INDEX

PLEADING, ETC.

TESTIMONY

EXHIBITS

I

Grounds of Appeal

(Filed 12|30|29)

GROUNDS OF APPEAL

Please Take Notice that the following are the grounds of appeals which the plaintiffs-appellants hereby assign and upon which they will rely:

1. The Court erred in permitting the following question to the witness Brumberg:

> "And you have either had your client, the assured execute them (Non-waiver agreements) or you have executed them for and on behalf of the assured, on many occasions have you not?" State of Case, p. 72, line 20 to bottom and 73, line 1-2.

2. The Court erred in permitting the following question to the witness Brumberg:

> "In what cases do the companies ask for the non-waiver agreement, Mr. Brumberg." State of Case, p. 84, line 9-10.

3. The Court erred in permitting the following question to the Witness Brumberg:

> "Did you read any description of the fire in the newspaper." State of Case, p. 93, line 22-23.

4. The Court erred in permitting the following question to the witness Brumberg:

> "Did you know that Eileen and Schleider had been indicted by the Grand Jury of Passaic County for this fire?" State of Case, p. 95, line 7-9.

5. The Court erred in permitting the question to the witness Brumberg:

> "Do you know Mr. Brumberg, from the account of this fire which you read in the newspaper, or from what you saw at the

premises, that there were quantities of gasoline around in cans and in automobile coverings, automobile tire coverings, papers and the like?" State of Case, p. 99, line 28-34.

6. The Court erred in permitting the question to the witness Brumberg:

"Well, what did you read in the papers about that? State of Case, p. 100, line 10-11.

7. The Court erred in permitting the following question to the witness Brumberg:

"Did you know that the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire?" State of Case, p. 101, line 34, to bottom of page.

8. The Court erred in striking out the question to the witness Brumberg:

"And as far as you know was either Mr. Eilen or Mr. Schleider convicted of any crime?" State of Case, p. 111, line 11-13.

9. The Court erred in striking out that following question to the witness Brumberg:

"Well did you read that in any newspaper?" (i.e. as to Eilen and Schleider's acquittal). State of Case, p. 111, page 21-22.

10. The Court erred in sustaining the objection to the following question to the witness Brumberg:

"Have you read in any newspaper whether Mr. A. Schleider, Q. Schleider or Eilen were convicted of this burning of this building?" State of Case, p. 112, line 1-6.

11. The Court erred in admitting in evidence

the exemplified copy of the order appointed trustee in bankruptcy of Eilen and Schleider, said order being D-4 for identification. In evidence, State of Case p. 116, line 23 and printed State of Case p. 223.

12. The Court erred in sustaining the objection to the following question to the witness Ritter:

"Did you as a result of your investigation, learn that Mr. Schleider had remained in his place of business in the store in the City of Passaic up to ten-thirty or eleven o'clock that evening?" State of Case, p. 162, line 35 and p. 163, line 1-4.

13. The Court erred in sustaining the objection to the following question to the witness Ritter:

"Chief do you know—just yes or no, I want, whether the complaint was dismissed by Judge Barbour", State of Case, p. 165, line 29-31.

14. The Court erred in permitting the following question to the witness Ritter:

"Chief after the fire, did Eilen and Schleider or either of them, offer to make you a present of furniture if you would drop the charges against them." State of Case, p. 166, line 15-18.

15. The Court erred:

(a) In refusing to strike out the defense as to misrepresentation of amount and value of the property destroyed.

(b) The defense as to misrepresentation of the costs of the said property, and

(c) The defenses as to the misrepresentation as to the amount of damage sustained by the fire.

and the Court erred in refusing to direct a verdict in favor of plaintiffs as to said defenses.

16. The Court erred in charging the jury that:

"If you find any of the defenses interposed to be good against Schleider and Eilen, they, of course, may be used, and the present plaintiffs are subject to them." State of Case, p. 193, line 21-24.

17. The Court erred in charging the jury as follows:

"Now, from the evidence in this cause, there seems to be ample proof that this fire was an incendiary origin, and I think, to use the parlance of the firemen, it was a set fire." State of Case, p. 196, line 21-24.

18. The Court erred in charging the jury as follows:

"As I said before you have a right to infer that this fire was of an incendiary origin."

19. The Court erred in charging the jury:

"The owners of the Art Store who are the assignors of the present plaintiff have not been produced in Court. I had not intended to mention this fact but counsel in his summation pointed out that they were unable to produce them. This is true insofar as the use of subpoenaes is concerned, because the jurisdiction of this Court does not extend to Brooklyn or wherever they are. However, if counsel saw fit to use the testimony of a witness who is non-resident there are other means, in other words, he could have applied to the Court for an order to take their testimony as of the place

where they are and that might be read in evidence." State of Case, p. 195, line 19-32.

20. The Court erred in charging the jury:

"Whether these men were dismissed because the charges were not sustained by the magistrate makes no difference." State of Case, p. 196, line 3-6.

JOSEPH T. LIEBLICH,
Attorney of Plaintiffs-Appellants.

Service of a copy of the within is hereby acknowledged this 2nd day of December, 1929.

ARTHUR T. VANDERBILT,
Attorney of Defendants-Appelles.

VI

Notice of Appeal

(Filed 12|30|29)

NOTICE OF APPEAL

To: Arthur T. Vanderbilt, Esq.,
Attorney of Defendants.

Sir:

Please Take Notice that the plaintiffs in the above entitled cause hereby appeal from the whole of the verdict and judgment in the above cause to the New Jersey Court of Errors and Appeals.

Dated: December 2nd, 1929.

JOSEPH T. LIEBLICH,
Attorney of Plaintiffs-Appellants.

Service of a copy of the within is hereby acknowledged this 2nd day of December 1929.

ARTHUR T. VANDERBILT,
Attorney of Defendants-Appelles.

SUMMONS

State of New Jersey: To:

Fidelity-Phenix Fire Insurance Company
Springfield Fire & Marine Insurance Company, North British & Mercantile Insurance Company, Lt.
Presidential Fire & Marine Insurance Company
The Baltimore-American Insurance Company
Automobile Insurance Company
The Commonwealth Insurance Company
The State Assurance Company, Limited
National Liberty Insurance Company
Aetna Insurance Company, Hartford, Conn.

You are summoned to answer the annexed complaint of Frank J. Matisovsky, Joseph J. Brumberg and Max J. Schleider and Nathan Eilen, trading as Art Furniture Co., in an action at law in the New Jersey Supreme Court, and Take Notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

L. S.

Witness: William S. Gummere, Esq., Chief Justice of the New Jersey Supreme Court, at Trenton, this third day of May, 1928.

Joseph T. Lieblich,
Attorney of Plaintiff.

Fred L. Bloodgood,
Clerk.

COMPLAINT

Filed May 17, 1928

First Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, Fidelity-Phenix Fire Insurance Company, of New York, say:

1. On February 21st, 1927, plaintiffs, Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, New Jersey.

2. On that day, the defendant Fidelity Phenix Fire Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 21st day of February, 1927, the defendant in consideration of $47.50 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 20470 through Thomas D. Saxe, its duly authorized agent at Passaic, New Jersey; the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the

said policy of insurance was in full force and effect, the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, New Jersey and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum off $978.26 as its amount in full settlement, compromise and claim and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven, in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J.

Matisovsky of Garfield, New Jersey, due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, New Jersey, due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Second Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against of Garfield, complaining against the defendant, North British & Mercantile Insurance Company, say:

1. On March 19th, 1927, plaintiffs, Nathan Eilan and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant, North British & Mercantile Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 19th day of March, 1927, the defendant in consideration of $35.63 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 382369 through

Marine C. Tamboer, Inc., its duly authorized agent at Passaic, N. J., the said contract by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect, the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to

pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven, in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Third Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, The Automobile Insurance Company of Hartford, Connecticut, say:

1. On February 16th, 1927, plaintiffs, Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in

the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant, The Automobile Insurance Company, was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 16th day of February, 1927, the defendant in consideration of $35,63 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 29090 through Max Epstein, Inc., its duly authorized agent at Passaic, N. J., the said contract by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect, the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Ad-

justment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven, in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Jospeh J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Fourth Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, The State Assurance Company, say:

1. On February 3rd, 1927, plaintiffs Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant The State Assurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On February 3rd, 1927, the defendant in consideration of $35.63 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 639001 through Marine C. Tamboer, Inc., its duly authoried agent at Passaic, N. J., the said contract by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect, the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have

given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven, in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J.,

due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding diverse demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Fifth Count

Plaintiffs, Frank J. Matisovsky, et als, a resident of Garfield, complaining against the defendant, Presidential Fire & Marine Insurance Company, say:

1. On February 21st, 1927, plaintiffs, Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, ware and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant, Presidential Fire & Marine Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 21st day of February, 1927, the defendant in consideration of $47.50 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 384, through Thomas D. Saxe, its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed

to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect, the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven, in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demand made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Sixth Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, The Commonwealth Insurance Company of New York, say:

1. On April 27th, 1927, plaintiffs, Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue,, Clifton, N. J.

2. On that day, the defendant, The Commonwealth Insurance Company, was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 27th day of April, 1927, the defendant in consideration of $35.63 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 757084 through Garret Roosma, Jr., its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insuranc ewas in full force and effect, the property insured in said policy was damaged and destroyed by fire, to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, New Jersey and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compro-

mise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven in said sum of $978.26 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $2500.

Seventh Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, National Liberty Insurance Company; say:

1. On March 15th, 1927, plaintiffs Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in cer-

tain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant National Liberty Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 15th day of March, 1927, the defendant in consideration of $21.38 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 2438, through Cadmus A. Zabriskie, its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $1500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect the property insured in said policy was damaged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requistie on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damages in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $586.96 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $586.96 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in the said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven in said sum of $586.96 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky, of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider assigned, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and not-

withstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $1500.

Eighth Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, The Baltimore American Insurance Co., of New York, say:

1. On March 9th, 1927, plaintiffs Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant, The Baltimore American Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 9th day of March, 1927, the defendant in consideration of $28.50 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 110297 through Daniel J. Feldman, its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $1500.

4. The defendant by this policy of insurance of which plaintiffs plead profert in curia, agreed to indemnify plaintiffs for loss and damage sustained to the property in question by fire.

5. On the 13th day of May, 1927, while the said policy of insurance was in full force and effect, the property insured in said policy was dam-

aged and destroyed by fire to the extent of $15,000.

6. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, the General Adjustment Bureau of Newark, N. J., and Charles E. Kling, the Assistant Manager was in charge of the adjustment of this loss.

7. On June 1st, 1927, in the city of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $586.96 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $586.96 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

8. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph seven in said sum of $586.96 but the defendant has failed to pay the same.

9. On May 25th, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider, assigned Two thousand ($2000) dollars of their interest in and to this cause of action to Frank J. Matisovsky of Garfield, N. J., due notice of which has been given to this defendant.

10. On June 1st, 1927, by deed of assignment, the said Nathan Eilen and Max J. Schleider as-

signed, subject to the Frank J. Matisovsky assignment, all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, N. J., due notice of which has been given to this defendant.

11. The defendant has failed to pay each and all of the plaintiffs the sum agreed upon as a compromise settlement to avoid litigation and notwithstanding divers demands made upon them by the said plaintiffs.

Plaintiffs demand damages on this count the sum of $1500.

Ninth Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, The Baltimore American Insurance Company of New York, say:

1. Plaintiffs repeat paragraph one in the Eighth Count of this Complaint as if recited herein at length.

2. Plaintiffs repeat paragraph two of the Eighth Count of this Compalint as if recited herein at length.

3. On March 9th, 1927, the defendant in consideration of $28.50 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 110296 through Daniel J. Feldman, its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $1500.

4. Plaintiffs repeat paragraphs four, five, six, seven, eight, nine, ten and eleven of the Eighth

Count of this complaint as if recited herein at length.

Plaintiffs demand damages on this count the sum of $1500.

Tenth Count

Plaintiffs, Frank J. Matsovsky, et als., a resident of Garfield, complaining against the defendant, Aetna Insurance Company of Hartford, Connecticut, say:

1. On May 3rd, 1927, plaintiffs, Nathan Eilen and Max J. Schleider, trading Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Avenue, Clifton, N. J.

2. On that day, the defendant, Aetna Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 3rd day of Mar., 1927, the defendant in consideration of $14.25 to it paid, executed and delivered to the Art Furniture Company, a contract of insurance No. 1269 through J. A. Marchese, Jr., its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $1000.

4. Plaintiffs repeat paragraphs four, five, six, of the First Count of this complaint as if recited herein at length.

5. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Charles E. Kling, Assistant Manager of the General Adjustment Bureau of Newark, in consideration of the plaintiff foregoing the claim of $15,000 and

agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $391.30 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $391.30 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

6. On the 6th day of June, 1927, plaintiffs delivered to this defendant the proof of loss as requested in paragraph five in said sum of $391.30 but the defendant has failed to pay the same.

7. Plaintiffs repeat paragraphs nine, ten and eleven of the First County of this complaint, as if recited herein at length.

Plaintiffs demand damages on this count the sum of $1000.

Eleventh Count

Plaintiffs, Frank J. Matisovsky, et als., a resident of Garfield, complaining against the defendant, Springfield Fire & Marine Insurance Company of Springfield, Massachusetts, say:

1. On April 27th, 1927, plaintiffs Nathan Eilen and Max J. Schleider, trading as Art Furniture Company, had an insurable interest in certain goods, wares and chattels while contained in the warehouse situate 638-640 Main Ave., Clifton, N. J.

2. On that day, the defendant Springfield Fire & Marine Insurance Company was and still is a corporation, duly incorporated with full power to insure risks against loss and damage by fire.

3. On the 27th day of April, 1927, the defendant in consideration of $35.63 to it paid, executed

and delivered to the Art Furniture Company, a contract of insurance No. 1361, through Garret Roosma, Jr., its duly authorized agent at Passaic, N. J., the said contract, by and with the knowledge and consent of the defendant, insured the property described in the policy in a sum not exceeding $2500.

4. Plaintiffs repeat paragraphs four, and five of the First Count of this complaint as if recited herein at length.

5. Plaintiffs have complied with such covenants of the policy of insurance as is and was requisite on their part to comply with and have given defendant due notice of the claim and the said defendant designated as its adjuster, Philip Feuerstein of Newark, N. J., who was in charge of the adjustment of this loss.

6. On June 1st, 1927, in the City of Passaic, the defendant by its agent and servant, Philip Feuerstein of Newark, in consideration of the plaintiffs foregoing the claim of $15,000 and agreeing to a settlement of loss and damage in the sum of $9000, the defendant by its agent and servant agreed to pay to the plaintiffs the sum of $978.26 as its amount in full settlement, compromise and discharge of this claim and the plaintiffs agreed to accept the said sum of $978.26 from the defendant as a full settlement and the defendant agreed to pay this sum upon the receipt of a proof of loss executed in said sum.

7. Plaintiffs repeat paragraphs eight, nine, ten, and eleven of the First Count of this complaint, as if recited herein at length.

Plaintiffs demand damages on this count the sum of $2500.

Joseph T. Lieblich,
Attorney of Plaintiffs.

ANSWER

Filed June 4, 1928

Defendants say that:—

1. They have no knowledge or information sufficient to enable them to form a belief as to paragraph 1 of each count of the complaint and they therefore deny it.

2. They admit paragraph 2 of each count of the complaint.

3. They admit the execution of the policies mentioned in paragraphs 3 and 4 of each count of the complaint and as to the terms and conditions of said policies, beg leave to refer to said policies in plaintiffs' possession and their records thereof.

4. They deny paragraph 5 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth, tenth and eleventh counts of the complaint.

5. They deny paragraph 6 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth, tenth and eleventh counts of the complaint, except that they admit that they designated General Adjustment Bureau as their adjuster and that Charles E. Kling, Assistant Manager thereof, was in charge of the adjustment of said loss as to the companies mentioned in the first to tenth counts inclusive of the complaint, and that the defendant Spring-

field Fire & Marine Insurance Company designated Philip Feuerstein as its adjuster.

6. They deny paragraph 7 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth count of the complaint, paragraph 5 of the tenth count of the complaint, and paragraph 6 of the eleventh count of the complaint. They admit that plaintiffs and defendants agreed upon a loss and damage of $9,000, but said agreement was had subject to all of the terms and conditions of the policies and under the protection of a non-waiver agreement entered into between plaintiffs and defendants.

7. They deny paragraph 8 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth count of the complaint, as pleaded in paragraph 6 of the tenth counts of the complaint and as repeated in paragraph 7 of the eleventh count of the complaint.

8. They have no knowledge of information sufficient to enable them to form a belief as to paragraphs 9 and 10 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth count and paragraph 7 of the tenth and eleventh counts of the complaint.

9. They deny paragraph 11 of the first to eighth counts inclusive of the complaint as pleaded and as repeated in paragraph 4 of the ninth count and paragraph 7 of the tenth and eleventh counts of the complaint.

First Separate Defense

Said policies contain the following terms and conditions:

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

In violation of such terms and conditions, with intent to cheat and defraud defendants and gain an advantage over them and secure a sum of money not otherwise justly due, the assured knowingly and wilfully, falsely and fraudulently misrepresented in writing and otherwise the amount and value of the property claimed by them to be involved in the fire, the cost of said property, the amount of damage caused by said fire, the origin and cause of said fire, well knowing that in truth and in fact the amount of property claimed to belong to them and involved in said fire and its value, the cost of said property and the amount of damage caused by said fire was much less than the amount represented and stated by them, and well knowing that the origin and cause of the fire was otherwise than as represented and stated by them; all of which was done by said assured, with intent, as aforesaid, to secure the payment of a sum of money from these defendants not otherwise justly due.

By reason whereof the said policies became

void and of no effect and defendants relieved of liability thereunder.

Arthur T. Vanderbilt,
Attorney of Defendants.

REPLY

Filed July 13, 1928

Plaintiffs by way of reply, say:

1. That in lieu of a motion to strike out the answer and for the entry of judgment, plaintiffs give notice that upon the trial of the cause they will move to strike out the answer and the First Separate Defense therein contained upon the ground that the same is sham and filed solely for the purpose of delay.

2. Plaintiffs deny paragraph ten marked First Separate Defense and further say that the proof of loss was made up and executed at the special instance and request of the defendants' agents and adjusters who prepared and supervised the drafting and making of the same and that the same were made and filed upon the representations and inducements of the defendants' agents and adjusters that the companies would pay the total sum of $9000.

Joseph T. Lieblich,
Attorney of Plaintiffs.

REJOINDER

Filed July 11, 1928

Defendants say:

1. That they deny paragraph 2 of the Reply.

Arthur T. Vanderbilt,
Attorney of Defendants

POSTEA

Filed April 16, 1929

This case was tried before Judged Edwin C. Caffrey (to whom the case had been referred for trial) with a jury at the Bergen County Circuit on March 11 and 12, 1929.

The Court dismissed the complaint as to the plaintiffs Nathan Eilen and Max J. Schleider; and the jury rendered a general verdict against the plaintiffs Frank J. Matisovsky and Joseph J. Brumberg and in favor of the defendants.

Circuit Court Judge.

RULE TO SHOW CAUSE

Filed March 19, 1929

A verdict having been rendered in the above entitled cause in favor of the defendants and application having been made in due course by the plaintiffs why a new trial should not be granted, it is on this 18th day of March, 1929, on motion of Joseph T. Lieblich, Esq., attorney of plaintiffs,

Ordered: That the defendants show cause before the Supreme Court at the State House, in the City of Trenton, on the first Tuesday of May, 1929, why the verdict should not be set aside and a new trial granted, reserving to the plaintiffs all exceptions taken in this cause.

Edwin C. Caffrey,

NEW JERSEY SUPREME COURT
Bergen County

Frank J. Matisovsky,
Plaintiff,
vs.
Fidelity Phenix Fire Insurance Company, et al.,
Defendants.
} Action at Law.

TESTIMONY

Hackensack, New Jersey,
March 11, 1929.

Before:

Honorable Edwin C. Caffrey, Judge, and a Jury.

Appearances:

For the Plaintiff, Joseph T. Lieblich, Esq.; For the Defendants, Arthur T. Vanderbilt, Esq.

(A Jury was empanelled, accepted and sworn.)

Mr. Lieblich—I suggest they be sworn in all the cases; there are eleven cases, eleven defendants.

Mr. Vanderbilt—It is one case.

The Court—He said "and others."

Mr. Lieblich—Oh, I beg your pardon.

Mr. Vanderbilt—If the Court please, I desire to amend the answer to set up a second separate defense as follows: On October 26, 1927, plaintiffs Max J. Schleider, Nathan Eilen, individually, and trading as Art Furniture Company, were adjudged bankrupts in

the United States District Court. By reason of the aforesaid, any cause of action of said plaintiffs vested in the said trustee in bankruptcy, and the plaintiffs are not entitled to maintain this action.

Mr. Lieblich—I have no notice of that. Mr. Vanderbilt first called my attention to that this morning. I came here prepared to try this case upon the pleadings and the issue raised by those pleadings. Furthermore, I do not suppose that it would really be material to this issue whether or not a trustee in bankruptcy had been appointed,, if there was one, by reason of the fact that it would be the trustee's right to interject himself into this suit, and in the absence of any proof or a representation even on the part of Mr. Vanderbilt that he appears for the trustee, how can he interject himself into this case on such a pleading?

The Court—Except that won't materially affect the issue; it will at least preserve the defendant's rights in the event of an apportioning of the amount. In other words, to the extent that the trustees have an interest in this policy, just to that exent the defendants are protected.

Mr. Lieblich—Well, there might be something to that. If the trustee appeared here, if there is a trustee in esse, and Mr. Vanderbilt did represent the trustee, I do not know whether he did or not; I knew nothing of the matter until he called my attention to it here in court this morning. But surely these in-

surance companies cannot come in, or their representative, and inject themselves for the benefit of someone else who may have in interest in this matter, and it would be a very late date for that position to be assumed, and if the trustee did come in and did assume it, why. we would have a perfect right, I assume, under your Honor's discretion to have an opportunity to look into that, because, as trial counsel in this matter, I have taken the issue and the pleadings and I have prepared the case upon that basis. I did not anticipate any other matter to be raised here in the trial of this case.

The Court—How many plaintiffs are there?

Mr. Vanderbilt—There are three plaintiffs, your Honor, four plaintiffs, Matisovsky, Brumberg, Schleider and Nathan Eilen, the last two trading as the Art Furniture Company, the last two for whom a trustee in bankruptcy was appointed as we are prepared to show by an authenticated copy of the record.

Mr. Lieblich—The pleadings show these two plaintiffs have no interest. There is an assignment for Judge Matisovsky for $2,000., and an assignment for Joseph J. Brumberg for the balance.

Mr. Vanderbilt—That assignment to Mr. Brumberg is merely an assignment for his fees as adjuster and is not an assignment that goes to the full cause of action, and we have a right to show that Mr. Matisovsky's

assignment and Mr. Brumberg's assignment, that the plaintiffs, or the assured, Schleider and Eilen, trading as the Art Furniture Company, really have no right to maintain this action, the cause of action having vested in their trustee in bankruptcy on his assignment on October 26, 1927.

The Court—Well, that won't affect the merits.

Mr. Lieblich—I may say to your Honor that Mr. Vanderbilt is slightly mbstaken. The first assignment to Mr. Brumberg is an adjustment fee of 10 percent; the second assignment is the balance over and above the amount reserved to Judge Matisovsky for his $2,000. and also includes—

The Court—What is the total claim involved?

Mr. Lieblich—$9,000. There is a settlement here; we are suing upon an agreed settlement of $9,000.

The Court—You are not going to take up the issue?

Mr. Lieblich—No. That is the only issue. Our theory of this case is this: this fire happened on May 13th, 1927; on June 1st of 1927, the representatives of these Eilen and Schleider and the insurance company representatives agreed upon a settlement of loss and damage, a compromise, in the sum of $9,000. Now, we are suing upon that compromise of $9,000., and we have assignments here aggregating $2,000. to Judge Matisovsky, the 10 percent assignment originally made to Mr. Brumberg for his fee.

The Court—How much of the nine thousand does that represent, those two assignments?

Mr. Lieblich—Mr. Brumberg's assignment is $7889.53, and Judge Matisovsky's is $2,000. That exceeds the amount of the compromise figure, anyway.

Mr. Vanderbilt—What is the date of that assignment, Mr. Lieblich,, that you are referring to?

Mr. Lieblich—Which one?

Mr. Vanderbilt—The second assignment to which you refer.

The Court—What is the defense, Mr. Vanderbilt, merely a suit on contract now as distinguished from a suit on a fire insurance policy?

Mr. Vanderbilt—We do not concede that at all, Your Honor. After the fire, the adjusters of both parties entered into a non-waiver agreement, the express terms of which, the adjustment was to be subject to all the terms and provisions of the policy. I do not think that will be kept out of the trial, because it was signed by the parties, and they then proceeded to agree on the extent of the loss to the property, but subject to all the terms of the policy, and our defense, our first defense here, is that there is fraud and misrepresentation on the part of the assured as to values and as to the origin of the fire.

The Court—Does not the agreement for adjustment waive the defense as to the payment

itself, and you may go into the question as to what the value is, irrespective of what the amount set forth in the assignment would be?

Mr. Vanderbilt—Well, as I understand it, the parties have agreed that if there is to be any recovery at all, that recovery will be in the amount of $9,000., but the express terms of the non-waiver agreement and the conditions and terms of the policy are still preserved.

The Court—In other words, that is a part of the adjustment agreement?

Mr. Vanderbilt—Yes. So incorporated in it, in so many words; so the question of values is now out of the case. The question is 1st, is there a cause of action; and our other defense to that cause of action, the second one I am urging, is, is the plaintiff entitled to maintain that cause of action in view of the assignment of the trustee in bankruptcy. I would be glad to show this to your Honor.

Mr. Lieblich—I think the interpretation of the non-waiver agreement is not exactly on all fours, if it is the usual agreement, I have not seen it.

The Court—So, after all, this agreement, the policies, and all conditions of the policies, are still in effect?

Mr. Vanderbilt—It is set up in the first paragraph, and again down in the memorandum at the bottom.

The Court—In other words, the policies are as if this had never existed?

Mr. Vanderbilt—Really changing it to a suit upon the value of the policies, the amount of damage being—

The Court—In other words, if the proof is that the fire came within the purview of the conditions, and there is no fraud, that the jury will assess, in other words, the fact question to be determined is whether or not the company is liable, and if they are liable, then we are not concerned with damages at all, because they have been fixed?

Mr. Lieblich—I do not agree to that construction of the non-waiver agreement. The non-waiver agreement, as I interpret it,—

The Court—Well, let us interpret the language as in this particular agreement. This puts you to your proof as to the liability, and if, on proof of that, then the amount agreed upon shall be paid; and the determination of the liability depends upon whether or not the plaintiff has performed conditions as required in the policy, and so forth.

Mr. Lieblich—No, no. My interpretation of that agreement is entirely different, that it puts the defendant—we make out a prima facie case, that is all that is required of us, and we prove the agreement as to loss and damage. Now, if they have any defense of any violation of the contract, the burden is upon them to prove any such violation.

The Court—Well, undoubtedly; but you must show first that you come by reason of some condition that justifies your right to sue under the policy.

Mr. Lieblich—Well, I do not quite follow your Honor's reasoning. I assume the burden would be upon us to show there was a fire. Now, there is no denial of that in this case. We all admit the fire happened on May 13th. There is no denial in this case—

The Court—What are the defenses?

Mr. Lieblich—Just the fraud and false swearing under the proof of loss.

The Court—Well, fraud is never presumed, of course. You have to prove that as part of your defense.

Mr. Vanderbilt—But counsel's original statement was this was not a suit on the policies at all. Of course, that is not so. This is a suit under the policy.

The Court—As I see this, it is nothing more than a suit on the policies, with the exception that if the jury conclude the plaintiffs are entitled to recover, they are not interested in working out the damage, because that is fixed.

Mr. Lieblich—That is right.

Mr. Vanderbilt—That is correct.

The Court—Now, about the amendment, it will not affect the issue; in other words, it will simply add those parties.

Mr. Vanderbilt—I am not asking to have the parties added, your Honor. I am not representing the trustee in bankruptcy, and what I have to say has no effect on whatever it should be determined is due to Mr. Matisovsky or due to Mr. Brumberg; but I do maintain, on proving the subject matter of my

amendment, that the plaintiff Schleider and the plaintiff Eilen are not entitled to recover, any cause of action which they may have had having been vested in the trustee in bankruptcy.

The Court—Well, aren't the claims of the other plaintiffs in excess of the policy?

Mr. Lieblich—Yes.

Mr. Vanderbilt—That all depends upon proof. That is a matter we cannot determine yet.

Mr. Lieblich—I state now it does exceed the amount of the—

The Court—In other words, taking this agreement as changing the situation only to the extent that if this had been a valid policy, now, if they prove the assignments as being valid, the assignments are in excess of the claim of $9,000.

Mr. Vanderbilt—That might be true. This is the first assignment to Mr. Matisovsky of $2,000, and that was followed by an assignment, the 10 percent interest, to Mr. Brumberg as adjuster.

The Court—On the 10 percent of the seven thousand?

Mr. Vanderbilt—10 percent of $7,000. He says, recognizing the prior lien,—

The Court—So, if we take two from nine, we have seven, and this would be 10 percent of seven which would be seven hundred.

Mr. Vanderbilt—Then the third one is the assignment to Mr. Brumberg, and I call your Honor's especial attention to the fact that

they provide there, "after assigning all moneys due to us from the companies below named, and authorizes you to have his name inserted in any proofs in payment of said loss," from which the inference is very clear that they expected to have their name also inserted and that, plainly, they had some interest in the subject matter. I say, to the extent of their subject matter, the trustee became entitled on his assignment. It is a matter of proof as to the extent of the assignments.

Mr. Lieblich—There is another set of assignments, too, Mr. Vanderbilt.

The Court—All I have before me here are the assignments amounting to $2700.

Mr. Vanderbilt—That is all I have.

The Court—What do your assignments show with respect to the assignees' rights?

Mr. Vanderbilt—They simply set up the assignments, and we feel we have no knowledge as to those assignments.

Mr. Lieblich—Where is the other assignment of June 1st, where it says that, in consideration of the sum of one dollar?

Mr. Vanderbilt—That is the only one that we have ever been served with.

The Court—How do the assignees plead their cause?

Mr. Lieblich—As of June 1st, there was an assignment made—

The Court—And how much do they cover?

Mr. Lieblich—On June 1st, 1927, by deed of assignment, the said Eilen and Schleider,

subject to the Matisovsky assignment, assignment, assign all of their interest in and to this cause of action to Joseph J. Brumberg, of Passaic, New Jersey, due notice of which has been given to this defendant.

Mr. Vanderbilt—And as to that, we plead we have no knowledge or information, and deny.

Mr. Lieblich—Well, in that situation, I could not safely go to trial, permitting the trustee to come in. I would have to go into that whole proposition of the trustee's coming in here; I have no knowledge of that at all.

Mr. Vanderbilt—I am not asking to have the trustee to come in. I am simply asking that the plaintiffs assured Eilen and Schleider are not to be permitted to recover in their own name to the extent of their own individual rights. I am not saying anything in derogation of Mr. Matisovsky's assignment or Mr. Brumberg's assignment to the amount that was actually assigned to them.

The Court—But you are claiming that the assignors who are parties to the contract under the assignments that you have are entitled to the difference between $9,000. and $2700., if the jury find liability?

Mr. Vanderbilt—That is right.

The Court—And to the extent of the difference between $2700. and $9000., that by virtue of an assignment of the trustee in bankruptcy, he has a beneficial interest?

Mr. Vanderbilt—That is right. He be-

comes vested with title to that cause of action to that extent, and he is not a party here, and that simply bars these individual plaintiffs from recovering to that extent.

The Court—In other words, I have to judicially notice the effect of a certificate; in other words, I take it, you have the evidence there?

Mr. Vanderbilt—Yes.

The Court—I have to notice that the parties in this suit are not the parties in interest to the extent that there has been a subrogation, so to speak, of the right of the trustee in bankruptcy?

Mr. Vanderbilt—Exactly. An assignment by operation of law.

The Court—Of law.

Mr. Lieblich—Oh, I do not think so. I think that is a matter of proof.

The Court—He has the proof.

Mr. Lieblich—Well, that may be so, Sir, but to come in at this late date when we are prepared to try an issue as raised by the pleadings, and attempt to amend, which would place us in an entirely different position if we fail to prove it, and their denial of the receipt of the assignments as well, sent to them under date of September the 29th, dated back as of June 1st, to cure an error in the original assignment which was sent to them, puts us in a position where we cannot safely go ahead.

The Court—When were these suits started?

Mr. Lieblich—The third of May, 1928.

The Court—Who is the trustee in bankruptcy?

Mr. Vanderbilt—The trustee in bankruptcy is Mr. Benjamin Stein of Paterson.

The Court—It is a wonder he did not apply to intervene.

Mr. Lieblich—I assume that he must have had knowledge of these assignments and been satisfied as to their sufficiency and realizes there was not any equity. My attention is called to the fact that this matter of the trusteeship was long prior to the time of bringing this action.

Mr. Vanderbilt—Oh, no. Oh, yes; that is right.

Mr. Lieblich—A long time prior to bringing the action, if they wanted to set that up, they surely had plenty of opportunity to set it up.

The Court—How about the plaintiff pleading a claim in himself under operation of law?

Mr. Lieblich—The plaintiff has not pleaded any such claim. He has just joined as a nominal plaintiff. We did not claim anything for the plaintiff in this case at all, the original assured designated.

Mr. Vanderbilt—That is not so, your Honor. The complaint reads, plaintiffs demand damages on this count in the sum of $2500., and that language is repeated on each count. There is no differentiation of plaintiffs. There is nothing to show they are nominal plaintiffs.

The Court—If this assignment to the trustee in bankruptcy was antecedent to the institution of this suit, why did the plaintiffs in their own name sue when, in fact, they were divested of all interest, first, by the assignments under their own hand and seal and, secondly, by virtue of the assignment according to the order of the bankruptcy court?

Mr. Lieblich—Why, I suppose that counsel is accountable for that, in this respect and upon this theory: that the policies of insurance for the purpose of identification were made out in these names, and an examination of the complaint will disclose that they claim no equity at all, they are simply nominal plaintiffs; they show upon the face a cause of action solely and only in favor of these assignees; there isn't anything set forth, any cause of action, or any reservation for these individual men. These pleadings upon their face show that the plaintiffs in this case are Judge Matisovsky and Mr. Brumberg. Now, an examination of the complaint will disclose that.

Mr. Vanderbilt—It says "plaintiffs."

Mr. Lieblich—Yes, it does say that.

The Court—Why didn't you plead according to the true tenor, in other words, you say here, you have named them all, and we do not know whether some are in the action as assignors, just nominal plaintiffs, and according to these pleadings, all plaintiffs stand in the same relation, that they have an insurable interest in this controversy?

Mr. Lieblich—No. I differ most respectfully with your Honor there. We do not show in the complaint—they are designated, that is all. But supposing this position came along: supposing Joseph T. Lieblich was named a party plaintiff in a cause of action against Mr. Vanderbilt, and the papers on their face failed to disclose a cause of action in favor of Joseph T. Lieblich. Then he would come and move to dismiss the complaint, and so here they are only named, but no cause of action is set forth.

The Court—No. You are wrong in your conception. You canot move to dismiss a complaint unless there be an error apparent on the face of the record. Now, if the motion were made to strike out this complaint, under the rule that you cannot go outside the pleadings to determine the sufficiency of the pleadings, you would have to treat this that there was a cause of action set up by all of the plaintiffs and, therefore, you could not dismiss the complaint; so your point is not well taken.

Mr. Lieblich—Well, possibly I have not made myself clear to your Honor, or you have not got my point. I say that an examination of this complaint will absolutely disclose on its face, exclusive of any extrinsic proof, that Eilen, that is, Schleider and Eilen, have no cause of action set forth.

The Court—No. You set up here in the first count,—

Mr. Lieblich—Yes.

The Court—the plaintiff Matisovsky, the second count, and others. Now, what do you mean by others? Who are the others?

Mr. Lieblich—Joseph J. Brumberg, and you will find in the first count the plaintiff Matisovsky complains, with others, and then he sets forth his cause of action. And we go down to paragraph—all the others are indicative of the issuance of the policy, the payment of the premium, the date of the fire, the compliance with policy conditions. You will find that in paragraph 9 of the first count, there is the deed of assignment on May 25, 1927, by deed of assignment (Reading paragraph 9) assigned $2,,000. of their interest in this cause of action.

The Court—That is $2,000. out of the way.

Mr. Lieblich—Yes. The next is paragraph 10 of the first count where by deed of assignment Eilen and Schleider, subject to the Matisovsky assignment, assigned all of their interest in and to this cause of action to Joseph J. Brumberg of Passaic, New Jersey, due notice of which has been given to this defendant.

The Court—Yes.

Mr. Lieblich—So you will see there is no cause of action for Eilen or Schleider.

The Court—Do all of the counts recite the same?

Mr. Lieblich—All recite the same.

The Court—When was the trustee appointed?

Mr. Lieblich—In October 1927, the answer

was filed. I suppose you can tell from your dates, within twenty days; it don't appear to be an extension; the action was started on the 3rd day of May, 1928.

Mr. Vanderbilt—If the Court please, we have denied knowledge and information as to both of those assignments in our pleadings, and we raised the issue that way.

The Court—Taking these pleadings, of course, they do not set up any insurable interest in Schleider or Eilen at all.

Mr. Lieblich—Any cause of action, your Honor please.

The Court—I said, it don't set up any cause. In other words, they point out that, first, the two thousand, and then, secondly,—

Mr. Vanderbilt—That is true, your Honor, but every count starts, plaintiffs Frank J. Matisovsky, et als, and every count concludes, plaintiffs demand damages on this count, not separating them at all.

The Court—Well, I think, of course, after all, it is nothing more than a misjoinder.

Mr. Vanderbilt—Exactly. It does not affect the suit. It does not affect Mr. Matisovsky's suit or Brumberg's suit.

The Court—A misjoinder or nonjoinder can be disposed of by striking those names out.

Mr. Vanderbilt—Well, I move, then, to strike the name of Nathan Eilen and Max J. Schleider as plaintiffs, on counsel's statement that they have no interest.

Mr. Lieblich—I would have no objection. They are not in this suit.

The Court—Then that will cure the difficulty. In other words, the suit now is by the assignees, and to Matisovsqy and Brumberg, and Schleider and Eilen are out. That will cure the difficulty or solve the difficulty, rather.

Mr. Vanderbilt—Yes, sir.

The Court—All right.

Mr. Lieblich opens the case to the Jury on behalf of the Plaintiff.

Mr. Vanderbilt opens the case to the Jury on behalf of the Defendants.

Mr. Lieblich—By stipulation of counsel, I think it is admitted that the policy conditions with respect to notice have been complied with, and that within a short time the insurance companies designated Charles E. Kling of the General Adjustment Bureau as their adjuster, Philip Feuerstein as their adjuster, and Henry F. Trimpi; is that right?

Mr. Vanderbilt—That is correct.

The Court—Then, is there any question as to the formal proofs of loss?

Mr. Vanderbilt—We have them here ready to produce.

The Court—I mean, there is no question, so the issue will be whether the fire was accidental or by design, insofar as the issue is concerned, giving a right to recover under it.

Mr. Lieblich—I suppose that would be Mr. Vanderbilt's case.

