STARBUCK & DUNHAM, Law Printers, 165 Market Street, Newark, N. J.

NEW JERSEY
Court of Errors and Appeals.

SOLOMON S. SONNEBORN, vs. THE MANUFACTURERS INSURANCE COMPANY.	In Error to the Supreme Court.

POINTS for Plaintiff in Error.

The sole question presented by the writ of error in this case is whether the Court, on the trial of the cause, rightly non-suited the plaintiff. The cause was tried at the Essex Circuit Court at the September term, 1881.

The policy of insurance was for $2000, upon the furniture of plaintiff, described in the policy as—

"All contained in the three-story frame shingle roof building, 40x50 feet, with two three-story frame shingle roof wings, each 30x72 feet, situate, detached, at Schooley's Mountain, Morris Co., N. J., (formerly known as 'The Forest Grove House,') *and to be occupied as a private summer residence by the assured. It is hereby understood and agreed that the said premises are not to be used as a hotel or boarding house, and that they are not to be left unoccupied any portion of the year.*" (Case, page 9, lines 17 to 27.)

On the trial the following facts appeared, as is shown by the bill of exceptions.

Plaintiff purchased the Forest Grove House in January, 1881, of Mr. Stoutenburgh, (page 43,) and effected insurance on the furniture contained therein, February 8, 1881, in the defendant's Company. The building corresponded to the description recited in the policy, and contained some ——— rooms. At the time of the purchase, and when the insurance was effected, one Alfred A. Smith lived with his family in four rooms in the extreme end of one of the wings. His engagement was to live in the house from month to month, and take care of the poultry which was at the barn. He paid no rent, and had no access to the main building, the keys of which were kept by Lawrence Hunt, a neighbor. His engagement commenced in November, 1880, and terminated April 5, 1881, by its own limitation. He had a family, consisting of a wife and three children, who lived with him in the four rooms before mentioned (case, pages 23 to 25). On the 19th of March, 1881, plaintiff hired one Ferdinand O. Hoffman, then residing at Flatbush on Long Island, to go to Schooley's Mountain, and take charge of the place as gardener. Hoffman went to the place on March 22nd ; and the arrangement was that Hoffman and his family should occupy the rooms occupied by Smith as soon as he should vacate them (case, page 29, also page 35, line 47, also page 36, line 40, also page 52, line 38). Hoffman's wife was confined on the 17th of March, and by reason of her illness consequent upon her confinement (which continued longer than was expected) she was unable to remove to Schooley's Mountain until April 19th.

When Hoffman went to the place in March he obtained the keys of the main building from Mr. Hunt, and assumed general charge of the place. He lodged and had his breakfast and supper at the house of one Jesse Miller, who lived about a quarter of a mile away; he habitually went to the premises at half-past five or six o'clock in the morning, carried his dinner with him and occupied himself in and about the premises each day until dark, (pages 31 and 32.)

Smith moved away on the 5th of April, being two weeks after Hoffman had commenced work. On the same day Hoffman brought the horses to the barn on the premises, and a few days afterward the cows, (p. 30,) this stock having been kept through the winter at Mr. Hunt's. From this time until April 19th Hoffman continued to work on the place, caring for the stock, milking the cows and going twice a day with the milk through the main building to the kitchen (which was in the extreme end of the other wing) and leaving it there. On the 19th of April, about noon, the building took fire from some leaves and brush which Hoffman was burning, and was totally destroyed with the insured furniture. On the same day Mrs. Hoffman went with her family from Flatbush to Schooley's Mountain and arrived there after the building had been burned.

Plaintiff, who resided in New York, had not been informed of Mrs. Hoffman's detention by her continued illness, and did not know that she had not gone there on the fifth of April, as had been agreed upon and intended, until after the fire.

Under these circumstances, when the plaintiff

rested his cause, defendant's counsel moved the Court for judgment of non-suit on the ground:

1.—That the policy was avoided, because the condition, that the premises were not to be left unoccupied any portion of the year, had been violated, and he claimed that neither the occupation of Smith, nor the subsequent occupation by Hoffman, was such an occupation as was required by the condition contained in the policy. The Judge held that the occupation by Smith was a substantial compliance with the condition, but that Hoffman's was not, and therefore non-suited the plaintiff.

The only Error assigned is the granting of the non-suit.

I.

The Court erred in its construction of the condition in this policy, in holding that it was violated.

There are undoubtedly cases in which the courts have held that the word "occupied" as used in those cases meant having the place habitually as a place of abode for human beings. But each case must be judged by its own circumstances and language, which under some conditions may well be held to bear that meaning, under other circumstances will be construed differently. It may be fairly deduced from the language of this contract that the occupation here spoken of did not relate to a family residence. It was plainly understood that the plaintiff was not to reside there, except in Summer. He did not reside there when the policy was entered into. It was further stipulated that it was not to be used as a hotel, or boarding house, and those were the only uses to which the premises

could be put involving the occupation by a family. The parties then agree that the premises are not to be *left unoccupied* during any portion of the year. In that connection, what are the meaning of the words "left unoccupied during any portion of the year?" It means that the property is not to be abandoned, or left uncared for, during the season when the owner was not there. The words "*left unoccupied*" imply abandonment, a wilful vacation of the premises, and leaving them uncared for. Such a covenant must be construed by what we may understand the parties desired to secure by it. It was for the benefit of the Company, and clearly was designed to secure that watchfulness and care over the property which would result from the presence of some competent person having charge of the property, and exercising over it the same kind and degree of care and watchfulness as would be shown by a person residing there.

The Judge undoubtedly decided rightly in holding that the occupation by Smith was a compliance with this condition.

Harrington v. Fitchburgh Ins. Co., 129, Mass. 129.

The building was all one building, Smith occupied four rooms, and had no access to, or care over, the main portion of the other wing, the keys of which were not in his custody. It never could have been contemplated that every room, or any large portion of the rooms, should be occupied during the owner's absence. The hotel and boarding house clause forbid such an intention. Now, if Smith's occupation satisfied the policy, so that the Company got thereby the protection and guardian-

ship over the property it contemplated surely it got the same objects in a greater degree by Hoffman's occupation. His duties required him to be about the house constantly. He had the keys. He brought the stock to the barn. He entered and passed through the house twice daily, and used it as a place to care for the milk. He ate his dinner there, and certainly served much better the purpose which such conditions are designed to secure than Smith's occupation did. It is respectfully argued that if there is any reason for a distinction between the occupancy of Smith and that of Hoffman the latter was much more favorable to the Company than Smith's.

II.

The case shows that the house was a place wherein human beings habitually resided. Smith habitually resided there with his family. Hoffman was employed to reside there habitually with his family. But for the accidental interruption of this habitual residence by Mrs. Hoffman's unexpectedly protracted sickness it would have continued to be a place where human beings habitually resided. Such an accidental and temporary interruption could not be fairly said to destroy the habitual character of the residence.

Suppose there had been no fire, and Mr. Hoffman had moved in on the 19th, and continued to occupy until June or July, when the owner came in, could anybody fairly say that the place was not one in which human beings habitually resided?

The words "left unoccupied during any portion of the year" mean something different from such

an occupation and use of these premises as were shown in this case. See—

Phœnix Insurance Company v. Tucker, 92 Ill., 64.

S. C., 34 Am. R., 106.

Whitney v. Black River Insurance Company, 72 N. Y., 117

Adm's of Stone v. U. S. Casualty Company, 5 Vr., 371.

Kelly v. Home Insurance Company, 2 Central Law J., 476.

Stupitzkie v. Transatlantic Fire Insurance Company, Sup. Ct. of Michigan, April, 1880.

S. C., 10 Central Law Jour., 476.

The acts of possession and care over the house coupled with the intent habitually to reside, such residence being temporarily and accidentally interrupted, bring this case within the true meaning of the word "occupied," and constituting occupancy as truly as a temporary absence of an habitual resident.

III.

The authorities above cited bring this case clearly within the exception recognized by the Judge in granting the non-suit.

"The mere cessation of occupation between the leaving of one tenant and the coming in of another would not be a violation of the policy; neither would the temporary absence of the owner, if he could be said to have the place habitually as a place of abode."

It is clear that the owner of this place did have it habitually as a place of abode, for his employees in his absence and for himself in Summer. The habit was to have it so occupied. The intention was to have it so occupied, but every such covenant is made subject and with reference to the accidents and incidents which happen to temporarily suspend the habit, such as sickness, death, accident, &c.

It was strictly a case of one tenant moving out and another moving in, with the added incident of sickness delaying the moving in. The premises, in the meantime, being more carefully guarded than if Smith had continued an occupancy admitted to have been sufficient.

IV.

It should have been left to the Jury to say whether the facts did not bring the case within one of the exceptions admitted by the Court.

V.

It is not pretended that the loss was occasioned, or the danger aggravated, by the change in the character of the occupancy from Smith to Hoffman. Had Smith still remained in the house when the fire occurred his being there would not have made the least difference in the result. Unless, therefore, the rule of law is arbitrary and inflexible on the well settled principle that such conditions are to be considered more strongly *contra proferentem*, the equities of the case require that this non-suit shall be set aside.

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N. J. Court of Errors and Appeals.

SOLOMON S. SONNEBORN, *vs.* THE MANUFACTURERS' INSURANCE COMPANY.	*On Writ of Error.*

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BRIEF OF JOSEPH COULT,

For Defendant in Error.

FACTS.

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On the eighth day of February, 1881, Sonneborn, the plaintiff in error, applied for and obtained of The Manufacturers' Insurance Company, the defendant in error, a policy of insurance for the sum of $2,000, for the term of one year, on his furniture and household goods contained in three-story frame building, detached, situate at Schooley's Mountain, in this State. The policy, in the body thereof, contains these provisions, written in ink—

"To be occupied as a private summer residence by "the assured. It is hereby understood and agreed that "the said premises are not to be used as a hotel or board-"ing house, and that they are not to be left unoccupied "any portion of the year."

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It also contained the following additional provisions—

"This policy shall become void unless consent in "writing is endorsed by the company hereon, in each of "the following instances. * * * * * * If any "building herein described be or become vacant or un-"occupied for the purposes indicated in this contract."

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The building described in the policy, together with the property therein insured, were destroyed by fire on the nineteenth of April, 1881. Suit was brought upon the policy on the first day of August, 1881, proofs of loss having been previously submitted to the company. Among the defences set up by the Company, it was claimed that the conditions of the policy in regard to occupation had been violated, and the contract thereby rendered void.

10 The cause came on for trial at the September term of the Essex Circuit. It appeared by the testimony taken at the trial, that the plaintiff purchased the property insured during the month of January last; that he became the owner of the real estate upon which the buildings were situated, and the furniture contained in the buildings at the same time, and that at the time he purchased, one portion of the building—the end of one wing—was occupied by Alfred A. Smith and his family—himself, his wife, and three children—and that Smith continued 20 in such occupation to the fifth day of April, 1881, on which day he and his family moved out. Prior to his leaving Mr. Sonneborn, the owner, had made an arrangement with a German by the name of Ferdinand O. Hoffman, who lived at Flatbush, Long Island, to take his family and go up to Schooley's Mountain and take possession and occupy the premises. It seems to have been the intention that he should move in before Mr. Smith moved out. Mr. Hoffman went to Schooley's Mountain 30 on the twenty-second of March. He took board in the vicinity at the house of one Isaac Miller, about half a mile from the building described in the policy. He expected his family to come up soon, but his wife being confined on the seventeenth of March, they were prevented from coming, and did not arrive at Schooley's Mountain until the evening of the day on which the house was consumed by fire. Mr. Hoffman continued to board at Miller's. He took possession of the key to the main building, which seems to have been in 40 the possession of Lawrence Hunt, about a week after

his arrival at Schooley's Mountain, and appears to have had a general oversight, working on the premises in the day-time. His care of the premises was confined to an occasional visit to the house, and to work in the yard and garden, milking the cows, feeding the chickens, &c.

From the fifth day of April to the nineteenth day of April, a period of two weeks, no person slept upon the premises insured. No person occupied the building for any purpose, or in any manner; it was wholly unoccupied. 10

Mr. Sonneborn intended, so it appears from his testimony, that Mr. Hoffman and his family should occupy the building after it was vacated by Smith, and he says he was not aware they had been unable to move in, until after the buildings burned.

This was substantially the testimony on the part of the plaintiff as to the occupation. It is certainly stating it as strongly for the plaintiff as the testimony will warrant. 20

On the nineteenth of April, and prior thereto, Hoffman had been raking up leaves and sticks in bunches and burning them on the premises near the building insured. From one of these burning heaps of leaves and brush the fire evidently communicated to the building by running through the grass and leaves, and it was soon consumed with its contents. Hoffman at that time had the keys of the building in his pocket, and after making some attempt to get water from the barn, raised an alarm, too late, however, to save the building or its contents. 30

At the close of the plaintiff's case the defendant moved the Court to non-suit the plaintiff, and the motion was granted. The plaintiff's counsel excepted to the ruling of the Court, and this brings the question to this Court—whether the judge at the Circuit erred in granting the motion to non-suit.

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The Court, in granting the non-suit, said—

"With respect to the written matter contained in this "policy, under the decision of the Supreme Court of this "State, in the case of *Dewees* vs. *The Manhattan Ins. Co.*, "'that description' (referring to the condition in relation "to occupation, &c.,) 'is a warranty, and is subject to "'that rule of law, that in policies of insurance warranties "'are considered to be conditions, and conditions upon "'the non-performance of which the contract fails.'"

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In regard to the occupation, he said:

"With respect to the period of time which elapsed "after Mr. Smith removed, I think it very clear that "these premises were unoccupied. The proof is that, "after Mr. Smith moved out, all that the man who suc-"ceeded him did was to supervise and oversee the build-"ing, and take care of the cattle and grounds. The "word occupied has received a construction in the books "that I think is entirely settled, and in respect to which "there can be no controversy. It is used in the case of "*Stone* vs. *The Casualty Ins Co.*, and in all the books on "this subject as a place where a human being habitually "resides."

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I.

THE CONDITIONS WRITTEN IN THE BODY OF THE POLICY WITH RELATION TO THE OCCUPATION OF THE PREMISES IN WHICH THE GOODS INSURED WERE SITUATE, ARE EXPRESS WARRANTIES AND MUST BE STRICTLY AND FULLY PERFORMED BY THE INSURER, ELSE THE CONTRACT ENDS.

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In his work on *Fire Insurance*—2d edition, 1874, at page 298—Mr. Flanders says:

"A clause, too, may be inserted in the policy binding "the insured to have the premises occupied the entire "year, and also not to carry on any unlawful business "therein. In the latter case, if the premises should be "occupied as a hotel without a license, or, in the former

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"case, should be permitted to remain unoccupied, the "insurance would be defeated."

Citing *Campbell* vs. *The Charter Ins. Co.*, 10 Allen, 213.

And that such a stipulation is not satisfied or complied with by allowing tools to remain in it, or by its being visited daily for examination, he says:

"The stipulation means that the building is to be oc- "cupied practically, that is, used for the purpose of oc- "cupation." 10

Citing *Keith* vs. *The Quincy Ins. Co.*, 10 Allen, 228.

Lord Eldon, in the case of *Newcastle Ins. Co.* vs. *MacMahon*, 1 Dow, 225, laid down this principle in insurance law. He said:

"It is a first principle in the law of insurance * * "* * * that if there is a warranty, it is part of the "contract that the matter is such as it is represented to "be. Therefore the materiality or immateriality signi- 20 "fies nothing. The only question is as to the mere "fact."

The same principle so early stated and applied has been uniformly held by our Courts. Judge Depue, in his statement of the law, said:

"I believe that construction of these provisions in "policies of insurance is universal."

The last case in our own Courts on this subject is that of 30

See also *Sayles* vs. *Ins. Co.*, 2 Curtis, C. C. U. S., 612.

Witherill vs. *Ins. Co.*, 49 Maine, 200.

Dewees vs. *Ins. Co.*, 5 Vroom, 244.

This principle is applied to covenants against non-occupancy.

Harrison vs. *Ins. Co.*, 9 Allen, 231.

Hartford Ins. Co. vs. *Webster*, 69 Ill., 392. 40

II.

By the Terms of the Contract it became void when the Building, in which the Goods Insured were, became unoccupied.

In addition to the warranty in relation to occupation, there is contained in this policy a direct, positive and plain agreement that it should be void if the building described therein be or become vacant or unoccupied for the purposes indicated in the contract, unless by the consent of the Company endorsed thereon.

It is not pretended that such consent was even applied for. If then the building in which the property insured was situate became unoccupied, the contract by its terms was at an end.

It is well established that where parties to an insurance contract agree upon the terms upon which the contract shall be void, Courts will enforce the provisions whether material to the risk or not. The principle is adopted with reference to fire and life insurance policies alike, and where there is no question of fact to be determined by the jury a non-suit will be given or a verdict directed.

Ætna Life Ins. Co. vs. *France*, 91 U. S., 511.
Jeffries vs. *Life Ins. Co.*, 23 Wall., 47.

The principle recognized and enforced in these cases, is, that parties to an insurance contract may stipulate that the contract shall be void in certain contingencies, and, if these occur, whether material to the risk or not, it will be so declared on the ground that they have the right to make such a contract.

III.

Occupation of a Dwelling House is the Practical Use of it as a Dwelling by persons living in it.

The premises destroyed by fire were left unoccupied during a portion of the year, to wit, from April 5th to April 19th, and the policy thereby became void.

To constitute occupancy there must be a practical use of the building in which the property insured was located, for the purposes for which it was constructed. A dwelling house is to be dwelt in. The aim of the insurer is not to obtain supervision of watchmen from without, but it is to secure that care which is given by persons dwelling within the building, such as would prevent or discourage incendiarism, and secure at all proper times the presence of persons ready and watchful in case of an alarm who could meet the fire at its earliest stages, prevent a serious conflagration, save movable property and reduce the damage to a minimum amount. 10

In this very case dwellers in the house, occupants of it, would unquestionably have saved the building, and would certainly have prevented the loss of its entire contents.

An early case on this subject is the one above cited.

Keith vs. *Ins. Co.*, 10 Allen.

In that case the question was what constitutes occupancy ; the building was used as a trip-hammer shop. The Court charged on the question of occupancy as follows: 20

"It is not sufficient to constitute occupancy that the "tools remained in the shop, and that the plaintiff's son "went through it almost every day to look around and "see that things were right; *some practical use must be "made of the building.*"

On appeal this direction was held correct.

In the case of *The Ins. Co.* vs. *Padfield*, 78 Ill., 108, the Court defines non-occupancy of a dwelling thus: 30

"A fair and reasonable construction of the language "'vacant and unoccupied,' is that it should be without "an occupant, without some one living in it."

In the case of *Paine* vs. *Agricultural Ins. Co.*, 5 T. & C., 619, Mullin, Judge, says:

"Occupation of a house is living in it, not mere super-"vision over it. Constant occupation," he continues, "is required by the insurer, because the danger of fire is "believed to be lessened, and if it should happen the 40

"probability of its extinguishment before serious injury "is done is materially increased."

In the case of *Whitney* vs. *The Black River Ins. Co.*, 9 Hun., 37,
Affirmed in 72 N. Y., 117,

Learned, Judge, says:

"The words 'vacant and unoccupied' must be con-"strued with reference to the kind of building or struc-"ture on the premises; occupation of a dwelling house "is living in it. * * * * Nor does it appear to me "that the intent of the owner is of any use in determin-"ing the question of non-occupancy. A house is none "the less vacant because the owner intends to occupy "it again."

