

INDEX

	Page
Complaint	1
Answer	4
Reply	7
Stipulation	8
Postea	10
Judgment	11
Notice of Appeal	12
Grounds of Appeal	14
Testimony	17
Motions for Non-Suit	19, 118
Motions	91

WITNESSES FOR PLAINTIFF.

Mulford L. Ballard:	
Direct	21
Cross	52
Redirect	59
Howard S. Wood:	
Direct	60
Cross	69
Redirect	79
Recross	81
Recalled—Cross	97
Edward J. Farrell:	
Direct	83
Recalled—Direct	116
Albert Moseley:	
Direct	84
Cross	85
Herbert Rohlffs:	
Direct	90

PLAINTIFF'S EXHIBITS.

	Off'd Page	P'd Page
P-1—Policy of Insurance	21	122
P-17—Letter—Ballard to Franklin Fire Insurance Co.	25	139
P-18—Letter—Ballard to C. Ray Swartley & Co.	26	140
P-19—Letter—Ballard to Schultz..	26	140
P-20—Letter—Ballard to Wagner-Taylor Co.	27	141
P-21—Letter—Ballard to Gotwals..	27	141
P-22—Letter—Ballard to Stokes, Packard, Haughton & Smith...	28	142
P-23—Letter—Glendenning to Ballard	28	142
P-24—Letter—Ballard to Franklin Fire Insurance Co.	29	144
P-25—Letter—Monrose to Ballard.	29	145
P-26—Letter—Krumdick to Ballard	29	146
P-27—Letter—Monrose to Ballard.	30	147
P-28—Letter—Ballard to Monrose.	30	147
P-29—Letter—Monrose to Ballard.	30	148
P-30—Letter—Ballard to Monrose.	31	149
P-31—Letter—Monrose to Ballard.	31	150
P-32—Letter—Ballard to Monrose.	31	151
P-33—Letter—Ballard to Monrose.	31	152
P-34—List of Materials partially or completely destroyed by fire...	33	153
P-35—List of Materials partially or completely destroyed by fire...	34	155
P-36—Letter—Ballard to Monrose.	34	156

	Off'd Page	P't'd Page
P-37—Letter—Ballard to General Adjustment Bureau	35	157
P-38—Letter—Ballard to Monroe.	35	158
P-39—Letter—Ballard to General Adjustment Bureau	35	158
P-40—Letter—Ballard to General Adjustment Bureau	37	159
P-41—Letter—Ballard to Monroe.	37	160
P-42—Letter—Monrose to Ballard.	38	161
P-43—Letter—Krumdick to Bal- lard	41	162
P-44—Letter—Ballard to Monroe.	42	163
P-45—Letter—Monrose to Ballard.	44	164
P-46—Letter—Ballard to Monroe.	44	165
P-47—Letter—Monrose to Ballard.	45	166
P-48—Letter—Krumdick to Bal- lard	45	168
P-49—Letter—Ballard to Monroe.	46	169
P-50—Letter—Monrose to Ballard.	47	170
P-51—Letter—Ballard to Monroe.	48	171
P-52—Letter—Monrose to Ballard.	48	171
P-53—Letter—Providence Washing- ton Ins. Co. to Ballard.....	49	172
P-54—Eight letters from Insurance Companies to Central Radiator Company	49	172
P-56—List of Patterns destroyed by fire		179
P-6A—Proof of Loss	87	182

Complaint.

Filed July 30, 1929.

New Jersey Supreme Court

ESSEX COUNTY.

10

CENTRAL RADIATOR COMPANY, a
corporation,

Plaintiff,

vs.

NIAGARA FIRE INSURANCE COM-
PANY,

Defendant.

Action at Law.

Complaint.

20

Plaintiff, a corporation of the State of Pennsylvania, complaining of the defendant says that:

1. On or about the thirtieth day of June, 1928, plaintiff was the owner of certain real and personal property situate at Lansdale, Pennsylvania, which property both real and personal is more particularly described in paragraph 3 following. 30

2. At the time aforesaid the defendant was and still is an insurance company authorized to insure premises and contents including dyes and patterns against loss or damage by fire.

3. In consideration of the payment of a certain premium amounting to \$258.90, the defendant insured the plaintiff in the sum of \$15,000, under policy #17035, and which policy ran from the thir- 40

Complaint.

tieth day of June, 1928 until the thirtieth day of June, 1929, covering the following described premises, and goods, wares and merchandise including patterns and dyes:

10 "On machine shop, main foundry, pattern shop and pattern storage building, engine and boiler room, core room, office, blacksmith shop, and on machinery and equipment in machine shop, main foundry, engine and boiler room and office and on supplies in machine shop and office building and on patterns in main foundry and pattern shop and pattern storage building, and on lumber in pattern shop and pattern storage building situate Lansdale, Montgomery Co., Pa.

20 This policy covers on the building, improvements and structures together with all tangible and/or destructible property movable and/or immovable, including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy the property of the assured or sold but not removed; also on assured's interest in and on assured's legal liability for similar property held by assured as follows viz: in trust or on commission or on joint account with others or on storage or for repairs."

30 Lines 10 and 11 of the policy referred to above covers bullion, manuscript, mechanical drawings, dyes and patterns.

Which said policy or a true copy thereof will be produced by plaintiff at the time of the trial of this cause.

40 4. On or about the third day of October, 1928, while the said policy was in force and effect a fire occurred on the aforementioned premises by virtue of which certain building, fixtures, patterns and dyes insured under the policy aforementioned, were

Complaint.

completely damaged and destroyed to the extent of \$14,093.

5. By the terms and provisions of this policy other insurance was permitted and the whole amount aggregated \$150,200 and a further provision of this policy was to the effect that:

“This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured bears to the whole insurance covering the property wheth-
valid or not, and whether collectible or
not.”

10

6. The liability of the defendant in connection with the policy aforementioned because of the fire loss amounted to \$1407.43, plus interest from the date of the fire.

20

7. The plaintiff having duly performed all the conditions and covenants of said policy have demanded payment from said defendant of the amount of the defendant's liability in connection with the loss, which this defendant has refused and still refuses to pay.

Wherefore, plaintiff demands damages in the sum of \$1407.43, plus interest and costs of suit.

30

KALISCH & KALISCH,
Attorneys of Plaintiff.

40

Answer.

Filed Sept. 23, 1929.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	CENTRAL RADIATOR COMPANY, a corporation,	}	Action at Law. Answer.
	Plaintiff,		
	vs.		
	THE CONTINENTAL INSURANCE COMPANY,		
	Defendant.		

20 Defendant says that:

1. It has no knowledge or information sufficient to enable it to form a belief as to the allegations of paragraph 1 of the complaint and therefore denies the same.

2. It admits the allegations of paragraph 2.

3. It admits the execution of the policy mentioned in paragraph 3, but as to the terms and conditions of said policy begs leave to refer to said
30 policy and to its records thereof.

Defendant further answering the allegations of paragraph 3 says that said contract of insurance was entered into in the State of Pennsylvania and is governed by the laws of that state.

4. It denies that any building, fixtures, patterns or dyes insured under the policy aforementioned were damaged or destroyed as alleged in paragraph
40 4 of the complaint. As to the other allegation of

RECEIVED

Answer.

said paragraph defendant has no knowledge or information sufficient to enable it to form a belief and it therefore denies them.

5. It admits that said policy contained the provision quoted in paragraph 5 of the complaint. As to the other allegations of said paragraph it has no knowledge or information sufficient to form a belief and therefore denies them. 10

6. It denies the allegations of paragraph 6.

7. It denies the allegations of paragraph 7.

8. FIRST SEPARATE DEFENSE.

Said policy contained the following terms and conditions:

“This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; 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.” 20

In violation of said terms and conditions with intent to cheat and defraud defendant and gain an advantage over it and secure the sum of money not otherwise justly due, the assured knowingly and willfully, 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 and the amount of damage caused by said fire, yet knowing that in truth and fact, the amount of property involved in said fire and its value, the cost of said property, and the amount of damage caused by said fire, was 30 40

Answer.

much less than the amount represented and stated by them.

By reason whereof said policy became void and of no effect and defendant relieved of liability thereunder.

10 9. SECOND SEPARATE DEFENSE.

The property, if any, damaged or destroyed by said fire as alleged in paragraph 4 of the complaint was not insured by defendant's policy.

10. THIRD SEPARATE DEFENSE.

Said policy contained, among others, the following terms and conditions:

20 "The insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss signed and sworn to by the insured, stating the knowledge and belief of the insured and of all others in the property; the cash value of each item thereof and the amount of loss or damage thereto; all incumbrances thereof; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies;

30 any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire * * *."

Without such time being extended in writing by defendant, plaintiff failed to render a statement to defendant signed and sworn to by plaintiff as provided for by the foregoing terms of said policy.

40

Answer.

By reason whereof plaintiff is not entitled to recover.

ARTHUR T. VANDERBILT,
Attorney of Defendant.

Reply.

10

Filed Sept. 27, 1929.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CENTRAL RADIATOR COMPANY, a
corporation,

Plaintiff,

vs.

ALLIANCE INSURANCE COMPANY
OF PHILADELPHIA,
Defendant.

Action at Law.

Reply.

20

Plaintiff replying to the answer filed by the defendant in the above entitled cause, says that:

30

1. It denies the violation of policy condition referred to in the First Separate Defense.
2. It denies the Second Separate Defense.
3. It denies the violation of policy condition referred to in the Third Separate Defense.

KALISCH & KALISCH,
Attorneys of Plaintiff.

40

Stipulation.**NEW JERSEY SUPREME COURT.****ESSEX COUNTY.**

	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. PROVIDENCE WASHINGTON INS. Co., a corp. Defendant-Appellee.	
10	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. FIREMEN'S FUND INS. Co., OF SAN FRAN- CISCO., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. STATE ASSURANCE Co., LTD., a corp., Defendant-Appellee.	
20	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. CONTINENTAL INS. Co., a corp., Defendant-Appellee.	Actions at Law. Stipulation to Consolidate.
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. BANKERS & SHIPPERS INS. Co., of N. Y., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. ALLIANCE INS. Co. OF PHILA., a corp., Defendant-Appellee.	
30	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. TRAVELERS FIRE INS. Co., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. U. S. FIRE INS. Co. OF N. Y., a corp., Defendant-Appellee.	
40	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. GREAT AMERICAN INS. Co., a corp., Defendant-Appellee.	

Stipulation.

CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
FRANKLIN FIRE INS. Co., a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
LONDON ASSURANCE CORP., a corp., Defendant-Appellee.	10
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
NORTHERN ASSURANCE LTD., OF LONDON, a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
NIAGARA FIRE INS. Co., a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
WESTCHESTER FIRE INS. Co., OF N. Y., a corp., Defendant-Appellee.	20
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant,	
vs.	
PHOENIX ASSURANCE Co., LTD., OF LON- DON, a corp., Defendant-Appellee.	

It is Stipulated and Agreed by and between the undersigned attorneys for the respective parties hereto, that the argument for the above entitled causes may be consolidated, only one record need be prepared by the Clerk of the Supreme Court, and filed with the Court of Errors and Appeals, and only one copy of each pleading, one policy of insurance and only one copy of the proof of loss, and of other exhibits of which there are duplicates, need be set forth in the printed State of the Case.

Dated: August 5, 1931.

KALISCH & KALISCH, 40
Attorneys of Plaintiff.

ARTHUR T. VANDERBILT,
Attorney of Defendants.

Postea.**NEW JERSEY SUPREME COURT.****ESSEX COUNTY.**

10	CENTRAL RADIATOR COMPANY, a corporation, Plaintiff, vs. THE TRAVELERS FIRE INSURANCE COMPANY OF HARTFORD, CON- NECTICUT, Defendant.	}	Action at Law. Postea.
----	--	---	---------------------------

20 This case was tried before Circuit Court Judge William A. Smith (to whom this case was referred for trial) with a jury, at the Essex Circuit on June 15th and 16th, 1931.

At the close of plaintiff's' case, defendant moved for a non-suit; and the Court being of the opinion that the evidence was not sufficient to entitle plaintiff to recover, directed that judgment of non-suit be entered against plaintiff.

WM. A. SMITH,
Circuit Court Judge.

30

40

Judgment.**NEW JERSEY SUPREME COURT.**

CENTRAL RADIATOR COMPANY, a corporation,	}	Action at Law.	10
Plaintiff,			
vs.			
NIAGARA FIRE INSURANCE COM- PANY,	}	Judgment of Non-Suit.	
Defendant.			

This case was tried before Circuit Court Judge William A. Smith (to whom the case was referred for trial) with a jury, at the Essex Circuit on June 15th and 16th, 1931. 20

At the close of plaintiff's case, defendant moved for a non-suit; and the Court being of the opinion that the evidence was not sufficient to entitle plaintiff to recover, directed that judgment of non-suit be entered against plaintiff.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant, Niagara Fire Insurance Company, do recover of said plaintiff, Central Radiator Company, a corporation, its costs, which have been taxed at the sum of Fifty-one Dollars and Fifty Cents. 30

Costs \$51.50.

Judgment signed and entered June 24, 1931.

WM. S. GUMMERE,
C. J.

Notice of Appeal.
NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. PROVIDENCE WASHINGTON INS. Co., a corp. Defendant.	
	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. FIREMEN'S FUND INS. CO. OF SAN FRAN- CISCO, a corp., Defendant.	
	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. STATE ASSURANCE Co., LTD., a corp., Defendant.	
20	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. CONTINENTAL INS. Co., a corp., Defendant.	
	CENTRAL RADIATOR Co., a corp., Plaintiff,	Actions at Law. Notice of Appeal.
	vs. BANKERS & SHIPPERS INS. Co., OF N. Y. a corp., Defendant.	
	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. ALLIANCE INS. CO. OF PHILA., a corp., Defendant.	
30	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. TRAVELERS FIRE INS. Co., a corp., Defendant.	
	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. U. S. FIRE INS. CO. OF N. Y., a corp., Defendant.	
40	CENTRAL RADIATOR Co., a corp., Plaintiff,	
	vs. GREAT AMERICAN INS. Co., a corp., Defendant.	

Notice of Appeal.

CENTRAL RADIATOR Co., a corp., Plaintiff,	
vs.	
FRANKLIN FIRE INS. Co., a corp., Defendant.	
CENTRAL RADIATOR Co., a corp., Plaintiff,	
vs.	
LONDON ASSURANCE CORP., a corp., Defendant.	10
CENTRAL RADIATOR Co., a corp., Plaintiff,	
vs.	
NORTHERN ASSURANCE LTD., OF LONDON, a corp., Defendant.	
CENTRAL RADIATOR Co., a corp., Plaintiff,	
vs.	
NIAGARA FIRE INS. Co., a corp., Defendant.	
CENTRAL RADIATOR Co., a corp., Plaintiff,	20
vs.	
WESTCHESTER FIRE INS. Co., OF N. Y., a corp., Defendant.	
CENTRAL RADIATOR Co., a corp., Plaintiff,	
vs.	
PHOENIX ASSURANCE Co., LTD., OF LON- DON, a corp., Defendant.	

To: ARTHUR T. VANDERBILT, ESQ.,
Attorney of Defendants. 30

Sir:

Take Notice that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment of non-suit entered in the above entitled causes in this Court, in favor of the defendants and against the plaintiff, on the sixteenth day of June, 1931.

Dated, July 9th, 1931. 40

KALISCH & KALISCH,
Attorneys of Plaintiff.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. PROVIDENCE WASHINGTON INS. Co., a corp. Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. FIREMEN'S FUND INS. Co., OF SAN FRAN- CISCO., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. STATE ASSURANCE Co., LTD., a corp., Defendant-Appellee.	
20	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. CONTINENTAL INS. Co., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. BANKERS & SHIPPERS INS. Co., of N. Y., a corp., Defendant-Appellee.	Actions at Law. On Appeal from the New Jersey Supreme Court.
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. ALLIANCE INS. Co. OF PHILA., a corp., Defendant-Appellee.	
30	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. TRAVELERS FIRE INS. Co., a corp., Defendant-Appellee.	Grounds of Appeal.
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. U. S. FIRE INS. Co. OF N. Y., a corp., Defendant-Appellee.	
	CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. GREAT AMERICAN INS. Co., a corp., Defendant-Appellee.	
40		

Grounds of Appeal.

CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. FRANKLIN FIRE INS. Co., a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. LONDON ASSURANCE CORP., a corp., Defendant-Appellee.	10
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. NORTHERN ASSURANCE LTD., OF LONDON, a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. NIAGARA FIRE INS. Co., a corp., Defendant-Appellee.	
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. WESTCHESTER FIRE INS. Co., OF N. Y., a corp., Defendant-Appellee.	20
CENTRAL RADIATOR Co., a corp., Plaintiff-Appellant, vs. PHOENIX ASSURANCE Co., LTD., OF LON- DON, a corp., Defendant-Appellee.	

TO: ARTHUR T. VANDERBILT, ESQ.,
Attorney of Defendants-Appellees. 30

Sir:

Take Notice that the following are the grounds of appeal which the plaintiff assigns and will urge why the judgment of non-suit rendered against the plaintiff-appellant in the above entitled causes should be reversed, set aside and for nothing holden.

1. That the Court erred in granting defendant-appellees' motion for non-suit. 40

Grounds of Appeal.

2. The Court, upon objection of the defendants-appellees, erroneously refused to permit the plaintiff-appellant's witness, Herbert Rohlfss, to answer the following questions:

10

(a) "What is the custom in the business of manufacturing manholes with regard to the transferability of patterns, where a foundry is not all housed in one building?"

(b) "What is the custom in the trade regarding constant retention of patterns in a single building of several buildings in a pattern manufacturing establishment?"

20

(c) "What is the custom regarding incidental changing from building to building as the occasion requires with regard to manhole patterns where the foundry consists of two or more buildings?"

KALISCH & KALISCH,
Attorneys of Plaintiff.

30

40

Testimony.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Monday, June 15, 1931.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
PROVIDENCE WASHINGTON INS. Co., a corp.
Defendant.

10

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
FIREMEN'S FUND INS. Co. OF SAN FRAN-
CISCO., a corp.,
Defendant.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
STATE ASSURANCE Co., LTD., a corp.,
Defendant.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
CONTINENTAL INS. Co., a corp.,
Defendant.

20

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
BANKERS & SHIPPERS INS. Co., OF N. Y.
a corp.,
Defendant.

Actions at Law.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
ALLIANCE INS. Co. OF PHILA., a corp.,
Defendant.

30

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
TRAVELERS FIRE INS. Co., a corp.,
Defendant.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
U. S. FIRE INS. Co. OF N. Y., a corp.,
Defendant.

CENTRAL RADIATOR Co., a corp.,
Plaintiff,
vs.
GREAT AMERICAN INS. Co., a corp.,
Defendant.

40

Testimony.

10	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	FRANKLIN FIRE INS. Co., a corp., Defendant.
	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	LONDON ASSURANCE CORP., a corp., Defendant.
20	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	NORTHERN ASSURANCE LTD., OF LONDON, a corp., Defendant.
	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	NIAGARA FIRE INS. Co., a corp., Defendant.
20	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	WESTCHESTER FIRE INS. Co., OF N. Y., a corp., Defendant.
	CENTRAL RADIATOR Co., a corp., Plaintiff,
	vs.
	PHOENIX ASSURANCE Co., LTD., OF LON- DON, a corp., Defendant.

30 Before—HON. WILLIAM A. SMITH, *J.*, and a jury.

APPEARANCES:

For plaintiff appear KALISCH & KALISCH
(by ISIDOR KALISCH).

For defendants appears ARTHUR T. VAN-
DERBILT (by HORACE M. SCHELL, a mem-
ber of the Bar of Pennsylvania).

Motion for Non-Suit.

A jury is called and sworn.

Mr. Kalisch opens for plaintiff.

Mr. Kalisch: If your Honor please, before opening I forgot to state that the complaint sets forth that the plaintiff corporation is a corporation of the State of Pennsylvania. It is a corporation of the State of New Jersey, and Mr. Vanderbilt said that he would consent that I amend it accordingly. 10

Mr. Schell: I move for a non-suit on the opening on the following grounds:

1. That it was admitted in the opening that no proof of loss was filed within 60 days as required by the terms and conditions of the policies;

2. That there is nothing in the complaint alleging any waiver of the requirement to file a proof of loss, which must be specifically pleaded. 20

Mr. Kalisch: I understood that under the general denial set up in the answer I was entitled to prove waiver. If I am incorrect as to that, I would ask that I be permitted to amend, because they are not injured by this contention; they have known of the waiver from the very beginning. I ask your Honor to exercise his discretion if I am not permitted to prove waiver under the general denial, and allow me to amend. 30

The Court: You move to amend to the effect that you failed to file proofs of loss within 60 days, but that that provision of the policy has been waived.

Mr. Schell: Just the mere allegation, without showing the authority of a person—for example, a mere clerk—

Mr. Kalisch: I am willing to say "by the agents."

Mr. Schell: What agents? 40

Motion for Non-Suit.

Mr. Kalisch: I don't understand that under an answer I am supposed to allege proof.

10 The Court: I think, Mr. Kalisch, you ought to state on the record what you are going to prove on the waiver. I do not think it is necessary to go into the amendment; just state it on the record so that the defendants may know what witnesses to obtain.

Mr. Kalisch: The General Adjustment Bureau and John G. Monroe; Mr. G. F. Krumdick of the General Adjustment Bureau.

The Court: And documentary evidence. The motion for non-suit will be denied.

Defendants' counsel prays an exception to this ruling of the Court.

20 Exception noted as ground of appeal.
Mr. Schell opens for defendants.

Mr. Kalisch: I call for the letter of October 11th addressed to the Franklin Fire Insurance Company.

30 Mr. Schell: If your Honor please, I think it was on Friday morning that these demands to produce certain papers from the various fire insurance companies were received by me at my office from Mr. Vanderbilt. I do not have any of the correspondence which passed between the plaintiff and the Franklin Fire Insurance Company direct, nor have I been able to obtain any correspondence between Mr. Ballard and these four or five concerns.

The Court: So that you do not produce them.

Mr. Schell: No, sir, I haven't any of them. There are certain things, however, which I do have.

Mulford L. Ballard—Direct.

MULFORD L. BALLARD sworn in behalf of plaintiff.

Direct-examination by Kalisch:

Q. Mr. Ballard, what is your business? A. General insurance.

Q. How long have you been in that business? A. About 30 years. 10

Q. As broker for the Central Radiator Company, did you represent it in the securing of policies of fire insurance from the several companies that are involved in this law suit? A. Yes, I did.

Q. I show you policy No. 1397 of the Providence Washington Insurance Company and ask you whether that is one of them. A. It is.

Mr. Kalisch: I offer it in evidence.

The Court: Put all of the policies in evidence but use only the first policy. 20

(Policy No. 1397 of the Providence Washington Insurance Company is received in evidence and marked Exhibit P-1).

(Policy No. B-1813150 of the Fireman's Fund Insurance Company of San Francisco, California, is received in evidence and marked Exhibit P-2).

(Policy No. 534036 of the State Assurance Company, Ltd., is received in evidence and marked Exhibit P-3). 30

(Policy No. 585 of The Continental Insurance Company is received in evidence and marked Exhibit P-4).

(Policy No. 1350822 of Bankers & Shippers Insurance Company of New York is received in evidence and marked Exhibit P-5).

(Policy No. 176954 of The Alliance Insurance Company of Philadelphia is received in evidence and marked Exhibit P-6). 40

Mulford L. Ballard—Direct.

(Policy No. 175130 of The Alliance Insurance Company of Philadelphia is received in evidence and marked Exhibit P-7).

10 (Policy No. 23327 of The Travelers Fire Insurance Company of Hartford, Connecticut, is received in evidence and marked Exhibit P-8).

(Policy No. 2916061 of United States Fire Insurance Company of New York is received in evidence and marked Exhibit P-9).

(Policy No. 25270 of Great American Insurance Company of New York is received in evidence and marked Exhibit P-10).

20 (Policy No. 768 of The Franklin Fire Insurance Company of Philadelphia is received in evidence and marked Exhibit P-11).

(Policy No. 7203939 of The London Assurance Corporation is received in evidence and marked Exhibit P-12).

(Policy No. 10154 of Northern Assurance Company, Ltd., of London is received in evidence and marked Exhibit P-13).

(Policy No. 17035 of Niagara Fire Insurance Company is received in evidence and marked Exhibit P-14).

30 (Policy No. 8760 of Westchester Fire Insurance Company of New York is received in evidence and marked Exhibit P-15).

(Policy No. 888165 of Phoenix Assurance Company, Ltd., of London is received in evidence and marked Exhibit P-16).

Q. Your office is in Newark? A. It is.

Q. And the property involved in this fire loss is located where? A. Lansdale, Pa.

40 Q. It is one of the plants of the Central Radiat-

Mulford L. Ballard—Direct.

or Company, is that right? A. Yes, sir, one of their ten or eleven plants.

Q. When you placed this risk, did you place it directly yourself? A. No, I did not.

Q. Through whom did you place it? A. Through the assistant secretary of the Franklin Fire Insurance Company of Philadelphia.

Q. What is his name? A. Mr. Glendenning. 10

Q. With regard to the endorsed coverage in these policies, do you recall whether you wrote out the coverage? A. That was a form that was attached to the policies when I took over the business, and had been the form, as I understand, for a number of years prior.