The Court—That is what I say.

Mr. Vanderbilt—Under our first separate defense, misrepresentation and fraud as to the origin of the fire.

FRANK J. MATISOVSKY, sworn as a witness on behalf of the Plaintiff, testified as follows:

Mr. Lieblich—I offer in evidence policy number 1269, Aetna Insurance Company, in the sum of $1,000.00.

(Policy marked Exhibit P-1 in evidence).

Mr. Lieblich—I. offer in evidence policy Number 2438, National Liberty Insurance Company, in the sum of $1500.00..

(Policy marked Exhibit P-2 in evidence.)

Mr. Lieblich—They all cover this warehouse. They are all in the name of Max J. Schleider and Nathan Eilen, trading as Art Furniture Company.

I offer in evidence policy Number 787084, Commonwealth Insurance Company, in the sum of $2500.00.

The Court—Seventy-five—

Mr. Lieblich—757084. I have a statement for your Honor with all of them set up, so

your Honor don't need to bother about it at all.

(Policy marked Exhibit P-3 in evidence).

Mr. Lieblich—I offer in evidence policy Number 101296, the Baltimore American Insurance Company, in the sum of $1500.00.

(Policy marked Exhibit P-4 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 110297, the Baltimore American Insurance Company, in the sum of $1500.00.

(Policy marked Exhibit P-5 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 384, Presidential Fire & Marine Insurance Company, in the sum of $2500.

Policy marked Exhibit P-6 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 639001 the State Assurance Company, in the sum of $2500.00.

(Policy marked Exhibit P-7 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 382369, North British & Mercantile Insurance Company, in the sum of $2500.00.

(Policy marked Exhibit P-8 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 20470, Fidelity Phoenix Insurance Company, in the sum of $2500.00.

(Policy marked Exhibit P-9 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 1361, Springfield Fire & Marine Insurance Company, in the sum of $2500.00.

(Policy marked Exhibit P-10 in evidence.)

Mr. Lieblich—I offer in evidence policy Number 29090, the Automobile Insurance Company, in the sum of $2500.00.

(Policy marked Exhibit P-11 in evidence.)

Mr. Leiblich—All of which cover Max J. Schleider and Nathan Eilen, trading as Art Furniture Company in the frame and cement-block building occupied as a store and storage of furniture, situated number 638, 640, Main Avenue, Clifton, New Jersey.

There are ten defendants, but eleven policies. I think in opening to the jury he said that there were ten.

Direct Examination by Mr. Lieblich:

Q. Judge, where do you live? A. Garfield.

Q. And what is your business, trade or occupation? A. Lawyer.

Q. And had you any business dealings or connec-

tion with Eilen and Schleider trading as the Art Furniture Combany with respect to representing them in any criminal matter? A. I did not.

Q. Did you have any dealings with them at all? A. Occasionally, yes.

Q. I see. Did you have any connection with respect to this fire of May 13, 1927? A. No.

Q. What connection, if any, have you had with these insurance companies with respect to this matter, Judge? A. None at all.

Q. Have you had any correspondence with them? A. Yes.

Q. What was the correspondence? A. I mailed to each of them a copy of an assignment executed by Schleider & Eilen to me in the sum of $2,000.00 for an advance of an equal sum.

Q. That is, did you advance $2,000.00 to Schleider & Eilen? A. Not individually. It was advanced by me on behalf of a mortgage company I represent.

Q. Well, that is all right. But you advanced the money? A. Yes, I did.

Q. And there was an assignment made to you? A. Yes.

Q. All right. And you say you did what with that? A. What, if anything, did you do with that assignment? A. I mailed—I had separate assignments made of each policy and mailed the original to the respective companies.

Mr. Lieblich—I will call upon the attorney for the insurance companies to produce the assignments mailed by Judge Matisovsky for the $2,000.00. Notice to produce was served,

Sir. Just one will do. We can stipulate as to the rest of them. (Paper produced.) All right. By stipulation—

Mr. Vanderbilt—That is all right.

Mr. Lieblich—By stipulation, I offer in evidence the assignment made to Frank J. Matisovsky by the Art Furniture Company, signed by Schleider and Eilen, under date of May 25th, 1927.

The Court—May 25th.

(Marked Exhibit P-12 in evidence.)

The Court—In the sum of—

Mr. Lieblich—$2,000.00.

Q. Have you got the copies there, Judge, or have I got them? A. No. I believe you have the copies there amongst your papers.

Q. All right. I will produce the Automobile copy.

Mr. Lieblich—I offer in evidence the letter from Judge Matisovsky to the Automobile Insurance Company, enclosing the copy of the assignment dated September 16, 1927.

(Marked Exhibit P-13 in evidence.)

Mr. Lieblich—I assume, Mr. Vanderbilt, that it is admitted that a copy of that assignment and such a letter went to each of the other insurance companies?

Mr. Vanderbilt—Yes; we will concede that.

Mr. Lieblich—All right.

Q. You are one of the plaintiffs in this case? A. Yes.

Q. Have you received anything at all? A. No, sir.

Q. How much, if anything, is due you? A. $2,000.00.

Mr. Vanderbilt—Objected to as a conclusion of law.

The Court—What is the question?

(Question read.)

The Court—I think the assignment speaks for itself.

Mr. Lieblich—Well, I won't press the question.

Q. How much, if anything, are you claiming from these insurance companies? A. $2,000.00, and accumulated interest.

Mr. Lieblich—You may take the witness, Mr. Vanderbilt.

Cross-examination by Mr. Vanderbilt:

Q. Now, you say that this assignment which was made, the copies of which were sent to the various companies, was for money not advanced by you, Judge? A. It was for money advanced by me for the Republic Mortgage Company as a loan to Schleider & Eilen, and an assignment of the proportionate amount on the policies was assigned to me as trustee.

Q. You have no personal interest in this assignment? A. Yes. I am a member of the company.

Q. I mean, it was not your assignment, to you personally? A. It was an assignment to me,—

Mr. Lieblich—The assignment speaks for itself.

A. (Continuing)—as trustee.

The Court—What is this?

Mr. Lieblich—I say, the assignment speaks for itself.

Q. Was this money advanced in connection with some mortgage which the Art Furniture Company was obtaining from the Republic Mortgage Company? A. No. It was advanced on a loan, and they executed a note back to the Republic Mortgage Company in the sum of $2,000.00, made on May 25th, 1927, payable sixty days afterwards.

Q. And did you attend to the making of the loan and to the preparation of this assignment? A. I did.

Q. And is this the signature of Eilen and Scheider on the assignment, on the Exhibit P-12? A. Yes, sir.

Q. And in this assignment you are referred to as Frank J. Matisovsky, trustee? A. That is right.

Q. Were you trustee for the Republic Mortgage Company? A. Yes.

Q. And the funds which were advanced were advanced by the Republic Mortgage Company? A. Yes.

Q. And the note which Eilen and Scheidler made was made to the Republic Mortgage Company? A. Yes.

Q. Did you act as attorney for the Republic Mortgage Company in the making of this loan, Judge? A. Yes.

Q. And, of course, you know at the time that the loan was made of the fire which had occurred a few days before, did you not? A. I did.

Q. Had the Republic Mortgage Company ever made any previous loans to Eilen and Scheidler? A. They did not.

Q. Through whom did the Republic Mortgage Company come to make this loan? A. One of the members of the company came up to the office and stated that Schleider and Eilen wanted to get a loan of a couple of thousand dollars, and then Eilen, or Schleider and Eilen both came up, and the arrangements were made between us at that time.

Q. And prior to making this loan on behalf of the Republic Mortgage Company, did you go down to the scene of the fire to ascertain what the extent of the fire loss was? A. No, I did not.

Q. You simply took the word of Eilen and Schleider as to what the amount of the loss was, and what the extent of their claim—A. No, I did not discuss the loss with them, to what extent it was.

Q. I see. A. I did not know what the amount of the loss would be.

Q. Did they tell you, either of them, any of the circumstances relating to the fire? A. They told me they had a fire, that was all.

Q. And you had not heard any of the circumstances connected with the fire at that time? A. I did not.

Q. Who was the member of the company who intrduced them to you? A. Abe Deutsch.

Q. Up to the time of the making of the loan by the Republic Mortgage Company, had you had any conferences with Mr. Brumberg, the adjuster for the assured, with respect to this fire? A. I went to see him about these assignments, whether it would be advisable to hold them or mail them on to the companies.

Q. Did you know at the time you took this assignment in your name as trustee that there was a prior assignment of ten percent of the amount in favor of Mr. Joseph J. Brumberg? A. I did not.

Q. He did not tell you that? A. No.

Q. Did you discuss the matter of the fire at all with Mr. Brumberg? A. Oh, I suppose I did, yes.

Q. And what did he tell you about it, Mr. Matisovsky? A. Well, I do not know anything particular that he told me about it, except the fact that there was a fire, and that is how I came to, I say, ask him about these assignments, whether I should leave them with him or mail them on to the company.

Q. Oh, you had these assignments before you saw him? A. I got the assignments the same day as the note was made and the same day as the money was advanced by me.

Q. But. I mean, you had these assignments actually executed, did you, as trustee, before you saw Mr. Brumberg? A. Yes.

Mr. Vanderbilt—That is all.

Re-direct Examination by Mr. Lieblich:

Q. Mr. Matisovsky, let me ask you this: How long after May 25th, or the date of that assignment,

did you discuss the matter with Mr. Brumberg? A. I do not know. I meet Mr. Brumberg, come in contact with him, probably—or with him, every day or every other day.

Q. Well then, tell me why was it that you did not mail the assignment dated May 25th until September the 16th or 17th? A. Well, then, I understood that there was some trouble over the collection of the insurance money, so I thought to protect myself these assignments should go in to the company.

Q. I see.

JOSEPH J. BRUMBERG, sworn as a witness on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Brumberg, what is your business, trade, or occupation? A. Insurance adjuster of fire losses.

Q. How long have you been engaged as an adjuster of fire losses? A. 25 years.

Q. And during the course of your 25 years experience as a fire insurance adjuster, have you ever been employed by insurance companies? A. No, sir.

Q. And by whom are you employed? A. By the assured.

Q. And what is the technical designation of the assureds' adjuster, or what is he known as in the trade or profession? A. To prepare the inventory.

Q. No. What is he known as, how do you refer to him? A. I did not get your question.

The Court—Public adjuster?

The Witness—Oh, I beg your pardon.

Q. So you are a public adjuster? A. Yes, sir.

Q. And you work exclusively for the public? A. Yes, sir.

Mr. Lieblich—No objection to his qualifications?

Mr. Vanderbilt—For the public, and Brumberg.

Q With respect to this loss, what connection, if any, did you have? A. I represented the assureds in the adjustment of their claim.

Q. I see. A. And do you know the date of this fire? A. May 13th, I believe.

Q. Yes. And how soon after May 13th, did you come into the case? A. I believe the day following.

Q. And what, if anything, did you do with respect to bringing about or notifying the companies, or, tell us in your own way, I don't want to lead you? A. We notified the companies as to the amount, as to the loss which occurred on the date of the fire. We prepared or, rather, prepared jointly, an inventory with the Salvage Corporation of New York City, and called a meeting of the insurance companies.

Q. Who were the Salvage Company? A. The firm that—

Mr. Lieblich—I think Mr. Vanderbilt and I will admit or, rather, stipulate that, won't we, the Salvage Company? Well, it is admitted that the Salvage Company is an organization employed and used by the insurance companies in this case for the purpose of coming in, checking up the stock, and taking out as much as could be taken out, for the purpose of salvaging it.

The Court—In this case did they represent the insurance companies?

Mr. Lieblich—Yes, sir.

Mr. Vanderbilt—And they check up on quantities for us, but the assured furnishes the values.

The Court—I see.

Q. Now, how soon after the loss did this Salvage Company come in there and check off? A. You have the records. I think it was several days later.

Q. Do you remember the date? A. No, I do not.

Q. You do not remember the date? A. No, sir.

Q. Well, I will show you this paper and ask you if that will tend to refresh your recollection as to the date when this was accomplished? A. You have an original there which would be much better.

Q. Well, come on down here and find it; I cannot find it. Here it is. Wait a moment. (Handing paper to the witness.) A. May the 20th.

Q. And how came the Underwriters' Salvage Company to come in there and check up and do what

they did? A. At the request of the insurance companies.

Q. And was that as the result of some agreement which you had entered into on behalf of the Art Furniture Company with the insurance companies' representatives? A. Yes, sir.

Q. And with whom did you confer, or with whom did you make such agreement? A. Well, there were three adjusters on that loss.

Q. Well, who were they? A. Mr. Feurstein.

Q. Philip Feurstein? A. Mr. Trimpi.

Q. Henry F. Trimpi? A And Charles Kling.

Q. Charles E. Kling? A. Charles E. Kling.

Q. And did you have any other conference with these three gentlemen subsequent to the date which you have last testified to? A. We had one after that, I believe, on June 1st.

Q. And what, if anything, transpired on June first? A. We had a meeting of the loss on the premises where the fire occurred; we checked the loss, and compromised it for $9,000.00.

Q. Tell us, did you agree upon the value of the property which had been destroyed at this time, too? A. I think we did.

Q. Yes. And how much if anything, was that? A. I believe around fifteen thousand and some odd dollars. I do not remember exactly.

Q. And why did you agree to $9,000.00 as the settlement and compromise? A. A compromise settlement to dispose of the—

Mr. Vanderbilt—I object to that. The witness cannot, by oral testimony,—

The Court—It seems that his is a collateral

matter. You are now suing on this agreement of $9,000., and that would be the best evidence.

Mr. Lieblich—Well, I am suing upon the fact, not upon any written agreement, that would be a matter for them, Sir, to offer that in evidence; I am producing a fact, or attempting to show a fact, that this gentleman entered into an agreement to compromise his claim for a certain sum. Now, the other matter would be a defense proposition, I take it.

The Court—Yes. But we have gone over that; that is in without objection, because they compromised for $9,000.; then you ask, what was the value? If you agreed to take $9,000.00, what difference does it make?

Mr. Lieblich—That is quite true. I just wanted to show the motive which actuated us in—

The Court.

Q. Now Mr. Brumberg, did you have occasion at any time to advance any money to Eilen and Scheider, the Art Furniture Company? A. I did.

Q. How much, if anything, did you advance? A. I gave you the figures before.

Q. All right.

Mr. Lieblich—I call for the production of the original agreement retaining Mr. Brumberg.

Q. Have you your checks? A. Yes, sure, I have. I can use this, can't I, your Honor? I can use this?

The Court—Well, if you need it to refresh your recollection, yes.

Q. Have you the original ten percent agreement? A. I believe you have it there.

Q. All right.

Mr. Lieblich—I call for the assignments delivered to the insurance companies, dated June the first, and under the date of September 28th, to each of the defendant insurance companies.

(Papers produced.)

The Court—What is the date of that?

Mr. Lieblich—Dated June 1st. No, I want the original.

Mr. Vanderbilt—These are all we have. Hasn't he got the originals?

Mr. Lieblich—No. He says he mailed them all to you, one to each company.

By Mr. Vanderbilt:

Q. Mr. Brumberg, haven't you the originals of the assignments made? A. No.

Q. Dated June first, 1927? A. We sometimes make the—

Q. Of which you sent copies to the insurance companies? A. Well, probably one of them,—they only have one original, and probably one of them

went to the insurance company, and the rest, we made copies.

Mr. Vanderbilt—I think we should have the originals.

Mr. Lieblich—Well, he says he sent you the original; he hasn't any copy.

Mr. Vanderbilt—After twenty-five years?

Mr. Lieblich—Well, he is 25 years an adjuster, but not as a lawyer, you know, making assignments. Is it all right to use these for the originals?

Mr. Vanderbilt—Well, I would prefer—

Mr. Lieblich—Well, you have got them. Look through your papers. You may find it.

Mr. Vanderbilt—We have gone through everything we have, Mr. Lieblich; we haven't got them.

Mr. Lieblich—Shall I prove it, or will you let it go in?

By the Court

Q. Did you send the originals to the insurance company? A. There would be only one original, because there would be quite a number of insurance companies; I would send the original to the one, and the copies to the others.

Q. You haven't that in your possesion? A. No, we have not.

Mr. Lieblich—I offer in evidence an assignment dated June 1st, 1927, assigning to Mr.

Brumberg the balance due over and above $2,000.00.

(Paper marked Exhibit P-14 in evidence.)

Mr. Vanderbilt—There are two dated June first, two different times.

Mr. Lieblich—Well, you can go into that. I will let you offer this one afterwards, and explain why.

I offer in evidence the assignment for ten percent dated May 14th, 1927, retaining Mr. Brumberg.

(Paper marked Exhibit P-15 in evidence).

Mr. Lieblich—These are produced by counsel for the defendant, and in lieu of the originals.

The Court—Then you spoke of an assignment of June 1st?

Mr. Lieblich—Well, I have that in evidence now, There is another one which Mr. Vanderbilt, in all probability, will take up on cross-examination.

The Court—Now, the ten percent is of May 1st?

Mr. Lieblich—May 1st.

The Witness—No. May 14th.

Mr. Lieblich—May 14th.

The Court—Yes.

Mr. Lieblich—That is ten percent.

The Court—Yes.

Mr. Lieblich—The other is a blank assign-

ment of the right, title and interest, subject to the $2,000., the prior assignment to Matisovsky, trustee.

The Court—Is there any reference in that to the May 14th assignment?

Mr. Lieblich—No. The May 14th, I construe it as an assignment, it is an agreement to be retained, that is my construction and my designation of the assignment. Possibly I misled the Court. It is an agreement to retain him, under my construction of it, I suppose.

The Court—What is the language of it?

Mr. Lieblich—It is an assignment on its face. "We retain Joseph J. Brumberg to advise and assist in the adjustment of loss by fire which occurred on the 13th day of May, 1927, and agree to pay him for such service a fee of ten percent of the amount of loss as adjusted or otherwise recovered from the company or companies, and we hereby assign, transfer and set over unto the said Joseph J. Brumberg the amount of ten percent of the loss as adjusted or otherwise recovered from the company or companies, authorizing the said company or companies to set over the amount of ten percent to the said Joseph J. Brumberg."

The Court—What was the date when the compromise settlement was made?

Mr. Lieblich—June 1st.

Mr. Vanderbilt—If the Court please, I want to object to the statement by the Court, and

I must object to the characterization of the compromise settlement. It was an agreement as to the amount of loss.

The Court—Well, I am using the language that the witnes used.

Mr. Lieblich—Counsel did.

The Court—I am just using the language of the witness.

By Mr. Lieblich:

Q. Now, Mr. Brumberg,—

Mr. Vanderbilt—What it was given for, it is not in evidence yet.

Mr. Lieblich—Yes, June 1st.

Mr. Vanderbilt—No, you asked, what date?

The Court—I am now referring to the conditional settlement of $9,000. I asked what date that was.

Q. What date was that Mr. Brumberg? A. June 1st.

Q. What year? A. 1927.

Q. All right. Now, Mr. Brumberg, how much money have you advanced to the Art Furniture Company by reason of that assignment of June 1st? A. Six thousand, nine hundred and eighty-nine, fifty-three.

The Court—Six thousand,—

The Witness—Nine hundred and eighty-nine, fifty-three.

Q. And have you your checks here? A. I have.

Q. Or evidence of—

Mr. Lieblich—I will leave that for you. You can bring that out on cross. Will you produce one letter enclosing the assignment?

(Paper produced).

Well, why not give us one direct to the companies, unless you do not want to make any point of it?

Mr. Vanderbilt—We do not.

Mr. Lieblich—I understand there is no point to be made? It is admitted, then that about September 23rd, 1927, and I offer in in evidence in substantiation of that Brumberg's letter to Adustor Kling, that the assignments dated June 1st, 1927,, were sent to each and all of the companies by Mr. Brumberg.

(Paper marked Exhibit P-16 in evidence.)

Mr. Lieblich—You may take the witness.

Cross-examination by M. Vanderbilt:

Q. Mr. Brumberg, you referred in your testimony to a compromise for $9,000. Is this the paper you referred to?

Mr. Lieblich—Is your signature on there, Mr. Brumberg? I object unless it can be in any wise shown that this witness had anything to do with that paper or signed it or can in any wise identify it.

The Court—What is the paper?

Mr. Vanderbilt—This is a non-waiver.

The Court—I take it the testimony is that on his direct testimony he said he represented the assured in the negotiations with the Salvage Company, at which time there was brought out this agreement?

Mr. Lieblich—No; he never mentioned the agreement at any time.

The Court—What did he mean when he said he agreed on the basis of $9,000.?

Mr. Lieblich—Well, he agreed with the adjusters, that was his testimony, to a compromise in the sum of $9,000; that is the case for; I am reasonably sure—your Honor can have the stenographer read it—there has been no reference at any time to any paper.

The Court—Let me see that paper? (Paper handed to the Court.) Well, I do not know as it makes a whole lot of difference at this time. He can be asked if he had anything to do with it, I take it.

Q. Did you have anything to do with the preparation of this agreement, this paper called a non-waiver agreement? A. Yes, sir.

Q. And is that the nine thousand dollar item that you were referring to on your direct testimony.

Mr. Lieblich—I object. There has been no testimony that that paper had anything to do with the $9,000.00.

The Court—The question is now asked if it had. Now, we are identifying that paper

with the agreement which has been referred to on the witness's testimony.

Mr. Lieblich—Exception. I do not see the relevancy or the connection according to the testimony.

The Court—We have not come to that yet.

Mr. Vanderbilt—Repeat the question, please.

(Question read as follows):

"Q. And is that the nine thousand dollar item that you were referring to on your direct testimony?" A. Yes, sir.

Q. And the agreement or compromise which you said was made of $9,000.00 was made by the adjusters for the company with the assured or the assureds' representative on the basis of this non-waiver agreement, was it not, Mr. Brumberg?

Mr. Lieblich—I object. This witness can only speak as to what he has done.

The Court—Just a minute. He is a party to the action, and that is a proper question.

Mr. Lieblich—Exception.

A. Repeat that question.

(Question read as follows):

"Q. And the agreement or compromise which you said was made of $9,000.00 was made by the adjustors for the company for the assured or the assureds' representative on the basis of this non-waiver agreement, was it not, Mr. Brumberg?"

A. Yes, sir.

Mr. Vanderbilt—I desire to have the non-waiver agreement marked for identification.

Mr. Lieblich—I object. It has not been identified in any wise by the witness.

Mr. Vanderbilt—He says he was connected with the preparation of it.

Mr. Lieblich—I may say, Sir, that I propose to raise a legal objection to the entire paper itself in due time.

Q. Can you tell us whether or not, Mr. Brumberg, this is the signature of Schleider on this paper? A. Yes, sir.

Q. And is that also the signature of Eilen further down the page? A. Yes, sir.

Q. And can you tell us whether this paper also has the signature of Charles E. Kling, Phillip Feuerstein and Henry F. Trimpi? A. Yes, sir.

Mr. Lieblich—I think you and I can agree as to that.

Mr. Vanderbilt—Well, he knows.

The Witness—I do not see Mr. Kling's signature here, there. Oh, yes, it is; I beg your pardon.

Mr. Vanderbilt—I desire to have it marked for identification.

(Paper marked Exhibit D-1 for identification.)

Q. And this agreement that you refer to of $9,000.00 was subject to all the terms and conditions of this non-waiver agreement, D-1 for Identification, wasn't it?

Mr. Lieblich—I object. That is calling for a legal conclusion, and I submit, Sir, that as far as that paper is concerned, until the paper itself can be used or offered in evidence, it is a burden upon the defendant insurance companies to show that there was some consideration passed to the benefit of this policy holder for the purpose of entering into or signing this paper, for he had his policies of insurance, and he paid his premium, and here they ask him to sign a paper—

The Court—Just a minute. Let us keep our eye right on the issue This man is an assignee, isn't he?

Mr. Lieblich —I will grant you that, Sir.

The Court—And I take it the purpose of this question is trying to show whether he had knowledge of what was going on, and, of course, if he had full knowledge of this, why wouldn't his contract of assignment be more or less measured by the agreement by his assignor?

Mr. Lieblich—But that is not the test in this matter, Sir, because, here, counsel, whether cleverly, adroitly or innocently, is attempting to inject in this record and bring to the minds of the jury a point of the non-waiver agreement which I submit that he would have no right to sign in the first place, if he had known his legal rights he would not have signed it.

The Court—Are you pleading fraud as to the execution of that non-waiver agreement?

Mr. Lieblich—No. But in due time, if they

at the time did set it up, I have no knowledge of it. It is not set up in the way of any pleading so as to apprise me, it is not a part of the pleadings in his case.

Mr. Vanderbilt—I am afraid counsel has not read the answer.

The Court—Mr. Lieblich, does not an assignee take such in interest that the assignor had?

Mr. Lieblich—I will grant you that, Sir.

The Court—If he has admitted his interest in these policies, doesn't the assignee just take such interest that the assignor had?

Mr. Lieblich—Yes, sir; but I am going a step further, that I do not want this in any wise—we admit we are bound by the $9,000., whether we signed or not, once Mr. Brumberg gave his word, we would not be a party to breaking it, we are not going behind it; but it is the paper itself that I am attacking and the method employed in the execution of this paper. That is the point that I make, that the paper itself is not evidential.

The Court—Well, it has not been offered yet. We will meet that when it comes.

Mr. Vanderbilt—Repeat the question, please.

(Question read as follows):

"Q. And this agreement that you refer to of $9,000.00 was subject to all the terms and conditions of this non-waiver agreement, D-1 for Identification, wasn't it?"

Mr. Lieblich—I object to the form of the question,

The Court—Well,—

Mr. Lieblich—And the question itself.

The Court—as to what is the agreement?

Mr. Vanderbilt—No.

Q. This agreement as to $9,000.00 loss was subject to all the terms and conditions of the non-waiver agreement, D-1 for Identification, was it not? A. Yes, sir.

The Court—Now, you are connecting up with his prior testimony?

Mr. Vanderbilt—Yes.

Q. You are familiar with non-waiver agreements in your 25 years of experience as a public adjuster, are you not, Mr. Brumberg? A. Yes, sir.

Q. And you have either had your client, the assured execute them, or you have executed them for and on behalf of the assured, on many occasions, have you not?

Mr. Lieblich—I object to that as immaterial as to what he may have done. He may be an adjuster, and he may have experience with respect to it, but he surely is not an attorney and he don't know what that paper means.

The Court—Well, the rule in evidence may be objectionable, but if it is admissible for any purpose, under a general objection the

question is proper. I will allow the question.

Mr. Lieblich—Exception.

(Question read).

A. I have had the clients execute them themselves, but I never execute any for any client.

Q. Well, on many occasions you have done that? A. Yes, sir.

Q. And there was no compromise or settlement in this case separate and apart from the terms of the non-waiver agreement, D-1 for Identification, was there?

Mr. Lieblich—I object. It is not part of the record. The witness has not referred to it on direct examination, and I object to the form of the question itself,—

The Court—I will allow the question.

Mr. Lieblich—it being predicated upon a false premise.

Q. Answer it. A. Repeat the question.

(Question read). A. No, sir.

Q. What was the date that the adjusters got together and fixed the loss at $9,000.00, Mr. Brumberg? A. June the 1st, 1927.

Q. And that was the date of the assignment, P-14, was it not? A. Yes, sir.

Q. You also had, bearing the same date, another paper dated June 1st, 1927. I ask you what that is? A. One didn't show consideration, and the other did.

Q. Well, did you send them both to the insurance companies? A. Yes, sir.

Q. And this one that I last have shown you was sent as well as the other one, is that right? A. Yes, sir.

The Court—What date is that?

Mr. Vanderbilt—The same date, June 1st, 1927. I ask to have that marked for identification.

(Paper marked Exhibit D-2 for Identification.)

Q. Is that right? A. That is right.

Q. And when were they sent? A. The letters will show that.

Q. Well, I show you this letter, I think the one already in, of September 23rd, 1927, and ask if that is the letter by which you sent the assignments to the companies?

Mr. Lieblich—I object to it. The question is misleading. He sent two assignments to the companies. I think counsel ought to tell him which one he refers to.

Mr. Vanderbilt—Yes; I understood him to say he sent them both.

Mr. Lieblich—No; he sent them at two separate times.

The Court—I thought in answer to the question he said September 25th; do you mean both?

The Witness—No. I says the letters will show that. I didn't have the letters in my hand.

Q. Is that the date on which they were sent?

Mr. Lieblich—Which are they? A. I make the same objection.

A. I believe there is another letter there.

Q. Well, is this the other letter? This is the letter, P-16, of September 23rd, 1927, that refers to one assignment, does it not? A. Yes, sir.

Q. Now, I show you another letter dated September 29th, 1927, and ask you if that refers eto the other assignment? A. One of the two; yes, sir.

Q. The one I have had marked D-2 for identification? A. Well, I do not know which one exactly was sent out first, but you have got two of them there that were sent out in a period of two days difference.

Q. One or the other was sent out by these two letter; you do not know which went in which? A. No, sir.

By the Court:

Q. You designate one was without consideration? A. One was without consideration and the other was with consideration.

Q. You cannot tell which was sent first? A. No, I cannot.

Mr. Vanderbilt—I ask to have the letter of September 29th marked for identification.

(Paper marked Exhibit D-3 for Identification.)

Q. So the first notice which you gave to the insurance companies of your having any interest by

assignment in these policies was in September, 1927, was it not? A. Yes, sir.

Q. And you, of course, visited the scene of the fire? A. Yes, sir.

Q. And you were familiar with the circumstances surrounding the fire? A. Sir?

Q. And you were familiar with the circumstances surrounding the fire? A. Yes, sir.

Q. When did you first advance any money to the assured, Eilen and Schleider? A. April 19th.

Q. And how much did you advance them then? A. $2500.

The Court—That was nineteen twenty—

The Witness—Seven.

Q. That was before the fire? A. Yes, sir.

Q. How much was that? A. $2500.

Q. And then. when did you next advance money to them?

Mr. Lieblich—You may as well tear those checks out.

The Witness—They are pasted in the book. It doesn't make any difference.

Mr. Vanderbilt—Well, they will be coming out in a minute.

Mr. Lieblich—Yes, you might as well take them out, because they are coming out; I can anticipate it.

The Witness—All right.

Mr. Lieblich—Unless you want to put slips in.

The Witness—It doesn't make any difference.

Q. What was the next advance? A. $1,000.00.
Q. The date? A. May 16th.

Mr. Lieblich—The first was $2500. on the 17th of April.
Mr. Vanderbilt—The 19th.

Q. And next? A. December the 5th, 1927.
Q. How much? A. $808.40.
Q. $808.40. Next? A. January the 18th, 1928, $212.00.

The Court—What date is that?
The Witness—January 18th, 1928.

Q. How much? A. $212.00.
Q. Next? A. February the 16th, 1928, $400.
Q. Yes. A. April the 19th, 1928, two hundred and nine, ten. May the 23rd, 1928, $421.00. July 19th, 1928, two hundred and six, naught seven. September the 25th, 1928, $110.17.
Q. $110.17; that was July 20th? A. September 25th, 1928.
Q. How much was that? A. $110.17. September the 25th, 1928, $408.00. October the 18th, 1928, $203.07. November the 21st, 1928, $406.05, 162, $105.17.
Q. 162? A. That is the only voucher that I have not had returned from the bank, as yet.
Q. What is the amount of that? A. Check number 162, the date February 26th, 1929, $105.17.

Q. February 26th, 1929? A. $105.17.

Q. That is a total of your advances? A. Yes, sir; outside of what I am still indebted—which I am endorsed for on some of those notes which are not matured yet, which are dragging along.

Q. You are endorsed on notes. Now, how did you come to make this advance of $2500. on April 19, 1927, prior to the fire? A. They were clients of the office, and they asked me if I would not do them a turn, and I did.

Q. You mean you were placing insurance for them at the time? A. Some.

Q. You had not been an adjuster of fire losses for them before this, had you? A. No, sir.

Q. How long had they been doing business with you? A. Well, I have been doing business with Eilen for about 10 to 12 years.

Q. And you endorsed the $2500.00 on April 19th, 1927, without any security? A. Yes, sir. Their note. No. I gave it to them.

Q. You made them a loan of that amount? A. I made them the loan on their note.

Q. You paid it by your check? A. Yes, sir.

Q. All of the other advances were after the fire, were they not, beginning May 16th, 1927? A. Yes, sir.

Q. At the time you made the May 16th, 1927, advance of $1,000.00, there had been no adjustment of the loss with the companies, had there? A. No, sir.

Q. And no assignment obtained by you until June 1st, 1928, or 1927? A. 1927; yes, sir.

Q. Now, how did you come to advance them $3,500.00 without obtaining an assignment, or this last

$1,000.00 of May 16th, 1927, without obtaining an assignment? A. Why, they were good for the money.

Q. They were good for the money? A. Yes, sir.

Q. And have they ever repaid any of this to you? A. No, sir.

Q. Still all due and owing to you? A. Yes, sir.

Q. Did you know that they went into bankruptcy? A. I did.

Q. When did they go into bankruptcy?

Mr. Lieblich—I object. The best proof would be the record.

The Court—No. That is going to this man's credit.

Mr. Lieblich—But the question was, when did they go into bankruptcy?

The Court—Well, that is a collateral matter. We do not need the best evidence for that.

Mr. Lieblich—All right. If he knows.

A. I do not know, but probably I think it was about four or five months after the loss, if I remember.

Q. Four or five months after the loss, which would bring it into the fall of 1927? A. Yes, sir.

Q. And before you made your third payment of December 7th, 1927, for $808.40? A. Well, I had the assignment at that time, this was in December.

Q. Yes. But I mean, at that time, you knew that they were in bankruptcy? A. Yes, sir.

Q. And, of course, you then knew it as all of the

subsequent checks? A. Yes. But I will explain that.

Q. Now, Just answer the question, And you also knew that the insurance companies were contesting the claim of the plaintiff with respect to—of the assured with respect to all of these policies, did you not? A. No, sir.

Q. Well, when did you first learn that the insurance companies did not intend to pay $9,000.00.

Mr. Lieblich—I object. I take it it is immaterial as to when he learned it. He admits that he gave all those checks after they were in bankruptcy.

The Court—It goes to the witness's credibility.

Mr. Lieblich—Well, I respectfully withdraw the objection.

A. The question, please?

(Question read as follows):

"Q. Well when did you first learn that the insurance companies did not intend to pay $9,000.00?" A. I did not learn that at all, but the—we started suit within a year under the insurance contract, the insurance contract.

Q. You knew when suit was started that they did not intend to pay it, didn't you? A. I did not.

Q. Do you mean that the mere fact that they had not paid it within a year after the fire was rather good evidence to you as an experienced adjuster of 25 years standing that they did not intend to pay that $9,000.00? A. I would not say that.

Q. You would not? A. No, sir.

Q. In other words, the fire occurred in the early part of May, 1927, and up till the following year they had not paid it, and you still had hopes that they were going to pay it? A. Yes, sir.

Q. Why so much faith, Mr. Brumberg? A. Because they are good for it.

Q. Oh, they are good for it. Yes. But I mean, if they had intended to pay it, they would have paid it within thirty days after the adjustment of the loss, wouldn't they? A. No.

Mr. Lieblich—I object. It is based upon false premises, because Mr. Vanderbilt and I will admit that the companies don't have to pay within thirty days.

The Court—No. Your knowledge and Mr. Vanderbilts we are not concerned with.

Mr. Lieblich—I submit that the policy contract does not provide that they pay for it within thirty days.

Q. Well, they could hold it until sixty, but they don't do it, do they, Mr. Brumberg? A. Very often.

Mr. Lieblich—If your contract doesn't even provide for sixty days, they can hold it only—

The Court—Just a minute. Suppose you state your objection and state it without testifying.

Mr. Vanderbilt—Yes.

Mr. Lieblich—I will grant you that. I ask your Honor's indulgence in that respect. I object to the form of the question being based upon false premises as not being within the

terms of the contract as to the form of payment.

The Court—I will sustain that objection.

Q. Well, didn't you suspect that they were not going to pay when the non-waiver agreement was asked to be signed? A. No, sir.

Q. Isn't that notice to you, the mere request to sign a non-waiver agreement, that the companies are questioning—raising a question as to the right of the assured to recover, and that they are thereby protecting themselves by getting this non-waiver agreement, D-1 for Identification?

Mr. Lieblich—I object to that question. There are incorporated in it, I think, at least, two or three questions in one. I do not know which counsel wants asked.

The Court—Well, technically, it is a double question. I will sustain the objection.

Q. Isn't the fact that a non-waiver agreement is asked for, Mr. Brumberg, proof that the companies are questioning their liability with respect to the loss on which the non-waiver agreement is asked?

Mr. Lieblich—I object to the form of the question.

The Court—I sustain the objection.

Q. Well, is the assured asked to sign a non-waiver agreement in every case—

Mr. Lieblich—I object.

Q. —of a fire?

Mr. Lieblich—I object. It is immaterial to this issue.

The Court—I sustaint the objection.

Mr. Vanderbilt—I think it is very material. Mr. Brumberg is here not only as an adjuster, but he is here as a party in interest.

The Court—Suppose we get the instant case insofar as it affects his knowledge.

Q. Well, did the fact that a non-waiver agreement was asked bring home to you as the adjuster of the assured and as the man who had previously advanced money to the assured any notice that the companies were raising any question with respect to this loss? A. No, sir.

Q. Well, is the non-waiver agreement asked for in the case of every fire loss?

Mr. Lieblich—I object. It is immaterial to this issue.

The Court—I will allow that in view of the witness's prior answer.

Mr. Lieblich—Well, he said no, in this case. How would that be relevant or material to this case?

The Court—This goes to his credibility. We have a man of 25 years experience dealing with adjustments. It goes to his credit, that is all.

Mr. Lieblich—I most respectfully—

The Court—Some of us are child-like and bland; and others are not.

Mr. Lieblich—And as I am bound by your Honor's ruling,—

A. Repeat the question, please?

Mr. Lieblich—I withdraw the objection.

(Question read as follows):

"Q. Well, is the non-waiver agreement asked for in the case of every fire loss?" A. No, sir.

Q. In what cases do the companies ask for the non-waiver agreement, Mr. Brumberg?

Mr. Lieblich—I object. It is immaterial to this issue, as to what cases they do.

The Court—That is true.

Mr. Lieblich—Unless a proper foundation be laid for it in this case.

The Court—No. What we are concerned with now is just a question of credibility. In other words, this man is experienced, his knowledge of these things has something to do with the propriety of the question.

Mr. Lieblich—May I say that it is entirely irrelevant to the direct examination. If he wants to make him his own witness,—

The Court—Well,—

Mr. Lieblich—I assume that upon that theory he could go into that question, but upon direct examination I did not go into that at all.

The Court—Well, you could not very well go into it on direct examination as to the credit of your own witness. You are vouching for him by calling him, therefore, cross-examination is not restricted; it is restricted to matters brought out on direct, but when

you come to the question of credibility, there is a great latitude on cross-examination.

Mr. Lieblich—I agree with your Honor in your Honor's reasoning, but still as to the credibility it would not permit him to bring into the record a good deal of extrinsic matter which is irrelevant and immaterial to the issue solely for the purpose of attempting to affect the credibility of the witness. This witness has testified as to his experience, true, but as far as this particular paper is concerned, I doubt it very much whether that would in any wise tend to affect his credibility with the jury or not.

The Court—Well, that we do not know. That is for the jury to say.