In the case of *Ashworth* vs. *Builders' Ins. Co.*, 112 Mass., 422, the question as to what constitutes occupation arose.

The Judge, (Colt,) says:

"The policy declares that buildings unoccupied are "not covered unless insured as such; this in description "of subject matter of the insurance. It is a stipulation "on the truth and fulfillment of which the contract de-"pends, and the insurer has a right to insist on a strict "compliance. It is decisive of this case, * * * for "the facts stated do not show an occupancy of either the "house or barn within the meaning of the policy. Oc-"cupancy as applied to such buildings implies an actual "use of the house as a dwelling place, and such use of "the barn as is ordinarily incident to a barn belonging "to an occupied house. * * * The insurer has a "right by the terms of the policy to the care and super-"vision which is involved in such an occupancy."

In this case the proof disclosed that the house was used by the assured and his servants for the purpose of taking their meals in it while at work on a contiguous farm, and the barn for storing hay and farming tools.

In the case of *Cook* vs. *Continental Ins. Co.*, 9 Ins. Law Jour., 87, a case in the Supreme Court of Missouri, the

condition of the policy was that it should become void if the premises insured, a dwelling house, should become unoccupied without the consent of the company. The house was located at Sedalia. Two weeks before the fire the assured moved to Kansas City, took a part of the furniture, left part; left the house in the possession of J. S., who was instructed to keep possession until rented. D. L., an agent, was to rent it. J. S. left for Kansas City two or three days before the fire; left the keys with D. L., who was to take charge in his absence. J. S. slept in the house when in Sedalia; did not take his meals there; *held* that the house was unoccupied and the policy void.

Although the conditions in the case of *Poor* vs. *Humboldt Ins. Co.*, 125 Mass., 274, were different somewhat from those contained in the policy in this case, yet the remarks of Judge Ames apply with great force; he says:

"The stipulation that a family should live in the house "throughout the year is an express warranty, and with-"out its liberal and exact fulfillment the policy would "cease to be binding on the company. Its natural in-"terpretation would be that during the year the house "would be under that kind of care and supervision "which would be furnished by the ordinary and con-"tinuous use and occupation of a family keeping house "in it and making it their home. It is manifest that "security against fire furnished by such a use of the "house would be more effectual than the occasional "though frequent visits of watchmen."

In our case we were entitled to such care and supervision as would be furnished by the ordinary use of the building in which the property insured was located, by an occupant living in it and making it his home.

I refer the Court also to an instructive case recently decided by the Supreme Court of Penn.

McClure vs. *Watertown Ins. Co.*, 9 Vol. Ins. Law Journal, 209; 90 Pa. State Rep., 277.

In this case the Court held that stipulations of the character under consideration were reasonable and fair and ought to be fairly interpreted and strictly enforced; that they are for the benefit of the insured as well as the insurer. It was urged in this case that the insured had in good faith endeavored to fulfill the condition; that the premises became vacant by the removal of a tenant without his knowledge; that he immediately sought for a new occupant and notified the company. In the short
10 interim the premises were burned.

The Court says:

"It is urged the plaintiff's tenant left the premises "without his knowledge and consent, and that as soon "as he discovered the fact he endeavored to procure a "new one. This may be all admitted as true, but then "who was to bear the risk in the meantime? Not the "Company, for it had expressly provided it would not "assume such risk. What then mattered the good in-"tention of the plaintiff?"

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The direction of the Judge below that a verdict be returned for the defendant was sustained. The Court cited and approved the cases in Massachusetts, above referred to, and also the case of

Corrigan vs. *The Ins. Co.*, 122 Mass., 298.

Two recent cases in the Court of Appeals in New York, which fully illustrate the position for which I am contending, remain to be noticed. The first is the case of

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Herrman vs. *Merchants' Ins. Co.*, decided in June, 1880, reported in 81 N. Y., 184.

In this case the policy contained a stipulation that it should be void if the premises should become "vacant *and* unoccupied." The dwelling was used as a summer residence by the insured, which he left in November, 1876, removing to the city of New York with his family, intending to return about the middle of May following. The house was left furnished throughout, and left in
40 charge of a person who lived near by. It was held by

the Court that though "unoccupied" the house was not "vacant." That a house thoroughly furnished from which the owner has removed for a season intending to return is not in any sense a vacant house. That many houses in the city and elsewhere are intended for use only in the summer or in the winter, and for ought the Court knew these two words "*vacant and unoccupied*," were adopted with a view to insurance upon that class of houses. In this case a verdict had been directed for the plaintiff. There was no question of fact, the Court held, for the jury, and no error in directing a verdict.

Later, the same plaintiff, Herrman, in a case against the Adriatic Ins. Co., (which gave a policy on the same risk,) came before the same Court, where the condition of the policy was that it should be void if the premises insured became "vacant *or* unoccupied." The facts in the last cases cited are so analogous to those in the case before the Court that I have considered it proper to state them as briefly as I can.

Herrman did business in New York. He had a country residence at Lloyd. His establishment consisted of several buildings and out buildings, his dwelling, a farmhouse, stables, barns, &c., all of which were insured. The dwelling was burned in April, 1877. He had left with his family in November, intending to return in May his farm house continued to be occupied by the farmer and his family. It was a short distance from the dwelling burned. This was left in charge of the farmer, fully furnished. Members of the farmer's family visited it weekly, overseeing and taking care of it, and ventilating it; they had the keys. The insured visited the house as often as once a fortnight during his absence in the city. The grounds were in charge of the farmer and his family as well as the other buildings.

Chief Justice Folger delivered the opinion of the Court in this case. I quote from his opinion:

"The question in agitation at the trial term and at the "general term was whether the policy was avoided by "a breach of the condition that if the premises should

"become vacant or unoccupied, and so remain for more
"than thirty days, without notice to and consent of the
"defendant in writing, the policy should be void.

"The plaintiff contends that the two words 'vacant'
"and 'unoccupied' are synonymous, and are to be inter-
"preted as having the same meaning, and that that
"meaning is 'empty'; and then argues that as the dwel-
"ling house was not empty, there was no breach of the
"condition. There are doubtless conditions of a dwel-
10 "ling house or other like structures where either word
"applied to it, or both words applied to it, will express
"a like state of it. There are, however, states of it
"where that will not be the case. It is so when the dif-
"ferent things that are receptive of the epithets of va-
"cant and unoccupied are different in their capacity of
"being filled or occupied. Some cannot have one of
"those terms applicable to them without the other at the
"same time being also applicable. Some from the
"nature of the use which goes with the occupation of
20 "them, may not be vacant and yet they will in any just
"use of the term, as applicable to them, be unoccupied.
"A dwelling house is chiefly assigned for the abode of
"mankind. For the comfort of the dwellers in it, many
"kinds of chattel property are gathered in it, so that in
"the use of it, it is a place of deposit of things inanimate,
"and a place of resort and tarrying of beings animate.
"With those animate far away from it, but with those
"inanimate still in it, it would not be vacant, for it
"would not be empty and void, and as a possible case,
30 "with all inanimate things taken out, but with those
"animate still remaining in it, it would not be unoccu-
"pied, for it would still be used for shelter and repose,
"and it is because that in our experience of the purpose
"and use of a dwelling house, we have come to associate
"our notion of the occupation of it with the habitual
"presence and continual abode of human beings within
"it, that word applied to a dwelling always raises that
"conception in the mind. Sometimes, indeed, the use
"of the word 'vacant,' as applied to a dwelling, carries
40 "the notion that there is no dweller therein; and we

"should not be sure always to get or convey the idea of "an empty house by the words 'vacant dwelling' ap- "plied to it, but when the phrase 'vacant or unoc- "cupied' is applied to a dwelling house, plainly there is "a purpose, an attempt to give a different statement of "the condition thereof, by the first word as an empty "house, by the second word as one in which there is "not habitually the presence of human beings. In the "case of *Herrman* vs. *The Merchants' Ins. Co.*, in this "Court, in June last, the decision was not on the 10 "ground that the two words were used to mean or that "they meant the same condition of the building, but "that by the use of the copulative conjunction with "them, there was a contract framed of which there was "no breach, unless the house was at the same time in "the double state expressed by the phrase, that is— "both vacant and unoccupied at the time of the fire: "both empty and unused for abode.

"It is clear from the testimony that the dwelling "house insured by the defendants, was not occupied as 20 "such at the time of the fire. The fortnightly visits of "the plaintiff and his wife to it were not the occupation "that is meant when a dwelling house is spoken of. "The weekly tours of inspection of the farmer and "members of his family living on the grounds, and his "supervision of it from his own house were more useful, "but they fall short of being occupation of it. The "term unoccupied used in the policy is entitled to a "sense, adapted to the occasion of its use, and the sub- "ject matter to which it is applied. It does not need 30 "that we go into discussion of the good reasons for ex- "acting the condition or taking a risk upon a dwelling "house. It is enough that the parties have come into "that covenant. It is to have a meaning fitted to the "circumstances in which it was made and to the subject "to which it related.

"We have already said enough to show our opinion "that for a dwelling house to be in a state of occupation, "there must be in it the presence of human beings as at "their customary place of abode, not absolutely and un-

"interruptedly continuous, but it must be the place of "usual return and habitual stoppage. We think that a "verdict of a jury would not have been allowed to stand "that found that this dwelling house was occupied at "the time of the fire, within the terms of the policy."

At the trial term before the Superior Court of the city of New York, at the close of the plaintiff's case the counsel for the defendant moved the Court to direct a verdict for the defendant, on the ground that this clause of the policy had been violated. This motion was granted. The Court of Appeals sustained the ruling as correct.

Applying the principles of law found in the cases cited to the case before the Court, it is manifest that there was no error at the Circuit. Our case, it seems to me, is much stronger than either of those cited above.

The owner desired insurance. Evidently the situation and condition of the property was made known to the insured. It was used and was intended to be used by the insured for a summer residence; during his absence it was occupied by a tenant; the Company say to him in effect, we will insure your furniture, &c., for the sum of $2,000, at one per cent. for one year, upon the express conditions (1st) you yourself shall occupy the house in which the property insured is situate as your summer residence, and (2d) it shall not be used as a hotel or boarding house, and shall at no time during the year be left unoccupied. That this may be fully understood it shall be written in the policy.

It was so done. By this the insured made these stipulations express warranties to be faithfully fulfilled and performed; both parties fully understood that the existence of the contract depended upon this. The Company plainly stated that it would not insure the property in a building that was to be unoccupied during any portion of the year.

Mr. Smith and his family were at this time—that is, when the policy was issued, living in one wing of the house. He was to remain until about the first of April.

In March Mr. Sonneborn engaged Hoffman and his family to take Smith's place. He expected Hoffman to move in when Smith moved out. This Hoffman did not do.

I refer now to the testimony at page 52, line 30; Mr. Sonneborn says:

"I engaged Hoffman about the middle of March in "this year, at my house in N. Y.; I made arrangements "with him to go immediately to Schooley's Mountain to "take possession, to do the general work and the garden- 10 "ing on the place, and take his family there as soon as "Mr. Smith would vacate the place, who was then oc- "cupying it. It was arranged he should go up as soon "as possible; within a week at all events, from that time "that I engaged him, he was to go. * * * I notified "Smith to move out as soon as he could to make room "for Hoffman's family to move in. * * * * * I "didn't know until I went up there (after the fire,) that "his family wasn't there. That was the first intimation "I had of it." 20

From Mr. Hoffman's testimony we learn that he intended to go up with his family and take possession of the house and occupy it as it was then being occupied by Smith. His wife having been confined about the time that he made the arrangement, and not recovering, he did not in fact have his family come up as was at first intended. They remained at their former home on Long Island, while he went up with a son of Mr. Sonneborn and took board at the house of a Mr. Miller, who lived 30 about a half a mile distant.

Smith moved out on the 5th; no one took his place, but the house continued unoccupied until it was burned. At page 39, line 10, Hoffman says:

"From the time Smith moved out down to the time "of the fire, so far as I know, no family lived in the 'building or any part of it. I was the only person that "had access to it, and my access to it was simply that of 'going to look into it to see if everything was all "right." 40

It thus appears that the very condition that the insurers attempted to guard against happened. *The house became unoccupied*, and during the time it was unoccupied the property insured was consumed by fire. It was to guard against this contingency that the clause was inserted in the policy, the warranty made. It is reasonably certain, too, that the loss occurred *because* the house was unoccupied. Hoffman attending to the grounds had been burning the leaves and brush. The house was locked and
10 securely fastened. While at a distance from the burning heaps, near where the fire communicated to the building, it evidently ran through the grass and leaves over a space of 20 or 30 feet, to one corner of the building, and thus set fire to it. Had Hoffman's family been living in and occupying the house this could easily have been prevented; the slightest effort of even a child would have been sufficient; a pail of water at the earlier stages would undoubtedly have prevented the conflagration; but the house was locked and Hoffman himself had to go to the
20 barn for a pail; 15 minutes elapsed, according to his testimony, before he could secure help. Then, it will be recollected, that our policy covered the movable property only. Had it been impossible to prevent the burning of the house, still much of the loss could have been prevented by the removal of the goods, had the house been occupied.

No one who has looked over the books could have failed to observe that the Courts in some States in the earlier cases have endeavored so far as possible to hold
30 the insurers liable, and have seemed to regard it as a duty to protect the insured even though it became necessary to make constructions and adopt principles which were not applied to other contracts. This has not been the case in New Jersey, and the cases I have cited show that the Courts of New York, Massachusetts and Pennsylvania, as well as the Supreme Court of the United States, hold the insurer and assured alike to the performance of their contracts. The business of insurance is very large, and it is important to the public that it
40 should be protected fairly. The insured stipulates for a

low rate of insurance on certain conditions. To the faithful fulfillment of these he ought in conscience to be bound, otherwise there is no mutuality in the contract, and no safety or security in doing this kind of business In the case before the Court there is no hardship in holding Mr. Sonneborn to his contract. He gave the Manufacturers' Insurance Company $20 to insure him against loss by fire to the extent of $2,000, for one year. He agreed with it that the building in which the property was should not be unoccupied during any portion of the 10 year. He failed to keep his contract, and in consequence of his failure the loss occurred. Notwithstanding his delinquency he seeks to compel the Company to give him $2,000.

The Judge very properly directed that a judgment of non-suit should be entered. In this I submit there was no error.

New Jersey Supreme Court.

SOLOMON S. SONNEBORN, vs. THE MANUFACTURERS INSURANCE COMPANY OF NEWARK, N. J.	Writ of Error.

10

New Jersey, ss.

The State of New Jersey, to the Chief Justice and other Justices of our Supreme Court of Judicature, greeting:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between Solomon S. Sonneborn, plaintiff, and the Manufacturers Insurance Company of Newark, New Jersey, defendant, in a plea of trespass on the case upon promises, manifest error hath intervened to the great damage of the said Solomon S. Sonneborn, as it is said:—We being willing that the error if any there should be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, that if judgment be thereupon given and affirmed then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the third Tuesday of November next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

[L. S.]

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Witness, our Chancellor and President, Judge of our said Court of Errors and Appeals at Trenton aforesaid, the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and eighty-one.

HENRY C. KELSEY, Clerk.

LOUIS J. RYERSON, Attorney.

The answers of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof mention is within made with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in certain Schedule to this writ annexed, as within we are commanded.

NEW JERSEY SUPREME COURT.

THE MANUFACTURERS INSURANCE COMPANY OF NEWARK, N. J., *ads.* SOLOMON S. SONNEBORN.	In Case. On Postea, &c.

FRANCIS M. TICHENOR, Attorney.

As yet of the first day of August, A. D., eighteen hundred and eighty-one.

Witness,

MERCER BEASLEY, ESQUIRE, Chief Justice.

BENJ. F. LEE, Clerk.

Essex County ss.

The Manufacturers Insurance Company of Newark, N. J , a corporation created and existing under and by virtue of the laws of the State of New Jersey, the defendant in this suit, was summoned to answer Solomon S. Sonneborn the plaintiff therein of a plea of tresspass on the case upon promises ; and thereupon the plaintiff by Louis J. Ryerson, his attorney, complains :

For that whereas heretofore, to wit, on the eighth day of February, in the year eighteen hundred and eighty-one, at Newark, in the county aforesaid, by a certain instrument in writing or policy of Insurance then and there made and executed by the signature of Geo. Wilkinson the President, and attested by D. Smith Wood the Secretary of and acting and duly authorized for and on behalf of The Manufacturers Insurance Company of Newark, N. J. the defendant, and which said instrument in writing or policy of insurance so executed by the defendant the said plaintiff now brings here into Court bearing date, to wit, the day and year last aforesaid, after reciting that the said plaintiff had paid the sum of twenty dollars to the said defendant in consideration thereof and of the agreements and conditions therein contained, did insure against loss or damage by fire to the amount of two thousand dollars to the said plaintiff his household furniture, useful and ornamental, beds, bedding, linen, wearing apparel, plate, plated ware, piano and sewing machine, if any, printed books, pictures and family stores, all contained in the three-story frame, shingle roof, building 40 x 50 feet, with two three-story frame, shingle roof wings, each about 30x72 feet, situate detached at Schooley's Mountain, Morris County, New Jersey, (formerly known as The Forest Grove House,) which building was to be occupied as a private Summer residence by the plaintiff, and not to be used as a hotel or boarding house, and not to be left unoccupied during any portion of the year, and not exceeding the interest

of the said plaintiff for the term of one year from the seventh day of February, eighteen hundred and eighty-one, at 12 o'clock, noon, to the seventh day of February, eighteen hundred and eighty-two, at 12 o'clock, noon, such interest to be estimated according to the actual cash value of the property at the time of the fire, and to be paid to the plaintiff or to his legal representatives, subject to certain terms and conditions in the said policy contained, a copy of which policy containing all the said terms and conditions is annexed to this declaration and intended to form part thereof as fully as if the same were here repeated.

And the said plaintiff further says that he, the said plaintiff, at the time of the making of the said policy of insurance, and from thence until the loss and damage hereinafter mentioned, was interested in and the owner of the said insured goods, chattels and effects in the said policy mentioned, and thereby intended to be insured to a large amount, to wit, to the amount of four thousand one hundred and ninety-nine dollars, at Schooley's Mountain, to wit, at Newark, in the county aforesaid ; and that the said household furniture, useful and ornamental, beds, bedding, linen and other effects in the said policy mentioned being in the said building, the Forest Grove House, in said policy mentioned afterwards, to wit, on the nineteenth day of April, in the year eighteen hundred and eighty-one, at Schooley's Mountain, to wit, at Newark, in the county of Essex aforesaid, were burnt down and consumed and entirely destroyed by fire, together with said building, which did not happen, directly or indirectly, by means or in consequence of an invasion, insurrection, riot, civil war or commotion or military power, nor by order of any civil or military authority, nor in consequence of any neglect or violation of any law or ordinance, nor by the fraudulent act or procurement of the said plaintiff, nor by the neglect of the plaintiff to use all practicable means to save and protect the said property at the

time of the fire, whereby the said plaintiff then and there sustained damage and loss to a large amount, to wit, to the amount of two thousand dollars so assured on the said goods and chattels and effects so burned and consumed.