By the Court:

Q. Then you did not write it out. A. I did not write it out. 20

By Mr. Kalisch:

Q. Have you ever had a general agency for any companies covering Pennsylvania? A. I have.

Q. Are you familiar with the Rating Bureau in Pennsylvania? A. I am.

Q. Will you please tell the jury what the office of the Rating Bureau is? I don't mean where it is, but what it does. A. The Rating Bureau serves all— 30

Objected to.

The Court: I do not see how it is material at the present time.

(Argument).

The Court: It seems to me that the Rating Bureau matter would be a matter of defense. I do not see how it concerns your proof. You prove the policy. 40

Mr. Kalisch: I will reserve the right after—

Mulford L. Ballard—Direct.

ward to submit it if I find it necessary.

The Court: Very well.

Q. After you ordered these policies through Mr. Glendenning's office, did you subsequently get them?

A. I did.

10 Q. And in the form that you have examined them here today? A. In that form, yes.

Q. I didn't show you all of them today, but you did examine them in my office today, and they are the same as they were originally? A. Yes, sir.

Q. They have not been altered from their original condition? A. Not at all.

Q. Did you note in the policy a reference to lines 10 and 11 of the standard form of policy? A. I did.

20 Q. Will you take this policy, Exhibit P-1, and kindly turn to lines 10 and 11? A. Yes, sir.

Q. Referring to lines 10 and 11, patterns are accepted from coverage, are they not?

Objected to on the ground that the policy speaks for itself.

Q. Will you point out to us any endorsement in connection with lines 10 and 11, if there is any?

30 Objected to on the ground that the policy speaks for itself.

The Court: If it is there, it is there and speaks for itself.

(Question withdrawn).

Q. After the loss, what did you do with regard to any notification to the companies? A. I notified the various companies or their agents.

Mulford L. Ballard—Direct.

By the Court:

Q. Your notice to them was of the loss? A. Yes, sir.

By Mr. Kalisch:

Q. I show you letter dated October 11, 1928, and ask you whether you sent the original of that letter on the date stated in the letter to the Franklin Fire Insurance Company of Philadelphia, attention of Mr. Glendening, assistant secretary. A. I did. 10

Objected to on the ground that it is not disputed that the notice of loss was received.

Objection overruled.

(The same is received in evidence and marked Exhibit P-17). 20

Q. Who is C. Ray Swartley & Company of Lansdale, Pa.? A. One of the agents who handled the policies.

Q. Was he one of the agents of these sixteen fire insurance companies? A. Yes, sir.

Q. Did you write him on October 11, 1928? A. Yes, sir.

Q. Is this a carbon copy of the letter which you wrote him? A. Yes, sir. 30

Mr. Kalisch: I offer it in evidence.

Mr. Schell: In addition to the objection which I have already made, these letters are self-serving declarations as to the description of the property alleged to have been damaged by this particular fire.

The Court: Because they describe it after the fire does not mean that it is covered by the policy. I suppose they may show that they contended then that it was covered by 40

Mulford L. Ballard—Direct.

the policy. Considering the fact of the defense of waiver, I think it ought to go in. I will allow it.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 (The same is received in evidence and marked Exhibit P-18).

Q. I show you what appears to be a carbon copy of a letter to D. S. Schultz, dated October 15, 1928. Will you tell us who he was at that time? A. An agent of one the companies involved in this loss.

Q. Did you send the original of that carbon to him? A. I did.

20 Mr. Kalisch: I offer it in evidence.

Mr. Schell: I object to it for the same reasons. In this letter they go so far as to attempt to fix the amount of loss.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-19).

30 Q. I show you what purports to be a carbon copy of a letter written to Wagner-Taylor Company dated October 15, 1928, and ask you whether you mailed the original of that letter to that company. A. Yes, sir.

Q. Who was the Wagner-Taylor Company at that time? A. Agents of some of the companies.

40 Mr. Kalisch: I offer it in evidence. That is similar to the last one.

Mulford L. Ballard—Direct.

Mr. Schell: I object to it for the same reasons.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-20). 10

Q. I show you a carbon copy of a letter dated October 15, 1928, which purports to be addressed to Mr. E. G. Gotwals, and ask you who E. G. Gotwals was at that time. A. He was an agent of one of the companies.

Q. I understand he is now deceased. A. I believe so.

Q. Did you send out the original of that letter? 20

A. Yes, sir.

Mr. Kalisch: I offer it in evidence.

Mr. Schell: I object to it for the same reasons.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-21). 30

Q. I show you what purports to be a carbon copy of another letter of that same date and addressed to Stokes, Packard, Haughton & Smith, and ask you who they were. A. Agents of several of the companies.

Q. I ask you whether you sent the original of this carbon copy to them at the time. A. Yes, sir. 40

Mulford L. Ballard—Direct.

Q. This is also a notification of loss? A. Yes, sir.

Mr. Kalisch: I offer it in evidence.

Mr. Schell: I object to that for the same reason.

Objection overruled.

10 Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-22).

Mr. Glendening, you say, was assistant secretary of the Franklin Fire Insurance Company of Philadelphia? A. That is right.

20 Q. I show you a letter apparently on the letterhead of the Franklin Fire Insurance Company, Philadelphia, dated October 13, 1928, and apparently signed by J. G. Glendening, on the righthand side of which letter appears the name John Glendening, assistant secretary, and I ask you whether you received that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

Objected to as immaterial.

Objection overruled.

30 Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-23).

40 Q. I show you what purports to be a carbon copy of a letter written to the Franklin Fire Insurance Company, dated October 15, 1928, attention of Mr. Glendening, and ask you whether at

Mulford L. Ballard—Direct.

that time you mailed the original of that letter. A. I did.

Q. That was in answer to the letter Exhibit P-23, dated October 13, 1928? A. Yes, sir.

Mr. Kalisch: I offer it in evidence.

Objected to as immaterial.

Objection overruled.

10

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-24).

Q. Subsequent to the letters which we have just referred to, regarding the notice of the loss, and the letter to Mr. Glendening, did you receive letter dated October 16, 1928; on the stationery of John G. Monroe? A. Yes, sir, I did.

20

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-25).

(Mr. Kalisch reads Exhibit P-25).

Q. Did you, on or about November 24, 1928, receive a letter which I show you, from the General Adjustment Bureau? A. I did.

30

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-26).

Q. I also show you a letter on the stationery apparently of John G. Monroe, dated November 24, 1928, and ask you whether you ever received that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

40

Mulford L. Ballard—Direct.

(The same is received in evidence and marked Exhibit P-27).

Q. In the letter of November 24, 1928, there is a suggestion that you come to a meeting—

Objected to.

10 Q. What did you do in response to this letter, Exhibit P-27? A. I went to Philadelphia and attended a meeting.

Q. Who were present? A. Mr. Krumdick, of the General Adjustment Bureau, and Mr. Monrose.

Q. Mr. Monrose, Sr., or junior? A. Senior.

Q. In one of these letters you were requested to send a copy of some form. Do you know what that had reference to? A. A copy of the form attached to the policies.

20 Q. Form of coverage? A. The form of coverage; that is right.

Q. On October 17, 1928, can you tell us whether you mailed the original of which this appears to be a carbon copy, to John G. Monrose? A. I did.

Q. Is this the original of that letter? A. That is right.

Mr. Kalisch: I offer the original in evidence.

30 (The same is received in evidence and marked Exhibit P-28).

Q. Did you, on or about October 18, 1928, receive this letter on the stationery of John G. Monrose? A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-29).

40 (Mr. Kalisch reads Exhibit P-29).

Mulford L. Ballard—Direct.

Q. Under date of October 23, did you write this letter to Mr. Monroe? A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-30).

Q. Did you receive this letter dated October 24, 1928, upon the stationery of John G. Monroe, in connection with that loss? A. I did. 10

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-31).

Q. I show you a letter dated November 28, 1928, on your stationery. Did you write that letter to Mr. Monroe? A. I did. 20

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-32).

Q. Did you write this letter dated November 14, 1928, to Mr. Monroe? A. I did.

Mr. Kalisch: I offer it in evidence.

Mr. Schell: I object to it as self-serving and argumentative and as inadmissible. It bears on one of the real questions in the case. 30

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-33).

(Mr. Kalisch reads Exhibit P-33). 40

Mulford L. Ballard—Direct.

Q. Will you tell us the difference between a specific rating and an average rating on insurance? A. A specific rate applies only to one building; an average rate covers all buildings on the premises, unless otherwise excluded.

By the Court:

10 Q. Is this an average rate? A. This is an average rate.

By Mr. Kalisch:

Q. Do you recall the first date that you went down to Philadelphia to confer on this matter with Mr. Monroe and Mr. Krumdick? A. I think it was sometime in November. It is nearly five years ago and it is hard to remember dates.

20 Q. Can you say whether it was before December 1? A. It was, I am quite sure.

Q. Do you recall what you discussed with Mr. Krumdick and Mr. Monroe? What was the topic of conversation among the three of you? A. It was the adjustment of this loss.

Q. Give us, as nearly as you remember, the substance of the conversation. A. As I recollect it, they claimed that this particular building was not covered—

30 The Court: "This particular building" does not mean anything.

Q. A building which was generally described as what? A. The storage or blacksmith shop was what it was originally built for, and it was later on used as a storage building.

40 Q. What did you say and what did they say in answer? A. They contended that that building was not covered, and I contended that it was; but they were willing to consider adjusting the loss on a compromise basis.

Mulford L. Ballard—Direct.

Q. Who said that? A. Mr. Krumdick and Mr. Monroe.

Q. At that time had you given them a statement of the amount of the loss? A. I did.

Q. Do you recall what it was? I show you a copy of a statement of items totaling \$14,373 and ask you whether that looks like it. A. That was the original amount submitted. 10

Q. When you went down to Philadelphia had you already sent them this? A. Oh, yes.

Mr. Kalisch: I offer the schedule in evidence. It is dated October 8, 1928.

Mr. Schell: You can't prove value that way.

Mr. Kalisch: I am not offering it for that purpose.

The Court: It shows that they were notified of what the plaintiff's claim was. I will instruct the jury that it is not evidence of the value. 20

(The same is received in evidence and marked Exhibit P-34).

Q. You say that when you went down there for that first conference they had already been given this schedule of loss? A. They had. 30

Q. You say you were discussing a question of compromise down there with these two gentlemen, is that so? A. That is right.

Q. When you left, will you tell us whether or not the matter of compromise was still open? A. It was.

Q. What, if anything, was discussed with regard to anything further you should do? A. It was suggested that I take it up with my clients.

Q. For what purpose? A. To see whether they would not reduce the compromise figure. 40

Mulford L. Ballard—Direct.

10 Q. You mean that the upshot of the conference was that they would not pay the amount you demanded, but they were willing to compromise and you were to see whether your clients would take less? A. Yes, sir. At that time I had already submitted a compromise of about one-half of the claim, and they still would not agree to that, and they asked me to take it up again.

By Mr. Kalisch:

Q. You say that the \$14,373 was the amount that the plaintiff claimed, or less than the amount?

A. That was the amount they originally claimed.

20 Q. And subsequently to your meeting down in Philadelphia, did you at any time forward to these adjusters, Krumdick and Monroe, a schedule reducing the amount of the claim of \$14,373 to some other figure? A. I did.

Q. I show you a paper dated December 17, 1928, and ask you whether that is the paper which you sent them. A. It is.

Mr. Kalisch: I offer in evidence the reduced schedule of December 17, 1928.

(The same is received in evidence and marked Exhibit P-35).

30

Q. I show you a letter produced by the defendants pursuant to a notice served upon them, which is written on your stationery, dated November 23, 1928, and ask you whether you wrote that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-36).

40

Q. I also show you a letter produced by the de-

Mulford L. Ballard—Direct.

fendants pursuant to notice, dated November 23, addressed to the General Adjustment Bureau, and ask you whether you wrote that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-37).

(Mr. Kalisch reads Exhibits P-36 and P-37). 10

Q. I show you an original letter on your stationery produced by the defendants pursuant to notice, dated November 26, 1928, addressed by you to John G. Monroe. Did you write that letter? A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-38). 20

Q. I show you what purports to be a carbon copy of a letter written by you to the General Adjustment Bureau on the same date, November 26, 1928, and ask you whether you sent the original of that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-39).

(Mr. Kalisch reads Exhibits P-38 and P-39). 30

Q. In discussing the loss in this case, with which of the companies did you at any time discuss the loss other than Krumdick and Monroe? A. I did not discuss it with anybody from the companies.

The Court: Is there any dispute that Krumdick and Monroe represented the companies? 40

Mulford L. Ballard—Direct.

Mr. Schell: There is no dispute that they represented them as adjusters for the loss.

Q. Did you, pursuant to that letter, appear down there on November 30? A. I did.

10 Q. Have you already told us what the conversation was, or was that conversation on a previous trip of yours? A. The conversation I described before was on a previous trip.

Q. What was the subject-matter of the conference of November 30? A. Practically the same thing. They contended that this property was not covered.

Q. You had since given them a reduced claim for compromise purposes, hadn't you?

20 The Court: The reduced claim was dated December 17.

30 Q. What was the final arrangement, if any; any conversation between you when you left on November 30? A. That I try to get my client to reduce the amount of the claim, and I should submit it, and they would endeavor to have their companies agree to it. As a matter of fact, the whole matter was in the adjusters' hands; they did not have to refer it. They had authority to settle the full amount, or the authority to settle for any other amount.

Mr. Schell: I ask that the last part of the answer be stricken out as to what the authority was.

The Court: I will strike it out.

40 Q. When you dealt with these adjusters on this loss, were you advised by the companies of any restriction on their agency? A. None whatever.

Mulford L. Ballard—Direct.

Mr. Schell: I object to that. It seems to me that that is wholly immaterial, whether he had any advices from the companies. He is an insurance broker and saw fit to deal with the adjusters. He said he had no dealings or conversations with the companies. It is negative evidence.

10

The Court: It is negative evidence, but I think it is admissible for what it is worth. I will allow it.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. I show you a letter dated December 19, 1928, produced by the defendants pursuant to notice, and ask you whether you wrote that letter to the General Adjustment Bureau. A. I did. 20

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-40).

Q. I also show you a letter dated December 19, 1928, addressed to John G. Monroe and signed by you. Do you remember sending that? A. I do.

Mr. Kalisch: I offer it in evidence.

30

(The same is received in evidence and marked Exhibit P-41).

(Mr. Kalisch reads Exhibit P-40).

Q. When you wrote these letters on December 19, stating that you had reduced the claim of your client to \$7893, had you had the valuations changed, or was this merely a compromise figure? A. Simply a compromise figure.

40

Objected to.

Mulford L. Ballard—Direct.

(Question withdrawn).

Q. Under what circumstances was the claim changed from \$14,373 to \$7893 as covered by the letter of December 19?

Objected to.

10 The Court: He said what he did in changing these figures. I don't think it makes any difference. What he did was to notify the adjusters.

Q. Do you recall the occasion for the change from \$14,373 to \$7893? Do you remember whether you had had any conversation with Mr. Monroe and Mr. Krumdick previous to the change? A. I do.

20 Q. What had either or both of them said to you regarding reducing the claim? A. They had suggested that I reduce the amount as a compromise, as a result of which I visited the plant, and we went over the whole proposition to see what we could do by way of reducing it, and that is the result.

Q. And did you reduce it? A. Yes, sir.

Q. For the compromise? A. That's the idea.

30 Q. On or about December 31, 1928, did you receive this letter from John G. Monroe? A. Yes, sir, I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-42).

Mr. Schell: I object to the letter on the ground that it is solely a proposition of an attempt to compromise between the parties.

40 Mr. Kalisch: I want to show the dealings between these parties.

Mulford L. Ballard—Direct.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Mr. Kalisch reads Exhibit P-42).

Mr. Schell: It has just occurred to me, your Honor, that it is complicating the situation to a considerable extent, because if letters dealing with compromise to show a course of dealing as between these sets of companies, they will have an entirely different legal situation by the time the letters are in. The correspondence which your Honor is now admitting deals with an attempted compromise of this matter. Of course, it is admitted over my objection. 10

The Court: You mean there are no such letters from the General Adjustment Bureau? 20

Mr. Schell: There are not.

The Court: If it is applicable to those companies you can request me to charge the jury to that effect at the proper time.

Mr. Schell: I have seen none which passed between Mr. Ballard and the General Adjustment Bureau.

Q. Mr. Ballard, in discussing compromise with Mr. Monroe, what was Mr. Krumdick's expressed attitude? What did he say? A. He agreed to whatever Mr. Monroe agreed to. 30

Q. What did he say? Give us as nearly as you can what he said when Mr. Monroe talked about these figures, or Krumdick did. What was the conversation? A. I don't remember the conversation in detail.

Q. What was the substance of the conversation? 40

Mulford L. Ballard—Direct.

A. The substance of the conversation was the reduction of the amount.

Q. What did Mr. Krumdick say about it? Did Mr. Monroe do all the talking? A. He did most of the talking.

10 Q. What did Mr. Krumdick say about the figures? Did he say, "I want to go in on this" at all? A. No, he said it would be all right—

Objected to.

Answer stricken out.

Q. What attitude did he assume?

Objected to.

Objection sustained.

20 Q. What, if anything, did he say? A. He suggested the same as Mr. Monroe; that I take the matter up with my client and get the amount reduced, and then they would consider it.

By Mr. Schell:

Q. When was this? A. At our conference.

Q. When was that?

Mr. Kalisch: I object to counsel's cross-examining now.

30 The Court: He is entitled to know the date.

A. I think it was the meeting we had on November 30, 1928.

By Mr. Kalisch:

Q. Do you know how it came to pass that most of your correspondence was with Monroe?

Objected to.

40 The Court: You may ask him whether

Mulford L. Ballard—Direct.

there was any arrangement that his correspondence would be other than to each.

Q. Had you any arrangement whereby your correspondence was to be with Monroe and the General Adjustment Bureau, or some other arrangement, if any? A. I had no arrangement. Mr. Monroe, of course, represented the greatest number of companies; naturally he took the lead in the adjustment. 10

Q. I show you a letter dated December 22, 1928, from the General Adjustment Bureau, and ask you whether you received that letter from Mr. Krumdick. A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received and marked Exhibit P-43). 20

Q. When figures were discussed among you and Monroe and Krumdick, did Monroe and Krumdick separate their figures, or were they all put in a lump sum covering the entire loss?

Objected to as immaterial.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

A. They were put in a lump sum.

By the Court:

Q. You mean the figures you discussed were put into lump figures applying to all the insurance companies? A. That is the idea.

By Mr. Kalisch:

Q. Pursuant to the letter of December 31, 1928, 40

Mulford L. Ballard—Direct.

which is Exhibit P-42, did you write this answer on January 2, 1929, to Mr. Monroe? A. I did.

Q. What did you mean by saying, "We have already made a considerable compromise by reducing the amount of the claim almost 100%"?

Objected to.

10 Objection sustained.

Witness: I simply made an error. I meant 50%.

The Court: Strike it out.

Q. The claim schedule before the reduced claim was \$14,373, wasn't it? A. That is right.

Q. And the reduced claim which you sent them was \$7893. A. Yes, sir.

20 *By the Court:*

Q. You mean you were in error when you said 100%? A. Yes, sir, 100% would be the whole thing; I meant 50%.

Mr. Kalisch: I offer in evidence the letter of January 2, 1929, to Mr. Monroe.

30 Mr. Schell: I object to that on the ground that it is dealing with a compromise between the parties, and also that it does not bind the companies represented by the rate bureau.

Objection overruled.

(The same is received in evidence and marked Exhibit P-44).

By Mr. Kalisch:

40 Q. In your dealings with Mr. Monroe and Mr. Krumdick, do you recall whether there was anything said by Mr. Krumdick regarding separate adjustment with his companies?

Mulford L. Ballard—Direct.

Mr. Schell: I object to that as leading. I think the witness may testify to any conversations he had with Mr. Krumdick with reference to the loss, but certainly the question suggests the answer.

The Court: He was already asked about the conversations and now he is asking him about a conversation with Mr. Krumdick. I will allow it. 10

A. No, there was not.

Q. What, if anything, did he say as to the adjustment? A. They were working together on it.

Q. What do you mean that they were working together on it? A. One would not agree to an adjustment without the other.

Q. Whom do you mean? A. Mr. Krumdick and Mr. Monroe. There was a Mr. Smith, by the way, who sat in on one or two conferences; I don't know just which ones. He is employed by the General Adjustment Bureau, as I understand it. 20

(Mr. Kalisch reads Exhibit P-44).

Q. Did you, on January 14, 1929, write to Mr. Monroe the original of which this purports to be a carbon copy? A. Yes, I did.

Q. Why didn't you on each occasion write a similar letter to Mr. Krumdick of the General Adjustment Bureau? 30

Objected to.

Objection sustained.

The Court: Does the claim made here include the patterns?

Mr. Kalisch: Yes, sir.

Q. Did you, on or about January 12, 1929, receive this letter from John G. Monroe? A. I did. 40

Mulford L. Ballard—Direct.

Mr. Kalisch: I offer it in evidence.

Mr. Schell: This letter is argumentative and a self-serving declaration. I do not see how it has any place in this record.

Objection overruled.

(The same is received in evidence and marked Exhibit P-45).

10

Q. Did you ever see Monroe and Krumdick after January 12 down at Philadelphia? A. No, sir, I haven't seen them from that day to this.

(Mr. Kalisch reads Exhibit P-45).

Q. Having received that letter of January 12, 1929, did you reply by this letter of January 14, 1929? A. I did.

20

Mr. Kalisch: I offer in evidence the letter of January 14, 1929.

Mr. Schell: I object to that as before stated.

Objection overruled.

Mr. Schell: I am objecting on the ground that it is wholly immaterial and irrelevant.

30

The Court: I understand, but it also asks them to consider the matter further. I think it ought to go in on that ground.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-46).

(Mr. Kalisch reads Exhibit P-46).

Q. On or about January 15, 1929, did you receive this letter from John G. Monroe regarding this loss? A. Yes.

40

Mulford L. Ballard—Direct.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-47).

(Mr. Kalisch reads Exhibit P-47).

Q. Did you on January 21, 1929, receive a letter from the General Adjustment Bureau, which I show you? A. I received that. 10

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-48).

The Court: What is that letter?

Mr. Kalisch: In substance it is a denial of liability.

Q. Did you, on March 18, 1929, write the original of which this purports to be a copy, to Mr. Monrose? A. Yes. 20

Q. How long before March 18, 1929, had you seen Mr. Krumdick and Mr. Monrose? A. I did not see them after 1928; that is, personally. I did not have any conference with them.

By the Court:

Q. In other words, you did not see them in 1929. A. No, sir, I don't think I did; I don't remember being down there in 1929. I may possibly have been, but it is so long ago that I can't remember. 30

Mr. Schell: I have the original of the letter.

Mr. Kalisch: I offer the original of that letter in evidence.

Mr. Schell: I have the same objection to that letter.

The Court: What is the letter? 40

Mulford L. Ballard—Direct.

Mr. Kalisch: In regard to a compromise and a previous visit.

Mr. Schell: I object to it.

Objection overruled.

Defendants' counsel prays an exception to this ruling of the Court.

10 Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P-49).

By Mr. Kalisch:

Q. I show you this letter dated March 18, 1929, and ask you whether your memory is refreshed at all of the circumstances in the early part of 1929 regarding any conversations with Krumdick and Monroe. A. Yes. I must have had a conference;
20 otherwise I would not have written that letter.

Q. After the conference at which some reference was made to reducing your claim to \$7893 and you should see whether you could get your client to reduce it still further, does this letter refresh your recollection that you did have that conference? A. Yes.

Mr. Schell: I object to that. Counsel is testifying on behalf of the witness, and the form of the question is objectionable.
30

The Court: The form is not the best, but I understand what he wants to ask and I will allow it. He wants to know whether the witness had a personal conversation with these two men after the compromise figure of \$7893 was submitted.

Witness: Yes.

Q. Regardless of the exact date of the conference, do you know who were present? You and
40 who else? A. I know that John G. Monroe was

Mulford L. Ballard—Direct.

there, and it was either Mr. Krumdick or the Mr. Smith I mentioned. I know that Mr. Smith was at one of the conferences.

Q. Do you know what the topic of conversation was at any conference after the submission of the figure of \$7893? A. That was all along the line of getting me to drop the amount of the claim—reducing it. 10

Q. I show you a letter dated March 22, 1929, signed by Mr. Monroe and addressed to you, and ask you whether you received that letter. A. I did.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-50).

Q. In the last paragraph of that letter Mr. Monroe mentions a meeting at his office on February 1, 1929, at which Mr. Krumdick was present. Does that now refresh your recollection as to the date you came down there the last time? A. Yes, I remember now that I was there. 20

By the Court:

Q. Was that the last conference? A. Yes, sir.

(At one o'clock p. m. the court takes a recess until two o'clock p. m.) 30

AFTER RECESS.

MULFORD L. BALLARD resumes the stand.

Direct-examination (continued) by Mr. Kalisch:

Q. On March 27, 1929, did you write a letter of which this is a carbon copy, to Mr. Monroe in an- 40

Mulford L. Ballard—Direct.

swer to his letter to you of March 22? A. I did.

