New Jersey Court of Errors and Appeals.

IN THE LAST RESORT, &c.

THE STATE INSURANCE COMPANY, *Pltff. in Error,* —*vs.*— HENRY F. MAACKENS, *Deft. in Error.*	*In Error to Supreme Court.*

STATE OF THE CASE.

The writ of error was tested returnable, November Term, 1875, and duly returned, with record and proceedings annexed, duly certified, as follows :—

NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT.

HENRY F. MAACKENS, —*vs.*— THE STATE INSURANCE COMPANY.	*In Case on Postea, &c.*

New Jersey Supreme Court of the fifth day of May A. D., eighteen hundred and seventy-five—

Hudson County, ss: The State Insurance Company, a body corporate of the State of New Jersey, the Defendant in this suit, was summoned to answer unto Henry F.

Maackens, the Plaintiff therein, of a plea of trespass on the case on promises, and thereupon the said Henry F. Maackens, by Gilchrist & McGill, his attorneys, complains for that whereas, heretofore, to wit, on and before the fifth day of January, A. D. eighteen hundred and seventy-two, the Defendant was organized and incorporated under an Act of the Legislature of the State of New Jersey, as a Fire Insurance Company; and as such corporation, and in its corporate name, was engaged in the business of taking risks and making insurance against loss by fire; and the Defendant afterwards, to wit, on the said fifth day of January, A. D. eighteen hundred and seventy-two, at Jersey City, in the County of Hudson, and within the jurisdiction of this Court, entered into a certain agreement, in writing, with one Gustav Kethel, commonly called a policy of insurance; and thereby, for and in consideration of the sum of sixteen dollars then paid therefor, by the said Kethel the said Defendant, did thereby insure the said Kethel against loss or damage by fire to the amount of sixteen hundred dollars, as follows, that is to say, sixteen hundred dollars on his one and a half story frame shingle roof building, with additions thereto, situate on the north side of Morgan street, between Palisade and New York avenues, town of Union, Hudson County, New Jersey.

And the said Defendant did thereby agree to make good all such loss or damage not exceeding in amount the sum of sixteen hundred dollars, and pay said loss to the amount of twelve hundred dollars to the Plaintiff, who was then mortgagee of said insured premises, and the remainder of said loss to said Kethel, as should happen by fire to the said property, from the said fifth day of January, A. D. eighteen hundred and seventy-two, at noon, to the fifth day of January, A. D. eighteen hundred and seventy-three, at noon; and further, that the amount of said loss or damage should be estimated according to the actual cash value, the cash value of the property at the time of the loss, and be paid sixty days after due notice and proofs of same made by the assured, should be

received at the office of said Defendant, in accordance with the terms of said agreement, unless it, the Defendant, should determine to repair, build or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of its intention so to do within sixty days after the receipt of the proofs of loss in said agreement required; and further, that notice of loss should be given forthwith by the assured to the Defendant, and that the assured should, as soon after as possible, render a particular account of such loss, signed and sworn to by them, stating whether any, and what other insurance had been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof were used, when and how the fire originated, and should also produce a certificate under the hand and seal of a magistrate, notary public or commissioner of deeds (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, not related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily that the assured has without fraud sustained loss on the property insured to the amount which such magistrate, notary public or commissioner of deeds should certify.

And the said Defendant did afterwards, to-wit, on the fifth day of January, A. D. eighteen hundred and seventy-three, at Jersey City, aforesaid, agree with the said Kethel, in consideration of other sixteen dollars to it paid, to extend and continue in force said agreement or policy from the fifth day of January, A. D. eighteen hundred and seventy-three to the fifth day of January, A. D. eighteen hundred and seventy-four, at noon, and did afterwards, to-wit, on the fifth day of January, eighteen hundred and seventy-four, at Jersey City, aforesaid, again agree with said Kethel, in consideration of other sixteen dollars to it paid,

to extend and continue in force said agreement or policy from the fifth day of January, A. D. eighteen hundred and seventy-four to the fifth day of January, A. D. eighteen hundred and seventy-five at noon.

And the said Defendant did afterwards, to-wit, on the sixth day of January, A. D. eighteen hundred and seventy-four, agree with the Plaintiff, by and with the consent of the said Kethel, for the consideration of said sixteen dollars then last paid to it, to alter and change the said agreement or policy so that the loss, if any, should be payable to the said Plaintiff as his interest might appear; which said damage was written in said policy or agreement.

And the Plaintiff further says that afterwards, and during the term of said policy, and while it was in force, between the said sixth day of January, A. D. eighteen hundred and seventy-four, and the fifth day of January, A. D. eighteen hundred and seventy-five, at noon, to-wit, on the twenty-sixth day of November, A. D. eighteen hundred and seventy-four, the said one and a half story frame shingle-roof building, with the additions thereto, mentioned in said policy of insurance, were by misfortune, and without any fraud or fault or evil practice on the part of the said Plaintiff, or the said Kethel, burned, damaged, consumed, and wholly lost and destroyed by fire; that the actual value of said house at the time of said loss was not less than nine hundred and thirty-one dollars and seventy cents, and that the Plaintiff's interest in said property, and damage on account of the loss of the same, was not less than one thousand dollars, and that the whole amount of insurance upon said property was the said sixteen hundred dollars.

And the Plaintiff further says, that forthwith after said loss or damage by fire, the said Plaintiff gave notice to the said Defendant of said fire, as required by the terms of said policy, and that said Plaintiff afterwards, and as

soon thereafter as possible, rendered to the said Defendant a particular account of such loss, signed and sworn to by him, containing a true and particular statement of all such matters and things as by the words and conditions of said policy of insurance were required to be therein contained, together with a certificate, under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the assured, and verily believed that the assured had, without fraud, sustained loss on the property insured to the amount nine hundred and thirty-one dollars and seventy cents, and that the Plaintiff has in this and all other respects fully complied with and performed all the matters and things in and by said policy required by him to be done.

And the Plaintiff further says, that more than sixty days have now elapsed after due notice and proof were made, as aforesaid, by the said Plaintiff, and received at the office of the Defendant at Jersey City, aforesaid, in accordance with the terms and conditions of said policy; and that the Defendant has not replaced the said property, nor given notice of its intention to rebuild or repair the lost or damaged premises, nor have they paid to the Plaintiff the said sum of money in said policy mentioned, or any part thereof.

By means whereof the said Defendant became liable to pay to the said Plaintiff the said sum of nine hundred and thirty-one dollars and seventy cents, parcel of the said sum of sixteen hundred dollars in said policy mentioned, and being so liable, it the said Defendant afterwards, to wit: on the twenty-first day of April, A. D. eighteen hundred and seventy-five, at Jersey City aforesaid, undertook and then and there promised the said Plaintiff to pay him the said sum of nine hundred and thirty-one dollars and seventy cents immediately.

Yet the said Defendant, not regarding its said several promises and undertakings, has not paid to said Plaintiff the said sum of money at said time aforesaid, nor at any other time, but has neglected and refused, and still does neglect and refuse to pay the same, or any part thereof, although often requested so to do.

Wherefore, the Plaintiff says that he is injured, and hath sustained damage to the amount of two thousand dollars, and therefore he brings his suit, &c.

And the said Defendant, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it did not promise and undertake in manner and form as the said Plaintiff hath above thereof complained against it, and of this it puts itself upon the country, and the said Plaintiff doth the like.

To Gilchrist & McGill, *Plaintiff's Attorneys*:—

Take notice that the Defendant will offer in evidence under the above plea of general issue according to the form of the statute in such case made and provided.

1. That this action was commenced before the expiration of sixty days from the time any notice and proofs made by the assured were received in the office of the Defendant, at Jersey City; that by the policy mentioned in Plaintiff's declaration, it was provided that the loss shall be paid sixty days after due notice and proofs of the same, made by the assured, should have been received at Defendant's office, in Jersey City; that it was further provided that if the policy should be made payable in case of loss to a third party, or held as collateral security, the proofs of loss should be made by the party originally insured, and until such proofs should be produced, the

loss should not be payable, and Defendant therefore claims that no action had accrued on said policy at the time of the commencement of this suit.

2. Also, that there was an over valuation of the premises described in the policy mentioned in the declaration made by the assured, at Jersey City, on the day of the date of said policy, whereby Defendant claims that said policy is void, under the conditions of said policy, in and by which it was provided that in case of an over valuation or any misrepresentation whatever, then the said policy should be void.

3. Also, that the said Plaintiff did not give notice of said loss in the declaration of Plaintiff mentioned to the Defendant, and did not as soon as possible after, render a particular account of such loss, signed and sworn to by him, according to the conditions of said policy as set out in said declaration, that although the Plaintiff did make oath of the said loss, yet the Plaintiff did not duly, properly and reasonably prove his said loss and damage according to the form and effect of the conditions of said policy set out in the Plaintiff's declaration.

4. Also, that it is in said policy of insurance provided, that should said policy be made payable in case of loss to a third party, or held as collateral security, the proofs of loss should be made by the party originally insured, unless there should have been an actual sale of the property insured, and until such proofs, declarations and certificates should be produced the loss shall not be payable. That no actual sale of the insured premises had been made up to the time of said loss, but that the said Gustav Kethel, the assured in said declaration and policy named, did not forthwith give notice of said loss to Defendant, and did not, as soon as possible after said loss, render a particular account of such loss, signed and sworn to by him, nor produce the proofs, declarations and certificates required by the said policy as set out in the said

declaration of the Plaintiff; that although the said Gustav Kethel, the assured, did make oath of said loss, yet the said assured did not duly, properly and reasonably prove said loss and damage according to the form and effect of the conditions of said policy above set forth and mentioned in the Plaintiff's declaration.

Also, that it was in said policy of insurance provided that the assured should, if required, submit to an examination under oath, by any person appointed by the Defendant, and until such examination should be permitted the loss should not be payable; and Defendant avers that the said insured, Gustav Kethel, after the said loss and damage by fire, in the declaration mentioned, to wit, on the first day of April, in the year 1875, at Jersey City, was required by the directors of Defendant to submit to such examination under oath, but the said assured then and there unreasonably neglected and refused to submit himself to, and hath not submitted himself to such an examination, and that such examination of the assured has not been permitted, contrary to the form and effect of the conditions of said policy of insurance.

Also, that said loss was fraudulent, and was caused by the wrongful act of the said Gustav Kethel, the assured.

COLLINS & CORBIN,
Attorneys for Defendant.