And the said plaintiff further says that he paid unto said defendant the said premium or consideration of twenty dollars in said policy named; that at the time of the making of the said policy of insurance, and hence until the said building, goods and chattels were so destroyed by fire, the said building was occupied; that the same was not used as a hotel, nor as a boarding house; that the same was in the care and occupancy of the employees, agents and servants of him, the said plaintiff, awaiting the occupancy by the said plaintiff as a private Summer residence; that the said goods, chattels and effects in the said policy mentioned, with the building containing the same, were duly described in the application for said insurance and not otherwise than they really were, according to their true value; nor did the said plaintiff omit to state to the said defendants any information material to said risk; that the said plaintiff hath not at any time obtained any other policy or agreement for insurance on the said goods and chattels and effects so insured by the defendant or any part thereof; nor has the risk been increased by any change in the occupation of the building in said policy mentioned, nor by the erection or occupation of adjacent buildings, nor by any means whatever within the knowledge of the said plaintiff; nor has the said building become vacant, nor has there been kept stored or used on the premises any benzine, benzole, benzine varnish, burning fluid, chemical oils, fireworks, gasoline, gunpowder, naphtha, nitro-glycerine, nitrate of soda, oily waste, petroleum or its products, phosphorus, rubber cement, saltpetre, spirit gas, or any article subject to legal restriction.

And that the said plaintiff did forthwith, after the said loss and damage, to wit, on the nineteenth

day of April aforesaid, at Newark, in the county aforesaid, give notice thereof to the said defendant, and also as soon as possible after, to wit, on the thirtieth day of April, in the year last aforesaid, did deliver to the defendant an inventory of the whole of said goods, chattels and effects, naming the quantity, quality and cost of the same, together with a statement of such knowledge or information as the said plaintiff had been able to obtain as to the time, origin and circumstances of the fire, with the interest of the said plaintiff therein, and that there were no incumbrances thereon, nor other person than the said plaintiff interested therein, and that there were no changes in the title, use, occupation, location, possession or exposure of said property since the issuing of the policy, and how, by whom, and for what purpose the building mentioned in said lease and the several parts thereof were occupied at the time of the fire; also the cash value of the goods and chattels and effects destroyed, and the amount of the plaintiff's loss by reason of the burning thereof, signed and sworn to by the said plaintiff.

And the said plaintiff further says, that he, the said plaintiff, has in all things conformed himself to and observed all and singularly the said articles, stipulations, conditions, matters and things which on his part were to be observed and performed according to the form and effect of the said instrument in writing or policy of insurance, in consideration whereof the said defendant then and there promised the plaintiff to pay him the said loss by fire to the amount of two thousand dollars on request. Yet the said defendant, disregarding its said promises, has not paid the said sum of two thousand dollars, nor any part thereof, to the said plaintiff although often requested so to do, but to do so has hitherto wholly refused and still does refuse, to the damage of the plaintiff four thousand dollars, and therefore he brings his suit, &c.

Judgment will be claimed for two thousand dol-

lars and legal interest thereon from April 30, 1881.

Take notice that the annexed is a true copy of the policy of insurance referred to in the foregoing declaration:

No. 56,707. $2,000

THE

MANUFACTURERS INSURANCE COMPANY

OF NEWARK, N. J.

In consideration of Twenty $\frac{00}{100}$ Dollars, and of the agreements and conditions herein contained, do insure S. S. Sonneborn against loss or damage by fire, to the amount of two thousand dollars, on his household furniture, useful and ornamental, beds, bedding, linen, wearing apparel, plate, plated ware, piano and sewing machine, (if any,) printed books, pictures and family stores. All contained in the three-story frame, shingle roof, building, 40x50 feet, with two three-story frame, shingle roof, wings, each about 30x72 feet, situate detached at Schooley's Mountain, Morris Co., N. J., (formerly known as "The Forest Grove House,") and to be occupied as a private Summer residence by the assured. It is hereby understood and agreed that the said premises are not to be used as a hotel or boarding house, and that they are not to be left unoccupied any portion of the year.

Amount insured, $2,000. Rate, 1. Term, one year. Premium, $20 $\frac{00}{100}$.

Against all such immediate loss or damage sustained by the assured, as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property, and except as hereinafter provided, for the term of one year from the seventh day of February, eighteen hundred and eighty-one, at 12 o'clock noon, to the seventh day of February, eighteen hundred and eighty-two, at 12 o'clock, noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which loss or damage shall in no case exceed what

it would then cost to repair or replace the same, deducting therefrom a suitable amount for any depreciation of such property from use or otherwise; and to be paid to the assured or his legal representatives as hereinafter provided, subject to the following terms and conditions:

1. WARRANTY OF THE ASSURED.

10 The assured by the acceptance of this policy hereby warrants: that any application, survey, plan, statement or description, connected with procuring this insurance, or contained in, or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this Company any information material to the risk; and this Company shall not be bound under this policy by any act of, or statement made to, or by, 20 any agent or other person, which is not contained in this policy or in any written paper above mentioned.

It is also a part of this warranty that if this policy shall be continued by renewal it shall be considered as continued under the original representations; and that any change in the risk, not made known to this company at the time it is so continued shall render this policy void.

This policy shall become void unless consent in 30 *writing is endorsed by the Company hereon, in each of the following instances, viz:—*

1. If the assured is not the sole and unconditional owner of the property; or if any building intended to be insured stand on ground not owned in fee simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, location or 40 possession of the property, (except in case of succession by reason of the death of the assured,) whether by sale, transfer or conveyance, in whole or in part, or by legal process or judicial decree, or the title or possession be now or hereafter become involved in litigation, or if this policy be assigned or transferred before a loss.

2. If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof.

3. If the risk be increased by any change in the occupation of the building or premises herein described, or by the erection or occupation of adjacent buildings; or by any means whatever within the knowledge of the assured.

4. If any building herein described be or become vacant or unoccupied for the purposes indicated in this contract.

5. If the property herein described, being a manufacturing establishment, shall be run at night or over time, or shall cease to be operated. 10

6. Or if any of the following named articles be kept, stored or used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding, viz: benzine, benzole, benzine varnish, burning fluid, chemical oils, fire-works, gasoline, gunpowder, naphtha, nitro-glycerine, nitrate of soda, oily waste, petroleum and products, phosphorus, rubber cement, saltpetre, spirit-gas, or any article subject to legal restriction. 20

2. Risks not covered by this Policy.

This Company shall not be liable under this policy for loss or damage by fire in any of the following instances, viz:—

1. If caused directly or indirectly by means or in consequence of an invasion, insurrection, riot, civil war or commotion, or military power, or by order of any civil or military authority, or in consequence of any neglect or violation of any law or ordinance, or by the fraudulent act or procurement of the assured. 30

2. If caused by lightning or explosion of any kind, unless fire ensues and then for the loss by fire only.

3. If the building herein described or any part thereof fall, except the fall is the result of fire.

4. If caused by the neglect of the assured to use all practicable means to save and protect the property at and after the fire, or when the property is endangered by a fire in neighboring premises. 40

5. For loss of accounts, bills, notes, deeds, manuscripts, evidence of debt or securities of property of any kind; or for loss by theft at or after the fire.

6. For any consequential or constructive loss or damage, beyond the actual damage by fire to the property, whether such loss or damage be occa-

sioned by any ordinance or law regulating the construction or repair of buildings or otherwise.

3. PROPERTY NOT COVERED BY THIS POLICY UNLESS SPECIFIED.

This insurance does not cover any of the following named articles or goods, unless separately and specifically mentioned in writing in the policy, viz.: Money or bullion, drawings, models, patterns, tools, implements, paintings, sculpture, medals, casts, curiosities, jewels, watches, scientific apparatus, store furniture and fixtures, awnings, signs, yard fixtures, nor goods held on storage.

4. GENERAL PRIVILEGES.

1. *Kerosene or Refined Petroleum Oil* of the legal standard may be used for *lights* only, lamps to be filled and trimmed by daylight and not within ten feet of artificial light.

2. *Mechanics* are allowed to make *ordinary* alterations and repairs to buildings not exceeding fifteen days in each year of this insurance, without notice to the Company. Any extension of this privilege must be previously consented to in writing on this policy.

3. *Plate Glass, Frescoes and Wall Decorations* are covered by insurance on the building; but if there shall be any other insurance on the building, this Company shall be liable only for such proportion of the loss on said plate glass, frescoes and decorations as the amount hereby insured shall bear to the whole insurance on the building, whether such other insurance applies to said glass, frescoes and decorations or not.

5. RELATIVE TO ISSUE AND CANCELATION OF POLICY.

1. If any broker or other person than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, he shall be deemed to be the *agent of the assured*, and not of this Company, in any transaction relating to the insurance.

2. This insurance may be terminated at any time by request of the assured, or by the Company on giving notice to that effect. On surrender of the policy the Company shall refund any premium that may have been paid, reserving the usual short rates in the first case, and *pro rata* rates in the other case.

6. Proceedings in case of loss.

1. When a fire has occurred, injuring the property herein described, the assured shall use all practicable means to save and protect the same, and shall give immediate notice of the loss in writing to this Company. When *personal property* is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory of the whole thereof, including property claimed to be totally destroyed, to be made and furnished to this Company, naming the quantity, quality and cost of each article. If the loss sustained be upon a *building, fixtures or machinery*, the assured shall, if required, furnish duly verified plans and specifications of such property destroyed or damaged. The assured shall, whenever and as often as called upon, exhibit to any person or persons named by this Company, all that remains of the said property, damaged or not damaged, for examination.

2. The amount of sound value and of damage to the property may be determined by mutual agreement between the Company and the assured; or failing to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail of a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of their disagreement; and, if the said appraisers fail to agree, they shall refer the differences to such umpire; and the award of any two, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not decide as to the validity of the contract or any other question except the amount of such loss or damage. Each party shall pay their own appraiser and one-half the umpire's fee. It shall be optional with this Company to take the whole or any part of the articles at their appraised value; and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after completion of the proofs herein required.

3. A particular statement of the loss shall be rendered to this Company, at its office in Newark, N. J., as soon after the fire as possible, signed and sworn to by the assured, stating such knowledge or information as the assured has been able to obtain as to the time, origin and circumstances of the fire; also stating the exact nature of the title and interest of the assured and of all others in the property herein described, all incumbrances thereon and the cash value thereof, the amount of loss or damage, all other insurance, whether valid or not, covering any of said property, and a copy of the written parts of all policies; any changes in the title, use, occupation, location, possession or exposures of said property that may have occurred since the issuing of the policy; how, by whom and for what purpose, the building herein described and the several parts thereof were occupied at the time of fire; and shall, if required, furnish a certificate under the hand and seal of the Chief of the Fire Department or other officer having charge of the investigation of fires, (if said property is situate within the jurisdiction of any such officer and, if not, then under the hand and seal of a magistrate 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 honestly sustained loss on the property herein described to the amount which such officer shall certify.

4. The assured shall, whenever required, submit to an examination or examinations under oath by any person appointed by this Company, and subscribe to such examinations when reduced to writing; and shall also, as often as required, produce their books of account and other vouchers, and exhibit the same for examination, either at the office of this Company or such other place as may be named by its agent, and permit extracts and copies thereof to be made; the assured shall also furnish certified copies of all bills and invoices of the property, the originals of which cannot be produced.

5. Any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination or in the proofs of loss or otherwise, shall cause a forfeiture of all claim on

this Company under this policy; and in such case, this Company shall have the right at any time to require the same to be delivered up to be canceled.

6. This Company shall not be liable for a greater proportion of any loss sustained by the assured upon any property described in this policy than the sum hereby insured thereon bears to the whole sum insured thereon, whether such other insurance be by policies specific or otherwise, or whether prior or subsequent to this insurance, or whether such other insurance be valid or not, and without reference to the solvency of other insuring companies. In the event of partially non-concurrent insurance, then to determine the liability of this Company, it shall be assumed that policies other than specific shall contribute with specific policies in the proportion that the loss on the property included in each item of the specific policies bears to the total loss for which the more general policies are liable. The adjusted claim under this policy shall be due and payable sixty days after the full completion by the assured of all the requirements herein contained.

7. Re-insurance, in case of loss, shall be settled in proportion as the sum re-insured shall bear to the whole sum specified in the contract or contracts of the re-insured Company.

8. When this Company shall claim that the fire was caused by an act or omission of any person, town or corporation, which created a cause of action, the party to whom the loss is payable under this, shall, on receiving payment, assign to this Company such cause of action.

9. It is hereby expressly provided, 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 Equity, until after full compliance by the assured with all the foregoing requirements; nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and should any suit or action be commenced against this Company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim.

In Witness Whereof, The Manufacturers Insurance Company, of Newark, N. J., on its part has caused these *presents* to be signed by their *Pres-*

ident, and attested by their *Secretary*, in the City of Newark, this eighth day of February, in the year of our Lord one thousand eight hundred and eighty-one.

Attested:

GEO. WILKINSON, President.

D. Smith Wood, Secretary.

10 And the said defendant, by Francis M. Tichenor, its attorney, comes and defends the wrong, and injury, when, &c., and saith that it did not undertake or promise in manner and form, as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c.

And for a further plea in this behalf the said defendant, by leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his afore-
20 said action thereof against it, because it says that in and by the said contract and agreement it was and is, among other things, covenanted and agreed by and between the said plaintiff and defendant, that the said plaintiff would occupy the dwelling house mentioned and described therein, and thereby insured against loss or damage by fire, as a Summer residence, and that the same should not during any portion of the year, during which and for which said contract of insurance was made,
30 be left unoccupied.

And it was in and by said contract further covenanted and agreed that the said contract should become null and void in case the building described therein should, during the continuance of said contract and while it remained in force, become vacant or unoccupied, unless the consent of the defendant thereto was endorsed in writing upon said contract of insurance.

And the said defendant avers and shows that the
40 said dwelling did during the said year and for a portion thereof become and was vacant, and that

the same was during a portion of the said year for which said insurance was effected, and for which said contract of insurance made as aforesaid, unoccupied to wit, from the fourth day of April, 1881, to the nineteenth day of April, 1881, and that no consent in writing made by the defendant was obtained by the said plaintiff and endorsed upon said contract of insurance, contrary to the terms and conditions of the said contract of insurance.

Whereby and by means thereof the same became and was and is void and of no force or effect; and this the said defendant is ready to verify. 10

Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, &c.

And for a further plea in this behalf the said defendant, by like leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action against it, because it says that in and by the said contract of insurance it was, among other things, expressly provided that if during the continuance of said contract a fire should occur by which the property thereby insured should be destroyed or damaged, that the insured, to wit, the plaintiff, should and would, if required, furnish a certificate under the hand and seal of the Chief of the Fire Department or other officer having the charge of the investigation of fires in the place where said property was situated, if within the jurisdiction of any such officer, and if not, then under the hand and seal of a magistrate nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, the said plaintiff, 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 honestly sustained loss on the property therein described to the amount which said officer shall certify. 30 30 40

And the said defendant says that although the

said assured, the plaintiff, was, after the said fire had occurred and before the commencement of the action by the said plaintiff, duly requested and required to furnish to the defendant such a certificate, made by or under the hand and seal of the Chief of the Fire Department, or other officer having charge of the investigation of fires at the time and place of such fire, or of the magistrate nearest to the place of the fire, not concerned in the said loss, nor related to the said plaintiff, as described in and set forth in said contract of insurance.

Yet the said defendent saith that the said plaintiff hath hitherto and at all times failed and refused to furnish to the defendant such certificate, or any certificate such as required by the said contract of insurance to be furnished by him as aforesaid, contrary to the terms and conditions of the said insurance contract and contrary to the covenant and agreement of the said plaintiff therein contained as above set forth; and this the said defendant is ready to verify.

Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, &c.

And for a further plea in this behalf the said defendant, by like leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action against it, because it says that in and by the said contract of insurance it was, among other things, expressly understood that if during the continuance of said contract a fire should occur by which the property insured should be damaged or destroyed, caused directly or indirectly by means or in consequemce of an invasion, insurrection, riot, civil war, or commotion, or military power, or by order of any civil or military authority, or in consequence of any neglect or violation of any law or ordinance, or by the fraudulent act or procurement of the assured, said defendant should not be liable under said contract.

And the said defendant says that the said fire did occur and said property was damaged and destroyed in consequence of the neglect of the plaintiff, and contrary to the terms and conditions of said insurance contract and the covenants and agreements therein contained and above set forth, and in violation of section one, paragraph five of the Supplement to the Act for the Punishment of Crimes, approved April 6th, 1876, enacted by the Legislature of the State of New Jersey, wherein it is provided that any person or persons who shall burn any pit of charcoal, or set fire to or burn any brush or other material whereby any property may be endangered, unless he or they shall keep and maintain a careful and competent watchman in charge of said pit-bed or other material while burning, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding six months, or both; and this the said defendant is ready to verify.

Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, &c.

And the said plaintiff as to the said plea of the said defendant by it first above pleaded, and whereof it hath put itself on the country, doth the like.

And the said plaintiff as to the said plea of the said defendant by it secondly above pleaded, saith that the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he says, that the said premises did not become vacant, nor did they become unoccupied from the

fourth day of April, 1881, to the nineteenth day of April, 1881, nor at any other time during the period for which said contract of insurance was made, as by the said plea supposed, but on the contrary, the said building was occupied as in the said contract of insurance provided, from the time of the beginning of said contract up to the burning of the said building and personal property.

And this the plaintiff prays may be inquired of
10 by the country, &c., and the said defendant doth the like.

And the said plaintiff as to the plea of the said defendant, thirdly above pleaded, saith that the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith that the said defendant did not require of the said plaintiff a certificate from the Chief of the Fire
20 Department, or of a Magistrate nearest the fire, and did not make any request for such certificate.

And this he, the said plaintiff, prays may be inquired of by the country, &c. ; and the said defendant doth the like.

And the said plaintiff as to the said plea of the said defendant fourthly by it above pleaded, saith that the said plaintiff by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his afore-
30 said action thereof against the said defendant, because he saith that the said fire did not occur by reason of his neglect, nor by reason of any violation of the terms and conditions of the policy of insurance, nor in violation of section 1, paragraph 5, of the supplement to the act for the punishment of crimes, approved April 6, 1876, nor in violation of any other act or law.

And this the plaintiff prays may be inquired of by the country, &c. ; and the said defendant doth
40 the like.

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 Newark, in and for the county of Essex, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and eighty-one, by whom, &c. And the same day is given to the parties aforesaid there, &c.

And now, at this day, to wit, the first day of November, A. D., eighteen hundred and eighty-one, before our said Supreme Court at Trenton, come the parties aforesaid, by their attorneys aforesaid, and the Justice before whom, &c., having sent hither his record had before him in these words, to wit:

"Afterwards, that is to say, on the third day of October, eighteen hundred and eighty-one, at the Court House in the city of Newark, in the county of Essex, before the hororable David A. Depue, one of the Justices of the supreme Court of Judicature of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within named plaintiff as the within named defendant by their respective attorneys within named, and the jurors of the jury being summoned also come, who to speak the truth of the matter within contained, were tried and sworn, and after evidence being given to them thereupon, they went from the bar of this Court to consider of their verdict to be given of and upon the premises; and after the said jury had considered thereof and agreed among themselves, they retnrned to the said bar to give their verdict in this behalf; upon which the said plaintiff being solemnly called, comes not, nor does he further prosecute his suit against the said defendant.

Therefore, it is considered that the said Solomon S. Sonneborn take nothing by his said writ, and that the said The Manufacturers Insurance Company, of Newark, N. J., do go thereof without day, &c.