Mr. Kalisch: I offer it in evidence.

Mr. Schell: I object to it as irrelevant and immaterial. We are dealing with personalities now.

10 The Court: I think it is admissible. It shows that at that time he went on record as to that not being the fact.

(The same is received in evidence and marked Exhibit P-51).

Q. After your writing that letter, I believe you received Mr. Monroe's reply of March 28, 1929. A. I did.

20 Q. That is the end of the correspondence between you and Krumdick and Monroe, is that right? A. That is right.

Mr. Kalisch: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-52).

Q. I show you a batch of carbon copies transmitting the proofs of loss.

30 Mr. Schell: We admit that on April 2, 1929, proofs of loss were sent to the companies, and the proofs were all rejected on April 6 and April 10; some of them April 10—the one of April 6 is from the Providence Washington.

Q. Did you receive that letter from the Providence Washington Insurance Company? A. I did.

Mr. Kalisch: I offer it in evidence.

40 Mr. Schell: I object to it as wholly immaterial. I admit that we received it.

The Court: I will allow it. It may bear

Mulford L. Ballard—Direct.

on the authority of the General Adjustment Bureau.

(The same is received in evidence and marked Exhibit P-53).

Mr. Kalisch: Then I will not offer the other letters with regard to the proofs of loss.

10

The Court: No, it is not necessary.

Mr. Kalisch: I think I should like to put them in, your Honor, as they are signed and state that the reason for rejection is that they were not submitted within 60 days. I offer the carbon copies of the letters accompanying the proofs of loss to the individual companies.

The Court: You do not need the letters sending them in; just show the receipt.

20

Mr. Kalisch: I offer the letters of John G. Monroe, dated April 10, 1929, rejecting proofs of loss. I offer them as one exhibit.

(The eight letters referred to are received in evidence and marked Exhibit P-54).

(Mr. Kalisch reads Exhibit P-53 and one letter of Exhibit P-54, the others being similar).

Q. Did you get any other letters besides these which you have just identified? A. I believe you have all the letters I received.

30

Q. Do you know in what manner you received the rejection of the claims with regard to the companies for which the General Adjustment Bureau was the adjuster? A. I don't recollect whether they wrote me acknowledging receipt of them or not. Isn't it in the file?

Mr. Kalisch: There is no question, is

40

Mulford L. Ballard—Direct.

there, that the fire insurance companies which were represented by the General Adjustment Bureau as adjuster, have turned down this loss also?

10 Mr. Schell: We have not admitted the loss, but if there is any question of rejection of proofs; if there is any correspondence, I haven't it. I have never seen the letters of the General Adjustment Bureau.

Q. To your knowledge, either orally or by letter, will you tell us whether the General Adjustment Bureau turned down your proofs of loss, or rejected them? A. I have no recollection of having seen a letter declining the acceptance of them.

20 *By the Court:*

Q. You mean you sent them in and did not hear anything from them? A. I did not hear anything from them.

By Mr. Kalisch:

Q. The only letter you got was from the Providence Washington Insurance Company? A. Yes, sir, and Mr. Monroe.

30 Q. This insurance was written in New Jersey or in Pennsylvania— A. It was written in Pennsylvania.

Q. And the contract of insurance; that is, the policy itself, was that issued in Pennsylvania or in New Jersey? A. In Pennsylvania.

Q. Do you know the amount of the premiums paid by the Central Radiator Company to these companies?

40 Objected to.
Objection sustained.

Mulford L. Ballard—Direct.

Q. Do you know whether the Central Radiator Company is still insured by most of these companies?

Objected to.

Objection sustained.

Q. When you placed this insurance for the Central Radiator Company, was it your intention as agent for the Central Radiator Company to exclude any buildings? 10

Objected to.

Objection sustained.

Mr. Kalisch: I understood the rule to be that the interpretation which the parties themselves place upon a policy, is of some value to us in construing the policy which is subsequently issued. 20

The Court: You have to prove it as to the other party first; you have to prove that it was their construction before you can prove his.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you know whether these policies before you received them, received an O. K. of the rating bureau in Pennsylvania? 30

Objected to.

Objection sustained.

Mr. Kalisch: The letters speak of this rating bureau's approval, and it is already in evidence what that office was. The rating bureau is a body not at all controlled by this plaintiff, but controlled by fire insurance companies. I was going to prove that, so that if there were any discrepancy— 40

Mulford L. Ballard—Cross.

The Court: I think if it is admissible, it should come on rebuttal rather than on your main case.

Cross-examination by Mr. Schell:

10 Q. When was the first meeting that you ever had with either the General Adjustment Bureau or Mr. Monroe with reference to this loss after the loss occurred? A. You mean a personal interview?

Q. Yes. A. The date of the letter shows that as November 30.

Q. That was the first meeting you ever had with them with reference to a personal interview with them regarding this loss? A. Yes, sir.

20 Q. Following that meeting, will you tell us whether or not you made any application to the General Adjustment Bureau or to Mr. Monroe for an extension of time for filing proofs of loss? A. I wrote them on December 1; three days prior to the expiration time.

Q. In which you asked for an extension of time for filing the proofs? A. Yes, sir.

Q. Are those the two letters in which you asked that the time be extended (handing papers to witness)? A. Yes.

30

Mr. Schell: I ask that they be marked for identification.

Mr. Kalisch: I have no objection to their going in evidence.

(The letters referred to are received in evidence and marked Exhibit D-1 and Exhibit D-2).

40 Q. Under what date did you receive a reply from Mr. Monroe to your letter of December 1? A. I

Mulford L. Ballard—Cross.

haven't the date in mind; my recollection is that it was two or three days afterward.

Q. Is that the letter which you received from Mr. Monroe in reply to your communication of December 1 (handing paper to witness)? A. That is it.

Mr. Schell: I ask that it be marked for identification. 10

Mr. Kalisch: I have no objection to its going in evidence.

(The same is received in evidence and marked Exhibit D-3).

(Mr. Schell reads Exhibit D-1 and Exhibit D-3).

Q. Will you tell me whether or not upon receipt of the letter of December 5 you addressed a letter 20 to any of the companies interested in this loss?

Mr. Kalisch: I object to that. Under the law of Pennsylvania existing at that time, the failure to file proof of loss does not work a forfeiture of the policies; secondly, the conduct of the adjusters up to December 30, which is within a few days before the time under the policy during which proofs of loss, which as they claim should have been filed 30—the conduct of the adjusters would not warrant, as a matter of law, as I take it, the conclusion that the plaintiff should be barred of his right to institute suit, when only a couple of days can elapse between the time of the conference and the time the 60 days shall have elapsed. And on the other hand, the answer of the companies through their adjusters is not sent until the 5th of the month. Manifestly, I think we have a right 40

Mulford L. Ballard—Cross.

to assume that the average letter sent from Newark to Philadelphia arrives within 24 hours or 36 hours. This letter is not addressed to Mr. Ballard until the 5th, or four days after the writing of our letter.

10 The Court: You are asking the jury to consider not only the course of dealings up to December 3, but after that. As far as you are concerned, it is a question of fact. You certainly have not proved the waiver as a matter of law, so that I would have to direct the jury that that provision was waived. This being a fact, this letter is admissible on the question of the waiver. I will allow it.

Plaintiff's counsel prays an exception to this ruling of the Court.

20 Exception noted as ground of appeal.

Q. Will you tell me whether or not you ever addressed a letter to any of the companies in interest requesting an extension of time for the filing of proofs of loss? A. No, because whenever I had any communication with them, I was simply referred back to their adjusters.

Q. So that your answer is that you did not. A. Yes.

30 Q. Following the receipt of the letter of December 5, you were negotiating for a settlement of this loss, is that right? A. Prior to December 5?

Q. I said after December 5 did you continue to negotiate for a settlement of this loss? A. I did.

Q. And you did ultimately file proofs. A. Yes, sir.

Q. And those proofs were sent to the companies by letter dated April 2. A. I think that is correct.

40 Q. Were any of your discussions with Mr. Mon-

Mulford L. Ballard—Cross.

rose or Mr. Krumdick prior to your letter of December 1, 1928, with reference to anything but a settlement of the loss? A. That is all we had to discuss.

Q. I show you letter dated November 15, 1928, and ask you whether or not you received that letter from Mr. Monroe, and whether it is in reply to your communication of November 14, 1928. A. I received that letter. 10

Mr. Schell: I offer it in evidence.

(The same is received in evidence and marked Exhibit D-4).

(Mr. Schell reads Exhibit D-4).

Q. Isn't it a fact that during any conferences you had with Mr. Krumdick or with Mr. Monroe, and through the medium of the correspondence which passed between you, that they contended on behalf of the insurance companies that the particular building which was involved in this loss was not covered by the contracts of insurance? 20

Mr. Kalisch: I object to the correspondence.

Mr. Schell: I will eliminate the correspondence. At the time of the conferences you had, is it not true that these gentlemen at all times contended that the building which was destroyed was not covered by the contracts of insurance? 30

Witness: They did.

Q. And as a consequence of that, there was considerable discussion between you and Mr. Monroe looking to an amicable adjustment of the claim. A. Yes, that is correct. 40

Q. And that was what took place between you

Mulford L. Ballard—Cross.

and Mr. Krumdick and Mr. Monroe either before or after December 1. A. That is right.

Q. The form which is attached to these policies was submitted by whom to the companies for the purpose of having them attached to the contracts of insurance? A. I submitted them.

10 Q. Do I understand that the form which you submitted was a copy of a form which had been in use on prior contracts of insurance and which had expired? A. Yes, sir.

Q. What, if anything, did you have to do with the preparation of the forms? A. I did not change the form.

Q. Did you at any time prior to the submission of the form which you desired to attach to the contracts of insurance, visit the plant of the Central Radiator Company at Lansdale? A. No.

Q. Did you ever at any time have submitted to you a plan of that property as prepared by Mr. Metz? A. I didn't see Mr. Metz at all.

Q. Did you know a man by the name of Henderson connected with the Central Radiator Company? A. Yes, sir.

Q. What was his official position, if you know? A. I think at that time he was assistant secretary.

30 Q. Are you familiar with the layout of the plant of the Central Radiator Company at Lansdale?

Mr. Kalisch: I object to that. The question is whether he was familiar with it at the time that the policies were written. The present condition is irrelevant and immaterial.

Q. I mean at the time the policies were written or at the time of the loss. A. Not at the time they were written.

40

Mulford L. Ballard—Cross.

Q. Were you familiar with the layout of the plant at the time of the loss? A. I was.

Mr. Kalisch: I object to that as immaterial and incompetent.

Objection overruled.

Q. When were you at the plant? A. After the fire. 10

Q. Can you tell me the location of the building which was damaged or destroyed in this fire?

Mr. Kalisch: I object to that on the ground that it is manifestly based upon hearsay. He said he was there after the fire. Furthermore, it is not cross-examination.

The Court: I do not think it is cross-examination. This witness was not called upon to identify any property loss. He said he had not been there before the loss. I will sustain the objection on that ground. 20

Q. How many meetings in all did you have in Philadelphia with either Mr. Monrose or Mr. Krumdick? A. I forget whether it was two or three.

Q. There was, on November 30 and one on February 21. A. I think that was the last one. 30

Q. Was there one in between? A. I can't recall that I had any meeting in between.

Q. Did Mr. Smith of the General Adjustment Bureau attend either one of those meetings? A. He was at one of the meetings.

Q. Which one did he attend? A. If I recollect right, it was the first meeting. I think Mr. Krumdick wrote me that he was going out of town and that Mr. Smith was going to take his place. I think that is correct, if my memory serves me right. 40

Mulford L. Ballard—Cross.

Q. Have you that letter? A. I don't know whether it is in the file or not, or whether Mr. Monroe wrote these. My mind is a little hazy on some of these things; it is so long ago.

Q. Isn't it a fact that you received a copy of the plan of this property from Mr. Denny prior to the time of this fire? A. Who is Mr. Denny?

10 Q. He is the Special Agent for the Travelers Fire Insurance Company here in Newark. A. He never furnished me with any plan; not to my recollection.

Q. So that prior to the fire you had no knowledge of the location of these buildings or of any of the contents. You had no personal knowledge of the location or the contents of these buildings. A. No.

20 Q. At the time of your meeting in Philadelphia on November 30, had you or had you not conferred with any of the companies with reference to an adjustment of that loan? A. No, I had not conferred with them.

Q. You never at any time conferred with the companies at all with reference to this matter? A. The only ones I talked to, were Mr. Glendening, who placed the business for me, and Mr. Blumenreicher, Secretary of the Home Insurance Com-
30 pany of New York, which owns the Franklin. It was through Mr. Glendening. I went to them in the first place.

Q. That was prior to the time that these policies were written? A. Yes, sir. I went to Mr. Blumenreicher, secretary in charge.

Q. And the purpose for going to Mr. Glendening was to get him to assist you in placing this line of insurance. A. I did it as a favor to the Home In-
40 surance Company, for assistance which they had rendered me before.

Mulford L. Ballard—Redirect.

Q. I am not talking of any conversations which you had with anyone connected with the insurance companies prior to the issuance of the contracts. My inquiry is whether you were in contact with the companies direct after the loss. A. Only those two companies that were directly interested.

Q. After the loss. A. After the loss. 10

Q. From whom did you obtain the forms which you copied to be placed upon the contracts of insurance which have here been offered in evidence.

A. They were on the expiring policies which were placed formerly by a New York firm of brokers.

Q. They were on expiring policies held by the Central Radiator Company? A. Yes, sir.

Q. Do you know who had prepared that contract form? A. I don't know whether the former brokers prepared it or not. 20

Q. Who, connected with the Central Radiator Company, gave you that form? A. Mr. Tinkham, I believe.

Q. What is his position? A. He is in charge of the insurance work for the Universal Pipe & Radiator Company, who are the parent company.

Q. What, if any, change did you make in the form? A. I made no change in the form except to substitute my name. 30

Q. You mean at the bottom of the form you had typed your name and address as broker? A. Yes, sir.

Q. But that was the only change in the form? A. That was the only change in the form.

Redirect-examination by Mr. Kalisch:

Q. Was it necessary for you to visit the plant before having these policies written? A. No, it was not necessary. 40

Howard S. Wood—Direct.

Q. Do you know whether the rate had been fixed before you asked for the policies to be written? A. The rate had been fixed.

Q. Specifically rating each building or not? A. No; average rate.

Q. Do you know who had promulgated the rate?
10 A. The rating Bureau of Pennsylvania.

Q. You say you did communicate with someone of the Home Fire Insurance Company after the loss. Do you remember with whom? A. I talked to Mr. Blumenreicher, secretary of the company.

Q. Did you receive a communication from Mr. C. Ray Swartley? A. Yes, sir.

Q. Which company is he with? A. He represents various companies at Lansdale, Pa.

Q. Does he represent any one of these? A. Yes,
20 several of them, I believe.

HOWARD S. WOOD sworn in behalf of plaintiff.

Direct-examination by Mr. Kalisch:

Q. Mr. Wood, you are connected with the Central Radiator Company at Lansdale? A. Not now.
30

Q. You were? A. Yes, sir, at one time.

Q. For how many years up to the time of this fire? A. About 10 years.

Q. What was your work? A. Pattern shop foreman.

Q. One of the class of things which the Central Radiator Company manufactured was manhole frames and covers? A. Yes, sir, manhole frames and covers, marine boiler patterns for boiler fronts, and they made miscellaneous castings.
40

Howard S. Wood—Direct.

By the Court:

Q. They were not confined to radiators, in other words. A. No, sir, not exclusively.

By Mr. Kalisch:

Q. Referring now to manhole frames and covers, did you have blueprints for those? A. Yes. 10

Q. On or about June 30, 1928, these patterns were in what building or buildings? A. The patterns were kept in the pattern storage. Of course, as new patterns were made up that necessitated moving other patterns to another place of storage, and some of the patterns we had in this plant were moved to the storage building.

Q. There is a building called the pattern shop? A. Yes, sir. 20

Q. And there is another one called the pattern storage, is that correct? A. Yes.

Q. The patterns at the time of the writing of this insurance; that is, June 30, 1928, were they placed in any one place and kept there? A. No.

Q. These patterns were used in what parts of the plant as occasion demanded? A. In the foundry.

Q. And the foundry consists of how many buildings? A. There is the foundry, moulding room, and the cleaning room and the core room— 30

Q. In other words, could you tell at any given moment when these patterns would be demanded in one building or another? A. No.

Q. Are you in a position to tell us what patterns were in the pattern shop and which of those that were damaged or destroyed were in the pattern storage building on June 30, 1928? A. If it was in the pattern shop—we would generally get a pattern for repair or replacement, then it would be 40

Howard S. Wood—Direct.

sent to the foundry with the order and the pattern returned to the shelving.

Q. Was there room in the pattern shop for all of these patterns which at the time of the fire were either destroyed or damaged or beyond use? A. No—

10 Mr. Schell: I object to that. I don't know what he means. I suppose that the question is aimed at whether there was sufficient space in the pattern shop for the storage of patterns. Whether there was sufficient space or whether there was not sufficient space, seems to me wholly immaterial, because the policies either do or do not cover the building in which these patterns were.

20 Q. Where were some of them? A. They were in this temporary storage building.

By the Court:

Q. Is that the one you are referring to as having been destroyed by fire? A. Yes.

By Mr. Kalisch:

Q. And that temporary storage building is also known among the employees there as what? A.
30 The old blacksmith shop.

Q. Why do you use the term "old"? A. Because we formerly used it as a blacksmith shop before we built a new one.

Q. You have a blacksmith shop there? A. Yes.

Q. And that is another building? A. Yes, sir, that is another building.

By the Court:

Q. There was another blacksmith shop on June
40 30, 1928? A. Yes, sir.

Howard S. Wood—Direct.

By Mr. Kalisch:

Q. I understood your testimony to be that there is a pattern shop and there is also a pattern storage building. A. Yes.

Q. Have you made an effort to identify the patterns for manhole frames and covers which were either destroyed or damaged beyond use in this fire? A. Yes. 10

Q. Will you tell the Court and jury how you figured out those patterns which were damaged or destroyed in the fire? How could you identify them? A. After the fire I could identify parts of the patterns from making them from time to time.

By the Court:

Q. You mean you could identify them from what was left? A. Yes, sir, parts. 20

By Mr. Kalisch:

Q. You have made up a list for me. You have, for example, pattern No. 1001-A. A. Yes.

Q. Have you attempted to figure up the replacement value of the loss in connection with pattern No. 1001-A? A. Yes.

Q. Have you the copy of your figures here? A. No, they are down there. 30

Q. What kind of work were you doing for these ten years you worked for the Central Radiator Company? A. We were making miscellaneous casting patterns and radiator patterns and manhole frames and covers.

Q. What kind of employment were you engaged in previous to that? A. At other plants?

Q. Anywhere. A. I worked at Ingersoll-Rand, the Ben Cox Stove Company, the Robert Smithers Stove Company— 40

Howard S. Wood—Direct.

Q. Do you know what has become of your list?
A. It is down there, I guess.

Q. I notice that this list which I have given you now has been typewritten. Do you know who dictated to the person who typewrote this list the figures? A. Yes.

Q. Who did? A. I did.

10 Q. After the stenographer typewrote them, what did you do in order to determine whether she had correctly transcribed what you gave her? A. I checked it up.

Q. Was this pattern No. 1001-A damaged beyond use or destroyed? A. Oh, yes.

Q. Will you please tell us what the replacement value of that pattern was on October 3, 1928?

20 Mr. Schell: I object to that. I have not heard that this witness is qualified to testify to the cost of the manufacture of patterns.

By the Court:

Q. Are you familiar with the cost of the manufacture of the patterns? A. It was my duty in the employ of the Central Radiator Company to give costs on the manufacture of material in the plant.

30 Q. You fixed the cost? A. Yes, sir.

By Mr. Schell:

Q. That was fixing the cost for the goods sold?
A. No, sir, we did not manufacture patterns to sell; I figured the cost of the patterns.

Q. That was your position at the plant? A. Yes, sir.

By Mr. Kalisch:

40 Q. What was the replacement value of pattern No. 1001-A? A. \$55.01.

Howard S. Wood—Direct.

Q. Did you take into consideration lumber and hours of labor? A. You do when you estimate.

Q. And leather fillets? A. Yes, sir.

Q. And glue, nails and varnish? A. Yes, sir.

Q. And the figure you gave us, you say, is the replacement figure? A. Yes, sir.

Q. What about pattern No. 1002?

10

The Court: I don't think we ought to go through it in that way. This witness has figured all these patterns and he has figured their replacement value?

Mr. Kalisch: Yes, sir.

The Court: I would suggest that you submit the list to the other side as well as any data you have to support it.

By the Court:

20

Q. I suppose those are blueprints of those patterns. A. Yes, sir.

The Court: You will have to check it over overnight.

Mr. Schell: We never had anything except a lump sum furnished us: 72 sewer man-holes, so much money. This is new to us. We would have to have time to check it.

The Court: If you give them time to check it they may accept this list. Then they could cross-examine this witness on it. You do not admit the value, but you will admit that he will testify to that effect.

30

Mr. Kalisch: I would like to put in the proofs of loss.

Mr. Schell: I have them.

Mr. Kalisch: My intention was to go through the entire list. If this entire list

40

Howard S. Wood—Direct.

is inspected, it may be that I will not have to examine him any further.

10 The Court: You have already proved \$55.-01, so you are past the non-suit stage on the loss. I think you may submit your figures to the defendants and they can check them up overnight.

Mr. Kalisch: Then I will restrict the examination to subject-matter not connected with the amounts.

By Mr. Kalisch:

Q. The pattern storage shop was a frame building? A. This building was.

Q. The pattern storage shop—the old blacksmith shop. A. The old blacksmith shop was a
20 frame building.

Q. Did you figure the value of that building at the time of the loss and previous to the fire? Can you give us any estimate of its value?

The Court: The building itself?

Mr. Kalisch: Yes, sir.

Mr. Schell: What value are you asking for? You asked about the replacement value of the other. Now you are asking for the
30 value of the building itself.

Mr. Kalisch: The replacement value is what I mean.

Mr. Schell: Do you mean what it would cost to build a building like it?

Mr. Kalisch: I think you ought to object to the Court.

Mr. Schell: I object to it. It is not the test under the policy of insurance.

40 The Court: It says that it shall not exceed the amount of the cost to repair or to

Howard S. Wood—Direct.

replace the same. The actual cash value is the market value.

Mr. Schell: The courts have held that the market value is not the test.

Mr. Kalisch: It is the cost less proper deduction for depreciation however caused.

The Court: Yes.

10

Q. Can you give us the value of that building at the time of the fire, with proper deduction for depreciation—

Mr. Schell: He is a pattern maker, your Honor.

The Court: I don't think he has qualified on giving us the value of buildings.

Q. Have you done any work on building also?

20

A. Yes, sir.

Q. When? Just tell us your qualifications with regard to frame buildings. A. I have built houses, school houses, churches—

By the Court:

Q. As a builder? A. No, not as a contractor. I worked for a contractor.

Q. You mean as representing a contractor? A. No, sir, actually worked on the job.

30

By Mr. Kalisch:

Q. Can you tell us the cash value of the building with proper deduction for depreciation at the time of the loss?

Objected to.

The Court: I will sustain the objection. I don't think he has qualified. He was a workman on the buildings.

40

Howard S. Wood—Direct.

Q. Have you bought and sold lumber when you were working as a carpenter? A. Yes.

Q. Do you know the approximate value of the lumber necessary to build what is known as the old blacksmith shop at Lansdale? A. Yes.

10 Q. Do you know the approximate time it would take to build it? A. Yes.

Q. The amount of material necessary? A. Yes.

By the Court:

Q. Could you rebuild it? A. Yes.

The Court: I will allow it.

By Mr. Schell:

20 Q. How long has it been since you have bought any lumber or material for building buildings? You had been a pattern maker prior to the fire. A. Yes, but as a pattern maker you also do all repairing and building of buildings.

Q. You mean you buy the materials necessary to make restoration of different parts of buildings? A. Yes, sir.

30 Q. When was the last time prior to the fire when you had bought material similar to the material of which this building was constructed? A. We did it right along.

Q. What kind of wood was this building constructed of? A. White pine Philadelphia fencing beaded boards.

The Court: I will permit him to testify.

By Mr. Kalisch:

40 Q. What was the actual cash value of that pattern storage building, with proper deductions for depreciation at the time of the fire. A. I should say about \$1500.

Howard S. Wood—Cross.

Q. How far away from the pattern shop was this pattern storage building which you have also described as the old blacksmith shop? A. I should say about 50 feet.

Q. When you said that \$1500 was the price, did you mean to replace the building? A. To replace it, yes.

10

Q. That was not the value of the building when it was burned, was it? A. No.

Q. How much reduction did you make of the \$1500 for depreciation up to the time of the fire? A. Say about 20%.

The Court: That would be \$1200.

Mr. Kalisch: Yes, sir.

Cross-examination by Mr. Schell:

20

Q. What, if anything, did you have to do with the fixing of the value and loss on this building for the purpose of filing a proof of loss? A. I was employed for the company at the time.

By the Court:

Q. Did you work on the proof of loss? A. Only this list.

Q. On the building? A. On the building, yes.

30

By Mr. Schell:

Q. And isn't it a fact that in the proof of loss you fix a value of \$1000 and a loss of \$800? A. Two-thirds of the building was demolished.