Therefore let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the county of Hudson, on the first Tuesday of September, in the year of our Lord eighteen hundred and seventy-five, by whom, etc.; and the same day is given to the parties aforesaid, their, etc.

And now at this day, to-wit, the third day of November, A. D. eighteen hundred and seventy-five, before our said Supreme Court, at Trenton, comes the said Plaintiff by his attorneys aforesaid, and the Justice before whom, etc., having sent hither his record, had before him, in these words, to-wit: Afterwards, to-wit, at a Circuit Court, held on the first Tuesday of September, in the year of our Lord eighteen hundred and seventy-five, at Jersey City, in and for the county of Hudson, before Manning M. Knapp, Esq., one of the Justices of the Supreme Court, came as well the said Plaintiff, Henry F. Maackens as the said Defendant. The State Insurance Company, by their attorneys, respectively within mentioned, and the jurors of the jury aforesaid, also come; who, to speak the truth of the matters and things within mentioned, being duly chosen, tried and sworn, upon their oaths say, that the said Defendant did promise and undertake in manner and form as the said Plaintiff has within thereof alleged against it; and they assess the damages of the said Plaintiff against the said Defendant, by reason of the non-performance of the said promises and undertakings, at the sum of nine hundred and six dollars and twenty cents over and above his costs and charges by him about his suit in this behalf expended, and for these costs and charges six cents.

Thereupon it is considered and ordered that the said Plaintiff do recover against the said Defendant his said damages by the jurors in form as aforesaid, found to be nine hundred and six dollars and twenty cents, and also fifty-six dollars and forty-six cents, for his costs and charges aforesaid by the Court now here adjudged to the said Plaintiff, and with his assent, which said damages, costs and charges in the whole amount to judgment signed this third day of November, A. D. eighteen hundred and seventy-five.

M. BEASLEY,

Ch. Jus.

NEW JERSEY SUPREME COURT.

—Hudson County Circuit—September Term, 1875.—

Henry F. Maackens, —*vs.*— The State Insurance Company.	*In Assumpsit.—Bill of Exceptions.*

Hon. Manning M. Knapp, Justice, presiding, with a jury.

Alexander T. McGill, Jr., appearing for Plaintiff.

Gilbert Collins appearing for Defendant.

Be it remembered, that at a Supreme Court Circuit, held at Jersey City, in and for the County of Hudson, on the thirteenth day of September, A. D. 1875, before Hon. Manning M. Knapp, one of the Justices of the Supreme Court, the several issues in the above stated cause, joined between the said parties according to the form of the Statute in such case made and provided, came on to be tried (*pro ut* the said issues), at which day before the said Justice came as well the said Henry F. Maackens, as the said The State Insurance Company, by their respective attorneys, and the jurors of the jury also came, who, being duly sworn according to law, the cause proceeds to be tried before the said Justice and Jury.

And thereupon the said Plaintiff, to maintain the said issues on his part, calls as a witness James G. Morgan, who, being sworn, testifies as follows:—

Q. You are an agent of the State Insurance Company?
A. Yes, sir.

Q. General agent?
A. Yes, at the Town of Union.

Q. Have you a power of attorney to act as such?
A. I have a commission to act as such, signed by the president and secretary.

Q. Have you that commission with you?
A. No.

Q. [Showing witness a paper.] Is that a policy issued by you?
A. Yes, sir.

Q. Is that the signature of the president of the company?
A. That is the signature of the secretary that was at that time; I have seen him write, and I know his signature; and that other is the signature of the president of the company.

Q. That policy was sent to you by the company, and you were authorized to issue it?
A. Yes, sir.

Q. [Showing another paper.] What is this?
A. It is a renewal.

Q. Is that the usual renewal issued by the company?
A. Such as I always received.

Q. And such as you always issued?
A. No, I didn't issue that. That comes from the company direct. They issue their own renewals and send them to me. This is the signature of the secretary and of the president. It is a renewal between '73 and '74.

Q. [Showing another paper.] What is that?

A. That appears to be a renewal from '74 to '75, properly signed by the proper officers of the company.

Q. What was your habit in issuing these policies?
A. I had the policies, and I have the power by my commission to insure in the company, according to my discretion.

[Plaintiff offers the policy and renewals in evidence.]

Q. The money that you received for this policy and these renewals, what became of it?
A. Every cent of it was paid over to the State Insurance Company of Jersey City. I received the premium, and paid it over to the State Insurance Company. By a check which I have in my office now, that is the amount stated in the policy as the premium.

And further to maintain the issues on his part:—

Henry F. Maackens, the Plaintiff, is sworn in his own behalf, and testifies as follows:—

Q. You are the Plaintiff in this suit?
A. I am.

Q. You held a mortgage on Mr. Kethel's property?
A. Yes.

Q. [Showing witness a paper]. Is this it?
A. Yes.

Q. How much is that for?
A. I think $1200.

[Plaintiff offers it in evidnce].

Q. When was this house destroyed by fire?
A. On the 26th November it was destroyed by fire.

Q. Was it wholly destroyed?

A. Yes.

Q. What was the value of that house at the time it was destroyed by fire?
A. I think about $1200, but I am not a carpenter.

Q. You have owned houses of this kind?
A. Yes.

Q. Are you acquainted with houses of this kind?
A. Yes, sir.

Q. Know their value?
A. Yes, sir.

Q. From having owned them?
A. Yes, sir.

Q. And you believe this to have been worth?—
A. At least $1200.

Q. What did you do immediately after the fire with respect to the insurance?
A. I went to the insurance company and notified them that the house had burnt down.

Q. Who did you notify?
A. Well, the president, Mr. Halliard, in his office of the company.

Q. What did Mr. Halliard say?
A. Well, he said that Mr. Kethel must make proof of loss. My notifying them was not enough. I must bring Kethel, that he should make proof of loss.

Q. Did you bring Kethel?
A. No.

Q. What did you do to get Kethel?
A. I went over to see him; I could not find him at

first. At last I found him, but he was sick; he could not come.

Q. Where was he then?
A. In New York City.

Q. Did you try again to get him?
A. Yes; several times.

Q. What did you finally do about making proof of loss?
A. I made proof of loss myself.

Q. By whose advice?
A. By your advice, Mr. McGill.

Q. Did you make proof of loss in writing?
A. Yes, sir.

[Plaintiff calls upon the other side to produce both proofs of loss.]

Mr. Collins—We produce a paper which is what you refer to, we suppose.

Q. [Showing witness a paper.] Is that the proof of loss you made?
A. Yes, sir.

Mr. McGill—Do you admit service of this?

Mr. Collins—We admit that that paper was served on the 20th Feb. 1875.

Q. Did you converse with any officer of the company after that paper was served on the company?
A. Yes; I seen Mr. Halliard, the president.

Q. What did he say in reference to this paper; anything about who it was made by?
A. No.

Q. After this paper was served, did the president make any objection to this paper?

[Question objected to.]

[Plaintiff offers the paper in evidence as a proof of loss served upon the company.]

[Defendant objects to it as irrelevant and immaterial, on the ground that the policy contemplates only a proof of loss made by the assured, and this paper is not by or in the name of the assured.]

[Plaintiff offers it to show due diligence on his part, not being able to procure proofs by Kethel, and this was the best the Plaintiff could do.]

[The Court withholds ruling for the present.]

Q. What objection did Mr. Halliard make, if any, to the paper?

[Objected to.]

Q. What was the conversation between you and Mr. Halliard?

A. He did not want to pay it.

Q. What did he say?

A. Met him two times; once in the office and once in the street.

Q. I want the conversation before Kethel's proof of loss was presented and after yours?

A. That was the first time; he would pay that loss, but I was not the proper man to make the proof of loss; he said Kethel must make it.

Q. Was that all he said?

A. Yes, sir.

[Plaintiff calls upon the other side to produce the other proof of loss.]

[Defendant produces a paper, and admit that it was received March 30th, 1875.]

Q. Do you recognize that paper?
A. Yes; I seen it.

Q. What do you know about that paper?
A. It is the proof of loss by Mr. Kethel.

Q. You procured that from Mr. Kethel, did you?
A. Yes.

[Plaintiff offers the paper in evidence.]

Mr. Collins—As to this paper which is offered as a proof of loss, we object to it on the ground that the conditions precedent of the policy have not been complied with. It has not been affirmatively shown that the certificate which, by the policy, is to be appended to the proof of loss, has been made by the nearest magistrate to the premises in question.

[The Court admits the paper.]

[Defendant excepts.]

[To which ruling of the said justice the Defendant, by its counsel, excepts, and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]
Justice of Supreme Court.

Q. Did you have any conversation with any of the officers of the company after this paper of Kethel's was left at their office?
A. Yes.

Q. With whom?

A. With President Halliard once, and with Dr. Foot once.

Q. Who is Dr. Foot?

A. He is the adjuster of the insurance company.

Q. State what the conversation was with Mr. Halliard?

A. It is so long ago.

Q. Did you give him the paper?

A. I believe I gave that paper to Mr. Callo; I believe so; I can't say positive.

Q. After this proof of loss of Kethel's was served upon the company did you have a conversation with any officer of the company; if so, with whom?

A. With the president and Dr. Foot.

Q. State the conversation with Dr. Foot?

A. It is impossible.

Q. Did he speak about that paper?

A. Yes.

Q. What did he say about that? Did he say whether he would pay it?

A. No, he would not pay.

Q. Did he say he would not pay?

A. He would not pay; exactly; that's so.

Q. Did he say why?

A. Well, the last time he says he would not pay unless it was a proper fire; a legal fire; a right fire of the building.

Q. Did he say what he thought about it; whether it was a proper fire or not?

A. Well, he think it was something wrong.

Q. Did he say anything about rebuilding?

A. Oh, yes; I ask him he should rebuild the building; make it so it had been before and I would be satisfied; if they build that house so it has been before I would be satisfied; and they would not do it.

Q. He said he would not do it?

A. Yes.

Q. Did he say anything else about this paper being wrong?

A. He did not make any objections about it.

Q. [By the Court.] Did he speak about it?

A. No.

Q. State what your conversation was with Dr. Foot, the adjuster?

A. Well, it was pretty near the same; I ask only for my money, and I didn't want no more that just exactly my money what I should lose; they could keep the lots if they wanted to, and pay me my money. It was the words I had with the president, now I think of it; I said he should take the lots, and I want only my insurance money or build the house as it has been before.

Q. Did he make any objections to this paper?

A. No.

Q. Did any officer of the company make any objection to this paper; if so, what?

[Question objected to as leading. The Court allows the question.]