And it is further considered by the Court here

that the said The Manufacturers Insurance Company, of Newark, N. J., do recover against the said Solomon S. Sonneborn the sum of dollars and cents for its costs and charges by it about its defence in this behalf laid out and expended by the Court here adjudged to the said The Manufacturers Insurance Company, of Newark, N. J., and with its assent, according to the form of the statute in such case made and provided, and that the said The Manufacturers Insurance Company, of Newark, N. J., have execution thereof, &c.

Judgment signed this first day of November, A. D., eighteen hundred and eighty-one.

M. BEASLEY,
Chief Justice.

I, Benj. F. Lee, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in above stated cause as the same remains of record in my office.

In testimony whereof I have hereto set my hand and the seal of said Court at Trenton, this second day of November, A. D., eighteen hundred and eighty-one.

BENJ. F. LEE, Clerk.

[SEAL.]

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT,

September Term, 1881.

SOLOMON S. SONNEBORN,
vs.
THE MANUFACTURERS INSURANCE COMPANY.

10

Before Hon. D. A. Depue, Judge, and a Jury.

For plaintiff appears Messrs. Ryerson, Harris and McCarter.

20

For defendants appears Messrs. Tichenor and Coult.

Mr Harris opens for plaintiff.

ALFRED A. SMITH, sworn on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. Where do you reside at present? A. Schooley's Mountain.

30

Q. How long have you resided there? A. Well, in the neighborhood of two years.

Q. Do you know the building at Schooley's Mountain known as the Forest Grove House? A. Yes, sir.

Q. That building was formerly owned by Mr. Stoutenburgh? A. Yes, sir.

Q. Did you ever reside in that building? A. Yes, sir, I did.

Q. When did you remove into the building—about? A. The 5th of November.

40

Q. The 5th of November of last year? A. No, sir; '79.

Q. Who was at that time owner of the building? A. Mr. Stoutenburgh.

Q. How long did you continue to reside in the building? A. The 5th of April I moved out.

Q. Of what year? A. 1881.

Q. This last April? A. Yes, sir.

Q. Do you know who, at that time, had become the owner of the building? A. Well, I was told Mr. Sonneborn.

Q. What part of the building did you occupy? A. The east wing.

Q. Just stand up and look at that diagram, and point out what represents the main building. (Witness indicates on diagram location of main building, wings, etc.) Which wing did you live in and whereabouts? A. (Indicating) I lived here.

Q. The north wing? A. No, we call it the east wing.

Q. This place is a little distance from the public highway; just point where the public highway is? A. (Witness indicates on diagram.)

Q. Where is the road running down to German Valley? (Witness indicates on diagram.)

Q. There is a lane running in for a couple of hundred yards, isn't there? A. Yes, sir.

Q. And you continued living there, you say, until the 5th of April? A. Yes, sir.

Q. How did you come to move out at that time? A. Well, my time was up to move and I moved.

Q. At anybody's request; was there anybody there before you went away?

Witness: Anyone in the house, do you mean?

Mr. Harris: No; I mean anyone that came there to take charge of the premises? A. Mr. Hoffman.

Q. Do you know where he came from? A. I do not.

Q. Do you know about when Mr. Hoffman came there? A. Well, I think about the last of February or first of March; somewheres about there.

Q. About how long before you moved out? A. Well, I would judge that he was there a month.

Q. Before you moved out? A. Yes, sir.

Q. Did you have anything to do with the premises except living in those rooms? A. Nothing but taking care of the poultry.

Q. Did you pay rent there? A. No, sir.

Q. What was the arrangement that was made at the time Mr. Sonneborn bought the place, about your living there? A. I was to live in the house from month to month for taking care of the chickens —the poultry.

Q. And did Mr. Hoffman who came up there, request you to move?

[Objected to as immaterial. Objection overruled.]

A. No, sir.

Q. Who requested you to move? A. No one as I know of; my time was up and I moved.

Q. You say you were to live there from month to month? A. Yes, sir. 10

Q. Up to what time? A. Till the 1st of April.

Q. You moved out on the 5th of April? A. I did; yes, sir.

Q. How long had you been living in the building under that arrangement, occupying those rooms; had you any family? A. Yes, sir.

Q. What family had you? A. I had a family of a wife and three children.

Q. And they occupied that portion of the building? A. Yes, sir; where I did, of course. 20

Q. How many rooms did you occupy in that wing? A. Four.

Q. On what floor? A. The lower floor.

Q. What was your means of access to your rooms? How did you get into the part you moved in? A. We came in the door and passed through a hall.

Q. Where was the door? A. On the end of that wing, at the south.

30

Cross-examination by Mr. Coult:

Q. You occupied four rooms; were they in the extreme end of the left wing? A. In the southwest wing—on the end of the wing.

Q. And the entrance to these premises was at the end of the building? A. Where I had possession was; yes, sir.

Q. Do you know how many rooms there were in the entire building? A. No, sir; I do not.

Q. Have you any idea? A. No, sir; I could not tell. 40

Q. Can't you tell about? A. Not knowing, I don't know how many there was.

Q. How many stories high was it? A. Well, there was three stories and a half; there was three flights of stairs.

Q. Are the main building and the wings both the same height? A. Yes, sir.

Q. And divided into rooms throughout? You

have been in it? A. Yes, sir; I have been in the house; but I don't know whether I have just taken notice whether it was all divided up into rooms or not.

Q. Can you point out how far the rooms you occupied extended up the southwest wing—what distance from the rear part? A. All on the lower floor.

10 Q. How many feet up the wing did they extend; you can tell us about that? A. Well, if I knowed how large the rooms was I could tell you exactly.

Q. Can't you give us an estimate? A. No, sir; I can't tell.

Q. Can you tell the size of the rooms, about, that you occupied; were they as much as a half or a quarter of the lower floor of that wing? A. Some wasn't quite so large; I couldn't give any number of feet.

20 Q. It wasn't all of the lower floor on that wing? A. No, sir.

Q. It wasn't half, was it? A. No, sir.

Q. It wasn't a quarter, was it? A. It might have been a quarter of it.

Q. That is, of the ground floor of that wing? A. Yes, sir.

Q. Did you have any access to the other parts of the building? A. No, sir.

Q. You were confined to your rooms? A.
30 Yes, sir.

Q. And your care extended only to the chickens? A. Yes, sir.

Q, Where was the poultry kept? A. At the barn.

Q. At the barn at the rear of the house? A. Yes, sir; at the rear of the house.

Q. Who at the time you occupied those rooms had the keys of the main building and the other portions of the house? A. Well, I believe Law-
40 rence Hunt.

Q. At the time you occupied the building and down to the time you moved out, did you ever go through the other part of the building at all?

Witness: From the time that I occupied it for Mr. Sonneborn?

Mr. Coult: Yes.

A. I think I was in one room oncet to put in a few potatoes.

Q. On the 5th of April your arrangement for taking care of the rooms expired? A. Yes, sir.

Q. And you moved out. Did anybody move in? A. Well, Mr. Hoffman was there taking care of the building.

Q. I asked you if anybody moved into the building to occupy it? A. Well, I think there was no one moved in; there was a gentleman there to take care of it.

Q. Did Mr. Hoffman board anywhere? A. Yes, sir; he boarded. 10

Q. Whereabouts did he board? A. He boarded at Mr. Miller's.

Q. Mr. Miller lives where? A. Schooley's Mountain.

Q. How far from these premises? A. It wasn't very far; it was a short distance.

Q. About how far—half a mile? A. Well, no; I don't think it was half a mile.

Q. Near it? A. I couldn't tell the distance. 20

Q. As near as you can tell? A. A quarter of a mile.

Q. Was it in sight of the building? A. Well, no; it wasn't really in sight.

Q. Were you living in the neighborhood of the building from the time you moved out till the fire occurred? A. Yes, sir.

Q. How far from there? A. Half a mile.

Q. Were you there at the time of the fire? A. I was there at the last of the fire. 30

Q. From the time you moved out down to the time of the fire did you observe the premises? A. No, sir.

Q. You didn't see them? A. I passed along by them but I never was onto them.

Q. So far as you observed was there anybody living in them after you moved out? A. I don't think there was any family living into 'em.

Q. And you didn't get to the fire until it was about over? A. No, sir. 40

Re-direct examination by Mr. Harris:

Q. What time in the day did the fire occur? A. Well, I couldn't tell you; it was about two o'clock when I got there.

Q. In the afternoon or morning? A. Afternoon.

Q. It was during the middle of the day some time? A. In the afternoon.

Q. When you came there at the time of the fire was Mr. Hoffman there? A. He was.

Q. Who else was there at that time? A. Oh, there was a great many there.

Q. Do you know whether or not Mr. Hoffman was working there on the place? A. He was.

Q. Every day? A. I think he was every day.

By Mr. Coult:

10 Q. Are you speaking of your own knowledge; of your own observation; of what you saw; did you see him on the premises at work? A. I saw him there at that time.

By Mr. Harris:

Q. Between the time you moved out and the day of the fire you saw him there? A. I did see him working on the place.

20 Q. What was he doing? A. He was cleaning up.

Q. How often did you see him about there? A. Well, as I went to my work where I labored; I went every morning and came home nights.

Q. You were not there when the farm took fire, so that you don't know what the cause was of your own knowledge? A. No, sir.

Re-cross-examination by Mr. Coult:

30 Q. I understood you to say that at the time you were away, and until you came back, you had not observed the premises? A. I passed the road; I had to go the road to my labor; I was not on the premises?

Q. Then you did see them? A. I saw Mr. Hoffman on the premises, yes, working very frequently; I couldn't help but see him.

Q. Was he in the yard? A. Yes, sir; and on the small lot of land there is there to it.

40 Q. How much land is there on the premises? A. I don't know, sir.

Q. You can tell pretty nearly? A. No, sir; I couldn't tell because I don't know.

Q. Was it ten acres? A. I think there had ought to be ten acres.

Q. As much as ten acres? A. I would think so, yes.

Q. You saw him working on the premises; did you ever see him in the house? A. Not after I moved away; no, sir.

FERDINAND O. HOFFMAN, sworn on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. Where do you reside at present? A. At Schooley's mountain.

Q. How long have you been at Schooley's mountain; since what time? A. Since the 22nd of March.

Q. Of this year? A. Yes, sir. 10

Q. How did you come to go to Schooley's mountain? A. Mr. Sonneborn hired me.

Q. What did he hire you for? A. To take charge of the place.

Q. What place? A. In Schooley's mountain —the Forest Grove House.

Q. Where had you lived previous to going to Schooley's mountain? A. Flatbush, L. I.

Q. You say you went to Schooley's mountain on the 22nd of March? A. Yes, sir. 20

Q. Who went with you? A. Nobody—Mr. Sonneborn's son.

Q. Did you go alone— A. (Interrupting,) yes, sir.

Q. (Continuing,) or was your family with you at that time? A. No, sir.

Q. Where was your family living at that time? A. Flatbush.

Q. What did you first do when you went to Schooley's Mountain? A. Trimmed some apple trees, and then cleaned up the place. 30

Q. Apple trees on what place? A. Schooley's Mountain.

Q. Do you mean on Mr. Sonneborn's place? A. Yes, sir.

Q. Then on and after the 22d of March you were at Schooley's Mountain in the employ of Mr. Sonneborn? A. Yes, sir.

Q. When you went to Schooley's Mountain was there any one living in the Forest Grove House, or any part of it? A. Yes, sir. 40

Q. Who? A. Mr. Smith.

Q. Whereabouts in the building did he live? A. In the southwest—or southeast wing.

Q. Just point out on the map which wing? A. (Witness indicates on map.)

Q. The wing off to the right? A. Yes, sir.

Q. Did you, after going to the Mountain, obtain the keys, and if so when and from whom? A. I got the keys from Mr. Hunt.

Q. What Mr. Hunt—Lawrence Hunt? A. Lawrence Hunt.

Q. The keys of what part of the building? A. The main building.

Q. The front door? A. Yes, sir.

Q. How long did Mr. Smith continue to live in the building? A. He lived there till the 5th of April.

Q. Did you or not request him to move out? A. No, sir.

Q. At the time you went up there did you go with the intention of remaining at Schooley's Mountain?

[Objected to.]

A. Yes, sir.

By the Court:

Q. When you went there you went there expecting to stay? A. Yes, sir.

By Mr. Harris:

Q. After you went there and up to the time of the fire, did you go back to your home at Flatbush? A. No, sir.

Q. At what were you employed during all that time?

Witness: Upon Schooley's Mountain?

Mr. Harris: Yes, from that time up to the fire? A. Cleaning up the place.

Q. Was there any stock on the place? A. They wasn't there yet; I got them from Mr. Hunt.

Q. Lawrence Hunt? A. Yes, sir.

Q. About what date did you bring the stock from Mr. Hunt on the place? A. I couldn't tell to the day; it was about a week after I was up there.

Q. Before Mr. Smith moved out? A. No, sir; I took the horses over the same day Mr. Smith moved out.

Q. Were there any cattle? A. There was two cows, and I took them a couple of days after.

Q. Where was the stock kept after you brought them on the place? A. In the barn.

Q. Who took care of them? A. I.

Q. Were you present the day Mr. Smith moved out? A. Yes, sir.

Q. How did he move? A. Some people helped him.

Q. Did you? A. I helped too.

Q. What did you do? A. I helped take some of his furniture away.

Q. With what team or wagon? A. Mr. Sonneborn's team.

Q. The horses that you brought back that day? A. Yes, sir. 10

Q. When did your family come to Schooley's Mountain? A. On the 19th of March.

Q. March or April? A. April.

Q. When, with reference to the fire? A. They came after the house was burned down.

Q. The same day? A. Yes, sir.

Q. Where did they come from that day? A. Flatbush.

Q. Had you expected your family there as soon as that? A. I did. 20

Q. When did you expect they would move there at the time you went up? A. Well, I expected as quick as my wife got well.

Q. What was the occasion of your wife's sickness? A. She had been confined.

Q. When was she confined? A. The 17th of March.

Q. That was two days before you went there? A. Four days; I went up the 22d. 30

Q. Did your wife's sickness continue longer than you expected? A. Yes, sir.

Q. Was your family or not detained from coming to the Mountain by that continued illness? A. Yes, sir.

Q. Where did you get your breakfast and supper from the time you went up there to the time when your family came? A. Mr. Miller's.

Q. What Miller? A. Jesse Miller.

Q. Where did Jessie Miller live? A. Between the Belmont and the Heath House, 40

Q. On the main road there? A. Yes, sir.

Q. By the big oak tree? A. Yes, sir.

Q. About how far was that from the Forest Grove House? A. I don't know; about a quarter of a mile, I suppose.

Q. Where did you take your dinner? A. I took that with me.

Q. What time in the morning did you go up to

the Forest Grove House; how early? A. Well, as soon as day-light; half past five or six.

Q. Had you breakfast before day-light? A. Yes, sir.

Q. And how long did you stay there? A. Till dark.

Q. That was continued all the time up to the fire? A. Yes, sir.

Q. Were you at work constantly, during all the day? A. Yes, sir.

Q. A. About the premises? A. Yes, sir.

Q. Were you at the building the day the fire occurred? A. Yes, sir.

Q. About what time was the fire discovered? A. Shortly after twelve.

Q. Twelve o'clock, noon? A. Yes, sir.

Q. You may just state, looking at that diagram, whether or not there is a grove about the premises—trees?

Witness: On which side?

Mr. Coult: Well, around the premises; is there a grove there about the building? A. Yes, sir.

Q. What were you cleaning up about the building? A. Leaves and brush.

Q. Leaves and brush in the woods? A. Yes, sir?

Q. Had there been trees cut down—if there was brush there to any extent? A. No, sir; it was dead limbs what fell off the trees?

Q. Twigs, &c.? A. Yes, sir.

Q. Where did the fire first break out—that you saw? A. (Indicating on map.) About in this part.

Q. Right near where the West wing joins on the building? A. Yes, sir.

Q. Is there, or not, a large porch running along each wing and all the way around the front of the main building? A. Yes, sir.

Q. Is that porch covered or not? A. Yes, sir, it is covered with slats.

Q. Up the front of it? A. Yes, sir.

Q. About how high above the ground is that porch? A. Two feet or a little over.

Q. And there is a trellis work along the outer edge of it down to the ground? A. Yes, sir.

Q. What were you doing that day? A. Raking leaves.

Q. What were you doing with the leaves? A. Burning them.

Q. At what part of the grounds were you at work at the time the fire broke out? A. On that side over here (indicating on the diagram, at the side marked North).

Q. Were you burning leaves that day? A. Yes, sir.

Q. Were there any heaps of leaves burning at about the time the fire broke out? A. There was about two or three heaps burning at that time. 10

Q. Just show us about where they were burning? A. [Indicating on diagram.] About up in this neighborhood.

Q. Was there some down nearer the building? A. There was some below there.

Q. About how far from the building were there any heaps of leaves burning? A. About twenty-five or thirty feet, perhaps more, I can't tell exactly. 20

Q. Had you raked up the leaves between the building and the point where they were burning? A. Yes, sir.

Q. How did the building catch fire? A. Well, I couldn't say how.

Q. How much fire was there in the building when you first saw it? A. I could't see nothing but smoke, first; I went and got some water, and when I got some water the fire was all along the front.

Q. On the outside on the weather-boards? A. Yes, sir. 30

Q. You mean the front of that part of the wing? A. Yes, sir, right under the porch, in that wing.

Q. The building was all frame? A. Yes, sir.

Q. Was there a wind that day? A. No, sir, not when I commenced.

Q. What kind of a day was it that day? A. It was about the nicest day I started to burn any leaves; no wind when I commenced.

Q. Was there a wind after the building was on fire, did you notice. A. Yes, sir, there was a wind after. 40

Q. Who first came to the fire after you discovered it? A. I couldn't say who came first.

Q. Mention some that came very soon? A. Mr. Miller, Mr. Heath, Mr. Hunt.

Q. Lawrence Hunt? A. Both of them—Lawrence and Harvey.

Q. Did the fire, after it got in the building, burn

rapidly or otherwise—burn up quickly? A. Yes, sir.

By the Court:

Q. Where were you while these heaps of leaves were burning? A. I was right by the fire.

Q. What were you doing? A. Keeping the fire from spreading too far and watching it.

10 By Mr. Harris:

Q. Do you know how the fire was carried from where the leaves were burning to the building? A. No, sir.

Q. How long after you discovered the fire was it before others came there? A. Well, it wasn't long: they came right up.

Q. About how long? A. About ten minutes, or fifteen.

20 Q. What were you doing during that time? A. Carrying water.

Q. Did you throw any water on the fire? A. Yes, sir.

Q. What effort was made to get things out of the building; was anything get out? A. Yes, sir.

Q. What was got out? A. Some chairs and sofas.

Q. Where from? A. From the main building.

Q. Whereabouts did you get into the main building at that time? A. Up where Mr. Smith lived.

30 Q. Through that wing? A. Yes, sir.

Q. What means was there of getting from that wing where Smith lived into the main building? A. We could not get in the main building.

Q. Is there a door or any communication between them? A. Yes, sir.

Q. Whereabouts is the door? A. (Witness indicates on map.)

Q. The back part of the main building on the first floor—what kind of a room or rooms were there there? A. I don't know.

40 Q. Did you go into that room that day? A. No, sir; just passed through the hall.

Q. Whereabouts was the sofa and chairs that they got out? A. In the back part of the main building.

Q. Do you mean in the back room of the main building? A. Yes, sir.

Q. Was that a large or small room? A. A large room.

Q. How far across the main building did it extend—I mean this way of that map (indicating)? A. The whole length of the main building.