Q. You mean that the other third was in perfectly good shape? A. Not in perfectly good shape; the partition was burned out.

Q. Then you did not include that in your proof. A. I would say yes.

40

Q. This building was located where as regards

Howard S. Wood—Cross.

the Bethlehem branch of the Philadelphia & Reading Railroad Company? A. I should say about 50 feet from the pattern shop.

10 Q. I understood you to say it was 50 feet from the pattern shop, but I asked you where it stood as regarded the right-of-way of the Philadelphia & Reading Railroad Company. A. I should say either on the line or about 10 feet in from the line.

Q. How long had that building been standing there to your knowledge? A. Since 1905.

Q. Do you mean to say that in your opinion the depreciation on a frame building is less than 1% a year? A. If it is constantly kept in repair.

Q. Did this building have any windows in it at the time of the fire? A. Yes.

Q. The windows were in? A. Yes.

20 Q. And glass was in the pane? A. Yes.

Q. Were there doors on the building? A. Yes.

Q. Were the doors kept locked? A. Not locked.

Q. There were stored in this unlocked building the patterns of which you have a list before you? A. Yes.

Mr. Kalisch: I object to that. The witness testified it was temporary storage.

The Court: He is asking him with reference to this list.

30 Mr. Kalisch: I will withdraw the objection.

Q. You have in that list approximately 37 sewer manhole patterns, have you not? A. Approximately.

Q. Do you know when those patterns were originally made? A. Not exactly year for year; they have been made since—

40 Q. Don't the blue prints say when the patterns were made? A. No.

Howard S. Wood—Cross.

Q. Did you make the blue prints since the fire?
A. No.

Q. And yet there is no date on them? A. On some of the prints, but not on the manhole frames and covers. I will look at them. No, there is no date on them.

Q. What is your best recollection as to the length of time in which those patterns were around the plant? A. From the beginning? 1913. 10

Q. In other words, those patterns were made just about at the time of the war. A. That is the time I went with the company, yes.

Q. How often since the war, which ended in 1918, were those patterns used, so far as you know? A. They were made from time to time.

Q. Can you give me any specified time that you of your own knowledge know that those patterns were used since the end of the war in 1918? A. The records in the office would show that. 20

Q. Do you have those records with you? A. No.

Q. Isn't it a fact that none of those sewer manhole frames and cover patterns were used by the Central Radiator Company from 1918 up to the time of the fire? A. Yes, they had.

Q. Can you give us the names of any people or any concern for whom the Central Radiator Company made any sewer manholes or covers from those patterns? A. I did not handle that end of the business. 30

By the Court:

Q. You mean you would not know whom they went to; you only made them? A. Yes, sir, I only made them. 40

Howard S. Wood—Cross.

By Mr. Schell:

Q. Have you any recollection at all approximately of the last time before the fire that those sewer manhole patterns were used? A. No, I would not have any recollection.

10 Q. What was the size of this old blacksmith shop? A. I would say it was 60 feet on one side and 40 feet on the other, and 20 feet wide.

Q. 60 by 40 and 20 feet wide? A. Yes, sir.

Q. How high was it? A. I would say about 20 feet high at the highest point; it had a pitched roof.

20 Q. I show you a plan of the property of the Central Radiator Company and ask you whether or not that plan depicts properly the layout of the buildings of that company at Lansdale.

Mr. Kalisch: I object unless he makes him his own witness.

Mr. Schell: It seems to me he has been permitted to testify as to values of buildings.

The Court: He may identify it as to whether it depicts it properly or not. You may mark it for identification.

30 Mr. Kalisch: It goes beyond my direct-examination.

The Court: You asked him as to the location of that building; that means where it is located as regards other buildings.

Mr. Kalisch: This question has to do with the entire layout of that factory at Lansdale, Pa.

The Court: I think they are entitled to know that. You referred to two other buildings.

40

Howard S. Wood—Cross.

By the Court:

Q. Is that the plant as of June 30? A. Yes, sir.

By Mr. Schell:

Q. Will you mark by the letter A the old blacksmith shop on that plan? A. It is marked.

Q. Mark with a letter B the building which was described as the pattern shop and pattern storage. 10

Mr. Kalisch: I object to that on the ground that he has not described the other building as the pattern storage building. He said the other building close by was the pattern shop.

By the Court:

Q. Were there three buildings, one described as the pattern shop, one as the pattern storage, and one as the old blacksmith shop which you used for pattern storage? A. No, sir, part of the pattern shop is used for pattern storage. It is just the pattern shop. 20

Q. The pattern shop and pattern storage is one building, is that right? A. Yes.

Q. And then these patterns were also kept in the old blacksmith shop, which you have marked A on the plan. A. Yes, sir. 30

Q. And that is temporary storage? A. Yes, sir.

By Mr. Schell:

Q. That is, two separate buildings. A. Yes.

Q. One was the pattern shop and pattern storage building combined for both purposes, and then there was the old blacksmith shop used for temporary pattern storage. A. Yes, sir.

Q. The first building, the pattern shop and pat- 40

Howard S. Wood—Cross.

tern storage building, is located where on that plan? A. Here (indicating).

Q. Will you mark it with a B on that plan? A. It is so marked there.

Q. The new blacksmith shop is located where? A. Right there (indicating).

10 Q. And it is so marked and identified on the plan, isn't it? A. Yes, sir.

By the Court:

Q. Does it say new blacksmith shop or just blacksmith shop? A. It says blacksmith shop.

(The plan referred to is marked Exhibit D-5 for identification).

By Mr. Schell:

20 Q. How long prior to the fire did they discontinue the use of the old blacksmith shop as a blacksmith shop? A. At least ten years.

Q. And it was at about that time, I take it, that the new blacksmith shop, if you want to call it that—the one you identified on the plan—was erected and built. A. The new blacksmith shop?

Q. You had the old blacksmith shop, which was the building you marked A on the plan. A. Yes.

30 Q. You say the use of that was discontinued about ten years before the fire. A. Yes, sir.

Q. The blacksmith shop, which is marked "blacksmith shop" on the plan, and which you have just identified, was that built about that time? A. Sure.

Q. Do you know Herbert H. Metz, surveyor, at Lansdale? A. Yes.

Q. Do you know anything about the making of that plan which I have just shown you? A. No.

40 Q. How long had the old blacksmith shop been

Howard S. Wood—Cross.

used for storage purposes prior to the fire? Ever since it was discontinued as a blacksmith shop?

A. No, it had been used for, I should say, three or four months before the fire.

Q. What had it been used for prior to that time?

A. They used it for a storage room for foundry supplies; that is, molding room supplies.

10

Q. When were the patterns first moved into that old blacksmith shop? A. I couldn't tell you.

Q. Within four months of the fire? A. Oh, yes.

By the Court:

Q. Within four months of the fire? A. Just before the fire.

By Mr. Schell:

Q. So that I will not have to spend a lot of time after I have gone over this list, you had one item, pattern 1001-A on which you gave a price of \$55.01. Was that price, \$55.01, what it would cost to make that pattern new? A. Yes, that is the actual cost.

20

Q. How much do patterns depreciate in value per annum? A. Some depreciate more than others.

Q. Of course, the question of depreciation depends largely upon the amount of use to which the pattern is put. A. Right. If a pattern is used a lot, it depends, and a lot depends, on the man using the pattern.

30

Q. But to a great extent, the number of runs of a pattern is the large factor in depreciation, isn't it? A. I would say yes.

Q. These patterns were made originally, you say, back in 1913? A. Well, from 1913 on up.

Q. On up to how far? A. 1924 or 1925; along there.

Q. I am talking only about the sewer and man-hole patterns. Is there anything else on this list

40

Howard S. Wood—Cross.

other than sewer and manhole patterns? A. Yes.

Q. How many of them are sewer and manhole patterns, do you know? These lists were made up by you in February, 1931, were they not? A. The lists, yes, separated.

10 Q. Where did you make the list from which was attached to the proof of loss? A. I made that up from the list we had of the manhole frames and covers we had at the time in the building.

Q. Isn't it a fact that you had on your books at that time a memorandum of sewer holes and miscellaneous patterns at a value of \$12,000? A. We had a list of manhole frames and covers that constituted the entire equipment of manhole frames and covers.

20 Q. And the books showed a value of \$12,000.

Mr. Kalisch: I object to that.

Q. You prepared this particular claim, did you not? A. Yes, sir, I fixed the estimated cost of the patterns that were used in the building.

Q. Where did you get the figure of \$12,000 from, which was in the schedule attached to the proof of loss.

30 Mr. Kalisch: I object to that. He is talking about the list and counsel is talking about the proof of loss.

Q. Isn't it a fact that you prepared the list which was attached to the proof of loss which was filed with the insurance companies? A. No.

Q. Is this the first time you have figured on these patterns, in February of this year? A. No, sir. I figured these costs when I got the job to build them.

40 Q. When was that? A. I couldn't tell you ten

Howard S. Wood—Cross.

years afterward, whether I had this one first or the other one first.

Q. Do I understand that you did this figuring in February of this year? A. Yes.

Q. And at that time you were furnished with certain blueprints evidencing certain styles and types of patterns, and from that you proceeded to calculate what in your opinion it would cost to replace them? A. Yes, sir. 10

Q. Then you simply applied a depreciation of 20% to the patterns, regardless of their age or use. A. A pattern would not depreciate 20%.

Q. Did you consider the extent of the sale of the products which would be made of that pattern in arriving at the depreciation? A. No.

Q. In your opinion is that or is that not an element of value of a pattern? A. For those patterns, yes. 20

Q. Yet you did not consider it. A. That is what I would want if I were to build one new.

Q. Do I understand that, less depreciation, you consider these patterns to have been of the value of approximately \$29,000 at the time of the fire?

Mr. Kalisch: If counsel is going to proceed with cross-examination, I would like to know whether he is again going to do that in the morning. He has been given leave to inspect these lists tonight. 30

The Court: I suppose he is entitled to ask the witness that so that the inspection would be of some use.

Q. Is that what your approximation is, \$29,000, as the cash value of these patterns at the time of the fire? A. Yes.

Q. Have you any records at all which will show 40

Howard S. Wood—Cross.

when these patterns were actually placed in this frame building—this old blacksmith shop? A. No.

Q. Have you any records at all to show to what use these patterns were put before the time of the fire? A. No.

10 Q. Do you have any records at all which will show the number of runs that these patterns have been subjected to? A. No, I wouldn't have.

-Q. Does the plant have any such records? A. The plant would have, I should think.

Q. Yet you did not take into consideration any of those records in arriving at this conclusion? A. No.

Q. Does obsolescence in your opinion enter into the question of the value of a pattern? A. Do
20 you mean if a pattern becomes obsolete?

Q. Yes. A. No pattern becomes obsolete.

By the Court:

Q. Then you did not take obsolescence into consideration. A. No, sir.

By Mr. Schell:

Q. Do you live in Lansdale? A. Yes, sir.

30 Q. Do you know whether or not the records are in court showing the runs, the length of time for which these patterns have been used and other similar data from which conclusions could be drawn? A. No.

Q. Who has charge of those records of the Central Radiator Company?

Mr. Kalisch: I object to that. He does not say that there were any records.

40 The Court: He said that there were some records.

Howard S. Wood—Redirect.

Witness: I said there naturally would be a record.

By the Court:

Q. Do you know of any record and where it is?

A. No, I do not.

By Mr. Schell:

10

Q. Who has general charge of the records of the company? A. That I don't know myself.

Q. You say you are not now connected with the Central Radiator Company? A. No.

Q. And you have not been for how long? A. I have not been since last Thanksgiving.

Q. Which is November, of 1930. A. That is right.

Q. But in February of this year you were asked 20 to make this schedule which you have here presented. A. I was asked to give the cost of these patterns.

Mr. Schell: I think that is all, subject to further cross-examination on the list in the morning.

Redirect-examination by Mr. Kalisch:

30

Q. Allowing 20% depreciation, what have you to say as to whether or not that would give the cash value of the patterns at the time of the fire?

A. I figured that patterns that are made of wood, and from what I saw after the fire, I figured that 20% would be a fair value for depreciation, because you know a pattern, when it comes out of the foundry, is not brought to the pattern shop for repairs. The only time the pattern goes to the pattern shop for repairs to bring it up to 100%, is 40 prior to putting it back into use.

Howard S. Wood—Redirect.

By the Court:

Q. In other words, if you do not use it again, you do not bother to spend the money to repair it.
A. No, but you don't know when you are going to use it.

10 *By Mr. Kalisch:*

Q. Would you say that 20% is a fair allowance for depreciation? A. Yes, it is a fair allowance for depreciation.

Q. These patterns for these manhole covers, are they used just in one part of the United States, or are they used all over? A. They are used all over.

Q. Can you tell when you are going to get a call for them or for radiator jobs? A. We never know.

20 Q. You did answer, I believe, that the manholes from these patterns are used from one part of the country to the other. A. Yes.

Q. Have they a period for how long they can be used? A. A pattern always has its value.

Q. Did you say in answer to the question regarding that plan, that this old blacksmith shop was also known as the pattern storage shop?

Objected to.

30 Objection sustained.

Q. Was the old blacksmith shop known by any other name than old blacksmith shop? A. No, it is generally known as the old blacksmith shop.

Q. Did it have any other name?

Mr. Schell: I object to that.

Objection sustained.

Mr. Kalisch: He has testified both ways.

Q. What was it used for?

40

Objected to.

Howard S. Wood—Recross.

Objection sustained.

Mr. Kalisch: I intend to prove that this place was inspected by the rating bureau and that they saw the use to which the old blacksmith shop was put, so that their knowledge of the use to which it was put was important in the terminology in the policy. 10

The Court: He has testified that it was used for the storage of patterns.

Mr. Schell: And he said that that was for four months before the fire.

Q. Do you know whether that building was used for the storage of patterns; that is, the old blacksmith shop—before June 30, 1928?

Objected to.

The Court: I think he said about four months. If you want to ask him whether he can fix it more definitely, all right. 20

Q. Can you fix it a little more definitely than saying a few months before the fire? A. No, I can't say. We had to have room in the pattern shop for newer patterns.

Recross-examination by Mr. Schell:

30

Q. From what source did you obtain the blueprints you have before you? A. They were taken from the records of the blue prints that we had in the plant.

Q. Where did you get them? A. I went to the plant to work up the estimate.

Q. And you have had them in your possession since February of this year? A. No, I have not.

Q. Where did you get them today? From some 40

Howard S. Wood—Recross.

officer of the Central Radiator Company? A. That is what I had for convenience.

By the Court:

Q. Where did you get them? A. I got them from the plant.

10 Q. How did they get into your possession so as to have them here today? A. We brought them with us.

Q. Where did you get them? A. From the superintendent of the plant.

By Mr. Schell:

Q. Who is the superintendent? A. Mr. Schaefer.

Q. Was he the superintendent at the time of this fire? A. No.

20 Q. Who was the superintendent then?

Mr. Kalisch: I object to that as immaterial and irrelevant.

The Court: You are offering the records. I will allow it.

A. I believe Mr. MacKenzie was superintendent at the time of the fire.

30 Q. Wasn't Mr. Quay superintendent at the time of the fire? A. I think he was plant manager.

Q. You got these blueprints in February of this year when you made up these figures? A. Yes.

Q. You were not working there in February of this year, were you? A. No.

Q. You left there last Thanksgiving. A. Yes.

40 Q. You got them from somebody connected with the plant in February, and then returned them to the plant, and then they were brought here by Mr. Schaefer? A. I didn't take these plans away from the plant at any time.

Edward J. Farrell—Direct.

Q. Then you prepared your estimate at the plant in February. A. Yes.

Q. What length of time did it take you to make these figures? A. It takes a couple of weeks to work up a big estimate like that.

Q. As I understand it, you started to use this old blacksmith shop for storage shortly before the fire because the other building was overcrowded. 10
A. Yes, sir.

Q. You used this for the overflow. A. Yes, sir, until such time as we could build a regular pattern vault.

Q. The patterns you took over to the old blacksmith shop were patterns that were not actively being used. A. You can't tell when you need to use them.

Q. But you moved them over. A. We moved 20
the larger ones; some of them were pretty large—we moved the larger ones and the parts that went with them.

Mr. Schell: That is all for the present.

EDWARD J. FARRELL sworn in behalf of plaintiff. 30

Direct-examination by Mr. Kalisch:

Q. Mr. Farrell, what was your connection with the Central Radiator Company? A. Cashier.

Q. Do you of your own personal knowledge know of any of the contents of that building which were burned other than these patterns and articles which Mr. Wood testified about? A. Other than what is shown in that list?

Q. Who prepared this list? A. Mr. Moseley. 40

Albert Moseley—Direct.

Q. Do you recall that these articles were in the building, or are you merely here to testify to the cost? A. I am here merely to testify to the cost.

Mr. Kalisch: I am sorry, but I have this witness on out of order; I will put Mr. Moseley on first, if I may.

10

The Court: Very well.

ALBERT MOSELEY sworn in behalf of plaintiff.

Direct-examination by Mr. Kalisch:

20 Q. Mr. Moseley, did you prepare a list of articles which you knew to have been in the building which was burned in this fire? A. Yes.

Q. Other than those articles which were referred to by Mr. Wood? A. Yes, sir.

Q. Who typewrote it? A. A stenographer.

Q. What method did you adopt to see whether she typewrote it correctly? A. I dictated it.

Q. What did you do after it was dictated? A. I made a check.

30 Q. You have items totaling \$1326.40. Is that correct? A. Yes, sir.

Q. Were the articles such as bales of excelsior and fire clay new materials or were they materials that had been on the ground for quite a time? A. Some of it was new.

Q. Wherever it was new material, have you charged the price that you paid for it as its value, or has Mr. Farrell made that? A. Mr. Farrell made that.

40 Q. Was this material bought on requisition by you? A. Yes, sir.

Albert Moseley—Cross.

Q. You gave the requisition, did you? A. Yes, sir.

Mr. Kalisch: I ask that it be marked for identification.

(The same is marked Exhibit P-55 for identification).

The Court: Now, as I understand it, you have had this witness identify this list as the items that were in that building. 10

Mr. Kalisch: Yes, sir.

Q. What have you to say as to whether the articles which are in your list there were or were not destroyed in this fire? A. I checked after the fire.

Q. Was it destroyed? A. It was destroyed.

Q. Can you tell us which of those articles were not new? A. No, I can't tell that. 20

Cross-examination by Mr. Schell:

Q. What, if anything, did you have to do with the preparation of this list to be attached to the proofs of loss? A. I had charge of all supplies in that building.

Q. What, if anything, did you have to do with the preparation of the proof of loss which was filed in this case? A. I made a check of this stuff on this list. 30

Q. I show you the proofs of loss which were filed by the Central Radiator Company under date of March 20, 1929, and ask you whether or not any of the items which appear on this list appear on the proof of loss which was submitted to the insurance companies.

Mr. Kalisch: I object to that as incompetent, irrelevant and immaterial. 40

Albert Moseley—Cross.

The Court: They are entitled to know what the proof of loss is.

Mr. Kalisch: It is not cross-examination of this witness; I have examined him on a list.

10 The Court: You have put in evidence the proof of loss.

Mr. Kalisch: Not yet.

The Court: You are saying that these things were in the building and were destroyed. He is entitled to know whether they are in the proof of loss or whether they are different. It goes to his credibility, I suppose.

A. Yes, they are the same.

Q. They are the same? A. Yes, sir.

20 Q. Do the values correspond?

Mr. Kalisch: I object to that.

The Court: He was not asked about the values. I will sustain the objection.

Q. I understand that you dictated this particular paper which you have before you. A. Yes, sir.

Q. But only as to quantities. A. Yes, sir.

30 Q. You know nothing about the values. A. No, sir.

Q. On the proof of loss you will notice the 13th item is 6 ton of fire clay.

Mr. Kalisch: Which schedule are you referring to?

Mr. Schell: The schedule attached to the proof of loss, Schedule B.

40 Q. Do you notice that 6 tons of fire clay? A. Yes.

Albert Moseley—Cross.

Q. On your list you show how many ton? A. 4 tons of fire clay.

Q. And your list was made when? A. 2/5/31—February 5, 1931.

Q. On your list you have 200 of 72-84 cupola bricks. A. Yes.

Q. On Schedule B you have 2000, have you not? 10
A. Yes.

Q. On the cupola bricks, the 36-48, you have 400 on your list, and 1000 on the proof of loss. A. Right.

Q. On the split bricks you have 250 on your list and 500 on the proof of loss, is that right? A. Right.

Q. Do you have any breast bricks at all on your list? A. No, sir.

Q. Do you have any brick slabs on your list? A. 20
Yes.

Q. How many? A. Two.

Q. And how many are on the proof of loss? 25?
A. 25 is right.

Q. You said you had no breast brick on your list, but on the proof of loss you have 200, have you not? A. Right.

The Court: The proofs of loss will be considered in evidence. 30

(Proof of loss under Providence Washington Insurance Company policy No. 1397 is received in evidence and marked Exhibit P-1A).

(Proof of loss under Fireman's Fund Insurance Company of San Francisco, California, policy No. B-1813150 is received in evidence and marked Exhibit P-2A).

(Proof of loss under The State Assurance Company, Ltd., policy No. 534036 is received 40

Albert Moseley—Cross.

in evidence and marked Exhibit P-3A).

(Proof of loss under The Continental Insurance Company policy No. 585 is received in evidence and marked Exhibit P-4A).

10 (Proof of loss under Bankers & Shippers Insurance Company of New York policy No. 1350822 is received in evidence and marked Exhibit P-5A).

(Proof of loss under The Alliance Insurance Company of Philadelphia policy No. 176954 is received in evidence and marked Exhibit P-6A).

(Proof of loss under The Alliance Insurance Company of Philadelphia policy No. 175130 is received in evidence and marked Exhibit P-7A).

20 (Proof of loss under The Travelers Fire Insurance Company of Hartford, Connecticut, policy No. 23327 is received in evidence and marked Exhibit P-8A).

(Proof of loss under United States Fire Insurance Company of New York policy No. 2916061 is received in evidence and marked Exhibit P-9A).

30 (Proof of loss under Great American Insurance Company of New York policy No. 25270 is received in evidence and marked Exhibit P-10A).

(Proof of loss under The Franklin Fire Insurance Company of Philadelphia policy No. 768 is received in evidence and marked Exhibit P-11A).

40 (Proof of loss under The London Assurance Corporation policy No. 7203939 is received in evidence and marked Exhibit P-12A).

Albert Moseley—Cross.

(Proof of loss under Northern Assurance Company, Ltd., of London policy No. 10154 is received in evidence and marked Exhibit P-13A).

(Proof of loss under Niagara Fire Insurance Company policy No. 17035 is received in evidence and marked Exhibit P-14A). 10

(Proof of loss under Westchester Fire Insurance Company of New York policy No. 8760 is received in evidence and marked Exhibit P-15A).

(Proof of loss under Phoenix Assurance Company, Ltd., of London policy No. 888165 is received in evidence and marked Exhibit P-16A).

(Adjourned until tomorrow, Tuesday, June 16, 1931, at ten o'clock A. M.) 20

SECOND DAY.

Tuesday, June 16, 1931.

Continued pursuant to adjournment.
Present, counsel as before stated.

Mr. Kalisch: I have one witness whom I should like to put on out of order. I have asked counsel about it and he has said that if you have no objection I may do it.

The Court: Put him on.

30

40

Herbert Rohlffs—Direct.

HERBERT ROHLFFS sworn in behalf of plaintiff.

Direct-examination by Mr. Kalisch:

Q. What is your business, Mr. Rohlffs? A. I am manager for A. Lamy & Son, Elizabeth.

10 Q. What kind of business is that? A. Pattern making and foundry.

Q. For how long a period of time have you been engaged in that kind of work? A. 18 years.

Q. Do patterns for manhole frames and covers become obsolete? A. They do not, for the simple reason that manhole covers are standard articles. They may be used in any county or in any state. Their size govern their obsolescence.

20 Q. What have you to say as to whether a 20% depreciation in patterns is a fair allowance after use for manufacturing manhole covers for a period of 15 or 16 years.

Objected to.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Q. What is the custom in the business of manufacturing manholes with regard to the transferability of patterns where a foundry is not all housed in one building?

Objected to.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Q. What is the custom in the trade regarding

Herbert Rohlfss—Direct.

constant retention of patterns in a single building of several buildings in a pattern manufacturing establishment?

Objected to.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Q. What is the custom regarding incidental changing from building to building as the occasion requires with regard to manhole patterns where the foundry consists of two or more buildings?

Objected to.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

CROSS-EXAMINATION WAIVED.

Mr. Kalisch: Mr. Schell wanted to cross-examine Mr. Wood further after inspecting some papers.

Mr. Schell: Yes, but I have a motion that I should like to make first. My motion is addressed to a paper identified by Mr. Wood yesterday which bears the heading "Central Radiator Company. Patterns destroyed by fire October 2, 1928." I call your Honor's attention to the fact that with one exception, to which I will address myself in a memorandum, none of the articles which appear on that list are included in either of the two schedules or in the proof of loss which was furnished in March, 1929, and hence, as to those items, I submit that this paper can have no evidential value 30 40

Motions.

whatsoever, in view of the fact that their contract of insurance requires that the company shall receive an inventory and a proof of the property upon which loss or damage is claimed, the point being that the company has thus an opportunity to examine as to the correctness of the claim made.