Mr. Lieblich—Well, I respectfully disagree that credibility would not cover the line of questioning which counsel is now attempting, which is entirely without the purview of the direct examination.

The Court—Well, with all that, I still adhere to my ruling.

Mr. Lieblich—Exception.

(Question read as follows):

"Q. In what cases do the companies ask for the nonwaiver agreement, Mr. Brumberg?"

Mr. Lieblich—If he knows.

Mr. Vanderbilt—Well, if he does know.

A. Sometimes, when there is a question of doubt.

Q. Of doubt? A. Yes.

Q. And they never ask for a non-waiver agree-

ment unless there is a question of doubt in their minds as to their liability on the loss under the policies, do they? A. Yes, sir.

Q. They do? A. Sometimes.

Q. Well, in whose mind is the doubt, then, in the assured's mind? A. Well, the company always had the upper hand, that is, for asking for the non-waivers; the assured never asks for them, only the assured's representative.

Q But that shows there is a doubt in the companies' minds when they ask for the non-waiver agreement? A. Sometimes.

Q. Now, how did it happen that you did not give notice to the companies of your assignments until September, 1927? A. Well, the money was not forthcoming until that time, and I thought it was pretty near time to get ready and protect my interests.

Q. Well, why did you take the chance between June and September of checks being drawn to the assured and paid to the assured when the companies during that period knew nothing of your assignments?

Mr. Lieblich—I object. The question is predicted upon false premises. There is no proof he was taking any chance.

Mr. Vanderbilt—Well, he said, your Honor, that he did not know they were not going to pay.

Mr. Lieblich—True, but he wasn't taking any chances. He knew he would get the companies, eventually.

The Court—Just a minute.

Mr. Vanderbilt—There was no notice given to the companies during this period, and they might have paid the assured, and I am asking him why, as an experienced adjuster, he took that chance for a period of four months, nearly four months.

The Court—I will sustain the objection.

By the Court:

Q. You knew, Mr. Brumberg, without knowledge of the assignment, the company could, with safety, pay to the assured, didn't you? A. No, I had the assignment of the contract, or for the adjustment, and Mr. Eilen was the responsible man, was responsible for the amount of money, without me filing the assignments to the company.

Q. No. I mean, with respect to the liability of the company, you knew that the company could have paid the money under the policy to the assured without considering you in the absence of their knowledge of the assignments? A. Well, I had the policies in question.

Q. Well now, you did not answer my question.

A. Will you repeat that question?

(Question read.)

A. Yes, sir.

The Court—A recess until 2 o'clock.

(Recess.)

After Recess. 2:00 o'clock P. M.

JOSEPH J. BRUMBERG, recalled for further cross examination, testified as follows:

By Mr. Vanderbilt:

Q. If you knew, as you stated, Mr. Brumberg, in answer to the Judge's question, that the insurance companies might have paid the $9,000.00 to the assured without liability to you until you have given notice of the assignment, why did you not give the notice of assignment until September, 1927? A. Because the assureds were good for the amount of money; one of the assureds is a property owner.

Q. Well, if the assured was good for the amount of money, why did you take an assignment from them at all? A. Well, I wanted to protect my interests the best I possibly could.

Q. Well, what was there that drove you, in September 1927, after a lapse of about four months, to obtain, or to forward these assignments to the insurance companies? A. I thought it was time to do so.

Q. What made you think it was time to do so? A. To protect my own interest.

Q. What? A. To protect my own interest.

Q. Yes. Well now, in what way did you think forwarding the assignments to the companies would protect your interests ? A. Why, having the assignment, and notifying the company of that interest, I would have prior claim to anybody else.

Q. Now, if you thought that in September, 1927, why didn't you have that same thought in June, 1927? A. It was not necessary at the time.

Q. Well, what happened in September, 1927,

that made it necessary in your mind to forward notice of these assignments to the companies? A. Nothing at all.

Q. Well, why did you do it, then? A. Just as I said before, to protect my interest.

Q. Well, what came up then that made you take that course? A. Nothing at all.

Q. Nothing at all? A. No, sir.

Q. You cannot assign any reason— A. No, sir.

Q. —for doing that, then, for not doing it earlier? A. No, sir.

Q. Well, why did you cotninue to make advances after notice was given in September, 1927, to the insurance companies? A. I was endorsed on certain paper which I had to make good.

Q. I see. And certain paper of Eilen and Schleider? A. Yes, sir.

Q. Schleider? A. Yes, sir.

Q. And when did you become an endorser on their paper? A. After the fire.

Q. How long after the fire? A. Well, probably during the months of June and September.

Q. During the months of June and September? A. Yes, sir.

Q. And to what extent in June, and to what extent in September? A. From June to September, to the extent of about $3489.53.

Q. Well, can you give us that in some detail? A. Yes.

Q. When you first became liable on their notes? A. Notes and the money advanced was $6.989.53.

Q. Will you give that to me again? A. $6.989.53.

Q. There were on notes of— A. No. That

was the notes, and including the $3500.00, was what I gave them the first two payments.

Q. Oh, yes. So that the notes were $3500. less this fifty-seven, is it?

Mr. Lieblich—$6985.50.

Q. The notes that you went on aggregated $3489.53, is that correct? A. I am on more notes than that, but that is the amount I paid up until the present time on those notes.

Q. That is the amount that you paid up until the present time. When did you first go on those notes? What was the date on which you first went on these notes? A. I do not know.

Q. What is that? A. I do not know.

Q. Well, was it before or after the fire? A. After the fire.

Q. After the fire. And to whom were these notes payable? A. Well, whoever they discounted the notes with.

Q. Oh, they took their notes? A. They took my note, or either I endorsed their note, and they went out and got the cash for it and used it.

Q. And this $3489.53 of notes is included in these various items of checks that you have paid? A. Yes, sir.

Q. How many notes in all did you sign for them? A. I do not remember.

Q. Or did you endorse for them? A. I do not remember.

Q. Well, haven't you got a note register? A. No, I don't keep a note register.

Q. Well, haven't you got any memorandum book in which you keep a record of the notes? A.

No. I have the notes here showing the amount of notes I have already paid for.

Q. Yes. But haven't you any record which shows the amount of notes that you are liable for? A. No, sir; I have not.

Q. And can't you tell us when you incurred that liability on the notes? A. No, sir.

Q. In other words, when you signed the notes? A. The only time I can tell is according to the check record when I make payment when the note comes due.

Q. Well, didn't you keep any record by which you would know in advance on Monday, March 11th, for example, 1929, you were going to have a note due that you would have to meet? A. Well, the bank would notify me to that effect.

Q. And you would not know except by the bank notifying you? A. That is right.

Q. And you did not keep any note register? A. No, I did not.

Q. Or any little memorandum which would correspond to that? A. No.

Q. Well, how many, in the aggregate, of these notes did you execute or endorse, make or endorse, as near as you can tell? A. Probably about $6500. outside of what I advanced to them.

Q. About $6500. in addition to that $3500.00? A. Yes, sir.

Q. And on how many different notes was this $6500. liability— A. Quite a number.

Q. —scattered? A. Quite a number.

Q. Well, was it 15 or 20 or 50? A. Every bit of 10 to 20.

Q. Every bit of 10 to 20 notes. And were these 10 to 20 notes all executed on the same day? A. No. Off and on.

Q. On and off, in the month of June and in the month of September, 1927? A. No, between those months.

Q. Between June and September, 1927. Well, how did you come to become accommodation maker or endorser on this number of notes of anywhere from 10 to 20? A. Well, they were friends of the office, they were customers of the office, and I done that as a matter of formality.

Q. How long had they been customers of the office? A. Eilen has been a customer of mine for ten or twelve years.

Q. Obtaining and placing his insurance through you? A. Yes.

Q. That is the way you mean he was a customer? A. Yes, sir.

Q. And how long was the other man? A. About two years.

Q. Two years, Schleider. And is that the only reason that you endorsed these notes for them? A. Yes, sir.

Q. Or made the notes? Do you do that for all your customers? A. I give many that I think are liable, reliable, rather.

Q. And how much do you still owe on notes made or endorsed for them? A. Well, according to my figures, probably around $2,000.00.

Q. And you have no way of telling us how many of those notes were made in June, and the various dates on which they were made? A. No, I have not.

Q. Do you know whether Mr. Eilen or Mr. Schleider has a record of them? A. I do not know.

Q. Do you know when suit was started in this

case, Mr. Brumberg? A. I think in the early part of 1928.

Q. And did you have anything to do with advising with respect to the starting of suit? A. Yes, sir.

Q. And who did you confer with about that? A. Mr. Lieblich.

Q. And did you confer with Mr. Matisovsky and with Eilen and Schleider about it? A. I conferred with Mr. Matisovsky, I did not with the assureds.

Q. Why didn't you consult with them? A. Because they had no interest in the contract.

Q. They had no interest in it at all. Now, you visited the scene of the fire immediately after the fire, did you not? A. The following day.

Q. The following day. You were familiar with the extent of the loss? A. After I checked it.

Q. Yes. Did you have any conferences with any of the firemen? A. No, sir.

Q. Did you read any description of the fire in the newspapers?

Mr. Lieblich—I object. It is immaterial as to what he read in the nawspapers. What has that to do with this case?

The Court—Not very much with the case, but it has something to do with the witness.

Mr. Lieblich—Well, I submit most respectfully that I object to the question as immaterial and irrelevant.

The Court—As I see it, this witness has said that he advanced certain moneys, that

serves as a basis of consideration for the assignment.

Mr. Lieblich—And his endorsing notes, too.

The Court—In other words, he was asked obligations for which he justifies the assignment.

Mr. Lieblich—Yes.

The Court—Now, counsel has a right to go into matters to this man's knowledge, and then the jury can determine, considering all of the circumstances, whether or not what this witness is saying is true. In other words, if the man said he made advances of money under certain circumstances, the jury has a right to say and to accept that as true or to reject it, and if he did things under certain conditions, that all goes in helping the jury arrive as to the truth.

Mr. Lieblich—But your Honor and I know that newspaper articles—

The Court—No; that is not the point. In other words, if I make a statement to you, Mr. Lieblich, whether it is true or not, and what I have told you operates on your mind and justifies your course of conduct, so far as you are concerned, it is immaterial whether what I said to you is true; you have acted upon what I have said.

Mr. Lieblich—Well, of course, I am bound by your Honor's rulings, and I most respectfully disagree, and, naturally, I take an exception to the ruling.

Mr. Vanderbilt—Will you repeat the question?

(Question read as follows):

"Q. Did you read any description of the fire in the newspapers"? A. Yes, sir.

Q. Did you know that Eilen and Schleider had been indicted by the Grand Jury of Passaic County for this fire?

Mr. Lieblich—I object to that, and I will now move for a mistrial, because counsel knows better than to put that question, and it is done solely for the purpose of prejudicing this jury. Now, no matter if I was indicted forty-two times over,—

The Court—Just a minute. Just a minute. Do you want me to decide this?

Mr. Lieblich—Yes, sir.

The Court—While it is true, an indictment, if the witness is on the stand, he may be asked if he were convicted of crime, he could not be asked if he were indicted. That section of the evidence act has no application to the instant situation. This question is in the same category as the others; in other words, if he knew that were a fact, would the jury believe him, that he made these advances, knowing that fact?

Mr. Lieblich—Well, I most respectfully submit, your Honor, that that would not be the test in this case.

The Court—Now, you are not deprived, if the jury draws an inference from this,

or precluded from answering that inference when you take this witness over again. In other words, if you think that an inference might be drawn on your re-direct, you may question this witness.

Mr. Lieblich—Yes. But I have always understood the test to be that no matter how many indictments, the test was, was the man convicted? If he was convicted, why, that can be used; but so long as there was no conviction—

The Court—If this man himself had been indicted and not convicted, counsel then could not ask him if he were indicted, because the question, as I take it, is not directed to affect this present witness's credit because of his conviction for crime, and it is, rather, going to whether he knew of a certain fact.

Mr. Lieblich—But, sir, as I understand the rule, it would be immaterial whether Schleider and Eilen were indicted. The test would be, were they convicted? If they were convicted, why, all right. Then they could prove it by the record; they would have the record, and could prove the record. But the mere fact that a man was indicted—

The Court—Well, that would be true if you were assailing this witness's credit by virtue of the conviction, but the purpose is not to assail this witness's credit by the fact of a conviction or of an indictment. It is whether or not he knew that these men were indicted and whether, if he knew it,

he would have done as he said that he has already done.

Mr. Lieblich—Well, it strikes me, however, with all due respect to your Honor, it is going far afield to test the credibility of this witness by bringing in all of this extrinsic matter. The question with respect to the non-waiver agreement and the question with respect to whether or not John Doe or Richard Roe or Eilen was indicted or was not, I do not think that those things go to the credibility, particularly that last remark, unless the man was convicted; then it would be a different proposition; but in the absence of any such proof or ability to prove such a thing, I do not think counsel should have injected that into the record for the purpose of prejudicing this jury.

The Court—Mr. Lieblich, in the absence of proof that is subject to demonstration, how do we ordinarily arrive at a conclusion in our own mind?

Mr. Lieblich—Well, under the facts in this case, which is the test, before your Honor, I would say, if the positions were reversed, that here is a man that comes in and says "I did so and so, I advanced $2,500." He has his check to prove it. "I advanced a thousand dollars." He has his check to prove it, and, in addition to that, "I endorsed certain notes." Now, having said that, the attack could be laid to affect his credibility as to whether or not he did those things, and the mere fact that he may have read in the paper that Joe

Lieblich was about to be indicted or Art Vanderbilt was about to be indicted—

The Court—That is just the point. He has testified he has advanced money or checks, he obligated himself by becoming an endorser. Now, that is his statement. Now, the jury have a right to determine the truth of that.

Mr Lieblich—I will grant you that, Sir.

The Court—Now, in arriving at the truth, as I said, in the absence of something that we might demonstrate, the jury have a right to say, "Well, now, he said that, but let us reason it out. What are the probabilities of this case?" Now, in order to determine what the probabilities are, they have a right to consider all of the circumstances, and one of the circumstances as presented by the instant question is, is it likely that this man would give a valuable consideration to men who were indicted? That is all it goes to.

Mr. Lieblich—True, Sir, but wouldn't the best evidence of that fact be the records in the Prosecutor's office, as to whether or not the man was indicted, not the mere say-so that he may have read in the paper?

The Court—Now, you have raised the indictment is not present?

Mr. Lieblich—That is one of my grounds of objection, that that is not the best evidence.

The Court—I will overrule your objection.

Mr. Lieblich—Exception.

(Question read as follows):

"Q. Did you know that Eilen and Schleider had been indicted by the Grand Jury of Passaic County for this fire?" A. Yes, sir. May I ask—Your Honor, may I ask a question? Give me the date when the indictment—

Mr. Lieblich—No. You say yes, you know it.

The Court—He has answered it, and then he wants to know the date of the indictment.

Mr. Lieblich—He says yes, he knows it. Now, whether they were arraigned, he has not said, I assume. That is the way I construe his answer. I do not know what construction your Honor put on it.

(Question and answer read.)

The Court—I thought the witness was in difficulty, that he wanted further information.

The Witness—That is what I wanted.

(Question re-read.) A. Yes, sir.

Q. Did you know, Mr. Brumberg, from the accounts of this fire which you read in the newspapers, or from what you saw at the premises, that there were quantities of gasoline around in cans and in automobile coverings, automobile tire coverings, papers, and the like?

Mr. Lieblich—I object to that part of the question that refers to accounts which

he read from the newspapers, that being pure hearsay evidence.

The Court—If that is your objection, I will overrule it.

Mr. Lieblich—And I object to the form of the question.

(Question read). A. Only what I read in the papers.

Q. Well, what did you read in the papers about that?

Mr. Lieblich—I object to that. That would be pure hearsay, not the best evidence, and it is irrelevant and immaterial to this issue.

The Court—If that is your objection, I will overrule it again.

Mr. Lieblich—Exception.

(Question read). A. I do not remember.

Q. What is that? A. I do not remember.

Q. You cannot remember? A. No, sir.

Q. Then, how could you answer the preceding question? A. What was the preceding question?

Mr. Vanderbilt—Will you read it to him, Mr. Stenographer?

(Preceding question read).

Q. Not my preceding question; but I asked you if you had read the newspaper accounts about this fire? A. I did.

Q. And you cannot remember what you read in them?

Mr. Lieblich—May I ask counsel for an opportunity to get these papers? I think there ought to be some definition or description of the particular papers.

Mr. Vanderbilt—The witness apparently knows, because he answers that he read them.

The Court—Do I understand you want to lay a foundation to produce the papers?

Mr. Lieblich—Yes.

The Court—What to do? To show that—

Mr. Lieblich—I do not know for what purpose, I would be entitled to look at them; I want to see what the articles were. Maybe the witness's memory has gone bad or something, and maybe it is good; I do not know. But I think we are entitled in view of the line of testimony which is coming in here to have an opportunity to check up and have the foundation laid for the papers.

The Court—Well, maybe, later on, when you take this man on re-direct, you may be able to clear up a lot of these matters.

Mr. Lieblich—Well, I appreciate that, Sir; but, of course, I have made my objection and your Honor has overruled it, and I do not want to press that feature of it.

Q. Did you see any evidence of gasoline on the premises when you went there? A. No, sir.

Q. None at all? A. No, sir.

Q. Did you know that the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire?

Mr. Lieblich—I object to that. The best evidence would be the complaint made by the Chief of Police if such a one was made.

The Court—If that is your specific objection, I will overrule it.

Mr. Lieblich—Exception. And, furthermore, Sir, I make this objection, as not the best evidence of any such complaint as to what this man's knowledge as to whether such a complaint was made or not; it may have been upon entirely different charges, and the understanding of this witness with respect to the contents of that complaint—

The Court—Well, if this witness does not understand what the question is, it is up to him to ask for an explanation.

Mr. Lieblich—That is quite true, Sir; but we are not dealing with a lawyer; we are dealing with a layman, and while he may be an adjuster, he may have one understanding of a complaint, and your Honor and myself may draw an entirely different inference after reading a complaint as to what it is for.

The Court—As to your specific objection, I overrule it.

Q. Will you answer the question? A. Repeat the question, please.

(Question read as follows):

"Q. Did you know that the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire"? A. I know there was a complaint made, but not for what purpose.

Q. Well, didn't you know it was in connection with this fire?

Mr. Lieblich—I make the same objection to all this line of testimony with respect to any complaint which was made by anybody else without the knowledge of this witness, or what its contents were.

The Court—Well, I understand that objection. Is there a question now?

Mr. Vanderbilt—Yes, sir.

(Question read as follows):

"Q. Well, didn't you know it was in connection with this fire"? A. Not at that time.

Q. Well, when did you first learn that the complaint had to do with this fire?

Mr. Lieblich—I object. The best evidence of what the complaint is, whether it had to do with this fire or not, would be the complaint.

Mr. Vanderbilt—I am not asking that. I am asking his knowledge.

Mr. Lieblich—And his knowledge with respect thereto is not the best evidence.

Mr. Vanderbilt—It is the only evidence that will do me any good.

The Court—I take it the complaint at this time is purely collateral, and the best evidence is not required as to a collateral matter.

Mr. Lieblich—As to what?

The Court—I say, I take it that the complaint is purely collateral to the main issue, and under the rule the best evidence is not required as to a collateral matter.

Mr. Lieblich—But the fact is as to this man's understanding and as to whether his understanding would be correct or not as to the contents of any such complaint, if any was made, they are in a position to produce that complaint in court so there may be no confusion in the mind of the jury as to what it was.

The Court—We have not come to that yet. What we are interested in is the mind of this witness.

Mr. Lieblich—True, Sir; but his newspaper reading should not be binding as to affect Mr. Matisovsky's claim in this respect and be prejudicial to his claim.

The Court—No. Mr. Matisovsky is not in this. This relates distinctly to the claim of this witness.

Mr. Lieblich—But, Sir, this claim of this witness must also stand or fall on Mr. Matisovsky's claim, and if it is prejudicial to his assignment, he stands in exactly the same legal position.

Mr. Vanderbilt—No.

The Court—This man is a party in interest claiming by virtue of an assignment based upon a valuable consideration.

Mr. Lieblich—Yes. So is Judge Matisovsky. It all grew out of these policies of insurance.

The Court—Whatever this witness says is not binding on the other plaintiff.

Mr. Lieblich—True, Sir; but it is going to affect the other plaintiff if the jury gets some wrong notion which they should not

be able to get by reason of your Honor's rulings.

The Court—The jury is intelligent.

Mr. Lieblich—I agree with you, Sir.

The Court—The jury have an understanding of the oath, and they certainly can take it now that a declaration by this witness is not binding on the other plaintiff.

Mr. Lieblich—True; but it is prejudicial to him, without a proper foundation having been laid. Now, if they could get it—if there was a complaint made, surely they are in a position to have gotten hold of it, or get hold of it, produce it here, so the jury would know.

The Court—I take it your objection is not so much to the form of the question as that the complaint itself has not been produced; is that it?

Mr. Lieblich—That is my main objection to i,, and its prejduicial effect; and here is testimony from hearsay that he read it in the paper, or what its contents may be, and the witness is giving his impression of it where we could have the exact knowledge of what it contained.

The Court—No. I do not see any merit to that objection.

(Question read as follows):

"Q. Well, when did you first learn that the complaint had to do with this fire?" A. I believe it was a few days later.

Q. A few days later. That would make it when? A. I do not know.

Q. Well, when did you first learn of any complaint at all? A. Several days after the fire.

Q. Several days after the fire. And then you first learned that it had related to the fire, a few days after that? A. Yes, sir.

Q. Now, was that before or after the non-waiver agreement was signed? A. What is the date of that non-waiver?

Q. I am looking for it, Mr. Blumberg. It is undated, but it was forwarded by you to the companies. I show you a letter of May 25, 1926, and ask you if that refreshes your recollection as to when the non-waiver agreement was executed? A. Yes, sir.

Q. Now, did you know that the complaint which had been made against Eilen and Schleider related to the fire before you forwarded the non-waiver agreement on May 26, 1927, to the adjusters of the companies? A. That case was dismissed before that.

Mr. Lieblich—I object.

Q. What is that? A. That case was dismissed before May 26th.

The Court—Do you withdraw your objection?

The Court—Yes, sir; as long as the case was dismissed.

Q. Now, when did you first learn of the indictment on the complaint? A. Several months afterwards.

Q. And when was that? Can you tell us the date? A. If you will give me the date of the in-

dictment, I will probably tell you a few days later.

Q. A few days after the indictment, you were told about it by the assureds? A. I do not remember by whom.

Q. And you cannot tell us from memory when it was you first heard about that? A. If you will give me the date, I will probably tell you a few days later.

Q. Now, you sent two forms of assignment dated June 1st, one marked in evidence P-14, and the other D-2 for identification, and you sent them within a few days of each other to the companies in September 1927. Did you obtain them both from the assured on the date they bear, June 1st, 1927? A. Yes, sir.

Q. Well, why did you take two different forms of assignment? What was your object in that? A. After the mail went out that afternoon or morning, whatever the time may have been, and in rechecking the paper that went out, I found that one of them did not have—that the original when it was sent out first did not have the word "in consideration of".

Q. But, Mr. Brumberg, neither one of them went out until September, 1927? A. Well, I had them both in the office.

Q. What is that? A. I say, I had them both in the office.

Q. I am asking you why you took from the assured two different kinds of assignment dated June 1st? A. Because that was the day I settled the loss, on June 1st.

Q. But why two different kinds of assignment? A. For the simple reason, after the assured left, I noticed the error, when it says "in considera-

tion"; I immediately got in touch with them, and got another assignment.

Q. On the same day? A. Yes, sir.

Q. They gave you two different assignments on June 1st? A. Yes, sir.

Q. Now then, you sent one of these assignments to each of the companies, or a copy of one of these assignments to each of the companies in September, 1927? A. Yes, sir.

Q. And about four days later, you sent another one of these assignments to the companies? A. Yes, sir.

Q. In September, 1927, now, I am asking you why, if you had two assignments in your hands from June 1st, 1927, each dated the same day, when you sent them out to the companies, you did not send them out together? A. For the simple reason that I probably did not handle this proposition myself. The girl in the office or the boy in the office probably done that with instructions.

Q. I see. Under instructions from whom? A. From myself.

Q. I see. A. They sent out the assignment.

Q. Now, which assignment did you send out first to the companies in September, 1927, was it D-2 for Identification, or P-14? A. The one without the consideration went out first.

Q. The one without the consideration went out first; that is D-2 for Identification? A. That is right.

Q. And the P-14 which says something about a dollar went out a few days later in September? A. Yes, sir.

Q. And, in other words, in September, 1927, in dealing with the companies and forwarding

notices to them, you made exactly the same mistake as you had made on June 1st in getting the assignment from the assured? A. That is right.

Q. You repeated the same mistake with the companies that you had made with the assured a few months before? A. That is right.

Q. Now, how do you account for that? A. No attorney, that is all; if I was an attorney, probably I would understand.

Q. But you are a man of 25 years experience as an adjuster, aren't you? A. Yes, sir.

Q. Now, before you began to endorse notes and make payments and continue to endorse notes and continue to endorse notes and continue to make payments, did you ever look at the books of the assured and find out what they were worth? A. I wasn't interested in that.

Q. In other words, you were endorsing and making notes and checks for them blindly? A. No. I knew one of the assureds was liable for it.

Q. Well, which one was that? A. Eilen.

Q. Well, you also knew that in October, 1927, he went into bankruptcy, didn't you? A. I did. I do not know whether it was in October. I knew he went in bankruptcy.

Q. Yes. A. Several months after the fire.

Mr. Vanderbilt—That is all.

Redirect Examination by Mr. Lieblich:

Q. Mr. Brumberg, did you have anything to do with the making or signing of that non-waiver agreement, referring to the exhibit for identification? A. Nothing, after asking the assureds to sign it.

Q. Exhibit D-1. Well, how did you get hold of it? A. Forwarded to me by the insurance company.

Q. Well, when you say insurance company, you did not deal with the companies, did you? A. Representatives of the insurance company.

Q. All right. Who sent it to you? A. A letter may show to that effect, one of the three.

Q. Well, don't you remember? A. I do not.

Q. I see. Then you submitted it to the assured for signature? A. The assured for signature.

Q. Was that before or after you had agreed with the companies to the $9,000.00 settlement? A. Before.

Q. Before. Where are Eilen and Schleider, the other fellow, now, do you know? A. One lives in Brooklyn, and one lives in Garfield.

Q. I see. And have you made search to try and get hold of the one in Brooklyn and the one in Garfield? A. I did.

Q. For the purpose of subpoena? A. He is on a trip.

Q. Do you know—the complaint was dismissed, I understand, you say, that was made? A. Sir?

Mr. Vanderbilt—Objected to as immaterial and incompetent evidence.

Mr. Lieblich—Why, you brought it out.

The Court—It is permissible; in other words, as I look at it, the jury may draw an inference; therefore, this question is directed to anything which might rebut that inference.

Mr. Vanderbilt—That may be true, your

Honor; but, I mean, on his mere say so does not dismiss that complaint.

The Court—I will allow the question. In other words, it goes to his knowledge anyhow.

Mr. Vanderbilt—Exception, your Honor.

A. Repeat the question.

(Question read.)

A. Yes, sir.

Q. And, as far as you know, was either Mr. Eilen or Mr. Schleider ever convicted of any crime?

Mr. Vanderbilt—Objected to.

A. No, sir.

The Court—Sustained. Strike it out.

Q. Well, did you read that in any newspapers?

Mr. Vanderbilt—Objected to.

The Court—Strike it out.

Mr. Lieblich—I submit that is upon the same theory as to what he may have read or may not have read in any newspapers.

A. Yes, sir.

Mr. Lieblich—Whether or not—you do not know what I am going to ask you.

The Witness—That they were indicted. I beg your pardon.

Q. Have you read in any newspapers whether Mr.— A. Schleider.

Q. —Schleider or Eilen were convicted of this burning of this building?

Mr. Vanderbilt—Objected to as immaterial.

A. No, sir.

The Court—Sustained. Just wait until the objection is made.

The Witness—All right.

Q. Well, are they in jail now? A. No, sir.

Mr. Vanderbilt—Objected to as immaterial.

The Court—It is immaterial. Strike it out.

Mr. Lieblich—All right. That is all.

Is William F. Russell here? (No response.)

All right. We rest subject to my calling Mr. Russell if he shows up.

Mr. Vanderbilt—If the Court please, I move for a non-suit as to the plaintiff Mr. Matisovsky on the ground that it appears from the proofs in the case—

Mr. Lieblich—Oh, I beg your pardon. I meant to ask your Honor to permit me to amend the pleading to conform with the proof, designating Mr. Frank J. Matisovsky as trustee—I have the notation and

overlooked it—in place of Frank J. Matisovsky individually.

The Court—The assignment as trustee, I take it?

Mr. Vanderbilt—As trustee.

The Court—Then you are not surprised?

Mr. Vanderbilt—Not a bit.

The Court—All right. I will permit the amendment.

Mr. Vanderbilt—I withdraw my motion. I move for a nonsuit as to the plaintiffs Eilen and Schleider.

The Court—They are out.

Mr. Lieblich—They are out. His Honor dropped them.

THE DEFENDANT'S CASE.

Mr. Vanderbilt—I offer an exemplified copy of the appointment of the trustee in bankruptcy for Max J. Schleider and Nathan Eilen on October 26th, 1927, Benjamin L. Stein.

Mr. Lieblich—I object to the offer on the ground of surprise and as not within the issue framed in this case.

The Court—I cannot see the materiality of it now, Mr. Vanderbilt.

Mr. Vanderbilt—If the Court please, it is material on the question of the various payments alleged to have been made by Mr. Brumberg, both with respect to notice by him. A great many of his payments, your Honor will recall, are after the date of the appointment of the trustee in bankruptcy,

all but three of them, as a matter of fact, follow the appointment of the trustee in bankruptcy, the only thing preceding that being those of April 19th, 1927, May 16th, 1927,—I beg pardon, only those two; the next one made on December 5th, 1927, follows the bankruptcy.

The Court—The adjudication was of March 9th, or rather—yes, is that the adjudication, March 9th?

Mr. Vanderbilt—I do not recall, your Honor. It will appear there.

The Court—Oh, yes. The 26th of October.

Mr. Vanderbilt—So, you see, with respect to all except the initial payment of $3500.00, the appointment of the trustee intervened.

The Court—Well, this order is not the adjudication in bankruptcy, was it?

Mr. Vanderbilt—No, it is the appointment of the trustee.

The Court—The appointment of the trustee.

Mr. Vanderbilt—But the adjudication must have preceded that.

Mr. Lieblich—Oh, not necessarily, does it?

Mr. Vanderbilt—Absolutely. A man may have a receiver before adjudication, but not a trustee.

Mr. Lieblich—But the facts in this case are a little different, if your Honor wishes to hear me.

The Court—Does that really make much

difference? It would seem that the trustee himself might intervene.

Mr. Vanderbilt—I am not presenting that, your Honor, at the present time for the purpose of showing title in the trustee; that is not my primary purpose. My primary purpose in offering it is on the bona-fides of Mr. Brumberg's claim. Now, if it appears, as it will on the introduction of this paper showing when the trustee was appointed, that all but three of his payments were made thereafter, it seems to me it has a most important bearing on that issue which is otherwise left in the air.

The Court—Well, what has been the testimony with reference to Mr. Brumberg's knowledge as to the bankruptcy?

Mr. Vanderbilt—He said he knew of the bankruptcy in the fall of 1927, but he could not give us the exact date of it.

The Court—He did testify to that?

Mr. Vanderbilt—Yes, your Honor.

Mr. Lieblich—But he also testified to the fact that these payments which were made were made by reason of his having endorsed notes between June and September, and that was why this contingent liability arose after the bankruptcy, that he was already liable, and he was paying off.

Mr. Vanderbilt—And he has also testified, your Honor, that he did not look at their books before he incurred this liability as an accommodation maker or endorser.

The Court—As counsel indicated the purpose of this offer is not to controvert

the claim, that is to say, that this present plaintiff is not entitled to the benefit of the assignment, and that this is not offered to show the real party entitled to this money would be the trustee in bankruptcy,—you say that is not the purpose?

Mr. Vanderbilt—That is not my present purpose.

The Court—Therefore, in view of the fact that the plaintiff Brumberg has testified that when he made these payments he knew of the existence of the bankruptcy, this may be admitted on the basis, although it is collateral, to affect the credit.

Mr. Lieblich—But, sir, it is not a certified copy or an exemplified copy of the appointment of the trustee; it is a certified copy of some other proceeding in that matter. Now, how will that prove when the adjudication took place?

The Court—The witness said he knew that the adjudication had taken place.

Mr. Lieblich—That is quite true, sir; but this paper is not proof of an adjudication. It is proof of some collateral matter in the adjudication. How is it evidential in this case?

The Court—That is all that this is admitted for, for a collateral purpose.

Mr. Lieblich—True, Sir; but I make my objection, and I will ask an exception.

Mr. Vanderbilt—I offer that.

(Paper marked Exhibit D-4 in evidence.)

Mr. Vanderbilt—I also desire to offer the non-waiver agreement, D-1 for Identification.

Mr. Lieblich—I object to the offer upon the ground there is no consideration for Eilen or Schleider having signed that agreement, that is not within the terms and conditions of the contract of insurance.

The Court—Anything further?

Mr. Lieblich—That is all, Sir.

The Court—I will overrule your objection.

Mr. Lieblich—Exception.

(Paper heretofore marked Exhibit D-1 for Identification marked Exhibit D-1 in evidence.)

Mr. Vanderbilt—(Reading Exhibit D-1, non-waiver agreement, to the jury.)

I desire to offer the second assignment of June 1st, dated June 1st, D-2 for Identification.

(Paper heretofore marked Exhibit D-2 for Identification marked Exhibit D-2 in evidence.)

Mr. Vanderbilt—I ask the jury to compare D-2 and P-14 (handing paper to the jury).

I call the deputy chief first.

JAMES SWEENEY, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. What is your position, please? A. First assistant chief.

Q. Fire chief of the City of Clifton? A. Yes, sir.

Q. And did you hold that position, Chief, back in May, 1927? A. Yes, sir.

Q. Were you called to a fire at 638 and 40 Main Avenue, Clifton, New Jersey, on May 13th, 1927? A. Yes, sir.

Q. About what time were you called there, Chief? A. About, if I remember rightly, it was eleven—11:56, pretty close to 12 o'clock.

The Court—P. M.?
The Witness—Yes, sir.

Q. And when you got there, what was the condition of affairs? A. Why, the rear end of the building was fully involved with fire.

Q. Well now, will you tell the Court and jury what this building was occupied with? A. As a furniture—

Q. What it was used for? A. As a furniture storehouse.

Q. And do you know who were the tenants of it? A. Under the name of the Art Furniture Company of Passaic.

Q. And do you know who it was who ran the Art Furniture Company? A. No, sir; I do not.

Q. Well, will you tell us what you saw and what you did there when you arrived at the scene of the fire? A. When the alarm came in, we went down, and as we arrived at the fire, we could see the flames coming through the skylight in the rear of the building. We broke open the doors of the front of the building, and we lined in with a line of hose and extinguished the fire.

Q. Yes? A. After the—we had the flames practically subdued, why I went around investi-

gating and looking to see if there was any more fires in different parts of the building, and I came across a tire cover.

Q. What? A. A tire cover.

Q. Yes. A. A cover that you cover the tires, the spare tire in the back of your car, and it had excelsior in and was saturated with gasoline.

Mr. Lieblich—I object and ask it be stricken out unless this man can be qualified as an expert on that.

The Court—An expert?

Mr. Lieblich—Yes.

The Court—Couldn't you and I both look at the tire cover?

Mr. Lieblich—Yes; but I mean that part about gasoline. This was after the fire. There had been plenty of water poured in there.

The Court—Well, he said there was gasoline. There might have been water; I do not know.

Mr. Lieblich—Well, I know, but—all right, go ahead, Chief. Pardon me for the interruption.

Q. Go ahead, Chief. A. At that, I called the attention of Chief Ritter to the conditions there and showed him the tire with the excelsior in, and I went around and found several more in different—

Q. Several more what? A. Tire covers, and these paper carrying bags what they use for shopping.

Q. These what? A. Paper carrying bags, shopping bags.

Q. What was the condition of the other tire covers that you found in addition to the first one that you told us about? A. They was practically in the same condition, excelsior.

Q. Well, describe them a little bit to us, what their condition was. A. Well, in different parts, and boxes and cases; we found some tire covers, and they had—some of them had paper in, and others had excelsior in.

Q. Yes? A. And there was a strong odor of gasoline in every one of them.

Q. Yes. What about these paper bags, these shopping bags? A. These shopping bags was in different parts of the building.

Q. Yes? A. And they had what I would call gasoline in.

Q. Well, were they flat, or were they opened up? A. Why, they was opened up, standing up on the —standing up, and they was opened as on the top.

Q. All right? A. What else did you notice, Chief? A. Why, then, that the building, the adjoining building, it is off an "el" there, we went in through the door there, and I found a five-gallon can with gasoline in, partly filled.

By the Court:

Q. Now, you say an adjoining building. Do you mean part of this same store? A. Well, this here building where the Art Furniture Company was went around as an "el," and on the "el," in the front of it, was a radio shop; the door between the radio shop and the furniture company was open. That is, the door had been torn off, and it had laid flat on the ground, and alongside of this door was a can of gasoline, partly filled, and the top was off it.

By Mr. Vanderbilt:

Q. Well now, was there anything else, Chief? A. Well, not that I know of, so far as I can remember.

Q. Now, were these automobile tire covers which you say were filled with excelsior and smelling of gasoline all in one place? A. No. They were in different parts of the building in the rear.

Q. And were these shopping bags all in one place? A No. They was in different parts, probably within a space of 35 feet square.

Q. Well, which part of the building were they in? The part occupied by the Art Furniture Company, or the other part? A. The part occupied by the Art Furniture Company.

Q. Now, with respect to this five-gallon can which you said had gasoline in it, was the top on or off of that can? A. It was off, removed.

Q. And just where was it that you found that can? A. That was in the radio shop.

Q. How far from the premises of the Art Furniture Company? A. I should judge about three feet.

Q. And the door between the Art Radio shop and the Art Furniture Company was down? A. Was down, it was laying on the floor.

Q. Did you examine through the Art Radio shop? A. Yes, sir.

Q. And find any other things there that were out of the way?

Mr. Lieblich—I object as to it being out of the way.

Q. Well, did you find anything in the Art Radio

Shop in addition to the five- gallon can of gasoline? A. No. I did not.

Q. Did you find anything in the Art Furniture Company except these automobile tire covers and the shopping bags that you told about? A. Not that I remember; in the Art Furniture Company except these automobile tire covers and the shopping bags that you told about? A. Not that I remember; no, sir.

Q. Was the fire in the Art Furniture Company confined to one place, or did it break out in more than one place, Chief? A. Why, it—when we arrived there, the rear end was fully involved, I would judge about two-thirds of the place.

Q. Yes. And how long did it take you to put out the fire? A. Well, that I couldn't judge. Do you mean since we arrived there until we—

Q. Yes. A. —went back to quarters?

Q. Yes. A. Why, I should judge we was there a good part of two hours. I am not sure, but I kind of imagine we were.

Q. Can you tell us, did you examine the floor of the building at all? A. No, sir; I did not pay any particular attention to it.