Q. And the things were taken out through that wing? A. Yes, sir; there was no things in that wing.

Q. In what wing—the Smith wing? A. Yes, sir.

Q. Was there or not smoke in the inside of the building when you went in there? A. Yes, sir. 10

Q. How much of the building was consumed by the fire? A. The whole of it.

Q. Had you been through all parts of the building? A. Yes, sir.

Q. Through what parts? A. I went through the wings and main buildings to see whether the doors was all fastened—just going through the hallways.

Q. How did you get in? A. I had the keys for the main building. 20

Q. What door did you go in when you went through it? A. The middle door.

Q. The front door? A. Yes, sir; the front door.

Q. Whereabouts are the stairways for going up into the wings? A. As you go into the main building.

Q. Just point out on the map where the stairways were for getting up stairs in the wings? A. (Indicating on map) here and here. 30

Q. In the end next to the main building. Were you up stairs in the wings after the fire broke out? A. No, sir.

Q. Why not? A. I couldn't very well; there was too much smoke.

Cross-examination by Mr. Coult:

Q. You lived on Long Island? A. Yes, sir.

Q. In whose employ had you been on Long Island? You lived on Long Island and had a family? A. Yes, sir. 40

Q. Of what did your family consist—your wife and how many children? A. Two.

Q. In whose employ were you on Long Island before you came to New Jersey? Q. I was in a railroad company.

Q. When did you contract to come to New Jersey? A. The 19th of March.

Q. When did you come? A. The 22d of March.

Q. What did you come to New Jersey for? A. To work for Mr. Sonneborn.

Q. What work were you to do for Mr. Sonneborn? A. To do the gardening.

Q. Then you came to enter into his employment as a gardener? A. Yes, sir.

Q. At that time your wife was sick? A. Yes, sir.

10 Q. She was soon to be confined? A. She was confined at that time.

Q. You did not expect to move her then? A. I couldn't.

Q. Well, you didn't expect to? A. No, sir.

Q. Nor your family until she recovered? A. Yes, sir.

Q. That was understood, wasn't it? A. No, sir.

Q. It was understood that you and your family were to move up there? A. Well, my family

20 couldn't go up, and so I went up alone.

Q. You went to Schooley's Mountain and you took board, didn't you? A. Yes, sir.

Q. With whom? A. Jesse Miller.

Q. Did you arrange, before you went, to get board at any place? A. No, sir.

Q. You went there and looked for a boarding place? A. The same day that I went up there I took board.

Q. Who sent you to Mr. Miller's to get board?

30 A. Mr. Sonneborn's son went with me.

Q. For how long did you engage your board? A. For no length of time.

Q. You say your family came out on the night after the building burned down; had you any place prepared for them to go to? A. No, sir.

Q. Or any arrangement for a place? A. No, sir; I didn't know they were coming that day.

Q. Where did you expect to take them? A.

40 To move in the house—Mr. Sonneborn's house.

Q. In the burned house? A. Yes, sir.

Q. What part of it? A. The east wing.

Q. Had you made any contract with him to go in? A. I was to have it at the time I hired out with Mr. Sonneborn; I was to have the rooms—to live in the house.

Q. Which had been occupied by Smith? A. Yes, sir.

Q. How long had you been there before you got the keys of the property? A. About a week.

Q. You got them from Holloway Hunt? A. Lawrence Hunt.

Q. That was the keys of the main building? A. Yes, sir; I was to take charge of the grounds and house.

Q. What did you have to do with the house? A. Well, I was to take charge of it.

Q. You didn't go into it for a week? A. No, sir.

Q. Then from the time Smith moved out of the left wing—did he move out the same day you got there? A. No, sir; he moved out the 5th of April. 10

Q. How much of the house had you been in? A. I had been through the hall part.

Q. Before Smith moved out? A. No, sir; after.

Q. Were you in it at all while Mr. Smith was there, except to go into the apartments that he occupied? A. I think I went in once to put in some seeds.

Q. Where? A. In the main building. 20

Q. With that exception you hadn't been into the house until after Smith moved out? A. I had been there that one time.

Q. What were you engaged about in the day time on the property; I understood that on the day of the fire you had been raking up leaves; before that what had you been occupying yourself about? A. Doing some raking of leaves and burning them. I was all the time raking; I had been burning there three times before that time. 30

Q. Was there a garden upon the property? A. Yes, sir.

Q. Where was that? A. Right back of the house.

Q. It was that especially that you came to take charge of, wasn't it? A. The whole grounds—to take charge of everything.

Q. You came as a gardener, did you not? A. Yes, sir.

Q. And you expected to devote your time principally to taking care of the garden? A. The garden and all—all of it. 40

Q. Didn't you expect to devote your time principally to taking charge of the garden? A. Yes, sir.

Q. The day that the fire occurred were the premises locked? A. Yes, sir; the house was locked.

Q. All around? A. Yes, sir.

Q. Had been all day? A. Yes, sir.

Q. And was when the fire occurred? A. Yes, sir.

Q. Where were the keys? A. I had them.

Q. In your pocket? A. Yes, sir.

Q. And the keys were in your pocket at the time the fire took place? A. Yes, sir.

Q. You say that the fire commenced about noon? A. About that time.

Q. Do you recollect where you were at that time? A. I was there watching the heaps.

Q. I mean at what particular point; was there an ice-house on the property? A. Yes, sir.

Q. Where, with reference to the building, was that located? Just point on the map. A. (Indicating on map); that is the ice-house.

Q. Were you there at that time? A. I was between this corner (indicating) and the ice-house.

Q. Had you been down to the ice-house? A. No, sir; I was about in the middle, between the corner and that.

Q. How far is the ice-house from the front of the building? A. I don't know.

Q. Had you taken your lunch at that time? A. No, sir.

Q. You were here (indicating on diagram) when you discovered the fire? A. No; there (indicating.)

Q. Then the fire was in the building? A. Yes, sir.

Q. And you saw the smoke proceeding from the building at this point? A. Yes, sir.

Q. Before that had you been raking leaves and brush along this point here? A. I had been about this part (indicating); this part was burned before.

Q. The same day? A. No, sir; before that.

Q. At the time when the fire took place, as I understood you to say, you stated that the nearest was twenty or thirty feet from where the fire struck the building? A. About here (indicating.)

Q. And you were down here when you discovered it? A. Yes, sir.

Q. Had you been burning down further along? A. All this whole side was burned.

Q. And you were burning down here by the ice-house? A. Yes, sir.

Q. And you were there when the fire occurred up here? A. Yes, sir.

Q. Did you notice how the fire connected with

the building at this point? A. No, sir; I couldn't tell.

Q. Didn't you see afterwards how it had got there? A. No, sir.

Q. It didn't communicate from the pile you were burning, down by the ice-house? A. I should think so; I couldn't tell.

Q. You didn't see any connection between the fire at the ice-house at this point where the building commenced to burn here? A. No, sir. 10

Q. From the time that Smith moved out down to the time of the fire, so far as you knew, did any family live in this building, or any part of it? A. No, sir.

Q. And the only person that had access to it, so far as you know, was yourself? A. Yes, sir.

Q. And your access to it was simply that of going into it to look at it? A. Yes, sir; to see if everything was all right. 20

By the Court:

Q. Where did you sleep? A. I slept at Jesse Miller's.

By Mr. Coult:

Q. Was it all grass on this side of the building? A. It was all grass in under.

Q. Grass and what? A. And trees. 30

Q. Were there trees there from which the leaves had dropped on to the sward? A. Them I had all raked up in the grove.

Q. All that you could? A. Yes, sir.

Q. In piles? A. Yes, sir.

Q. Was there any path or wagon road along that side of the building? A. There was a road all around the house.

Q. Was that a road that was gravelled; was there a plain, travelled road on that side of the house? 40 A. It was a common road.

Q. Was it a gravelled road? A. Yes, sir.

Q. On which side of the gravelled road were the piles of brush and leaves which you had raked up and set fire to? A. On the outside of the road.

Q. Furthest from the building? A. Yes, sir.

Q. Are you sure that there is a plain, open, travelled road along there? A. Yes, sir.

Q. Was not the grass growing in that road? A.

No, sir; I don't think there was any grass in it; no grass will grow in the winter in the road.

Q. From the point where you stood could you see the place where the fire afterwards broke out? A. I could see the smoke around the corner of the house.

Q. But you couldn't see the place? A. No, sir; I could see the smoke first; and after I got up to it and got water I could see the place.

10 Q. Standing where you were when the fire broke out, you couldn't see the place where the fire originated? A. Oh, yes; I could see right up to it.

Q. Could you see the fire, or did you only see the smoke which came from the fire? A. I seen the smoke first.

Q. Then you walked up? A. I walked up to it.

Q. Then you could see the fire? A. Yes, sir; shortly afterwards.

20 Q. Before the fire how many rooms of this house had you been in? A. I don't know exactly how many rooms.

Q. Can't you say? A. I suppose half a dozen or a dozen or more; some rooms I had to go through to get in the hall.

Q. Had you occasion to go into any more than two or three of the rooms of the house? A. Well, I had no occasion; I only wanted to see that everything was locked.

30 Q. In point of fact, had you ever been in more than three of the rooms? A. I think so.

Q. Have you not stated that you did not go into more than three of the rooms? A. It might have been more; I don't think I have been in less.

Q. Have you not stated since the fire that you had not been in more than three?

Witness: I don't know exactly what you mean.

40 Mr. Coult: Didn't you tell somebody after the fire that you had only been in three of the rooms of the house before the fire took place? A. Well, I have been first off in about two or three or more; then after that, up to the last week, I had to go through the lower floor and the wing to get into the kitchen.

Q. That don't answer the question. Didn't you state after the fire that you had not been—did a gentleman converse with you about how the fire

took place; did you tell anybody about the circumstances, and about what care you had had over the building? A. I think I did; yes, sir.

Q. Did you see this gentleman, Mr. Winterton? A. Yes, sir.

Q. Did you tell him? A. Yes, sir.

Q. And did he take down a statement of what you—? A. Yes, sir.

Q. You told him correctly, did you, at that time? A. Yes, sir. 10

Q. Do you recollect telling him at that time that you had never been in more than two or three rooms in the house before the fire? A. I had been in two or three of the main building.

Q. Didn't you say so? A. Well, I said I had to go through the wing the last week before the fire happened every day to get some milk in the kitchen; I had to go through.

Q. Did you tell him at that time that you hadn't been, up to that time, in any except two or three 20 rooms of the house? A. Well, I suppose I had been in two or three, perhaps more; I can't tell exactly.

Q. If you did tell him so at that time you intended to tell him the truth, didn't you? A. Yes, sir.

Q. You say that the fire had been in the place ten or fifteen minutes before anybody came? A. Well, about that.

Q. Do you know how long it had been in the 30 building, or could you tell from the looks of it, at the time you discovered it? A. No, sir.

Q. How much of it was on fire when you saw it? A. Fire under the whole porch.

Q. Under the whole floor? A. Well, under the whole porch, all around the house.

Q. Was it in a blaze? A. Well, I could see the smoke first, and then the blaze after.

Q. Was it in a blaze when you first went to it? A. No, sir. 40

Q. Had it got into the weather-boards of the house? A. It started up from the office corner along the sides in the weather-boards.

Q. Was there smoke coming out of the house itself? A. I can't tell; I only see the smoke from under the porch, what I could notice.

Q. Where did you go to get your water? A. The spring, right close by.

Q. Whereabouts, in the milk-house—the ice-

house? A. No, sir; it is out this way (indicating).

Q. Where did you get your pail? A. Up at the barn.

Q. You went from there to the barn and got the pail? A. The water was in the pails at that time.

Q. And then you had the key of the building in your pocket? A. Yes, sir.

Q. Had you given any alarm? A. Yes, sir.

10 Q. Cried "fire"? A. Yes, sir.

Q. When did you do that? A. As soon as I got back with the two pails of water; then I gave the alarm right off.

Q. When you got back the fire was pretty well under way, wasn't it? A. No, sir; I couldn't see nothing but heavy, thick smoke yet, and a little fire.

Re-direct examination by Mr. Harris:

20 Q. You say you went into the kitchen through the hall every day; what for? A. To put milk into it.

Q. Where did you get the milk? A. From Mr. Sonneborn's cows.

Q. Who milked them? A. I did.

Q. Where were the cows kept? A. In the barn.

Q. Where did you keep the milk? A. In the kitchen.

30 Q. In what part of that building is the kitchen? A. It is up in that wing (indicating).

Q. How did you get into that wing with the milk; where did you go in? A. Through the main building up to this door (indicating).

Q. You went through the front door into the main building? A. Yes, sir.

Q. You had the key to that door? A. Yes, sir.

40 Q. How often a day did you do that? A. Twice a day; that was the last week I was there.

Q. What was done with the milk there in the kitchen? A. I was going to make butter out of it.

Q. For how long before the fire did you take the milk in every day? A. For about a week.

Q. You say there were two cows that you milked? A. Two cows.

Q. At the time that you made the arrangement with Mr. Sonneborn to go up there, when did you

arrange for your family to go up there? A. As soon as they could be able to come.

Q. And then you arranged that they should live in the place where Smith lived? A. Yes, sir.

By the Court:

Q. You said that some of the furniture was got out of the house? A. Yes, sir.

Q. What furniture was it? A. Chairs and sofas and some little stuff out of the kitchen? 10

Q. About how many chairs? A. I can't tell, exactly.

Q. As near as you can tell? A. Five or six dozen, perhaps, more or less.

Q. How many sofas? A. Three or four or five.

Q. And what other stuff was there? A. Some kitchen things.

Q. What was done with those things? A. They all remained in the barn.

Q. You took them in the barn? A. Yes, sir. 20

SOLOMON S. SONNEBORN, plaintiff, sworn in his own behalf.

Direct examination by Mr. Harris:

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

Q. Where do you now reside? A. In the city of New York; that is my present residence.

Q. Have you ever lived at Schooley's Mountain? 30 A. I have.

Q. When? A. Last Summer.

Q. Do you mean this last Summer? A. This Summer a year ago—1880.

Q. Whereabouts did you live? A. I lived at the Forest Grove House.

Q. You lived in this building of which we have been speaking? A. Yes, sir.

Q. Who was the owner of the building at that time? A. Mr. Stoutenburgh. 40

Q. And you lived there as his tenant? A. I did.

Q. Who was the owner of this building at the time of the fire? A. I was.

Q. When had you purchased it? A. During the month of January of this year.

Q. That is the deed of the building, is it from Mr. Stoutenburgh to yourself? A. (After examining diagram) Yes.

Q. At the time you purchased the building, did

you, or not, purchase any personal property? A. Yes, I purchased the furniture, also.

Q. Where was this furniture at that time? A. In the building; or, in other words, I bought the entire contents of the building.

Q. Did you buy the furniture separately? A. I bought every thing the house contained with the exception of a few articles exempted in my bill of sale.

10 Q. (Paper shown to witness.) Look at that, and state whether that is the bill of sale? A. Yes, sir, that is the bill of sale of the contents of the house—utensils.

Q. This was all one transaction; the buying of the real estate and the furniture? A. Yes, sir.

Q. And it was all included in the one consideration? A. Yes, sir.

Q. Have you made an estimate of the value of the furniture in this building? A. I have.

20 Q. When did you make that estimate?

Witness: The estimate I made originally, you mean?

Mr. Harris: Yes.

A. The estimate I made about the time that I bought the property, during the time I occupied the place, and afterwards.

30 Q. You saw the furniture when you occupied the place? A. Yes, sir.

Q. Had you occupied it as a tenant? A. Yes, sir; during the Summer of last year—the whole season.

Q. Did you make a statement or estimate of the loss to the Manufacturers Insurance Co.? A. I did.

Q. Under oath? A. Under oath.

Q. (Paper shown to witness.) Just look at this

40 paper and see whether that is the one you refer to? A. That is the paper.

Q. According to that paper what was your estimate of the value of the things that were lost?

[Objected to.]

A. $4,199.

Q. This is simply the articles that were burned at this fire? A. Yes, sir.

Q. Were you at the premises at the time of the fire? A. I was not.

Q. When had you last been there? A. I hadn't been there since we left it in the latter part of September, 1880.

Q. You were not up there at the time of the purchase? A. No, sir; my attorney was there; I don't think I was up there since; I am not sure; as near as I can remember I have not been up there since. 10

Q. Had you moved away from the building any of the furniture that you had purchased? A. No, sir.

Q. It had remained there? A. Yes, sir.

Q. Do you know whether or not all the furniture was consumed at the fire? A. I believe there were a few things saved, which I have learned—a few chairs, and I think a sofa or two, possibly, and I think a little crockery.

Q. Were you up there immediately after the fire? 20 A. The second day after the fire.

Q. Did you see the things that were taken out, that you have just mentioned? A. No, I did not; I heard so since, as near as I can remember.

Q. At that time did you learn that any of the things had been saved? A. It is possible that I may; I could not say positively as to that. They might have told me at that time and I might have forgotten it.

Q. From the estimate you made there, and which 30 is contained in that proof of loss, what have you to say as to the values which were affixed to the goods? A. That is to the best of my recollection what I would estimate as the value of those goods.

Q. In your bargain to buy this house and property do you recollect what valuation the furniture was included? A. No, sir, I do not; not precisely. The seller mentioned to me as he put in sometimes the different things; but I had the property assessed by a competent person, both the furniture 40 and the real estate, at that time.

Q. What was the valuation of the furniture at that time? A. My valuation was about $3,000; that I considered it worth at half price—old furniture and old carpets, and such like. I said I should only buy it if I got it at about half value, as it was old and not such goods as I wanted.

Q. What price did you pay for the property? A. $10,000.

Q. Was that the price that Mr. Stoutenburgh asked for the property, when you desired to purchase it? A. No, sir.

Q. What was the price he asked for it? A. $18,000; he stated he had been offered $24,500 for it a few years before.

Q. Was this negotiation for the property a matter that occupied some space of time before you came to a bargain? A. Yes, sir; it occupied all of the time since I left, the latter part of September, until the date of the purchase.

Q. Do you know when Mr. Stoutenburgh had last lived on the premises before you occupied them that Summer? A. I think Mr. Stoutenburgh left the place a few days before we got there; perhaps the day previous only; not more than a day or two, as near as I can remember.

Cross-examination by Mr. Coult:

Q. You occupied this property as a tenant of Mr. Stoutenburgh for more than one season, or one season only? A. Only one season.

Q. What part of it did you occupy, the whole of it? A. The whole of it.

Q. Was it all furnished? A. Yes, it was pretty near all furnished, except the part that was occupied by Mr. Smith, and perhaps a few rooms above that wing.

Q. How many rooms were there in the house? A. Well, we occupied about twenty rooms.

Q. How many rooms were there? A. I don't know how many rooms there were; there was quite a number of rooms.

Q. Have you never heard? A. I have heard there were thirty, forty or fifty in the whole premises.

Q. Weren't there more than that? A. Not that I know of.

Q. You lived there a year; don't you know? A. I only lived there one season.

Q. Can't you tell whether it was forty or fifty? A. I say there was either thirty, forty or fifty rooms in the house, all told, and we occupied about twenty.

Q. You occupied which portion? A. The centre building and the upper part of the wing as sleeping apartments on this side; we occupied this whole centre of the main building, and all the rooms in the upper part of this wing, and the lower part for sitting rooms.