Q. Did any officer make any objection to this Kethel paper?

A. I can't remember.

Q. [By the Court.] Did you ask anybody anything

about that paper afterwards—whether they had received it or not?

A. Yes.

Q. Who did you ask?

A. I believe Mr. Callo.

Q. [By Court.] What did he say?

A. He said they had received it.

Q. [By Court.] Did he say anything more about it?

A. No.

Q. [By Court.] Did he say whether it was good or not? 10

A. No; he did not say anything about it.

Q. [By Court.] How soon after it was sent to the company did you ask?

A. Six or eight days.

Q. Your mortgage was foreclosed?

A. Yes.

Q. Sold at sheriff's sale?

A. Yes.

Q. Who bought the property?

A. I. 20

Q. [Showing witness a paper.] Is that your paper?

A. Yes; my deed for the property.

Q. How much did you pay for it?

A. $575.

[Plaintiff offers the deed in evidence.]

Q. Why did not you put the papers in sooner?

A. I could not.

Q. Why?

A. The lots was not sold. I did not want the lots at all. I thought the insurance company would pay me sooner. I adjourned the sale six or seven times so that Kethel could have time, and the insurance company would have time to pay me.

Q. Did you urge Kethel to put in this loss?
A. I did.

Q. Did you see him as soon as you could?
A. Yes.

Q. Where did you find him?
A. In New York, in Chatham street; he was sick.

Q. Did you go again?
A. Yes.

Q. Did you urge him to put in proofs?
A. Yes.

Q. What did you say to him about it?
A. That he must make his proof of loss, or he would not get any money.

Q. How did you finally succeed in getting him to do it?
A. At last he got better and he come up.

Q. As soon as he got better?
A. Yes.

Cross-Examined.

Q. Have not you told Dr. Foot that you could have this building rebuilt for $930?
A. Yes.

Q. Did not you offer to Mr. Callo, the general agent of the company, to replace the building for $900?
A. No, sir; never.

Q. Could you have had it replaced for for $930?
A. Yes; I think I could.

Q. A builder had offered to put the house up for that price?
A. Yes.

Q. Who served Kethel's proof upon the company?
A. I don't know who served it.

Q. Did you get Mr. Kethel to make the affidavit that is there?
A. No.

Q. Did you go with Mr. Kethel to Justice Kephart to have that Justice make the certificate which Justice Gerlich afterwards made?
A. No.

Q. You did not go with Mr. Kethel?
A. No; I did not go.

Q. Did not you go to Mr. Kephart's yourself, without Mr. Kethel, and ask him to make the certificate required?
A. I believe I did; yes.

Q. Who was the nearest magistrate to the fire?
A. Kephart was.

Q. How much nearer than Gerlich?
A. A couple a blocks. I did not count how many.

Q. Why didn't Kephart make the certificate?
A. He was interested in the Hanover Insurance. He had Kethel insured in the Hanover Insurance, and for that reason he would not sign.

Q. Did he refuse to sign?
A. Yes; he told me so.

Q. Did he accompany you to Gerlich's?
A. Yes.

Q. Kephart went with you to Gerlich's?
A. Yes.

Q. Kephart is the magistrate who signed your paper.
A. Yes.

Q. Did you get this paper from Mr. Kethel just as soon as he had sworn to it?
A. I don't know exactly.

Q. How long did you have it in your possession after you got it from Kethel before you procured the certificate from Gerlich? I see the affidavit of Kethel is dated Dec. 23d, 1874; the certificate of the Justice is February 19, 1875, How long did you have it in your possession after Kethel signed it and swore to it before you procured this certificate?
A. Not long. I can't tell. Some days I believe.

Q. Some weeks?
A. No; some days I believe. I had lawyer Smyth, and he had the paper in his pocket, and he told me he had delivered it already in, and afterwards we found it was not signed, and then he gave it to me, and we got it signed.

Q. Then you took it, and got Gerlich's signature to it?
A. Yes.

Q. And after Gerlich signed it you had it all the time till it was served on the company?
A. No; I believe I gave it to Mr. McGill.

Q. Kephart signed the first paper without objections, didn't he—yours?
A. Yes.

Q. Didn't he say he believed there was fraud in the fire, and so he would not sign it?
A. He didn't say it to me.

Q. Fraud on the part of Kethel, not on your part. Didn't he say that he believed there had been fraud in Kethel, or that Kethel had set fire to the building, and that therefore he could not sign it?

A. No.

Q. Don't you know that Kephart did say that?

A. No; he didn't say so.

Q. Did Kethel to your knowledge ever give notice to the company of the burning of the building?

A. I don't know.

Q. You saw Mr. Halliard yourself, and told him the building had burned down?

A. Yes.

Q. What did Mr. Halliard say the first time you saw him after the fire?

A. I must see Kethel to make his proof of loss.

Q. Didn't he also tell you that as soon as the proofs of loss were furnished you would see Dr. Foot, the adjuster, and he would attend to the matter of the loss?

A. Yes; that is so.

Q. And didn't he also tell you that the president had nothing at all to do with the losses, and that Dr. Foot had full charge of that matter?

A. Yes.

Q. Did Mr. Halliard tell you anything to the contrary?

A. I don't think; no.

Q. Never did.

A. No; I don't think.

Q. At the time you gave notice that the building had burned down did you see Henry J. Callo?

A. Yes.

Q. You served a paper on him?

A. I believe so; he was the general agent of the company.

Q. What did Mr. Callo tell you?

A. He told me I should go to Dr. Foot.

Q. Did he say, also, that you must get Kethel to furnish proofs of loss?

A. Yes.

Q. Has anyone ever assumed to act in the matter except Dr. Foot?

A. No; I don't think.

Q. Did you tell Mr. Callo when he told you that Kethel must furnish proofs of loss, that Kethel would do so, provided you would pay his expenses, but that you were not willing to do so, and that Kethel would not do it unless you would pay the expenses of drawing up the papers, and that you were not willing to do it?

A. No, sir.

Q. You did'nt tell Callo so?

A. No, sir.

Q. When did you first see Dr. Foot?

A. About eight or fourteen days after the fire. I can't tell for the first time.

Q. What did the doctor tell you?

A. The same story—that Kethel must furnish proof of loss.

Q. Did the doctor read for you the conditions contained in the policy?

A. No, sir.

Q. Didn't he read the policy to and tell you?

A. No, he didn't.

Q. I don't mean your own paper, but a printed blank policy?
A. No.

Q. Did you ever tell Dr. Foot that Kethel was willing to make proofs of loss if he would pay the expenses?
A. No.

Q. [By Court.] Who did pay the expenses?
A. Kethel himself.

Q. After the second proof—the Kethel proof—was served, did you go to see Dr. Foot?
A. Yes.

Q. What did he tell you then?
A. The insurance would not pay that loss.

Q. Didn't the doctor say to you then that the company had sixty days within which to pay the loss, if a proper one, and that he would let you know at the end of sixty days what would be done about it?
A. He didn't say so.

Q. He didn't say that the company had sixty days after the service of that paper, and that before the end of that time he would tell you what the company would do?
A. I don't think he done so; I don't remember anything of it.

Q. Are you sure he didn't say so?
A. That is so long.

Q. In the Jersey City Fire Insurance Company's Office, Grand street, corner of Greene—didn't he there tell you, then, that the company had sixty days within to pay a loss after service of the proofs?
A. In the beginning he talked about sixty days, but not after that paper was coming.

Q. He did tell you at one time that the company had sixty days after furnishing proofs?

A. I don't recollect anything of it.

Q. What did the doctor say about sixty days?

A. It is hard to tell; as much as I can recollect, he say the insurance would not pay.

Q. [By the Court.] Did he give any reasons?

A. They had heard there was something wrong.

Q. Didn't the doctor tell you, always, on every occasion when you saw him, before these last proofs were furnished, that proofs must be furnished by Kethel, and till they were furnished he could do nothing, and when they were furnished he wanted Kethel for examination under oath?

A. Yes; he told me so only once, he wanted Kethel for examination.

Q. [By Court.] When was the once he told you so—after the second paper was given?

A. I believe it was.

Q. Didn't he tell you so before the second paper was furnished?

A. I can't say; I remember he told me once that he wants Kethel for examination.

Q. Kethel never came?

A. I didn't tell Kethel at all.

Q. Do you remember going to see the doctor with a lawyer from Union Hill?

A. No.

Q. Don't you remember going there with a lawyer?

A. No.

Q. With some one?

A. No; not to Dr. Foot.

Q. Did you come to the Jersey City Insurance Company to see him sometime with somebody?
A. I don't remember it.

Q. Didn't Dr. Foot say to you before the proofs were furnished that when they were furnished Kethel must be produced for examination?
A I don't remember.

Re-direct:—

Q. You had a conversation with Dr. Foot in my office, didn't you?
A. Yes.

Q. That was the day we commenced the suit, was it not?
A. I believe so.

Q. What did the doctor do there that day?
A. I don't know.

Q. He took you one side, didn't he?
A. Yes.

Q. Didn't I call out to him?
A. Yes.

Q. What did I say to him; that that was not according to Hoyle to talk with you?
A. Yes.

Q. He was trying to pump you, wasn't he?
A. Yes.

Q. He is the man who makes up cases for this company to squirm out of?
A. Yes.

Q. And he was trying to have a conversation with you?

A. Yes.

Q. And we stopped him?

A. Yes.

Q. What did he say then about paying this loss?

A. He didn't say anything about the loss, but he turned my words right around; I told him he should pay me whatever comes to me, and he should pay the rest to Kethel, and he turned right around and told Mr. Gilchrist and Mr. McGill; he says I say pay him and not give Kethel anything; that is the way he twisted it 'round.

Q. What did he say about paying the loss that day?

A. He wouldn't pay it.

Re-Cross.

Q. Did Dr. Foot ask you where Kethel was?

A. No, sir.

Q. Didn't he ask you where Kethel was?

A. No, sir.

Q. What did he say to you?

A. I ask him, the insurance should pay me and pay the rest to Kethel, and he turned right round to Mr. Gilchrist and Mr. McGill and says, do you hear what Mr. Maackens says, that we shall pay him, and nothing to Mr. Kethel.

Q. What did he say to you?

A. He didn't say anything.

Q. How much did you claim?

A. I claimed $930, odd.

Q. How much did you expect was going to Kethel?

A. That house was insured for $1600, and the company took every year $16; and now when it comes to pay, they don't pay nothing.

