I see no reason why loss on this dwelling should not be adjusted and paid and I will give instructions to our Loss Department to do so.

Yours very truly,

WILLIAM HARE
Manager.

10 20 30 40

Exhibit P-8.

THE STATE ASSURANCE COMPANY, LTD.
100 Maiden Lane
New York

November 19th, 1924

10 Messrs. McCourt & Henehan,
122 Paterson Plank Road,
West Hoboken, N. J.

Dear Sirs:

Policy 382990—Levine & Petrofsky

I acknowledge receipt of your letter of the 14th inst. I note what you say about the title of the property, we have a letter from Samuel Harden
20 who represents himself as the attorney for Samuel Rubin in which he says that the property has been sold by contract to his client. I did not state in my letter that the title had actually passed but there is a question whether Messrs. Levine & Petrofsky had "a sole and unconditional ownership."

In the second paragraph of my letter I did not state that we were not notified of the loss. You notified us of the loss and in consequence of your notice we sent an adjuster who ascertained the
30 amount of damage under what is known as a non-waiver agreement. In my letter I stated that the loss had not been proved; this refers to the printed portion of the policy which requires a claimant to file proof of loss within sixty days after date of fire.

If you told Messrs. Levine & Petrofsky that it was not necessary to endorse their policy when the occupancy was changed from store and dwelling to
40 a mattress factory you made a very serious mistake. Were you not aware of the fact that the policy con-

tract prohibited the increase of hazard without notice to the Company?

I am inclined to treat our loss claimants liberally but you must realize that I am in a position of trustee to a corporation and I should not pay out the Company's money unless the money is due. However I am referring this whole case again to our adjusters with instructions to again examine into it and to make recommendations to us.

Yours very truly,

WILLIAM HARE
Manager.

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70 OCT.1.1928

NEW JERSEY

Court of Errors and Appeals

VICTOR LEVIN and SAMUEL PETROFSKY, Plaintiffs-Appellants, and HIGHLAND TRUST COMPANY, Plaintiff-Respondent, vs. STATE ASSURANCE COMPANY, LTD., Defendant-Respondent.	Action at Law.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS.

On the trial of the above-stated cause at the Hudson Circuit of the Supreme Court the Trial Judge ordered a judgment of nonsuit in favor of the defendant insurance company and against the plaintiffs Victor Levin and Samuel Petrofsky on the second count of the plaintiffs' complaint and overruled questions propounded to witnesses called by the plaintiffs, and this appeal seeks a review of the judgment of nonsuit and of the overruling of the questions.

The Facts.

The action was brought on two policies of fire insurance issued by the defendant company on April 4, 1923, one of which insured the plaintiffs Victor Levin and Samuel Petrofsky for the term of three years against all direct loss or damage by fire to an amount not exceeding $2,500 on the two-story frame building occupied as a store and dwelling and situated at 1198 Summit Avenue, in Jersey City, while the other insured them for the term of three years against all direct loss or damage by fire to an amount not exceeding $2,500 on the two-story frame building occupied by two families and situated at 1200 Summit Avenue, Jersey City.

There is a mortgagee clause annexed to each of these policies whereby the loss or damage is payable to the plaintiff Highland Trust Company, as first mortgagee, as interest may appear.

The policies in question are in the standard form and were countersigned and delivered to the insured by McCourt & Henehan, the agents of the insurer, and copies thereof, which were annexed to the plaintiffs' complaint and were placed in evidence by stipulation of counsel (Case, p. 56, and p. 77, lines 15-20), are set forth in full on pages 7-34 of the printed book.

On May 23, 1924, the plaintiffs Levin and Petrofsky and their wives entered into a written agreement with one Samuel Rubin whereby they agreed to convey to him, on or before January 15, 1925, the building 1198 Summit Avenue and the lot whereon it stood subject to a monthly tenancy therein held by him at $50 per month rent, commencing June 1, 1924, with the right to occupy same as a monthly tenant from June 1, 1924, at

the monthly rental of $50 until taking of title. It was therein further agreed and understood that if for any legal reason the title or deal could not go through, the said Rubin should be entitled to a lease for a further term of two years, commencing January 15, 1925, at the yearly rental of $600 per year, and the vendors did also thereby presently grant such two years' lease in the event the title did not go through for any reason. This agreement contains additional provisions, *inter alia,* that the risk of loss or damage to said premises by fire or otherwise until the delivery of the deed was assumed by the vendors and that the purchaser and his heirs and assigns could have possession on January 15, 1925, and from thence take the rents thereof to their own use.

The agreement to which we have just referred was offered in evidence as Exhibit P-1 (Case, p. 56, lines 5-10) and is set forth on pages 80-87 of the printed book.

The prospective purchaser, Samuel Rubin, took possession as tenant under said agreement on June 1, 1924 (Case, p. 66, lines 14-17), and on the 26th of the following month of July a fire occurred which entirely destroyed the premises at No. 1198 occupied by him and damaged the other building at No. 1200 (Case, p. 67, lines 34-36; p. 75, lines 23, 24).

The sound value of No. 1198 exceeds the amount of the policy covering thereon and the damage to No. 1200 amounted to $135 (Case, p. 75, lines 15-32).

Messrs. McCourt & Henehan, the agents of the defendant, had authority not only to sign and issue its policies, but to endorse thereon changes in the interest, title or possession of the property insured (Case, p. 78, lines 5-30; p. 69, lines 34-41; p. 70, lines 5-19).