Q. For what purpose had it been used? A. Mr. Stoutenburgh had a boarding school, I believe.

Q. Was the furniture at the time you made your purchase stored in some portion of the building, and was there some portion of the building entirely vacant as far as furniture is concerned? A. I think likely; there was mattrasses and such like as that piled up in one room, but the furniture, when we went up, was all scattered through the rooms and located in them nicely. I went up and looked at the house when I rented it. 10

Q. Did you use the furniture you had there at the time you occupied it? A. Yes, sir.

Q. You only used some small portion of it? A. I think I used it all as far as I know; I don't know of any place being exempted from furniture.

Q. How large a family did you have? A. I had a family of eight children and six servants.

Q. How many beds were there in the place? A. I think there must have been about twenty that we occupied. 20

Q. Do you mean that your family used all those beds? A. We had one or two spare rooms that we had for friends; we occupied all but them.

Q. Did you make an estimate of the value of the furniture which you intended to purchase at the time you made this bargain? A. Yes, sir.

Q. By items? A. No, not by items exactly; I made a general valuation; we had a list at that time from Mr. Stoutenburgh; we had a schedule of all the material, while we rented it, from Mr. Stoutenburgh, which was the basis for me in making up my estimate. 30

Q. I understood you to say he made the estimate of the amount of the furniture and its value? A. I suppose he did; yes.

Q. Did he tell you what his estimate was—that the furniture you purchased; did you buy it all? A. I bought all, but a few articles of it were exempted in the bill of sale. 40

Q. What was his estimate? A. $3,000 was the lowest amount he ever mentioned to me as the lowest value; I never heard him say any other figure.

Q. You made a statement which was furnished and put in your proof of loss? A. Yes, sir; (producing paper,) here it is.

Q. How did you get at the value of each particular article? A. I got the value through the same gentleman who was up there inspecting the property

for me—a competent party, a judge of these things —and knowing these things assisted me in making up this estimate, getting at the value of the different items.

Q. When was that estimate made? A. The day of that document; right after the fire, or a few weeks after the fire.

Q. Let me understand; you sat down after the fire and made an estimate of the value of the articles consumed? A. In my proof of loss I had to make up the valuation of the property.

Q. Did you go up there? A. Yes, sir; two days after the fire.

Q. Was it made then? A. No, sir.

Q. When was it made? A. It was made at the day of that paper.

Q. Can you tell from memory how long after the fire it was? A. Two or three weeks after the fire.

Q. Where was it made? A. At Bloomingdale, N. J.

Q. What did you have as a basis on which to make it? A. A basis of my general knowledge of the property while I had it in my possession the previous Summer.

Q. Did you have a list of the articles? A. Yes, sir.

Q. Where did you obtain it? A. From Mr. Stoutenburgh.

Q. The original bill of sale? A. Yes, sir.

Q. You sat down and took this bill of sale and put a value to each article? A. Yes, sir.

Q. Tell us how you arrived at the value of each particular article? A. From my general knowledge of the things and as near as I could remember of the condition of the things while I occupied them during that Summer.

Q. You put on your valuation by taking the schedule by which you purchased and putting a value on them from your recollection of the articles? A. Yes, sir.

Q. Did you omit any thing at all as having been taken out, or did you put a valuation upon each article contained in the schedule? A. I did put on a valuation upon each article contained in this bill of sale.

Q. You had been up to see the wreck after the fire? A. I did.

Q. And you knew that some of the articles were saved? A. I did not. It might have been men-

tioned to me at the time and might not. I had no recollection at the time I made the proof of loss that anything was saved.

Q. Didn't you see any articles there that had been saved? A. Not that I remember. As I stated before, I have learned since there are, and they are all there in the barn—never been touched.

Q. You put down 118 parlor and bedroom chairs? A. Yes, sir.

Q. And put the value of those at $2.00 each? A. Yes, sir. 10

Q. Were they worth that? A. That is to the best of my knowledge and belief.

Q. That isn't it. You saw them? A. I did.

Q. Do you now believe them to be worth that sum? A. I believe what I have put down on that piece of paper.

Q. You say yes, then? A. Yes, sir; they might have been worth $10 a piece.

Q. Were there not a great many of those chairs entirely used up? A. There might have been. 20

Q. Don't you know there were? A. No, sir; I have no such recollection.

Q. Broken, or destroyed partially? A. There might have been such chairs not in good condition, but I don't remember even that.

Q. Did you examine them so as you could tell their condition? A. I did not; only a general observation. I made the valuation by the general observation I made during my tenantcy of the place. 30

Q. Wasn't that enough to give you knowledge as to whether they were in a good condition? A. As far as I can remember they were in good condition. Some of the chairs were the ordinary cane-bottom chairs; and the parlor chairs were covered with cloth—hair-cloth.

Q. There was one hair-cloth set. In the sitting-room there were chairs of a different description? A. Very fine sitting-room chairs, with a rest for the feet—about five or six were up stairs in our room. There were quite a number of those chairs. 40

Q. Did you include all the chairs that were purchased in number? A. Yes, sir; I did. I put them down on an average of $2.00.

Q. That was your idea? A. That was my idea,

Q. You put down twenty mattresses? A. Yes, sir.

Q. Do you know how many of those chairs had been used? A. No, sir; I couldn't tell you.

Q. Have you any idea? A. No, sir.

Q. Did they not have an appearance of being used for a long time? A. Some of them had and some hadn't, some in a good condition and some not.

Q. You put down twenty bedsteads; were there twenty? A. To the best of my knowledge, there were

10

Q. Did you count them?

Witness: When I purchased them?

Mr. Coult: Yes? A. My attorney did.

Q. Did you? A. I did not; no, sir.

Q. Did you examine them at the time of purchase? A. No, sir.

20

Q. How do you know what they were worth? A. Because I had occupied them during the Summer of the previous year.

Q. All of them? A. All of them, as near as I know.

Q. Did you sleep in the twenty different beds yourself? A. No, sir.

Q. Did you see each one of them? A. Yes, sir.

Q. Do you swear, from your observation, they were worth $10 a piece? A. I swear to the best of my knowledge and belief, they were worth on an average about that price.

30

Q. Could you recollect and state, from memory, what each individual article in this long list refer to, when you made up these proofs of loss and you set them down at Bloomingdale? A. I think I could.

Q. You could remember when the list was called over, what each article referred to was worth, in order to fix its value? A. I could only put on a general value; I haven't put on exact figures on every article; its general value, as near as I could get at it.

40

Q. Twenty-two large flannel blankets, you put them down as worth $2.00; did you recollect the quality of those blankets at that time? A. I have no exact remembrance of the quality of the blankets at that time.

Q. How did you fix in your mind their value? A. From general observation of the blankets at the time I had them in use.

Q. Then you put down, "Miscellaneous articles, $200?" A. Yes, sir.

Q. How did you fix that? A. I supposed that was the value of the miscellaneous articles.

Q. Did you have no actual appraisement of the value of these articles, and did you simply make out, in this proof of loss which you made up, the value of these articles from the memory which you carried of the appearance of the articles? A. I have already stated that, in connection with a gentleman who had valued the property at the time.

Q. Who was that gentleman? A. Mr. Lange.

Q. When did he make the valuation? A. At the time I purchased it.

Q. Did he have a schedule of it? A. He had the memorandum; yes.

Q. Did he have the articles each down separately? A. I don't know how he valued it exactly; I wasn't present.

Q. Did you see any schedule prepared with the value of each article annexed to the article? A. No, sir; I had a schedule from Mr. Stoutenburgh of all the articles contained in this bill of sale.

Q. Did you see prepared by Mr. Lange or Mr. Stoutenburgh, or was there prepared by you at that time, any schedule which affixed to each article the value? A. No, I never had a paper showing the precise value of each and every article.

Q. You never saw one? A. No, sir.

Q. Do you know how many yards of carpet there were? A. I do not from memory.

Q. How do you fix their value? A. From general observation at the time I occupied the building.

Q. Do you know how many separate pieces of carpet there were? A. No, sir; I do not.

Q. You furnished these proofs of loss; did you get a letter from the Company with relation to them? A. From the Company? No, sir; not that I know of.

Q. Or from any person? A. I received no letter that I know of from anybody of the Company.

Q. In relation to your proofs of loss? A. Not that I know of. I received, I think, a letter from a New York person, which I handed to my attorney. I received a letter from a certain person speaking on this matter.

Q. (Paper shown to witness). Is that the letter? A. I believe that is the letter.

Q. What is the date of it? A. June the 4th, 1881.

The Court: When were these proofs of loss served?

Mr. Coult: The 29th of April they are sworn to.

10

Witness: This letter is dated June the 4th.

Q. Who is it from? A. It is from some person in New York; I don't know his name.

Q. (Reading letter addressed "S. S. Sonneborn," and signed, "A. H. Winterton.") You received that letter? A. Yes, sir.

Q. Did you make any reply to it? A. I did not.

20 Q. And have not since? A. Nor have I since.

Q. Did you make any valuations of the articles saved? A. I have not.

Q. At any time? A. I have not seen them since; I have not been up there since that day.

Q. You don't know the number of them, nor the value of them? A. No, sir.

Q. And in your proofs of loss you made no allowance for them whatever.

30 *Re-direct examination* by Mr. Harris:

Q. When, about, did you hire or engage Mr. Hoffman to go out to the Mountain? A. I engaged Mr. Hoffman about the middle of March, in this year.

Q. Where did you meet him and make the agreement? A. At my house in New York.

Q. What was the arrangement between you and him as to his serving you? A. I made arrangements with him to go immediately to Schooley's
40 Mountain to take possession—to do the general work and the gardening on the place, and take his family there as soon as Mr. Smith would vacate the place, who was then occupying it.

Q. Was it arranged at that time when he should go up? A. He should go up as soon as possible; within a week at all events from that time that I engaged him he was to go.

Q. Did you at that time learn from him that his wife had been confined? A. No, I had not.

Q. Whom did you send with Hoffman up to the Mountain? A. My son.

Q. What knowledge had you previous to the fire as to the time when Mr. Smith moved out? A. I notified Mr. Smith to move out as soon as he could to make room for Hoffman's family to move in. I wanted to give him fair time.

Q. Did you know, up to the time of the fire, that Hoffman's family had been detained from moving up? A. I did not; I didn't know until I went up there that his family wasn't there; that was the first intimation I had of it. 10

Re-cross-examination by Mr. Coult:

Q. You sent your son with Mr. Hoffman up there? A. Yes, sir.

Q. Did he tell you he had procured board for Mr. Hoffman? A. He did not; no, sir.

Q. Then you didn't know where he was when he came back? 20

Witness: Where who was?

Mr. Coult: Mr. Hoffman. A. Nothing except that he was on the place.

Q. You knew his family hadn't gone? A. Yes, sir; I knew they hadn't gone that day; I didn't know when they did go.

Q. You are doing business in New York? A. I am doing business in Bloomingdale, N. J. 30

Q. And Mr. Hoffman was from Long Island? A. Yes. sir.

Q. Where did you make your contract with him? A. At my residence in New York City.

Q. All you know was, your son went with him? A. Yes, sir.

Q. What is your business? A. I am a manufacturer of India rubber goods.

Q. Factory, where? A. Factory at Bloomingdale, N. J. 40

Q. (By the Court.) Who served the proofs of loss for you? A. My attorney, Mr. Ryerson.

GEORGE E. LANGE, sworn on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. Where do you reside? A. Bloomingdale, N. J.

Q. What is your employment? A. Civil engineer.

Q. By whom are you employed? A. By the Rubber Comb and Jewelry Co.

Q. Their factory is at Bloomingdale? A. Yes, sir.

Q. Is Mr. Sonneborn an officer of that Company? A. Yes, sir.

Q. Have you ever been at Schooley's Mountain?
10 A. Yes, sir.

Q. When? A. I went there last year in August or September.

Q. Who was occupying the place at that time? A. Mr. Sonneborn.

Q. How long were you there at that time? A. I was only there two days.

Q. What were you doing there? A. I was visiting Mr. Sonneborn.

Q. Did you at that time go through the Forest
20 Grove House? A. Yes, sir.

Q. What part of it? A. I went most through all parts of it, except two rooms.

Q. With whom? A. I went through with Mr. Sonneborn.

Q. For what purpose did you go through the building and examine it? A. Mr. Sonneborn was showing it to me; he expected to buy the place.

Q. For what purpose were you examining the things; did you examine the goods and chattels
30 and personal property? A. No, sir; I only made an estimate on them, but not for the purpose to buy the place.

Q. Did you look at the furniture that was there with the purpose of making an estimate on it? A. No, sir.

Q. You did make an estimate? A. Yes, sir; a rough estimate, but not for the purpose to buy the place.

Q. You made an estimate for the purpose of find-
40 ing out what it was worth? A. No, sir; I was visiting him and he spoke about buying the place, and all I said I thought it was very cheap, what he could buy it for; that is all I estimated.

Q. Did you make an estimate of the value of the personal property that was there at that time? A. Yes, sir.

Q. By setting down the articles separately or generally? A. No, sir; only a rough estimate.

Q. What was the amount of your estimate of the

things at that time? A. $15,000 for the place; that is as much as I remember; I can't tell exactly.

Q. Did you make an estimate of the value of the personal property, furniture, etc? A. Yes, sir.

Q. Do you remember how much that estimate was? A. From $3,500 to $4,000.

Q. Were you present at the time Mr. Sonneborn made the proof of loss—the valuation of the goods in the proof of loss? A. Yes, sir.

Q. Did you assist him to do it? A. Yes, sir. 10

Q. How was the value of goods and furniture reached at that time? A. Only by what I seen last year in August; by my judgment from what I seen that time.

Q. Were you up to Schooley's Mountain during the Winter about the time Mr. Sonneborn purchased? A. No, sir.

Q. Did you make out this list or assist in making it out? A. Yes, sir.

Q. In whose writing is it? A. Somebody in the office has copied it. 20

Q. In whose writing are the figures that are set down opposite the names? A. In Mr. Sonneborn's.

Q. Were you present when he wrote it? A. Yes, sir.

Q. And this was the result of your judgment and his? A. Yes, sir.

30

Cross-examination by Mr. Coult:

Q. You are in the employ of Mr. Sonneborn? A. I am in the employ of the Rubber Comb and Jewelry Company.

Q. He is one of the officers of that Company? A. Yes, sir, treasurer of the Company.

Q. And he was boarding out at Schooley's mountain, last Summer? A. Yes, sir.

Q. And you went up to visit him? A. Yes, sir, I was there two days. 40

Q. You were there just to make a visit? A. Yes, sir.

Q. You saw the personal property in his house? A. Yes, sir.

Q. Did you go about making a list of it? A. No, sir.

Q. Do you know how many beds there were? A. No, sir.

Q. Or chairs? A. No, sir.

Q. Or tables? A. No, sir.

Q. Or carpets? A. No, sir, I couldn't remember how many carpets; they were new, some of them.

Q. Did you go in all the rooms of that house? A. Most all the rooms.

Q. How many rooms were there in it? A. I think about sixty.

Q. Were you in sixty rooms? A. I don't remember having been in them all; no, sir.

10 Q. Then you didn't see all the furniture? A. No, sir.

Q. Did you go in the kitchen? A. Yes, sir.

Q. Did you see the kitchen furniture? A. I havn't looked so much at that.

Q. Did you see the knives and forks and plates? A. Only what is down on the table.

Q. Did you undertake to place a value upon those articles from that—from your knowledge of them? A. Yes, sir; after the fire.

20 Q. Up at Bloomingdale? A. Yes, sir.

Q. Never had seen them in the mean time? A. Never saw them since last year.

Q. Had you got the list? A. I got a list from Mr. Sonneborn.

Q. Who fixed the price? A. I did.

Q. How did you know what you were doing? A. Yes, sir; I think I did.

Q. How did you know? A. By what I remembered seeing last Summer when I was there.

30 Q. Did you remember from the looks of a table or a wash-stand or a bedstead? A. No, sir; I remember well what kind of furniture it was.

Q. How many bedsteads where there? A. That I don't know.

Q. How many stands? A. I don't know.

Q. How many of them were marble tops? A. There was a good many.

Q. How many? A. I don't know.

Q. Do you know how many mirrors there were?

40 A. No, sir.

Q. Or the size of them? A. I remember the size of them; I can't tell exactly now.

Q. Your memory is just as good now as it was when you made out this proof of loss? A. No, sir, I don't think it is.

Q. What made it better then than now? A. Because it is five or six months ago since I made it.

Q. Could you remember the distinct items; could you recollect the appearance of those different ar-

ticles at the time you made out this proof of loss? A. As good as I could, yes, sir; I couldn't remember every thing.

Q. Could you mention, now, any of the articles in the house? A. I have seen some beds; some black walnut beds and bureaus?

Q. How many? A. They seemed to me as if they all were black walnut.

Q. All you saw were black walnut? A. Yes, sir; they looked like black walnut. 10

Q. Did you estimate on black walnut bedsteads all through? A. I estimated on black walnut second hand.

Q. All the way through? A. Yes, sir.

Q. What kind of stands did you estimate black walnut? A. I estimated on the stands, beds and bureau—all one set.

Q. That was the way you made your estimate? A. Yes, sir.

Q. You estimated them in suits and sets? A. Yes, sir; all one set. 20

Q. What kind of mirrors were there? A. That I don't remember.

Q. Do you know how many? A. No, sir.

Q. Do you remember, them? A. No, sir.

Q. How could you tell what they were, whether they were gilt or black walnut, or large or small? Do you know? A. No, sir.

Q. How did you fix the value if you didn't know? A. Some that Mr. Sonneborn told me and some what I remember, and some what Mr. Sonneborn's son told me. 30

Q. What kind of carpet did you estimate on? A. On ordinary carpet at $1.50 per yard.

Q. What kind of carpet did you estimate at a $1.50 a yard? A. Brussels carpet I estimated in some places, and in bedrooms rag carpets.

Q. Did you estimate it all at a $1.50? A. No, sir.

Q. How many yards did you estimate at $1.50? A. Very few yards. 40

Q. Do you know how much you estimated on carpet altogether? A. I don't remember; I think I estimated some carpets at 30c. a yard.

Q. How many yards, and of what kind? A. Carpet in the bedrooms.

Q. Did you estimate on any pianos? A. Yes, sir.

Q. How many? A. I estimated on two pianos.

Q. Do you recollect seeing two pianos in the house? A. Yes, sir.

Q. Do you recollect what you estimated them? A. Yes, sir; I remember one I estimated at $300, and I believe one at $100.

Q. That is to say, then, you fixed these prices on these different articles all the way through this list, did you? A. Yes, sir.

Q. Are you able by just going through a building—
10 a large building of this kind, containing sixty rooms—to estimate and put a price upon such articles as that? A. I can by taking what Mr. Sonneborn told me.

Q. Didn't you just take what he told you as your only authority? A. No, sir; not exactly; some what I saw I estimated at my knowledge.

Q. Some of what you saw you estimated on your own knowledge? A. I estimated on what I saw. I saw that was what the furniture was.

20 Q. You have never been engaged in the furniture business? A. But I bought furniture for the Company's house and for my own house.

Q. You had never been engaged in estimating the value of furniture beyond that, anywhere? A. No, sir.

By Mr. Harris:

Q. What had you to ascertain the quantity; had
30 you the bill of sale? A. Yes, sir.

JOSEPH HEATH, sworn on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. Where do you reside? A. Schooley's Mountain.

Q. How long have you resided there? A. I have resided there for about nineteen years in succession.

40 Q. What is your business? A. Merchant.

Q. You have a store there, do you?—how far from the location of the Forest Grove House? A. In the nearest way we can go it is about four hundred yards.