Q. [By Court]. How did you come to speak of $930 as the sum that would put up the building?

A. There is a carpenter in this Court that will state it, that he will put up that property at $934, I believe.

Q. [By Court]. Why did you claim $930 from the company?

A. That would fetch me out of the trouble; that was the balance that was due to me.

Q. Wasn't this conversation between you and the doctor out loud, so that everybody could hear it?

A. No; it was aside.

Q. [By Mr. McGill]. When was this house built that was burnt down?

A. Eight or nine years ago.

Q. It costs less to build now than when it was built?

A. Yes; but Mr. Kethel made several additions to it. He built $800 to that building.

Charles Knack, for Plaintiff, sworn, testified as follows:—

Q. You know this house of Gustav Kethel's before it was burned down?

A. Yes.

Q. You are a carpenter?

A. I am.

Q. And builder?
A. Yes.

Q. Can you tell us what the value of that house was before it was burned down?

Mr. Collins—We admit the value is as sworn to by the last witness—$930.

Q. Is building dearer now than it was three or four years ago, or cheaper?
A. It is about the same price that it was three or four years ago.

Q. How is the price of materials?
A. Almost the same price—perhaps a penny less for weather-boarding.

James G. Morgan, recalled, testified:—

Q. Have you your commission?
A. Yes. [Produces a paper.]

[The seal is admitted to be the seal of the company. The signatures are also admitted to be the signatures they purport to be.]

Q. This was given to you by whom?
A. It was mailed to me.

Q. Has the company always since the mailing of that to you recognized you as their agent?
A. Yes, sir.

Q. These words in the policy above your signature as to alteration was made by you?
A. Yes, sir.

[Plaintiff offers the commission in evidence.]

[Plaintiff offers in evidence a written agreement between Collins & Corbin and Mr. McGill.]

And further to maintain the issues on his part, the said Plaintiff calls as a witness—

ALEXANDER T. MCGILL, Jr., who being sworn, testifies as follows:—

At the time this proof of loss was brought to me it was handed to me by the Plaintiff. I caused that to be served on the State Insurance Company at their office. At that time I was a member of the Legislature. I carried it to Trenton and kept it in my pocket one week and brought it back; discovered it was in my pocket and sent it immediately to the insurance company. I urged the Plaintiff from the time of the loss by fire till the suit was commenced, and this proof was put in, to hasten the proofs as speedily as possible.

Cross-Examined:—

Q. After the service of that paper did you receive a letter from Dr. Foot, the adjuster?

A. I don't remember.

Q. Asking whether you were attorney for Kethel?

A. I either received a letter from Dr. Foot or received a verbal communication asking me that question.

Q. Wasn't it a letter?

A. It may have been; I don't remember.

Q. And didn't you tell the doctor that the reason you didn't answer his letter was because you were waiting to ascertain whether you was his attorney or not?

A. I remember telling the doctor that I sent Maackens to Kethel to know if Kethel desired me to bring suit for him, and I hadn't answered his letter partly because I was so busy, and partly because I wished to know whether Kethel was going to allow me to bring suit for him.

Q. The adjuster's reason was that he might make demand on you for Kethel to examine him?

A. I don't know what his reason was; he didn't state any reason, to my knowledge.

Q. Didn't he state that he wanted to examine Kethel?

A. He did not.

Q. Did he ask you where Kethel could be found?

A. Not to my knowledge.

Re-direct.

Dr. Foot came into my office on the day or the day before we commenced suit—possibly the doctor was there first—and Mr. Maackens was there,and he took Mr. Maackens one side of the room, and commenced talking to him; and I called out to Mr. Maackens, says I, "Look out, Mr. Maackens, that is a dangerous man," and, says I, "Dr., that hain't according to Hoyle, to talk to a man you are going to have a suit with." Mr. Gilchrist was near by, and he says, "Sue them;" and the doctor says, "Well, commence your suit; we won't pay the loss."

Re-cross.

Q. Didn't he come there to consult you on some pending measures in the legislature, and Maackens happened in?

A. I don't remember. Might be; because there was an insurance bill before the legislature, and there was some expense attending it which he wanted the county to pay, and I made the insurance companies pay it.

Q. Didn't the doctor tell you that under the policy the loss was not payable till sixty days after furnishing proofs of loss, and when that time expired he would let you know?

A. I don't remember his telling me that till the other day in court here, when he told me he would beat me on some ground or other.

Q. Don't you remember the sixty days were referred to?

A. No, I don't. It was an unequivocal declaration on the part of the doctor that the company would not pay and would not rebuild. It was unequivocal, there is no doubt about that.

Q. Don't you remember that at that conversation the doctor said that he wanted you to take notice that the company would waive no condition of the policy?

A. No, I don't; I remember the doctor stating something about that about the time Mr. Maacken's proof was put in. I think it was before that was put in, while it was in my possession, and that was a long time before the suit was commenced. But he afterwards stated objections and waived that a thousand times over.

Q. He stated to you that the company would waive nothing, and he never said anything to the contrary?

A. He declared to the contrary. He didn't say to me that he took that back in express words. I was speaking to him about the service of proofs of loss by Maackens, and he says "We suspect fraud in this, but we can't prove it, and we would like to inquire more into it." Said I, "Very well, we will be happy to furnish you anything." He said, "We don't ask you to furnish anything, and we don't waive anything." That was before any proofs were served; before either the first or second.

Q. And didn't the doctor at that same conversation tell you that after the proofs were furnished that he desired to examine Kethel under oath?

A. I don't remember his ever telling me that he desired to examine Kethel under oath.

Q. Do you remember a conversation at Trenton with the doctor?

A. Yes, the doctor recalled my attention to it yesterday or day before.

Q. And an offer of compromise was made by you?

A. No, I made no offer of compromise; the doctor said to me that the company would not mind paying $250; that that would be about what it would cost to contest the suit, and would cost them that to get out of it.

Q. And you on your part said you would let Maackens take $500?

A. No; that was here on Friday last.

Q. Didn't you say that at Trenton?

A. No; that was here Friday last; I said if he would make his proposition at $500 that I would talk to Maackens about settling the matter; not that we would take $500; we didn't intend to do that.

Q. Has the doctor ever made you any offer?

A. Excepting $250 Friday last; he wanted to go away; he said he had some other engagements, and wanted to go out of town till Tuesday, and he was afraid the case would come on, and he said he wouldn't mind advising the company to pay $250.

Q. And didn't he add that the matter was now in the hands of counsel?

A. He said he would consult counsel in the settlement.

Q. In the conversation in Trenton didn't he say that he desired to examine Kethel?

A. He did not to my recollection, and I remember pretty clearly what took place.

[Plaintiff rests, reserving the right to call Mr. Kephart if he comes before the case is closed.]

The Court—This first paper offered as a proof of loss, as to which ruling was withheld, I will admit in evidence, and allow the Defendant an exception.

[Defendant excepts.]

[To which ruling of the said Justice, the Defendant, by its counsel, excepts, and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [L. S.]
Jus. Sup. Ct.

And thereupon, by its counsel, the Defendant moves to nonsuit the Plaintiff on the ground—

First.—That Plaintiff has not shown that the policy has been issued by this Company, or by one of its agents who had power to issue the policy.

Second.—On the ground that the Plaintiff has not complied with the conditions precedent, compliance with which alone entitles him to recover. The proofs of loss were not served upon the company in accordance with the terms in the policy; neither by the proper party nor within the proper or a reasonable time. No notice of loss was given by the assured forthwith within the meaning of that clause. The proofs were not sworn to before the nearest magistrate. The suit is prematurely brought. There is an over-valuation. The mortgage has no insurance clause; it does not show that Kethel was under any obligation to insure for Maackens.

[The Court refuses to non-suit.]

[Defendant excepts.]

[To which ruling of the said Justice the Defendant, by its counsel, excepts and prays that this, its bill of Exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [L. S.]
Jus. Sup. Ct.

And thereupon the said Defendant, to maintain the issues on its part, calls as a witness HENRY J. CALLO, who being sworn, testifies as follows:—

Q. You were along the first part of the year 1875 the general agent for the State Insurance Company?
A. I was, and prior to that time.

Q. Did the Plaintiff ever call upon you?
A. He did.

Q. When?
A. After the fire.

Q. How soon?
A. I can't say how soon.

Q. Can you approximate?
A. No; I cannot.

Q. What was the conversation between you and him?
A. Generally respecting the fire; and he was the mortgagee of the property.

Q. Give us the conversation?
A. I don't recollect it.

Q. Did Mr. Maackens call with reference to the fire?
A. Yes.

Q. Did he come to give notice that the fire had occurred?

A. I had quite a number of interviews with him.

Q. The first one we are speaking of?

A. I don't recollect.

Q. What was said between you and him about furnishing proofs of loss?

A. I stated to him that the insured must furnish proofs of loss, he as the mortgagee could not. He said he could not get Kethel to furnish proofs of loss. The fire had occurred mysteriously, and he had left.