Q. Now, will you tell us with some detail, if you can, just where these automobile tire covers and the shopping bags were placed; were they in aisles or were they on shelves, or where were they? A. Well, the first one we discovered was in an aisle right alongside of some chairs, and others was placed on—

By the Court:

Q. Now, what are you referring to now, the bags or the tire covers? A. The tire cover and the—

then the rest of the tire covers and bags were placed in different parts on packing cases and other furniture; I cannot just recall what furniture was really in there; but they were above the ground probably about—we had to climb up to reach them. The furniture and packing cases were piled up approximately eight or ten feet or maybe seven feet. One of the bags was on an ordinary kitchen chair on the inside of the rungs in an upright position.

By Mr. Vanderbilt:

Q. Now, was this furniture that was in the room crated or uncrated? A. Some of it was crated and some uncrated; the chairs was uncrated, that is, a great many of them.

Q. Was there or was there not any excelsior and paper lose around the place? A. Yes, quite considerable.

Q. And where was that, Chief? A. Well, that was all in different parts of the building, approximately all around in the rear end there.

Q. Have you got any of the things that you saw that day here in court with you? A. I haven't no, sir. I believe the Chief has.

Q. Your Chief has? A. Yes, sir.

Q. Do you know whether he took them away with him? A. That I couldn't say.

Q. I see.

Mr. Vanderbilt—That is all.

Cross-examination by Mr. Lieblich:

Q. Nothing unusual, was there, Mr. Sweeney, in a warehouse, in a furniture warehouse, to have excelsior and loose paper? A. No, sir.

Q. That is quite customary, isn't it? A. Yes, sir.

Q. Yes. And that would not indicate to your mind any suspicion at all, would it? A. Not the excelsior and newspapers, no, sir.

Q. No. The Art Furniture Company did not use any tire covers, did they, or sell them? A. That I do not know.

Q. No. A. I do not know anything about that.

Q. What was this other store that was in the premises? A. A radio shop.

Q. Yes. And did he sell tire covers? A. That I could not say.

Q. Well, didn't you investigate? A. Not a thorough investigation of the Art—

Q. Well, you know Mr. Ruttenberg, don't you, the investigator for the National Board of Fire Underwriters? A. I may have met him. I don't know him personally.

Mr. Lieblich—Mr. Ruttenberg, will you stand up?

Q. Didn't you see him out in the lobby at noon hour? A. Not that I know of; no, sir.

Q. You did not talk to anybody from the National Board of Fire Underwriters, Chief? A. Not that I know of; no, sir.

Q. About this case? A. No, sir.

Q. At no time? A. Well, I may have.

Q. Yes. Now, tell us? A. Surely, after the fire, I did.

Q. Yes. A. Yes, sir.

Q. Didn't Mr. Ruttenberg come and see you,

working for the fire insurance companies in this case? A. He came to inquire of Chief Ritter at one time.

Q. I don't know about Chief Ritter. I will take care of Chief Ritter. I want to know what you did. A. Why, I didn't do anything. He asked me if Chief Ritter was around; I said he wasn't at the present time.

Q. And you didn't talk to him about this case at all? A. No, sir; not to any extent.

Q. Well, did you talk to Mr. Vanderbilt about this case? A. Who?

Q. This counsel who just questioned you? A. At the present time.

Q. Yes; but before that? A. No, sir; I never met the gentleman before.

Q. So you told nobody what you were going to testify to about these bags and tires, did you? A. No, sir.

Q. And you did not take the trouble to investigate whether the man in that store sold these tires? A. I was ordered back to quarters.

Q. Oh, I see. A. And I did not investigate it from then on.

Q. Now, Chief, tell us, candidly speaking, was there anything suspicious about this fire at all? A. Why, to my mind, it was a set fire.

Q. You think so? A. Yes, sir.

Q. All right. Do you know what time Eilen or Schleider went out? We will find out, maybe, who set it. Do you know what time they left?

The Court—Who left?

Q. Eilen of Schleider. Or were they in that

building at all that day? A. That I could not say.

Q. Didn't you make an investigation? A. No, sir.

Q. So you do not know whether they were there at all that day, do you? A. No, sir; I do not. I wouldn't know the men if I seen them.

Q. Now, you say that you came in there after the fire; that is right? A. During the progress of the fire.

Q. Well, the fire had been subdued before you got in, had it not? A. We went in and we subdued it.

Q. Yes. A. We had to get in to subdue it.

Q. And you had been there a couple of hours, hadn't you? A. Approximately. Well, I couldn't just say what the time was.

Q. How many lines of hose did you have working on that? A. We had one.

Q. Just one? A. Yes, sir.

Q. Well, what part of the building was this fire, in the rear, in the cellar, or around the front where the store was? A. In the rear.

Q. In the rear? A. Yes, sir.

Q. Wasn't there any fire in the front where the store was? A. No, sir; it hadn't reached there.

Q. What? A. It hadn't reached there. It went up through the skylight in the rear.

Q. The fire was confined to the rear part of that building? Approximately two-thirds of it.

Q. Yes. And no fire had reached the front part at all? A. No, sir.

Q. And this five-gallon can of gasoline that you say you found, where was that, in the radio shop? A. Yes, sir.

Q. Any water get in there at all? A. No, sir.

Q. It didn't? No fire there at all? A. No, sir.

Q. I see. Did you ask the man who ran the radio shop how that gasoline got in there? A. No, sir.

Q. You did not ask him? A. No, sir.

Q. Did the firemen come through the radio shop at all to get at the fire? A. No, sir.

Q. To fight the fire? A. No, sir.

Q. You knew that the Art Furniture Company had very valuable furniture in that place, did you not? A. No, sir.

Q. You did not even know that? A. No, sir.

Q. What kind of tire covers were these, Chief? What do you mean by tire covers, or Mr.—A. Why, a cover that you would put over the rear, the extra shoe you carry on your car.

Q. I see. Well, is that all closed up, or is it open? A. Why, it was open.

Q. Yes. And where was this excelsior that had been slipped in there, or where was it with respect to the tire cover? A. It was in the center of the tire cover, on the inside of the cover.

Q. And was the cover lying flat? A. Yes, sir.

Q. Or hanging up? A. Lying flat.

Q. I see. And what, if anything, did you do with those covers? A. I did not touch them.

Q. Well, didn't you think it was important to take them? A. No, sir.

Q. Nobody took them away? A. I did not.

Q. Well, do you know who did? A. I kind of imagine Chief Ritter did.

Q. Oh, you don't know that? A. Well, as far as my knowledge is concerned, he did.

Q. And you stayed there with the Chief and looked at these tire covers? A. Yes. I stayed there and looked at them, but—

Q. And took them all down? A. I beg pardon?

Q. Took them all down? A. No; I didnt take them down. That wasn't done in my presence.

Q. Well, how many tire covers did you examine? A. Well, I couldn't just say; there were several of them.

Q. Well, do you mean one, two or three? A. Well, there was—I should judge there was three or more.

Q. Well, would there be four or five? A. That I couldn't say.

Q. What is your best recollection, Mr. Ritter? A. Well, I know there was three.

Q. You know there were three? A. I am quite sure there were three, yes.

Y. Now, where were the three that you know of? A. Well, there was one on the floor and one on a packing case, and I cannot just remember where the other one was.

Q. Yes. Well, Chief, suppose you make a little sketch for me, will you, of that building, showing the "el" and the other store? A. (The witness marks on paper).

Q. Now, will you indicate Main Avenue on that, Chief? A. (The witness indicates on paper).

Q. What is the nearest street as you are approaching Passaic? A. Approaching Passaic?

Q. Yes. A. From Clifton?

Q. Yes. A. Hadley Avenue.

Q. That is in Clifton, Hadley Avenue? A. Yes.

Q. Now, going from fire headquarters toward

this Art—A. Yes. We went direct Hadley Avenue.

Q. Yes. A. That is where the box is on the corner.

Q. That is at Clifton? A. Yes, sir.

Q. Now, what is the next street going toward Passaic? A. The next street going toward Passaic on the same side as the—

Q. The same side of the street. There is no such street outside of Highland Avenue; that is in Passaic.

Q. Now, suppose you mark Highland Avenue there for me. A. (The witness marks on paper.)

Q. And this is Hadley Avenue, Clifton? A. Yes, sir.

Q. Suppose you write Hadley Avenue for me.

Mr. Vanderbilt—Is that right next door?

The Witness—There is a garage in between.

Q. Well, put in the garage. A. That is not in the same building.

Q. All right. Put the garage in, anyway. A. Well, mark this as garage, Hadley Avenue.

Q. Now, going from Hadley Avenue to Highland Avenue, you would be traveling in a southerly direction, would you not, Chief? A. Yes, sir.

Q. Suppose you put the point of your compass and mark it "north," or "south," rather; it is south? A. South. (Marking on paper.)

Q. South. That is the idea.

Mr. Vanderbilt—What way is south, now?

The Witness—Towards Highland Avenue. Here is the front of the building (indicating).

Q. All right.

Mr. Vanderbilt—Then, this is north, where the arrow is?

The Witness—Yes; that is north.

Mr. Lieblich—Let him mark it.

Mr. Vanderbilt—That is the arrow. We don't want two arrows pointing in opposite directions, do you?

The Witness—North and south (marking on paper).

Mr. Lieblich—That would be confusing. Why not leave the arrow there?

Q. Finish it up; put your arrow south, write north, that way; that is the idea. Now, put your arrow here indicating south. A. Do you want another arrow?

Q. That is the idea. A. (The witness marks on paper.)

Q. All right. Suppose you make this street line; put Main Avenue, will you? I ask you to make the street line of Main Avenue from Highland Avenue to Hadley Avenue. A. (The witness marks on paper.)

Q. Now, this building, then, Chief Ritter, was on the westerly side of Main Avenue, wasn't it?

The Court—This is not Chief Ritter.

Mr. Vanderbilt—No. This is the deputy chief; his name is not Ritter; Sweeney.

Q. All right, Mr. Sweeney, I won't give you any honors. Not with any intention of being discourteous to you, but I will call you Mr. Sweeney. A. I see.

Q. So it is on the easterly side of the street, you say? A. Yes, sir.

Q. All right. Now, you have testified to some store being there, designated it a radio shop. Will you mark that on there?

Mr. Vanderbilt—Mark it "R", will you?

The Witness—"R". (Marking on paper.)

Mr. Lieblich—All right. I have no objection to marking it "R".

Q. Then this other space which you have designated there represents the Art Furniture Company? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

Q. Now, will you make an "X" indicating that part of the building that you say the fire was in? A. Why, it was in through here up to about around here, this here (indicating).

Q. Well, I ask you to mark the part of the building wherein you say that the fire was, marking it by "X"; you have designated practically the whole building there? A. Two-thirds of it.

Q. All right, then; all the part that you have interlined that way? A. Yes, sir.

Q. Suppose you start your—put a letter "F" where you started it. A. (The witness marks on paper). There was a little office in this corner (indicating).

Q. All right. Mark it "Q", if you don't mind.

Mr. Vanderbilt—"O" for "office".

Q. "O" for "office". And the fire traveled all through that; "F" indicates the course of the fire? A. Yes; with the skylight right in there, approximately, right in there (indicating).

Mr. Vanderbilt—Mark that an "S", will you for skylight?

The Witness—(Marks on paper.)

Q. Now, this furniture was piled up there, wasn't it, in this warehouse? A. Yes, sir.

Q. Up to the ceiling? A. Not up to the ceiling; no, sir.

Q. But it was piled up? A. It was quite high.

Q. And they had to have an aisle to walk through too, did they not? A. Yes, sir.

Q. And where was the entrance? A. In the front of the building here (indicating).

Q. Was there a back entrance? A. There was an entrance between the garage and the—there is a place, but it was nailed up or locked up; you couldn't open it.

Q. I see. All right. A. As far as I know.

Q. That was to the garage, all right. Suppose you mark it over here "garage", so we will know where that entrance was? A. (The witness marks on paper.)

Mr. Vanderbilt—"G" for "garage"?

The Witness—"G" for "garage".

Q. You better write it all out so there will be no misunderstanding. A. (The witness writes on paper.)

Q. All right. Now, there wasn't any other entrance, was there? A. One in here (indicating), in the radio shop.

Q. There was an entrance from the radio shop to the— A. Yes, sir.

Q. Was that barred up? A. No, sir.

Q. It was open? A. Yes, sir.

Q. Do you know what time the radio shop man closed his place of business? A. No, sir; I do not.

Q. Do you know what his usual hours were? A. No, sir; I do not.

Q. You do not know anything about the investigation? A. I do not know anything about the investigation at all.

Q. I see. Well, were you present in Judge Barber's court at the time this complaint was made and dismissed?

Mr. Vanderbilt—Objected to as immaterial and irrelevant.

Mr. Lieblich—Well, it is before the jury that a complaint—counsel opened the door.

The Court—What is the purpose of this question?

Mr. Lieblich—I want to know if he gave the same testimony there as he gave here.

The Court—I will permit you to call the witness's attention to the time and place.

Mr. Lieblich—Yes, that is what I intended to do; that was the purpose of my question.

I will offer this in evidence, first, if there is no objection, this sketch which the Chief—

Mr. Vanderbilt—Oh, no objection to that.

Mr. Lieblich—All right.

(Paper marked Exhibit P-17 in evidence.)

Q. It is not done for the purpose of embarrassing you. Do you want to make it over? I just want it for use with the jury? A. Yes, sir.

Q. Now, Mr. Sweeney, were you in Judge Barber's court room when the complaint was made and dismissed, and did you testify there? A. When the complaint was made and dismissed?

Q. Yes. Well were you ever in Judge Barber's court, and did you ever testify? A. Yes, on the several occasions I am trying to think.

Q. Well, I mean this case? A. Of this occasion?

Q. Of this matter, no other matter. A. What took place on this occasion of whether I was there or not,—

Q. I see. A. —it kind of comes to me that I was.

Q. Yes. A. And whether the case was dismissed or not, I do not remember.

Q. You do not remember? A. No, sir.

Q. Up to that point, you had not talked to Mr. Ruttenberg of the National Board, had you? A. Probably if I could see Mr. Ruttenberg, I would know whether I did or not. I do not know him at all. I will say up to that point, I did not.

Q. No. A. No, sir.

Q. That is right. Now, it was after that that Mr. Ruttenberg representing the insurance companies came to you, wasn't it? A. He came looking for—if it is the gentleman I have in mind, he came looking for Chief Ritter.

Q. Yes. A. That is, some gentleman from the Underwriters.

Q. I see. A. Or from hte National Board, rather.

Q. I see. Well, do you remember whether you testified in this case before Judge Barber in Clifton?

Mr. Vanderbilt—I object to it as immaterial and irrelevant.

The Court—I did not hear the question.

Q. I say, do you remember whether you did testify before Judge Barber in Clifton with respect to this complaint which has been testified to as being dismissed?

The Court—He has not testified.

Mr. Lieblich—He said he did not. I am only asking him whether he did or not.

A. I said, if I remember right, I said I could not remember.

The Court—Now, Mr. Lieblich, please get right to the point.

Mr. Lieblich—Yes.

The Court—If he has testified and you say the purpose is of showing inconsistency, ask him specifically whether or not he did give certain testimony.

Mr. Lieblich—I think he says he did not testify at all; what is the use of asking him anything?

The Court—Why speculate, then?

Mr. Lieblich—I see.

Ruttenberg, will you stand up? (A man stands.)

Q. Do you know the gentleman? Is that the investigator from the insurance companies that talked to you? A. No, sir; I do not think that is the gentleman.

Q. You do not think that is the one? A. No, sir.

Q. All right. You have not discussed this with anybody at all then, have you, this case, or the merits of this case, Mr. Sweeney? A. Outside of Chief Ritter.

Q. Yes. When did you discuss it with Chief Ritter? A. At the time it happened.

Q. I see. And how long ago was that? A. Well, that was in 1927.

Q. And you have not discussed it since, have you? A. No, sir.

Q. You are sure about that, Mr. Sweeney? A. Positively sure; yes, sir.

Q. And what is there about that case which stands out so firmly in your mind as to cause you to so intimately recall all of these matters? A. I do not recall all of them. I recall a great many of them.

Q. Yes. But you attended a good many fires, didn't you, Mr. Sweeney? A. Yes.

Q. And still you remember this one? A. Being that this gasoline and these tire covers and such things was there, why I can recall. In fact, I could go right to the building right now and show you just where they were, and the condition.

Q. I do not question that. I just want to know how many you see, that is all. A. Yes, sir.

Q. And you are certain there was gasoline there? A. Well, it had the smell; it had the odor of gasoline.

Q. May it have been the odor of gasoline or some other substance of naphtha? A. It may have been naphtha; I do not think so.

Q. So you may have been mistaken when you say it was gasoline? A. Well, I would say it was a volatile liquid.

Q. You would say that? A. Yes, sir.

Q. Furniture polish smells something like that, too, doesn't it? A. Not that I know of. I never—

Q. Have you ever smelled furniture polish? A. Yes, I have home.

Q. Yes? A. Yes.

Q. Have you bought any? A. No, sir; I never bought any.

Q. And you are certain that the smell that you saw in the rear there, or smelled there, rather, was not furniture polish? A. I am positive sure it was not.

Q. You are positive sure? A. Yes, sir.

Q. You are positive you did not talk to anybody since the time of that fire except with Chief Ritter? A. As far as my knowledge and belief is, no.

Q. I see.

Mr. Lieblich—All right. That is all.

The Court—That is all.

CORNELIUS NEDERFIELD, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. Mr. Nederfield, where do you live? A. 11 Union Avenue, Clifton.

Q. And what is your business, please? A. Fireman.

Q. And how long have you been with the fire department of Clifton? A. Since October first of 1924.

Q. Did you attend the fire on the premises of the Art Furniture Company at 45—at 638-40 Main Avenue, Clifton, on May 13th, 1927? A. No, sir.

Q. Did you investigate the fire after it occurred? A. Yes, sir.

Q. When did you first arrive there? A. On —at eight-thirty on the morning of the 14th.

Q. And by whose directions did you go there? A. Chief Ritter's.

Q. And will you tell the Court and Jury what you saw at that time? A. Well, I—to my knowledge, I judge—

Mr. Lieblich—I take it that that is immaterial. Conditions may have been changed considerably between the time of this fire and what would have happened the next morning at eight-thirty. Here was a place which was destroyed. There is no foundation being laid.

The Court—Can you show the—

Q. Oh, let me ask you, Officer: was the place guarded in the meantime by any representatives of your department or the police department of Clifton? A. That I could not say.

Q. You do not know?

By the Court:

Q. Who was there when you arrived? A. There were some representatives from the Art Furniture, and that is all I know; but who they were. I could not say.

Mr. Vanderbilt—I will withdraw this witness for a minute. Chief Ritter.

The Court—That is all for the time being.

The Witness—Yes, sir.

(Witness excused.)

ADAM A. RITTER, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. Where do you live, Chief? A. 40 Barkley Avenue, Clifton.

Q. And what is your occupation? A. Chief Engineer—Fire Department.

Q. Of Clifton? A. Yes, sir.

Q. How long have you held that position? A. Since 1918.

Q. Did you attend the fire at the place of the Art Furniture Company, 638-40 Main Avenue, Clifton, New Jersey, on May 13th, 1927? A. Yes, sir.

Q. Was the fire still in progress when you got there, Chief? A. It was going; yes, sir.

Q. Will you tell the Court and Jury where the fire was and what you saw? You may refer, if you desire, to the sketch made by the deputy

chief. Can you follow that? A. Yes, sir. That is Main Avenue, going down.

Q. That is right. That (indicating)is Highland Avenue and here is Hadley Ave., and there is the garage. A. This is the—the Art Furniture Company place ran in here (indicating), with the "el" in here; here was the radio store; here was the skylight, veering into the rear of the building. The fire was started directly underneath the skylight. There was a lot of excelsior and newspapers and other tissue paper that comes in the wrappings of furniture underneath the skylight, and pieces of wood. There was an explosion created; it blew out the skylight; it blew out the glass in the front. A man next door that worked in the garage heard the explosion.

The Court—No, no.

Mr. Lieblich—Oh no, Chief.

Q. Just what you saw yourself, Chief; you cannot tell about the garage. A. I cannot tell about the other fellow?

Q. All right; go right ahead. A. Well, there was an explosion created from the gasoline fumes, blew out the skylight; the flames had gotten up and scorched the skylight considerably.

By Mr. Lieblich:

Q. When did you find this all out, Chief? A. Sir?

Mr. Vanderbilt—Now, I object to the interruption.

By the Court:

Q. Did you hear the explosion, Chief? No, sir.

Q. What? A. No, sir.

By Mr. Lieblich:

Q. Did you hear, yes, or no?

The Court—Just tell us what you know yourself.

Mr. Lieblich—Yes; you cannot tell us what you think you know.

By Mr. Vanderbilt :

Q. Go ahead, Chief. A. Well, what I saw?

Mr. Lieblich—Yes.

The Witness—Yes. The fire started in the center, right directly under the skylight. All the glass was blown out of the skylight. It was badly scorched, and to my left was crated furniture.

Mr. Lieblich—Crated, you say?

The Witness—Crated furniture, that is right, with tissue paper and excelsior wrappings. The excelsior was pulled out the sides of the crate, hanging out. Fireman Zan Grando called my attention, he said the Chief wanted to see me, and they told me that they have found some tire covers and paper bags. I examined them, and I found excelsior in the tire covers, and also gasoline. We found all the bags, where they were placed, and they con-

tained gasoline. The door leading from the Art Furniture Company—

Q. Go ahead. A—to the radio store was blown off. Just inside of the door stood a five-gallon can without a top, which contained gasoline. I said "You leave those things there until the morning," and we would pick them up. So we did.

The following morning I had Fireman Nederfield and Fireman Johnson to come down there and pick up this stuff. We put it in a box, or two boxes rather, one big box holds or contains the seven automobile tire covers, a small box that contains eight paper shopping bags, partly burned, and I have the five-gallon can of gasoline, what is left of it, what was left of it. The top of the gasoline can, or the five-gallon can was found on a crate of furniture about eight feet from the door leading to the radio store. That I know, because we counted the tire covers as we took them down and put them in the box. And we counted the paper bags.

The gasoline is Standard "Esso", high explosive.

Mr. Lieblich—I assume that the Chief will qualify as an expert. In the absence of such qualification, if your Honor will strike that out, as Standard "Esso"?

By the Court:

Q. How many years have you been a fireman, Chief? A. 25.

Q. During that time, have you had occasion to come in contact with gasoline of various kinds? A. Gasoline fires; yes, sir.

Q. What? A. Gasoline fires; yes, sir.

Q. Have you examined gasoline to know the kind of gasoline it is? A. Well, I know of "Esso" by its red color.

Q. "Esso" by its red color? A. That is right. I am not an expert on gasoline.

The Court—Well, the witness has given his opinion by reason of the color, and that is the data upon which he bases his opinion, and I will allow it.

By Mr. Vanderbilt:

Q. Can you tell the—

Mr. Lieblich—Of course, it is up to your Honor.

Q. —Court and Jury, Chief, where those automobile tire covers and paper bags were? A. Some of the paper bags were on the floor; some of the automobile covers was in between the crated furniture with the both ends sticking up, leaving a hollow here like the (illustrating), that is the way they were stuffed in, contained excelsior and gasoline, and I think, if I remember correctly, there was three of them on the top of the crated furniture, that the man had to climb up to get, that was possibly higher than—about as high as that (indicating), I imagine, just about.

Q. Was there any fire in the shop of the radio concern? A. No, sir.

Q. Did you personally supervise the removal of these various objects to fire headquarters? A. Yes, sir.

Q. And have you had them in your custody ever since? A. Yes, sir.

Q. Have you got them in court with you now? A. Yes, sir.

Q. Will you produce them, please, Chief? A. There they are, right there (indicating), sir.

Q. What is in the little box, Chief? A. Paper shopping bags.

Q. Will you open that up? A. (The witness does so.)

Q. Now, are these the paper shopping bags that you say you found with the gasoline in them? A. Yes, sir.

Mr. Vanderbilt—I desire to offer them in evidence. I suppose they may be marked as one exhibit?

The Court—Yes, to preserve them.

(Marked Exhibit D-5 in evidence.)

Q. What have you got in this big box, Chief? A. Automobile tire covers.

Mr. Lieblich—Why don't you get one of your men to open that up, Chief, and take them out?

The Witness—It won't take long (opening box).

The Court—Suppose you put them on the floor; I mean, step down and then the Chief can go down and pick them out as far as you can.

The Witness—If you want to pick them out of the box, I will get your floor all mussed up with excelsior, you know.

The Court—Well, you do not have to

take them out. The jury will have that privilege later if they want to.

Q. Was this excelsior in them at the time you found them, Chief? A. Yes, sir.

Q. And it was that, you say, that smelled of the gasoline? A. Yes, sir; they held gasoline.

Q. They held gasoline? A. Put up on the ends.

Mr. Vanderbilt—I offer the automobile tire covers in evidence as one exhibit.

(Marked Exhibit D-6 in evidence.)

The Court—I would not take them out now.

Q. (Can produced) I show you a five-gallon can, and ask you what that is? A. In my opinion, that is gasoline, Standard "Esso".

Q. And is this the gasoline that you took away from the scene of the fire we have been talking about and kept at headquarters ever since? A. Yes, sir.

Mr. Lieblich—Took it from the radio shop, he says.

Q. This was inside of the radio shop? A. Right inside of the door. Here is the opening of the door, and it stood right alongside of the door.

Q. Now, will you explain to us about that door? Was that door open on its hinges, or— A. Opened into the radio shop; it originally had a bar, but the bar was not there, and the door was nailed with two nails on the side, and it was blown completely off its hinges, and the hinges fell off and the door flat on the floor.

Q. The door itself was flat on the floor? A. Yes, sir.

Q. And you could see the evidence of where the nails were? A. The nails were in the door, bent over.

Mr. Vanderbilt—I offer this as an exhibit.

(Can marked Exhibit D-7 in evidence.)

Q. Now, what other firemen were there along with you, Chief? A. In the morning that I picked this up?

Q. Yes. A. Firemen Nederfield and Johnson.

Q. I see. And you mentioned Fireman Zan Grando? A. Zan Grando, he worked there that night of the fire.

Q. I see.

Mr. Vanderbilt—Cross examine.

Cross Examination by Mr. Lieblich:

Q. Chief, you made quite an investigation of this matter, did you not? A. Yes, sir.

Q. Yes. And did the course of your investigation disclose to you whether or not Schleider or Eilen had been there that day? A. Only from—

Q. In those premises? A. Only from what they say themselves.

Q. Well, you examined them, didn't you? A. Yes.

The Court—Just a minute. He said "Only from what they say themselves."

Mr. Lieblich—Well, possibly I do not follow your Honor's thought.

The Court—I did not know whether the Chief had completed his answer or not.

Mr. Lieblich—Oh, I beg your Honor's pardon.

Q. I beg your pardon, Chief. Had you completed your answer? A. No; you did not give me a chance.

Q. Oh, all right. Go ahead. A. I did. I questioned—

Q. Yes. A. —Schleider,—

Q. Yes. A.—and he told me that he himself had been there in that storehouse between four-thirty and five o'clock that very day.

Q. All right. That was Schleider had been there; was Eilen there? A. No.

Q. He was not there at all? A. No.

Q. Did he tell you what time they closed up the storehouse? A. Between four-thirty and five o'clock.

Q. I see. Did you examine the radio man? A. Yes, sir.

Q. What time did he close his store? A. Nine-thirty, I think he said.

Q. Nine-thirty? A. Yes, sir.

Q. And this door which you have testified to as being blown in must have been in good condition at nine-thirty then, was it not, when he closed his store?

Mr. Vanderbilt—I object to that unless the witness was there and knows about it.

Mr. Lieblich—I am asking him the result of his investigation.

The Court—Even so, it is argumentative, and it is hearsay.

Mr. Lieblich—I will withdraw it with your Honor's permission.

Q. The radio man did tell you that he closed his place at nine or nine-thirty? A. Something like that; yes, sir.

Q. Yes. It was after nine o'clock? A. Yes.

Q. How about the garage next door? When did they close up for business? A. They were open all night.

Q. They are open all night? A. Yes, sir.

Q. Had you been in these premises prior to this time, Chief, for making an inspection of the premises in compliance with the ordinance passed by the city counsel with respect to fire traps? A. Which one do you refer to?

Q. The Art Furniture Company? A. A fire trap?

Q. I asked you, did you, or did you not, make an inspection of places in the City of Clifton including the Art Furniture Company prior to the date of this fire? A. The Art Furniture Company had been only at 638 and 640 Main Avenut—

Q. I did not ask you that, did I? Now, you understood my question. If you did not, tell me. Had you made an inspection of these premises during the time that the Art Furniture Company was there, yes or no, before the fire?

The Court—Just a minute. That was not your question before.

Mr. Lieblich—I beg your Honor's par-

don. I started to ask him, in compliance with the ordinance of the council; he did not understand, and I changed the form of the question.

The Court—As of the time when the furniture company started there?

Mr. Lieblich—My question was directed whether, prior to this fire and during their occupancy of this premises, he had ever made an inspection. That calls for a yes or no answer.

A. Oh, pardon me; but you mentioned—

The Court—No. Just answer the question.

Q. I will reframe the question for you Chief. A. No, because I do not understand it. I have made inspections in that building prior to the Art Furniture Company being there.

Q. I did not ask you that. Had you made an inspection of those premises during the time that the Art Furniture Company were in there? A. I want to answer you.

The Court—No. You can answer yes, or no.

The Witness—No.

Q. No. All right. A. I do not know how long they have been there.

Q. I do not care; I am not asking you that. Counsel for the insurance company, if he wants to, will bring that out. So you had not been in

those premises, Chief, prior to the fire at all, had you? A. Yes.

Q. During the occupancy by the Art Furniture Company? A. No.

Q. No. And how long after the fire did you go in there? A. How long after the fire?

Q. Yes. A. I was there at half past eight the next morning, after I had something to eat.

Q. Then you did not go in that night at all, did you? A. The same night of the fire?

Q. Yes. A. I thought I gave testimony here that the—Chief Sweeney had sent fireman Zan Grando—

Q. I did not ask you all that. I asked you whether you had been in there? A. I am answering your question.

The Court—Just a minute. Were you at that fire?

The Witness—Yes, sir.

The Court—All right.

Q. What time of the day or night was that fire? A. 11:56 P. M.

Q. What time did you get there? A. About 11:59.

Q. All right. Now, at any time that night after the fire was subdued, did you go into those premises? A. Yes, sir.

Q. All right. How long were you in there? A. Possibly about an hour and a quarter, an hour and a half.

Q. That is after the fire was out? A. In the building; yes, sir.

Q. After the fire was out? A. Yes, sir.

Q. You made an investigation? A. Yes, sir.

Q. And at the time you made this investigation, was the door from the radio shop blown in? A. It laid flat on the floor.

Q. It had been blown in, as you testified? A. Yes, sir.

Q. What blew it in, do you know, Chief? A. Fumes of gasoline.

Q. So you think fumes of gasoline were able to blow in the door between the radio shop and blow it back into the Art Furniture Company's premises; that is right, is it? A. No.

Q. Well, didn't you testify— A. No.

Q. —that that door was blown into the Art Furniture Company's premises? A. No, sir.

Q. Where was it blown, into the radio shop? A. Yes, isr.

Q. The door laid in the radio shop? A. Yes, sir.

Q. Chief, will you show me Main Avenue here, and the radio shop ? A. Sure. You want Main Avenue?

Q. Yes. Make Main Avenue.

The Court—Is that the same sketch?

The Witness—No; this is a new one.

Mr. Lieblich—No. I am going to refer to a little different items. I think we are entitled to that. This is directed to the veracity of some of these witnesses, to show that we are entitled to go into the veracity proposition a little bit.

A. (The witness draws on paper.) There is the door; here is where the door goes into the radio store (indicating).

Q. Now, you have designated Main Avenue, Chief? A. Yes, sir.

Q. Now, will you put the points of the compass, indicating north or south, or indicating Hadley Avenue in Clifton, and Highland Avenue in Passaic? A. (The witness marks on paper.)

Q. Will you mark Hadley Avenue here, Chief? A. (The witness marks on paper.)

Q. Then I suppose that Highland Avenue would be up here (indicating) wouldn't it? A. (The witness marks on paper.)

Q. Now, where you have designated on here "R", that is a radio shop? A. That is right.

Q. How would you say the door swung between the radio shop and the Art Furniture company premises? A. Into the radio shop.

Q. The door swung into the radio shop? A. Yes, sir.

Q. And the nails were on the radio shop side or on the Art Furniture Company side? A. On the radio side.

Q. And your investigation disclosed the nails were still there? A. Bent.

Q. They were bent? A. Yes, sir.

Q. And on investigation, it disclosed that the door had been blown into the radio shop? A. Yes, sir.

Mr. Lieblich—I offer this in evidence.

The Witness—Here is your pencil.

Mr. Lieblich—All right; thanks, Chief.

(Paper marked Exhibit P-18 in evidence.)

Q. Where was this bar, Adam—Chief Ritter? A. That is all right.

Q. Pardon me. A. Standing alongside of the—

Q. I mean the bar that you testified to as holding the door, or words to that effect? A. Standing alongside of the door opening, where she—where it stood right alongside of the door frame.

Q. Indicating it had been left out, is that what you mean? A. Yes.

Q. Yes. Now, referring to your sketch, Exhibit P-18, if that door swung in toward the radio shop, the bar would have been in the radio shop instead of the Art Furniture, wouldn't it? A. No, sir; it was on the radio shop side.

Q. Oh! Then the bar was in the radio shop? A. Absolutely.

Q. I see. And the bar was controlled by the owner of the radio shop; is that the idea? A. I know nothing at all about that.

Q. Well, from what you saw in your investigation, wouldn't that bar be placed in position by the owner of the radio shop? A. That I could not say.

Q. Well, it was on the inside, wasn't it? A. Yes.

Q. On the radio shop side, wasn't it? A. Yes, sir.

Q. And the Art Furniture Company side could not control placing that bar into position after the door was shut, could they? A. That I do not know.

Q. Well, after that door was shut, could anybody in the Art Furniture Company's premises put that bar in position? A. That I can't say.

Q. Well, why not, Chief? A. Well, because they could have went around to the front of the radio store and taken the bar out or put it on.

Q. I see. Well, all right. Assuming, then, that nobody would go around outside and into the radio shop, that is, anybody in connection with the Art Furniture Company, could they then place that bar into position in order to lock that door? A. I imagine they could if they could get in that way.

Q. Well, all right. Well, let me put it this way: If the radio shop man had closed that door and locked his front door, could anybody get into those premises for the purpose of setting that bar without breaking in? A. Not that I know of.

Q. No. So that that bar was under the absolute control of the radio man, was it not? A. That I could not say.

Q. And your investigation don't lead you to that conviction? A. No, sir.

Q. All right. Now, Chief, will you point out to me upon your sketch and designate with your pencil, in the radio shop, where the five gallon can of gasoline,—"Esso", wasn't it, Chief? A. Surely.

Q. —"Esso", stood? A. Mark that a "C"? I will mark that a "C". (Marking on paper.)

Q. Suppose you rub that out; just make a little "X". You know, it is only a small can in comparison with the size of the store; make a small "X", just where you think the exact spot is. A. All right. (Marking on paper.)

Q. All right. And this "X" on the Exhibit P-18 indicates the place or position where you found the five-gallon can? A. That is right.

Q. Now Chief, how big was this door that opened from the radio shop to the Art Furniture Company's premises? With respect to the door designated "Female Witnesses" (indicating), will

you look at that door and tell me with respect to that? A. It wasn't the size of that door. An ordinary two foot, six.

Q. A two foot, six, door? A. Right.

Q. And which way did it swing, Chief, with respect to the entrance from the Art Furniture to the Radio Shop? A. It swung towards the front of the building into the radio store.

Q. Yes, I know that. A. Yes.

Q. But after you approach into the radio store, would it swing to the right or would it swing on the left? A. It swung to the right.

Q. It swung to the right? A. Coming from the front.

Q. Coming from the Art Furniture Company? A. No.

Q. All right. I want to know. Coming from the Art Furniture Company into the radio shop, which way did the door swing, to the right, or did it swing to the left? A. It swung to the left.

Q. To the left? A. When you come in from the Art Furniture Company's place.

Q. So that it was hinged on the left jamb? A. Right.

Q. You are sure about that? A. Right.

Q. Now, when you got into the premises, where did you find the door? Did it fall in straight, or was it over to one side? A. It fell perfectly flat on the floor.

Q. Perfectly flat. There wasn't any indication at all on that door of any fire explosion, was there? A. Yes, sir.

Q. There was? A. Yes, sir.

Q. You are sure about that, Chief? A. Yes, sir.

Q. There was no fire in the premises of the radio shop, was there? A. But that door has—

Q. Was there any fire in the premises of the radio shop, Chief? A. No, sir.

Q. No? A. No.

Q. Let me ask you this, Chief: Fire confined to a premises and being unable to escape will generate gas, will it not, or heat? A. Yes, sir.

Q. And when heat escapes, that will cause an explosion? A. Yes, sir.

Q. And was the skylight the weakest place in that Art Furniture Company for the purpose of the heat escaping? A. Directly over the fire.

Q. Yes. Now, you did not hear an explosion yourself, did you, Chief? No? A. It was gone (the witness snaps fingers).

Q. Gone, naturally. I want to know whether you heard it?

The Court—Did you hear it?

The Witness—No, sir; I did not, no.

Q. No, certainly not. Now, there must have been considerable heat in there, wasn't there, where this fire was? A. Usually.

Q. Yes.

The Court—Mr. Lieblich, the hour of adjournment has come.

(Whereupon, an adjournment was taken until Tuesday, March 12, 1929, at 10:00 o'clock A. M.

Hackensack, New Jersey
March 12, 1929. 10:00 o'clock A. M.

Trial Resumed.

The Court—Proceed with this case.

ADAM A. RITTER, recalled for further cross examination, testified as follows:

The Court—You were cross examining this witness, Mr. Lieblich. What was the last question?

(Last question and answer read.)

By Mr. Lieblich:

Q. And as a result of your experience and knowledge of gasoline, you know that gasoline will ignite solely by reason of the vapor coming in contact with heat, don't you? A. Not unless there is a fire there.

Q. Well, there was fire, wasn't there? A. Certainly.

Q. And there being fire in the premises, any gasoline around that premises would immediately ignite, would it not? A. By the fire being there.

Q. Yes. And you are certain that each of these tire covers had gasoline in them? A. Yes, sir.

Q. No question about that? A. No question.

Q. How many of these tire covers did you say there was on the premises, Chief? A. Seven, I think, if I remember correctly.

Q. All right. I show you Exhibit P-18, the sketch, and ask you if you will be kind enough to delineate or mark thereon by an "X" the ap-

proximate location of these tire covers as you found them after this fire?

Mr. Vanderbilt—I suppose there are several "X's".

Mr. Lieblich—No; not on his sketch.

Mr. Vanderbilt—I say, one "X", or several "X's", if they are in different places.

Mr. Lieblich—Well, he is marking an "X" for each one.

Mr. Vanderbilt—Yes.

Q. Now, will you just mark on the bottom, Chief, " 'X' denotes place of tire covers"? A. (The witness marks on sketch.)

Q. Were these tire covers in the area where the fire was greatest, Chief? A. No, sir.

Q. Then the fire had not reached the place where the tire covers were? A. No, sir.

Q. Now, Chief, if there was gasoline in these tire covers, the gasoline would have saturated the tire cover, would it not? A. No.