Q. Do you remember the occasion of the burning of the Forest Grove House? A. I do.

Q. What time in the day was it? A. About half past twelve.

Q. Were you present at the fire while it was burn-

ing? A. Yes, sir; I got there soon after it took fire.

Q. What called your attention to the fire? A. The alarm.

Q. The call of "fire"? A. Yes, sir.

Q. Do you know from whom? A. I think it was a gentleman by the name of Powers.

Q. Some one along the road? A. Yes, sir.

Q. And you went there? A. I went there.

Q. To what extent had the fire progressed when you reached there? A. It had got in the weather-boards above the stoop—above the piazza. It was going up the side of the house. 10

Q. What space was covered by the flame at that time? A. Well, I couldn't say how much space; perhaps several feet.

Q. What part of the building was it? Just point on the map? A. (Indicating on map); about here, sir.

Q. Between the main building and the wing? A. Yes, sir; there was a small building right here on the end of that porch that they called the office; it was about in front of that. 20

Q. After you came were efforts made to extinguish the fire? A. No, sir.

Q. Why not? A. It was no use.

Q. Why not? A. The fire wouldn't wait.

Q. Were there any means at hand to put it out? A. No, sir.

Q. Did you see Mr. Hoffman there? A. No, sir. 30

Q. How soon after you came did you see him? A. A short time after I came there.

Q. Where did you first see him? A. At the rear of the house.

Q. What was he doing? A. I can't say what he was doing. We were making an effort to get some furniture out.

Q. Was there anybody about the fire when you first got there? A. Very few. 40

Q. Who? A. I don't know as I could mention the persons. We came up in the front of the house and saw there was no chance to do anything there, and we went round to the rear of the house and endeavored to save some of the furniture.

Q. Where did you get into the house for that purpose? A. At the rear of the east wing.

Q. What is the inside arrangement of that wing?

A. There is a hall through the centre of it—rooms on each side.

Q. And you can go from that hall where? A. You can go from that hall to this room here, which was formerly called the chapel, I think.

Q. Occupying the east portion of the main building? A. I think it occupies the whole of the rear of the main building, first floor.

Q. Whereabouts are the stairways of the wings? A. I couldn't answer that question.

Q. Did you make an effort to get into the front door? A. No, sir; the fire prevented making the effort.

Q. What was the rapidity of the fire? A. It was very rapid; it burned like straw, almost.

Q. What kind of a building was the Forest Grove House? A. A wood building—a frame building.

Q. Do you know about how long it had been built? A. No, sir.

Q. Was it built when you came there, nineteen years ago? A. Yes, sir.

Q. What did you get out of the building at that time? A. We got some sofas, tables, chairs.

Q. Do you know about how many chairs? A. No, sir.

Q. How many sofas? A. There was a number of people engaged in carrying out articles; we couldn't get many on account of the smoke.

Q. Was the inside of the main building, when you went there, filled with smoke? A. Yes, sir; there was smoke in this room when we went after the articles of furniture; it was very thick.

Q. Were the articles of furniture in the back room, or one of the rooms? A. In the back room.

Q. What was called the chapel? A. Yes, sir.

Q. Through what way did you carry them out? A. The door leading into the east wing.

Q. And out through the hallway? A. Out through the hallway.

Q. Was any effort made to get into the other wing? A. Yes, sir; we got into the other wing; the fire didn't burn there so rapidly. We got in this wing where the kitchen is located, and got out some articles—out of the kitchen.

Q. Could you get up stairs in that wing? A. Yes, sir; there were some people up stairs.

Q. Was there anything brought from up stairs?

A. I think there was some things pitched out of the window.

Q. Do you know whether or not Mr. Hoffman had been burning leaves that morning? Had you seen him? A. Yes, sir; I saw the smoke.

Q. What kind of a day was it? A. Well, it was a pretty dry day; not much wind in the morning; but the wind increased and changed afterwards; the course of the wind changed.

Q. Do you know whether or not others in that neighborhood were engaged in the same work. 10

[Objected to as immaterial. Objection sustained.]

Q. Had you become acquainted with Hoffman previous to the fire? A. I had seen him several times.

Q. Whereabouts? A. I saw him in my store, and I saw him pass along the road to and from the Forest Grove House. 20

LOUIS RYERSON sworn on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. Where do you reside? A. Bloomingdale.

Q. What is your occupation or business? A. Attorney-at-law.

Q. You are the attorney of record for Mr. Sonneborn in this suit? A. Yes, sir. 30

Q. Have you ever been to Schooley Mountain? A. Yes, sir; I have been there three times—once in December; again on or about the 20th of January, and then on the 27th of January.

Q. For what purpose were you there? A. In carrying out the transaction in regard to the purchase of this property by Mr. Sonneborn from Mr. Stoutenburgh.

Q. What did the purchase by Mr. Sonneborn include? A. Certain real estate, together with the house and household furniture. 40

Q. [Photograph picture shown to witness.] Just look at that picture; is that a photograph of the house? A. It seems to be.

Q. That is a photograph of the building as it appeared at the time you were there? A. Yes, sir; it seems to be.

Q. Did you at any time when you were there examine as to the personal property that was on the

premises? A. The last time I was there, which was the day after the consumation of the sale, Mr. Stoutenburgh and myself went through the house hurriedly, and made a hurried examination of the articles, as they were expressed in the bill of sale.

Q. You had at that time the bill of sale which we have had here this morning? A. Yes, sir.

Q. To see whether the articles taken were in the building? A. Yes, sir.

10 Q. You found them there? A. Yes, sir.

Q. That was the next day after the sale? Yes, sir.

Q. Did you form an estimate as to the value of the goods that were there on the premises at that time? A. Well, a sort of an estimate; not enough to be relied on I don't consider, because I am not an expert in that business.

Q. Did you ever see this letter of Mr. Winterton's that has been referred to? A. Yes, sir.

20 Q. Did you ever have it in your possession?—A. Yes, sir.

Q. Of whom did you receive it? A. Mr. Sonneborn.

Q. What did you do with it, or do with reference to it? A. I read it.

Q. Anything else? A. No, sir.

Q. Did you go to the Company? A. I went to the Company; yes, sir.

Q. Before or after the receipt of that letter?—

30 A. After the receipt of that letter.

Q. Whom did you see? A. I saw Mr. Wilkinson.

Q. The President? A. Yes, sir.

Q. Did you have any conversation with him about this loss? A. Yes, sir.

Q. For what purpose did you go there? A. To make a demand on the Company for the amount of the policy of the insurance.

40 Q. Did you make such demand? A. I did.

Q. Upon whom? A. Mr. Wilkinson.

Q. What reply did he make? A. Mr. Wilkinson declined to pay the loss.

Q. Did he give any reasons for declining to pay? A. He stated that the premises were not occupied; that was the principal reason, and the one dwelt most on.

Q. Did he state any other reason for not paying the policy? A. He said that Mr. Winterton had

written a letter to Mr. Sonneborn and that I should have seen Mr. Winterton.

Q. What reply was made to that? A. That I had no knowledge that Mr. Winterton was an officer of the Company, and that I preferred to see the President of the Company rather than some other person.

Q Anything further that you recall in your conversation with him? A. He mentioned incidentally something in regard to the proof of the loss not being entirely proper, but also suggested that he would like very much to see Mr. Sonneborn, and that if I would make an arrangement for them to meet he would like to see Mr. Sonneborn, and that he didn't wish Mr. Sonneborn to be the loser, but the Company couldn't pay the policy; and gave me to understand that the matter was a subject of adjustment, or compromise, perhaps; that was my understanding. 10 20

[Objected to.]

Q. Can you recall anything further of the conversation that took place? A. No, sir.

Q. Afterwards there was a suit commenced, in Chancery, and an injunction by Mr. Stoutenburgh against Mr. Sonneborn, and an injunction against paying those policies of insurance? A. Yes, sir.

Q. You had charge of that suit, in behalf of Mr. Sonneborn? A. Yes, sir. 30

Q. Did you ever, on the pendency of that suit, make any further demand, or have any conversation with Mr. Wilkinson or any officer of the company? A. No, sir; not myself.

Q. Were you present when the estimate of loss was made—of proofs of loss—to the Company? A. I was.

Q. And that was made by whom? A. Mr. Sonneborn and Mr. Lange; I was also present, and another gentleman. 40

Q. Who was the other gentleman? A. A gentleman by the name of Pierce.

Q. Had he anything to do with it? A. Well, I may say yes.

Q. Had he ever seen the furniture; what had he to do with it? A. He advised with Mr. Sonneborn and Mr. Lange in estimating the value of the property.

Cross-examination by Mr. Coult:

Q. You are the attorney of Mr. Sonneborn in this case? A. Yes, sir.

Q. You were acting for him, as I apprehend, before this controversy arose; you went to Schooley's Mountain? A. Yes, sir.

Q. That was at the purchase; you were acting as his attorney at that time? A. Yes, sir.

Q. Where do you live? A. Bloomingdale, N. J.

10 Q. And practice law there? A. Paterson.

Q. Between the time of the fire and the time when the suit was brought, had you ever been to Schooley's Mountain? A. No, sir.

Q. You knew nothing about the circumstances, personally, attending the fire then? A. No, sir.

Q. You made no examination there on the ground, or in that neighborhood, to ascertain how the fire originated? A. Not on the ground; no, sir.

Q. You made the certificate did you not, on the

20 proofs of loss? A. I did, sir.

Q. (Paper shown to witness.) You made this certificate as Notary Public? A. Yes, sir.

Q. Where was the certificate made? A. Bloomingdale, Morris county.

Q. At the time you had this consultation between Lange and Sonneborn and yourself? A. Yes, sir.

Q. You were at that time acting as the attorney of Mr. Sonneborn? A. Yes, sir.

Q. You made up the proofs of loss and sent them

30 to the Company yourself? A. Yes, sir.

Q. You took the affidavit of Mr. Sonneborn? A. Yes, sir.

Q. Personally you knew nothing about the value of those goods? A. No, sir.

Q. Did you know at that time that any portion of them had been saved? A. I did not.

Q. That you have since learned? A. Yes, sir.

Q. That had not been disclosed to you at that time? A. It had not, sir.

40 Q. Did you say that after furnishing the proofs of loss you saw Mr. Wilkinson? A. Yes, sir.

Q. You demanded pay? A. Yes, sir.

Q. He declined to pay? A. Yes, sir.

Q. And stated that one reason why he wouldn't pay was, that the building was unoccupied at the time of the fire? A. Yes, sir.

Q. And he also stated that the proofs of loss were defective? A. He mentioned that incidentally, but did not give it as his direct reason for refusing to pay the policy.

Q. Didn't he refer you, in that connection, to Mr. Winterton? A. He asked me why I had not called on Mr. Winterton instead of coming to see him.

Q. Didn't he tell you, you had better see Mr. Winterton, on that occasion? A. I didn't understand it so.

Q. You had had pointed out to you at that time the imperfections in the proofs? A. I don't understand your question. 10

Q. At the time you saw Mr. Wilkinson had you seen the letter of Mr. Winterton pointing out the defects in the proofs of loss? A. I saw a letter of Mr. Winterton; I didn't see any pointing out of the proofs of loss in that letter.

Q. You read the letter? A. Yes, sir.

Q. But you didn't understand the letter to mean that? A. No, sir.

Q. Where did you see Mr. Wilkinson? A. In the office of the Manufacturers Insurance Co. in Broad street. 20

Q. In this city? A. Yes, sir.

JOSEPH HEATH recalled on behalf of plaintiff.

Direct examination by Mr. Harris:

Q. I believe you said you had seen Mr. Hoffman passing to and from the premises; for about what space of time, Mr. Heath? A. Well, I had saw him almost every day after he came there until the fire occured. I would not say every day. 30

Q. At what time in the day did you see him pass and repass? A. I have seen him coming from the house, after dark—quite dark—dusk.

Q. Did you ever see him at work on the place? A. Never.

Cross-examination by Mr. Coult: 40

Q. You were at the fire, as I understand it, very soon after it occurred? A. Yes, sir.

Q. And when you got there the building was so ignited that you gave up all hope of saving it? A. Yes, sir.

Q. And addressed yourself to getting out what furniture you could? A. Yes, sir.

Q. Your entrance effected in the rear part of the building? A. Yes, sir.

Q. And was that open when you got there? A. Yes, sir.

Q. You came to the West wing? A. Yes, sir.

Q. Was there any furniture in the West wing? A. Nothing of any account.

Q. It had all been removed? A. Yes, sir.

Q. The furniture was in the East wing? A. In the West wing; it was the East wing we got entrance to.

10 Q. It was on the side next to where the fire occurred that the furniture was stored? A. Yes, sir.

Q. The other side was empty? A. The side Mr. Smith occupied; yes, sir.

Q. Do you know what was taken out of the main building? A. There was some chairs, sofas, tables.

Q. Whatever was in the lower part of the main building was taken out? A. No, sir, not all.

Q. The larger part? A. I couldn't say, sir;
20 we took what we could lay our hands on.

Q. What you could see? A. We couldn't see anything.

Q. Do you know what was taken out of the north wing? A. There was some kitchen furniture, and plates, dishes and articles used in kitchens.

Q. Any beds or bedding? A. No, sir.

Q. What was done with the furniture that was removed from the building? A. First we carried it to the south of the building as the wind then was
30 a blowing towards the barn, and after we got it there shortly the wind changed and brought the fire towards where we left the furniture, and we had to move it again.

Q. Where did you put it then? A. We carried it towards the barn; it was there when I left.

Q. Have you seen it since? A. No, sir.

Q. Do you know whether there was any schedule made of it, or any account kept of it? A. I do not.

40 Q. Nor what has become of it? A. No, sir.

Q. Did you observe how, or in what manner, the fire had communicated to this building? A. No, sir.

Q. Did you make any examination to ascertain? A. I supposed the fire had run along through the grass. There was a little grass there; although there was a road on that side of the house I think there was grass enough to communicate the fire; there might not have been.

Q. Didn't you see the track? A. No, sir; not across the road.

Q. Did you see a track to the road, and from the road to the building? A. I saw the grass was burned between the road and the building. I also saw that there was some twigs, some little limbs, that were afire; I didn't notice them when I first went there.

Q. You saw the heap of burning brush near by, or the remains of it? A. I didn't take particular notice of it; I saw where there had been a heap, afterwards. 10

Q. Didn't you trace the track where it had communicated to the building? A. Not all the way through.

Q. You saw the roadway? A. Yes, sir.

Q. Wasn't that partially overgrown with grass and leaves? A. There wasn't much grass on it; there may have been some.

Q. Don't you know that there was some grass there then? A. I couldn't swear positive there was. I saw where the fire ran under the stoop—caught to the leaves; but I couldn't trace it from where it was originally set on fire. 20

Q. You knew this building as long as you had known Schooley's Mountain? A. Yes, sir.

Q. It was an old structure? A. It was an old building; yes, sir.

Q. And not very well built? A. I couldn't say as to that, sir. 30

Q. Had you been through it? A. Not all through it; no, sir.

Q. Do you know how many rooms it contained? A. No, sir.

Q. Do you know what was in it? A. No, sir.

Q. Or the character of the furniture in it? A. No, sir.

Q. You knew nothing about that? A. No, sir.

Q. How near do you reside to this place? A. Four hundred yards by the nearest route. 40

Q. Are you a notary public? A. I am, sir.

Q. And have been how long? A. I don't know that, sir.

Q. As near as you can tell? A. (Producing paper.) I have brought my commission here, sir.

Mr. Coult: It is dated the fourth day of November, 1857?

Q. And you have since that time been acting as Notary Public when called upon? A. Yes, sir.

Q. How far is Bloomingdale from this place? A. I don't know, sir, I never was at Bloomingdale.

Q. You can give us an idea? A. No, sir.

Q. How far is it from your place to Dover? A. About ten miles, I should think.

Q. Do you know how far from Dover to Bloomingdale? A. No, sir.

10 Q. It is more than ten miles, then? A. Oh yes, sir.

Q. It is twice that? A. Possibly; I can't say.

Q. Are there any Justices of the Peace residing in your immediate vicinity? A. Yes, sir.

Q. Who? A. William Marinus.

Q. Now acting, and has been? A. Yes, sir; about within one mile from my place.

Q. Schooley's Mountain is in his jurisdiction? A. Yes, sir.

20 Q. Is there any Fire department there? A. No, sir.

Q. And never has been? A. Never has been.

Re-direct examination by Mr. Harris:

Q. About what was the value of the things that were saved from the building? A. I could not tell, sir; I don't know what were saved; I didn't examine them after they were together; I only
30 know that they were being carried out—all that we could get a hold of.

DAVID MILLER, sworn on behalf of plaintiff:

Direct examination by Mr. Harris:

Q. Where do you reside? A. Schooley's Mountain.

Q. How long have you lived there? A. Twenty-five or thirty years.

40 Q. Were you acquainted with the Forest Grove House? A. Yes, sir.

Q. You remember the occasion of this building being burned? A. Yes, sir.

Q. How far do you live from the Forest Grove House? A. 307 yards.

Q. In what direction from the building? A. West, exactly—straight.

Q. Were you present at the fire? A. Yes, sir.

Q. Early? A. The third man that was there.

Q. Who was there before you? A. A man by the name of Pierce; he had a load of plow iron in the wagon, and he happened right by the road that goes from the main turnpike into the building, and he tied his horse and went in there.

Q. Who else? A. A man of the name of Read, that worked for Crowell at Belmont Hall; none of us was apart twenty yards, hardly.

Q. You were there, substantially, at the same time? A. Yes, sir. 10

Q. How were you notified of the existence of the fire? A. I was eating my dinner and I had just got done and stepped out on the stoop, and I heard some one halloo, "fire!" and I see a man come with a sulky and a horse on a run from German Valley, and I live right across the street from Belmont Hall, and I looked across there and it had just took fire under the stoop.

Q. At what point of the building? A. The North-west wing, under the office. 20

Q. Where that joins the main building? A. Yes, sir.

Q. What was the extent of the fire when you got there? A. It went just as fast as if it had been a straw heap; I ran my best with a pail, and when I got there it was on top of the North-west wing, one-third of the way back on to it, and it had spread into the main building, at that time.

Q. What did you then do, or those that were there? A. I ran right round the building to see 30 whether there was any place to get in to do anything, and there wasn't; and I ran to the upper wing—towards the barn—the east end; and that door was fastened, and after a while some one opened it.

Q. Did you see Hoffman there when you first went there? A. Yes, sir; I saw him just before I went into the house; it struck twelve o'clock. I heard this hollering, and I saw him at the north end. He was keeping some fire back between the 40 ice-house and the north end of the north wing. He was keeping the fire back. There was some good bunches of leaves back of the building. I suppose he was keeping that back; and the wind began to rise a good deal, and it took a whirl to the south-west end of that same wing, and it whirled up to the end of this wing.

Q. Did you see the fire whirl up to the end of the building? A. Yes, sir; it flew right from

the leaves on this side of the road. Some of the witnesses say there was grass on that road; there was no more than there is on this floor, right where this fire crossed, and there ain't now. The further end of the road was growed up pretty well with grass; that is there yet.

Q. Where did you see the whirling leaves whirled from? A. From the west side.

Q. Show on the map? A. (Indicating on map); this is the southeast. Here is where Hoffman was a working, and here is where the fire took place, and the fire came in a circle round here like and took a whirl in the weeds. It is a natural grove, and it is quite thick, and the wind whirled it.