Q. What was said about recompense?

A. Maackens said that Kethel said he would not furnish proofs of loss unless he would get some recompense for it.

Q. How long was that after the first interview?

A. Probably a month.

Q. Did you ever tell Maackens or anyone that the company would not pay that loss?

A. I never said that. I said that nobody could claim the loss but the insured.

Q. You had never told anyone that the company would not pay that loss?

A. No.

Q. [By Court]. Did you know that he held a mortgage on the property?

A. Yes, sir.

Q. [By Court]. Why did you say to him that the company would pay nobody but the insured?

A. I told him that nobody could make up those proofs of loss but the insured.

And further, to maintain the issues on its part, the Defendant call as a witness NATHANIEL FOOT, who, being sworn, testifies as follows:—

Q. What is your profession?

A. Practicing medicine. My business is insurance business. I am adjuster for the State Insurance Company.

Q. State your connection with this loss from the beginning?

A. Early in December I was informed by the State Insurance Company that a Mr. Maackens had been there to notify them of a loss, and they expected proofs in a few days, and they would send them to me to attend to on receiving the proofs. A short time afterwards Mr. Maackens called on me at my office, corner Grand and Greene street, and wished to know what I wanted in that loss. I took a blank policy of the State of the same edition of his, and read to him the conditions which was to be complied with by the assured in case of loss. I told him I wanted the proofs of loss therein called for. He called in a few days afterwards, and wanted to know what I was going to do about that loss. I asked him where the proofs were. He said they were not made out; that Mr. Kethel said he would not make out any unless he could get pay for it; that he would have to pay a lawyer to make them out for him, and he would not get any thing from the insurance company. I asked him why he would not get any thing; what the amount of his claim was? He told me a little over $900, and the insurance is $1,600, and the property is not worth any more than my claim, he says. And, he says, I can have it rebuilt for nine hundred and odd dollars, and that is all it is worth. He said you ought not to have insured it for so much; when I had it I only had it insured for $800. I asked him if he thought Kethel was all right in regard to the fire, and, with a shrug of his shoulders, says he, "No, I don't think he was." Said he, I had foreclosed my mort-

gage, and was about selling out the property when Kethel went over to New York, and the place took fire. I then told him I wanted proofs of loss as soon as possible, and as soon as they were received I wanted to examine Kethel under oath. I saw him several times; each time urged him to produce the proofs of loss, or to have Kethel do it, and each time he told me he would attend to it. Sometime afterwards I saw his attorney, Mr. McGill, in Trenton, in regard a bill before the Legislature, in regard to the investigation of the origin of fires, and referred him to this case in point for his own client, stating that if we had that law I could go on and make the examination, but now I was waiting for the proofs of loss before examing him under oath. I then told him I was waiting for the proofs of loss that had been promised, but had not been furnished. Sometime afterward the second proofs were furnished—I don't recollect whether I had received the first proofs or not—and I immediately, on receipt of them, wrote to Gilchrist & McGill, seeing their card on the proofs—to know if they were the attorneys of Kethel. I received no reply to my communication, and after waiting a few days I went to see Mr. McGill, and he was gone to Trenton. I called at his office several times without seeing him. I finally was at his office to see him again about this bill that was before the Legislature, and while conversing with him Mr. Maackens came into the office. I spoke to Mr. Maackens and asked him if he knew where Mr. Kethel could be found, and while speaking to Maackens, within eight feet of Mr. McGill and within six feet of Mr. Gilchrist, Mr. McGill laughingly spoke in regard to Maackens looking out for Dr. Foot; he is a dangerous man—I can't state the exact words. I remarked to him, I didn't anticipate any suit in the case; I thought he would comply with the conditions of his policy first, and then we would examine Mr. Kethel under oath; something in regard to that, I cannot give the exact words. Mr. Gilchrist then says, what do you fool with them at all for? why don't you com-

mence suit first, and then the company will be anxious to settle. I then turned to him and said, if you want to commence suit before the policy is payable, commence suit as soon as you please, and see whether the conditions amount to anything or not, but I want you to distinctly understand we don't waive any of the conditions of the policy. And at every interview I have had with Mr. McGill I have distinctly stated to him that he must understand we could not waive any of the conditions of the policy.

Q. Is that your invariable custom?

A. It is. I have in several instances had parties construe my language into waivers, and I invariably state to them that we don't waive any of the conditions of the policy. And I stated so at these interviews referred to by the witnesses in this case. I stated that to them both before and since, and that if they were entitled to anything, I would pay whatever they were entitled to under the policy.

Q. Did you then state, or at any other time, that you would not pay the loss at all?

A. I never refused to pay the loss, but stated to them that when the sixty days were up I would then inform them what the company would do; that it was not due then; that when the loss was due I would tell them.

Q. Did you state that at this interview in Gilchrist & McGill's office referred to?

A. Yes, sir; and I stated that all I wanted was for them to fulfil their part of the contract, and we would stand by ours.

Q. And you stated at that interview, that you desired to examine Kethel under oath?

A. I stated that to Mr. Maackens before Mr. McGill spoke to Maackens to be careful of me.

Q. Did you speak in an ordinary tone of voice?

A. I spoke in an ordinary tone of conversation.

Q. You did not say that the company would not pay the loss?
A. I never have said so at any time to any person.

Cross-examined:—

Q. Who notified you of the loss?
A. Either Mr. Callo or Mr. Halliard; I think Mr. Callo.

Q. At what date?
A. My impression is it was in December.

Q. What did they say to you?
A. My impression is they said that they had just learned of another loss at Union Hill, and that the mortgagee had been down and give them notice of the loss, and as soon as the proofs were sent they would be sent to me. I attend to the adjusting of all their losses.

Q. You attend to the losses of other companies?
A. Yes, sir.

Q. Are you specially connected with the State Insurance Company?
A. No; simply do their adjusting.

Q. Do you act for companies in New York?
A. Yes, sir.

Q. Are you paid a salary?
A. No, sir.

Q. For each case?
A. Yes, sir.

Q. Paid according to the success of that case?
A. No, never; I am paid for my services.

Q. You practiced medicine at one time?
A. Yes, sir.

Q. Gave that up for this pursuit?
A. Yes, sir.

Q. You had a conversation with me at Trenton. State that conversation again?

A. As near as I can recollect it; I don't pretend to give the exact words; I met you in the hall, and asked you if I could have a little conversation with you in regard to the bill for the investigation of the origin of fires. We talked about that, and then referred to this case incidentally as one that it would act well in if we had it passed, and stated to you at the time that Mr. Maackens had stated to me that he didn't think it was all right so far as Mr. Kethel was concerned.

Q. Are you sure that you stated to me, that this was a case of that kind?

A. I am; yes, sir; very positive; and what makes me more positive is, that at the next interview I had with you you stated that Mr. Maackens told you that I must be mistaken about that, because he, Maackens, never stated that to me, and I told you how Maackens said he knew that, because he said Kethel was in New York at the time.

——CASE CLOSED.——

Adjourned for the day to Tuesday, Sept. 14th, 1875.

And thereupon, by its counsel, the Defendant presents in writing the following propositions to the Court, asking the Court to charge the same to the jury:—

First.—That if the assured Gustav Kethel did not forthwith after the fire, give notice of the loss, and as

soon after as possible render a particular account of such loss to the Defendant according to the terms of the policy, the Plaintiff can not recover.

Second.—That the proofs of loss required by the policy to be furnished in this case are proofs to be made by the assured, and that the assured in this case is Gustav Kethel.

Third.—That unless such particular account of such loss required by the policy was furnished within a reasonable time, Plaintiff can not recover.

Fourth.—That under the circumstances of this case from Nov. 25th, 1874 to March 30th, 1875 is not a reasonable time for such purpose, and that foom Nov. 25th, 1874 to Feb. 20th, 1875 is not a reasonable time for such purpose.

Fifth.—That if Plaintiff had control of the proofs of loss made by the assured from Feb. 19th, 1875 to March 30th, 1875, and through neglect or wilfully did not furnish them to the company, he cannot recover.

Sixth.—That unless the certificate required by the policy to be furnished to the Defendant was made by the nearest magistrate, or other officer named in the policy, Plaintiff can not recover.

Seventh.—That if this action was brought within sixty days after furnishing proofs of loss to the Defendant, the Plaintiff cannot recover.

Eighth.—That because the proof does not sustain the declaration Plaintiff cannot recover.

Ninth.—That no waiver of any right or condition by the Defendant is operative, unless it was made on good consideration, or unless if not enforced the Defendant

will lose a substantial right which he had at the time of the waiver.

Tenth.—That if the Plaintiff could not have sustained his action after sixty days after proofs of loss were furnished, then refusal to pay, made within that time, will not authorize a recovery in this action.

Eleventh.—That a statement, if made by the adjuster before the expiration of the sixty days that the company would not pay the loss, the company, by the policy, having the privilege of rebuilding would not authorize the bringing of the suit within the sixty days.

Twelfth—That if the Defendant required the examination of the assured, Gustave Kethel, under oath, and the adjuster so informed the Plaintiff, and the assured did not offer himself and was not produced for examination the Plaintiff cannot recover in this action.

Thirteenth.—That the verdict of the jury should be for the Defendant.

And thereupon the said Justice charges the Jury as follows:—

Gentlemen of the Jury: This action is brought by the mortgagee of premises that the Defendants had insured to one Kethel against loss by fire. Kethel had executed a mortgage to the Plaintiff on the property to secure a sum of money, and by arrangement with the company, or its agent, the loss which might occur under the policy was made payable to the Plaintiff, the mortgagee. A fire destroyed the premises insured. It consisted of a house. No personal property. The policy having been renewed from time to time by the company was operative at the time fire destroyed the building.

There is no dispute about the building having been destroyed. Nor is there any serious dispute that this building was, under the terms of the contract of insurance expressed in the policy, insured and the owner indemnified against loss by fire. The Defendants in this case put their defences upon the ground, generally, that the conditions embraced in the contract between the parties, or some of them. have not been complied with by the Plaintiff, and that, therefore, he is not entitled to recover of them the loss which the fire created.

The terms of the contract, as made by these parties, is the test of their mutual obligations and rights. We must find in their own agreement, subject to such legal interpretation as it calls for, the law that is to govern them and determine their rights. It is most likely true that there are many conditions connected with these policies that parties seldom look at, and are often times unable to read if they do look at them; and they are often surprised when they come to understand them. Many of them seemingly quite severe in their operations, oftentimes difficult to decipher without artificial aid in reading them, and yet parties accept them, and make them the contract between them and the insurer, and the courts have no power to relieve them. We must enforce the contract as we find it. I have sometimes thought that public justice would be done if the courts should declare void all these minute imprints upon policies impossible to decipher without the aid of artificial means as a fraud upon the insured and the public. The courts have not done so, and they are to be regarded as a part of the contract between the parties. Parties accept them, perhaps, innocently, but under the rules of law they are to be held as having accepted them, and are bound by them.

There is no dispute in this case that there was a fire, and there is no evidence in the cause that there was any fraud in procuring this loss. So far as appears in this case, this was an accidental fire, such a fire as this company insured against, such a fire as they engaged to pay

the loss, but upon the conditions stated in the policy. And they defend themselves in this case solely because certain conditions requiring subsequent action on the part of the insured have not been strictly complied with; and, as has been stated by counsel, it is not a question for you whether any substantial injury is done to the company by this neglect so to comply or not. It is simply a question of whether they have obeyed the written terms of the contract. And we must look at these and see whether they are so far neglected as, within the rules of law, would exonerate the Defendant from liability.