10 The Court: Your contention is that they cannot recover anything not included in their proof of loss.

Mr. Schell: That is right, plus the fact that the pleadings do not cover any items—the pleadings seeking to recover the exact amount in the proof of loss.

20 The Court: I suppose it also raises the question of whether they are included in the policies. One of the disputes in this case, as I understand it, is that the patterns were not covered by the policy.

Mr. Schell: I do not think that is it.

The Court: Do you admit that the patterns are covered by the policies?

30 Mr. Schell: Not these particular patterns. They were in a building we allege is not covered by the policies. But I am addressing myself to the fact that the schedule of February 28, 1931, is not covered in the schedules presented to the companies or in the proofs of loss, with the one exception, that there is an item of four 18-inch 3-column radiator patterns; on the list there appears an 18-inch S wall. The number of patterns is given as one of four, but there is no other item on the entire list which can possibly correspond with the proof, except that one item, and that one item they would be entitled to—

The Court: It might be well in cross-examining Mr. Wood to ask him about that.

40 Mr. Kalisch: The proofs of loss were rejected by

Motions.

the company. They cannot blow hot and cold with regard to the same instrument. According to our contention they have put us off from time to time, with the result that the proof of loss came in after 60 days. It is our contention that there is a waiver. They waited until after 60 days, and then rejected them. Now they are taking advantage of something they refused to consider. If I attempted to recover for an amount greater than the amount mentioned in the proof of loss—it may well be that what we have incorporated in the proof of loss is an admission against interest, but it is not a limitation of our right. They said this paper is not good for anything; now they say we are bound by it. If counsel will recall my opening to the jury, I said it will be observed when the damages are proved that the amount may be greater than the proof of loss, but I said that in view of the fact that we started our suit on that amount, we will adhere to that amount. I say now that we will stand by that \$14,373, because that is what we demanded. The subsequent damages which we claim, were damages we discovered later on, and since we did not demand it in the first place, we will not demand it now. You cannot deduct it bodily, because while the amount should be deducted from the whole amount, maybe we cannot recover more than the \$14,373—I am willing to be restricted to that amount, but I want to prove all the loss so that we can be certain that we can recover the full amount as originally claimed.

Mr. Schell: In the first place, as far as the General Adjustment Bureau was concerned, there was no rejection of the proofs; as far as Mr. Monroe was concerned, it was based solely on the fact that the proofs of loss were not submitted within 60 days. Would it be possible for any defendant to

Motions.

prepare a defense against any claim which is not in the proof, in the schedules, or in the complaint? Would it be possible for anybody to be prepared to meet a claim of this character which is brought up in court for the first time?

10 The Court: It seems to me that the question of waiver only goes to the furnishing of the proof of loss within time.

Mr. Kalisch: They say they do not take any cognizance of the paper at all.

The Court: In order for you to succeed, you must have your proof of loss, and that is the thing which you dispute over between you in the settlement of the loss; that is, what you have in your proof of loss is what is presented to them, and what they have to pay for if it is proper, but they do not have
20 to pay for anything that is not in the proof of loss.

Mr. Kalisch: But the list read by counsel was merely given for the purpose of helping in the examination of the witness. I will admit that. If your Honor goes so far as to agree with the first part of counsel's contention that if this man is testifying that certain parts of that testimony, if it goes beyond the proof of loss—I say assuming my contention is incorrect, and I do not admit that it is—that your Honor will limit the jury's consideration of the damages to the amount of the proof
30 of loss. But I say that that paper is not offered as an exhibit.

The Court: It is limited to what is covered by your proof of loss. I have not read the proof of loss. I have not even seen it. If that schedule will include these patterns, you can have him testify to them; if they do not, you cannot.

Mr. Kalisch: There is no question about the
40 patterns. Here is an item of \$12,000 in one place.

Mr. Schell: I took this list last night, and there

Motions.

are 72 sewer manholes and miscellaneous patterns claimed. The number of sewer manholes and marine boiler fronts and parts patterns total exactly 72 on those two sheets. This is a third sheet. The only reason I made this motion was that, as I recall the situation yesterday, we were agreed to save time, that Mr. Wood would so testify if he was called, and then there would be nothing but the cross-examination on these papers which might be the subject-matter of cross-examination. I say that with the one exception to which I called your Honor's attention, there isn't a single thing which would bring this paper within the proofs. 10

Mr. Kalisch: You refer only to that one paper?

Mr. Schell: Yes, the list of patterns.

The Court: If that goes in, he will have to cross-examine on it. 20

Mr. Schell: I have no way of meeting it.

The Court: If it goes in he will have to cross-examine on it, and if I am going to exclude those items when I submit the case to the jury, there is no reason why it should go in.

Mr. Kalisch: I am perfectly content, in order to dispose of the case as rapidly as possible, to eliminate from the case, either by the testimony of the witness, or by the jury's consideration of the facts, anything that we did not claim originally. The only thing was that they asked me for the complete list of what this man would testify to. 30

The Court: Do not let us waste time over it. We understand each other perfectly as to what it was for. There is no need to put in a list, or to consider it, when the jury is not going to consider it. You have to limit yourself under my ruling, not only to the amount, but the items in the proof of loss. I will limit you not only to the amount 40

Motions.

of the proof of loss, but to the items of the proof of loss.

10 Mr. Kalisch: I ask an exception upon the proposition that the proofs of loss, having been rejected by the companies, they cannot take advantage of the amount or of the items therein stated, those proofs of loss being nothing but an admission against interest on the items in question.

Exception noted as ground of appeal.

The Court: You have here 72 sewer manhole and miscellaneous patterns, \$12,000, and four 18-inch three column radiator patterns.

Mr. Schell: I am keeping those in. There are 37 patterns on that page; on this page and this page are 35 more, making 72.

20 The Court: I suppose that is what your man will testify to, Mr. Kalisch.

Mr. Kalisch: Yes, sir, but I want to be sure that I get the benefit of everything that appears in the proof of loss.

The Court: Here is 72. I imagine if that is the way you have them listed on the first page, you will find the additional ones afterward, but you cannot prove them.

30 Mr. Schell: Then there would be only one question as to the four 18-inch three column radiators.

The Court: Suppose you eliminate the last page. You can take the last page and ask him questions about it, and I will rule on it. But you had better admit on my ruling that the ones you are asking about are not in that 72. The 72 have gone in already.

Howard S. Wood—Recalled—Cross.

HOWARD S. WOOD recalled for further cross-examination.

Further cross-examination by Mr. Schell:

Q. Mr. Wood, I show you a list which is marked O. K. with your signature, and I call your attention to an item "162-1 S. C. 51," being the pattern number, and the item immediately beneath, "162-1, pattern S. C. 52." Those you total at \$54.90 for the first pattern as the replacement value, and \$36.60 for the second item. Down here (indicating) you have "162-1, pattern No. S. C. 51, \$54.90; and 162-1, pattern No. S. C. 52, \$36.60." Is that or is that not a duplication of the first two? A. No. 10

Q. That is a marine boiler, isn't it? A. Yes, sir. 20

Q. How does it happen that the pattern numbers and the values are identical if that is not a duplication? A. In the first place, you can have two different patterns and it would require two different kinds of equipment to handle that pattern.

Q. I show you a blueprint, "John Read & Company, drawing No. 1621, for furnace door, gray iron casting," and call your attention to the list of material at the top and ask you whether it shows any other type of material than cast iron. A. Cast iron is the material cast from the pattern. 30

Q. In the light of the fact that that calls for cast iron only, and the numbers correspond, do you still say that that is not a duplication? A. This is production job—

Q. I didn't ask you that. I asked you whether in the light of the fact that that calls for cast iron only, and the numbers correspond, do you still say 40

Howard S. Wood—Recalled—Cross.

that that is not a duplication? A. Yes, we have two or more patterns.

Q. So that the item of \$54.90 and \$36.60, is a duplication of the item which appears above. A. Yes, the number of patterns.

By the Court:

10 Q. Do they represent duplicate patterns, or is it duplicated on the list? A. Down here it is listed "S. C. 51" and S. C. 52 is a unit in itself, and in the production shop you have more than one of the same pattern—that is, you are running more than one floor.

By Mr. Schell:

20 Q. Then how is it that you do not have a duplication of S. C. 53, 54, and 56? A. You have S. C. 53.

Q. Yes, it appears on your list once, and S. 54 appears once and 56 appears once. If it is a fact, say so. Isn't that a duplication or a mere mistake you made in the preparation of this paper? A. No, it is not a mistake.

30 Q. And you mean to tell me that the same identical pattern number, the same drawing number and the same prices is not a duplication of what appears here, and you have only one of those two patterns in the plant? A. No, we did have one pattern of some of these and we did have more than one pattern of others.

Q. Where is there anything on the blueprint which shows that there is any different kind of material? A. It is a cast iron product.

40 Q. And that is all the blueprint calls for. A. There are some steel products here, but we did not make that.

Q. Yet, at the inception of your testimony, you

Howard S. Wood—Recalled—Cross.

said it appears because you used different materials. A. Different materials in making up the patterns.

Q. What materials did you use? A. We used cast iron parts to mount on the wood patterns, but the print would not show that; that is a matter of foundry practice.

Q. Take the item "166, S. C. 57," which appears here and shows a price of \$36.60, and the item "166 S. C. 57," which corresponds with the other and shows a price of \$44.42; and the item "166, S. C. 57, \$76.15." How do you account for the difference in the price of those three items? A. S. C. 57, that is the number you said, is a master pattern in one case, and in another case it is a wood working pattern.

Q. What is the third case? A. It might be possible that we had two. 20

Q. You had two what? A. Two metal patterns.

Q. They would cost the same, wouldn't they? A. Not necessarily.

Q. You mean to say if you make one metal pattern and figure the cost of it, and you want to make another metal pattern, it would cost a different amount? A. Yes.

Q. Do you know of your own knowledge that all these patterns on this list were in this old blacksmith shop? A. I know they were moved there. 30

Q. Do you know of your own knowledge that at the time of the fire these patterns were in the old blacksmith shop? A. The patterns still were in the storage when we—

Q. Do you know of your own knowledge that on October 2 or October 3, 1928, all the patterns which appear on this list were in the old blacksmith shop? I am now talking about the 72 pat- 40

Howard S. Wood—Recalled—Cross.

terns. A. They were moved out of that building into that building (indicating).

Q. Do you know of your own knowledge that on the day of this fire these 72 patterns were in the old blacksmith shop? A. Why, yes.

Q. How do you know it? A. Because I saw them move the patterns over.

10 Q. Did you ever see them moved out? A. Only when it was necessary to have some made.

Q. How do you know that these particular patterns bearing the particular numbers which you placed upon your list, were in the old blacksmith shop at the time this fire occurred? A. We had a number of patterns pertaining to the same class of work, and I had taken the prints as a whole—
20 not this batch, but among more prints—and gone over the storage and I found—that is not shown here—we had patterns to those prints, but the patterns to those prints which were on the first floor of the pattern storage shop, and when they were moved into this temporary storage place, those patterns were cleaned off, and they represent these prints.

Q. Did you check them yourself? A. When I made this list.

Q. When you made this list in February of this
30 year you checked them? A. What I had on hand, yes.

Q. How could you check, in February, 1931, the patterns which you had in the old blacksmith shop in 1928?

Mr. Kalisch: I object to that. He did not say he did that.

Objection overruled.

A. I did not check them.

40 Q. Did you at any time prior to October 2, 1928,

Howard S. Wood—Recalled—Cross.

make a personal check of the patterns which were in the old blacksmith shop? A. No.

Q. You have produced a number of blueprints evidencing patterns for marine boiler fronts and parts, and I want you, as rapidly as you can, to give me the dates from these blue prints, and tell me whether or not, after refreshing your recollection from the dates appearing on the blueprints, when the Central Radiator Company began to manufacture or cast from those blueprints. 10

The Court: Have you been over them?

Mr. Schell: Yes, sir.

The Court: Tell him what you understand. He may know that as well as you do.

Q. It is my understanding, Mr. Wood, and see whether I am correct, that all of those blueprints bear date from the earliest date, October, 1917, and the latest date, down to 1920. Is that your recollection? A. Yes, approximately. 20

The Court: You want to save putting them into the record, I suppose.

Mr. Schell: Yes, sir.

Q. Did the Central Radiator Company start to cast from those patterns about the date that the various blueprints show? A. Well, not immediately on that date. 30

Q. But I mean within a month or so. A. Yes.

Q. Within two months of the dates which appear upon those particular blueprints, you would say that the Central Radiator Company started to cast the parts called for by those blueprints? A. Yes.

Q. All of those blueprints bear the name of the 40

Howard S. Wood—Recalled—Cross.

John Read Company, do they not? A. Yes.

Q. Who is John Read & Company? A. Manufacturers of marine boilers.

Q. Have you any idea of the last date prior to October, 1928, that you cast any parts for John Read & Company from those prints? A. I would
10 not have any such record.

Q. Do you know of your own knowledge as to whether or not the Central Radiator Company upon its books or other records, kept any record of castings made from those prints?

Mr. Kalisch: I object because this witness manifestly is not in a position to say that.

The Court: If he knows he may testify to it.

20 A. I don't know whether they have. I would say they should have.

Q. In other words, whenever a casting is made from any of the patterns evidenced by those blue-prints, the ordinary operation of a business such as that of the Central Radiator Company, a record of that fact is made upon the books.

30 Mr. Kalisch: I object to that on the ground that the witness did not state that he knows what the practice is in the office of the companies. He testified he is familiar with his part of the work. Now he is calling upon him to disclose or to give his opinion as to what businesses do.

The Court: He has not testified to anything outside of his field. It is too broad. I will sustain the objection.

40 Q. As I understand it, if a casting is made from the patterns which are evidenced by those blue-

Howard S. Wood—Recalled—Cross.

prints, the practice of the Central Radiator Company was to note that fact upon its records.

Mr. Kalisch: I object to that upon the ground that there is no support in the testimony for any such thought on the part of counsel.

10

By the Court:

Q. Do you understand the question? A. Yes; that is customary in the business.

Mr. Kalisch: I move that that be stricken out.

The Court: Strike it out.

By Mr. Schell:

Q. As I understand it, if a casting is made from the patterns which are evidenced by those blue-prints, the practice of the Central Radiator Company was to note that fact upon its records. 20

By the Court:

Q. The question is whether the Central Radiator Company kept the record or not. A. I would say they would.

Q. Do you know? A. That was not my part of the business. 30

By Mr. Schell:

Q. Didn't you have charge of the patterns? A. Yes.

Q. And if a casting was made from the patterns, didn't you give to some other person a record of the fact that a casting had been made from a certain pattern? A. No, sir, the slip follows the pattern into the foundry and then it is out of my hands. 40

Howard S. Wood—Recalled—Cross.

Q. But that slip would show upon the face of it the pattern number and the number of castings which had been made from that pattern. A. Yes.

Q. Do you know of your own knowledge where those slips finally went? A. They are destroyed when the job is out. That follows the pattern and the pattern is returned to its shelf, or when it is taken out of the foundry and put back into storage.

Q. Do you know whether or not before that slip is destroyed any record is made of the casting evidenced by that slip? A. I don't know, but I should say that it should be; I suppose it should be.

Q. Don't suppose. If you don't know, say so. I show you this book of manhole patterns. The red marking which appears on those various patterns, are those made by you? A. Yes.

Q. When you say, "Cover burned," and you have a certain spot appearing on the pattern, does that indicate that the pattern was burned at that particular spot, or that the cover of the pattern was burned at that particular spot? A. No.

Q. What is the significance of the cross that appears on various places on the blueprints? A. That might be a shop practice in checking. I haven't anything to do with that.

Q. I thought you said the notation in red, "Cover burned," "Frame and cover burned," and so forth, was made by you? A. Only where it is printed.

Q. Do you mean to say that the red mark which appears on there is not made at the same time as the notation? A. No, sir, that was in the book when I got it; that is, the cross.

Q. Will you turn to pattern No. 1041? Is there any date upon that pattern? A. No.

Howard S. Wood—Recalled—Cross.

Q. Look on the back. What is the notation which appears on the back of it? A. That is a notation as I get it, actual weights.

Q. What is the date? A. When the weights were made.

Q. What is the date? A. 8/21/16.

Q. Unless that pattern had been made at that time you could not have had the actual weights, could you? 10

Mr. Kalisch: I object to that as argumentative.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. That is a fact, isn't it, Mr. Wood? 20

Mr. Kalisch: I object to that as argumentative.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The weights are always given after a pattern is made, unless it is an estimated weight. 30

Q. That shows actual weight, doesn't it? A. That is actual weight.

Q. Turn to your pattern No. 1054. Was there a date given upon that pattern? A. Yes.

Q. What is the date? A. 4/26/15.

Q. And No. 1055. A. No, I don't see any date on that.

Q. Is there any date on the back? A. Yes.

Q. What is the date on the back? A. 8/20/16.

Q. And No. 1064. A. Yes. 40

Q. What is the date? A. December 3, 1915.

Howard S. Wood—Recalled—Cross.

Q. No. 1067. A. Yes.

Q. What is the date? A. February 11, 1916.

Q. No. 1108. A. 3/18/21.

Q. So far as you know, is there any date appearing upon any of the other patterns which appear in that little book? A. There is no date on any patterns.

10 Q. Except the ones you have mentioned? A. We never put dates on patterns.

Q. On the blue prints which you have there. A. Yes, there is dates on them.

Q. There are no dates on any of the others you have mentioned except those. A. No, unless I look at them.

Q. Do the numbers starting with 1001-A precede in time those I have mentioned? A. No, I wouldn't say so.

20 Q. Do I understand from that that you would have a higher pattern number on a pattern which was made at an earlier time?

Mr. Kalisch: I object: This witness is not interested in what a lawyer understands.

Mr. Schell: He is the pattern man.

The Court: I will allow it.

30 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The pattern can have a higher number, although it had been made a long time ago. I do not arrange the pattern numbers; the pattern maker does not arrange the pattern numbers. He takes them from the drawings.

Q. Isn't it a fact that all of those blueprints
40 which you have before you are arranged in consec-

Howard S. Wood—Recalled—Cross.

ative order, starting with 1001-A and going down to 1111? A. That is the way they run in the book.

Q. Isn't it a fact that 1001-A would have been manufactured prior to No. 1111? A. No.

Q. Would you say that that was not so or not necessarily so? A. Not necessarily so.

Q. Do you know whether or not, as a pattern man in this plant, they had any record in the shop showing the dates of these various patterns which are evidenced by these blue prints? A. No, I wouldn't know that. 10

Q. Those blueprints were furnished by what company? A. John Read & Company?

Q. Those you have in your hands. A. The Central Radiator Company.

Q. Look at them please. A. Central Radiator Company. 20

Q. The Central Radiator Company or Central Foundry Company? A. Central Foundry Company.

Q. Is the Central Foundry Company affiliated with the Central Radiator Company, do you know? A. I believe it is.

Q. On the proof of loss which I show you, you have an item "four 18-inch three column radiator patterns." I take it that the four signifies the number. 30

Mr. Kalisch: I object to that on the ground that this witness has not stated that he made up this proof of loss. While we may be bound by it under your ruling, I do not think he is bound by the way it is set up in that proof.

Q. There is an 18-inch three column radiator pattern appearing on that list. You are familiar with the patterns of that character. 40

Howard S. Wood—Recalled—Cross.

Mr. Kalisch: Which list?

Mr. Schell: The proof of loss.

10 Mr. Kalisch: I object to an examination concerning the manner in which this list is set up in the proof of loss, because this witness has not said that he had anything to do with the making up of that proof of loss.

The Court: As I understand it, you said that the items are identical.

Mr. Kalisch: I have not said anything. Counsel has made a statement to the Court.

The Court: Can you tell us whether or not they are identical?

20 Mr. Kalisch: That has nothing to do with the proof of loss. I did not see the proof of loss until yesterday afternoon. They have been in the hands of the companies.

The Court: Haven't you copies of them?

Mr. Kalisch: No, sir.

The Court: You have an item of 72 sewers, manholes and miscellaneous patterns. Don't you know what that is?

Mr. Kalisch: Certainly I do.

The Court: Isn't it the same list which you asked this witness to testify to?

30 Mr. Kalisch: I say assuming it is—

The Court: You know what I mean, Mr. Kalisch.

Mr. Kalisch: Yes, sir, I do.

The Court: I am asking you for some information.

Mr. Kalisch: We stand by the claim we made.

40 The Court: You have put in evidence the proofs of loss, and they contain 72 sewer manholes and miscellaneous patterns. You put this witness on the stand and you have

Howard S. Wood—Recalled—Cross.

given him a schedule which he made up, containing 72 sewer manholes and miscellaneous patterns, and I am only asking you whether they are identical.

Mr. Kalisch: I don't know; I have not seen the proof of loss.

The Court: Then I will rule out his testimony, because you do not tell me whether they are the same as in the proof of loss; if they are not in the proof of loss, you cannot recover under my ruling. 10

Mr. Schell: I ask that the testimony of this witness be stricken out.

The Court: I will strike it out.

Mr. Kalisch: I have not finished my examination of this witness. I was told to cover one item and that then I had passed the point of non-suit. 20

The Court: Then if they were agreeable they would take that list of items with this witness' testimony.

Mr. Kalisch: Since that time I have not been given the proofs of loss which have been with counsel over here. Your Honor has asked me to do something which, if your Honor will reflect for a moment, you will know it is impossible for me to do. 30

The Court: I don't understand that. You must have known what this schedule attached to the proof of loss was.

Mr. Kalisch: I thought they were the same thing.

The Court: You have two schedules here.

Mr. Kalisch: My thought is the same thing, but I would not want to make a statement until I looked at it. 40

Howard S. Wood—Recalled—Cross.

The Court: Very well; look at it now.

Mr. Kalisch: Now that I have had an opportunity to ask him a question, they are the same. There are 72 manhole covers and the other items.

10 The Court: In other words, the proof you have offered in evidence is the testimony of this witness that there were 72, which are covered by the proof of loss.

Mr. Kalisch: Yes, sir.

The Court: Then I will permit the testimony to stand.

Mr. Schell: I would like to ask the witness a question.

20 The Court: Suppose Mr. Kalisch proves those without the list. This man's testimony is contained in those statements. This list is not going in, but you may ask him about it and he may use the list.

By Mr. Kalisch:

Q. There is one item here, the 6th item from the bottom of that list. Is that in the \$12,000 column or is it not? Is that a manhole cover pattern? A. No, that is a radiator pattern.

30 Mr. Schell: The item immediately above the 72 is an item of 18-inch three column radiators.

Mr. Kalisch: That is it.

Mr. Schell: I do not find anything on that list except that one item.

40 Q. Is this item to which I have referred you the same item otherwise described as 18-inch three-column radiator pattern? A. No, that is a wall and the other is a three-column.

Howard S. Wood—Recalled—Cross.

Q. So that they are not identical. A. No, sir.

By Mr. Schell:

Q. Is there anything on that list which corresponds with the item on the proof of loss which reads: "Four 18-inch three column radiator patterns"? A. No, it is not on this list as I see it. 10

Q. You only have one 18-inch item on there. A. Wall radiator.

The Court: Now suppose you put that list in evidence.

Mr. Kalisch: As long as we make a claim for it, I want to ask him whether he recalls what it is.

The Court: Have those three pages marked with the understanding that they are admitted in evidence with the purpose of showing what this witness would testify to if he were interrogated. 20

Mr. Schell: My objection generally is that I have heard no evidence from the witness from which we would be able to determine that he knows that these particular patterns which are included in this list were actually in this building when this loss occurred. He said he had never checked them in the building before. I have no objection to his testimony as to value. 30

The Court: I think the testimony he has already given, as I understand it, is sufficient to allow his testimony as to these items in evidence. There may be some question which the jury may have to determine, and that is whether or not from his testimony he knew that they were in that building, but as far as I am concerned he has already said 40

Howard S. Wood—Recalled—Cross.

that they were there. The effect of your cross-examination on him is for the jury not for me.

10 Mr. Schell: I would also call your Honor's attention to the fact that there should be eliminated from this schedule by a ruling of your Honor an item of one 9 x 11 upright marine open engine, on the ground that it was not included in the original claim.

The Court: It is not on the proof of loss.

Mr. Schell: The value given here is \$1500, and there is no such item appearing on the proof of loss.

Mr. Kalisch: My point is that the proofs of loss bind us only as an admission.

20 The Court: You still make your objection to the elimination of that item because you are not bound by the proof of loss.

Mr. Kalisch: That is right.

The Court: Put it into evidence now.

(The same is received in evidence and marked Exhibit P-56).

By Mr. Kalisch:

30 Q. There is an item in your proof of loss of four 18-inch three column radiator patterns. A. Yes, sir.

Q. And I note that the value of that is contained in the proof of loss as—

Mr. Schell: I think he may ask the witness what his opinion of the value of those is, but I do not think he can ask him about anything when he objected to our using it.
(Question withdrawn).

40 Q. Will you please give us an estimate of the

Howard S. Wood—Recalled—Cross.

replacement value of four 18-inch three column radiator patterns as of the time of this fire. A. As a matter of fact, we did not make an 18-inch three column pattern. I don't recall it on this list.