At the time the agreement between Levin and Petrofsky and their wives, of the one part, and Rubin, of the other part, was entered into, Levin called on McCourt & Henehan, and told them about the agreement and showed it to them and informed them that he had rented the store at No. 1198 to Rubin for a show room and sales room, and intended conveying No. 1198 to him in January, 1925, and they promised Levin to do whatever should be necessary to continue the policy thereon in full force and thereafter notified Levin and Petrofsky that they had done everything that was necessary in order to continue the policy in full force and effect (Case, p. 46, lines 37-42; p. 47, lines 5-15; p. 60, lines 22-26; p. 70, lines 33-38; p. 78, lines 31-39; p. 79, lines 5-26; p. 92, lines 33-41; p. 93, lines 4-9; p. 96, lines 36-40).

After the fire, the agents reported the loss to the insurer and the latter sent its adjusters and appraisers to examine and appraise the loss, and they appraised the loss and negotiated with Levin for a settlement (Case, p. 60, lines 9-19; p. 73, lines 31-42; p. 93, lines 10-16). These adjusters on two different occasions had Levin go to the trouble and expense of supplying them with estimates of cost of rebuilding (Case, p. 93, lines 15-18).

Besides assisting in the appraisal of the loss and damage, the agents McCourt & Henehan tried to effect a settlement between the insured and insurer, and their correspondence with the defendant company in that effort is contained in the letters, Exhibits P-2 to P-8 inclusive, set forth on pages 88 to 97 of the printed book.

At the trial the liability of the defendant to pay the claim of the plaintiff of $135 under the policy covering No. 1200, as alleged in the first count of their complaint, was conceded, and judgment for that sum was rendered in favor of the plaintiff.

The Law and the Argument.

The sole ground upon which the defendant requested and was granted a nonsuit appears on page 77 of the printed book and is as follows, viz.:

> "In reference to the second count of the complaint, which is that count covering the premises known as 1198 Summit Avenue in Jersey City, I ask for a nonsuit on the following grounds: First, because there was a change in the interest or possession of the plaintiff as evidenced by Exhibit P-1, which is a contract for the sale of said premises made between the plaintiffs and their respective wives and one Rubin, dated May 23, 1924, which contract provides, among other things, a purchase price, time of passing of the title, consideration paid and the terms and conditions upon which the balance is to be paid."

The defense under which the defendant urged the foregoing ground for a nonsuit is embraced in its answer to the plaintiffs' complaint under the heading "Fifth Defense to Second Count," reading as follows, viz. (Case, p. 38, lines 21-30):

> "Said policy amongst other things provided: This entire policy, unless otherwise provided by agreement endorsed hereon or added thereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance; or if the hazard be increased by any means within the control of knowledge of the insured; or if the interest of the insured be other than the unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if any change other than by default of the insured take place in the interest, title or

> possession of the subject of insurance whether legal process or judgment, or by voluntary act of the insured; or otherwise."
>
> "The interest of the insured was other than the unconditional and sole ownership and there was a change in the interest, title and possession of the subject of insurance other than by default of the insured."

The plaintiffs filed five separate and distinct replies to this fifth defense of the defendant as follows, viz. (Case, pp. 46-48) : (1) Denial. (2) Allegations that McCourt & Henehan were general agents of the defendant; and that any change in the interest, title or possession of the subject of the insurance was reported to said agents, who promised plaintiffs to do and thereafter represented to plaintiffs that they had done everything that was necessary and requisite to continue the policy in full force and effect; and that said promise and representation estopped the defendant from forfeiting the policy because of said supposed breach. (3) Allegations that any change in the interest, title or possession of the subject of said insurance was reported by the plaintiffs to the defendant and that the defendant thereupon agreed with the plaintiffs to continue the policy in full force and effect regardless of any such change. (4) Allegations of the appointment by the defendant, after the loss and with full knowledge of the supposed breach, of adjusters to meet with adjusters appointed by the plaintiffs for the purpose of estimating the amount of the loss, the examination and appraisal of the insured premises by said adjusters and calculation by them of the amount of the loss and the furnishing by the plaintiffs, at the request of the defendant, of written estimates of the cost of rebuilding the building destroyed by the fire, and resulting estoppel. (5) Allegations of payment to the plain-

tiff-mortgagee, Highland Trust Company, subsequent to the occurrence of the fire of the sum of $2,500, and that by reason thereof the defendant was estopped from claiming a forfeiture of the policy because of the supposed breach of condition. The defendant in its answer had alleged (Case, p. 35, lines 37-42, and p. 36) the making of this payment and subrogation to it of all the rights of said mortgagee.

1.

Reply of plaintiffs denying defense that there was a change in the interest, title and possession.

On the argument of the motion for a nonsuit the attorneys of the plaintiffs stressed all the matters alleged in their said replies and counsel for the defendant relied chiefly on the case of *Grunauer* v. *Westchester Ins. Co.,* 72 N. J. L. 289.

The facts in the case at bar differ in so many particulars from those in that case that it is not applicable. We invite the attention of the Court to the following important differences, viz.:

(a) The agreement to convey in the present case contains the following clauses which did not appear in the contract in the *Grunauer* case:

> "The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part."
>
> "In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part shall repair the damage before the date set for delivery of said deed

or make an appropriate deduction from the purchase price herein stated except as herein stated" (Case, p. 85, lines 4-13).

(b) In the present case the agreement between the plaintiffs, Levin and Petrofsky, and Rubin was for a monthly tenancy with an option either to purchase or to lease for a definite term beginning *in futuro* "in the event the title did not go thru for *any* reason" (Case, p. 81, lines 20-40), whereas the agreement in the *Grunauer* case was an unconditional bilateral agreement for a sale and conveyance.