If they are, it must be exonerated; if not, justice requires that it should be held. The first objection I shall notice, made by the Defendant, is that the conditions have not been complied with requiring notice of the accident and the proof of loss. "The assured shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, etc." Now, the Plaintiff in this case says that a day or two after he gave notice to this company that this fire had occurred, there was some little dispute as to whether it was within two or three days or a week; and it is a question for you when notice was given, and whether that was within a reasonable time—whether it was within the contemplation of this condition for giving the notice forthwith. He certainly was not obliged to go to them the same night. It would be very severe to say that he should go to them the same day. His business might be such that he could not do it. In this case the Plaintiff was most interested in this matter, the building being so near in value to the security he had upon it. And it might be that the man whose name appears in the policy would never have taken any steps in it, and whatever was done was to be done by this Plaintiff, and it is for you to say whether he exercised due diligence in giving the notice. The company received the notice. Dr. Foot says that shortly after this the company gave him notice of this fire, and the president stated

that proofs would be sent to him when they came in. No objection was made at the time by the president to this notice. No objection as to neglect at that time. Plaintiff was instructed that his proof of loss must be obtained. He says that he made effort to procure the attendance of the assured, to make proof in his name; that he found the insured sick. When he was able to get him here the proof of loss (which is the second proof) was obtained and signed and sworn to by him, and the certificate of the magistrate appended, and then, with such delays as you have heard of, arising from the causes that you have heard, as remaining in the possession of some of the parties, being carried to Trenton by counsel by mistake, this paper was finally filed with the company. But before this second paper was filed with the Company, the Plaintiff, under the direction of his counsel, made out in form a proof of loss, in his own name, and on the 20th of February he presented that proof of loss to the company. It appears in evidence that objection was made to that, the ground of objection being—and I am stating these matters generally as matters not disputed, and so far as I recollect the testimony, and, if I am not correct, gentlemen, it is for you to find the facts—the objection being tbat that proof of loss was made by the Plaintiff, and not made by the insured. That was distinctly stated, as I understand the testimony, to the Plaintiff, and he then proceeded to the second, or to have the second one filed with the company to obviate that objection made by the officer of the company, and he had the proof made by the insured, and I don't understand from the evidence in this case—and that is for you to inquire into—that any objection was made to this second proof of loss that was filed. If any evidence of that was given, it has escaped the attention of the Court, but you will inquire whether any objection was made by the company to the second proof of loss, because that may be important in this case. I don't understand that any such objection was made. I understand that the company received this without making any specific objection to it.

The subsequent history of this case was mainly between counsel for Plaintiff and the adjuster of the insurance company as to the payment of the loss. You recollect what that testimony was. There is a dispute between the witnesses upon that point. Mr. McGill testifying on the part of the Plaintiff says, that in making request of payment the agent of the company positively and expressly declared that the company did not mean to pay that loss. Dr. Foot denies that; he has no recollection of having made any such declaration; on the contrary he says that he did not say anything about it, that he did not undertake by anything he said to declare that the company would not pay. Now, that is a matter for you to reconcile, for it may be important.

Now several objections on the trial of the cause are suggested to the proofs. It is objected that it does not appear in the testimony, but appears adversely, that the Justice who signed the certificate, at least of the second proof of loss, was not nearest in proximity to the fire, and that was not a compliance with the terms of the condition. That objection was not made at the time, nor at any time after the presentation of this proof of loss, nor before the trial of this case, so far as I remember the testimony. If there is any testimony on that point you will recall it, for it may be important. In the two proofs of loss that are in evidence here, the one made by the insured and the other by the Plaintiff, different magistrates have signed and made the certificate. There is some testimony in the case as to the reasons why the second magistrate did not sign it. That is in evidence for what it is worth. Whatever was said on that subject, because it was in without objection. It was said by some witness in the cause that this Justice was interested in one of the insurance companies. That would have excused him according to the terms of this condition, and would have been a ground of objection by the Defendants in the first instance if they had made it. They didn't make it, but it was good reason why the Plaintiff, if he discovered it afterwards, sought another Justice who was not liable to that objection. It

turns out, so far as I understand the evidence, that no objection was made to either of the Justices who signed the certificates.

Now as to the rule of law that governs in these cases, and it is the rule of reason and common sense, established by the Courts in this State, and which is to govern us. It is this: That where the preliminary proofs of loss are presented to the company, and they receive them without making objections or without stating what their objections are, if they have any, they are bound by them, and they are held to have waived those objections. It won't do to to wait till a man comes into Court, believing that he has complied with all the forms and requirements of the policy, and then say, "Oh! you didn't get the right Justice, you didn't make the right proof on this or that point." They are too late, and the jury have the right to say where they have failed to make their objections within reasonable time after the proof is furnished, that by reason of their silence and want of objection that they have waived them. It is for you to say in this case whether whatever objections there are to these proofs of loss have not been waived by want of objection thereto within a reasonable time after they were furnished. If you find as a matter of fact that the proofs of loss either one or the other, was received by this company and no objection made, you have a right to say, if you think so, that that is a waiver of any objections that may exist. Beside that, it does not appear in this case, as to the second—that is admitting the propriety of passing the Justice who signed the first proof of loss—it does not appear otherwise than that the Justice who signed the second one was nearest in proximity to the building.

I do not mean to discuss all the matters that have been suggested to the Court as necessary to be presented to the Jury, but only such as occur to me to be drawn into the case.

The next substantive point of objection to a recovery is, that the action is brought too soon. Upon this point there may be more difficulty. It appears that the first

paper that was filed as a proof of loss, against which I am not prepared to say that the company did not do right in objecting, was filed on the twentieth of February. There is a provision in the policy that the money shall not be due and payable to the insured till sixty days after notice and proof of loss have been put in. And there is another provision in the policy, that if they do not bring the suit within six months from the time of loss they cannot have any suit at all. So that there may come a state of circumstances when parties will be narrowed down to very close ground. But it is part of the contract, as made in these policies, and if men are willing to accept them, and insure under them, they must abide by it. Men insuring should understand what is in the policies upon which they base their hopes, for they bound by them.

Now, the first proof of loss was filed, as is admitted, on the 20th of February. This suit was commenced on the 21st of April, which was on the sixtieth day. For the purposes of this suit, my instructions to you are that the suit is brought in proper time, treating that as the time of the filing of the proof of loss. That proof of loss was objected to, and, at the instance of the company, or by reason of that objection, that proof of loss was changed. The company could have accepted the first one, for it proved the same things, in substance, except as to amount, which I will speak of. The company could have accepted that, and perhaps would have been just as well off; but they had a right, I will assume, to object to it, and require that it should be otherwise. They did not accept it; they made that objection, and the correction was made. The second, or corrected proof of loss, was not objected to. The company accepted it, and, the matter standing just in that shape, the company would have sixty days to determine whether they would pay this loss, and to pay it. They could have examined into it. And I think that is the object of this condition—to examine into the matter, and determine whether the loss shall be paid; whether there is a substantial, fundamental objection to paying the loss. But, gentlemen, if the time of making the cor-

rection in the proof of loss be regarded as the time of making proof of loss, the Court charge you that, if you believe from the evidence that the company had, irrespective of the proofs of loss, resolved not to pay this loss on ground of substance, and had so declared themselves, you have a right to regard that as evidence of a waiver of the time. And if so waived, the suit would be properly commenced if it was commenced after you find such purpose was formed and declaration was made by the company.

There are authorities holding that rule, and it is better that it shall be applied in this case. If the Court are in error in directing you that way, that error can be corrected. In this case the Court instruct you that, if you believe from the evidence that the company had resolved not to pay this money at the time of the conversation between Mr. McGill and Dr. Foot, and Dr. Foot as their agent so declared it, that the company did not mean to pay it, that absolved the Plaintiff from the necessity of waiting for the expiration of sixty days. He was not bound to wait and be barred by the clause of limitation. Some objection is made to a recovery, on the ground that the company desired to examine the insured. And it is for you to say whether any evidence appears to show that steps were taken by this company with a view to have this man examined; whether any information was brought to him or efforts made to that end. If not, that objection cannot be raised here. If they were in good faith then till such submission had been made, the right of action could not arise. That is a matter for you under the evidence.

In one of the requests to charge on the subject of the declaration of the agent that the company would not pay, it is claimed that the refusal to pay did not embrace another right which the company had of rebuilding this building. Gentlemen, if you believe that when the company refused to pay they still had in mind the purpose to exercise the right of rebuilding, and intended to be so understood when they refused to pay, that would

change the matter of the waiver of time. Did the agent mean, when he declared the company would not pay, that they might rebuild? Was there any such thing in his mind? That is for you. I think I have touched upon all the other matters in the requests to charge so far as I think the case requires.

If you find for Plaintiff, the next question is, what are the damages to be. As I understand it, and counsel must correct me if I am in error about it, at the time of the commencement of this suit there was due upon the Plaintiff's mortgage over and above the amount he had received by the sale $897.48. Counsel will make a statement of that, and hand it to the jury.

If you find the Plaintiff is entitled to recover, he is entitled to recover only such sum as is due to him as mortgagee, irrespective of amounts stated in the proofs of loss. It is only the balance that is due upon that mortgage, and that amount will be submitted to you.

Counsel agree that $906.20 is the balance, and if the Plaintiff is entitled to recover at all it cannot exceed that amount.

[And the said Justice refused to charge the jury as requested as aforesaid by the Defendant's counsel, except so far as he has already charged.]

[And thereupon the Defendant, by its counsel, prays that an exception may be allowed to so much of the charge of the Court as instructs the jury that Justice Kephart was not competent to give the certificate by reason of his interest, the point being that such interest, even if it were proven, does not disqualify him, and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]
Justice Supreme Court.

[And also that an exception may be allowed to that part of the charge which instructs the jury that there was evidence that Kephart was interested in the fire.]

THE COURT—I cannot allow you an exception to that. The jury must judge of the evidence—that is a comment on the evidence.

[And also that an exception may be allowed to that part of the charge which instructs the jury that if either one of the proofs of loss were received without objection, Defendants had waived their right to object here, and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]
Justice Supreme Court.

[And also that an exception may be allowed to that part which instructs the jury that this suit is brought within proper time, considering the first paper as a proper proof of loss, and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]
Justice Supreme Court.

[And, also, that an exception may be allowed to that part which instructs the jury that if they believe that the company had determined not to pay this loss, and so declared themselves by their agent, Dr. Foot, the jury have a right to regard that as a waiver of the time, and this suit, if commenced after such declaration, is in time, and that they were not bound to wait—to be barred by the clause of limitations — and prays that this, its bill of exceptions, may be sealed, and it is sealed accordingly].