Q. It would not? A. No, sir.

Q. And why not? A. How would it?

Q. I am asking you. A. It is waterproof; it is waterproof, and it is liquid proof.

Q. Yes. But wouldn't it have saturated the bottom of the tire cover? A. That can be possible.

Q. All right. Now, for instance,— A. Within any length of time.

Q. Well, I show you one of the tire covers. When you observed the tire cover first, was it lying flat or standing up, or how? A. It was setting up like that (indicating), between the crates of furniture.

Q. Yes. A. That is the way it was setting up.

Q. All right. Then, whatever there was, was contained in the tire cover ? A. That is right.

Q. And there was gasoline contained therein? A. Yes, sir.

Q. Now, do you say that the bottom of that was not saturated, then, if there was gasoline contained in that tire cover? A. I have not looked it over thoroughly. I wouldn't say that.

Q. Sir? A. I have not looked it over thoroughly. I would not say that the bottom of it was not saturated.

Q. Doesn't it stand to reason that if the tire cover contained gasoline in it that the bottom of it would be saturated? A. Not necessarily when it stands up like that between two crates, there is a little gasoline stays in here, and there is a little stays in here (indicating), and there would none get in the center.

Q. Is this the position (illustrating) ? A. That is the idea exactly.

Q. Then the gasoline would go to the bottom of that, would it not? A. Yes, sir.

Q. So the bottom, at least, would be saturated? A. It contained gasoline.

Q. Yes. If there was gasoline in this tire cover,— A. Yes, sir.

Q. —and it was in this position between crates, the gasoline would go to the bottom? A. Absolutely.

Q. Yes. A. Sure. It couldn't help it.

Q. All right. A. It runs down hill.

Q. Yes. And that applies to all of these tire covers, Chief? A. I think so; yes, sir.

Q. Well, will you explain to the court and Jury how it is then that the outside of these tire

covers are burned and the insides which appear as if they did contain gasoline are not burned? A. Why, my only solution of that is, this possibly was the nearest one to the fire, and the gasoline had been spilled over it and it was scorched.

Q. That is, the fire hit it on the outside, and there had been gasoline on the inside, only the outside would burn and not the inside; is that your explanation? A. No.

Q. Well,— A. The gasoline on the inside had burned, and there possibly had been some spilled on the outside of the cover and that ignited.

Q. Why, Chief, don't you know if they had gasoline at all in any part of it that it would be all scorched and burned in any part wherein the gasoline was? A. Very often, when an explosion is created, the concussion blows the flame out, and we find that the woodwork which has been painted with gasoline is scorched and no fire.

Q. All blistered, isn't it? A. All blistered.

Q. Yes. Indicating that the gasoline had become ignited? A. Right.

Q. And the gasoline would become ignited at considerable distance from a fire, would it not, Chief? A. Providing there is fire in the place.

Q. Well, there was fire here, wasn't there, Chief? A. Right.

Q. Now, you have testified that this can that you found in the radio shop contained "Esso" gasoline, is that right? A. I believe it is.

Q. Well, now, we are depending upon your testimony, Chief. Was it "Esso" gasoline? A. I believe it is.

Q. Well, may it have been furniture polish? A. No, sir.

Q. All right. Then, you are reasonably certain it was gasoline? A. Yes, sir.

Q. And it was "Esso" gasoline? A. Yes, sir. Well, I wouldn't be positive on the "Esso;" it might have been something else; but I do not remember of anybody having any red gasoline in 1927; since then, other gasoline concerns are making red gasoline.

Q. Well, what caused you to change your mind? Yesterday you were quite positive that it was "Esso" gasoline, Chief. A. I do not think I did.

Q. Well, then, maybe I am mistaken. I thought you said it was "Esso" gasoline?

The Court—He said that, and you asked him why he said it, and he said because it was red.

A. I think that is right.

Q. So you did say it was "Esso"? A. That may be possible.

Q. Now, do you think that you were mistaken? A. No.

Q. And you now say that "Esso" was the only colored gasoline in the market in 1927? A. I said I thought so.

Q. Oh, then you do not know, do you? A. Not positively.

Q. No. As the result of your examination of Eilen and Schleider, did you learn where Mr. Schleider was during the course of that day and that evening up to and including the time of the fire? A. He had been to his store and looked at the warehouse between four-thirty and five o'clock.

Q. Which one? A. Mr. Schleider.

Q. Yes. And did he tell you who was there at the time? A. He did not tell me exactly who; he said one of his drivers.

Q. Yes. A. Or his driver.

Q. And they were there and took out something, did they not? A. Some chairs.

Q. Some chairs? A. Yes, I think so.

Q. And did he tell you then that he went to his store in Passaic? A. I suppose he did.

Q. Did he tell you, Chief?

Mr. Vanderbilt—I object to that as immaterial.

The Court—Just a minute. You cannot establish defendants' acts by self-serving declarations.

Mr. Lieblich—The defendant?

The Court—Yes. I mean, the man who owned the store.

Mr. Lieblich—Well, if it please the Court, they were not parties to this record, now.

The Court—It does not make any difference and, at most, this witness is testifying as to what somebody had told him.

Mr. Lieblich—I am trying to obtain from the Chief as the result of his investigation what he learned.

The Court—It does not make any difference, investigation or no investigation; it is hearsay testimony.

Mr. Lieblich—Of course, I am bound by your Honor's ruling.

Q. Did you, as the result of your investigation,

learn that Mr. Schleider had remained in his place of business in the store in the City of Passaic up to ten-thirty or eleven o'clock that evening?

Mr. Vanderbilt—I object to it as immaterial.

The Court—I sustain the objection.

Mr. Lieblich—Exception.

The Court—I won't preclude you from showing that as a fact. It is not proper.

Mr. Lieblich—Your Honor knows the condition, the way it has been disclosed in the evidence.

The Court—I am not interested in that. I am interested in the question before the Court now.

Mr. Lieblich—Well, I appreciate that; but by reason of the circumstances, while I do not ask for illegal evidence to be admitted, these plaintiffs are handicapped. I do not ask a violation of the rule, but I thought there might be some theory better known to your Honor, better known to your Honor which is not known to me.

The Court—Well, I do not know that theory.

Q. Chief, you were present in Judge Barber's court in Clifton after a complaint was made in this matter? A. Yes, sir.

Q. And you testified in that case? A. Yes, sir.

Mr. Vanderbilt—I object as immaterial.

The Court—Except he is laying a founda-

tion to contradict. If that is the purpose, I will allow it.

Mr. Vanderbilt—If that is the purpose, no objection.

Mr. Lieblich—Yes, sir.

Q. And after hearing your testimony and all other testimony, Judge Barber dismissed the complaint?

Mr. Vanderbilt—I object to it as immaterial.

The Court—I sustain the objection, and strike it out.

Q. Did you give this same testimony before Judge Barber as you gave here in court today?

Mr. Vanderbilt—I object as immaterial.

The Court—Sustained. If the witness testified differently, I will permit you to ask him as to that fact, and then if he is testifying differently now, the jury can see the distinction.

Q. Well, did you read in newspapers, Chief, that the complaint had been dismissed?

Mr. Vanderbilt—I object as immaterial.

The Court—Sustained.

Mr. Lieblich—Well, I am testing his veracity.

The Court—No.

Mr. Lieblich—That is the theory on which I understood your Honor to admit what Mr. Brumberg read in the papers.

The Court—That was not the theory on which the question was allowed to Mr. Brumberg at all.

Mr. Lieblich—The question, as I recall, was directed to his veracity, for the purpose of testing his veracity.

The Court—No; it was not.

Mr. Lieblich—May I most respectfully ask your Honor the theory upon which it was admitted?

The Court—I admitted the testimony yesterday because Mr. Brumberg claimed that he paid a valuable consideration for this assignment.

Mr. Lieblich—Yes.

The Court—The questions were directed as to his information of all of the circumstances, whether he obtained that from first-hand knowledge or reading it in the newspaper or hearsay; in other words, how was his mind affected by the information? Then it is for the jury to say, after hearing that he knew of these facts or knew of the alleged facts, whether or not he really did pay a valuable consideration for the assignment.

Mr. Lieblich—I thank your Honor.

Q. Chief, do you know—just yes, or no, I want—whether the complaint was dismissed by Judge Barber?

Mr. Vanderbilt—I object to it as immaterial.

The Court—Sustained.

Mr. Lieblich—Exception.

Q. Was the complaint dismissed, Chief?

The Court—Sustained.

Mr. Vanderbilt—Objected to. I think counsel should be—

The Court—It is immaterial so far as this witness is concerned.

Mr. Vanderbilt—If the Court please, there is one point I omitted to ask; if I may have the Court's permission, I would like to question the witness about it.

Redirect Examination by Mr. Vanderbilt:

Q. Chief, after the fire, did Eilen and Schleider, or either of them, offer to make you a present of furniture if you would drop the charges which you had preferred against them?

Mr. Lieblich—I object. There is no evidence in this case of any charges having been preferred, and if there are charges, the best evidence would be the complaint. Furthermore, the act of these gentlemen would not be binding upon the present plaintiffs in that respect.

The Court—Are they not the assignors of the claim under which the plaintiffs are suing?

Mr. Lieblich—Yes, they are, sir.

The Court—Then, doesn't the plaintiff now stand practically in the same shoes as the assignors?

Mr. Lieblich—As far as his claim is concerned against the insurance companies, yes.

The Court—Suppose the defendants have equities against the assignors' claims; wouldn't they have the same claims against the assignees?

Mr. Lieblich—They would as against equity. But supposing Eilen and Schleider did come to the Chief and say what they proposed to bring out; I do not know whether it is a fact or not; how is that going to be binding on Mr. Matisovsky and Mr. Brumberg? It don't go to the merits of the case; it don't come out of the claim; it is an act entirely extrinsic and deals with a proposed criminal matter.

The Court—Suppose these two men admitted they had made a fire, and then they assigned the claims? Would that have any effect on the assignee?

Mr. Lieblich—Yes, if the company had set up such a defense.

The Court—Has the company set up that defense?

Mr. Lieblich—No.

The Court—Of fraud?

Mr. Lieblich—Not that they made the fire.

The Court—They set up the defense of fraud.

Mr. Lieblich—Of fraud, yes; but not that they made this fire; no such defense in this case, sir.

The Court—I will allow the question.

Mr. Lieblich—Exception.

Mr. Vanderbilt—Will you repeat it, please, Mr. Stenographer?

(Question read as follows):

Q. "Chief, after fire, did Eilen and Schleider, or either of them, offer to make you a present of furniture if you would drop the charges which you had preferred against them?"

Mr. Lieblich—I object, further, with your Honor's indulgence, to identify which one so that we will know. He says, either of them. I think we are entitled to know which one it is.

Q. Well, you tell which one it was, Chief, if it wasn't both of them. A. On Saturday, May the 14th, between the hours of four and five P. M., I went down to the Art Furniture Company on Monroe Street, Passaic, and saw Mr. Schleider in regards to the insurance he carried on the stock in the warehouse. He told me that they carried $20,000.00 insurance, and had carried—and had cancelled $10,000.00 insurance a few days ago on account of the high cost. He invited me upstairs to his office.

Mr. Lieblich—I object to this. It is purely hearsay evidence and not binding the assignees in this case. Of course, we are not concerned with any cancellation; it is irrelevant to this issue here.

The Court—This is the entire conversation, I take it.

Mr. Lieblich—Exception.

Q. Go ahead, Chief. A. He then invited me upstairs to his office. After being in his office a few minutes, or in the office, why, he invited me out on the floor, that is, on his show room, and

said that he had got an awful licking that afternoon in the newspaper, that he was a young man, trying to be honest.

Mr. Lieblich—I do not want to be on my feet, but, surely, that is irrelevant to this issue.

Q. Go ahead. A. And if the statement was retracted in the Monday afternoon papers,—

Mr. Lieblich—I am compelled to object to the statement, if the statement was retracted. It is referring to some hearsay.

The Court—No. He is relating a conversation had with one of the assignors.

Mr. Lieblich—You do not have to look at that, Chief; you can testify.

The Witness—Do you want to see it, Judge?

The Court—No.

Q. Go ahead, now, Chief. A. And said if it was retracted in the Monday afternoon papers, I could pick out anything that I wanted on the floor for my home. I told him there wasnt' anything there that I needed at home, and he said, "Oh, that is all right," he said, "bring the wife down sometime and she may find something there that she likes." And I told him no, we didn't need anything at home, and that is about the story.

Mr. Vanderbilt—That is all.

Recross Examination by Mr. Lieblich:

Q. So, all that he wanted was a retraction of certain newspaper articles? A. That is right; yes, sir.

Q. That is right. Chief, you discussed this matter with Mr. Ruttenberg, the investigator for the insurance company, didn't you?

Mr. Vanderbilt—I object to that as immaterial and incompetent.

The Court—I will allow it. He may call him. I do not know.

A. I reported the matter to the National Board of Fire Underwriters.

Q. Yes. A. Mr. Ruttenberg was sent out to Clifton to investigate.

Q. Yes. A. And Mr. Ruttenberg naturally came to my office, and I gave him what I had.

Q. Isee. A. Mr. Ruttenberg of the National Board made a thorough investigation—

Q. Yes. A. —of the entire case.

Q. I did not ask you that, did I. I asked you whether you discussed this matter with Mr. Ruttenberg, didn't I, Chief? A. That is right.

Q. You understood my question?

The Court—He has answered it.

A. I am trying to answer it.

Q. It wasn't necessary to give me that whole speech, was it?

The Court—Just a minute. You are wasting time by making a speech, too.

Q. Do I understand you to say that Mr. Ruttenberg came at your request? A. The National Board sent him out, I believe, so far as I know; I made the request to the National Board of Fire Underwriters, yes, sir.

Q. And who was that? That is the insurance companies? A. A group of insurance companies.

Q. Yes.

Mr. Lieblich—All right; that is all.

By Mr. Vanderbilt:

Q. That is an organization of all the insurance companies, isn't it? A. Sir?

Q. That is an organization of all the insurance companies in the country? A. Yes, yes.

Mr. Vanderbilt—That is all, Chief.

ROMOLO ZAN GRANDO, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. Mr. Zan Grando, where do you live? A. 70 Van Riper Avenue, Clifton.

Q. And what is your business, please? A. City paid fireman.

Q. What? A. City paid fireman of the City of Clifton.

Q. And how long have you been with the fire department of the City of Clifton? A. Three years on the first of October.

Q. Do you remember the fire at the place of the Art Furniture Company? A. Yes, sir.

Q. Back in May, 1927? A. Yes, sir.

Q. Did you attend at the fire? A. Yes, sir.

Q. Will you tell the Court and Jury what you saw there? A. Well, I—the Company One answered the alarm, and when I got there, I was on the line, and I went in, and the rear of the building appeared to be all in flames. And after we had the flames under control, the fire, rather, Assistant Chief Sweeney asked me to accompany him to investigate, as he had found something that he thought—

Mr. Lieblich—Do not tell us what he thought.

The Court—What did you do?

Q. What did you do yourself? A. I accompanied him around, and we found several tire covers and paper bags saturated with gasoline, the tire covers containing the gasoline inside.

Q. And where were they located, Mr. Zan Grando? A. Why, at different parts of the furniture that was stacked up in the rear of the building, some above, and some in between, and some on the floor.

Q. Did you say you found some bags, as well as tire covers? A. Yes, sir.

Q. And what was in the bags, if anything? A. Well, to me, it appeared to be gasoline.

Q. Do you know what was done with these tire covers and bags that you have been telling us about? A. No, sir.

Q. I mean, afterwards, were they left there, or were they taken away? A. Why, they remained there when I was ordered back to fire house.

Q. What time did you leave the place? A. I do not remember the exact time I left there.

Q. Well, it was early in the morning, I assume. What time did the fire occur, do you recall? A. Well, the alarm came in at 11:56 P. M.

Q. Well, about how long were you there? A. About an hour and a half.

Mr. Vanderbilt—That is all.

Cross Examination by Mr. Lieblich:

Q. You were at the scene of the fire for an hour and a half? A. Yes, sir; about.

Q. And how long were you pumping water in there before you put out the flames, the fire? A. We didn't pump any water.

Q. Didn't you put any water in there at all? A. We didn't pump any water.

Q. Well, did you put any water in there to put out the flames? A. Yes, sir.

Q. How did you get the water in? A. Through a line.

Q. Was the line, the end of the line, connected to an engine? A. No, sir.

Q. What? Just to the hydrant? A. Yes, sir.

Q. And there was enough pressure on that hydrant to force the water into the place? A. Yes, sir.

Q. How long did you keep putting water into the place? A. That I do not remember.

Q. Well, you remembered how long you were there? A. Yes, sir; about, I said.

Q. All right. About how long were you putting water in those premises? A. I cannot remember.

Q. But you can remember how long you were there? A. Yes, sir.

Q. You put considerable water in there before you put the fire out? A. We did, some.

Q. What do you mean by some? A. Water.

Q. Water? A. Water.

Q. Yes. We understand that. But what do you mean, a little bit or a lot? A. Well, enough to subdue the fire.

Q. And how long did it take you to subdue the fire? A. Why, I do not know.

Q. What is your best recollection? A. I cannot remember.

Q. You cannot remember that? A. No, sir.

Q. Still, you can remember how long you were there? A. I did not say the exact time. About, I said.

Q. About how long were you there, then? A. About an hour and a half.

Q. And what were you doing there in that hour and a half? A. Well, I helped extinguish the fire and then assisted Assistant Chief Sweeney on the investigation.

Q. All right? A. Now, how long did the investigation take you? A. That I cannot remember.

Q. What is your best recollection? A. I cannot remember.

Q. You cannot remember that? A. No, sir.

Q. Well, did it take you half the time to put out the fire, and half the time for the investigation? A. That I cannot say.

Q. I see. A. I cannot remember.

Q. You cannot remember that at all? A. No, sir.

Q. Did you discuss this matter with anyone before you came to court? A. No, sir.

Q. Not a soul? A. No, sir.

Q. Did you sign a statement before you came here? A. No, sir.

Q. Did you ever talk to Mr. Ruttenberg about this case? A. No, sir.

Q. Did you talk to Mr. Vanderbilt about it? A. No, sir.

Q. You did not discuss it with anyone, did you? A. No, sir.

Mr. Lieblich—That is all.

Redirect Examination by Mr. Vanderbilt:

Q. You were with Chief Sweeney that night, weren't you? A. Yes, sir.

Mr. Vanderbilt—That is all.

Recross Examination by Mr. Lieblich:

Q. You remember that? A. Yes, sir.

Q. Well, how long were you with Chief Sweeney? A. Why, during the whole fire, from when we went out of the fire house until we returned.

Q. Yes. But with respect to the investigation, how long were you with Chief Sweeney? A. I cannot remember.

Q. And you do not remember how long you were pouring water in the place? A. No, sir.

Q. You haven't any recollection at all? A. No, sir.

Q. It is not, of course, because you do not want to remember, is it? A. What is that?

Q. It is not because you do not want to? A. No, sir.

JAMES JOHNSON, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. Mr. Johnson, where do you live? A. 308 West Second Street, Clifton.

Q. And what is your business? A. Fireman.

Q. Were you at the fire at the Art Furniture Compny in May, 1927? A. No, sir; no, sir.

Q. Did you go around there the next morning with Chief Ritter? A. Yes, sir.

Q. And were you with Chief Ritter when these tire covers and bags and the can that have been offered in evidence were brought from the scene of the fire to fire headquarters?

Mr. Lieblich—I object. He testifies he was there the next morning. Now, conditions may have been changed. It is too remote; that is, with respect to the time; a good deal may have intervened, and the evidence discloses, as I recall it, that they did not leave any watchman or have anybody in charge, so that the conditions were to remain exactly alike, and there is no proof that they remained exactly alike.

The Court—He is now referring to the exhibits that are in evidence. He asked if he assisted in taking those away.

Mr. Lieblich—I did not so understand the question, sir.

Q. Did you assist the Chief in taking these from the scene of the fire to fire headquarters? A. Yes, sir.

Q. And you saw that they were actually transported— A. Yes, sir.

Q. —from the scene of the fire to fire headquarters? A. Yes, sir.

Q. Was there gasoline in the tire covers at the time you saw them?

Mr. Lieblich—I object until such time as this witness is proven properly qualified as an expert on gasoline and can state as a fact that there was gasoline.

Q. Well, Mr. Johnson, do you know what gasoline smells like? A. Yes, sir.

Q. Are you sure you recognize the smell of gasoline? A. Yes, sir.

Q. And have you been around an automobile on various occasions— A. Yes, sir.

Q. —in the last few years? And I suppose you have seen gasoline used occasionally for cleaning purposes? A. Yes, sir.

Q. Now, do you know gasoline when you smell it? A. I imagine I do.

Q. Yes. Now, was there gasoline in these tire covers when—

Mr. Lieblich—I object.

Q. —when you saw them, and they were being taken away from the scene of the fire by Chief Ritter and you?

Mr. Lieblich—I object. The witness has

ont proven himself qualified to be an expert in testifying as to gasoline.

The Court—Do you think it requires an expert to determine whether a fluid is gasoline or not?

Mr. Lieblich—Yes. I think, if your Honor drives an automobile, you can hardly draw a conclusion between naphtha, gasoline and some of the furniutre polishes which are in the market as to the smell, because they all more or less contain ingredients of naphtha.

The Court—Well, aside from that, the witness—

Mr. Lieblich—He says he imagines; he did not say he would.

The Court—I will let him testify whether the fluid that he says was in these covers was or was not gasoline.

Mr. Lieblich—Exception.

Q. Well, did you see any fluid in the covers? A. Yes, sir.

Q. And do you know whether or not that fluid was gasoline? A. It appeared to be gasoline.

Q. Was there any fluid in the paper bags? A. Why, there was excelsior and papers in the bags.

Mr. Lieblich—He did not testify about the paper bags. He testified that he took those things away.

Mr. Vanderbilt—Including the paper bags.

Mr. Lieblich—I did not so hear him. I may be in error.

Q. Well, let me ask you that. Did you also,

in addition to taking the can and the automobile covers, assist the Chief in taking away the paper bags that were offered in evidence? A. Yes, sir.

Mr. Lieblich—I object to the form of the question as being leading.

The Court—I will overrule your objection.

Mr. Lieblich—Exception.

Q. Was there anything in those paper bags, Mr. Johnson? A. There was excelsior and paper in the bags, and it seemed to be saturated with gasoline.

Mr. Vanderbilt—That is all.

Cross Examination by Mr. Lieblich:

Q. It might have been water in those bags, too, might it not, Mr. Johnson? A. I hardly think so.

Q. There was plenty of water in that place, was there not? A. Not in the paper bags.

Q. Was there any water in the tire covers? A. I do not remember seeing any water in them.

Q. No. But there was lots of water in that building, wasn't there, to put out the fire? A. Well, not when I got there the following morning. The water had all run out.

Q. The water had all run out? A. Yes, sir.

Q. And you are certain that this was not water in these bags? A. Yes, sir.

Q. And the tire covers? A. Yes, sir.

Q. Who did you talk this matter over with before you come to court? A. No one at all.

Q. Nobody at all? A. No, sir.

Q. You did not refresh your recollection at all in the matter, did you? A. No, sir.

Q. Did you ever sign a statement? A. Not that I remember.

Q. I see. So you have not had occasion to discuss this matter, or— A. No, sir.

Q. —go over it with anyone since that fire? A. No, sir.

Mr. Lieblich—That is all.

The Court—That is all.

Mr. Vanderbilt—That is all.

I desire to offer the proofs of loss which were served on the companies, and rather than offer them all in evidence, with the consent of counsel, I will offer one and stipulate that they are all in the same form.

Mr. Lieblich—I object until they are properly proven.

Mr. Vanderbilt—If the Court please, at the very beginning of the plaintiffs' case, he asked me to stipulate that proofs of loss had been served, and I have done that.

Mr. Lieblich—No. I think you are mistaken. All I asked you to stipulate was as to the agency and not to keep all the agents here as to the proof of notice.

Mr. Vanderbilt—All right. Mr. Brumberg.

The Court—Didn't I ask if there were any question as to the performance of all conditions on both sides?

Mr. Lieblich—Maybe you did. We do not have to file a proof of loss.

The Court—All right.

Mr. Vanderbilt—I will prove it, your Honor.

JOSEPH J. BRUMBERG, recalled as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Vanderbilt:

Q. Mr. Brumberg, I show you a letter dated June 4th, 1927, addressed to Mr. Philip Feuerstein, and ask you if that is a letter which you signed and sent to him? A. Yes, sir.

Q. And did you send a similar letter to the other adjusters enclosing proofs of loss to them? A. Yes, sir.

Q. Covering this loss? A. Yes, sir.

Mr. Vanderbilt—I ask to have this letter marked in evidence.

(Letter marked Exhibit D-8 in evidence.)

Q. I show you a proof of loss to the Automobile Insurance Company and ask you if that is one of the proofs of loss which you sent to the adjusters of the several companies defending here? A. Yes, sir.

Q. And these proofs of loss were executed by Schleider and Eilen, were they not? A. Yes, sir.

Q. And that is their signature on the second page? A. Yes, sir.

Q. And these proofs of loss are all the same except where they refer on the first page to the names of the different companies? A. Yes, sir.

Q. And the different policy number and the different amount of the insurance, are they not? A. Yes, sir.

Mr. Vanderbilt—I offer this proof of loss in evidence.

(Marked Exhibit D-9 in evidence.)

Mr. Vanderbilt—I offer the other proofs of loss.

Q. They were all signed by the assured in the same way, were they not, Mr. Brumberg? A. If they were the ones, yes.

Q. Do you want to look them over? A. I would rather. (Referring to papers.)

Mr. Lieblich—You sent them all to the companies, didn't you, Mr. Brumberg?

The Witness—Yes, sir.

Mr. Lieblich—Well, I guess they are all right. I have no objection to marking them all in evidence.

The Witness—All right.

The Court—Do you want to mark them in without further examination by the witness?

Mr. Lieblich—Yes.

The Court—All right. Mark them.

(Nine papers marked Exhibits D-10 to D-18, inclusive, in evidence.)

Mr. Vanderbilt—That is all.

Mr. Lieblich—No questions.

Mr. Vanderbilt—We rest.

(The Defendants rest.)

The Court—Any rebuttal, Mr. Lieblich?

Mr. Lieblich—Is there somebody here from the Clifton Police Department in response to my request.

(No response.)

REBUTTAL

WILLIAM L. PFEIL, sworn as a witness in rebuttal, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Pfeil, where do you live? A. 2 Amsterdam Avenue, Passaic.

Q. With respect to May 13th, 1927, what was your business, trade or occupation? A. I owned the radio studio in Clifton.

Q. And that radio studio, Mr. Pfeil, was that connected in any wise, that is, with respect to location, with the premises of the Art Furniture Company? A. It was in the same building.

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

Q. Were you in your place of business on the 13th day of May, 1927? A. I was.

Q. And what time did you leave your place of business, Mr. Pfeil? A. To the best of my recollection, between nine-thirty and ten o'clock.

Q. And at the time you left, was there any indication to you of any fire or smoke or anything? A. No, there was not.

Q. You have been in court here and heard the testimony with respect to the door leading from the Art Furniture Company into your premises? A. I did.

Q. And at the time that you left, was that door in position and closed? A. To the best of my recollection, it was.

Q. And were you the last one out, Mr. Pfeil? A. I was.

Q. Did you observe the position of a bar which, according to the testimony, was on the in-

side of your store and was not in position, that is, across the doorway? A. I am unable to recollect. We discussed that with the Chief on the night of the fire. It was quite customary to put that bar up in its place.

Q. I see. But you do not recall now whether it was in place or not? A. That is right.

Q. Mr. Pfeil, coming from the Art Furniture Company premises into your store, which way did the door swing? A. I really do not know.

Q. Haven't you any recollection, Mr. Pfeil? A. Yes. Now, I recall it swung in toward my place.

Q. It swung in on the right hand side or left hand side as you come in from the Art Furniture Company into your premises? A. I believe it swung left.

Q. But you are not certain? A. I am not certain.

Q. I see. Had you had any difference or enemies of any kind that would be inclined to destroy the premises? A. No.

Q. Had you had any differences or arguments with the garage-keeper next door with respect to the use of the alley for parking purposes? A. No.

Mr. Lieblich—That is all.

Cross Examination by Mr. Vanderbilt:

Q. Were you at the place, Mr. Pfeil, while it was burning? A. While it was burning?

Q. Yes. A. Yes; I was notified.

Q. What time did you get there, about? A. I should say between twelve and half past twelve.

Q. Did you notice anything unusual about the fire?

Mr. Lieblich—May it please the Court, I suppose that is a hypothetical question that would call for an expert opinion, did he notice anything unusual? I object, sir, to the question.

The Court—If that be your only ground of objection, I will have to overrule it.

Mr. Lieblich—All right.

A. Nothing, offhand, that I can recall.

Q. Well, were you able to—let me ask you this: Did you or did you not smell gasoline? A. Why, yes, from the—out by the street, you could smell the odors of gasoline.

Mr. Vanderbilt—That is all.

Redirect Examination by Mr. Lieblich:

Q. There was a garage next door, wasn't there? A. On the corner, yes.

Q. Yes. A. Yes, there was a garage.

Q. Yes. And they had pumping stations, didn't they? A. I do not know.

Q. Didn't they sell gasoline at that garage? A. I do not know.

Q. It is a public garage, and they store everything, buses, and there is a gasoline station across the street owned by the Standard Oil, so it would not be anything unusual to smell gasoline, would it, Mr. Pfeil? A. No.

Mr. Vanderbilt—Well,—pardon me.

Q. I understood you to say you closed at six-thirty? A. No, sir.

Q. At nine-thirty? Was it nine-thirty? A. Between nine-thirty and ten.

Q. I see. Do you know whether during that day any truck or anything of the Art Furniture Company had been to that storehouse? A. Why, no. They came any time. That was their business, I suppose.

Q. Yes. A. I do not know whether they came that day or not.

Q. You do not remember, do you? A. No.

Q. And at the time that you closed between nine-thirty and ten o'clock, did you smell any gasoline in that store? A. I did not.

Mr. Lieblich—That is all.

Recross Examination by Mr. Vanderbilt:

Q. Well, Mr. Pfeil, when you spoke of smelling gasoline, was there any difference in the smell of gasoline that night at the place and what you had experienced on any other occasion? A. Well, I did not recall smelling any gasoline on any other occasion; but that was attracted to my attention by the people who were standing around looking at the fire.

Q. Other people smelled it, too? A. They attracted my attention to it, too.

Mr. Lieblich—I object as pure hearsay as to whether he did or not; that is not the best evidence.

Q. I show you this can which has been offered

in evidence. Did you hear the Chief's testimony about that? A. I did.

Q. Did you own this can, Mr. Pfeil? A. No, sir.

Q. Did you ever have a can like that in your store? A. No, sir.

Q. You had no grudge against Eilen or Schleider, did you? A. No.

Q. You did not set this place on fire, did you? A. I did not.

Mr. Lieblich—And there is no proof that Eilen or Schleider set it on fire, either.

Mr. Vanderbilt—I object to counsel testifying.

Mr. Lieblich—I say there is no proof. Just remember that.

The Court—Do not testify, Mr. Lieblich.

Mr. Lieblich—I am not trying to testify. I am just calling his attention to it, that there is no proof.

Mr. Vanderbilt—That is all.

The Court—The jury is going to decide that.

By Mr. Lieblich:

Q. They were not on bad terms with you, were they, Schleider or Eilen? A. No. We were friends.

Q. Yes. Do you know who that can belongs to? A. No, I do not.

Q. Was there anything to in any wise cause you to become suspicious or to have any inclination that there was gasoline on the premises or anything about those premises at the time you closed it?

Mr. Vanderbilt—Objected to as immaterial.

The Court—I sustain the objection.

Q. At the time you closed your store, you made the usual observation that you make when closing? A. I believe I did.

Q. And everything seemed to be in good shape? A. It did.

Q. There wasn't anything to attract you or cause you to be suspicious of anything, was there? A. No.

Mr. Lieblich—That is all.

Mr. Vanderbilt—That is all.

By the Court:

Q. Just a minute, Mr. Pfeil. When you were there between nine-thirty and ten,— A. Yes.

Q. —was that can of gasoline in the store occupied by you? A. I do not believe it was.

Q. Well now, how did you go out of your store, the back way, or— A. The front door.

Q. Did you lock it? A. I did.

Q. Was there a rear door? A. The rear door leads into the store room in the Art Furniture Company.

Q. So the only entrance or exit is the front door, so far as your store is concerned? A. That is right.

Q. When you left there, did you lock it? A. The front door?

Q. Yes. A. I did.

The Court—That is all.

By Mr. Lieblich:

Q. Mr. Pfeil, I understood you to say you were in the radio business? A. That is right.

Q. Did you sell tires, too? A. I did.

Q. And did you handle tire covers, too? A. No, I did not.

Q. You just sold tires. A. That is right.

Q. There wasn't anyone else had a key to your premises? A. My young brother.

Q. I see.

Mr. Lieblich—That is all.

I wish to make a motion. I first move to strike out each and every part of the first separate defense interposed by the defendants upon the ground that there is no proof adduced with respect to first, that the assured knowingly and wilfully, falsely and fraudulently misrepresented in writing, (1) the amount and value of the property claimed to be involved in this fire; (2) the cost of said property; (3) the amount of damage caused by said fire; (4) the origin and cause of the said fire.

The cases are clear that, in order for the defendant to establish such a defense, the burden is upon them to establish that by proof, and I suppose it can be admitted to all intents and purposes for this argument that there is no proof of the other items, with the exception of the interjection of the firemen as to the cause and origin of the fire; so I think that I will confine myself to that particular point, if that would meet with your Honor's—

The Court—You may make any objection you wish, and I will hear them all.

Mr. Lieblich—Well, as to the others, there is absolutely no proof in the case, for this reason: it is conceded that the loss and damage, according to the appraisal or the non-waiver agreement, is $9,000.00, and that the cash value was $15,000.00. An examination of the proofs of loss which are before your Honor,—for the purpose of this motion, they all stand unimpeached—discloses that the proofs of loss are made in exact conformity with the non-waiver agreement. Now, having agreed to that as to a value and damage between the insurance companies and the assured, there can be no fraud by virtue of that agreement; in other words, in order to work a forfeiture on the ground of fraud, it is necessary to misrepresent a material fact, and the misrepresentation must be substantially and materially untrue, and must be made with fraudulent intent. So that I take it as to those there isn't anything in this case at all.

Now, the only proof adduced is on the part of the fire department of the City of Clifton, that at 11:55 P. M. there was a fire; they claim there was gasoline contained in these tire covers. Now, according to the testimony, no one on the part of the Art Furniture Company was there after four or five o'clock in the afternoon, and that the place had been closed; that Mr. Pfeil, the other neighbor, left the premises at nine-thirty P.M., or at least four to five

hours afterwards, closed up his place, and there wasn't anything of a suspicious nature or character at all. But the cases go further, and they hold that, where the defense in an action upon a policy of insurance against fire is that the plaintiff himself set fire to the property (and that is the point that they are driving at, that these plaintiffs set this place afire), it must be established by clear and satisfactory proof; not by circumstantial evidence, or by innuendos; it is not even circumstantial.

The Court—What is that, that it could not be established by circumstantial evidence?

Mr. Lieblich—Not in a case of this kind.

The Court—Why, the Court of Appeals has upheld criminal convictions for arson on circumstantial evidence.

Mr. Lieblich—Well, possibly I am in error. I have cited the law as I have found it; that is, circumstantial evidence may be in the case, but the proof must be clear and satisfactory.

The Court—Who is to pass on that?

Mr. Lieblich—Well, if there isn't anything in the case at this point to charge these men, if they were not within the premises, they were not around, there is no evidence showing that they were near this place at all, and I assume that that would be a matter for your Honor at this time, so long as there is no proof in the case.

The Court—The only evidence concerning their leaving at four o'clock was the testimony based upon the statements al-

leged to have been made by them to the firemen.

Mr. Lieblich—And Mr. Brumberg's testimony was to that effect, too.

The Court—Was he there at the fire?

Mr. Lieblich—No. But his testimony was—

The Court—Where did he get his information?

Mr. Lieblich—The same place where he got the newspaper information, for all I know, that went before the jury.

The Court—That newspaper information, you say?

Mr. Lieblich—I make my motion, and your Honor can rule accordingly on it.

The Court—I will rule. Have you got any more motions?

Mr. Lieblich—Yes. That is the motion to strike out that defense.

The Court—Motion denied.

Mr. Lieblich—I make a motion—your Honor will permit me an exception?

The Court—What is that?

Mr. Lieblich—I say, your Honor will permit me an exception.

The Court—I thought you had some more motions.

Mr. Lieblich—No. I do not think I will make any more, sir. I would rather leave it to the jury.

The Court—All right. Then you may sum up.

Mr. Vanderbilt sums up the case to the jury on behalf of the defendants.

Mr. Lieblich sums up the case to the jury on behalf of the plaintiffs.

The Court then charged the jury as follows:

CHARGE

CAFFREY, J. Ladies and Gentlemen of the Jury: this is an action by Frank Matisovsky, who is suing as trustee for a loan association, and Joseph Brumberg, against several insurance companies. I think there are eleven policies in existence which covered the premises of the Art Furniture Company which was operated by Max Schleider and Nathan Eilen. The owners of the store are not parties to this action by virtue of the assignment of the interest they had under these policies, but their assignees are seeking to recover this money as plaintiffs in the action. Therefore, the rights of the present plaintiffs are wholly dependent upon the rights of Eilen and Schleider, and if you find any of the defenses interposed to be good against Schleider and Eilen, they, of course, may be used, and the present plaintiffs are subjected to them. I will touch upon that later.

There is no question in this case that the policies were issued, and there is no dispute at all that there was a fire. There is no dispute that on May 13th, or thereabouts, at 11:56, I think the fireman testified, an alarm was sounded and they went to these premises and they found a fire burning which involved two-thirds of the store. The Chief and the other witness who testified as to the scene gave evidence that the fire was confined principally to the rear of the store and, in addition to that, the Chief

and the other fireman who witnessed, or were present at the time the exhibits were found, corroborated the Chief in respect to the finding of these exhibits, and you heard the evidence of Deputy Chief Sweeney, Chief Ritter and the other fireman who testified as to the location of these tire covers filled with excelsior, and they also pointed out to you the condition of the paper carrying bags and the can which they said contained gasoline. There has been no evidence offered by the plaintiffs with respect to that. We do not know whether the surmise of the firemen is correct with respect to the material or, rather, the ingredients of the can and the excelsior, and so forth; and whether or not the odor of gasoline is still on them, of course, I cannot say, and I do not know whether you, in handling them, might determine; but that, of course, in considering that phase of it, you have a right to remember that this fire occurred May 13, 1927.

Now, the company or, rather, the companies through their agents, and the assignors of the present plaintiffs, signed a non-waiver agreement. That in no wise changed the conditions of the policies. The non-waiver agreement which has been marked in evidence and will be taken by you to the jury room is nothing more than an agreed amount in the event that the insurance companies are liable. In more than one place, there is an express statement, to refer to the latter clause, that this memorandum is without an admission of liability, and in another part, it provides that this agreement does not waive or invalidate any condition of the policy held by such companies.