(c) In the instant case the prospective purchaser Rubin went into possession under the agreement as a monthly tenant of the vendors from June 1, 1924, until the date fixed for the taking of title (if such a tenancy can be said to be monthly), and not as a purchaser, and he was in possession as a tenant at the time the fire occurred which destroyed the building, while in the *Grunauer* case the purchaser was in possession as a monthly tenant at the time the agreement to purchase was made, but the tenancy was discontinued and from the date of the agreement she continued in possession as a purchaser and not as a tenant; so that here there was no change in the interest, title or possession of the subject of insurance, except change of occupants by creation of the monthly tenancy, which was expressly permitted by the terms of the policy, whereas in the *Grunauer* case the purchaser was let into possession as a purchaser and not as a tenant, thereby causing a change in the interest, title and possession.

In the *Grunauer* case this Court, in referring to the increased risk in the giving of possession to a prospective purchaser under a contract to purchase, said (at p. 293 of the opinion):

> "Thereafter the assured could have but a diminished incentive in the preservation of the property from injury, and such result was the very object intended by the insurer to be guarded against by the inserted condition."

Such increase in hazard was not present in the instant case; for here the lessors and vendors expressly assumed the risk of loss or damage by fire until the closing of title.

The case of *Burke* v. *Continental Ins. Co.*, 112 N. Y. Supp. 865, is the only reported case we have been able to find where the insured in disposing of insured property agreed to assume liability for loss by fire. It was there held:

> "After insured had sold the insured property to another under an agreement making the seller liable for loss or damage thereto before delivery, except loss by fire, the parties to the agreement changed it before the loss, so as to make insured liable for such loss. Held, that the change preserved the insurable interest under a policy which covered property sold by insured, but not delivered, for which it might be held liable, so that its assignor could recover under the policy."

Professor Cooley, in his "Briefs on the Law of Insurance" (Supplement Vol. 6, pp. 1746-1747), makes reference to the *Burke* case. He says:

> "The facts were these: The C. Company, manufacturers and owners of a stock of glass, insured it under a policy covering its

> own or that held by it in trust, or sold, but not delivered, for which it might be held liable, and thereafter sold and delivered the glass to the I. Company, agreeing at the same time that all glass manufactured by it within a specified time should be the property of the vendee as soon as manufactured and subject to the latter's order. It was further agreed that in the meanwhile the glass should be stored in the warehouse of the insured, leased to the vendee for that purpose, the insured to assume responsibility for all loss except loss by fire. The glass was to be insured by the vendee; the vendor, however, to pay the premium. In view of this state of facts, the Court of Appeals in *Burke* v. *Continental Ins. Co.,* 184 N. Y. 77, 76 N. E. 1086, reversed the judgment below, holding that under the agreement the entire insurable interest in the property was in the vendee. On a motion for rehearing attention was called to the fact that before the fire the vendor and the vendee entered into an agreement whereby the vendor assumed liability for any loss by fire. The motion for rehearing was denied, however, on the ground that the evidence did not show any such agreement. On the second trial, the evidence to support this subsequent agreement was entirely uncontradicted, and it was therefore held in *Burke* v. *Continental Ins. Co.,* 128 App. Div. 391, 112 N. Y. Supp. 865, that by reason of this modification of the agreement the insurable interest of the vendor was preserved as to property sold, but not delivered, and the policy was not void."

It would seem that if the question whether a vendor in an executory agreement to convey real estate has retained his insurable interest is to depend upon the terms of that agreement, a covenant therein by the vendor that he assumes the

risk of loss or damage by fire until the closing of title should be given its full force and effect. He would be liable over to the vendee on such a covenant.

It has been held that:

> "If the insured is liable to suffer pecuniary loss by the destruction or injury to the property by fire, he has an insurable interest, although possessing no legal or equitable title therein."
>
> *Berry* v. *A. C. Ins. Co.*, 132 N. Y. 49-56.
> *Cal. Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387.

After joining in the agreement containing a covenant on the part of the vendor to assume the risk or loss, it can hardly be said that the vendee in the present case had an insurable interest, especially in view of the fact that he never went into possession as a vendee.

All the reported cases in New Jersey on this subject stress the proposition that only in cases where the agreement to sell and convey is accompanied by a transfer of possession can there be a forfeiture of the policy.

> *Martin* v. *State Insurance Co.*, 44 N. J. L. 485.
> *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568.
> *Ordway* v. *Chace*, 57 N. J. Eq. 478.
> *Grunauer* v. *Westchester Ins. Co.*, 72 N. J. L. 289.

The reported cases in New York are to the same effect.

Brighton Beach Ass'n v. *Home Ins. Co.*, 133 App. Div. 728; aff'd in 189 N. Y. 526.

See also:

Pringle v. *Des Moines Ins. Co.*, 77 N. W. 521.

Richards on Ins., p. 349.

In addition to the fact that the agreement in the case *sub judice* contains a clause whereby the vendor assumes the liability of loss by fire and that the possession was transferred to and held by the prospective purchaser as tenant and not as vendee by permission of the insurer contained in the policy, we have here a contract which in effect is merely an option to purchase and which further differentiates this from the contract in the *Grunauer* case.

The contract in the case of *Sooy* v. *Henkelman* (not officially reported), 6 N. J. Adv. Rep. (Pamph. 20), p. 840, was held by this Court to be an option to purchase, rather than a contract to sell and purchase, for the reason that while it required the vendor to convey it imposed no obligation on the purchaser to purchase.

Applying the standard thus promulgated to the agreement entered into by these plaintiffs, wherein they agreed to and did grant a lease to Rubin for a term of two years at a specified yearly rental "in the event the title does not go through for *any* reason," it would seem that it gave Rubin an option either to purchase or lease and that he could not be compelled to take title (Case, p. 81, lines 35-38).

So it has been held that a policy of fire insurance is not forfeited where a contract to purchase amounts to a mere option,

> *Terminal Ice & Power Co.* v. *American Fire Ins. Co.,* 196 Mo. App. 241 and 194 S. W. 722;
> *Mackintosh* v. *Agricultural Fire Ins. Co.,* 150 Cal. 440 and 89 Pac. Rep. 102;

or where the contract to purchase is not enforceable.