M. M. KNAPP, [SEAL.]
Jus. Sup. Ct.

[And, also, that an exception may be allowed to that part of the charge which instructs the jury that if they believe that when the agent said the company would not pay he intended and impliedly reserved that the company would rebuild. That would change it, but it is for the jury to say whether there was any such intention, and prays that this, its bill of exceptions may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]

Jus. Sup. Ct.

The above exceptions are allowed, subject to the language used in the charge.

M. M. KNAPP.

[And, also, that an exception may be allowed to the refusal of the Court to charge as requested in each particular where the Court did not so charge, and prays that this, its Bill of Exceptions, may be sealed, and it is sealed accordingly.]

M. M. KNAPP, [SEAL.]

Jus. Sup. Ct.

EXHIBIT 1.

No. 146. $1,600

THE STATE INSURANCE CO.,

By this Policy of Insurance, in consideration of sixteen dollars, do insure Gustav Kethel against loss or damage by fire to the amount of Sixteen Hundred Dollars on his one-and-a-half story frame shingle roof building, with additions thereto, situate on the north side of Morgan Street, between Palisade and New York avenues, Town of Union, Hudson County, N. J.

[$16.00]

The one-story frame barn, used as a carpenter shop, is torn down, and therefore does not affect the above risk.

Loss, if any, payable to Henry F. Maackens, ~~to the amount of $1200,~~ as his interest may appear.

J. G. M.,
Agent.

Jan. 6, '74. Alteration as above in Mortgage Clause made this sixth day of Jan., '74.

James G. Morgan,
Agent.

Amt. insured, $1,600. Term, One Year. Rate, per cent. Premium, $16.00.

And said company hereby agree to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified, from the fifth day of January, one thou-

sand eight hundred and seventy-two, *at noon*, to the fifth day of January, one thousand eight hundred and seventy-three, *at noon;* the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same, made by the assured, shall have been received at this office, in accordance with the terms of this policy hereinafter mentioned.

1. But *provided*, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators, indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further, that it shall be optional with the company to repair, rebuild or replace the property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within sixty days after receipt of proofs herein required; and in case this company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

2. This company shall not be liable for loss by theft at or after a fire; nor for any loss or damage by fire caused by means of, or during an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical or scientific instruments, ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models or curiosities, unless particularly specified in the policy; nor from fires in buildings unprovided with good and substantial stone or brick chimneys; nor in consequence of any neglect or deviation from the laws or regulations of

police, where such exist; nor for loss or damage caused by the falling of any building, or from any fire ensuing therefrom; nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance; nor by lightning, or the explosion of a steam boiler, unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property, after the casualty by explosion or lightning; nor for loss or damage caused by removal of property from a building, except it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and the company in the proportion that the whole sum insured bears to the whole value of the property insured.

3. If an application, survey, plan or description of the property herein insured is referred to in this policy, such application, survey, plan or description, shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an over valuation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever within the control of the assured, without the assent of this company indorsed hereon; or if the property be sold or transferred, or any change takes place in title, or possession, whether by legal process, or judicial decree, or voluntary transfer, or conveyance; or if this policy shall be assigned either before or after a loss without the consent of the company indorsed hereon; or if the premium shall be unpaid; or

if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if the assured shall keep or use spirit gas, or chemical oils, without written permission in this policy; then, and in every such case, this policy shall be void.

4. This policy may be canceled at any time at request of assured, the company retaining customary monthly short rates for time the policy has been in force; it may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a rateable proportion of the premium for the unexpired term of the policy.

5. This insurance (the risk not being changed), may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representation; but no insurance, whether original or continued, shall be binding until the actual payment of the premium; but in case there shall have been any change in the risk, either within itself or by adjacent buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

6. If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or (if said property be a building or buildings), of the land on which said building or buildings stand, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void.

7. In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of

this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or *floating* policies, and without reference to the solvency or the liability of the other insurers. Re-insurance for any other insurance company to be on the basis of joint liability with said company, and in the event of loss, this company to pay its proportion of said loss sustained by said company under their policy.

8. In case of loss, the assured should use their best endeavors in saving and protecting the property from damage at and after the fire; if they shall fail so to do, this company will not be liable for damage caused by such failure; and there can be no abandonment to the company of the property insured. The assured shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all *policies* thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used, when and how the fire originated, and shall also produce a certificate under the hand and seal of a Magistrate, Notary Public, or Commissioner of Deeds (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such Magistrate, Notary Public, or Commissioner of Deeds, shall certify. And the assured shall, *if required*, submit to an examination under oath by any person appointed by the company, and if deemed necessary by the company, to a second

examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the company. Damage to property not totally destroyed shall be appraised by disinterested men, mutually chosen by the assured and the company, and the company reserves the right to take the articles damaged at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers in writing shall form a part of the proofs hereby required, one-half the appraisers' fees to be paid by the company. In case of loss on property, held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth with their respective interests therein, certified to by them. If this policy is made payable in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. And until such proofs, declarations and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy.

9. *It is furthermore hereby expressly provided, and mutually agreed*, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or Chancery, unless

such suit or action shall be commenced within six months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claims, any statute of limitation to the contrary notwithstanding.

10. *If Gunpowder, Saltpetre, Camphene, or Refined Coal or Earth Oils*, are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time, without written consent indorsed hereon, this policy shall be void.

11. It is mutually agreed that the person or persons, if any, other than the assured, who have procured this insurance, to be taken by the company, shall be deemed to be the agent or agents of the assured, and not of this company, in any transaction relating to this insurance, except such person or persons have been appointed agents of this company, in writing, under the seal of the company.

Gasoline, Phosphorus, Petroleum, Naphtha, Benzine, Benzole, or Benzine Varnish, are positively prohibited from being deposited, stored or kept in any building insured, or containing any property insured by this policy, unless by special consent, in writing, endorsed on this policy, naming each article specifically, otherwise this insurance shall be void.

Plate glass in doors or windows, when the plates are of the dimensions of three square feet or more, also fences and privies, store furniture and fixtures, must be separately and specifically insured, otherwise they are not protected by this policy.

In witness whereof, THE STATE INSURANCE COMPANY have caused these presents to be signed by their

President and attested by their Secretary, in Jersey City, and State of New Jersey, and this policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of said State Insurance Company, at Town of Union, N. J.

JOHN HALLIARD,
President.

DAVID HALLANAN,
Secretary.

Countersigned at Town of Union, this fifth day of January, A. D. 1872.

JAMES G. MORGAN,
Agent.

EXHIBITS 2 AND 3.

Morgan, on building premises north side of Morgan street, Town of Union, N. J.

OFFICE OF THE STATE FIRE INSURANCE CO.,
JERSEY CITY, 5th January, 1873.

No. 45,124.

Received of Gustav Kethel sixteen dollars, being the premium on sixteen hundred dollars, insured under policy No. 146—39,980—which is hereby continued in force for one year, to wit, from the 5th day of January, 1873, until the 5th day of January, 1874, at noon.

DAVID HALLANAN,
Secretary.

1 per cent.

Similar renewal from January 5th, 1874, to January 5th, 1875, at noon.

EXHIBIT 4.

To the State Insurance Company of Jersey City:

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

Be it known, That on this thirteenth day of December, A. D. 1874, before me, David A. Kephart, a justice of the peace, legally qualified, and residing in the Town of Union, in the county and State aforesaid, personally appeared Henry F. Maackens, of the same place, who, being duly sworn, according to law, declares under oath that the State Insurance Company of Jersey City, through its agency at the Town of Union, in said county of Hudson, did, on the fifth day of January, A. D. 1872, issue to Gustave Kethel their policy of insurance, No. 146, the written body of which, with its immediate context, is as below specified; said insurance terminating on the fifth day of January, 1873, at noon.

No. 146, the State Insurance Company, by this policy of insurance do, in consideration of sixteen dollars, insure Gustav Kethel against loss or damage by fire to the amount of sixteen hundred dollars ($1600) on his one and a-half story frame shingle-roof building, with additions thereto, situate on the north side of Morgan street, between Palisade and New York avenues, Town of Union, Hudson county, N. J. The one-story frame barn used as a carpenter shop, is torn down, and therefore does not affect the above risk. Loss, if any, payable to Henry F. Maackens, " as his interest may appear. (This was first

written, "to the amount of $1200—J. G. M., agt.") January 6, 1874. Alteration as above on mortgage clause made this sixth day of January, 1874.

JAMES G. MORGAN, Agent.

Which said policy was subsequently continued in force, by renewal, until the fifth day of January, A. D. 1875, at noon.

That in addition to the amount covered by said policy of said company, there was no other insurance made thereon.

That on the twenty-sixth day of November, A. D. 1874, a fire occurred by which the premises insured were damaged to the amount of $, as set forth in the statements and the several schedules and papers hereunto annexed, forming a part of this proof of loss, which this deponent declares to be a just, true and faithful account of the loss thereon, and the circumstances concerning said loss.

That the actual cash value of the premises so insured at the time immediately preceding the fire was $931 $\frac{70}{100}$, as will appear by the annexed statement and certificate marked schedule————, duly verified under oath, being a full and accurate description of all the property so insured, as well as the value of the same, with the damage thereto.

That the property insured, consisting of a one and a-half frame, shingle roof building, with additions thereto, belonging solely to Gustav Kethel, and had so belonged since the eighteenth day of April, A. D. 1870, and there was no other party interested therein.

That the building insured was occupied in its several parts by the parties hereinafter named, and for the fol-

lowing purposes only, to wit: As a dwelling house and a shoe mending shop, in the addition; the house was occupied by the wife of Gustav Kethel, who lived there, and the shoe mending shop was occupied by ——— ———, who worked there during the day, slept in same at night, and for no other purpose whatever.

That the fire originated don't know how. And the said deponent further declares that the said fire did not originate by any act, design, or procurement on his part, nor on the part of any one having any interest in the property insured, or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by him, and that nothing has been done by or with his privity or consent to violate the conditions of insurance, or render void the policy aforesaid, and that he will furnish, whenever required by said State Insurance Company, full particulars, exhibiting the construction of the building, including its dimensions and condition at the time of said fire, and such additional information concerning said insured property, the damage thereto, and the insurance thereon, as well by means of plans and specifications, books of accounts and other vouchers furnished, as by replies to interrogatories made, as shall be required by said company.