Q. It is not on that list, but you haven't any recollection of that article being there? A. No, I did not move it. 10

Q. You testified that one metal pattern might be higher in cost than another. Why? A. Workmanship on a pattern increases the cost.

Q. You are talking about some cards which follow the pattern throughout the plant. What is that? A. That is a card issued by the office for putting the job into the foundry.

Q. Is that a requisition card? A. Yes, that is the card that follows the pattern. 20

Q. When a pattern goes out, is there any card or ticket left with you when the pattern goes out? A. No, that goes with the pattern. If the pattern needs replacing or repairing to put it into 100% condition for the foundry, the card comes in and the pattern is made ready for the castings, and then the card accompanies the pattern to the foundry.

By Mr. Schell:

30

Q. How were the patterns kept in the old blacksmith shop? A. They were kept in one end of the building.

Q. Were they kept in bins? A. Some.

Q. How many of the 72 would you say were kept in bins? A. 72 manhole frames and covers would not go in bins. They were put on a shelf.

Q. How many of the 37 patterns for manhole covers were on shelves? A. You would not pile a 40

Howard S. Wood—Recalled—Cross.

manhole frame and cover on shelves; you would not necessarily need to.

Q. I am asking you as to how the patterns were kept in the old blacksmith shop previous to the time of the fire. You ought to be able to tell us that. A. In one corner of the building, manhole frames piled one on top of the other.

10

Q. What about the patterns for those marine boilers evidenced by the blueprints of the John Read Company?

Mr. Kalisch: I object to that as not re-cross examination.

The Court: I am going to consider this cross-examination.

20 Q. How were they piled? A. Likewise.

Q. And standing on the floor of the building and just piled up in the building? A. Yes, one on top of the other, like you would stack boxes or books.

Q. Were the patterns of the John Read Company kept in the building separate from other patterns?

A. Oh, yes.

30 Q. Do I understand that you know of your own knowledge that each one of those 72 patterns which are evidenced by this list which you have produced here, were actually in this building on the day before the fire? A. I would say yes.

Q. Do you know of your own knowledge that they were? A. I know they were put there in the building from the fact that I saw them put there.

Q. How long before the fire? A. About three or four months; it was in the summer time.

Q. The summer of 1928? A. Yes.

40 Q. Do you know whether or not any of them were taken out of there between the summer of 1928 and October, 1928? A. Yes, there were patterns taken out; just which ones, I could not say,

Howard S. Wood—Recalled—Cross.

because I helped to take one out that I know of.

Q. Then how can you say that these particular patterns which appear on that list which you have produced were the patterns that were in this old blacksmith shop on October 2, 1928? A. Well, I had not any slip that said that that pattern should be out of the storage room.

Q. You just said you took one out yourself. A. Yes, but it was after the job was completed. The pattern is returned to its storage after the job is completed.

Q. Do you know that of all the other patterns; do you know that if there were any which were taken out that they were returned to that particular building? A. Oh, sure.

Q. How do you know that they were? A. It would still be around the plant today if it wasn't; it would not have been in the fire.

Q. I am asking you how you know that they were returned. Did you see them returned? Did you take them back or did someone else tell you so? A. It was not my duty to return the pattern to its storage.

Q. Then all you know is that someone told you that they were returned. A. It is customary practice—

Q. Is that the way you know? A. That is the only way I would know, yes.

Q. Did you ever, prior to October 2, 1928, make a list of the patterns which were in the old blacksmith shop? A. No.

10

20

30

40

Edward J. Farrell—Recalled—Direct.

EDWARD J. FARRELL recalled in behalf of plaintiff.

Direct-examination by Mr. Kalisch:

10 Q. You made up a list, did you not, of prices for articles which are alleged to have been in the building at the time of the fire? A. That is right.

Q. Is that your list (handing paper to witness)? A. Yes, sir.

Q. Have you compared it with Mr. Moseley? A. That is right.

Q. The thirty bales of excelsior you have down here, was that new or old material? A. That was new material.

20 Q. When was it put in? A. I recollect it was put in—I don't know the day it was put in there; that is up to Mr. Moseley.

Q. When was it purchased? A. It was purchased, I believe, on the day of the fire, or the day before the fire.

Q. And it was put into this building where the fire was? A. Yes, sir.

The Court: How much does it amount to?

Mr. Kalisch: \$37.50.

30 The Court: I suppose that is the item of \$45 in the proof of loss.

Mr. Kalisch: Yes, it is.

Q. You have made up a list and you have given us a total valuation of \$1326.40 of the articles that were in that building at the time of the fire and destroyed by the fire, is that correct? A. That is right.

40 Mr. Kalisch: I offer it in the same manner as the pattern list.

Edward J. Farrell—Recalled—Direct.

The Court: Is there anything on that list other than covered by the proof of loss?

Mr. Kalisch: I will remove them immediately if counsel will tell me what they are. I haven't had these papers.

Mr. Schell: I have it checked. The trouble is that there are items appearing on this list which are not in the proof of loss, and there are items appearing in the proof of loss which are not on this list. 10

The Court: It must conform to the proof of loss.

Mr. Schell: I thought I would like to call them to his attention on cross-examination, because there are certain things we want to examine him on as to the prices.

The Court: You may read the items into the record and then you may examine him. 20

Q. Mr. Schell: I imagine after cross-examination we will have to examine as to which item is which, because I think there is only one item that goes all the way down the list; there is a discrepancy in every other item.

The Court: I should like to save time if I can.

Mr. Kalisch: If your Honor please, we will waive all of those items. We waive all the items referred to on that list. 30

The Court: You have the proof on the frame building.

Mr. Kalisch: I have that in.

The Court: And you have the patterns in.

Mr. Kalisch: Yes, sir. I am going to stand on the patterns and the building, so that it will bring this down to a very simple proposition.

The Court: The item of patterns, of course, seems to be the large item.

Mr. Kalisch: Yes, sir. 40

Edward J. Farrell—Recalled—Direct.

The Court: Then I understand that by the witness Wood you have proved a loss of \$800 on the building. Mr. Wood said that the cost of reproduction of the building was \$1500, and 20% depreciation made it \$1200; two-thirds of the building was demolished and that made the loss \$800.

10 Mr. Kalisch: Yes, sir, and on this list, Exhibit P-56, where there is a \$1500 item eliminated under your ruling, is it all right for me to make the deduction and then take off the 20% depreciation?

The Court: I have figured it as \$5701.79 on that page. That makes it over \$12,000. Then the item that goes to the jury, as far as your proof is concerned, is \$12,000. That is as far as patterns are concerned. The total is \$12,800. And now I understand you will rest on that proof and the other
20 items are withdrawn; in other words, you are not going to submit proof on them.

Mr. Kalisch: I am going to stand just on the items which I mentioned before.

PLAINTIFF RESTS.

30 Defendants' counsel moves that plaintiff be nonsuited on the following grounds:

1. That the evidence in this case is not sufficient in law for the jury to find a waiver of the requirement to file a proof of loss;

2. That there is no evidence in this case to establish that the building in which these patterns were contained is covered by the contracts of insurance which are in evidence.

(Argument).

40

Motion for Non-Suit.

The Court: Accepting as true the proof in behalf of the plaintiff, and the inferences to be drawn from it, previous to November 30, the insurance companies had considered this claim and had taken the position that their policies did not cover the loss, and the insured had taken the position that they did; and that the insurance companies by their representatives fixed on November 30 as a date on which a conference would be had to determine whether or not they would reach an adjustment or a settlement of the controversy—that is, November 30 was the date fixed, and I think it was fixed by the insurance companies— 10

Mr. Schell: At the request of Mr. Ballard.

The Court: Yes, at the request of Mr. Ballard. But it was fixed by the companies on that date, and there was a conference at which the representatives of all the insurance companies which are defendants here, met with Mr. Ballard, who represented the plaintiff, and at that time a figure had been or was submitted for which the plaintiff would settle if the insurance companies would pay that sum. That was unsatisfactory to the adjusters present, and they requested, according to Mr. Ballard's testimony, that he go back to his client and get a further reduction or a new figure to submit to the companies upon which they would pass, and Mr. Ballard left that meeting for that purpose. 20 30

Now, applying the rule in *Gould v. Dwelling House Insurance Company*, 134 Pa. 570, if I assume that that is the rule both in Pennsylvania and in New Jersey, it says: "Nothing will do that short of an express agreement, or a change of position by the insured reasonably induced by the acts of the company, and to his disadvantage * * *" 40 will be a waiver.

Motion for Non-Suit.

10 I say that the jury might infer, if they believe what Mr. Ballard said, that the companies' representatives asked him to go back and get a new figure for submission to the companies, and that they would then take it up with the companies and see whether they could get the companies to approve the new figure—the reduced figure. I say that the jury may determine from that whether under the policy there was a waiver of the filing of the proof of loss within time.

On that ground I will deny the first part of the motion for non-suit.

(Argument).

20 The Court: It seems to me that this case turns entirely upon the question of whether or not these policies by the coverage rider covered this particular building that was damaged or destroyed by fire. From the testimony it clearly appears that the pattern shop and pattern storage building is not that building which was destroyed; the building which was destroyed is described as the old blacksmith shop, and is not covered by this particular rider. It is an old building that had been used for a blacksmith shop long before these policies were written; it had been abandoned for that use and a new blacksmith shop erected, and that is described in the coverage rider. The policy is based on an average rate for the buildings; it includes certain things and excludes certain things. Therefore, it does not seem to me that the policy covers the building which was damaged.

30 On the question of the patterns, I can see very well that patterns which were in use in the buildings in the course of manufacture, and taken from one building to another, might be covered, but here we have them removed, not temporarily, but for

40

Motion for Non-Suit.

storage, to another building. The present storage building was too crowded, and these patterns were moved over to this building in which they were stored; they were taken out of there, not for use, but were taken over to this building for storage. It seems to me that neither are they covered. I can very well see that the assured would not want those covered. If they were insured for full value, it would increase the insurance line to a considerable rate, and they are supposed to insure up to 90% of their value. 10

For that reason I will grant the motion for non-suit on the second ground.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

30

40

Exhibit P-1.

No. 1397

Stock Company

**PROVIDENCE WASHINGTON INSURANCE
COMPANY**

Providence, R. I.

45813

Amount \$7500.00 Rate, 1.726. Premium, \$129.45

10 In Consideration of the Stipulations herein named and of One Hundred Twenty Nine and 45/100 Dollars Premium

20 Does Insure Central Radiator Company for account of whom it may concern, and legal representatives to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of one year from the 30th day of June, 1928, at noon, to the 30th day of June, 1929, at noon, against all Direct Loss and Damage by Fire, and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding Seventy Five Hundred Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, namely:

30

Exhibit P-1.

CENTRAL RADIATOR COMPANY

For account of whom it may concern.

On machine shop, main foundry, pattern shop and pattern storage building, engine and boiler room, core room, office, blacksmith shop, and on machinery and equipment in machine shop, main foundry, engine and boiler room and office and on supplies in machine shop and office building and on patterns in main foundry and pattern shop and pattern storage building and on lumber in pattern shop and pattern storage building situate Lansdale, Montgomery Co., Pa. 10

This policy covers on the buildings, improvements and structures together with all tangible and/or destructible property movable and/or immovable, including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy the property of the assured or sold but not removed; also on assured's interest in and on assured's legal liability for similar property held by assured as follows: viz: in trust or on commission or on joint account with others or on storage or for repairs. 20

It is understood and agreed that this form excludes coverage on fireproof storage vault and patterns contained therein, (and all raw materials in or about plant of assured). 30

It is understood and agreed that cost of excavations, brick, stone or concrete foundations, piers or other supports which are below the under surface of the lowest basement floor or where there is no basement, which are below the surface of the ground and underground flues, pipes or drains are not insured under this policy, nor does this policy 40

Exhibit P-1.

cover bituminous coal in the open.

It is further understood and agreed that this insurance also covers property, not otherwise specifically excluded, in cars on trucks within one hundred feet (100) of buildings and platforms insured hereunder.

10 It is hereby understood and agreed that this policy excludes the assured's own make or products manufactured or in process of manufacture.

Other insurance permitted without notice until required; to discontinue insurance at pleasure subject to the Reduced Rate Contribution Clause.

20 Privilege to use electric current and to work at all hours, to make alterations, repairs and additions for sixty days at any one time, and this policy, so far as it applies on building, shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations and additions when completed and so far as it applies on contents shall extend to cover in such additions, and to remain vacant thirty (30) days at any one policy year after period permitted by the policy condition.

30 It is understood and agreed that the word "noon" as used in this policy or contract is intended to mean "noon" at the place where the property which is the subject of this insurance is situated.

This insurance is held binding as a special agreement, anything in this policy contained regarding ownership of ground or mortgage or trust deed to the contrary notwithstanding.

40 Permission granted for such use of the premises as is usual in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quanti-

Exhibit P-1.

ties as the exigencies of the business require.

Note—The word “materials” as used above, includes gasoline and such other materials as are prohibited by the printed conditions of this policy.

It is warranted by the assured that wood shaving making machines will not be used in pattern shop and storage building without notice and readjustment of rate. 10

The following forms and clauses attached:

Watchman & Clock clause (form #27)

Shut Down Permit (form #26)

Permit for Automobiles to Enter Premises (form #8)

Gasoline Form A (form #21)

Lightning Clause A (form #17)

90% Reduced Rate Contribution Clause.

Attached to and forming a part of policy No. 20
1397 of the Providence Washington Insurance
Company of Providence, R. I.

WAGNER TAYLOR COMPANY, Agent.

Allen F. Ries,
Attorney.

M. L. Ballard,
24 Commerce Street,
Newark, N. J.

30

Reduced Rate Contribution Clause.

In consideration of the reduced rate and (or) form under which this policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to 90 per cent. of the actual cash value of the property described herein at the time when such loss shall hap- 40

Exhibit P-1.

pen, nor for more than the proportion which this policy bears to the total insurance thereon.

10 In the event that the aggregate claim for any loss is both less than ten thousand dollars (\$10,000), and less than five per cent (5%) of the total amount of insurance upon the property described herein at the time such loss occurs, no special inventory or appraisal of the undamaged property shall be required.

If this policy be divided into two or more items the foregoing shall apply to each item separately. Philadelphia Suburban Underwriters' Association. Lightning and Electrical Apparatus Clause "A."

20 First.—Except as hereinafter provided, this policy also covers direct loss or damage to the property described in this policy caused by lightning (meaning thereby the commonly accepted use of the term "lightning" and in no case to include loss or damage caused by cyclone, tornado or wind-storm) whether fire ensues or not.

30 Second.—If dynamos, excitors, lamps, motors, switches, radio apparatus, electric automobiles or other electrical appliances or devices are covered under this policy, this Company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices whether from artificial or natural causes, unless fire ensues, but if fire does ensue, then, in consideration of the rate of premium at which this policy is written, this Company shall be liable for its proportion of loss or damage caused by such ensuing fire.

40 Third.—It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy

Exhibit P-1.

bears to the whole amount of fire insurance applying, whether such other insurance contains a similar clause or not.

Fourth.—The liability of this Company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and except as specified herein shall be subject to all of the terms and conditions of this policy. 10

Philadelphia Suburban Underwriters' Association.
Automobile Permit for Manufacturing Risks
or for Automobiles to Enter Premises.

In consideration of the compliance by the insured with the following warranties, permission is hereby given for automobiles while engaged in the transaction of livery or freight or delivery business to enter buildings described in this policy; or if a manufacturing risk, to store and use automobiles on the premises. 20

Warranties.

First.—That no claim shall be made for loss or damage to an automobile or any of its parts unless such automobile is specifically mentioned as insured under this policy.

Second.—That automobiles entering premises under the above permit shall remain only so long as may be necessary to load and (or) unload, except that where the needs of the business occasionally require they may remain over night, a holiday, or a Sunday; except that in a manufacturing risk only, automobiles may be used and stored on the premises as the exigencies of the business requires. 30

Third.—Unless otherwise permitted by endorsement hereon there shall be no gasoline kept on the premises, except that contained in the reservoirs of the automobiles. 40

Exhibit P-1.

Fourth.—That no gasoline reservoir of an automobile shall be opened, emptied or filled while on the above-mentioned premises, nor shall repair work be done to automobiles.

The term "gasoline" shall be held to include naphtha, benzine or any of the light products of petroleum by whatever name known.
 10 Philadelphia Suburban Underwriters' Association.

Gasoline Form "A."

Permit for Use, Sale or Storage of Gasoline; or
 Use of Gasoline Machines or Devices.

Permission is hereby granted to keep not to exceed 10 gallons of gasoline for sale or on storage or for use in such machines or devices as are permitted by being specifically mentioned herein,
 20 namely: (name, or type of machines or devices, with name of manufacturer, must be stated) Torch

Quantity of gasoline permitted is in addition to that contained in reservoir or tank of any machine or device covered by this permit.

This permission is granted in consideration of the rate and premium at which this policy is issued and also in consideration of the following special provisions which are hereby made a condition of this insurance:
 30

First.—That the handling of gasoline by opening, filling or emptying any container, shall be done only by daylight or electric light, and there shall be no other light or blaze in the same room, or in any adjoining room with open communication.

Second.—That gasoline shall be contained in an air-tight and entirely closed metallic container, free
 40 from leak.

Exhibit P-1.

Third.—That any supply of gasoline in excess of quantity specifically provided for in this permit shall be kept outside, at least five (5) feet from building, additions or connections to which this permit applies, or shall be contained in an underground tank.

The term "gasoline" shall be held to include naphtha, benzine or any of the light products of petroleum or coal tar. 10

Philadelphia Suburban Underwriters' Association.
Shut-Down Permit.

Permission is hereby granted, without charge, to cease operations for sixty (60) consecutive days after the period permitted by the Standard Policy Conditions, at any one time during the term of this contract; but, in consideration of the fact that no additional premium is charged, it is made a condition of this insurance that all fire extinguishing appliances and apparatus, installed on the premises described in this policy, shall be maintained in complete working order and that one or more watchmen shall be continuously on duty day and night during the cessation of operations under this permit and be required to make hourly rounds of inspection, recording same on an approved recording station or watch clock. 20 30

Philadelphia Suburban Underwriters' Association.
Watchman and Clock Clause.

In consideration of the reduced rate of premium at which this policy is written, it is made a condition of this policy that, so far as within the control of the insured, an approved watchman's service with approved recording system or watch clock 40

Attached to and made a part of Policy No. 1397
of the Providence Washington Insurance Company
of Providence, R. I.

10

Allen F. Ries, Agent,
Attorney.

20

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

30

W. H. Philips, Secretary.

Countersigned at Melrose, Pa., this 8th
day of June, 1928.

Wagner-Taylor Company, Agent,

By Allen F. Ries.

Attorney.

Fraud, misrepresentation, etc.

40) This entire policy shall be void if the insured has

Exhibit P-1.

concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; 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.

10

Property uninsurable and excepted.

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies, or patterns.

Hazards not covered.

This Company shall not be liable for loss or damage 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 the neighboring premises.

20

This entire policy shall be void, unless otherwise provided by agreement in writing added thereto,—
Ownership, etc.

30

(a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property insured hereunder, by reason of any mortgage or trust deed; or (d) if any change other than

40

Exhibit P-1.

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); or (e) if this policy be assigned before a loss.

- 10 *Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring,—*

Other insurance.

(a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard.

- 20 (b) while the hazard is increased by any means within the control of the insured; or

Repairs, etc.

(c) while mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc.

- 30 (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories.

- 40 (e) if the subject of insurance be a manufactur-

Exhibit P-1.

ing establishment, while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.

(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or 10

Explosion, lightning.

(g) by explosion or lightning, unless fire ensue, and in that event for loss or damage by fire only.

Chattel mortgage.

Unless otherwise provided by agreement in writing added thereto, this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder. 20

Fall of building.

If a building or any material part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease. 30

Added clauses.

The extent of the application of insurance under this policy, and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver 40

Exhibit P-1.

of any of the conditions or provisions of this policy may be provided for by agreement in writing added thereto.

Waiver.

- 10 No one 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 added thereto; nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto; nor shall any provision or condition of this policy, or any forfeiture, be held to be waived by any requirement, act, or proceeding on the part of this Company relating to appraisal or to any examination herein
20 provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy.

- 30 This policy shall be cancelled at any time at the request of the insured; in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company, by giving to the insured a five days' written notice of cancellation, with or without tender of the excess of paid premium above the *pro rata* premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not
40 tendered) will be refunded on demand.

*Exhibit P-1.**Pro rata liability.*

This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not.

10

Noon.

The word "noon" herein means noon of standard time at the place of loss or damage.

*Mortgage.**Interests.*

If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss, and shall be subject to the provisions hereof as to appraisal and time of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right to recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue, or it may pay the mortgage debt and require an assignment thereof and of the mortgage; other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

20

30

40

*Exhibit P-1.**Requirements in case of loss.*

The insured shall give immediate notice in writing to this Company of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish
10 a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and *the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss*, signed and sworn to by the 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
20 value of each item thereof and the amount of loss or damage thereto; all incumbrances thereon; all other contracts of 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; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire;
30 and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as may be reasonably 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;
40 and, as often as may be reasonably required, shall produce for examination all books of account, bills,

Exhibit P-1.

invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.

10

In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire, and, failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the county in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item, and, failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this Company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

20

30

Company's options.

It shall be optional with this Company to take all or any part of the articles at the agreed 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, giving notice of its intention so to do prior to thirty days

40

Exhibit P-1.

after ascertainment of loss or damage is made, as herein provided.

Abandonment.

There can be no abandonment to this Company of any property.

10

When loss payable.

The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss as herein provided is received by this Company, and ascertainment of the loss or damage is made, either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as

20

Suit.

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

30

Subrogation.

This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

Endorsed: Pennsylvania Standard Policy—Expires June 30th, 1929.—Property: Lansdale, Mtg. Co. Pa.—Am't \$75,00.00.—Premium: \$129.45.—Central Radiator Company.—No. 1397.—

40

Exhibit P-1.

45813.—Incorporated 1799.—Providence Washington Insurance Company, Providence, R. I.—Capital, \$2,000.000.—It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

10

Exhibit P-17.

October 11th, 1928.

Franklin Fire Insurance Company,
421 Walnut St.,
Philadelphia, Pa.

Attention: Mr. J. Glendening, Asst. Sec'y. 20
Re: Central Radiator Company
Lansdale, Pa.

Dear Mr. Glendening:

You will recall that you secured several contracts for me on the above captioned risk dating June 30th, 1928. I do not know whether you have a list of the companies with whom you placed the business or not. However, I wish you would report to the agencies thru whom the contracts were issued, that there was a fire at this plant on the 2nd inst., in which the blacksmith shop and contents were destroyed. I do not know whether this loss will be handled thru an adjustment bureau or not, but I presume it will be and that I will receive the necessary proofs of loss in due course. 30

Very truly yours,

MLB: ECG

M. L. BALLARD. 40

Exhibit P-18.

October 11th, 1928.

C. Ray Swartley & Company,
Lansdale, Pa.
Gentlemen:

10 I am sorry to have to report that on October 2nd,
the blacksmith shop and contents of the Central
Foundry Company was destroyed by fire.

Will you kindly notify the various companies in-
terested thru your office and see that the necessary
proofs of loss are forwarded to me in the regular
course, and oblige,

Very truly yours,

MLB: ECG

M. L. BALLARD.

20

Exhibit P-19.

October 15th, 1928.

Mr. D. S. Schultz,
Lansdale, Pa.

Re: *Central Radiator Company*
Lansdale, Pa.

Dear Sir:

30 Please be advised that on the 3rd inst., this as-
sured had a fire at Lansdale, in which the black-
smith shop and contents were destroyed. The loss
I understand will amount to approximately
\$15,000. After you have made your investigation
will you be kind enough to send me the necessary
proofs of loss and oblige,

Very truly yours,

MLB: ECG

M. L. BALLARD.

40

Exhibit P-20.

October 15th, 1928.

Wagner-Taylor Company,
422 Walnut Street,
Philadelphia, Pa.

Re: *Central Radiator Company*
Lansdale, Pa.

Gentlemen:

10

Please be advised that on the 3rd inst., this assured had a fire at Lansdale, in which the blacksmith shop and contents were destroyed. The loss I understand will amount to approximately \$15,000. After you have made your investigation will you be kind enough to send me the necessary proofs of loss and oblige,

Very truly yours,

20

MLB: ECG

M. L. BALLARD.

Exhibit P-21.

October 15th, 1928.

Mr. E. G. Gotwals,
Lansdale, Pa.

Re: *Central Radiator Company*
Lansdale, Pa.

Dear Sir:

30

Please be advised that on the 3rd inst., this assured had a fire at Lansdale, in which the blacksmith shop and contents were destroyed. The loss I understand will amount to approximately \$15,000. After you have made your investigation will you be kind enough to send me the necessary proofs of loss and oblige,

Very truly yours,

40

MLB: ECG

M. L. BALLARD.

Exhibit P-22.

October 15th, 1928.

Stokes, Packard, Haughton & Smith,
5th & Walnut Sts.,
Philadelphia, Pa.

Re: *Central Radiator Company*
Lansdale, Pa.