> *Pomeroy* v. *Aetna Ins. Co.,* 120 Pac. Rep. 344 and 86 Kan. 214.

The possession of the tenant Rubin was susceptible of termination by dispossession in the event of his failure to pay the monthly rent at any time during the period intervening between June 1, 1924, and January 15, 1925, and the uncertain nature of his possession is further illustrated by the fact that his tenancy in the land as well as the building was automatically terminated *eo instanti* on the destruction of the building, by force of the statute (2 Comp. Stat., p. 3078, Sec. 31), which provides that:

> "And in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then, and from thenceforth, the lease shall cease and come to an end; provided always, that this section shall not extend to or apply to cases where the parties have otherwise stipulated in their agreement to lease."

The case of *Poole* v. *Engelke,* 61 N. J. L. 126, raises but does not decide the question whether the foregoing statute is applicable to monthly tenancies.

2 and 3.

Replies of plaintiffs that defendant is estopped from forfeiting policy because its general agents were notified of the alleged change in the interest, title and possession, and promised to do and thereafter represented that they had done everything necessary to continue the insurance in full force and effect; and that this notice to the agents was notice to the defendant and the agreement of the agents was the agreement of the defendant (Case, p. 46, lines 37-42; and p. 47, lines 4-35).

In their letter of November 14, 1924 (Ex. P-6, Case, pp. 92-93), the general agents of the defendant informed the defendant that the plaintiffs did not lease the store at No. 1198 for a mattress factory but only for use as a showroom and salesroom and that the plaintiffs had informed the agents that they had rechanged (*sic*) the occupancy of the building by renting it to Rubin and that the agents did not think it was necessary to make any change in the policy covering on those premises until they were writing a renewal thereof.

The defendant distorted these statements of its agents into an admission that the agents were informed by the insured that the occupancy was changed from a store and dwelling to a mattress factory, and in its letter to the agents of November 19, 1924 (Ex. P-8, Case, pp. 96-97), said:

> "If you told Messrs. Levine and Petrofsky that it was not necessary to endorse their policy when the occupancy was changed from store and dwelling to a mattress factory you made a very serious mistake."

These attempts of the defendant to evade payment of its just liability to the plaintiffs is indicative of its attitude throughout all the transactions subsequent to the occurrence of the fire.

The evidence in the case is that shortly after the agreement between the plaintiffs and Rubin was entered into and months prior to the fire, the plaintiffs showed the agreements to the general agents of the defendants, or, at the very least, informed them of the contents thereof (Case, p. 60, lines 22-26; p. 70, lines 33-38; p. 78, lines 31-39; p. 79, lines 5-26; p. 92, lines 33-41; p. 93, lines 4-9; p. 96, lines 36-40; p. 78, lines 5-30; p. 69, lines 34-41; and p. 70, lines 5-19).

On a number of occasions in the course of the trial, counsel for the plaintiffs tried to show by questions to the witnesses produced on behalf of the plaintiffs that when the agents were informed of the agreement with Rubin they promised to do everything that was necessary and requisite to continue the policy in full force and effect and thereafter notified the plaintiffs that they had done everything that was necessary in order to continue the policy in full force and effect. These questions to the witnesses were overruled on objection by counsel for the defendant, and exceptions thereto were duly noted (Case, p. 60, lines 22-40; p. 61, lines 4-30; p. 70, lines 33-43; p. 73, lines 4-30; p. 79, lines 24-40; pp. 92, 93, 96 and 97).

The questions and the objections thereto were as follows, viz.:

On examination of plaintiff Levin:

> "Q. What did you do?" (Case, p. 60, line 26).
>
> Objection: "The policies were accepted subject to the stipulation 'No officer, agent

or other representative of this company shall have power to waive any condition or other provision of this policy, etc.'" (Case, p. 60, lines 37-40; p. 61, lines 15-23).

On examination of witness Henehan:

"Q. And did you make any promise to him as to what you would do as agent for the company?"

Objection: "I object; calling for a conclusion" (Case, p. 70, lines 37-41).

"Q. And after he had told you about the contract did you promise to do anything about it?"

Objection: "I object on the ground that it is not binding, on the ground that the policy itself limits the power and authority of this witness, and whatever he said or whatever he promised was not binding upon the defendant company unless it was in accordance with the terms of the contract, which provides it must be in writing, attached to the policy" (Case, p. 79, lines 25-36).

On behalf of the plaintiffs it is contended that the overruling of the foregoing questions was error and constitutes ground for reversal (Notice of Appeal, Case, p. 2, lines 19-29).

The condition in the policy which the defendant claims was violated (Case, p. 28, lines 25-31) is what is known as the "alienation clause" and is a condition subsequent.

Richards on Insurance (3rd Ed.), 343, 344.

Center Garage Co. v. *Columbia Ins. Co.*, 96 N. J. L. 456.

This Court in the case of *Cheshansky* v. *Merchants' Fire Ins. Co.*, 102 N. J. L. 414, held:

"An agent formally designated in writing by an insurance company and intrusted with

> policies of insurance in blank to be issued upon the application of persons seeking insurance is clothed with apparent authority to waive any condition of the policy whether *precedent or subsequent* notwithstanding a provision of the policy that 'in any matter relating to this insurance no persons unless duly authorized in writing shall be deemed the agent of this company.' "

In the case of *Snyder* v. *Insurance Co.*, 59 N. J. L. 544, this Court held:

> "A local insurance agent entrusted with policies of insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proof of loss, and may bind the company by his admission in respect thereto."