And the insured claim of the State Insurance Company by reason of said loss, damages and policy of insurance, the sum of nine hundred and thirty-one $\frac{70}{100}$ dollars as follows:—

His interest being as mortgagee to the amount of $, being the amount of decree of foreclosure of a mortgage held by deponent on said property with interest and costs. The land upon which the house insured stood was sold by the sheriff of Hudson County, under and by virtue of execution from the Court of Chancery of New Jersey, under a decree for the foreclosure of Defendant's mortgage and sale of said prem-

ises to deponent for the sum of , leaving unpaid of the decree and costs ordered to be paid deponent the sum of , which is deponent's interest on said insured premises.

H. F. MAACKENS.

Subscribed and sworn to before me, this 13th day of February, 1875.

D. A. KEPHART,
Justice of the Peace.

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

I, DAVID A. KEPHART, a Justice of the Peace, residing in Town of Union, nearest and most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire and damage as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that he has by misfortune, and without fraud or evil practice, sustained by the said described fire, loss and damage to the amount of nine hundred and thirty-one $\frac{70}{100}$ dollars.

The above is a mortgagee's claim, and any portion of said claim is in my opinion just, and this proof and jurat is made for mortgagee and not for Gustav Kethel.

In testimony whereof, I have hereunto set my hand and official seal this thirteenth day of February, A. D. 1875.

D. A. KEPHART, [SEAL.]
Justice of the Peace.

EXHIBIT 5.

To the State Insurance Company of New Jersey :—

By your Policy of Insurance, No. 146, dated January 5th, 1872, issued at your agency, at Town of Union, N. J., and continued by renewal No. 51,353 to the fifth day of January, 1875, you insured Gustav Kehtel against loss and damage by fire, as more fully appears by the printed portions and conditions of said policy, the written portion being as follows, viz: Sixteen hundred dollars, on his one-and-a-half story frame shingle roof building, with additions thereto, situate on the north side of Morgan street, between Palisade and New York avenues, Town of Union, Hudson county, N. J. On the sixth day of January, A. D. 1874, an endorsement was made upon the said policy, as follows, viz: Loss, if any, payable to Henry F. Maackens, as his interest may appear. Also, there was no other insurance on said property.

A fire occurred on the twenty-sixth day of November, A. D. 1874, at about the hour of seven o'clock A. M., and originated as follows, viz: Unknown.

The actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made, was as follows, viz: Twelve hundred dollars on the building insured in said policy.

Total sound value, and total loss or damage, $1,200.

[For a more particular statement of same see "Schedule A" annexed.]

Amount claimed of the State Insurance Company, $1,200.

The property insured belonged exclusively to Gustav Kethel, who held the same in fee simple.

The building insured or containing the property destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: The main building by Gustav Kehtel, and Henry Rabe occupied one room on first floor.

The said fire did not originate by any act, design or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him; that nothing has been done by or with his privity or consent to violate the conditions of the policy, or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and were in the possession of, the said assured at the time of said fire.

GUSTAV KEHTEL. [L. S.]

Personally appeared, Gustav Kethel, signer of the foregoing statement of loss, and made solemn oath to the truth of the same, before me, this twenty-third day of December, A. D. 1874.

[L. S.] AUGUST MOLLER,
Notary Public.

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

I, Charles Gerlich, a Justice of the Peace, in and for said county, residing most contiguous to the property of Gustav Kethel, insured as set forth in the preceding affidavit, certify that I am not concerned in said loss or interested in said claim, either as a creditor or otherwise, or related to the assured or sufferers, and that I am acquainted with the character and circumstances of the said assured, and having made diligent inquiry into the facts

set forth in the foregoing statement, believe and know that the said assured was really, by misfortune, without fraud or evil practice, sustained by the described fire, loss and damage to the amount of twelve hundred dollars, the sum stated in his affidavit of loss.

In testimony whereof, I have hereunto set my hand and official seal this 19th day of February, A. D. 1875.

CHARLES GERLICH,
Justice of the Peace.

N. J. COURT OF ERRORS AND APPEALS,

IN THE LAST RESORT, ETC.

THE STATE INSURANCE COMPANY,
Plaintiff in Error,
—VS.—
HENRY F. MAACKENS,
Defendant in Error.

Assignment of Errors.

Afterwards, that is to say, on the third Tuesday of November, in the year of our Lord, eighteen hundred and seventy-five, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey comes the said The State Insurance Company by Collins & Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matter recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit: That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Henry F. Maackens to have his said action against the said The State Insurance Company. There is also manifest error in this, to wit: That on the trial of the said cause in the Supreme Court Circuit, held in and for the County of Hudson, the Justice before whom said cause was tried, admitted incompetent and illegal evidence produced by said Henry F. Maackens, and objected to by the said The State Insurance Company; whereas, by the law of the land said evidence was illegal and incompetent, and ought not to have been admitted: therefore, in that there is manifest error.

There is also manifest error in this, that on the trial of the said cause, and after the testimony on behalf of the said Henry F. Maackens, the Plaintiff below, was closed; the Justice before whom said cause was tried refused to order judgment of non-suit thereon, although moved so to do by the said The State Insurance Company, the Defendant below, through its counsel and although by the law of the land, judgment of non-suit ought to have been ordered; therefore, in that there is manifest error.

There is also manifest error in this, to wit: That the said Justice before whom said cause was tried on the trial thereof, after the evidence was closed on both sides, charged the jury among other things as follows:—"It was said by some witness in the cause that this Justice was interested in one of the insurance companies. That would have excused him according to the terms of this condition." (From giving a certificate required to be appended to the proof of loss); whereas, by the law of the land the said Justice should not have so charged; therefore, in that there is manifest error.

There is also manifest error in this, to wit: That the said Justice, before whom said cause was tried, at the trial thereof, after the evidence was closed on both sides, charged the said jury, among other things, as follows: "If you find as a matter of fact that the proof of loss, either one or the other, was received by this company, and no objection made, you have a right to say, if you think so, that this is a waiver of any objection that may exist." Whereas, by the law of the land, the said Justice should not have so charged. Therefore in that there is manifest error.

There is also manifest error in this, to wit: That the said Justice, before whom, etc., at the trial, etc., after, etc., charged the said jury, among other things, as follows:

"Now, gentlemen, proof of loss was filed, as is admit-

ted, on the twentieth day of February, in the year eighteen hundred and seventy-five; this suit was commenced on the twenty-first day of April, which was on the sixtieth day. For the purpose of this suit, my instruction to you is that the suit is brought in proper time, treating that as the time of the filing of the proof of loss."

There is also manifest error in this, to wit: That the said Justice, before whom, etc., at the trial, etc., after, etc., charged the said jury, among other things, as follows: "In this case the Court instructs you that if you believe from the evidence that the company had resolved not to pay this money at the time of the conversation between Mr. McGill and Doctor Foote, and Doctor Foote, as their agent, so declared that the company did not mean to pay it, that absolved the Plaintiff from the necessity of waiting for the expiration of sixty days; he was not bound to wait and be barred by the clause of limitation."

There is also manifest error in this, to wit: That the said Justice, before whom, etc., at the trial, etc., after, etc., charged the said jury, among other things, as follows: "In one of the requests to charge on the subject of the declaration of the agent that the company would not pay, it is claimed that the refusal did not embrace another right which the company had, of rebuilding this building. Gentlemen, if you believe that when the company refused to pay they still had in mind the purpose to exercise the right of rebuilding, and intended to be so understood when they refused to pay, that would change the matter of the waiver of time. Did the agent mean, when he declared the company would not pay, that they might rebuild? Was there any such thing in his mind? That is for you." Whereas, by the law of the land, the said Justice should not have so charged; therefore in that there is manifest error.

There is also manifest error in this, to wit: That the

said Justice before whom, etc., at the trial, etc., after, etc., when the said the State Insurance Company, by its counsel, requested the said justice to charge the said jury as follows, to wit:—

"*First*—That if the assured, Gustav Kethel, did not forthwith, after the fire, give notice of the loss, and as soon after as possible render a particular account of such loss to the Defendant, according to the terms of the policy, the Plaintiff cannot recover.

"*Second*—That the proofs of loss required by the policy to be furnished in this case are proofs to be made by the assured, and that the assured in this case is Gustav Kethel.

"*Third*—That unless such particular account of such loss, required by the policy, was furnished within a reasonable time, Plaintiff cannot recover.

"*Fourth*—That under the circumstance of this case, from November 26, A. D. 1874, to March 30, A. D. 1875, is not a reasonable time for such purposes; and that from November 26, A. D. 1874, to February 20, A. D. 1875, is not a reasonable time for such purpose.

"*Fifth*—That if Plaintiff had control of the proofs of loss made by the assured from February 19, A. D. 1875, to March 30, A. D. 1875, and through neglect or wilfully did not furnish them to the company, he cannot recover.

"*Sixth*—That unless the certificate required by the policy to be furnished to the Defendant was made by the nearest magistrate, or other officer named in the policy, Plaintiff cannot recover.

"*Seventh*—That if this action was brought within sixty days after furnishing proofs of loss to the Defendant, the Plaintiff cannot recover.

"*Eighth*—That because the proof does not sustain the declaration, Plaintiff cannot recover.

"*Ninth*—That no waiver of any right or condition by the Defendant is operative, unless it was made on good consideration, or unless if not enforced, the Defendant will lose a substantial right which he had at the time of the waiver.

"*Tenth*—That if the Plaintiff could not have sustained his action after sixty days after proofs of loss were furnished, then refusal to pay, made within that time, will not authorize a recovery in this action.

"*Eleventh*—That a statement is made by the adjuster before the expiration of the sixty days that the company would not pay the loss, the company, by the policy, having the privilege of rebuilding, would not authorize the bringing of the suit within the sixty days.

"*Twelfth*—That if the Defendant required the examination of the assured, Gustav Kethel, under oath, and the adjuster so informed the Plaintiff, and the assured did not offer himself and was not produced for examination, the Plaintiff cannot recover in this action.

"*Thirteenth*—That the verdict of the jury should be for the Defendants."

The said Justice refused so to charge, whereas, by the law of the land he should not have so refused, but should have charged in accordance with the said requests, or some or one of them, as to which he did not charge as requested; therefore in this there is manifest error.

There is also manifest error in this, to wit: That by the record aforesaid it appears that the judgment in the plea aforesaid was given for the said Henry F. Maackens against the said The State Insurance Company, when, by the law of the land, judgment in the said plea ought to

have been given for the said The State Insurance Company against the said Henry F. Maackens; and therefore in that there is manifest error.

And the said The State Insurance Company prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment.

COLLINS & CORBIN, 10

Att'ys. for Plff. in Error, and of Counsel.

Defendants filed common joinder in error.