10

Gentlemen:

Please be advised that on the 3rd inst., this assured had a fire at Lansdale, in which the blacksmith shop and contents were destroyed. The loss I understand will amount to approximately \$15,000. After you have made your investigation will you be kind enough to send me the necessary proofs of loss and oblige,

20

Very truly yours,

MLB:ECG

M. L. BALLARD.

Exhibit P-23.

(Letterhead of Franklin Fire Insurance Company)

Philadelphia, October 13, 1928.

30

Mr. M. L. Ballard,
24 Commerce Street,
Newark, New Jersey.

Re: *Central Radiator Company*
Lansdale, Penna.

Dear Mr. Ballard:

We would prefer not to be involved in the loss proceedings for the above assured. We believe it would facilitate the adjustment of the loss if the
40 matter was handled direct from your office as nat-

Exhibit P-23.

urally there will be negotiations in the loss settlement and valuable time would be wasted if we served as the middle men in the transaction.

We assume that you have a complete record of the policies and the agencies where they were issued but for convenience we will state that the line was placed in the following offices:

10

Stokes, Packard, Haughton & Smith—5th & Walnut Sts. Phila.

Wagner-Taylor Company—422 Walnut Street, Phila.

E. G. Gotwals—Lansdale, Pa.

C. Ray Swartley—Lansdale, Pa.

D. S. Schultz—Lansdale, Pa.

Yours very truly,

20

J. GLENDENING,
Assistant Secretary.

JG:B

30

40

Exhibit P-24.

October 15th, 1928.

Franklin Fire Insurance Company,
421 Walnut Street,
Philadelphia, Pa.

Attention: Mr. John Glendening, Ass. Sec'y.

Re: Central Radiator Co., Lansdale, Penna.

10

Dear Mr. Glendening:

I thank you very much for yours of the 13th inst., giving me a list of the agencies with whom you placed the above line. This is what I wanted. I did not expect you to handle the loss for me. What I had in mind was, that possibly you would notify the various agencies with whom you placed the business as I did not have a list of them. However, now that you have furnished me with same I will complete my negotiations with them.

20

Thanking you for your trouble in the matter, I am,

Very truly yours,

MLB:ECG

M. L. BALLARD.

30

40

Exhibit P-25.

(Letterhead of Jno. G. Monroe).

Philadelphia, October 16th, 1928.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

Dear Sir:

10

*In Re Claim: Central Radiator Co.,
Lansdale, Penna.*

This is to advise you that we are representing
the following Companies on the above captioned
loss:

Travellers Fire
West Chester
Bankers and Shippers
Northern
Great American
Continental
London Assurance
State Assurance
Alliance of Phila.

20

with expectation of obtaining more, and would
request that you advise us as soon as your client
is ready with statement of claim.

30

In the meantime, may we request that you favor
us with copy of the form.

Awaiting your advices, we beg to remain,

Yours very truly,

JGM:EB

JNO. G. MONROSE.

40

Exhibit P-26.

(Letterhead of General Adjustment Bureau).

Philadelphia, Pa., November 24th, 1928.

Mr. M. L. Ballard,
24 Commerce Street,
Newark, N. J.

10 Dear Sir:

Re: *Central Radiator Company*
Lansdale, Pennsylvania.

This will acknowledge receipt of your letter of
the 23rd instant, in connection with the above men-
tioned claim, and in reply wish to advise that after
conferring with Mr. Monroe, who is associated
with us in this matter, we have arranged for a
meeting at this office on Friday, November 30th,
20 at 2:30 P. M.

Yours very truly,

G. F. KRUMDICK,
Manager.

RGS; EG.

30

40

10000 10000 10000 10000

Exhibit P-27.

(Letterhead of Jno. G. Monroe).

Philadelphia, November 24th, 1928.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

Dear Sir:

In re Claim: Central Radiator Company.
Lansdale, Penna.

10

Acknowledgment is made of your favor of 23rd instant, making request for a meeting and informing us that you think it would be well for us to be at your conference with the General Adjustment Bureau.

Replying please be advised that we fully agree with you, in as much, that we represent more of the insurance than the Bureau does, and the time set for the meeting which they have made, viz., Friday, 30th instant at 2:30 P. M. at their office, will suit us.

20

Yours very truly,

JGM/EB

JNO. G. MONROSE.

Exhibit P-28.

(Letterhead of M. L. Ballard).

30

Jno. G. Monroe,
308 Walnut St.,
Philadelphia, Pa.

Re: Claim: Central Radiator Co.,
Lansdale, Penna.

Dear Sir:

As per your request of the 16th inst., I am enclosing herewith copy of the form attached to the contracts of the above captioned assured.

40

Very truly yours,

MLB: ECG
(Enclosure).

M. L. BALLARD.

Exhibit P-29.

(Letterhead of Jno. G. Monroe).

Philadelphia, October 18th, 1928.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

10 Dear Sir:

*In re Claim: Central Radiator Company.
Lansdale, Penna.*

We have for acknowledgment your favor of October 17th, 1928, enclosing copy of form which is attached to policies covering under above named Assured's plant at Lansdale, but you make no mention as to when schedule of claim will be ready.

20 Not wishing to delay matters, we got in touch with Mr. Quay, who advised that his claim was ready, but due to the fact that he was going out of town, he would not be able to take it up until Monday, October 22nd, 1928, and we have arranged accordingly with the General Adjustment Bureau, who are also interested in this loss, to take up the matter on that date, leaving Philadelphia on the 10:25 A. M. Reading train.

30 Again thanking you for the copy of the form, we beg to remain,

Yours very truly,

JOHN G. MONROSE, JR.

JGM, JR:DMK

40

Exhibit P-30.

(Letterhead of M. L. Ballard).

October 23rd, 1928.

Mr. John G. Monroe, Jr.,
308 Walnut Street,
Philadelphia, Pa.

Dear Sir:

10

*Re: Claim: Central Radiator Company
Lansdale, Penna.*

You stated in your favor of the 18th inst., that you were going to Lansdale yesterday, the 22nd inst., and that you were going to get a copy of the schedule of claim from Mr. Quay. I do not know whether Mr. Quay furnished you the schedule or not as usually plant Managers do not furnish any information without an authorization either from my office or the assured's Executive Office in New York. However, in case you were not successful in securing this schedule I now beg to enclose you one herewith showing the total amount of claim as \$14,373.00.

20

Very truly yours,

MLB: ECG

M. L. BALLARD.

30

40

Exhibit P-31.

(Letterhead of Jno. G. Monroe).

Philadelphia, October 24th, 1928.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

10 Dear Sir:

*In Re Claim: Central Radiator Co.,
Lansdale, Pa.*

Acknowledgment is made of your favor of the 23rd instant, enclosing copy of claim, for which please accept our thanks. In reply please be advised as follows:

20 As stated in our respects of 18th instant, our Junior went to Lansdale and upon examining the premises found that the building in which the fire had occurred was not covered under the form attached to the policies, or at least, under the form which you forwarded to us, as we have not seen the policies, and as a result the matter was submitted to the Companies, as per enclosed copy of letter and data referred to.

Yours very truly,

30 JGM/EB

JNO. G. MONROSE.

Exhibit P-32.

(Letterhead of M. L. Ballard).

November 8th, 1928.

Mr. John G. Monrose,
308 Walnut Street,
Philadelphia, Pa.

Re: Central Radiator Company Fire Loss 10
Lansdale, Pa.

Dear Sir:

You wrote me on the 18th ult., that you were going to make a call at this plant on the 22nd ult., and which call I understand you made, but to date I have heard nothing further from you. You will oblige me very much if you will give this matter your prompt attention.

Very truly yours,

20

MLB: ECG

M. L. BALLARD.

30

40

November 14th, 1928.

Mr. John G. Monroe,
308 Walnut Street,
Philadelphia, Pa.

10 Re: Central Radiator Company Fire Loss
Lansdale, Pa.

Dear Sir:

I duly received yours of the 9th inst., stating that you were surprised at the receipt of my letter of the 8th inst. Evidently you considered this matter closed.

20 Your letter of the 24th ult., with which you enclosed copy of letter addressed to the various companies was duly received and in the last paragraph of this letter you stated you were submitting your report for their consideration and requested that they advise you whether or not they desired to admit liability and I have been waiting since for your final report so that I might know what action to take, as my contention is, that this building was covered under my form and it was also included in the values filed with the Rating Bureau. If the Rating Bureau made the mistake of applying a specific rate to this building, that of course is not my fault. If you have heard anything further from the companies you represent in this matter I will be pleased to hear from you.

Very truly yours,

MLB: ECG

M. L. BALLARD.
G.

Exhibit P-34.

*The following is a List of the Materials Partially
or Completely Destroyed by the Fire in
our old Blacksmith Shop.*

Item No. 1.	1 Frame Building, 60x20 ft.- 40ft. of which was completely destroyed—Balance badly damaged	\$800.00	10
Item No. 2.	400 Ft. - in., 1½ in. and 2 in. Water Pipe	32.00	
Item No. 3.	1-36 in. Pulley, 12 in. Face	15.00	
Item No. 4.	3-12 in. Pulleys, 4 in. Face	24.00	
Item No. 5.	1 Ladle Truck	30.00	
Item No. 6.	5 Ladle Bails	10.00	
Item No. 7.	1-150 lb. Shank	15.00	
Item No. 8.	60 ft. 14 in. Galvanized Blower Pipe		
	1-14 in. Galvanized Blower Pipe Elbow	12.00	20
Item No. 9.	400 ft. Lowden Monorail Track	160.00	
Item No. 10.	1 Barrel Lowden Hangers & Fixtures	65.00	
Item No. 11.	3 Chain Hoists—2 ton	150.00	
Item No. 12.	1-5/8 in. Cable—50 Ft.	10.00	
Item No. 13.	1-16 Wheel Trolley (Louden)	35.00	30
	5-8 Wheel Trolley (Louden)	125.00	
Item No. 14.	12-2 Way Switch (Louden)	120.00	
Item No. 15.	400 Ft. No. 6 Electric wire	16.00	
Item No. 16.	2 Rolls Fence Wire	8.00	
Item No. 17.	6 Ton Fire Clay	75.00	
Item No. 18.	4 18 in. 3 Col. Radiator Patterns	400.00	
Item No. 19.	72 Sewer, Manhole & Miscellaneous Patterns	12,000.00	
Item No. 20.	30 Bales Excelsior	45.00	40

Exhibit P-34.

	Item No. 21.	1000 2 in. Fire Bricks (500 Destroyed)	32.00
	Item No. 22.	2000-72-84 Cupola Bricks (200 Destroyed)	30.00
	Item No. 23.	1000 -36 -48 Cupola Bricks (400 Destroyed)	52.00
10	Item No. 24.	1500 -1 in. Split Bricks (150 Destroyed)	9.00
	Item No. 25.	500 Ladle Bricks (150 Destroyed)	2.00
	Item No. 26.	200 Breast Bricks (100 Destroyed)	7.00
	Item No. 27.	25 Brick Slabs—24x12x3 (2 Destroyed)	2.00
	Item No. 28.	1 Pipe Cutter with Dies from 1/2 in. to 3 in.	40.00
20	Item No. 29.	3 Induction Blowers	45.00
			\$14,373.00

30

40

Exhibit P-35.

The following is a List of the Materials Partially or Completely Destroyed by the Fire in our old Blacksmith Shop.

Item No.		Loss	Adjustment	
1.	1 Frame Building, 60x20 in.-40 in. of which was completely destroyed—Balance Badly damaged	\$800.00	\$800.00	
2.	400 Ft. 1 in., 1½ and 2 in. Water Pipe	32.00	15.00	
3.	1-36 in. Pulley, 12 in. Face	15.00	15.00	10
4.	3-12 in. Pulleys, 4 in. Face	24.00	24.00	
5.	1 Ladle Truck	30.00		
6.	5 Ladle Bails	10.00		
7.	1-150 lb. Shank	15.00		
8.	60 Ft. 14 in. Galvanized Blower Pipe			
	1-14 in. Galvanized Blower Pipe Elbow	12.00	12.00	
9.	400 Ft. Lowden Monorail Track	160.00	100.00	
10.	1 Barrell Lowden Hangers & Fixtures	65.00	65.00	
11.	3 Chain Hoists—2 Ton	150.00	150.00	20
12.	1-5/8 in. Cable—50 Ft.	10.00		
13.	1-16 Wheel Trolley (Louden)	35.00	35.00	
	5-8 Wheel Trolley (Louden)	125.00	75.00	
14.	12-2 Way Switch (Louden)	120.00	120.00	
15.	400 Ft. #6 Electric Wire	16.00	16.00	
16.	2 Rolls Fence Wire	8.00		
17.	6 Ton Fire Clay	75.00	25.00	
18.	4-18 in. 3 Col. Radiator Patterns	400.00	200.00	
19.	72 Sewer, Manhole and Miscellaneous Patterns	12,000.00	6,000.00	30
20.	Excelsior	45.00	45.00	
21.	1000-2 in. Fire Bricks	32.00	32.00	
22.	2000-7284 Cupola Bricks	30.00	30.00	
23.	1000-36-48 Cupola Bricks	52.00	52.00	
24.	1500-1 in. Split Bricks	9.00	9.00	
25.	500 Ladle Bricks	7.00	7.00	
26.	200 Breast Bricks	7.00	7.00	
27.	25 Brick Slabs—24x12x3	2.00	2.00	
28.	1 Pipe Cutter with Dies from ½ in. to to 3 in.	40.00	10.00	40
29.	3 Induction Blowers	45.00	45.00	
		\$14,373.00	\$7,893.00	

Exhibit P-36.

(Letterhead of M. L. Ballard).

November 23rd, 1928.

Mr. John G. Monroe,
308 Walnut St.,
Philadelphia, Pa.

10

Re: *Central Radiator Company*
Lansdale, Pa.
Fire Loss.

Dear Sir:

I am writing the General Adjustment Bureau today requesting that their Mr. Smith set a day some time next week when it will be convenient for him to meet me at their office with a view to reaching some agreement on this loss and I believe that
20 it would be well for you to be at this conference as you are representing certain companies and the General Adjustment Bureau the others. I would suggest therefore, that you get in touch with Mr. Smith upon receipt of this letter and agree upon a day that will be agreeable for you both to meet me either at your office or Mr. Smith's office.

Very truly yours,

30

MLB: ECG

M. L. BALLARD.

40

Exhibit P-37.

(Letterhead of M. L. Ballard).

November 23rd, 1928.

General Adjustment Bureau,
Fifth & Walnut Sts.,
Philadelphia, Pa.

Re: *Central Radiator Company*
Lansdale, Pa.

10

Gentlemen:

On October 3rd last, this assured suffered a loss by fire at their plant in Lansdale and all of the carrying companies were duly notified by me and I understand that several of these companies referred the matter to your office for attention. I also understand that your Mr. Smith has visited the plant and been handling this matter, but for some reason best known to yourselves I have not heard from you as to what action you intend to take. I am quite anxious of course to have this matter settled as promptly as possible and I feel that I have waited very patiently.

20

I would like to make an appointment therefore to meet your Mr. Smith at your office some day next week to suit your convenience. Will you kindly advise what day it will be convenient for him to see me?

30

Very truly yours,

MLB:ECG

M. L. BALLARD.

40

November 26th, 1928.

Re: Claim: Central Radiator Company
Lansdale, Pa.

In accordance with yours of the 24th inst., would state that I will be pleased to meet you at the office of the General Adjustment Bureau on Friday the 30th inst., at 2:30 P. M.

20 MLB:ECG M. L. BALLARD.
G.

Exhibit P-39.

November 26th, 1928.

Re: *Central Radiator Company*
Lansdale, Pa.

I beg to acknowledge receipt of your valued favor of the 24th inst., advising that you have arranged for a meeting on Friday afternoon, November 30th, at 2:30 and I accordingly will be on hand at the appointed time.

40 Very truly yours,
MLB: ECG M. L. BALLARD.

Exhibit P-40.

(Letterhead of M. L. Ballard).

December 19th, 1928.

General Adjustment Bureau,
Fifth & Walnut Sts.,
Philadelphia, Pa.

Gentlemen :

10

Re: *Central Radiator Company*
Fire Loss
Lansdale, Pa.

I visited the plant of this assured a few days ago, and went over the list of articles damaged or entirely destroyed by the fire on October 3rd last, with Mr. Quay, Superintendent of the plant, with a result that the claim has now been reduced to \$7,893.00, which means an average of less than \$500.00 for each company. 20

I am enclosing you herewith a list showing the revision and would thank you to advise me as promptly as possible whether or not it will be agreeable to adjust the loss on this basis. I feel that the same has now been reduced to the minimum.

Awaiting your reply, I am,

Very truly yours,

30

MLB: ECG
(Enclosure)

M. L. BALLARD.

Exhibit P-41.

(Letterhead of M. L. Ballard).

December 19th, 1928.

Mr. John G. Monrose,
308 Walnut St.,
Philadelphia, Pa.

10 Dear Sir:

Re: *Central Radiator Company*
Fire Loss
Lansdale, Pa.

I visited the plant of this assured a few days ago, and went over the list of articles damaged or entirely destroyed by the fire on October 3rd last, with Mr. Quay, superintendent of the plant, with a result that the claim has now been reduced
20 \$7,893.00, which means an average of less than \$500.00 for each company.

I am enclosing you herewith a list showing the revision and would thank you to advise me as promptly as possible whether or not it will be agreeable to adjust the loss on this basis. I feel that the same has now been reduced to the minimum.

Awaiting your reply, I am,

30

Very truly yours,

MLB: ECG
(Enclosure).

M. L. BALLARD.

Exhibit P-42.

(Letterhead of Jno. G. Monroe).

Philadelphia, December 31st, 1928.

M. L. Ballard, Esq.,
 24 Commerce Street,
 Newark, N. J.

Dear Mr. Ballard:

10

*In Re Claim: Central Radiator Co.,
 Lansdale, Pa.*

After much correspondence pro and con with the Companies, and a thorough discussion of the matter with Mr. Krumdick of the General Adjustment Bureau, we have reached a point where handling this claim as if there were no question of liability it appears to us, that the Sound Values involved amount to \$8294. and the loss thereon \$7417.00. 20

The question of liability being open with the odds decidedly in favor of the Companies, it merely remains to be seen if we can get together with you on the basis of an acceptable compromise, and if you can get your assured to make an attractive concession from the last named amount of \$7417.00, we would be very glad to submit it to the Companies, with hearty recommendation for its acceptance. 30

Bespeaking the favor of your early advices, we beg to remain, with compliments of the Season.

Yours very truly,

JNO. G. MONROSE.

JGM/EB

40

Exhibit P-43.

(Letterhead of General Adjustment Bureau).

Philadelphia, December 22nd, 1928.

Mr. M. L. Ballard,
24 Commerce Street,
Newark, N. J.

10 Dear Sir:

Re: *Central Radiator Company*
Lansdale, Penna.

This will acknowledge receipt of your letter of the 19th instant, enclosing revised claim in connection with loss on the property of the above Assured.

20 As previously agreed, we had written to the Companies represented by this office, but thus far have received a response from only one of them. We are, therefore, writing again today requesting some definite action. As soon as we have any further information, will get in touch with you.

Very truly yours,

G. F. KRUMDICK,
GFK/EG Manager.

30

40

Exhibit P-44.

(Letterhead of M. L. Ballard).

January 2nd, 1929.

Mr. John G. Monroe,
308 Walnut St.,
Philadelphia, Pa.

Re: Claim: Central Radiator Co., 10
Lansdale, Pa.

Dear Mr. Monroe:

I received your valued favor of the 31st ult., in this morning's mail and note that you suggest a compromise from the figure of \$7,417.00, but I think you will agree with me that we have made a considerable compromise by reducing the amount of the claim almost 100%, and I therefore feel that the companies should be willing to pay the above amount without any question. Either the assured is entitled to this amount or they are not entitled to anything, and I believe if this proposition is put up to the companies in the proper way they will have no objection to your adjusting the claim on this basis. In fact, I understand that several of the companies are perfectly willing to settle on this basis. As far as I am concerned I do not care to ask my client to accept a further cut. 20

The loss of the patterns constitutes the greater portion of the claim and at the time the contracts were written these patterns were in a building in which there is absolutely no question of coverage; consequently the companies received a premium on the value of these patterns and not on the value of \$6,000., but on the value of \$12,000. Under the circumstances I do not see where they are justified in asking for a further reduction. After you have 30

40

Exhibit P-44.

submitted the matter to your companies I will be pleased to receive your final proposition.

Wishing you a Happy and Prosperous New Year, I am,

Very truly yours,

MLB:ECG

M. L. BALLARD.

10

Exhibit P-45.

(Letterhead of Jno. G. Monroe).

Philadelphia, January 12th, 1929.

M. L. Ballard, Esq.,
24 Commerce St.,
Newark, N. J.

20

Dear Mr. Ballard:

*In Re Claim: Central Radiator Co.,
Lansdale, Penna.*

Fire—October 2, 1928.

30

Your letter of 2nd instant, came duly to hand and answer has been delayed pending submission of the matter to a meeting of the Companies, as requested in your letter above referred to, and we now beg to advise you that a meeting of the Companies interested was held in New York yesterday, the 11th instant, and after a very full discussion of the matter, a resolution was unanimously adopted to the effect that there is no liability under the policies involved and that no claim would be entertained. In addition, the adjusters were instructed to advise you to that effect.

40

Yours very truly,

JGM:DMK

JNO. G. MONROSE.

Exhibit P-46.

(Letterhead of M. L. Ballard).

January 14th, 1929.

Mr. John G. Monroe,
308 Walnut St.,
Philadelphia, Pa.

Dear Mr. Monroe:

10

Re: *Central Radiator Company*
Claim
Lansdale, Pa.

I certainly was surprised to receive your letter of the 12th inst., stating that the companies after holding a conference in New York on Friday last, had instructed you to advise me that there was no liability under their policies and that no claim therefore would be entertained. It certainly took them a long while to reach this conclusion, but you neglected to advise me under what conditions of the contract they felt justified in turning the claim down. I presume however, it was due to the fact that the Rating Bureau specifically rated the building in question, but that, you must agree has nothing to do with the assured. The Bureau could have specifically rated every building on the premises, but that would not alter the fact that my policies are written at an average rate and there is no exclusions whatsoever under the form. The contract covers on the buildings, improvements and structures together with all tangible and/or destructible property movable and/or immovable. If the building in question was to have been excluded and it was not intended by the Bureau that same should have been covered, the Bureau before approving my form should have required the exclu-

20

30

40

Exhibit P-46.

sion of this building or any others on the premises which were not to be covered.

10 I am rather reluctant about going to court in this matter, but if this is the final decision of the companies involved I would have no other recourse, and before taking this step I would like you to advise me whether or not you would care to take the matter up further with the companies.

Very truly yours,

MLB: ECG

M. L. BALLARD.

Exhibit P-47.

(Letterhead of Jno. G. Monroe).

20

Philadelphia, January 15th, 1929.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

Dear Mr. Ballard:

*In Re Claim: Central Radiator Co.,
Lansdale, Penna.*

30 Acknowledging receipt of your favor of 14th instant, please be advised that the blanket rate has nothing to do with this matter.

This blanket rate covered certain specific buildings, which were enumerated in the Bulletin issued fixing the rate, and your form specifically mentions which buildings claimed to be insured, and the building which was destroyed is not mentioned among the buildings enumerated in your form.

40 The second paragraph of your form, while inter-

Exhibit P-47.

pretative of the first, does not extend its cover to any building not mentioned therein.

While it is true, that there is a blacksmith shop mentioned in your form, the blacksmith shop so mentioned, is not the building which was destroyed, and if you will refer to the diagram made up for your Assured, by Mr. Herbert H. Metz, registered engineer, you will note that the blacksmith shop referred to and insured is a building situated about sixty feet northeast of the main warehouse, whereas, the building destroyed has no special designation and is located north of the metal pattern storage building, on the line of the Philadelphia and Reading Railroad, and can by no stretch be held to be mentioned in the form attached to the policies.

Under date of 31st ultimo, we wrote making a suggestion towards a compromise settlement, if it was possible, and this you turned down in your letter of 2nd instant. We, therefore, regret that it is not within our province to again take up the matter with the Companies, as we have already done so on the lines indicated in your letter of 2nd instant, above referred to, and the result has been communicated to you.

Yours very truly,

JGM/EB

JNO. G. MONROSE.

10

20

30

40

Exhibit P-48.

(Letterhead of General Adjustment Bureau).

January 21st, 1929.

#40443.

M. L. Ballard, Esq.,
24 Commerce St.,
10 Newark, N. J.

Dear Sir:

*Re: Claim: Central Radiator Co.,
Lansdale, Pa.*

Fire—October 2nd, 1928.

20 This is to advise you that a meeting of the Companies interested was held in New York on the 11th instant, and after a very full discussion of the matter, a resolution was unanimously adopted to the effect that there is no liability under the policies involved and that no claim would be entertained. The Adjusters were instructed to advise you thereof.

Yours very truly,

RGS/EG
G. F. KRUMDICK,
Manager.

30

40

Exhibit P-49.

(Letterhead of M. L. Ballard).

March 18th, 1929.

Mr. John G. Monroe,
308 Walnut Street,
Philadelphia, Pa.