In the *Snyder* case the attempted limitation of the powers of the agent of the insurer to waive conditions of the contract were practically the same as those in the instant case (Case, p. 25, lines 39-41; p. 26, lines 5-15).

In the case of *Millville Mutual M. & F. Ins. Co.* v. *M. & W. B. & L. Ass'n,* 43 N. J. L. 652, this Court decided that:

> "The agent had power, on behalf of the company, to receive notice of sale and conveyance of the property insured, to waive the condition of the policy and assent to the alienation."

There, as in the present case, the agent promised to endorse upon the policy the consent to a change, and the Court said:

> "Until notice was given to him to do some further act, he (the insurer) had a right to rest securely upon the agent's assurance. The company cannot thus lull their policyholder into a false security, and take advantage of an omission on his part thereby induced, to work a forfeiture of their contract."

In the case of *Shyowitz* v. *Union Indemnity Co.* (not officially reported), 140 Atl. Rep. 448, the policy contained the following limitation of the authority of the agents, viz.:

> "No condition or provision thereof shall be waived or altered by anyone, unless by indorsement thereon, signed by the president or secretary of the company, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract, or any part of it."

In that case the policy was issued by the company itself and not by an agent, and the agent who had placed the insurance endorsed on the policy a consent to a transfer of title, and it was held that this act of the agent was not within the scope of his agency.

In the case of *Plockzek* v. *St. Paul Fire & M. Ins. Co.* (not officially reported), 91 Atl. Rep. 812, the agent who placed the insurance was informed by the vendee of the insured premises that he had taken title thereto, but there was no evidence that the agent promised to change the policy or that the agent had issued the policy. Vice Chancellor

Howell, in writing his opinion in that case, was careful to say (at the end of the opinion):

> "Mere notice of transfer is not sufficient. The mere oral assent of the corporation would make a doubtful case, in the face of the requirement that the consent shall appear in writing indorsed upon or annexed to the policy, yet in a given case the facts might warrant the conclusion of a waiver of the provision."

In their reply the plaintiffs allege that the notice to the general agents of the company and their promise and subsequent representations that they had done everything necessary in order to continue the policy in full force and effect *estopped* the company from forfeiting the policy because of the supposed breach of condition (Case, p. 47, lines 15-25).

In the case of *Redstrake* v. *Cumberland Ins. Co.*, 44 N. J. L. 294, our Supreme Court treated such action on the part of the agent of an insurance company as an estoppel rather than a waiver, and held:

> "When one insured under such a policy, gave notice of subsequent insurance to such an agent, and delivered to him the policy for transmission to the company, and the agent afterwards returned the policy, asserting that it was all right, and the insured acted upon the assertion and treated the policy as still in force, to the knowledge of the company * * * Held, that the company is estopped from contesting the performance of the condition, although no endorsement was made on the policy, and no acknowledgment, in writing, was produced."

The case of *Hanson* v. *National Liberty Fire Ins. Co.*, 100 N. J. L. 215, is not comparable with the present case; for in that case the agent promised to attend to the change of title, while in the present case he not only promised to attend to it but thereafter notified the insured that he had done so.

After receiving the promise of the agents that they would do everything necessary to continue the policy in full force and effect there was nothing the plaintiffs could have done to assist them in making the change in the policy, for the policies were in the hands of the mortgagee (Case, p. 56, lines 28-34; p. 57, lines 40, 41).

4.

Reply of plaintiffs, that co-operation by the defendant company with them in adjustment of loss and the furnishing by the plaintiffs at request of the defendant of written estimates of cost of rebuilding worked an estoppel (Case, p. 47, lines 5-42; and p. 48, lines 5-16).

The evidence is that about three or four weeks after the fire the plaintiffs caused the damages to be appraised at their expense and the company also caused an examination of the insured premises to be made by its adjusters; that the plaintiffs met with these adjusters of the company and with the agents and appraised the loss (Case, p. 59, lines 40, 41; p. 60, lines 4-21); that the agents entered into negotiations with the company for an adjustment of the loss (Case, p. 71, lines 4-11; p. 72, lines 26-34; p. 73, lines 31-42; p. 74, lines 4-10), and that the adjusters representing the company negotiated with the plaintiffs for a settlement of the loss, and

at their request the plaintiffs furnished them on two different occasions with estimates of cost of re-building (Case, p. 93, lines 10-18). The manager of the company states in his letter to the agents that the appraisal by its adjusters was under a non-waiver agreement (Case, p. 96, lines 26-32); but this statement is a conclusion and no such agreement was proved at the trial.

In the case of *Agricultural Ins. Co.* v. *Potts,* 55 N. J. L. 158, the fact that the general agent of the defendant visited the scene of the fire and attempted to adjust the loss was taken into consideration in the finding that there was an estoppel.

In the case of *Cheshansky* v. *Merchants' Fire Ins. Co.,* 102 N. J. L. 416, the insured made out a list of the chattels destroyed at the request of the company's agent and on his assurance that the company would settle, and these facts were taken into consideration in the determination that there had been a waiver of the appraisal covenant and of further proofs of loss.

The following is taken from Vol. 3 of *Cooley's Briefs on Law of Insurance,* p. 2733 (citing cases):

> "It is a general rule that where the company, with knowledge of a breach of a condition or warranty, requires the insured after a loss to furnish proofs, or to furnish additional proofs, it will be held to have waived its rights to insist on the defense arising out of such breach. The proofs are of no benefit or use unless there is an intention to pay the loss notwithstanding the breach, and therefore a demand for them is equivalent to a declaration of such intention, which the company is not at liberty to withdraw after the insured has gone to the trouble and expense of complying with the request."

And at page 2739 (citing cases):

> "The rule that putting the insured to trouble or expense in proving his loss operates as a waiver of a forfeiture is not confined to the production of formal proofs, but extends to any act or expense in relation to such matter demanded by the company with the knowledge of the breach of warranty or condition."