So, you see, after all, this is nothing more than a

statement of that, and the rights of the plaintiffs and the rights of the various defendants are to be measured by the contract that they had entered into.

Now, the defense claims as the basis of defense that this particular clause, which I will read, has been violated. The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching upon any matter relating to this insurance or the subject thereof whether before or after loss. There are eleven policies all in standard form, and each policy contains a similar provision.

The owners of the Art Store who are the assignors of the present plaintiffs have not been produced in court. I had not intended to mention this fact, but counsel in his summation pointed out that they were unable to produce them. That is true insofar as the use of process of this court in bringing them here under subpoena is concerned, because the jurisdiction of this court does not extend to Brooklyn, or wherever they are. However, if counsel saw fit to use the testimony of a witness who is non-resident, there are other means, in other words, he could have applied to the court for an order to take their testimony as of the place where they are, and that might be read into the evidence.

In the course of counsel's argument, he emphasized the fact that there had been a dismissal of the complaint against these men by the recorder of Clif-

ton. The insistent stress upon that point has also made it necessary for me to call your attention in my own way of this point. Whether these men were dismissed, or whether they were dismissed because the charges were not sustained by the magistrate, makes no difference in this case. And I will go further: If these men were actually tried and found guilty of this crime of arson, that, itself, would not be conclusive on this case; even if they were convicted and they appeared as witnesses, that could be shown only to affect their credit. In other words, what has been done in a police court is not binding on you. We cannot tell what the circumstances were that produced the dismissal of the complaint. So, therefore, so far as this case is concerned, you are going to decide it on the evidence that you have heard, and you are not going to consider, or you should not consider, what has happened in the police court.

Now, from the evidence in this cause, there seems to be ample proof that this fire was of an incendiary origin and, I think, to use the parlance of the fireman, it was a set fire. I think the evidence warrants you drawing that inference. However, the conclusion that you might come to that this fire was the result of a set fire needs to go further in order to show that the assignors were guilty of it. The defense under the pleadings is fraud. In addition to argument of counsel for the defense that this fire was the result of a plan or design, the defendants rely upon another statement or, rather, rely on this as a basis of defense: you have proofs of loss which were submitted, and with reference to that part asking the cause of the fire, the assign-

ors of the present plaintiffs signed in each one of the proofs of loss, "Cause unknown to the assured." As I said before, you have a right to infer that this fire was of an incendiary origin. There is no direct evidence as to who committed this act, and, at best, we must draw our conclusions; in other words, we must determine as best we can, if we can at all, who set this fire, and you sitting as jurors, some of you for the first time, which is a change from your daily walks of life, are not justified in throwing your methods of reasoning to the winds; in other words, your transition to the seat of judgment of facts should in no wise change your mental operations. You have a right to reason the problem involved here as you would reason any other problem that confronts you in your every-day life. You have had the benefit of argument of counsel for practically an hour, and it would serve no useful purpose on my part to further go into the evidence. I might say that you are the sole judges of the evidence and, as such, you have a right to determine the credibility of the testimony that has been offered for your consideration. You have a right to reject evidence that does not meet with your standards of credibility and, on the other hand, you have a right to accept that which does meet the standard. You are the sole judges. I, too, will say, as counsel have said, if I in my reference to the testimony have misstated it, of course, I do not want you to follow my recollection of it; you must decide this case upon your own recollection of the testimony. Nor is my comment or my deductions binding on you. You are the sole judges of the act, and you must make your own conclusions, and you can ignore the Court's con-

clusions with reference to the facts because that is your right. It is your absolute right to decide upon the facts.

Now, coming back to this claim, you will have it with you in the jury room, and all that it means is that if the plaintiffs recover, they shall recover no more than $9,000.00. Now, you have two plaintiffs in this cause. You have Mr. Brumberg, and Mr. Matisovsky, who is suing as trustee. He claims the sum of $2,000.00, Matisovsky does, as trustee, because an organization which he represents loaned that money to Schleider and Eilen. The other plaintiff claims in excess, because, if I recall the figures, his advances are in excess of the difference, or, rather, his advances and his claim under a percentage basis are in excess of the difference between the $2,000. and the remaining which make up the nine. But, irrespective of that, if you conclude in favor of the plaintiffs, your verdict ought to be in favor of Matisovsky for $2,000.00, or in his representative capacity, and for Brumberg for the difference.

Now, the present plaintiffs, admittedly, had nothing to do with this store before the fire, and they had nothing to do personally with the preparations of the proofs of loss. But if you conclude that the defense as pointed out to you in the policy, then, of course, you are not concerned with a division of damages; your verdict ought to be in favor of the defendants. The plaintiffs in this case are entitled to what they claim in its entirety, or they are entitled to claim nothing. In other words, we cannot make a division and hold that one company is liable and another company is not liable, or that as to one company there was fraud and as to other companies

there was no fraud. In other words, it must be all or none.

I have some requests for charge.

The plaintiffs' request:

(1) Fraud is an affirmative defense and must be clearly proven by the defendant insurance companies since they are the ones who set it up as a defense. I so charge you.

(2) A false swearing must be in a matter materially affecting the risk and must be with wilful intent to defraud the insurance companies. I so charge you.

(3) In order to void a policy of insurance on the ground of fraud, it is necessary to misrepresent a material face and the misrepresentation must be substantially and materially untrue and made with fraudulent intent.

I will deny the fourth.

Mr. Lieblich—I will withdraw the fourth.

The Court—The fifth, I have already covered that.

(6) I will deny that, because it relates to number four, which is withdrawn.

(7) I have already charged that in substance.

(8) I have already charged in my main charge.

(9) Where the defense in an action upon a policy of insurance against fire is that the plaintiff—that should mean plaintiffs' assignors—set fire to the property, it must be established by clear and satisfactory proof. I so charge you.

(10) Conditions in a policy which create a forfeiture will be construed more strongly against the

insurer and will not be extended beyond the strict words of the policy. I so charge you.

I have two requests of the defendant.

The first request, I charge you that the rights of the plaintiffs Matisovsky and Brumberg are wholly dependent upon the rights of Eilen and Schleider. If you find that the fire was caused by the designs of Eilen and Schleider or either of them, then you must find for the defendants in this action. I so charge you.

The second request, Max Schleider and Nathan Eilen, in the proofs of loss which they submitted to the defendant insurance companies, swore that the origin of the fire of May 13, 1927, was unknown to them, and also that the fire did not originate by any act, design or procurement on their part. If you find from the evidence concerning this fire that they swore falsely when they stated in their proofs of loss that the origin of this fire was unknown to them, and that it did not originate by any act, design or procurement on their part, this would amount to a misrepresentation, fraud and false swearing with respect to a matter very material to the insurance, and your verdict on such a finding would be for the defendants, so far as the damage alleged to have resulted from this fire is concerned. I so charge you.

Swear the officer, and the jury will take the case.

(Officer sworn, and jury retired.)

Mr. Lieblich—In number 10, you said "more strongly."

The Court—It is only an adjective, that is all.

Plaintiffs exceptions to Court's Charge

Mr. Vanderbilt—May I take an exception to the Court's charging of the plaintiffs' tenth request?

Mr. Lieblich—I take exception to the Court's charging the two requests to charge in behalf of the defendant.

I except to that part of the charge wherein the Court said, "If you find any of the defenses interposed," and so forth,, "against Schleider," indicating to the jury or causing the jury to infer—

The Court—I do not hear you.

Mr. Lieblich—indicating to the jury or causing the jury to infer there may have been one or more defenses interposed in this case by the defendants.

I except to that part of the charge wherein the Court disclosed to jury numerous ways in which testimony could be obtained for use upon the trial, since the same was intrinsic and irrelevant and immaterial to the issue, and tended to prejudice the jury.

The Court—I did not hear that.

Mr. Lieblich—Repeat that for the Court.

(Last exception read.)

Mr. Lieblich—I except to that part of the Court's charge wherein the Court called the jury's attention to the value, use or credibility to be attached to any evidence which would be adduced with respect to a criminal conviction, since there was no testimony in the case with respect thereto, and the Court's action tended to prejudice the jury as against the plaintiffs.

I except to that part of the Court's charge wherein the Court, on two occasions, stated to the jury, "There seems to be ample proof of the incendiary origin of this fire," indicating to the jury, and tending to remove from their consideration, notwithstanding the Court's statement to the jury that they were the sole judges of the fact, that the Court had come to the conclusion that the fire was of incendiary origin and thus removing from their consideration, inferentially, the determination of a fact,, to the prejudice of the plaintiffs in the case.

I except to that part of the Court's charge wherein the Court again called the jury's attention to the incendiary origin of the fire, or use of the following language: "You have a right to infer this fire was of incendiary origin," again indicating to the jury that the Court's mind was of that construction, that the fire was of incendiary origin, causing the same to have whatever effect it might have, coming from the Court, upon the jury to the prejudice of the plaintiffs in the case.

PLAINTIFFS' REQUESTS

The Plaintiffs' requests to charge as originally submitted to the court are as follows:

(1) Fraud is an affirmative defense and must be clearly proven by these defendant insurance companies since they are the ones who set this up as a defense.

(2) False swearing must be in a matter materially effecting the risk and must be with wilful intent to defraud the Insurance Companies.

(3) In order to avoid a policy of insurance on the ground of fraud, it is necessary to misrepresent a material fact and the misrepresentation must be substantially and materially untrue and must be made with fraudulent intent.

(4) An innocent though exaggerated estimate of the value will not avoid the policy.

(5) Over-valuation by the insured of the property insured when made in good faith does not effect the rights of the parties and if the Insurance Companies rely on such over-valuation, the Insurance Companies must show that Art Furniture Company fraudulently and with intent to defraud the companies, over-valued the property.

(6) An over-valuation in order to work a forfeiture must be so plain that it cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate upon the value of his own property.

(7) Within the terms of the policy, in order to establish a defense of fraud, the Insurance Companies must show that the fraudulent statement as made was relevant and wilfully false and that the motive of the assured in making this statement was bad.

(8) When fraud in the proof of loss is applied as a defense, the burden of proving the intent is upon the party pleading.

9. Where the defense is an action upon a policy of insurance against fire is that the plaintiff himself set fire to the property, it must be established by clear and satisfactory proof.

(10) Conditions in a policy which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy.

THE DEFENDANTS' REQUESTS TO CHARGE

as originally submitted to the Court are as follows:

(1) I charge you that the rights of plaintiffs Matisovsky and Brumberg are wholly dependent upon the rights of Eilen and Schleider. If you find that the fire was caused by the design of Eilen and Schleider or either of them then you must find for defendants in this action.

(2) Max Schleider and Nathan Eilen, in the proofs of loss which they submitted to the defendant insurance companies, swore that the origin of the fire of May 13, 1927 was unknown to them, and also that the fire did not originate by any act, design or procurement on their part. If you find from the evidence concerning this fire that they swore falsely when they stated in their proofs of loss that the origin of this fire was unknown to them, and that it did not originate by any act, design or procurement on their part, this would amount to misrepresentation, fraud and false swearing with respect to a matter very material to the insurance, and your verdict on such a finding would be for the defendants so far as the damage alleged to have resulted from this fire is concerned.

EXHIBITS

EXHIBIT P-1

No. 1269

Aetna Insurance Company
Hartford, Conn.
Incorporated in 1819

Amount $1,000.00 Rate 1.425 Premium $14.25

In Consideration of the Stipulations herein named and of Fourteen and 25/100 Dollars Premium Does Insure Nathan Eilen and M. J. Schleider, trading as Art Furniture Co., for the term of one year, from the third day of May, 1927, at noon, to the third day of May, 1928, at noon, against all direct loss or damage by fire except as hereinafter provided,

To an amount not exceeding One thousand Dollars, to the following described property while located and contained as described herein and not elsewhere, to wit:

Nathan Eilen and M. J. Schleider, t/a Art Furniture Co.

$1,000. On stock of furniture, beds, bedding, pictures, awnings, trunks, leather goods, carpets, rugs, oil cloth, linoleums and such articles not more hazardous as are usually kept in a retail furniture and housefurnishing store, and on stock of store and office furniture and fixtures of every description all while contained in cement block and frame building occupied as store and furniture warehouse, situate No. 638-640 Main Avenue, Clifton, New Jersey.

O. J. P., M. P. L. C. W. P. 80 Co.-Ins. P.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following and conditions printed on back hereof,

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

Provisions required by law to be stated in this Policy.—This Policy is in a stock corporation.

In Witness Whereof, This Company has executed and attested these presents this 3rd day of May, 1927; but this Policy shall not be valid until countersigned by the duly authorized Agent of the Company at Passaic, N. J.

Ralph B. Ives,
President.

Guy E. Beardsley,
Secretary.

Countersigned at Passaic, N. J.
this 3rd day of May, 1927.

J. M. Marchese, Jr., Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be

ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandanment to this company of the property described.

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

This entire policy, unless otherwise provided by

agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss, or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary not withstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dyna-

mite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glicerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light) or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

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

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

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings,

bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

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

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

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

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

except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

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

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

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, but it in the best possible order,

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

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for exam-

ination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

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

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

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole

insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

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

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

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

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

Exhibits P-2, P-3, P-4, P-5, P-6, P-7, P-8

EXHIBIT P-2

Policy No. 2438 National Liberty Insurance Co., $1500. On stock (identical similar as to name and coverage as P-1).

1 yr. from 3|15|27—Prem. $21.38.

EXHIBIT P-3

Policy No. 757084 Commonwealth Ins. Co. of N. Y. $2500. On stock (similar to P-1), 1 yr. from 4|27|27. Prem. $35.63.

EXHIBIT P-4

Policy No. 110296 Baltimore American Insurance Co. $1500. On stock (similar to P-1), 1 yr. from 3|9|27. Prem. $28.50.

EXHIBIT P-5

Policy No. 110297 Baltimore American Insurance Co. $1500. On stock (similar to P-1) 1 yr. from 3|9|27. Prem. $28.50.

EXHIBIT P-6

Policy No. 384 Presidential Fire & Marine Ins. Co. of Illinois. $2500. On stock (similar to P-1) 1 yr. from 2|21|27. Prem. $47.50.

EXHIBIT P-7

Policy No. 639001. The State Assurance Company Ltd. of Liverpool. $2500. On stock (similar to P-1) 1 yr. from 2|3|27. Prem. $35.63.

EXHIBIT P-8

Policy No. 382369. North British & Mercantile Insurance Company. $2500. On stock (similar to P-1) 1 yr. from 3|19|27. Prem. $35.63.

EXHIBIT P-9

Policy No. 20470. Fidelity-Phenix Fire Insurance Company. $2500. On stock (similar to P-1) 1 yr. from 2|21|28. Prem. $47.50.

EXHIBIT P-10

Policy No. 1361. Springfield Fire & Marine Insurance Company. $2500. On stock (similar to P-1) 1 yr. from 4|27|27. Prem. $35.65.

EXHIBIT P-11

Policy No. 29090. Automobile Insurance Company. $2500. On stock (similar to P-1), 1 yr. from 2|16|27. Prem. $35.63.

EXHIBIT P-12

Received Sep. 19, 1927. Fire Loss Div.

To: The Automobile Insurance Company
of Hartford, Connecticut.

Gentlemen:

Re: Policy No. 29090

We hereby assign set over and transfer to Frank J. Matisovsky, Trustee, the sum of Two Thousand ($2000.00) Dollars and interest thereon from May 25th, 1927, out of monies due us from your company and any other insurance company for fire loss which occurred in our premises on May 13th, 1927. An this is to authorize you to make draft payable in his name under the above named policy.

Dated May 25, 1927.

Respectfully,
Art Furniture Co.

Witnessed by
Joseph F. Matisovsky.
M. J. Schleider
N. Eilen

EXHIBIT P-13

Letter Frank J. Matisovsky to Automobile Ins. Co., dated 9|16|27 enclosing Ex. P-12 (record P)

September 16th, 1927

The Automobile Insurance Company,
Hartford, Connecticut.

Gentlemen:

I am enclosing herewith assignment executed to me as Trustee by M. J. Schleider and Nathan Eilen, trading as Art Furniture Company. Will you kindly see that my interest is protected by having my name inserted on the draft which may be due them from your company according to the loss mentioned in the assignment.

Thanking you for same, I am,

Very truly yours,

FJM:ADM

EXHIBIT P-14

Passaic, New Jersey
June 1st, 1927.

We hereby assign, set over, and transfer to Joseph J. Brumberg, all our rights, titles, and interests; subject to a prior claim of Frank J. Matisovsky, trustee, in the sum of $2000.00, all monies due us from the below mentioned insurance companies, in payment of our fire loss of May 13th, 1927, to our stock, at premises located at Nos. 638-40 Main Avenue, Clifton, New Jersey; and authorize you to have his name inserted in any drafts in payment of the said loss.

The Automobile Insurance Company of Hartford, Connecticut. Policy No. 29090.

Springfield Fire and Marine Insur. Co. of Springfield, Massachusetts. Policy No. 1361.

North British and Mercantile Ins. Co. of London & Edinburgh. Policy No. 382369.

The State Assurance Company of Liverpool, England. Policy No. 639001.

Presidential Fire and Marine of Chicago, Illinois Policy No. 384.

Fidelity-Phenix Fire Insurance Co. of New York. Policy No. 20470.

The Commonwealth Ins. Co. of New York. Policy No. 757084.

The Baltimore American Ins. Co. of New York. Policy No. 110296.

National Liberty Insurance Company of America. Policy No. 2438.

The Baltimore American Insurance Co., of New York. Policy No. 110297.

Aetna Insurance Company of Hartford, Conn. Policy No. 1269.

Art Furniture Co.,
By: M. J. Schleider
By: N. Eilen

Witness thereof:
Irving H. Burg.

Copy of the Original assignment dated June 1st, 1927.

EXHIBIT P-18

Sketch made by delivered to S/A of Court.

EXHIBIT D-1

General Adjustment Bureau

Non Waiver Agreement

It is hereby mutually understood and agreed, by and between Art Furniture Company of Passaic, hereinafter called the Claimant, and the Insurance Companies, whose names are signed hereto, hereinafter called the Companies.

That any action taken by the Companies, or their representatives, in investigating the claim made by Claimant for loss which occurred at 638-40 Main Avenue, Clifton, New Jersey, on thirteenth day of May, 1927, or in the investigation or ascertainment of the amount of value and loss or damage, shall not waive or invalidate any condition of the policies of such Companies held by said Claimant, nor the rights of either or any of the parties to this agreement; and such action shall not be, or be claimed to be, any admission of liability on the part of said Companies, or any of them.

The consideration of and for this agreement is the mutual desire and intention of the parties hereto, to determine the value of the property and/or the amount of damage thereto without regard to any other questions.

Witness our hands, at Newark N. J. this day of May, 1927.

Aetna Insurance Co. of Hartford
Baltimore-American Insurance Co. of Md.
National Liberty Insurance Co. of America
North British & Mercantile Ins. Co. of England
Commonwealth Insurance Co. of New York

Exhibit D-1

Fidelity-Phenix Fire Ins. Co. of New York.
State Assurance of England
By General Adjustment Bureau
Art Fur. Co. by M. J. Schleider.
Henry F. Trimpi, 5|27|27
Gen. Adj. Automobile Ins. Co.
C. E. Kling, Asst. Manager.
Philip Feuerstein,
Adj. for Springf. Ins. Co.

(This memorandum may be detached if desired.)

Memorandum of Value and Loss

Assured Art Furniture Co. of Passaic,
Location 638-40 Main Avenue, Clifton, N. J.
Property involved in claim Stock.
Date of fire May 13, 1927.

This memorandum is without admission of liability. The sound value of the property claimed to be insured and the loss thereon have been ascertained as shown below, without prejudice to any defenses and subject to all and singular the terms and conditions of the policies upon which claim is made.

Item: Stock of Furniture. Value: $15,206. Loss: $9000.

Art Furniture Co.,
N. Eilen.

Aetna Ins. Co.
Baltimore Am. Ins. Co.
National Liberty Ins. Co.
No. British & Merc. Ins. Co.
Commonwealth Ins. Co.
Fid. Phenix Ins. Co.
State Assur. Co.
by Genl. Adj. Ins.
by C. E. Kling, Asst. Mgr.

EXHIBIT D-2

Assignment by Art Furniture Company to Joseph J. Brumberg dated 6|1|27.

EXHIBIT D-4

Sketch made by delivered to S/A of Court.

EXHIBIT D-4

United States of America,
District of New Jersey, } ss.

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed is a true copy of Order appointing Benjamin L. Stein as Trustee in the matter of Max J. Schleider and Nathan Eilen, ind. and trdg. as Art Furniture Company, Bankrupt, filed Oct. 26, 1927; I do hereby further certify that I do not find that said Benjamin L. Stein has been discharged as such Trustee, as the same remains of record, and on file in my office; that I have compared said copy with the original record, and that it is a correct transcript therefrom, and of the whole of the original.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this ninth day of March, A. D. nineteen hundred and twenty-nine.

George T. Cranmer,
Clerk.

United States of America,
District of New Jersey, } ss.

I, J. L. Bodine, Judge of the District Court of of the United States for the District of New Jer-

sey, do hereby certify that George T. Cranmer, whose name is attached to the foregoing certificate, was at the time of making the same, and still is, Clerk of the aforesaid Court, and full faith and credit are due all his acts as such; and that the seal affixed to said certificate is the seal of said Court, and the attestation thereto is in due form.

In testimony whereof, I have hereto subscribed my name, at Trenton, in said District, this ninth day of March A. D. nineteen hundred and twenty-nine.

J. L. Bodine,
District Judge.

United States of America,
District of New Jersey, } ss.

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that J. L. Bodine, whose name is attached to the foregoing certificate, was at the time of making the same, and still is, Judge of said District Court, and that his signature to said certificate is genuine.

In testimony whereof, I have hereto subscribed my name, and affixed the seal of said Court, at Trenton, in said District, this ninth day of March A. D. nineteen hundred and twenty-nine.

George T. Cranmer,
Clerk.

(Seal)

Notice of Trustee and Order of his Appointment

United States District Court
District of New Jersey

In the Matter of Max J. Schleider and Nathan Eilen, ind. and trdg. as Art Furniture Company, Bankrupt.	In Bankruptcy Notice to Trustee and Order of his Appointment

At the Bankruptcy Court Room, 45 Church St., Paterson, in said District, on the 26th day of Oct. A. D. 1927 before George W. W. Porter, Esquire, Referee in Bankruptcy.

This being the day fixed by order of the Referee for the first meeting of creditors under said Bankruptcy, and of which due notice has been published in the Paterson Morning Call and by mailing a copy of said notice to each creditor, I, the undersigned Referee of said Court, in Bankruptcy, sat at the time and place above mentioned, pursuant to such publication and notice, to take the proof of debts, for the choice of a trustee or trustees, and examination of the bankrupt under the said bankruptcy, and I do hereby certify that the creditors whose claims have been allowed and were present, or duly represented, having waived their right to make choice of a Trustee for said bankrupt estate; therefore I hereby do appoint Benjamin L. Stein of 126 Market Street, Paterson, in the County of Passaic, as Trustee of the same and fix his bond at the sum of $3500.00.

G. W. W. Porter,
Referee in Bankruptcy.

EXHIBIT D-8

Passaic, N. J., June 4th, 1927

Mr. Philip Feurstein, Adjuster,
Union building, 15 Clinton Street,
Newark, N. J.

Dear Sir:

Re:—Loss—Art Furniture Company, Springfield—1361.

I am herewith enclosing proof of loss properly signed and executed for your apportionment of claim under springfield policy 1361, as agreed.

Trusting you will kindly forward same to the company interested for immediate payment, I remain,

Very truly yours,
Joseph J. Blumberg.

/AB
L Enc.

EXHIBIT D-10

To the State Assurance Insurance Company of Liverpool, England.

By your policy of insurance No. 639001 dated February 3rd, 1927, issued at your Agency at Passaic, N. J., you insured Max J. Schleider and Nathan Eilen/T/A-Art Furn. Co. against loss or damage by fire to the amount of twenty-five hundred and no/100ths dollars, according to the terms and conditions printed in said policy, the written portion, together with correct copy of all endorsements, assignments and transfers, being as follows, viz:

Merchandise in Mercantile Risk (Protected)

$2500 on merchandise consisting principally of furniture, beds, bedding, pictures, awnings, trunks,

leather goods, carpets, rugs, oil cloth, linoleums and such articles not more hazardous as are usually kept in a retail furniture and house-furnishing store and on/including full and empty packages, boxes, samples and supplies, the property of the insured, or held in trust or on commission, or sold but not delivered or removed.

On store furniture and fixtures, including counters, shelving, racks, scales, show cases, cash registers, and all such implements and utensils used in the insured's business of every description. All while contained in the frame and cement block building, occupied as store and storage of furniture situated 638-640 Main Avenue, Clifton, New Jersey. For the term one year from the third day of February A. D., 1927, to the third day of February A. D. 1928 at noon; which said Policy was subsequently continued in force by Renewal No._____until the_____day of A. D. 19_____ at noon.

That in addition to the sum insured by said policy on said property, there was_____other insurance made thereon, to the amount of Twenty Thousand Five Hundred Dollars, as particularly specified in Schedule_____hereto attached, besides which there was no other insurance thereon.

In Schedule of Additional Insurance, give the name of each Company, date and expiration of each policy, and the entire written portion of each Policy and all endorsements, assignments or transfers thereon.

A fire occurred on the thirteenth day of May, A. D. 1927 at 11:56 o'clock P. M. by which the stock insured was destroyed, or damaged, to the extent of Nine thousand and No/100ths dollars,

and originated as follows, viz.: cause unknown to assured.

The actual Cash Value of each specific subject thus situated and insured under the aforesaid Policies at the time of loss, and the actual loss and damage by said fire to the same, and for which claim is hereby made, was as follows, viz.:

Stock, sound value: $15,206.00; loss or damage on same: $9,000; insurance on same: $23,000. Total Sound Value: $15,206.00; Total Loss or Damage: $9,000; Total Insurance: $23,000.00.

For a more particular statement of same see Schedule_____annexed.

And the Insured claim of the State Assurance Insurance Company, by reason of said loss, damage and Policy of Insurance, the sum of Nine Hundred Seventy Eight and 26/100ths ($978.26) dollars.

The building insured, or containing said property, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: store and storage of furniture. And for no other purposes whatever.

The said fire did not originate by any act, design, or procurement on our part, nor on the part of any one having any interest in the property insured, or in the said Policy of Insurance, nor in consequence of any fraud or evil practice done or suffered by us; that nothing has been done by or with our privity or consent to violate the conditions of the Policy, or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed and belonging to, and in the possession of the said insured at the time of the said fire; that no

property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss, or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

The furnishing of this blank to assured, or making up proofs by Adjuster for Company, is not to be considered as a waiver of any of the rights of the Company.

Witness my hand at Passaic, N. J., this 3rd day of June, 1927, Art Furniture Company; by M. J. Schleider; by N. Eilen.

Personally appeared Max J. Schleider and Nathan Eilen signers of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of.

Witness my hand and official seal, this 3rd day of June, 1927. Gustav A. Lauffer, Notary Public of N. J.

Re: Loss—Art Furniture Company, 638-640 Main Ave., Clifton, N. J. Fire—May 13th, 1927.

"Apportionment of Loss"

Company	Insures Stock	Pays Stock	Total
No. 382369			
North British & Mer. of London & Edinburgh	2,500	978.26	978.26
No. 20470			
Fidelity-Phenix Fire of New York	2,500	978.26	978.26

Exhibit D-11

No. 384 Presidential F. & M. of Chicago, Ill.	2,500	978.26	978.26
No. 1361 Springfield F. & M. of Sprinfield, Mass.	2,500	978.26	978.26
No. 639001 The State Assurance of Liverpool, Eng.	2,500	978.26	978.26
No. 757084 Commonwealth Ins. Co. of New York	2,500	978.26	978.26
No. 29090 Automobile Ins. Co. of Hartford, Conn.	2,500	978.26	978.26
No. 110297 Baltimore-American of New York	1,500	586.96	586.96
No. 110296 Baltimore-American of New York	1,500	586.96	586.96
No. 2438 National Liberty of America	1,500	586.96	586.96
No. 1269 Aetna Ins. Co. of Hartford, Conn.	1,000	391.30	391.30
	23,000	9,000.00	9,000.00

EXHIBIT D-11

Proof loss, policy No. 1269 Aetna, similar in all articles to D-10, except claim is made for $391.30.

Exhibits D-12, D-13, D-14, D-15, D-16, D-17, D-18

EXHIBIT D-12

Proof of loss, policy No. 110296, Baltimore-American, similar in all details to Ex. D-10, except claim is made for $586.96.

EXHIBIT D-13

Proof of loss, No. 1361, Springfield, similar to D-10, except claim is made for $978.26.

EXHIBIT D-14

Proof of loss, No. 382369, North British & Mercantile, similar to D-10, except claim is made for $978.26.

EXHIBIT D-15

Proof of loss, No. 110297, Baltimore-American, similar to D-10, except claim is made for $586.96.

EXHIBIT D-16

Proof of loss, No. 757084, Commonwealth, similar to D-10, except claim is made for $978.26.

EXHIBIT D-17

Proof of loss, No. 2438, National Liberty, similar to D-10, except claim is made for $586.96.

EXHIBIT D-18

Proof of loss, No. 20470, Fidelity-Penix, similar to D-10, except claim is made for $978.26.

REASONS

The plaintiffs write down the following reasons upon which they will rest the reasons for a new trial in the above entitled cause.

1. The verdict is contrary to the weight of the evidence in view of the fact that the defendants have failed to sustain by a preponderance of evidence or by clear and satisfactory proof that when Eilen stated in the proofs of loss that the cause and origin was unknown to him, that the same was false swearing sufficient to warrant a forfeiture under the policies sued upon.

2. That the verdict of the jury was contrary to the weight of evidence considering that the proofs of loss as filed were the result of a novation and agreement to settle the loss in the sum of $9000. as is evidenced by Exhibit D-8, which remains uncontradicted and disclosed that the proofs of loss as filed were made by and with the consent and knowledge of the defendants' agents and adjusters.

3. The verdict of the jury was contrary to the Court's charge, in that, the jury disregarded the testimony of the plaintiffs which stands unimpeached and relied solely upon the failure of Eilen to appear and testify, which verdict was contrary to the plaintiff's Ninth Request to Charge as charged by the Court.

4. That the defendants failed to establish any of the defenses interposed by any preponderance of evidence or any rule at law applicable, and the verdict was a matter of conjecture on the part of the jury.

New Jersey Court of Errors and Appeals

Frank J. Matisovsky, Joseph J. Brumberg and Max J. Schelder and Nathan Eilen, trading as Art Furniture Co.,
Plaintiffs-Appellants,
vs.
Fidelity Phenix Fire Insurance Co., Automobile Insurance Co., Springfield Fire & Marine Insurance Co., North British Mercantile Insurance Co., The State Assurance Company, Presidential Fire & Marine Insurance Co., The Baltimore American Insurance Co., National Liberty Insurance Co., and Aetna Insurance Company of Hartford, corporations,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

Joseph T. Lieblich,
Attorney and of Counsel with
Plaintiffs-Appellants.

FACTS

This appeal brings up for review a judgment rendered in favor of the defendants at the Bergen Circuit of the Supreme Court.

Max J. Schleider and Nathan Eilen were engaged in the retail furniture business in the City of Passaic where they had their show rooms and

traded as Art Furniture Co. They maintained a warehouse at 638-640 Main Avenue Clifton, (Ex. P-13) where they carried their surplus stock, the front portion of this warehouse was occupied by William L. Pfeil, as a radio studio (P-183) and for the sale of automobile tires (P-189), that adjoining this warehouse with an alley intervening was a garage (P. 129-132-185).

On May 13th, 1927, as the result of a fire in this warehouse, the furniture therein was damaged to the extent of $9000. (Loss agreement Ex. D-1, p. 220.) It appears from the record (P. 163-164) that subsequent to the first, Police Recorder Barbour of Clifton, New Jersey, and after a hearing of the arson complaint made by the Fire Chief Ritter (P. 101-102) against Eilen and Schleider, dismissed this complaint, (Record P. 106) because the evidence adduced did not warrant his holding Eilen and Schleider for the Grand Jury on this complaint.

On or about May 27th, 1927, by a written agreement, plaintiffs and defendants agreed to a loss and damage of $9000. (Ex. D-1) that Mr. Joseph J. Brumberg, one of the plaintiffs, relied upon this being an agreement on the part of the Insurance Companies to collectively pay $9000, is evidenced by Ex. D-8, pP. 224, and Ex. D-10 to D-18 inclusive.

On May 25th, 1927, the Art Furniture Co., assigned to Frank J. Matisovsky, Trustee, $2000 of the money due under the defendants' insurance policies (Ex. P-1 to 11, P. 216) and due notice given to the Insurance Companies, (Ex. P-12, P. 217).

On June 1st, the representative of the plaintiffs and defendants entered into a compromise agreement whereby the defendants agreed to pay $9000. in settlement and plaintiffs agreed to accept said sum. (Record P. 59, 60, 66, 67, 69.)

On June 1st, 1927, the Art Furniture Co., assigned to Joseph J. Brumberg, subject to the $2000 Matisovsky's assignment, all moneys due therein from defendants, (Ex. P-14, P. 217) to cover the loans which Mr. Brumberg made to Eilen & Schleider, the sum of $2500 on April 19th, 1927, (P. 75) and $1000 on May 16th, 1927 (P. 77) had endorsed $6500 of notes for Eilen & Schleider between June and September of 1927 (P. 89).

After the making of the agreement to compromise this claim by the payment of $9000, Mr. Brumberg prepared the proofs of loss (Ex. D-8 to 18 inclusive) in compliance with policy conditions (Ex. P-1, P. 212, lines 3-15) showing the respective amount to be paid by each defendant and sent same to the companies' adjuster, (Ex. D-8, P. 224) and was not apprised of any intention on the part of the companies not to pay until almost a year had elapsed (Page 80-82).

It further appears, from the record, over objection, that subsequent thereto the matter in some way reached the 1927 September Term of the Passaic County Grand Jury and Eilen and Schleider were indicted for arson (P. 95-99).

The assignments of error or grounds of appeal (P. 1 to V) set forth the legal errors committed by the Trial Court which form the basis of this appeal, all of which were prejudicial and harmful to the palintiffs and as the result thereof, a verdict was returned in favor of the defendants.

POINT I.

THE COURT ERRED IN PERMITTING THE FOLLOWING QUESTIONS TO THE WITNESS BRUMBERG:

1. "And you have either had your client the assured, execute (non-waiver agreements) or you have executed them for and on behalf of the assured, on many occasions have you not? (P. 72, line 20 to bottom and P. 73, line 1-2, Ground of Appeal No. 1.)

2. "In what cases do the companies ask for the non-waiver agreement, Mr. Brumberg?" (P. 84, line 9-10, Ground of Appeal, No. 2.)

It is to be observed that the policyholder is not obliged to sign a non-waiver agreement, there is no provision for same in the policy and the sole issue and only defense interposed is: Fraud and false swearing in th proof of loss, still the learned Trial Judge permitted both of these questions to be answered over plaintiffs' objection and exception. That this was harmful error is apparent. The rules of evidence require as a condition of admissibility that ***the evidence be relevant to*** some phase of ***the case under the pleadings.*** This evidence did not tend to prove or disprove the issue in this case, i. e., fraud and false swearing in the proof of loss, and whether the witness Brumberg had his clients in other cases execute non-waiver agreements or whether in certain cases insurance companies ask for non-waiver agreements, was immaterial and irrelevant and was injected solely for the purpose of conveying to the jury that this was an exceptional case and by the execution of

the non-waiver agreement, (Ex. D-1) the assured made the admission that this was an exceptional case.

The rule is well settled in this State, that the admission of evidence of this type is reversible error. In Park vs. Muller, 27 N. J. L., 338, it appeared:

> "A factor sued his principal to recover an alleged over-advancement of money. The factor attempted to prove that he did not guarantee the credit of the person to whom the factor sold the principal's cattle by showing that the factor was in the habit of marking a sale in his books as guaranteed when it was guaranteed. Said Justice Vredenburgh in condemning the evidence at page 351 of 27 N. J. L., 338: 'I think this evidence was illegal for several reasons, First: ***the question before the jury was, did or did not the plaintiffs guarantee to the defendants the proceeds of this particular sale?*** This could not be proved by the habit of the plaintiffs with regard to other sales, in fact, much less by proving their habit of entries in their books."

Fischman vs. The Consumer's Brewing Co., 78 N. J. L., 300, was an action:

> To recover for loss of plaintiff's horse and buggy by reason of fire originating on premises of defendant adjoining stable where plaintiff's horse and buggy were kept, the fire having originated in a pile of ashes on defendant's premises. At the trial plaintiff was permitted to show that seven years prior a fire occurred on the

same premises of defendant, the condition of the fence separating the premises having meanhwile changed." Held, Error and new trial granted. Justic Minturn speaking for the Court at page 301 of 78 N. J. L. 300, says: "The only purpose, apparently which could actuate the plaintiff in introducing this character of testimony as material to his cause is contained in the specious reasoning included in the proposition, ***propter hoc,*** the fire of 1901 originated; ***ergo post hoc,*** the fire in question originated and it requires no elaboration of argument to expose the fallacy of such a syllogism both in logic and in law."

"Relevancy of testimony, as defined by Stephen is 'that any two facts to which it is applied are so related to each other that according to the common course of events, one either taken by itself or in connection with other facts proves or renders possible the past, present or future existence of nonexistence of the other.' Steph. Dig. Ev. Art. 1." (See also Quellmalz vs. Atl. Coast Elec. Ry. Co., 94 N. J. L., 474.)

It must be apparent that whether Brumberg had his clients execute a non-waiver agreement in other cases or not had no bearing on whether in fact he had done so in this case, nor any possible bearing on any other fact in issue and was harmful error to the interest of Judge Matisovsky, the co-plaintiff; whether in certain cases insurance companies ask for non-waiver agreements and in certain others do not, raises no basis for inference in any given case where they do demand such an

agreement. The Judge allowed the first question saying the objection was general and that it might be admissible for some purpose. What? A most charitable consideration of the law and this particular question fails to reveal any purpose for which it was admissible. Credibility of the witness was the reason advanced by the Judge for allowing the second question presented under this point. How in the world the insurance companies' method of doing business as to non-waiver agreements affected the credibility of the witness is beyond my comprehension (see argument, S. C. p. 85). It did not in any way relate to Judge Matisovsky or to Brumberg or to anything they testified to. It solely referred to the insurance companies' methods of doing business in general. This Court will observe the fact that the admission of the testimony on the ground that it went to credibility led to the judicial failure to enforce the rules of evidence with consequent erroneous relaxation of the primary rules of exclusion, causing the disastrous result to the plaintiffs in this case.