Q. Where was Hoffman when you came up to the building? A. He came and run to this end (indicating). He just see it then. I ran as fast as I could from my place. It is 300 yards.

Q. (Photographic picture shown to witness). Just look at this picture that represents the house. Where is the road you were just speaking of? Is this it on this side? Does that road go on up to the side of the building? A. Yes, sir.

Q. It is a narrow wagon-way? A. Well, there is just a track to go back to the ice-house. It is a road they carted their ice on, and some wood.

Q. Was it a road kept cleared up? A. It was always clean and nice, whenever I saw it.

Q. Did you help get any of the things out? A. Yes, sir; some.

Q. What was gotten out? A. The first I attempted to get out, we went to the north end of this wing and got the door open and went the whole length of the southeast wing of the main building, and we knocked that open with an ax, and we was going to take the piano out, but the blaze was all round; the cracks was all open, and the smoke flew through. I said, "If you think more of the piano than you do of your life, you may stay there." Mr. Heath was along with me at that time. The flames, as we stepped out, was leaping off the ground onto the main building. Then this northwest wing—the kitchen, as they call it—it is all connected together in one building; at the same time there was a partition there. The kitchen was cut off from the room part; they had it for school purposes, or something or another. We got some crockery out of there.

Q. Did you see the things got out of the building and piled up at the barn? A. Yes, sir.

Q. State what they were? A. I couldn't tell you. Some was broke and some wasn't broke; some pretty good furniture. I have seen it twice since that.

Q. What was there? A. A sofa or two and some good chairs, and quite a good many things; they was worth some value.

Q. Of what value? A. I don't know; I couldn't tell you; I don't know. 10

Q. How had the previous part of that day been, as to the wind blowing? A. It was very calm and mild in the morning and all along in the forenoon. It was fired a little after 9 o'clock; I saw him a working there from my own stoop. The wind towards noon commenced rising a little.

Cross-examination by Mr. Coult:

Q. Which side of this building is your house on? 20 A. It is right west from the—

Q. (Interrupting.) On this side or that side? (Indicating on map.) A. I would call it on that side.

Q. That is on the south side. Have you ever been to Belmont Hall? A. It is right across the road; it is right straight west from the main building. It is the road that leads out from the Belmont gate to Hackensack.

Q. It is out on this side of the building? 30

Witness: My building?

Mr. Coult: Yes. A. Yes, sir.

Q. Is your building situated so you can look behind this Forest Grove House? A. No, sir; I can look on the northwest wing; I can see clear to this point.

Q. This building is three stories and a half high? 40 A. Yes, sir.

Q. Your house is on this side of it? A. It is right straight in front of the house; that is rather west of it.

Q. That (indicating) is the turnpike road? A. Yes, sir.

Q. And that runs in front of the Belmont Hall? A. Yes, sir; it runs right straight west of Belmont Hall.

Q. Then your building is on this side? A. Well, it is west; it is kind o' crooked here to me, because the sun went down in the east to me here the other night.

Q. Then you had a view of the east side of the house? A. The northwest wing and the front of the main building is right where I can see the whole of it.

Q. You were alarmed by a cry of "fire?" A. Well, I stood there and heard this man hollering "fire," and he was coming right straight to my house.

Q. Were you not eating dinner? A. No, sir; I was standing on the stoop.

Q. Were you at your dinner when you were first alarmed by something? A. No, sir; not till I came out on the stoop.

Q. After dinner? A. Yes, sir; and I didn't stand there half a minute before I heard this man hollering "fire" and I looked over there and see it.

Q. When you saw it the alarm had been given? A. Yes. sir.

Q. Was the fire at that time in the house? A. No, sir; it was under the stoop.

Q. Burning on the side of the house? A. It was burning in the leaves and came right up; when I got there it had run up to the top of the building, the northwest wing, to the top of the weather boards.

Q. Right on the corner between the main building and the other building? A. Yes, sir.

Q. Do you say you saw the fire communicate with the building, or was it at the building before you saw it? A. It was under the stoop when I first saw it.

Q. You saw eddying leaves whirling round towards this part of the building? A. Yes, sir.

Q. When you got there you thought the building was gone? A. I did; in ten minutes two thousand people couldn't have done anything.

Q. You went and tried to get things out? A. Yes, sir.

Q. You broke in? A. Yes, sir.

Q. Did you get an ax and smash the door in? A. We did after we opened the southwest wing; we broke through the hall door.

Q. How did you get in there? A. I think it was unlocked.

Q. Was there anybody in? A. No, sir; not till we got in.

Q. You broke in the other wing? A. No, sir; that was the main building. We knocked it in with an ax.

Q. Was it locked up? A. Yes, sir.

HOLLOWAY W. HUNT sworn on behalf of plaintiff.

10

Direct examination by Mr. Harris:

Q. Where do you live? A. Schooley's Mountain.

Q. About what distance from the Forest Grove House? A. I should judge it to be about 500 or 600 yards.

Q. Were you at the Forest Grove House shortly after it was burned or about the time it was burned? A. I got there after the main house and east wing was gone, and the west wing nearly gone; and the kitchen, or the new part, put up by Mr. Stoutenburgh, was nearly gone.

20

Q. Do you know how long the main part of that building had been built? A No, sir; I should think somewhere about twenty-five or twenty-seven years; it may be a little longer.

Q. What was the character of the building? What kind of a building was it? A. It was a frame building enclosed, with pine shingle roof, except the building Mr. Stoutenburgh put up, and I think that was flat roofed, with tin on it.

30

Q. Did you see the things that had been removed from the house? A. Yes; I didn't take particular notice of them. I passed by them and went to the house after I heard of the fire. I saw, I think it was, the parlor set of furniture, or part of it, out; that was all that I saw of any value. I think the kitchen stove and some kitchen chairs had been carried out, but I didn't see anything that struck me as being of any value except the parlor sofa and a few chairs; that was about all.

40

Q. Can you form any estimate of the value of the things that were saved? A. No; I don't think that I can. It wouldn't be very much, but I wouldn't like to state figures, because I hadn't taken sufficient notice of the articles to do that. I simply formed the impression when I saw it that very little had been saved.

Q. About what value? A. Well, it might reach

$100; it might be a little more; perhaps not quite so much.

Cross-examination by Mr. Coult:

Q. Did you fix any estimate of value upon the pieces that were saved? A. No, sir.

Q. There was a set of parlor furniture? A. Not entirely, I don't think.

10 Q. Do you know how many pieces were saved? A. I think I remember four.

Q. Was that the best suit? A. I think it was, sir.

Q. It was out of the main building? A. Yes, sir.

Q. Can you give an estimate of the value of that suit? A. Well, the sofa might be worth $25, the chairs might have been worth $10 a piece, that would be $55.

20 Q. What kind of a suit was it? A. I think the wood was walnut, and I think the cover was green rep.

Q. Do you know how long it had been used? A. It had been there some little time; I can't tell how long.

Q. Had you ever been through this building? A. A great number of times.

Q. Had you seen the furniture? A. Some of it.

Q. Do you know the class of the furniture? A. There was some rooms very nicely furnished.

30 Q. As to the others? A. As to the others, just fair furniture.

Q. Fine furniture? A. No, sir; I wouldn't call it fine.

Q. Pine? A. Yes; I think stained to imitate walnut and other wood.

Q. They were not walnut chairs and bedsteads? A. Not many of that kind.

Q. Had it not been used for a school? A. Yes, sir.

40 Q. For many years? A. Yes, sir.

Q. By Mr. Stoutenburgh? A. Yes, sir.

Q. For the use of scholars? A. Some of it was; after the school broke up there was new furniture put in there.

Q. Do you know what? A. I saw some bedrooms that were furnished, as I understood, after the school broke up.

Q. Mr. Stoutenburgh had been there some years? A. Yes, sir.

Q. How many years in that school? A. He had been there—been living there—I should think fourteen years or fifteen; something like that.

Q. And a part of the furniture had been there during that entire time? A. I couldn't say as to that; Mr. Stoutenburgh can tell you that.

Q. You made no inventory or estimate of the pieces or the value of the pieces saved? A. No, sir.

Q. Do you know where the furniture was originally purchased? A. No. 10

Q. Do you know whether it was bought at auction? A. No, sir.

Q. Do you know who Mr. Stoutenburgh purchased it from? A. Of the executors of Patrick Matthews, deceased.

Q. Who were they? A. Charles Borcherling, William Silas Whitehead and William Helker.

Q. How long ago? A. Well, I think it was somewhere between twelve or fifteen years. 20

Q. Was it sold at auction at that time? A. No, sir; I think the property was purchased of the executors at private sale.

Q. That is your recollection about it, eh? A. That is my recollection.

ELWOOD C. HARRIS, sworn on behalf of plaintiff.

Direct examination by Mr. McCarter: 30

Q. Did you have anything to do with the collection of this policy? A. Yes, sir; I was employed by Mr. Ryerson to assist him in arranging for the collection of this policy of insurance. There was an injunction that had been granted by the Court of Chancery restraining Mr. Sonneborn from collecting, and the companies from paying, on account of a claim of Mr. Stoutenburgh. We applied to the Court, and on the 25th of July we had that injunction modified, so that I was appointed on behalf of Mr. Sonneborn to make demand for the payment of this policy. And the injunction was also so modified that if the Company desired to pay at that time, or pending any suit, they could make even in the Court of Chancery. I served a copy of that order upon Mr. Tichenor, who acknowledged service on the same day. I then went to Mr. Wilkinson, of this Company, on the 25th of July, the day the summons was issued, and stated that I had 40

served the order and asked the payment of this policy. He stated to me that the Company refused to pay the policy because the building became unoccupied, and was unoccupied for the space of about two weeks previous to the fire. He told me at that time that the courts of some other States had decided that the companies were not liable, and he referred me to a case that had been printed or mentioned in the New York Tribune shortly before. He said he had cut out the slip, and I think he told me that he had sent that to Mr. Sonneborn and refused to make payment on that ground. We talked it over a short time, and he still refusing, I left and issued summons. He didn't mention proofs of loss; he based their refusal upon the ground that the building was unoccupied at the time the fire occurred.

Q. Do you know how long the injunction had subsisted? A. I have papers in my satchel from which I can ascertain, I think; the bill was filed April 26th, and it is my impression that the injunction was granted about that time.

Q. The order was modified so as to permit the defendant to pay; that was on the 25th of July? A. Yes, sir; and I issued a summons immediately.

Q. You had served that order on Mr. Tichenor? A. Yes, sir; he had acknowledged service for the Company; I informed Mr. Wilkinson that the Courts had modified this injunction so that a demand might be made, and permitted me to make the demand.

Q. Anything else you desire to say about it? A. No, sir.

Cross-examination by Mr. Coult:

Q. You were simply acting as counsel for Mr. Ryerson, were you not? Yes, sir.

Q. He residing in Paterson, and you in this city? A. Counsel for Mr. Sonneborn, with Mr. Ryerson, who is his attorney.

Q. Had you had the papers in your hands before that—the papers that were served? A. Yes, sir.

Q. Did you have Mr. Winterton's letter? A. No, sir.

Q. Had you seen it? A. No, sir; it was sent to me, I think, sometime afterwards—after the suit was begun.

Q. It had been furnished to Mr. Ryerson, as you understand? A. I learned afterwards that it had.

Q. Was anything said about the proofs of loss at that time? A. No, sir; Mr. Wilkinson stated the reasons as I have recited them, and I left.

Q. Did you go for the purpose of obtaining a waiver from the Company of any claim on their part? A. No, sir; I went for the purpose of obtaining payment of the policy, if possible.

Q. Did Mr. Wilkinson tell you, and didn't you know, that the matter had been placed in the hands of Mr. Winterton as adjusted? No, sir.

Q. Had you not learned of that? A. No, sir.

Q. Did you not know of it from Mr. Ryerson? A. No, sir. 10

Q. Didn't you know he had been employed to examine into the circumstances of this fire, by the Company? A. No, sir; some time after that Mr. Ryerson asked me to see the proofs of loss, and ascertain whether the matter was all right; he then handed me Mr. Winterton's letter. I went to Mr. Tichenor's office, after the suit was commenced, and saw the proofs of loss. I ascertained that the letter stated with reference to the magistrate, not that the Company required him to produce a certificate, and that— 20

[Objected to.]

—I thought from that circumstance that the letter did not require a magistrate, but that the policy did; and I say that the policy did not.

Q. You went to see if the proofs of loss were made out according to the policy and examined Mr. Winterton's letter to see whether it required registration? A. It was some time after I talked to Mr. Wilkinson.

Q. And you reported to Mr. Ryerson that it did not? A. No, sir; I did not. I reported to him that Mr. Winterton's letter did not require that there should be a certificate of a magistrate. It contains requirements by the policy and by the Company, and I wrote back and asked him whether they had ever made any other demand for a certificate. 30

[Plaintiff rests.]

Defendant's counsel moves that plaintiff be nonsuited on the ground that it appears by the testimony 40

that certain conditions of the policy of fire insurance have not been complied with by plaintiff.

After argument the Court said:

DEPUE, J.—With regard to that part of the case which consists in noncompliance with the conditions of insurance with respect to a certificate of a magistrate, I would be entirely unwilling to withdraw this case from the jury or nonsuit on that ground. The condition is undoubtedly a valid one. It has been held to be such by the Courts of this State. But it is a condition that is imposed by the insurer, which is a burden upon the assured without any conceivable benefit to be derived from it. It is one of those conditions that are not favored in law, and in which a party coming into court and endeavoring to rely upon it is bound to place himself *stricti juris*.

There is evidence in this case of the furnishing of a certificate, but there is no evidence of a demand on the part of the defendant, within the conditions of insurance, for a certificate such as is required by this policy; and, as I read the condition, the assured was under no obligation to procure a certificate of this kind unless he was required to do so. Looking at the character of the certificate I think the law ought to require that the Company should place themselves directly and literally within the meaning of the policy before they could defeat an application on the non-essential condition.

But with regard to the condition as to the occupation of these premises, that is a condition inserted in the policy for the benefit of the assured. It is a substantial part of the contract, and a contract from the performance of which ordinarily the insurer derives benefit. It is a condition that enters into the safety and security of the premises; and with regard to conditions of that kind the law adopts a different rule of construction, and construes them precisely the same as conditions and

covenants contained in any other contract between parties.

With regard to that condition I quite agree with the counsel for the plaintiff that the substance of this objection does not rest upon the printed part of this policy ; that it rests upon the written matter.

[The Court here read from policy and continued.]

With respect to the written matter contained in this policy, under the decision of the Supreme Court of this State in the case of DeWees v. The Manhattan Insurance Company, that description is a warranty, and it is subject to that rule of law ; that in policies of insurance warranties are considered to be conditions, and conditions on the non-performance of which the contract falls. In that case, I think, the evidence was that the property was used as a mill and stable, and that when the agent insured the property he saw it was used in that way, and said it made no difference. The Court held that it wasn't competent, in the first place, to qualify the policy by proof of that conversation ; and, in the second place, that the statement with regard to the condition of the insured premises was a warranty, and on the non-performance of it the contract became void.

That construction of these provisions in policies of insurance, I believe, is universal. The last case there is on the subject is a case decided at the last term, and which will be reported in the next number of Vroom's reports. The general principle is there laid down, that, with regard to warranties or conditions of insurance, the parties undertake for the mutual compliance with the terms of the conditions ; and that, where a condition of residence is inserted, it is a simple matter of construction, to determine what the parties meant by a contract, their capacity to make which is admitted by the law. It isn't a question whether there would have been more risk one way than the other ; it isn't a

question whether the fire originated by the breach of the condition or not; but simply whether the condition of insurance the party relies upon has been complied with.

So that, in this case, the inquiry will be as to the meaning of this condition of insurance, this warranty that these premises were not to be left unoccupied any portion of the year, and whether the evidence shows that it has been broken.

10 This warranty doesn't relate to any portion of the premises referred to in this policy of insurance but the dwellings. The policy describes this property as situated in certain buildings, and it describes them as premises to be occupied as a Summer residence by the assured. And then follows the stipulation which has been referred to—that the said premises are not to be used as a hotel or boarding house, and that they are not to be left unoccupied any portion of the year.

20 With regard to the occupation of these premises by Mr. Smith, I think that occupation was substantially a compliance with these conditions of insurance. The condition doesn't provide that every part of the premises shall be occupied, but substantially that the building shall be a place of residence, a place of abode, a place where some human being habitually resides. With respect to the period of time which elapsed after Mr. Smith removed, I think it is very clear that these premises were un-
30 occupied. The proof is that, after Mr. Smith moved out, all the man who succeeded him did was to supervise and oversee the building and take care of the cattle and the grounds.

The word *occupied* has received a construction in the books that, I think, is entirely settled, and in respect to which there can be no controversy. It is used in the case of Stone vs. The Casualty Ins. Co., and in all the books on this subject, as a place where a human being habitually resides.

40 The mere cessation of occupation between the leaving of one tenant and the coming in of another

wouldn't be a violation of the policy; neither would be the temporary absence of the owner, if he could be said to have the place habitually as a place of abode.

In the present case the evidence is very clear that the premises were not so occupied between the time that elapsed after Mr. Smith left and the date of the fire.

I need not give any reasons as to why clauses of this kind are inserted in policies. I think it is very apparent what they are; it isn't for the Court to inquire why a Condition of Insurance of this kind is inserted. It is merely a question of construction. Parties are at liberty to make their contracts in this way; and the policy of the law and the duty of the Courts holds them to the performance of their conditions.

I think clearly there ought to be a non-suit on that ground.

To which ruling of the Court plaintiff's counsel excepts, and prays a bill of exceptions, which is allowed and sealed accordingly.

DAVID A. DEPUE, [SEAL.]
J. S. C.

NEW JERSEY

Court of Errors and Appeals.

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SOLOMON S. SONNEBORN, *Plaintiff in Error*, *v.* THE MANUFACTURERS INSURANCE COMPANY OF NEWARK, N. J., *Defendant in Error.*	In Error to the SupremeCourt. Assignment of Errors.

Afterwards, that is to say on the third Tuesday
20 of November, in the year eighteen hundred and eighty-one, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Solomon S. Sonneborn by Louis J. Ryerson, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

That the said Justice on the trial of the said
30 cause, when the said plaintiff had closed his testimony and rested his case, granted the motion of defendant to non-suit the plaintiff, and thereupon directed the plaintiff to be called and against the will of the plaintiff ordered judgment of non-suit to be entered against him.

Therefore the said Solomon S. Sonneborn prays that the judgment aforesaid by reason of the error aforesaid, and of other errors appearing in the record and proceedings aforesaid, be reversed, an-
40 nulled and for nothing held, and that the said Solomon S. Sonneborn may be restored to all things he

has lost on occasion of the said judgment, and that the said The Manufacturers Insurance Company may rejoin to said errors, &c.

LOUIS J. RYERSON, *Attorney*, and

ELWOOD C. HARRIS *of Counsel with Plaintiff in Error.*

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NEW JERSEY COURT OF ERRORS AND APPEALS.

THE MANUFACTURERS INSURANCE COMPANY OF NEWARK, N. J., *Defendant in Error*, *and* SOLOMON S. SONNEBORN, *Plaintiff in Error.*	In Error to the SupremeCourt.

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And hereupon comes the said The Manufacturers Insurance Company, of Newark, N. J., by Francis M. Tichenor, its attorney, and says that there is no error either in the record and proceedings aforesaid, or in the giving of judgment aforesaid, and it prays here that the Court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

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FRANCIS M. TICHENOR,
Defendant's Attorney.