This subject is treated in Vol. 26, *Corpus Juris,* at page 334, as follows:

> "The weight of authority is to the effect that, where the insurer, with knowledge of the facts constituting a breach of condition, deals with the insured as though the policy were in force by proceeding to adjust the loss and to negotiate a settlement, it waives the breach even though the adjustment subsequently is broken off or does not reach completion or does not result in a promise to pay."

It is respectfully submitted that the judgment of nonsuit should be reversed.

KELSEY & LUDWIG,
Attorneys for and of Counsel with
plaintiffs-appellants, Victor Levin
and Samuel Petrofsky.

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New Jersey Court of Errors and Appeals

VICTOR LEVIN and SAMUEL PETROFSKY,
Plaintiffs-Appellants,

and

HIGHLAND TRUST COMPANY,
Plaintiff-Respondent,

vs.

STATE ASSURANCE COMPANY, LTD.,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENTS.

POINT I.

The policy of insurance issued by this defendant to the plaintiffs was void under the terms of the policy by a change in the interest, title and possession of the subject of the insurance.

On the 4th day of April, 1923 the defendant company issued to the plaintiffs its policy of insurance (Case, p. 21, ll. 1-33 incl.; p. 34, ll. 5 to 18 incl.). Thereafter and on the 23rd day of May, 1924 the plaintiffs entered into an agreement to convey the subject of the insurance to one Samuel Rubin (Case, p. 80, l. 19, to p. 87 incl.). Thereafter on or about the 26th day of July, 1924, the subject of the insurance was damaged by fire (Case, p. 59, ll. 10-14).

On the trial of the cause in the Hudson County Circuit of the Supreme Court plaintiffs were non-suited because there was a change in the interest or possession of the plaintiffs in the subject of the insurance.

Appellants appealed from the non-suit so granted on the grounds that there was no change in the interest or possession of the plaintiffs in the property assured sufficient to invalidate the policy of insurance.

It is contended by the appellants, contrary to well established doctrines, that the agreement of sale executed between Victor Levin and Samuel Petrofsky and their respective wives, and Samuel Rubin, did not effect such a change in interest as to void the policy of insurance issued by State Assurance Company, Ltd. to the plaintiffs, in spite of the fact that said policy of insurance amongst other things provided:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the owner be other than unconditional and sole ownership, *or if any change other than by default of the insured takes place in the interest, title or possession of the subject of insurance whether by legal process or judgment, or by the voluntary act of the insured or otherwise.*" (Case, p. 14, ll.39-43; p. 15, ll. 5-6.) (Italics ours.)

Appellants had agreed (Case, p. 80, l. 19, Exhibit P. 1) to convey the subject of the insurance to one Samuel Rubin, and had entered into a formal agreement of sale with the said Samuel Rubin.

It has been held in this State in the case of *Grunauer* v. *Westchester Insurance Company,* 72 N. J. L. 289, in which case the insured, Grunauer, had entered into a contract of sale to sell the subject of insurance to the lessee, that

> "Although the vendor still retains the legal title to the land agreed to be sold and conveyed, he thereafter holds it only as a trustee for the vendee who becomes an equitable and beneficial owner."

In the instant case, as in the Grunauer case, it is not open to question that upon the admitted facts a change at least in the possession or right of possession of the insured had taken place (Case, p. 58, ll. 31-33).

In the Grunauer case it was held:

> "The facts of the recited acts (entering into an agreement to convey and delivering possession to the vendee as tenant) of the insured upon the conditions in question has not, as yet, it seems received judicial consideration in this State * * * Undoubtedly such a contract creates the relation of trustee and *cestui que trust* between vendor and vendee. It produces in equity a complete transition of the vendor's holdings from real to personal, and give the vendee the equitable ownership. After such contract the vendor's interest is no longer real estate, and the unpaid purchase-money is personalty and goes to the vendor's personal representative in case of his death." (The parenthetical insertion is ours.)

Justice Vredenburgh held in the Grunauer case that such a change in interest voided the policy.

The case of *Plockzek* v. *St. Paul Fire & Marine Insurance Company*, reported in 91 Atl. p. 812, held that the provision relative to change of interest

> "is a part of the contract and must be enforced unless there is evidence that its provisions have been waived by the defendant."

This same clause in the standard policy has been considered in the case of *Hanson* v. *National Liberty Fire Insurance Co. of America*, 100 N. J. L. 215, which case recognizes the validity of the clause.

It is contended by the appellants that the terms of the agreement in the instant case create a con-

dition sufficiently different from that in the Grunauer case as to make the latter case inapplicable. The only variation, however, between the instant case and the Grunauer case is that in the instant case there is a clause in the agreement (Case, p. 85, ll. 5-7).

> "The risk or loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part."

Appellants contend that this clause removes the instant case from the scope of the doctrine laid down in the Grunauer case. It is self apparent, however, that any agreement entered into between the insured and a third party to which agreement the defendant was not a party privy cannot, in any way, be binding upon the defendant.

Appellants admit that "all the reported cases in New Jersey on this subject stress the proposition that only in cases where the agreement to sell and convey is conditioned by the transfer of possession can there be forfeiture of the policy." *Martin* v. *State Insurance Co.,* 44 N. J. L. 485; *Franklin Fire Insurance Co.* v. *Martin,* 40 N. J. L. 568; *Ordway* v. *Chace,* 57 N. J. L. 478; *Grunauer* v. *Westchester Insurance Co.,* 72 N. J. L. 289.

Defendant points out that in the instant case the agreement to sell was conditioned by the transfer of possession in identically the same manner as the possession in the Grunauer case, *supra.*

Appellants also erroneously construe the agreement (Case, p. 80, l. 19, Exhibit P. 1) between the appellants and defendant as an option to purchase and consequently come to the fallacious conclusion that this agreement is non-enforce-

able as an agreement to sell and convey the property.