That it was harmful error to the plaintiff, Judge Matisovsky, is apparent, and it is not to be supposed that the admission of this evidence was harmless error to the plaintiff Brumberg. The first question as to the witness having executed non-waiver agreements in other cases was prelminary to and paved the way for the second, as to those cases in which insurance companies demand non-waiver agreements. ***Both were used in argument to the jury that the insurance companies ask for non-waiver agreements where the assured has done something questionable*** and that since a

non-waiver agreement was asked for by the insurance companies in this case and the assured had executed the same, ***'ergo post hoc'*** to use Justice Minturn's phrase, ***the assured had done something questionable in the instant case.***

The permitting of these two questions enabled the defendants to use the fact of the execution of this agreement by the assureds and the companies against Judge Matisovsky in a prejudicial manner as heretofore demonstrated and the Jury, by virtue of the Trial Judge's charge:

> "And you sitting as Jurors, some of you for the first time, which is a change from your daily walks of life, are not justified in throwing your methods of reasoning to the winds, etc." (Case 197, line 8-20.)

and the illegal evidence admitted without the slightest differentiation as to its legal effect upon either or both of the plaintiffs, abiding by the Court's charge:

> "You_____are not justified in throwing your methods of reasoning to the winds, etc."

apparently presumed that "plaintiffs' assignors" had set this fire; or propter hoc would have appeared to testify, ***thus 'ergo post hoc' a verdict for defendants.***

Thus, for the unlawful admission of this evidence resulting in harmful error to the plaintiffs, the judgment should be reversed.

POINT 2

THE COURT ERRED IN PERMITTING THE FOLLOWING QUESTIONS TO THE WITNESS BRUMBERG:

1. "Did you read any description of the fire in

the newspaper?" (Case, p. 84, line 9-10, Ground of Appeal No. 3.)

2. "Did you know that Eilen and Schleider had been indicted by the Grand Jury of Passaic County for this fire?" (Case, p. 95, line 7-9. Ground of Appeal No. 4.)

3. "Do you know Mr. Brumberg from the account of this fire which you read in the newspaper or from what you saw at the premises, that there were quantities of gasoline around in cans and in automobile coverings, automobile tire coverings, papers and the like?" (Case, p. 99, line 28-34. Ground of Appeal No. 5.)

4. "Well, what did you read in the papers about that?" (Case, p. 100, line 10-11. Ground of Appeal No. 6.)

5. "Did you know that the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire?" (Case, p. 101 line 34 to bottom of page. Ground of Appeal No. 7.)

NOTICE OR KNOWLEDGE WERE IRRELEVANT AND NOT EVIDENTIAL AS AGAINST AN ASSIGNEE OF A CHOSE IN ACTION.

All five of these questions present certain aspects common to each. They all call for hearsay testimony and if for no other reason their admission was error. ***They do not call for what the witness knew of his own knowledge*** but for ***information acquired from reading the newspaper or from others.*** It is well known that hearsay evidence is incompetent to prove any fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. (Hirshberg vs. Robinson, 75 N. J. L., 256.) This

rule applies with full force to hearsay evidence acquired from reading a newspaper, (Johnson County Savings Bank vs. Walker, 69 Atl. 15). The trial Court gave as reason for admitting these questions that they went to show knowledge or notice to the plaintiff Brumberg of the facts as to the assureds being indicted, of the facts as to gasoline being found on the premises in cans and tire coverings, and of the fact that the Chief of Police in Clifton had made a complaint against the assureds for setting the fire and that this tended to affect the credibility of the plaintiff Brumberg, in that, he had previously testified on direct examination to making the payments for which the assignments were made to him. I suppose that the legal rule which the Trial Judge attempted to apply is the one which is laid down in Wigmore Evidence (2nd Ed.) Section 1766, thus:

> "The theory of the hearsay rule (ante Sec. 1361) is that, when a human utterance is offered to evidence the truth of the fact asserted in it, the credit of the assertion becomes the basis of our inference and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matters asserted but without reference to the truth of the matter asserted, the hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be recieved as it has any relevancy to the case; but if it is not received this is in no way due to the hearsay rule."

"For example, in a prosecution against a defaulting embezzler, Doe, it is desired to show that after leaving his employment he concealed himself and passed under a false name; here his statement, 'my name is Roe,' is not offered to evidence, that his name was in truth Roe; on the contrary it will be shown that his name was Doe; and the statement is not used as hearsay. Or, on an issue of insanity it is offered to show that the party said 'I am the Emperor of Africa'; here the utterance is not offered as evidence that he was in truth the Emperor, but, on the contrary, as circumstantially indicating his mental aberration. Again in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted the horse was only four years old, here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old; he has not offered the defendant's statement with any view to using as evidence of its truth, but just with the contrary purpose. Or (to take an illustration of Lord Abinger's) suppose on an issue of mitigation of damages in an action for battery, the defendant offers to prove that the plaintiff just before the assault provoked the defendant by asserting that he was a liar; here the defendant by no means desires the jury to take this utterance as evidence of the fact asserted; he would be much disappointed if they should accept it

> in that aspect; his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it."
>
> "The prohibition of the hearsay rule, then, does not apply to all words or utterances merely as such.
>
> "If this fundamental principal is clearly realized, its application is comparatively a simple matter. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter."

While the Trial Judge saw the rule, he failed to see all the important limitation on it which in reality is the rationale for the application or non-aplication of it. We refer to that portion of the rule which Professor Wigmore thought sufficiently important to place at the very beginning of the section.

> "If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. **IT MAY OR MAY NOT BE RECEIVED ACCORDINGLY, AS IT HAS ANY RELEVANCY TO THE CASE:**

Consider the illustrations Professor Wigmore has placed before us. The embezzler, Doe's statement 'my name is Roe', is admitted in evidence to prove Doe's concealing himself or to show an admission of guilt of the embezzlement, the vital question in the case. The insane party's statement, 'I am Emperor of Africa' is admitted in evidence to prove

his insanity, the issue in the case being his insanity. Note how Professor Wigmore is careful to state: "On an issue of insanity," so as to all of the illustrations.

I CONTEND THAT ASSIGNEE BRUMBERG'S NOTICE OR ACKNOWLEDGE OF THE FACTS AS TO EILEN AND SCHLEIDER BEING INDICTED FOR THE FIRE, ETC., WERE NOT RELEVANT TO ANY ISSUE IN THE CASE AND THEREFORE EXCLUDED BY THE LIMITATION ON THE RULE HEREIN DISCUSSED.

AN ASSIGNEE OF A NON-NEGOTIABLE CHOSE IN ACTION, TAKES WHATEVER RIGHTS HIS ASSIGNOR HAD, WHETHER HE HAS NOTICE OR KNOWLEDGE OF ANY POSSIBLE DEFENSES OR NOT. Here we note a distinction between the law of commercial paper and the legal doctrine of assignability. Thus it is well known that under the law of commercial paper a holder in due course who acquires title, without notice of any defenses, before maturity for a valuable consideration takes free of those defenses. Under the Uniform Negotiable Instruments Act one claiming the status of a holder in due course must show good faith and that he had no notice of any defect or defense which would defeat the title of the person from whom he purchases the instrument. 3 Compiled Statute, p. 3741, Section 52. But the assignee of a non-negotiable chose in action, whether he has notice or not takes merely whatever right his assignor had, subject to all defenses, whether personal or otherwise. The absence of notice will not increase his right nor will the presence of notice decrease his right. (Smith vs. Holzhauer, 67 N. J. L., 206) affirming the rule

laid down by Justice Dixon, speaking for this Court:

> "The plaintiff does not stand in the position of the innocent person. As assignee he is entitled to only the rights of his assignor, and the assignor is, in legal contemplation, implicated in the fraud of the agent so far as relates to the enforcement of the alleged contracts from which the defendants have hitherto accepted no benefit."

Alexander vs. Brogley, 63 N. J. L. 307. Furthermore, the statute giving an assignee of a chose in action the right to sue in his own name, expressly declares that the defendant in the action is entitled to set up any defense which he might have made if the suit had been brought against him by the assignor. 3 Compiled Statute. p. 4056, Section 19.

That a claim for a loss on a fire insurance policy is not a negotiable instrument but is subject to the above rule as to assignments is too apparent for argument. Authorities may be found in 26 Corpus Juris 446. ***Thus it will be seen that the question of notice to Brumberg whose claim rested on an ordinary assignment was not an issue in the case but immaterial and irrelevant.***

WHETHER AN ASSIGNEE PAYS CONSIDERATION FOR THE ASSIGNMENT OR NOT, HIS RIGHT TO SUE ON THE CHOSE IN ACTION EXISTS UNAFFECTED.

The Trial Judge intimated as part of his reason for admitting the line of questions under consideration that they would tend to negative the witness Brumberg's testimony on direct examination as to the payment he made for the assignment (p. 98,

lines 19-23). ***The question of payment or consideration for the assignment was utterly immaterial and irrelevant.*** Presence or absence of consideration does not in the least affect the assignor's right to sue (Robertson vs. Burstein, 104 N. J. L., 218) wherein our learned Chief Justice, speaking for the Supreme Court, said:

> "Assuming that no consideration was paid them by the plaintiff, that fact did not invalidate the assignments. Since the enactment of Section 19 of the Practice Act of 1903 (Compiled Statute, p. 4056) which vests in the assignee of a chose in action the unrestricted right of suing upon it in his own name, ***the assignee is entitled to maintain the action without regard to whether or not the assignor received consideration therefor,*** the defendant in the action being entitled to set up any defense which he might have if the suit had been brough against him by the assignor."

Moreover Brumberg's testimony as to the advances he had made was uncontradicted, the defendants producing no testimony on the point. (P. 75, lines 9-20; p. 77, lines 3-4; p. 89, line 10 to bottom and p. 90, lines 1-30.) While it is true the answer formally denies the assignments, still no evidence on the point was offered by the defendants. The SOLE ISSUE developed on the trial WAS the question of FRAUD AND FALSE SWEARING BY THE ASSURED (p. 46, line 30 to bottom, and p. 47, lines 1-5). Thus the question of consideration was irrelevant to this issue of fraud and false swearing in the proofs of loss.

SOME GENERAL CONSIDERATIONS

According to the testimony a complaint was made by Fire Chief Ritter before Recorder Barbour of Clifton (P. 101-102) which was apparently dismissed (P. 163-164), after which the matter was presented to a Passaic County Grand Jury and an indictment returned. This fire happened on the 13th day of May, 1927, (p. 57). The ***indictment was returned by the September 1927 Grand Jury*** which did not convene until after the fourth Tuesday in September 1927. Brumberg testified that on ***April 19th, 1927 he advanced $2500 in cash to the assureds*** (p. 57, lines 9-20) and ***$1000*** in cash on ***May 16th, 1927*** (p. 77, lines 3-4). ***He*** also ***endorsed notes*** for their accommodation ***which he had to make good*** (p. 89, line 10 to bottom and p. 90, lines 1-30). Then how could Brumberg's reading in the paper:

1. That Eilen and Schleider being indicted for the fire,
2. That quantities of gasoline were found around the premises.
3. That the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire,

become relevant, material or evidential and tend to contradict, weaken or affect the witness Brumberg's credibility as to these transactions which occurred months before he read same in the newspapers. Brumberg could not have read of the assured being indicted or of a complaint being made against him in the newspaper till some time after the indictment and apprehension of the defendants and until such things appear in the newspaper takes more time. Here a further query arises.

The way these questions were put it may as well have been as not that Brumberg read these things in the newspaper just a day before the trial. As to items like this the questions are very broad: the fact is that they are directed almost solely to the fact of the assured being indicted for the fire, for its affect upon the jury and I invite this Court's consideration of them from this point of view.

I therefore submit that all the questions now considered are hearsay, that they have no independent relevancy to any issue in the case, that they could only have been admitted to prove the facts asserted in the statements read in the newspapers and acquired elsewhere, that consequently they all come within the ban of the hearsay rule, that aside from this they were all irrelevant and immaterial, that their admission was vitally prejudicial to the interest of the plaintiffs, particularly Judge Matisovsky who in the language of the Court:

> "Mr. Lieblich—True, sir; but this newspaper reading should not be binding as to effect Mr. Matisovsky's claim.
>
> The Court—No, Mr. Matisovsky is not in this. This relates distinctly to the claim of this witness." (Page 104, line 10-20.)

and that if for no other reason than this, the judgment should be reversed.

Questions 2 and 5 considered under this point present some considerations peculiarly their own. They relate to the witness Brumberg's knowledge of Eilen and Schleider's having been indicted and of the Chief of Police in Clifton having made a complaint against them for setting the fire. *If*

Eilen and Schleider had themselves been on the stand these questions would have been improper. The fact that a witness was charged with a crime cannot be admitted to affect credibility. (Pullen vs. Pullen, 43 N. J. Eq., 136). Nor the fact that he was indicted for a crime. (Roop vs. State, 58 N. J. L., 480). Only conviction of the witness of a crime may be brought out. (State vs. Bossone, 88 N. J. L., 45, affirmed 89 N. J. L., 724.) Yet the harmful result was reached by the Trial Judge's ruling that the fact that Eilen and Schleider's being indicted for and charged with the fire was brought out on examination of Brumberg, their assignee. All this serves to emphasize how prejudicial the allowing of these questions were and why I am asking this Court to set aside this verdict.

POINT 3.

THE COURT BELOW ERRED IN STRIKING OUT AND SUSTAINING THE OBJECTIONS TO THE FOLLOWING QUESTIONS:

1. "And as far as you know was either Mr. Eilen or Mr. Schleider convicted of any crime?" (P. 111, lines 11-13. Grounds of Appeal No. 8.)

2. "Well, did you read that in any newspaper (i. e., as to Eilen and Schleider's acquittal)?" (P. 111, lines 21-22. Ground of Appeal No. 9.)

3. "Have you read in any newspaper whether Mr.— A. Schleider. Q. Schleider or Eilen were convicted of this burning of this building?" (P. 112, lines 1-14; Ground of Appeal No. 10.)

These questions I put to the witness Brumberg on redirect examination to rebut or explain the inference brought out by defendants' attorney in asking the questions on cross-examination, dis-

cussed under Point 2 of this Brief and ***the learned Trial Judge would not allow the questions.***

In allowing the questions discussed under Point 2 on cross-examination over plaintiffs' objection and exception, the learned Trial Judge had decided that this line of questioning was proper to be brought out by defendants on cross-examination; yet when plaintiffs sought to overcome the interference interjected by these questions, the Trial Judge refused to allow the same line of questioning. Our Courts have expressly held that a party who calls a witness may re-examine him to rebut or explain or avoid the effect of new matter brought out on cross-examination (State vs. McCormick, 93 N. J. L. 287; State vs. Mussikee, 101 N. J. L. 268-272; 126 Atl. 595). The questions allowed on cross-examination, they were presumably directed to the witness Brumberg's knowledge; were new matters, not brought out on direct examination and thus these questions were propounded in re-direct examination of him and I take it that the learned Trial Judge over-looked this rule and his own ruling:

> "Well, maybe, later on, when you take this man on redirect, you may be able to clear up a lot of these matters." (P. 101, lines 24-28.)

Their exclusion was prejudicial and harmful error, especially so in view of the nature of those brought out on cross exacination, sufficient to warrant this Court in a reversal of this verdict.

POINT 4.

THE COURT ERRED IN ADMITTING IN EVIDENCE THE EXEMPLIFIED COPY OF THE ORDER APPOINTING TRUSTEE IN BANKRUPTCY OF EILEN AND SCHLEIDER, SAID ORDER BEING D-4, IN EVIDENCE. (State of Case, p. 116, line 33, and Case, p. 223. Ground of Appeal No. 11.)

Eilen and Schleider were dropped as parties from the record on motion of defendant's attorney, (p. 45, lines 30-34, and p. 46, lines 1-10). Defendants had at the opening of the trial moved to amend the answer to set up a second separate defense as follows:

> "On Oct. 26, 1927, plaintiffs Max J. Schleider, Nathan Eilen, individually and trading as Art Furniture Company, were adjudged bankrupts in the United States Districct Court. By reason of the aforesaid, any cause of action of said plaintiffs vested in the said Trustee in Bankruptcy and the plaintiffs are not entitled to maintain this action." (P. 281, line 32 to bottom, and p. 30, lines 1-5 and argument thereon, pp. 30-46.)

Since it appeared that Eilen and Schleider had no interest in the suit, they having assigned all their claim to Frank J. Matisovsky, Trustee and Joseph J. Brumberg, the matter was solved by dropping their names from the record as parties, as heretofore pointed out and denying the motion to amend, (p. 46, lines 1-8).

The ***defendants' attorney admitted*** that ***he was not offering the order*** appointing Trustee in Bankruptcy ***to prove title in the trustee,*** (p. 115, lines

3-6) but the Court admitted it to affect the credibility of the witness Brumberg (p. 116, lines 9-14). The Court stated:

> "The Court—Therefore, in view of the fact that the plaintiff Brumberg has testified that when he made these payments he knew of the existence of the bankruptcy, this may be admitted on the basis, although it is collateral to affect the credit." (Case, p. 116, lines 9-14.)

The learned Trial Judge's theory in admitting the questions discussed in this brief under Point 2 was that they showed notice to the witness Brumberg. We believe we have shown this to have been legally fallacious, but applying even that theory to the evidence under consideration, ***how could Brumberg have notice of an order appointing a Trustee in Bankruptcy*** of Eilen and Schleider which was on file in the United States District Court at Trenton, ***this record is silent.***

Brumberg had testified that he knew that Eilen and Schleider went into bankruptcy, he did not know the date but it probably was about "four or five months after the loss." (P. 79, lines 9-25.) And the order appointed the Trustee itself bears him out, it bearing date October 26th, 1927 (p. 223). It will be remembered the fire occurred May 13th, 1927. (P. 57, lines 20-21.)

How the order appointing the Trustee in Bankruptcy tended to contradict Brumberg's testimony as to the payments he made to Eilen and Schleider has eluded our research, investigation, or legal reasoning. Its prejudicial effect upon the claim of Judge Matisovsky is apparent, however; in the language of Justice Minturn, the defendants' at-

torney did have a real motive for introducing the order appointing the trustee in bankruptcy as disclosed by him in his summation to the jury and reiterated in his brief on the rule to show cause before the Supreme Court in this case, in which he said at page 7, lower middle of page:

> "From the testimony it appears that they were in bad financial straits. Before the fire they were continually borrowing money for the conduct of their business, and shortly after the fire they went into bankruptcy."

Without the admission of this paper (Ex. D-4) defendants' attorney could not have disclosed to the jury, in his summation, that there was a bankruptcy of Eilen and Schleider.

Thus they used it to insinuate that assureds set the fire because as they alleged, the assureds needed money which they say was shown by the fact that assureds shortly after the fire 'went into bankruptcy.' In my argument underPoint 1, I have endeavored to demonstrate the universal requirement that evidence to be admissible must be relevant. That the fact of assureds going into bankruptcy four or five months after the fire, can form no proper basis for inferring that they set fire or swore falsely in the proof of loss is self-evident.

I respectfully submit that the admission in evidence of the order appointing the Trustee in Bankruptcy for Eilen and Schleider (Ex. D-4) was prejudicial and harmful error for which this judgment should be reversed.

POINT 5.

THE COURT ERRED IN SUSTAINING THE OBJECTION TO THE FOLLOWING QUESTION TO THE WITNESS RITTER:

> "Did you as a result of your examination, learn that Mr. Schleider had remained in his place of business in the store in the City of Passaic up to ten-thirty or eleven o'clock that evening?" (State of Case, p. 162, line 35, and p. 163, lines 1-4. Ground of Appeal No. 12.)

A reading of the evidence will disclose that the sole question presented was whether assureds had been guilty of fraud and false swearing in stating in the proofs of loss that the cause of the fire was unknown to them. ***This*** in turn ***involved the question, did the assureds set the fire?*** Now Schleider was one of the assureds. If this question were answered yes, it would have raised a presumption to show that he could not have set the fire and evidence of the fact that he was at a different place than the scene of the fire and physically unable to be there at the time of the fire. It is to be noted tha the fire occurred about half-past eleven (p. 118, lines 6-15) the Passaic store is quite some distance from the warehouse at 638-640 Main Avenue, Clifton, probably five miles. This question was therefore clearly material and defendants objection which was that it was immaterial was not well taken (p. 163, lines 5-6). The situation is analogous to the one presented by the doctrine of "Alibi" in the criminal law. "Alibi" is defined thus:

> "A term used to express that mode of defense to a criminal prosecution, where the party accused in order to prove that he

> could not have committed the crime with which he is charged offers evidence to show that he was in another place at the time; which is termed setting up an alibi."

Black's Law Dictionary (2nd Ed.), page 57. "Alibi" has been recognized as a defense to criminal prosecutions in this state time and again. (State v. DeGeralmo, 83 N. J. L. 135; State v. Juliano, 103 N. J. L. 663-680.)

The Trial Court after sustaining the specific objection made by the defendants seemed to volunteer the objection that perhaps the witness did not know the information called for. What moved the Trial Court in his offer I don't know but the fact remains that if the witness did not know, he could very well have said so. By the Trial Judge's ruling, the witness was not permitted to even attempt to answer the question.

I respectfully submit that this was harmful error warranting the reversal of the judgment below.

POINT 6.

1. THE COURT ERRED:

(a) IN REFUSING TO STRIKE OUT THE DEFENSE AS TO MISREPRESENTATION OF AMOUNT AND VALUE OF THE PROPERTY DESTROYED.

(b) THE DEFENSE AS TO MIS-REPRESENTATION OF THE COSTS OF SAID PROPERTY.

(c) THE DEFENSES AS TO THE MIS-REPRESENTATION AS TO THE AMOUNT OF DAMAGES SUSTAINED BY THE FIRE.

(d) **AND THE COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PLAINTIFFS AS TO SAID DEFENSES.** (P. 189, lines 13-14) exception taken to refusal of Court to Grant motion. (P. 192, lines 22-27, Ground of Appeal No. 15.)

2. **THE COURT ERRED IN CHARGING THE JURY:**

"—if you find any of the defenses interposed to be good against Schleider and Eilen, they of course may be used, and the present plaintiffs are subject to them." (P. 193, lines 21-24 and P. 201, lines 7-16, Ground of Appeal, No. 16.)

The defenses alluded to in subdivision one of this Point will be found in the First Separate Defense contained in the defendants' answer. (P. 25, line 33 to bottom and P. 26.) They were also asserted by defendants' counsel in open Court:

"—and our defense, our first defense here, is that there is fraud and misrepresentation on the part of the assured as to values." (State of Case, p. 33, lines 29-33.)

It is to be observed that the general rule that ***he who asserts fraud has the burden of proving it,*** has full application to cases where suit is brought on fire insurance policies. In Samaha vs. Farmers Fire Insurance Co., 84 N. J. L., 731, suit was brought by the assured on a policy of fire insurance, The defense set up by the defendant company was fraud of the assured. Justice Kalisch speaking for this Court on page 733, says:

"It is a firmly established legal rule that

where fraud is set up as a defense, the burden of proof is upon the party alleging it."

A perusal of the testimony in this case will disclose that there is not even a scintilla of evidence showing misrepresentation by Eilen and Schleider ***as to values.*** We challenge an inspection of the state of the case. ***As a matter of fact the insurance companies*** and the assureds ***executed*** the non-waiver ***agreement*** heretofore referred to in ***which it was agreed that the sound value*** of the property insured ***was $15,206 and the loss thereon $9000.*** (Ex. D-1, p. 219, 220 and particularly page 220, lines 17-25) and ***these*** identical ***figures are given by the assureds in their proofs of loss*** to the respective companies. (P. 224-229, see particularly p. 226, lines 3-12.) Thus the record by uncontradicted evidence affirmatively excludes any inference of fraud or false swearing by the assureds as to values. In this situation the ***Court was under a legal duty to strike out the defenses of mispresentation*** by the assureds ***as to values.*** Where the testimony will support but one verdict on the issue or any of the issues in the case, it becomes the duty of the Trial Court to control the Jury in its action and to direct a verdict on such issue. (Leper vs. Somers, 74 N. J. L. 57); (American Savo Co. vs. First Natl. Bank, 60 N. J. L. 417); Meyers vs. Madreperla, 68 N. J. L. 258.

We respectfully submit that the Court below erred in denying plaintiffs' motion to strike out these defenses, as it would have clarified the situation and assisted the jury in ascertaining that there was but one defense of fraud and false swearing in the proofs of loss as to the cause and origin of the fire.

We now come to subdivision B of this Point. The Trial Judge charged:

> "—if you find ***any of the defenses interposed*** to be good against Schleider and Eilen, they of course, may be used, and the present plaintiffs are subject to them." (Case, p. 193, lines 21-24.)

We do not mean to question the substantive rule of law embraced in this instruction to the effect that the assignee takes merely the rights of the assignor subject to all defenses. Indeed we have shown this to be the law under Point 2 of this Brief. What we complain of is the language employed "any of the defenses interposed," the natural tendency of which was to lead the jury to believe that the companies had succeeded in producing evidence of more than one defense which required the jury's consideration.

I have exposed under this Point, the fact that there was no testimony whatever showing misrepresentation as to values. ***The only possible defense under the evidence*** therefore, was the single one as to false swearing of the ***cause and origin of the fire.*** In causing the jury to disregard this plain fact by the portion of the instruction under consideration, the Trial Judge erred.

Considered in another light, the learned Trial Judge emphasized and aggravated the legal error he had previously committeed in refusing to strike out the defenses as to misrepresentation by the assureds as to values.

I respectfully submit that here is harmful error sufficient to warrant a reversal.

POINT 7.

THE COURT ERRED:

1. **IN CHARGING THE JURY AS FOLLOWS: "NOW FROM THE EVIDENCE IN THIS CAUSE THERE SEEMS TO BE AMPLE PROOF THAT THIS FIRE WAS OF AN INCENDIARY ORIGIN AND I THINK TO USE THE PARLANCE OF THE FIREMEN IT WAS A SET FIRE."** (Case, p. 196, lines 21-24. Exception. Case, p. 202, lines 3-4, Ground of Appeal No. 17.)
2. **IN CHARGING THE JURY AS FOLLOWS: "AS I SAID BEFORE YOU HAVE A RIGHT TO INFER THAT THIS FIRE WAS OF AN INCENDIARY ORIGIN."** Case, p. 197, lines 197, lines 2-4, Exception. Case, p. 202, lines 15-25, Ground of Appeal No. 18.)

Subdivisions 1 and 2 of this Point will be considered together. In my opinion the Trial Judge committed the same error twice in each of the instructions.

It is a maxim of our jurisprudence long consecrated by judicial precedents, "Since the memory of man runneth not to the contrary," that questions of fact are for the jury. It is their province to decide the facts. The judge's function is limited to deciding questions of law with certain exceptions not material to the case. Indeed the "raison d'etre" of the jury is that it is to decide the facts. I respectfully submit that ***both insructions*** herein considered ***are violative of this fundamental principle of law.***

Undoubdted'y the Trial Judge may in his charge comment on the testimony. (Reinfeld vs. Laden,

98 L. 709) but this right like any other has its limitations, not perhaps hard and fast but existent nevertheless. It will be noted that under the evidence the sole defense and question presented was the false swearing of the assureds in the proofs of loss as to the cause and origin of the fire. The testimony on this point was solely that of the firemen who arrived on the scene of the fire in answer to an alarm after the fire had started (p. 117-180). Their testimony was simply to the effect that they came to the scene of the fire, found the assured's warehouse burning and that in the warehouse were excelsior, loose paper and tire covers filled with excelsior smelling of gasoline, and upon the adjoining premises of the Radio Shop a five gallon can, partly filled with gasoline. (See for instance Chief Sweeney's testimony, case, p. 117-137). The rest of the testimony given by other firemen is largely cumulative. Nowhere is there testimony that anyone saw the fire set, if it were set at all, and nowhere is there any testimony stating who, if anyone, at all set the fire. One searches the state of the case in vain for testimony of this kind. Chief Sweeney did testify that to his mind it was 'a set fire.' (Case, p. 125, lines 26-28.) Clearly this was a mere guess or conclusion. ***This was the question the jury was to decide,*** i. e., to determine the issue of fraud and false swearing. In this state of the evidence, the Trial Judge's instructions herein considered were legal error. The defendant's defense that assurds swore falsely as to the cause and origin of the fire involves two processes of thought.

1. The assureds swore the cause and origin of the fire were unknown to them.

2. They set the fire themselves and therefore were guilty of false swearing.

The proposition involved in premise number one was undisputed and is a part of the proof of loss (p. 226, lines 1-2). The defendants' defense therefore really was that the assureds set the fire themselves. Our Courts have declared that where in a suit on a fire insurance policy the defense is that the assured set the fire himself, the defense must be established by ***clear and satisfactory proof.*** (American Mutual Ins. Co. vs. Anderson, 33 N. J. L. 151.) The question of fraud and false swearing is for the jury. This is the ruling of the Supreme Court of the United States. (Insurance Companies vs. Weide, 14 Wall, 375) and the rule has been adopted in this state. (Carson vs. Jersey City Ins. Co., 43 N. J. L. 300; affirmed in Ct. of Err. & App. 44 N. J. L. 210) expressly approving of the doctrine of Insurance Companies vs. Weide, supra.) So far does this rule go that even where there is a material discrepancy between the sworn proofs of loss and the testimony of the assured on the trial, the question is nevertheless for the jury, for the testimony at the trial may be false and only false swearing in preliminary matters will avoid the policy. (Insurance Companies vs. Weide, supra.) Therefore it will be seen that in ***directing and instructing the jury that this was a set fire and that the inference was that it was of incendiary origin,*** the Court was itself judging the only question involved in the case and directing a verdict. True the Court further on in his charge said that it was necessary to find that

the assureds set the fire (p. 196, lines 25-28); nevertheless, still further on he stated:

> "As I said before, you have a right to infer that this fire was of an incendiary origin." (Case, p. 197, lines 3-4.)

Then to leave no room for doubt as to what he meant, he continued as follows:

> "There is no direct evidence as to who committed this act, and at best, we must draw our conclusions; in other words, we must determine as best we can, if we can at all, ***who set this fire and you sitting as jurors, some of you for the first time, which is a change from your daily walks of life, are not justified in throwing your methods of reasoning to the wind.***"

Plainly, therefore, the Court directed the jury that the assureds set the fire. Since there was no dispute about the assureds having sworn that the cause of the fire was unknown to them, the instruction directed the jury to bring in a verdict for the defendants in violation of the rules of law above stated. This Court declared in McCoy vs. Milville Traction Co. at pae 511 of 83 N. J. L., 508:

> "To justify a Trial Judge, in his charge in deciding a question against the plaintiff, the proofs must be in such a state that no inference of fact upon which the legal question depends can legitimately be drawn in his favor."

And in Nolan vs. Bridgeton Traction Co., 74 N. J. L., 559, this Court held that where different inferences may be drawn, whether ***from controverted or uncontroverted testimony,*** the question is for the jury. (See to the same effect Brower vs. Public Service Corp., 74 N. J. L. 193.)

The Trial Judge was not commenting upon the evidence but was stating the result or conclusion to be reached from it. It will no doubt be said that later on in his charge, the Court said to the jury:

> "I might say that you are the sole judges of the evidence and as such, you have a right to determine the credibility of the testimony that has been offered for your consideration." (P. 197, lines 19-23.)

and that therefore, no error was committeed; but, this is an illusion. For the Trial Court in one breath, in effect, to say:

I direct you that this fire was set by the assureds with the conclusion of false swearing in the proofs of loss, following as of course, and then for him in the next breath to say to them:

> "You are to judge from the evidence if there was false swearing."

is a hallow mockery of the rule that the jury is to decide the facts. Moreover, viewing the matter in its most liberal aspect, we have two inconsistent instructions and in that situation our learned Chancellor, speaking for this Court in Brown vs. Public Service Ry. Co. at page 754 of 98 N. J. L., 747, says:

> "Where two distinct propositions are charged, one correct and the other erroneous, the jury cannot decide which is right, and there is consequently reversible error in the record." (See Collins vs. Central Railroad Co. of N. J., 90 N. J. L., 593.)

Even applying the rule that a charge is to be considered as a whole, harmful error was committed in that, these two propositions gripped the

jury into a vise, without knowledge or experience to pass upon the issue in this case; that from the language and delivery of this charge as a whole, a verdict for the defendants followed as night follows the day and that by the charge the jury apparently considering the Trial Court's superior mentality, experience and knowledge of facts, and they:

> "Sitting as jurors, some of you for the first time, which is a change from your daily walks of life, are not justified in throwing your methods of reasoning to the winds; in other words, your transition to the seat of judgment of facts should in no wise change your mental operations. You have a right to reason the problem involved here as you would reason any other problem that confronts you in your everyday life." (Case, p. 197, lines 8-15.)

were so overcome and carried away by this erroneous charge that they apparently accepted the Trial Court's direction, and not their own deliberations based upon the evidence adduced.

I respectfully submit that the charge was erroneous and worked harmful error to plaintiffs, sufficient to warrant a reversal of the judgment.

Respectfully submitted,

JOSEPH T. LIEBLICH,

Of Counsel with Plaintiff-Appellants.

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New Jersey Court of Errors and Appeals

FRANK J. MATISOVSKY, JOSEPH J. BRUMBERG and MAX J. SCHLEIDER AND NATHAN EILEN, trading as ART FURNITURE COMPANY, Plaintiffs-Appellants, *vs.* FIDELITY PHENIX FIRE INSURANCE CO., AUTOMOBILE INSURANCE CO., SPRINGFIELD FIRE & MARINE INSURANCE CO., NORTH BRITISH & MERCANTILE INSURANCE COMPANY, THE STATE ASSURANCE COMPANY, THE COMMONWEALTH INSURANCE COMPANY, THE BALTIMORE AMERICAN INSURANCE COMPANY, NATIONAL LIBERTY INSURANCE COMPANY and AETNA INSURANCE COMPANY, Defendants-Appellees.	Action at Law. On Appeal from the Supreme Court.

BRIEF FOR DEFENDANTS-APPELLEES.

Statement of the Case.

Defendants issued policies of insurance totaling $23,000 to Max J. Schleider and Nathan Eilen, trading as Art Furniture Company, covering them against loss by fire to furniture located in a warehouse in Clifton, New Jersey.

On the night of May 13, 1927, a fire occurred damaging the insured furniture. The uncontradicted testimony established quite clearly that the fire was of incendiary origin. The firemen reached the burning building at 11:59 p. m. and shortly

thereafter extinguished the flames. Fire Chief Ritter and Deputy Chief Sweeney examined the warehouse and found unquestionable proof that the fire was "set". Seven tire covers filled with gasoline were found scattered over the premises (S. C., p. 119, l. 5 to p. 120, l. 25; p. 141, l. 25 to p. 142, l. 22). Numerous paper shopping bags filled with gasoline and excelsior were found and excelsior was strewn about the place (S. C., p. 141, l. 25 to p. 142, l. 22). A five-gallon can of gasoline was found three feet from the door of assureds' warehouse (S. C., p. 120, ll. 20-25). In the opinion of the firemen it was a set fire (S. C., p. 125, ll. 25-30), and it is difficult to see how any reasonable person could reach any other conclusion.

The undisputed evidence displayed that, after the fire assureds had offered a bribe to have charges, which had been preferred against them, withdrawn. Fire Chief Ritter had filed a complaint against assureds and they were subsequently indicted by the Grand Jury. After the complaint was filed, assureds invited Chief Ritter to their store in Passaic and offered to give him whatever he needed at home if he would drop his charges against them (S. C., pp. 168-169).

After the fire, assureds and defendants entered into a non-waiver agreement whereby it was agreed that the amount of damage was $9,000 and the total value of the insured furniture was $15,000. This agreement is on its face made subject to all of the terms and conditions of the policies. It is expressly stated to be merely an ascertainment of the amount of damage and to, in no manner, affect the liability of defendants (Ex. D-1, pp. 219-220). Contrary to the assertions contained in the brief of appellants there was no "settlement" or "compromise".

Plaintiffs' testimony showed that before the fire assureds were in bad financial straits, and it is admitted that shortly after the fire they went into bankruptcy (S. C., pp. 76-79).

Assureds filed a sworn proof of loss in which they stated that the origin of the fire was unknown to them (S. C., pp. 181-182; Ex. D-10, p. 224).

This action was brought by assureds and Brumberg and Matisovsky, as assignees. By consent of counsel the assureds, Schleider and Eilen, were nonsuited.

At the trial neither of the assureds testified. The testimony showed that Schleider lived in Brooklyn and that Eilen lived in Garfield, N. J., but plaintiffs Brumberg and Matisovsky failed to produce them as witnesses and failed to take their depositions. No excuse was furnished by plaintiffs Brumberg and Matisovsky other than that Eilen at the date of the trial was "away on a trip" (S. C., p. 110, l. 22).

On the foregoing facts the Court submitted the case to the jury on the issue of whether assureds had intentionally caused the fire. If they had, it is of course evident that assureds swore falsely when they stated that the cause of the fire was unknown to them. The jury returned a general verdict for defendants.

Plaintiffs obtained a rule to show cause, reserving their exceptions. In their brief submitted to the Supreme Court and at the argument, plaintiffs urged upon that Court that the Trial Court had committed errors in its rulings and charge.

The Supreme Court in its opinion expressly considered and overruled plaintiffs' contentions and discharged the rule to show cause. Plaintiffs in their brief, nevertheless, again urge the identical points disposed of by the Supreme Court in its opinion.

ARGUMENT.

POINT I.

Grounds of appeal numbers 1 to 7 inclusive should be dismissed; the Trial Court committed no error in permitting the questions set forth in said grounds.

Points 1 and 2 of plaintiffs' brief, based on grounds of appeal 1 to 7 inclusive, are devoted to a discussion of the cross-examination of witness Brumberg. On his direct examination Brumberg testified in response to questioning by his counsel that he advanced $6,989.53 to assureds by reason of an assignment to him of assureds' claim. On cross-examination, defendants attacked the credibility of this testimony by the line of questions set forth under Points 1 and 2 of plaintiffs' brief.

Before considering the points raised by plaintiffs in their brief, we wish to note that those points may not properly be considered and that grounds of appeal numbers 1 to 7 inclusive should accordingly be dismissed.

Plaintiffs argued in their brief submitted to the Supreme Court and by oral argument that the questions referred to in grounds 1 to 7 inclusive of their grounds of appeal were objectionable. The Supreme Court in its opinion dismissing plaintiffs' rule to show cause expressly decided that the cross-examination of Brumberg, now objected to, was proper. The Court said:

> "The cross examination of the assignee, Joseph J. Brumberg, as to his acquaintance with the suspicious circumstances before he took his assignment seems pertinent and not prejudicial. The examination was not to prove the fact but to prove the assignee's

state of mind at the time he advanced money for the assignment."

Matisovsky v. *Fidelity Phenix Fire Insurance Company, et als.*, 7 N. J. Misc. 907, 147 Atl. 504 (Sup. Ct. 1929).

It is well settled that where, as in our case, the admissibility of evidence is argued on a rule to show cause and the Supreme Court expressly overrules the objections, the alleged errors will not be considered on appeal.

El Mora Realty Co. v. *Griffin*, 2 N. J. Misc. 1187, 126 Atl. 639 (Sup. Ct. 1924).

"When a party argues under a rule the questions reserved in the rule, his action is a waiver of the reservations made in the rule. His action will be deemed an abandonment of the exceptions reserved."

Faragasso v. *Introcaso*, 98 N. J. L. 538, 121 Atl. 773 (Sup. Ct. 1923).

"For this court to hear and determine the validity of the exceptions reserved, after they have been considered and determined by the circuit court on the rule to show cause, would be, in effect, to review the action of that court in discharging the rule. That such judicial action by the trial court is not directly reviewable on error has been so frequently declared by our courts that citation of authority for the proposition is unnecessary. Can it be thus reviewed by indirection?