An inspection of this agreement indicates that an option was created to effect a lease which option is created in a covenant independent and serverable from the agreement to convey. If this covenant is severed from the agreement and the lease therein provided for and the option to lease removed there still remains a valid and binding agreement to sell and convey the subject of the insurance, which agreement contains all of the attributes essential to its enforcement by either party to the agreement.

Appellants insist that in spite of said agreement there still remains in the plaintiffs an insurable interest in the subject of the insurance. Such a contention is, however, immaterial in the determination of this case. If the agreement between the plaintiffs and Samuel Rubin was in fact a binding and enforceable agreement then under the doctrine laid down in the case of *Grunauer* v. *Westchester Insurance Company, supra,* the policy was voided. And an inspection of the agreement indicates that there were incorporated in it the following prerequisite elements of an enforceable agreement, to wit: identification of the vendor and vendee (Case, p. 80, ll. 19-28); a sufficient and adequate description of the premises to be conveyed (Case, p. 81, ll. 8-16); the consideration to be paid and the manner in which it was to be paid (Case, p. 82, ll. 29-40; p. 83, ll. 5-45), and the time and place when and where the deed was to be delivered and the consideration to be paid (Case, p. 84, ll. 24-31).

Defendants insist, therefore, that in the light of this agreement, which was a valid and enforceable one, that a change in the interest of the sub-

ject of the insurance was effected, and that under the terms of the policy said policy was vitiated.

POINTS II and III.

There was no waiver of the terms and conditions of the policy of insurance.

Plaintiffs attempt to rely upon the pleadings in the case and call the Court's attention to the reply filed by the plaintiffs to defendant's answer.

It is respectfully insisted that the pleadings do not constitute evidence in the case and cannot be construed as evidence.

Witness Henehan testified (Case, p. 70, ll. 29-32)

> "Q Did you ever see this agreement marked Exhibit P. 1? Did you ever see that before the fire occurred? A No, sir.
> Q Never saw that? A No, sir."

It is well established that the scope of an agent's authority may be limited by notice of the limitation given to those with whom the agent deals. In the instant case the policy issued to the plaintiffs provided (Case, p. 8, l. 28; p. 12, ll. 8-28).

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and additions printed on the back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall

have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached."

In the case of *Catoir* v. *American Life Insurance etc Co.,* 33 N. J. L. 487, it was held:

> "Where a policy expressly provides that no agent has authority to waive or modify any condition or stipulation therein the holder of the policy is bound by such limitation of the agent's authority."

In the instant case it is not contended that the agent did not have authority to consent to the change in interest, but defendant contends that the manner in which his authority had to be exercised was specifically set forth in the policy of insurance, (Case, p. 12, ll. 8-28) which provided that any change should be endorsed on the policy in writing. The agent himself testified (Case, p. 78, ll. 23-24) that the only manner in which such a change in the policy might be accomplished was by there being added to the policy a written endorsement, which in this case was not done.

Appellants contend that the Court erred in sustaining the objection to the question (Case, p. 60, l. 25) "What did you do?" It is obvious that under the terms of the policy it is entirely immaterial what an agent said, or what the plaintiffs said to the agent, inasmuch as no change could be effected in the policy unless it was endorsed upon the policy in writing.

Appellants also contend that the Court was in error in sustaining the objection to the question (Case, p. 70, ll. 37-38) "And did you make any promise to him as to what you would do as agent for the company?" The very wording of the

question is indicative of the fact that no answer could be made that would not be conclusive, and that such a question calling for a conclusion was highly improper.

Appellants also contend that the Court was in error in sustaining the objection to the question asked the witness Henehan (Case, p. 79, ll. 25-26) "And after he had told you about the contract did you promise to do anything about it?"

An inspection of the case of *Plockzek* v. *St. Paul Fire & Marine Co.*, reported in 91 Atl. p. 812, in which Vice-Chancellor Howell held:

> "I shall therefore assume that the defendant was notified of the change of ownership, but that of itself would not be sufficient to maintain the validity of the policy under its terms. By the terms of the policy the change of ownership invalidates the instrument, unless a note of the change is endorsed on or appended to the policy. This is part of the contract, and is appealed to by the defendant, and must therefore enter into the judgment to be pronounced by this Court. The requirement has not been met."
>
> "Mere notice of transfer is not sufficient. The mere oral assent of the corporation would make a doubtful case, in the face of the requirement that the consent should appear in writing endorsed upon or annexed to the policy."

is sufficient to indicate the impropriety of this question.

Defendant further contends, however, that even if the agent should have acquiesed in the agreement to sell and convey and the change in interest, that such action on the part of the agent would not be binding upon this defendant inasmuch as the authority of the agent was definitely

set out in the policy of insurance. *Catoir* v. *American Life Insurance etc. Co., supra.*

In the case of *Hanson* v. *National Liberty Fire Insurance Co.,* 100 N. J. L. 215, it was held:

> "Both policies contained the usual clause that unless otherwise provided by agreement endorsed thereon or added thereto they should be void 'if with the knowledge of the insured, foreclosure proceedings be commenced * * * by virtue of any mortgage or trust deed; or if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance * * * whether by legal process or judgment or voluntary act of the insured or otherwise.' There is nothing to show that either company assented to this change of title. Poling testified that he had told Walling, the agent, and that Walling had said he 'would attend to it.' But apparently he never did attend to it. In this situation there could be no recovery on the policies by the new owner as such."