The design of the party applying for the rule, in asking a reservation of exceptions, and of the trial court, in directing that they be reserved, as is pointed out in the case of *Ashhurst* v. *Atlantic Coast Elec. R. R. Co.*, 66 N. J. Law, 16, 48 Atl. 999, is that the questions raised by the exceptions should be heard and decided in a court of review; and it was, consequently, there held that, so long as the reservations stand, the questions presented

thereby should not be considered and passed upon in determining whether a rule to show cause should be made aboslute or should be discharged. The case of *Holler* v. *Ross,* 67 N. J. Law, 60, 50 Atl. 342, is to the same effect; the court there declaring that the principle was applicable to cases arising in our circuit courts, as well as to those arising in this court.

But, as was indicated in *Gregutis* v. *Steinberg* (N. J. Sup.), 116 Atl. 780 (not yet officially reported), the prosecutor of the rule may afterward abandon his design and waive the reservation of his exceptions—with the permission, of course, of the court allowing the rule—if he considers it advisable to do so; and may submit to that court the consideration and determination of the matters involved in the exceptions, instead of presenting them to the court of review. When, therefore, the prosecutor of the rule, with full knowledge that, so long as the reservation of exceptions stands, the matters embraced therein will not be permitted to be considered and decided by the trial court upon the return of the rule, argues those matters, and the trial court, with the same knowledge, hears the argument and considers and decides them, the necessary implication is that the purpose of having these matters decided by a court of review has been abandoned by the prosecutor, with the approval of the court, in order that the rule to show cause should be dealt with as if the same had been originally allowed without any exceptions reserved.

The prosecutors in the present case having elected to abandon their exceptions, and the trial court having ratified that election, their right of appeal was thereby destroyed, and the appeal sued out by them must therefore be dismissed."

Accord: *Catterall* v. *Otis Elevator Co.,* 103 N. J. L. 381, 135 Atl. 865 (E. & A., 1927); *Goekel* v. *Erie R. R. Co.,* 100 N. J. L. 279, 126 Atl. 446 (E. & A., 1924); *Margolies* v. *Goldberg,* 101 N. J. L. 75, 127 Atl. 271 (E. & A., 1925).

In our case the Supreme Court passed upon the questions now urged by plaintiffs and that determination is *res judicata.* Accordingly, it is clear that grounds 1 to 7 inclusive, of plaintiffs' grounds of appeal should be dismissed.

Grounds 1 to 7 inclusive of the grounds of appeal should be dismissed for the additional reason that they do not set forth the answers to the questions now objected to by plaintiffs.

In *Benson* v. *Brady,* 5 N. J. Misc. 13, 135 Atl. 343 (Sup. Ct. 1926) the Court said:

> "The alleged illegal testimony objected to—question and answer—should be embodied in the reason. This is the settled legal rule relating to the stating of a ground of appeal in a case upon appeal."

Nor do they state that the questions were permitted above objection. See *Bowen* v. *State Highway Commission,* 5 N. J. Misc. 10, 11, 135 Atl. 340, 341, (Sup. Ct. 1926).

Assuming, however, that this Court will consider Points 1 and 2 of plaintiff's brief, it is evident that the objections therein contained are without merit.

At the trial of the case, assureds prosecuted no claim, but recovery was sought by plaintiffs Brumberg and Matisovsky as assignees. On direct examination, in response to questions asked by his counsel, Brumberg testified that he had received an assignment of assureds' claim against defendants and had advanced $6,989.53 in reliance upon said claim (S. C., p. 65, ll. 25-30). He testified:

> "Q. Now, Mr. Brumberg, how much money have you advanced to the Art Furniture Company by reason of that assignment of June 1st? A. Six thousand nine hundred and eighty nine, fifty three" (S. C., p. 65, ll. 25-30).

In the answers filed on behalf of defendants, they denied the validity of the assignments to Brumberg and Matisovsky (S. C., p. 24, ll. 20-28). Defendants attacked the validity, consideration and *bona fides* of plaintiff Brumberg's assignment. This they had an unquestioned right to do for the purpose of showing that assureds or their trustee in bankruptcy were the real parties in interest. And all through the trial counsel for appellants admitted that defendants had a right to attack the credibility of Brumberg's testimony as to the alleged assignment and payment of money in reliance thereon. In a colloquy between counsel for plaintiffs and the Court the following was said:

> "Mr. Lieblich: * * * Well, under the facts in this case, which is the test, before your Honor, I would say, if the positions were reversed that here is a man comes in and says 'I did so and so, I advanced $2,500'. He has his check to prove it. 'I advanced a thousand dollars.' He has his check to prove it and in addition to that 'I endorsed certain notes.' Now having said that, the attack could be laid to affect his credibility as to whether or not he did those things and the mere fact that he may have read in the paper that Joe Lieblich was about to be indicted or Art Vanderbilt was about to be indicted——
>
> The Court: That is just the point. He has testified he has advanced money or checks, he obligated himself by becoming an endorser. Now, that is his statement. *Now, the jury have a right to determine the truth of that.*
>
> Mr. Lieblich: *I will grant you that, Sir.*" (S. C., p. 97, l. 23 to p. 98, l. 10).

Furthermore, the law of this State is well settled that as to *all* matters testified to on direct examination by plaintiff Brumberg, defendant had the right to cross-examine. Wigmore states that

to be the New Jersey rule and the adjudications in this state fully support his statement.

1 Wigmore, Evidence—p. 162, s. 15.

In *State* v. *Engsberg,* 94 N. J. L. 464, 466, 110 Atl. 918 (1920) this Court said:

> "Where, as here, no motion is made to strike out irrelevant testimony given by a witness on his direct examination, opposing counsel have the right to cross-examine him on it."

In *Ulbright* v. *Onist Baking Co.,* 3 N. J. Misc. 410, 128 Atl. 577 (1925) our Supreme Court held to the same effect. The Court said:

> "Surely after having introduced evidence as to a run away horse the plaintiff cannot be deprived of a right to cross-examine on the same subject. *Bahrey* v. *Poniatishin,* 95 N. J. L. 128, 112 Atl. 481."

In *Bahrey* v. *Poniatishin,* 95 N. J. L. 128, 112 Atl. 481 (E. & A. 1921) the Court said:

> "The defendant cannot now object or protest at the fact that irrelevant matter has crept into the case where he first introduced it * * *."

In our case it is clear that the cross-examination as to the assignment and the consideration therefor was highly material and relevant. However, even if that testimony were not material plaintiffs could not object where, as in our case, the testimony was brought out by them on direct examination by their counsel.

We wish to now consider the individual questions objected to by plaintiffs in their brief. Under Point 1 of plaintiffs' brief, objection is made to the questions (1) as to whether Brumberg has exe-

cuted non-waiver agreements for assureds in the past and (2) as to what cases the companies ask for non-waiver agreements. The purpose and admissibility of these questions is quite apparent. Brumberg testified that he had advanced about $7,000 for a $7,000 interest in a fire claim. The truth of that statement was being attacked. If it could be shown that Brumberg *knew* that the companies questioned the validity of the claim and accordingly would resist payment that would cast considerable doubt on the truth of his testimony. For that purpose, Brumberg was asked, without objection, whether his execution in this case of a non-waiver agreement conveyed to him the information that the companies were questioning the validity of this loss (S. C., p. 83, ll. 10-15). He answered that it did not (S. C., p. 83, l. 15). Of course, defendants were not bound by his mere statement that his execution of the non-waiver agreement did not inform him of the attitude of the companies. They had the right to bring out that as a public adjuster of twenty-five years experience Brumberg would know that non-waiver agreements were asked for only when the loss was questioned.

For that purpose the questions referred to under Point 1 of plaintiffs' brief were asked and they were highly material towards contradicting Brumberg's earlier denial. That the questions were admitted solely for the purpose of attacking the credibility of Brumberg's testimony as to the assignment and the consideration therefor is evident from the State of Case (S. C., p. 84, ll. 15-20) and is admitted in plaintiffs' brief. It is clear, therefore, that the questions referred to under Point 1 of plaintiff's brief were proper.

The only objection made to the question as to whether Brumberg had executed non-waiver agreements (and on this appeal plaintiffs are con-

fined to the objection made below. *Saffran* v. *Grillo,* 4 N. J. Misc. 618, 133 Atl. 772 (Sup. Ct. 1926); *Wittke* v. *Wittke,* 102 N. J. L. 176, 130 Atl. 598 (E. & A. 1925)) was a general objection based on immateriality. That question was clearly material as a preliminary question to those affecting Brumberg's credibility. Furthermore, the pleadings raised an issue as to the meaning of the non-waiver agreement (S. C., p. 27). In plaintiffs' reply they stated that the non-waiver agreement was a "compromise" and that assertion is again made in plaintiffs' brief. Clearly the question was material on that issue.

Even if the question as to Brumberg's execution of non-waiver agreements were improper, no harm has been done to plaintiffs. That question and answer merely stated that Brumberg had in the past caused assureds to execute non-waiver agreements. How possibly could that information prejudice the jury as to the issues of the case. In the absence of a showing of prejudice, no ground for reversal exists. *In re Board of Recreation Com'rs.,* 103 N. J. L. 419, 136 Atl. 176, 178 (E. & A. 1927).

The sole objection made to the question as to what cases companies ask for non-waiver agreements was that it was immaterial. Brumberg had testified that his execution of a non-waiver did not indicate to him that the loss was being questioned. Certainly, an admission by him that he knew, as a public adjuster with twenty-five years experience, that companies ask for non-waivers only when a claim is questioned would be highly pertinent and material as affecting the credibility of his earlier testimony. And it would also be material as indicating that Brumberg did know from the execution of the waiver in this case that the loss was being questioned. If he did know that, then it would be for the jury to ascertain

whether his testimony that he paid $7,000 for a $7,000 interest in a fire claim, which he knew would be disputed, was truthful.

Again, the question was obviously material within the issue raised by plaintiffs' reply and defendants' rejoinder as to whether the non-waiver agreement constituted a "compromise". Lastly, it is difficult to see how the evidence that Brumberg knew that non-waiver agreements were asked for when claims were questioned could possibly prejudice plaintiffs.

Plaintiffs, in their brief, refer to *Fischman* v. *The Consumers Brewing Co.,* 78 N. J. L. 300, and *Park* v. *Miller,* 27 N. J. L. 338, for the proposition that testimony as to what defendant did several years prior to the time in issue is not evidential. It is quite obvious that those cases have no bearing on ours. In our case, Brumberg was asked whether the signing of the non-waiver in this case did not convey to him that defendants were questioning this claim. That question was admittedly material and no objection was made thereto. Brumberg testified that it did not and for the purpose of impeaching that testimony the questions, now objected to were asked, in order to display that he must have known the loss was questioned. The evidence was not admitted to prove that the claims were, in fact, doubtful and plaintiffs' brief is in error when it states that the evidence was introduced to show that "assured had done something questionable in the instant case".

As expressed by the Supreme Court in its opinion:

> "The examination was not to prove the fact but to prove the assignee's state of mind at the time he advanced money for the assignment." *Matisovsky* v. *Fidelity Phenix Fire Insurance Company, et al.,* 7 N. J. Misc. 907, 147 Atl. 504 (Sup. Ct., 1929).

Plaintiffs' brief alleges that defendants argued before the jury that the non-waiver agreement was evidence that assured did something questionable. That is not so; and since the argument before the jury is not in the State of Case this statement is improperly inserted in their brief.

The first question objected to under Point 2 of plaintiffs' brief is, "Did you read any description of the fire in the newspaper?" (S. C., p. 95, ll. 5-7.)

This question was merely preliminary to those to be hereinafter considered. The answer to this question was, "yes", and without more could not possibly be prejudicial to plaintiffs. Plaintiffs' only objection to the question was that it was immaterial. That it was highly material for the purposes for which it was admitted will be shown in our consideration of the subsequent questions objected to.

The second question referred to under Point 2 of plaintiffs' brief is: "Did you know that Eilen and Schleider had been indicted by the Grand Jury of Passaic County for this fire?" (S. C., p. 95, ll. 7-10.) To this question the witness answered that he did (S. C., p. 99, l. 4). The objection to this question was that it was immaterial, which objection was later changed to the objection that it was not the best evidence (S. C., p. 98, ll. 32-35). Here again it is clear that the evidence was highly material for the purpose for which it was offered. Brumberg had testified that he had advanced about $7,000 for a $7,000 claim. Defendants clearly had a right to cross-examine him as to the truth of his testimony. It is difficult for us to imagine more pertinent testimony to discredit Brumberg's assertions than evidence that he knew that assureds were indicted for setting the fire which gave rise to their claim against defendants. It would be for the jury to decide

whether they would believe that a man of twenty-five years experience would advance $7,000 on the faith of a $7,000 interest in a fire claim when he knew that assureds were indicted for setting the fire which gave rise to the claim.

The objection that Brumberg's statement that he knew assureds were indicted was not the best evidence of the fact that Brumberg *knew* they were indicted was absurd. It has been abandoned in plaintiffs' brief. Plaintiffs' brief raises the objection that the evidence as to Brumberg's knowledge as to the indictment and the evidence to be hereinafter considered was hearsay. Since plaintiffs objected to the question as to Brumberg's knowledge of the indictment only on the ground of immateriality they cannot now raise the objection that it was hearsay. But assuming the objection is properly raised here, it is clear that plaintiffs' objection is without foundation.

The evidence that Brumberg knew that assureds were indicted was not admitted to prove that assureds had set the fire. It was admitted to show only that Brumberg knew assureds were indicted and to present that knowledge of Brumberg to the jury to enable it to decide whether despite that knowledge he had advanced $7,000 on the faith of a $7,000 interest in assureds' claim against defendants.

That it was only admitted for that purpose was made very clear to the jury by the Court in its charge and by the Court's discussion with counsel in the jury's presence. The Court in its charge said:

> "If these men were actually tried and found guilty of this crime of arson, that, itself would not be conclusive on this case; even if they were convicted and they appeared as witnesses that could be shown only to affect their credit" (S. C., p. 196).

In its discussion with counsel the Court stated that the evidence as to plaintiffs' knowledge of the newspaper articles and the indictment were admitted only to show that plaintiff Brumberg *knew* those facts and accordingly it was for the jury to decide whether he would pay the sums he said he did despite that knowledge (S. C., pp. 93-99).

To quote the Court's remarks:

> "Q. Did you read any description of the fire in the newspapers?
>
> Mr. Lieblich: I object. It is immaterial as to what he read in the newspapers. What has that to do with the case?
>
> The Court: Not very much with the case, but it has something to do with the witness.
>
> Mr. Lieblich: Well, I submit most respectfully that I object to the question as immaterial and irrelevant.
>
> The Court: As I see it, this witness has said that he advanced certain moneys, that serves as a basis of consideration for the assignment.
>
> Mr. Lieblich: And his endorsing notes, too.
>
> The Court: In other words, he was asked obligations for which he justifies the assignment.
>
> Mr. Lieblich: Yes.
>
> The Court: Now, counsel has a right to go into matters to this man's knowledge, and then the jury can determine, considering all of the circumstances, whether or not what this witness is saying is true. In other words, if the man said he made advances of money under certain circumstances, the jury has a right to say and to accept that as true or to reject it, and if he did things under certain conditions, that all goes in helping the jury arrive as to the truth.
>
> Mr. Lieblich: But your Honor, and I know that newspaper articles——
>
> The Court: No; that is not the point. In other words, if I make a statement to you,

> Mr. Lieblich, whether it is true or not, and what I have told you operates on your mind and justifies your course of conduct, so far as you are concerned, it is immaterial whether what I said to you is true; you have acted upon what I have said'' (S. C., p. 93, l. 22 to p. 94, l. 30).

An understanding of the hearsay rule shows that the foregoing evidence was not objectionable as hearsay. Wigmore very clearly illustrates why the testimony in question is not objectionable when admitted for the purpose this testimony was admitted: *3 Wigmore Evidence* (2d Ed.) Sec. 1766.

> ''The theory of the Hearsay rule (*Ante,* Sec. 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy to the case; but if it is not received, this is in no way due to the Hearsay rule.
>
> For example, in a prosecution against a defaulting embezzler Doe, it is desired to show that, after leaving his employment, he concealed himself and passed under a false name; here his statement, 'My name is Roe', is not offered to evidence that his name was in truth Roe; on the contrary, it will be shown that his name was Doe; and the statement is not used as hearsay. Or, on an issue of insanity, it is offered to show that the party said 'I am the Emperor of Africa'; here the utterance is

not offered as evidence that he was in truth the Emperor, but, on the contrary, as circumstantially indicating his mental aberration. Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old, here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old; he has not offered the defendant's statement with any view to using as evidence of its truth, but with just the contrary purpose. Or (to take an illustration of Lord Abinger's) suppose, on an issue of mitigation of damages in an action for battery, the defendant offers to prove that the plaintiff, just before the assault, provoked the defendant by asserting that he was a liar; here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted; he would be much disappointed if they should accept it in that aspect; his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it.

The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such.* If this fundamental principle is clearly realized, its application is comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted.*"

Our Court of Errors and Appeals has fully recognized the validity of the above quoted remarks. *Rathbun* v. *Brancatella,* 93 N. J. L. 222, 107 Atl. 279 (E. & A. 1919).

The cross-examination of Brumberg inquired as to Brumberg's *knowledge.* His testimony on the witness stand, while subject to examination by his own counsel, as to his own knowledge certainly is not hearsay, as Wigmore amply illustrates.

The third question referred to under Point 2 of plaintiffs' brief is: "Do you know, Mr. Brumberg, from the accounts of the fire which you read in the newspapers or from what you saw in the premises that there were quantities of gasoline around in cans and in automobile coverings, automobile tire coverings, papers and the like" (S. C., p. 99, ll. 25, 35). There was no exception taken to the overruling of the objection to this question. Accordingly, the admissibility of this question will not be considered by this Court. *Cordery* v. *American Ry. Express Co.,* 104 N. J. L. 434, 140 Atl. 416 (E. & A. 1928):

> "To both questions objection was made but no exception was taken to the ruling on either. Objection alone to the admission of evidence is not sufficient on which to base a ground of appeal alleging error in the subsequent ruling on such objection. *Kargman* v. *Carlo,* 85 N. J. L. 636, 90 A. 292; *Union Garage Co.* v. *Wilner,* 101 N. J. L. 362, 128 A. 161."

Secondly, the question was not answered and accordingly could not have prejudiced plaintiffs. Thirdly, the question could not have prejudiced plaintiffs for the uncontradicted and overwhelming testimony in the case established, as a fact, the presence on the premises of the articles mentioned in the question. Lastly, the only objection made to the question was that it was hearsay (S. C., p. 100, l. 2). The invalidity of that objection has already been shown.

The next question referred to under Point 2 of plaintiffs' brief is:

> "Well what did you read in the paper about that?" (S. C., p. 100, ll. 10-11).

Here again the witness did not answer the question. He said, "I don't remember" (S. C., p. 100, l. 21). How possibly could that prejudice plain-

tiffs? The objections to this question were that the evidence it called for was not the best evidence, was immaterial and was hearsay. The question was asked for the purpose of discrediting Brumberg's statement that he had obtained an assignment of a $7,000 interest in this claim and had paid $7,000 for it. It is obvious that evidence to the effect that plaintiff *knew* that the papers stated that gasoline, etc., was found would discredit his testimony that he subsequently advanced money for the claim. Accordingly, it was undoubtedly material. The objection that it was hearsay has already been considered. The objection that Brumberg's testimony as to what he read would not be the best evidence has been abandoned in plaintiffs' brief.

The last question referred to under Point 2 of plaintiffs' brief is:

> "Did you know that the Chief of Police in Clifton had made a complaint against Eilen and Schleider for setting this fire?"

The only objection made to this question was that it was not the best evidence since the complaint could be obtained (S. C., p. 102, l. 1). Accordingly, all other possible objections were waived. *State* v. *Krupin,* 101 N. J. L. 228, 127 Atl. 270 (E. & A. 1925); *Del Rosso* v. *United States Trucking Corp.,* 7 N. J. Misc. 967, 147 Atl. 641 (Sup. Ct. 1929).

The objection that the question called for testimony which was not the best evidence is abandoned in plaintiffs' brief and is so utterly without foundation as to hardly warrant consideration. Certainly the best evidence as to Brumberg's knowledge was obtained by asking him whether he knew of the complaint. The complaint itself would be of no value in ascertaining whether Brumberg knew of it. Furthermore, in all events, the objection was invalid under the doctrine that it has no

application to collateral matters. *Hoisting Machinery Co.* v. *Goeller Iron Works,* 84 N. J. L. 504 (Sup. Ct. 1913); *Hartman* v. *Dobar,* 80 N. J. L. 250 (Sup. Ct. 1910).

Finally, the question was entirely proper for the reasons stated in our discussion of the other questions objected to.

Plaintiffs cite *Robertson* v. *Burstein,* 104 N. J. L. 218 (Sup. Ct. 1928) reversed in 7 N. J. A. R. 836, 146 Atl. 355 (E. & A. 1929) for the proposition that an assignee may bring an action even though he pays no consideration for his assignment. Without considering the validity of that proposition, it is clear that it has no bearing on our case. First, defendants attacked the validity, consideration and *bona fides* of the assignment and certainly the *Robertson* case does not in any manner deny their right to do so.

Secondly, Brumberg on his direct examination testified that he paid approximately $7,000 upon the faith of this claim. Under the well established law of this State defendants would have the right to cross-examine on that subject even if it were immaterial.

> *State* v. *Engsberg,* 94 N. J. L. 464, 486, 110 Atl. 918 (E. & A. 1920); *Ulbright* v. *Onist Baking Co.,* 3 N. J. Misc. 410, 128 Atl. 577 (Sup. Ct. 1925).

Lastly, during the trial below plaintiffs admitted that defendants had the right to attack the credibility of Brumberg's testimony as to the assignment and the money paid therefor (S. C., p. 98, ll. 3-10) and they cannot be heard to deny that now.

> *Del Rosso* v. *United States Trucking Corp.,* 7 N. J. Misc. 967, 147 Atl. 641 (Sup. Ct. 1929); *State* v. *Krupin,* 101 N. J. L. 228, 127 Atl. 270 (E. & A. 1925).

In plaintiffs' brief it is stated that the indictment was returned in September, 1927. A careful search of the State of Case fails to show any evidence to substantiate that statement. Brumberg's testimony was to the effect that he advanced money from April 19, 1927, until February 26, 1929 (S. C., p. 76, l. 10, to p. 78, l. 1). The fire occurred on May 13, 1927. Plaintiffs' brief intimates that the advances were before Brumberg knew of the indictment, etc. Obviously, that was not so and nowhere on the State of Case is there any testimony to support that intimation. In fact the testimony is expressly to the contrary.

Reference is made in plaintiffs' brief to the fact that Brumberg's testimony prejudiced the case of plaintiff Matisovsky. During the course of the trial the Court explicitly informed the jury that the testimony of plaintiff Brumberg was in no way to affect plaintiff Matisovsky's claim. Referring to Brumberg's testimony the Court said (S. C., p. 104, l. 32, to p. 105, l. 10):

> "The Court: Whatever this witness says is not binding on the other plaintiff * * *. The jury have an understanding of the oath, and they certainly can take it now that a declaration by this witness is not binding on the other plaintiff."

It is respectfully submitted that grounds of appeal numbers 1 to 7 should be dismissed and that the Trial Court committed no error in permitting the questions set forth in said grounds.

POINT II.

Grounds of appeal numbers 8 to 10 inclusive should be dismissed; the Trial Court committed no error in sustaining the objections to the questions set forth in said grounds.

The objections to the questions set forth in grounds of appeal numbers 8, 9 and 10 were sustained but no objections were made to the Courts' rulings and no exceptions were taken thereto. Under these circumstances, it is established that the rulings of the Trial Court will not be reviewed.

> *Cordery* v. *American Ry. Express Co.*, 104 N. J. L. 434, 140 Atl. 316 (E. & A., 1928); *Perry* v. *Lyons Const. Co.*, 7 N. J. Misc. 403, 140 Atl. 637 (Sup. Ct., 1928); *Kimble* v. *Kavanaugh*, 101 N. J. L. 164, 128 Atl. 259 (E. & A., 1925).

Furthermore, it is clear that the Court's action was proper in sustaining the objections. The first question asked was:

> "And as far as you know, was either Mr. Eilen or Mr. Schleider ever convicted of crime?" (S. C., p. 111, ll. 10-20).

The only possible purpose of that question was to show that Eilen and Schleider had not been convicted of arson or any other crime. What possible materiality could that have? The testimony was offered to prove that assureds had not been convicted and accordingly had not set fire to their premises. No citations are necessary for the proposition that such evidence is inadmissible.

Plaintiffs now contend that the question was proper to rebut possible inferences raised by the cross-examination of Brumberg. This contention was not made below. Plaintiffs do not state what possible inferences raised by Brumberg's cross-examination this testimony would rebut and defendants fail to see any. His cross-examination certainly did not raise any inference that there was a conviction; to the contrary, the failure of defendants to ask about a conviction must have raised a contrary inference. Nor could it possibly be said that the evidence as to Brumberg's knowledge raised an inference that Brumberg knew of a conviction.

The next question asked was:

> "Well, did you read that in any newspaper?" (S. C., p. 111, ll. 10-20.)

Fully stated, this question inquired as to whether assureds had read that Schleider or Eilen were ever convicted of any crime. All the comments made on the first question apply with equal force here. Both questions were objectionable on the additional ground that they were too broad, including as they did, an inquiry as to whether assureds had ever been convicted of *any* crime.

The third question was:

> "Have you read in any newspapers whether Schleider or Eilen were convicted of the burning of this building."

Here again the comments made with reference to the other questions are fully applicable and dispositive.

Finally, the exclusion of the foregoing questions could not have prejudiced plaintiffs with reference to the issue upon which the jury reached its conclusion.

It is respectfully submitted that grounds of appeals numbers 8 to 10 inclusive should be dismissed; the Trial Court committed no error in sustaining the objections to the questions set forth in said grounds.

POINT III.

Ground of appeal number 11 should be dismissed; the Trial Court committed no error in admitting in evidence the exemplified copy of the order referred to in said ground.

Plaintiffs in their brief submitted to the Supreme Court on the return of the rule to show cause argued that the Trial Court committed error in admitting the exemplified copy of the order referred to under Point 4 of plaintiffs' brief.

The following is an excerpt from pages 12 and 13 of plaintiffs' brief submitted to the Supreme Court:

> "My learned adversary brought before the jury:
>
> * * * 3. That a bankruptcy petition was filed, etc.
>
> I regret that my study of the law and my knowledge is circumscribed by my inability to grasp or ascertain the legal theory upon which Mr. Brumberg was examined and this evidence admitted * * *. I trust that my learned adversary may be able to enlighten the Court on the point herein raised in his answering brief or in the absence thereof, this Court will grant the plaintiffs a trial *De Novo.*"

The Supreme Court in its opinion expressly overruled this contention of plaintiffs. Accordingly, it is evident that the objection raised under

Point 4 of plaintiffs' brief will not be considered by this Court.

> *El Mora Realty Co.* v. *Griffin,* 2 N. J. Misc. 1187, 126 Atl. 639 (Sup. Ct., 1924); *Catterall* v. *Otis Elevator Co.,* 103 N. J. L. 381, 135 Atl. 865 (E. & A., 1927).

Assuming that this Court will consider the validity of the objection raised under Point 4 of plaintiffs' brief, it is apparent that no error was committed. During the cross-examination of Brumberg the following testimony was given, without objection by plaintiffs:

> "Q. Did you know that they went into bankruptcy? A. I did.
>
> Q. When did they go into bankruptcy?
>
> Mr. Lieblich: I object. The best proof would be the record.
>
> The Court: No, that is going to this man's credit.
>
> Mr. Lieblich: But the question was, when did they go into bankruptcy?
>
> The Court: Well, that is a collateral matter. We do not need the best evidence for that.
>
> Mr. Lieblich: All right. If he knows.
>
> A. I do not know, but probably I think it was about four or five months after the loss, if I remember.
>
> Q. Four or five months after the loss, which would bring it onto the fall of 1927? A. Yes, sir.
>
> Q. And before you made your third payment of December 7, 1927, for $808.40? A. Well, I had the assignment at that time, this was in December.
>
> Q. Yes. But I mean, at that time, you knew they were in bankruptcy? A. Yes, sir.
>
> Q. And, of course, you then knew it as all of the subsequent checks? A. Yes" (S. C., p. 79, l. 9 to p. 80, l. 2).

In view of the fact that this testimony was given without objection by plaintiffs, how possibly could the admission of an order appointing a trustee in bankruptcy prejudice plaintiffs? The only facts shown by the order are the bankruptcy and the ensuing appointment of a trustee. But that information was already in the jury's possession and its subsequent admission could not have prejudiced plaintiffs. Of course, a showing of prejudice is necessary before the Court will consider alleged errors by the Trial Court. In plaintiffs' brief, they state that without the admission of the order appointing the trustee defendants would have no proof that assureds went into bankruptcy. That is not true. Plaintiff Brumberg had testified without objection that assureds went into bankruptcy shortly after the fire.

Assuming that a showing of prejudice could be made, it is submitted that the admission of the order was proper. The only objection made to its admission was that the order did not prove the adjudication of bankruptcy but proved the appointment of a trustee (S. C., p. 116, ll. 22-26). It is clear that this objection is invalid, for an adjudication in bankruptcy necessarily precedes the appointment of a trustee.

Furthermore, the order was admissible to identify the time of the bankruptcy of which plaintiff Brumberg testified he knew (S. C., p. 79, l. 9, to p. 80, l. 2). His knowledge of assureds' bankruptcy before he is alleged to have made advances was certainly admissible to attack the credit of his testimony relative to payments. It would be an unusual business man of 25 years' experience who would advance $7,000 on the faith of a $7,000 claim when he knew his obligors were bankrupt and the claim was being questioned and contested. The time of the adjudication of bankruptcy as

well as the appointment of the trustee was important to show that they took place before the dates on which Brumberg is alleged to have made his loans.

Although the order was admitted solely for the purpose of affecting Brumberg's credit, for which purpose it was undoubtedly admissible, the order was admissible on another ground. Defendants by their pleadings had raised the contention that the cause of action, if any, was vested in the Trustee in Bankruptcy and not in plaintiffs. On that issue the order was of the utmost importance.

It is respectfully submitted that ground of appeal number 11 should be dismissed and that the Trial Court committed no error in admitting in evidence the exemplified copy of the order referred to in said ground.

POINT IV.

The Trial Court committed no error in excluding the question referred to in ground of appeal number 12.

The question excluded was:

> "Did you as the result of your investigation learn that Mr. Schleider had remained in his place of business in the store in the City of Passaic up to ten-thirty or eleven o'clock that evening?" (S. C., p. 162, L. 40, to p. 163, L. 4).

The only possible purpose of this question and its purpose as stated in plaintiffs' brief was to prove that Schleider was not at the warehouse when the fire was started. The question expressly called for hearsay testimony of the most objectionable kind. It inquired as to whether Chief Ritter as a result of his investigations after the

fire concluded that Schleider was not at the warehouse when the fire was started. His testimony on that question could be nothing but an opinion based on hearsay and was inadmissible.

Hirshberg v. *Robinson,* 75 N. J. L. 256 (Sup. Ct. 1907).

In addition, the question was entirely immaterial for the reason that it referred to assureds' whereabouts at ten-thirty or eleven o'clock, whereas the fire did not occur until about midnight (S. C., p. 118, ll. 6-10).

During an earlier portion of Chief Ritter's cross-examination he testified as follows:

> "Q. Did the course of your investigation disclose to you whether or not Schleider or Eilen had been there that day, in those premises? A. Only from what they say themselves * * *" (S. C., p. 146, ll. 25-30).

Can there be any doubt that his conclusion from what assureds said to him as to their whereabouts was inadmissible to prove that fact?

3 *Wigmore Evidence,* Secs. 1361, 1362.

Any answer the witness might have given would necessarily have been based on inadmissible self-serving declarations of assureds.

Lastly, the exclusion of the question could not have prejudiced plaintiffs, for earlier in the testimony plaintiffs had elicited, in effect, the information sought by this question (S. C., p. 163).

It is respectfully submitted that the Trial Court committed no error in excluding the question referred to in ground of appeal number 12.

POINT V.

The Trial Court committed no error in refusing to strike out the separate defense of defendants.

At the conclusion of the case, plaintiffs moved to "strike out each and every part of the first separate defense * * *" (S. C., p. 189, ll. 12-15).

Obviously, the motion was properly denied for defendants' first separate defense alleged, that assureds swore falsely as to the origin of the fire. Plaintiffs now contend that the part of the first separate defense which refers to misrepresentation as to values should be stricken. The motion below, however, requested that the entire separate defense be stricken and even if part of the defense was not sustained the motion was properly denied as too broad.

Bashaw v. *Eichenberger,* 100 N. J. L. 153, 125 Atl. 130 (E. & A., 1924).

> "The motion of counsel was to strike out the whole of it. Assuming the physical impossibility of the turn as described by Gordon (which we do not undertake to assert) the motion was properly denied as too broad in its scope."

Furthermore, the only exception taken by plaintiffs was to the refusal of the Trial Court to strike out the defense of misrepresentation as to origin. After argument that the evidence as to origin of the fire was insufficient, counsel for plaintiffs said:

> "That is the motion to strike out that defense" (S. C., p. 192, ll. 19-20).

The Court replied:

> "Motion denied" (S. C., p. 192, l. 21).

It is clear, therefore, that plaintiffs may not now urge that the Trial Court erred in not striking out the portion of defendants' first separate defense which referred to values.

Assuming, however, that the motion and exception thereto were proper, there can be no doubt that plaintiffs were not prejudiced by the failure to strike out the portion of the defense which referred to values. As plaintiffs in their brief state there was not one iota of evidence as to values introduced in the case. The Court in its charge instructed the jury that the sole issue involved was whether assureds had intentionally burned the premises and had accordingly sworn falsely when they verified that the origin of the fire was unknown to them. The jury found that they did.

The jury could not possibly have considered values for there was absolutely no evidence of values in the case. It is admitted that in the absence of prejudice, this Court will not review alleged errors of the Trial Court.

Plaintiffs in their brief quote the following remark in an attempt to show prejudice:

> "Our first defense here is that there is fraud and misrepresentation on the part of the assureds as to value" (S. C., p. 33, ll. 30-34).

But plaintiffs neglected to continue with their quotation and include a withdrawal of that issue. We stated to the Court:

> "The question of values is now out of the case" (S. C., p. 34, ll. 14-16).

In a further attempt to show prejudice, plaintiffs refer to the following portion of the Court's charge:

> "The owners of the store are not parties to this action by virtue of the assignment of the interest they had under these policies, but their assignees are seeking to recover this money as plaintiffs in the action. Therefore, the rights of the present plaintiffs are wholly dependent upon the rights of Eilen and Schleider, and if you find any of the defenses interposed, to be good against Schleider and Eilen, they of course, may be used and the present plaintiffs are subjected to them. I will touch upon that later" (S. C., p. 193, ll. 13-25).

Plaintiffs admit, in their brief, that as a proposition of law that statement is entirely correct. They contend nevertheless that it was prejudicial to plaintiffs in this case. A reading of the entire charge discloses the invalidity of plaintiffs' contention. Not only did the charge fail to give rise to the inference that there was an issue, other than whether assureds had set fire to the premises, but it expressely negatived such inference. The Court in its charge said:

> "Defendants * * * rely on this as a basis of defense: You have proofs of loss which were submitted and with reference to that part asking the cause of the fire the assignors of the present plaintiffs signed in each one of the proofs of loss: 'Cause unknown to the assured'" (S. C., p. 196, l. 32 to p. 97, l. 2).

The Court then left to the jury the question of whether assureds burned the premises and accordingly swore falsely. A reading of the entire charge will adequately disclose that there was no possible prejudice to plaintiffs.

It is respectfully submitted that the Trial Court committed no error in refusing to strike out the separate defense of defendants.

POINT VI.

Grounds of appeal numbers 17 and 18 should be dismissed; the Trial Court committed no error in its charge.

Plaintiffs argued before the Supreme Court on the return of the rule to show cause that the Trial Court committed error in its charge. (See their brief submitted to the Supreme Court, at pages 13 and 14). The Supreme Court in its opinion expressly overruled the allegations of error in the charge.

> *Matisovsky* v. *Phenix Fire Insurance Company, et als.*, 7 N. J. Misc. 507, 147 Atl. 904 (Sup. Ct., 1929).
>
> "The charge of the trial court was a clear and impartial submission of the issues in the case."

Accordingly grounds of appeal numbers 17 and 18 argued under point 7 of plaintiffs' brief may not be argued here.

Plaintiffs under point 7 of their brief contend that the Court erred in its charge when it made the following remarks:

> "Now from the evidence in this cause there seems to be ample proof that the fire was of an incendiary origin and I think to use the parlance of the fireman, it was a set fire. I think the evidence warrants you drawing that inference. However the conclusion that you might come to, that this fire was the result of a set fire, needs to go further in order to show that the assignors were guilty of it" (S. C., p. 196, ll. 20-30).
>
> "As I said before you have a right to infer that this fire was of an incendiary origin" (S. C., p. 197, ll. 3-4).

The Court continued its charge as follows:

> "I might say that you are the sole judges of the evidence and, as such, you have a right to determine the credibility of the testimony that has been offered for your consideration. You have a right to reject evidence that does not meet with your standards of credibility and, on the other hand, you have a right to accept that which does meet the standard. You are the sole judges. I, too, will say, as counsel have said, if I in my reference to the testimony have misstated it, of course, I do not want you to follow my recollection of it; you must decide this case upon your own recollection of the testimony. Nor is my comment or my deductions binding on you. You are the sole judges of the act, and you must make your own conclusions, and you can ignore the Court's conclusions with reference to the facts because that is your right. It is your absolute right to decide upon the facts" (S. C., p. 197, l. 20, to p. 198, l. 3).

Plaintiffs contend that by the foregoing charge the Trial Judge instructed the jury that assureds set the fire. We wonder whether plaintiffs are sincere. The Court in its charge, expressly told the jury that even if they should decide that the fire was "incendiary" or "set" that would not be sufficient; they must find that assureds set the fire in order to deny recovery. And the Court expressed no opinion as to whether it believed assureds set the fire.

The Court did state that in its opinion that there was ample proof that the fire was of an incendiary origin *i. e.*, was set by some one. And can there be any doubt about that? Has any one ever found paper shopping bags filled with gasoline or automobile tire covers filled with gasoline in a furniture store, where the fire was not "set"?

As the Supreme Court said in its opinion:

> "There was ample proof to justify the verdict of the jury",

that it was set, and set by the assureds.

That the trial judge had the right to comment on the evidence is admitted.

> *Kneip* v. *New York & L. B. R. Co.,* 102 N. J. L. 374, 131 Atl. 886 (E. & A., 1926);
> *Reinfeld* v. *Laden,* 98 N. J. L. 709, 121 Atl. 445 (Sup. Ct., 1928).

That the trial Court left the jury the determination of the facts and the conclusions to be drawn therefrom cannot be doubted, after reading the entire charge (S. C., p. 197, l. 20 to p. 198, l. 3).

Plaintiffs in their brief refer to portions of the charge not set forth in their grounds of appeal and too obviously correct to warrant discussion.

It is respectfully submitted that grounds of appeal numbers 17 and 18 should be dismissed and that the trial Court committed no error in its charge.

The remaining ground of appeal, *i. e.,* 13, 14, 19 and 20, having been abandoned in plaintiffs' brief will not be considered.

It is respectfully submitted that the judgment rendered upon the verdict of the jury should be affirmed.

Respectfully submitted,

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Defendant-Appellees.