It is apparent that the action of the insured and the agent in the Hanson case was analagous to the action of the appellants and the agent in the instant case, for in the Hanson case it appears that the agent told the insured that he would attend to it, but apparently he never did attend to it. In the instant case plaintiffs contend that the agent's actions and silence create the same condition, i. e. that the agent would and had attended to it.

It is apparent that if the doctrine of the case of *Hanson* v. *National Liberty Fire Insurance Co., supra* is a correct statement of the law that the contention of the plaintiffs in the instant case must fail and that there was no waiver of the terms of the policy.

In view of these two cases, *Plockzek* v. *St. Paul Fire & Marine Insurance Co., supra,* and *Hanson* v. *National Liberty Fire Insurance Co., supra,* it is apparent that no oral promise made by the agent could waive or in any way affect the terms and condition of the policy.

POINT IV.

Appellants contend that the actions of the defendant in permitting appellants to undertake the expense of estimating the damage to the subject of the insurance estops the defendant from denying the validity and demanding the forfeiture of the policy.

Plaintiffs here again attempt to rely upon the pleadings in the case and call the Court's attention to the reply filed by the plaintiffs to defendant's answer.

It is respectfully insisted that the pleadings do not constitute evidence in the case and cannot be construed as evidence.

Defendant contends that the point taken is trivial and immaterial and has no bearing in the matter, and that there is no testimony in the case to warrant the inference which the appellants make in this point.

POINT V.

The judgment entered in the Court below should be affirmed.

Respectfully submitted,

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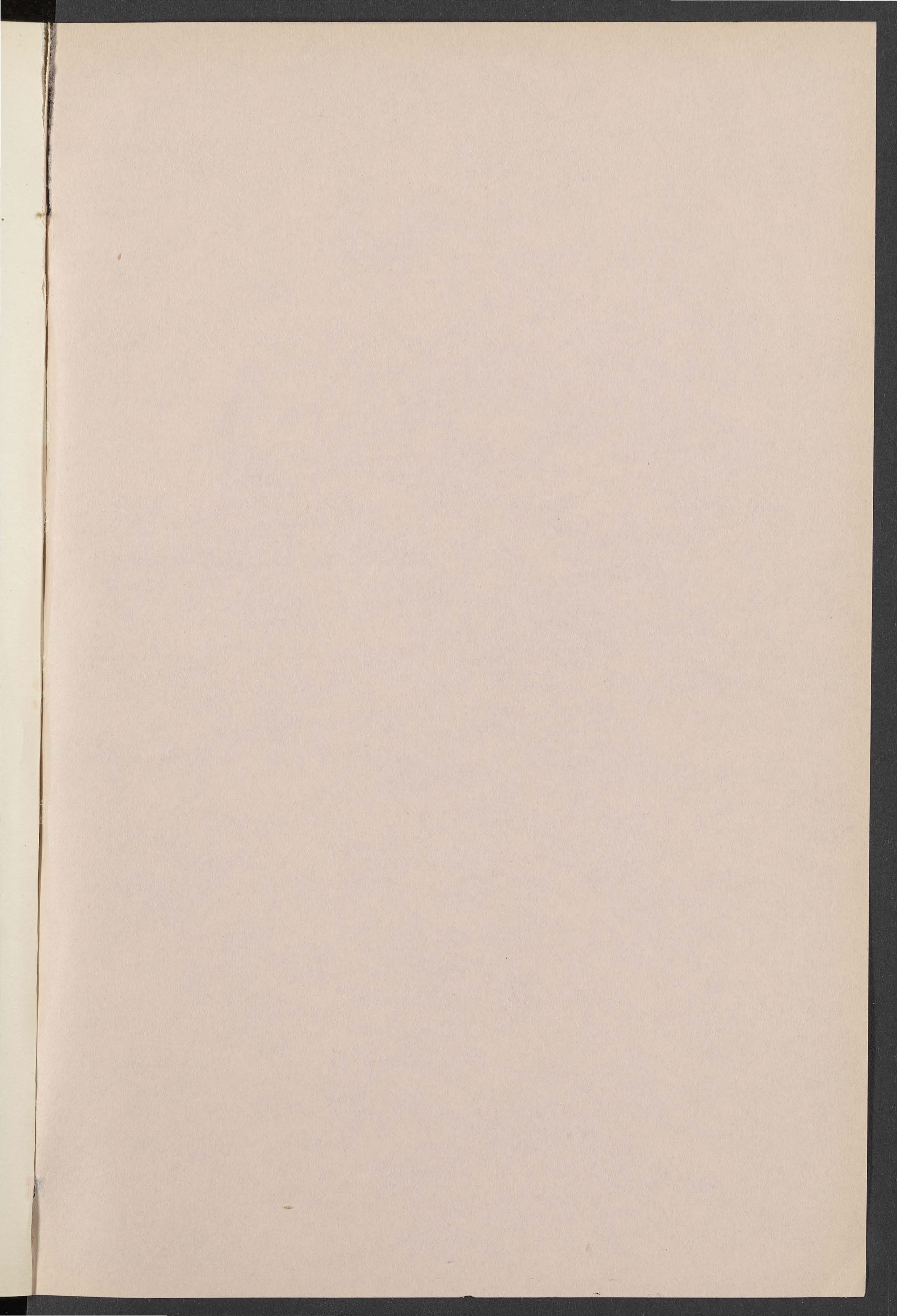
Defendant-Respondents.

WILLIAM A. WACHENFELD,
Of Counsel.



as held in these two cases, Plochark v. St. Paul Fire & Marine Insurance Co., supra, and Ramsom v. National Liberty Fire Insurance Co., supra, it is suggested that no oral promise made by the agent could waive or in any way affect the forfeiture condition of the policy.

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Plaintiffs have again attempt to rely upon the pleadings [illegible] call the Court's attention to [illegible] the plaintiffs to defendant's [illegible].

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