Re: *Central Radiator Company* 10
Fire Loss

Since my conference with your good self and Mr. Krumdick representing the fire insurance companies interested, I have had several conferences with my client and they have finally taken the position that they will not recede from their stand.

I am very sorry that our friendly efforts have not resulted in a compromise you and Mr. Krumdick and I have been trying to effect. Under the 20
circumstances I am filing proofs with the various companies and will have to resort to our only other alternative.

Very truly yours,

MLB: ECG

M. L. BALLARD.

30

40

Exhibit P-50.

(Letterhead of Jno. G. Monroe).

Philadelphia, March 22nd, 1929.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

10 Dear Mr. Ballard:

*In Re Claim: Central Radiator Co.,
Lansdale, Penna.*

Acknowledgment is made of your favor of 18th instant, and in reply, we must beg to express our surprise at reference to a compromise which you say, we have been trying to effect.

20 As a matter of fact, the only time at which the subject of compromise was broached was in our respects of December 31st, 1928, to which you replied on January 2nd, 1929, rejecting our suggestion and asking that the matter be submitted to the Companies, which was done, at a meeting held in New York on January 11th, 1929, at which the Companies decided that there was no liability under their policies and of this you were advised on January 12th, 1929.

30 On January 14th, 1929, you wrote again, suggesting a compromise and on January 15th, we replied that under instructions from the Companies, we could not discuss this feature with you.

Later on you visited this office on February 21st, 1929, where you met the writer and Mr. Krumdick, and it was again stated clearly to you, that there was nothing that we could discuss with you, as the Companies had already made their decision.

Yours very truly,

40 JGM/EB

JNO. G. MONROSE.

Exhibit P-51.

March 27th, 1929.

Mr. John G. Monroe,
308 Walnut Street,
Philadelphia, Pa.

Dear Sir:

Re: Central Radiator Company Fire Loss

Answering yours of March 22nd, 1929, wish to say that the contents certainly surprise me. Needless to say, my recollection is contrary to what you write. The thought therefor occurs to me that your letter is a studied attempt to establish a position for the trial in order that my client shall be denied the right to which it is in all fairness and legally entitled.

Very truly yours,

MLB: ECG

M. L. BALLARD.

10

20

Exhibit P-52.

(Letterhead of Jno. G. Monroe).

Philadelphia, March 28th, 1929.

M. L. Ballard, Esq.,
24 Commerce Street,
Newark, N. J.

30

Dear Sir:

*In re Claim: Central Radiator Company.
Lansdale, Pa.*

Acknowledgment is made of your letter of 27th instant, contents of which are noted with amazement and regret, but our letter of March 22nd, having "smoked you out", we are satisfied with results and we pursue the correspondence no further.

Yours very truly,

40

JGM/EB

JNO. G. MONROSE.

Exhibit P-53.

(Letterhead of Providence Washington Ins. Co.)

Providence, R. I., April 6th, 1929.

Mr. M. L. Ballard,
24 Commerce St.,
Newark, N. J.

10 Dear Sir:

*Melrose, Pa., Policy No. 1397
Central Radiator Company*

We are in receipt of your communication of the
3rd inst. together with paper purporting to be proof
of loss which we have referred to our representa-
tives, the General Adjustment Bureau of 5th and
Walnut Sts., Philadelphia, Pa. for such attention
as may be deemed proper.

20

Yours truly,

PROVIDENCE WASHINGTON INS. CO.
A.F.C. (*) By A. F. Covell.

Exhibit P-54.

(Letterhead of Jno. G. Monroe).

30

Philadelphia, April 10th, 1929.

Registered Mail.

Central Radiator Company,
Lansdale, Pa.

Gentlemen:

We are in receipt, through Mr. M. L. Ballard, of
a paper purporting to be a Proof of Loss, in support
40 of claim, under our policies #176954 and 175130,

Exhibit P-54.

issued at our Melrose Park and Lansdale, Pa. Agency, by reason of fire of October 2nd, 1928.

Replying please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order. 10

Yours very truly,

THE ALLIANCE INSURANCE COMPANY

By Jno. G. Monrose,

JGM/EB

Adjuster.

(Letterhead of Jno. G. Monrose).

20

Philadelphia, April 10th, 1929.

Registered Mail.

Central Radiator Company,
Lansdale, Pa.

Gentlemen:

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our policy #23327, issued at our Lansdale, Pa. Agency, by reason of fire of October 2nd, 1928. 30

Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

We are therefore, not prepared to take cogni-

40

Exhibit P-54.

zance of this paper, which we hold subject to your order.

Yours very truly,

TRAVELERS FIRE INSURANCE COMPANY

By Jno. G. Monroe,

JGM/EB

Adjuster.

10

(Letterhead of Jno. G. Monroe).

Philadelphia, April 10th, 1929.

Registered Mail.

Central Radiator Company,
Lansdale, Pa.

20 Gentlemen:

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our Policy #534036, issued at our Philadelphia, Pa. Agency, by reason of fire of October 2nd, 1928.

30 Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order.

Yours very truly,

THE STATE ASSURANCE COMPANY LTD.

By Jno. G. Monroe,

JGM/EB

Adjuster.

40

Exhibit P-54.

(Letterhead of Jno. G. Monroe).

Philadelphia, April 10th, 1929.

*Registered Mail.*Central Radiator Company,
Lansdale, Pa.

10

Gentlemen :

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our policy #768, issued at our Lansdale, Pa. Agency, by reason of fire of October 2nd, 1928.

Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928. 20

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order.

Yours very truly,

FRANKLIN FIRE INSURANCE COMPANY

By Jno. G. Monroe,

JGM/EB

Adjuster.

30

(Letterhead of Jno. G. Monroe).

Philadelphia, April 10th, 1929.

*Registered Mail.*Central Radiator Company,
Lansdale, Pa.

Gentlemen :

We are in receipt, through Mr. M. L. Ballard, of 40

Exhibit P-54.

a paper, purporting to be a Proof of Loss, in support of claim, under our policy #7203939, issued at our Philadelphia, Pa. Agency, by reason of fire of October 2nd, 1928.

10 Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order.

Yours very truly,

THE LONDON ASSURANCE COMPANY

By Jno. G. Monroe,

JGM/EB

Adjuster.

20

(Letterhead of Jno. G. Monroe).

Philadelphia, April 10th, 1929.

Registered Mail.

Central Radiator Company,
Lansdale, Pa.

Gentlemen:

30

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our policy #8760, issued at our Bryn Mawr, Pa. Agency, by reason of fire of October 2nd, 1928.

Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

40

We are therefore, not prepared to take cogni-

Exhibit P-54.

zance of this paper, which we hold subject to your order.

Yours very truly,

WESTCHESTER FIRE INSURANCE COMPANY

By Jno. G. Monrose,

JGM/EB

Adjuster.

10

(Letterhead of Jno. G. Monrose).

Philadelphia, April 10th, 1929.

Registered Mail.

Central Radiator Company,

Lansdale, Pa.

Gentlemen:

20

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our policy #25270, issued at our Philadelphia, Pa. Agency, by reason of fire of October 2nd, 1928.

Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

30

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order.

Yours very truly,

GREAT AMERICAN INSURANCE COMPANY

By Jno. G. Monrose,

JGM/EB

Adjuster.

40

Exhibit P-54.

(Letterhead of Jno. G. Monroe).

Philadelphia, April 13th, 1929.

*Registered Mail.*Central Radiator Company,
Lansdale, Pa.

10

Gentlemen:

We are in receipt, through Mr. M. L. Ballard, of a paper, purporting to be a Proof of Loss, in support of claim, under our policy #1350822, issued at our Philadelphia, Pa. Agency, by reason of fire of October 2nd, 1928.

20

Replying, please be advised, that to be entitled to consideration, this paper should have been received within sixty days from date of fire, the sixty day period expiring on December 1st, 1928.

We are therefore, not prepared to take cognizance of this paper, which we hold subject to your order.

Yours very truly,

BANKERS AND SHIPPERS INSURANCE COMPANY
OF NEW YORK

By Jno. G. Monroe,

30 JGM/EB

Adjuster.

40

Exhibit P-56.

CENTRAL RADIATOR COMPANY.

Patterns Destroyed by Fire October 2nd, 1928.

Manhole Frames and Covers.

Mr. Wood will testify.

Pattern Number	Lumber	Labor	Hours	Leather Fillets	Glue, Nails & Varnish	Total
1001-A	4.75	48.74	37	.37	1.15	55.01
1002	17.00	108.04	82	.86	.81	126.71
1005	4.00	68.51	52		.69	73.20
1027	5.00	135.70	103	.32	.45	141.47
1029	72.10	353.09	268	3.00	2.00	430.19
1030	4.50	131.75	100	1.28	.95	138.48
1030-A	1.00	105.40	80	3.00	.52	109.92
1030	7.00	92.23	70	3.60	.72	103.55
1035	2.15	64.56	49	2.63	.25	69.59
1037	1.00	80.36	61		.39	81.75
1038	26.50	411.06	312	2.00	.30	439.86
1040	7.00	284.57	216		.79	292.36
1041	.95	23.72	18	1.80	1.04	27.51
1042	1.43	56.65	43	.24	.24	58.56
1043	15.31	204.21	155		1.08	220.60
1044	5.84	187.08	142	1.44	.84	195.20
1045	20.00	210.79	160		1.12	231.91
1046	2.46	26.35	20	.42	1.27	30.50
1047	31.98	403.15	306	3.30	.77	439.20
1049	.72	9.22	7		.30	10.24
1049-A	6.04	9.22	7		.30	15.56
1050	14.70	63.24	48	.37	.99	79.30
1051	31.98	389.97	296	3.30	2.55	427.80
1052	1.42	94.86	72		.32	96.60
1053-A	.38	35.57	27	.20	.35	36.50
1054	2.51	23.71	18		.62	26.84
1055	5.93	138.33	105	.96	1.18	146.40
1056	1.56	67.19	51		.55	69.30
1057	15.89	83.00	63	1.92	.45	101.26
1059	28.82	458.49	348		.69	488.00
1062	.61	17.12	13		.57	18.30
1064	2.87	32.93	25		.80	36.60
1066	1.38	48.73	37		1.13	51.24
1067	6.05	102.76	78		1.18	109.99
1083	14.89	138.33	105	4.32	1.06	158.60
1108	15.47	63.24	48	1.20	1.39	81.30
1111	40.00	364.94	277	3.60	1.20	409.74

421.19	5,136.81	40.13	31.01	5,629.14
		Less 20% Depreciation		1,125.83

\$4,503.31	40
------------	----

The above is O. K.
Howard S. Wood.

Exhibit P-56.

CENTRAL RADIATOR COMPANY.

List of Material Destroyed by Fire.

Marine Boiler Fronts & Parts, including Marine Engine.

Mr. Howard Wood will testify.

	Drawing Number	Pattern Number	Lumber	Labor	Hours	Leather Filletts	Glue Nails & Varnish	Totals
10	162-1	2-S.C-50	39.20	1,239.77	941	5.20	5.00	1,289.17
	162-1	S.C-53	1.02	76.41	58	.36	1.21	79.00
	162-1	S-54	.62	35.57	27	.28	.13	36.60
	162-1	S-56	.18	17.12	13		1.00	18.30
	162-1	S.C-51	.76	52.70	40	1.20	.24	54.90
	162-1	S.C-52	.62	35.57	27		.41	36.60
	166	S.C-57	1.30	34.25	26		1.05	36.60
	214	S.F-23	1.52	36.89	28	.25	.50	39.16
	229	S.F-26	1.52	38.20	29	.25	.50	40.47
	214	S.F-21	1.90	34.25	26	.25	1.95	38.35
	214	S.F-22	1.90	34.25	26	.25	1.95	38.35
20	191	W.C-50	12.05	412.37	313	1.44	1.14	427.00
	1211-O	Adapter Ring	5.12	44.79	34	.28	1.05	51.24
	162-1	S.C-51	.76	52.70	40	1.20	.24	54.90
	162-1	S.C-52	.62	35.57	27		.41	36.60
	225	2-S.L-1	54.00	1,279.29	971	6.40	2.31	1,342.00
	226	S.L-2	2.05	18.44	14	.24	.27	21.00
	166	S.C-57	3.60	39.52	30	.80	.50	44.42
	659	Por-1	65.70	645.58	490	4.25	8.00	723.53
	336-O	Por-51	2.25	52.70	40	.60	.70	56.25
	445-O	Por-12, 11, 10	13.50	144.92	110	1.60	1.75	161.77
	229-1	Sec-13, 14, 15	14.75	151.51	115	1.60	1.75	169.61
30	245-o	Sec-10, 11, 12	13.00	131.75	100	1.50	1.65	147.90
	311-1	N. Y. Ship	63.18	592.88	450	4.25	8.00	668.31
	382-1	S.F-39, 40, 41 42, 43	15.75	230.56	175	4.50	8.00	258.81
	662-1	XOS	60.75	757.56	575	3.50	11.50	833.31
	674-1	Directing Tube	9.00	98.81	75		1.50	109.31
	662-1	Front Plate	13.05	118.58	90	.70	5.50	137.83
	662-1	Top Plate	.90	39.53	30	.15	.60	41.18
	909-O	Air Directing Tube	9.00	125.16	95		.60	134.76
40								\$8,627.23
								Less 20% Depreciation
								1,725.44
								\$6,901.79

The above is O. K.
Howard S. Wood.

Exhibit P-56.

CENTRAL RADIATOR COMPANY.

List of Material Destroyed by Fire.

Marine Boiler Fronts & Parts.

Mr. Howard Wood will testify.

Drawing Number	Pattern Number	Lumber	Labor	Hours	Fillets	Blue Nails, Screws & Varnish	Al. Steel Metal	Total	10
360-O	Plate	14.35	527.00	400	3.18	3.90	72.00	620.43	
361-4	Front Plate	15.75	559.94	425	5.00	4.00	70.00	654.69	
366-3	S.L-10	8.76	75.09	57	1.40	.24	25.00	110.49	
166	S.C-57	2.40	52.70	40		1.05	20.00	76.15	
367	S.C-52	.62	42.16	32		.30	22.00	65.08	
364-0	R-4	1.02	85.64	65	.36	1.21	30.00	118.23	
364-0	R-5	.62	42.16	32	.28	.13	10.00	53.19	
531-3	XO-1								
532-3	XO-3	41.04	625.80	475	2.72	6.94		676.50	20
623-0	Portable Fire Box	8.10	184.45	140	.45	1.85	30.00	224.85	
								\$2,599.61	
Less 20% Depreciation								519.92	
								\$2,079.69	

The above is O. K.
Howard S. Wood.

30

40

Exhibit P-6A.

Policy Number	Amount of Policy
176954	10,000.
Agency at	Expires
Melrose Park, Pa.	June 30, 1929

Sworn Statement in

PROOF OF LOSS

10

to the

ALLIANCE OF PHILADELPHIA

By the above numbered Policy of Insurance you insured Central Radiator Company

against loss by fire upon the property described under Schedule "A", according to the terms and conditions of the said policy and all forms endorsements, transfers and assignments attached thereto.

20

(1) *Time and Origin*: A fire occurred during the night of the 2nd day of October, 1928, about the hour of o'clock M. The cause and origin of the said fire were: Unknown to Assured.

(2) *Occupancy*: The building described, or containing the property described, was occupied at the time of the fire as follows, and for no other purpose whatever: Storage.

30

(3) *Title and Interest*: At the time of the fire, the interest of your insured in the property described by this policy was sole and unconditional ownership, and no other person or persons had any interest therein or incumbrance thereon, except: None.

40

(4) *Changes*: Since the said policy was issued there has been no assignment thereof, or change of ownership, use, occupancy, possession, location or exposure of the real or personal property described, or of your insured's interest therein, except: None.

Exhibit P-6A.

(5) *Total Insurance*: The total amount of insurance upon the property covered by this policy was, at the time of the fire, \$150,200., as more particularly specified in the apportionment attached under Schedule "C", besides which there was no policy or other contract of insurance written or oral, valid or invalid.

10

(6) *The Cash Value* of said property at the time of the fire was \$165,000.

(7) *The Whole Loss and Damage* as stated under Schedule "B" was \$14,093.

(8) *The Amount Claimed* under the above numbered policy is \$938.28

The said loss did not originate by any act, design or procurement on the part of your Insured, or this Affiant; nothing has been done by or with the privacy or consent of your Insured or this Affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but such as were in the building damaged or destroyed, and belonging to, and in possession of the said Insured at the time of said fire; no property saved has in any manner been concealed, and no attempt to deceive the said Company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished on call and considered a part of this proof.

20

30

The furnishing of this blank or the preparation

40

Exhibit P-6A.

of proofs by a representative of the above Insurance Company is not a waiver of any of its rights.

CENTRAL RADIATOR COMPANY,
Treasurer.

State of New York
County of New York
10 Subscribed and sworn to before me
this 28th day of March, 1929.
William C. Ritchie,
(Seal) Notary Public.

SCHEDULE "A"—POLICY FORM

Below are complete copies of all written or printed
forms attached to the Policy, including endorse-
ments, transfers and assignments attached there-
20 to.

CENTRAL RADIATOR COMPANY

For account of whom it may concern.
On machine shop, main foundry, pattern
shop and pattern storage building, engine
and boiler room, core room, office, black-
smith shop and oil house and on machinery
and equipment in machine shop, main foundry,
30 engine and boiler room and office and
on supplies in machine shop and office
building and on patterns in main foundry
and pattern shop and pattern storage building
and on lumber in pattern shop and pattern
storage building and on contents of oil
house situate Lansdale, Montgomery Co.,
Pa.

This policy covers on the buildings, improvements
40 and structures together with all tangible and/or

Exhibit P-6A.

destructible property movable and/or immovable, including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy the property of the assured or sold but not removed; also on assured's interest in and on assured's legal liability for similar property held by assured as follows: viz; in trust or on commission or on joint account with others or on storage or for repairs. 10

It is understood and agreed that this form excludes coverage on fireproof storage vault and patterns contained therein, (and all raw materials in or about plant of assured.

It is understood and agreed that cost of excavations, brick, stone or concrete foundations, piers or other supports which are below the under surface of the lowest basement floor or where there is no basement, which are below the surface of the ground and underground flues, pipes or drains are not insured under this policy, nor does this policy cover bituminous coal in the open. 20

It is further understood and agreed that this insurance also covers property, not otherwise specifically excluded, in cars on tracks within one hundred feet (100) of buildings and platforms insured hereunder.

It is hereby understood and agreed that this policy excludes the assured's own make or products manufactured or in process of manufacture. 30

Other insurance permitted without notice until required; to discontinue insurance at pleasure subject to the Reduced Rate Contribution Clause.

Privilege to use electric current and to work at all hours, to make alterations, repairs and additions for sixty days at any one time, and this policy, so far as it applies on building, shall also cover in accordance with the conditions of this policy 40

Exhibit P-6A.

all materials and supplies therefor, therein or adjacent, and such alterations and additions when completed and so far as it applies on contents shall extend to cover in such additions, and to remain vacant thirty (30) days at any one policy year after period permitted by the policy condition.

- 10 Permission is granted to cease operations for not exceeding 60 consecutive days in addition to the time allowed under the standard policy conditions.

It is understood and agreed that the word "noon" as used in this policy or contract is intended to mean "noon" at the place where the property which is the subject of this insurance is situated.

- 20 This insurance is held binding as a special agreement, anything in this policy contained regarding ownership of ground or mortgage or trust deed to the contrary notwithstanding.

Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies. Watchman & Clock Warranty—90% Reduced Rate Contribution Clause—Shut Down Privilege.

C—Permit for Gasoline Stoves Form 9.

- 30 Attached to and forming part of policy No.....
of the Insurance Company of
.....Agent.

M. L. Ballard,
24 Commerce Street,
Newark, N. J.

Exhibit P-6A.

SCHEDULE "B"

Statement of Cash Value and Loss and Damage.

1 Frame Building, 60x20 ft.-40 ft. of
which was completely destroyed

	Value	Loss	
—Balance badly damaged	1,000.00	800.00	10
400 Ft. 1 in., 1½ in. and 2 in. Water Pipe	32.00	15.00	
1- 36 in. Pulley, 12 in. Face	15.00	15.00	
3-12 in. Pulleys, 4 in. Face	24.00	24.00	
60 Ft. 14 in. Galvanized Blower Pipe			
1-14 in. Galvanized Blower Pipe Elbow	12.00	12.00	20
400 Ft. Lowden Monorail Track	160.00	100.00	
1 Barrel Lowden Hangers and Fixtures	65.00	65.00	
3 Chain Hoists—2 Ton	150.00	150.00	
1-16 Wheel Trolley (Louden)	35.00	35.00	
5-8 Wheel Trolley (Louden)	125.00	75.00	
12-2 Way Switch (Louden)	120.00	120.00	
400 ft. #6 Electric Wire	16.00	16.00	
6 Ton Fire Clay	75.00	25.00	
4-18 in. 3 Col. Radiator Patterns	400.00	400.00	
72 Sewer, Manhole and Miscellaneous Patterns	12,000.00	12,000.00	30
Excelsior	45.00	45.00	
1000-2 in. Fire Bricks	32.00	32.00	
2000-72-84 Cupola Bricks	30.00	30.00	
1000-36-48 Cupola Bricks	52.00	52.00	
1500-1 in. Split Bricks	9.00	9.00	
500 Ladle Bricks	9.00	9.00	
200 Breast Bricks	7.00	7.00	
25 Brick Slabs—24x12x3	2.00	2.00	
1 Pipe Cutter with dies from ½ in. to 3 in.	40.00	10.00	
3 Induction Blowers	45.00	45.00	40
	<u>\$14,500.00</u>	<u>\$14,093.00</u>	

Exhibit P-6A.

SCHEDULE "C"—APPORTIONMENT

Insurance and Apportionment					
	Policy No.	Expiration	Company	Insures	Claim
	175130	6/30/29	Alliance	\$20,000	\$1,876.56
	B-1813150	"	Firemen's Fund	15,000	1,407.43
	768	"	Franklin Fire	15,000	1,407.43
10	17035	"	Niagara Fire	15,000	1,407.43
	2916061	"	United States	15,000	1,407.43
	176954	"	Alliance	10,000	938.28
	23327	"	Travellers	10,000	938.28
	888163	"	Phoenix	7,500	703.71
	1397	"	Providence-Wash'n	7,500	703.71
	534036	"	State Assurance	5,200	487.90
	1350822	"	Bankers & Shippers	5,000	469.14
	585	"	Continental	5,000	469.14
	25270	"	Great American	5,000	469.14
	LU-7203939	"	London Assurance	5,000	469.14
20	10154	"	Northern Assurance	5,000	469.14
	8750	"	Westchester Fire	5,000	469.14
				\$150,200	14,093.00

Endorsed: Sworn Statement in Proof of Loss to the Alliance Insurance Company of Philadelphia, Pa.—Insured: Central Radiator Company.—Policy No. 17695.—Amount of Policy \$10,000.—Amount claimed \$938.28.—Amount paid: \$938.28.—Date of Loss: October 2, 1928.

30

40

New Jersey Court of Errors and Appeals

CENTRAL RADIATOR Co., a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i> NIAGARA FIRE INS. Co., <i>et als.</i> , <i>Defendants-Appellees.</i>	}	<i>Action at Law. On Appeal from the Supreme Court.</i>
--	---	--

BRIEF IN BEHALF OF PLAINTIFF-APPELLANT.

Statement of Facts.

Plaintiff-appellant (hereinafter referred to as the assured) is the owner of a large foundry and manufacturing plant at Lansdale, Pennsylvania, and on June 30, 1928, it had the defendants-appellees, fifteen insurance companies (hereinafter referred to as the insurers), issue sixteen policies, all in *totidem verbis*, covering the premises, and the goods, wares and merchandise (Ex. P. 1; Case, pp. 122-123). On October 3, 1928, a fire occurred on the premises by reason of which a certain building, fixtures, patterns and dies were damaged or destroyed. Suit was brought by the assured against each of the insurers for a proportionate part of the loss or damage. On the trial of the issue, from the testimony of the assured's witnesses, it was made to appear that the dies and patterns, for the loss of which the instant actions were started, were at the time of the fire housed in a building known as the old blacksmith shop, which too, was destroyed (Case, p. 61, ll. 11-13; p. 62, ll. 20-30; p. 66, ll. 15-23).

On appeal the contention that this building itself was covered is abandoned. The loss of this building as testified, amounts to \$800 (Case, p. 69, ll. 32-34). Assured's witness testified that as new patterns were constantly being made, it became necessary to remove the old ones for temporary storage into the old blacksmith shop, from where they were recalled when the need for them in the pattern shop or foundry arose (Case, p. 61, ll. 10-19, 23-30; p. 62, ll. 20-30; p. 71, ll. 15-30; p. 73, ll. 28-39; p. 80, ll. 6-9, 18-19). There was no customary place of deposit for these dies and patterns (Case, p. 61, ll. 23-28); they were transferable from one pattern shop or foundry to another as the occasion for the use of them arose, and only when not in actual use were they on deposit in the old blacksmith shop.

During the cross examination of the assured's witness, Howard S. Wood, the Court put the following question to him:

"Q And then these patterns were also kept in the old blacksmith shop, which you have marked on the plan?

"A Yes, sir.

"Q And that is *temporary storage*? (Italics supplied)

"A Yes, sir."

(Case, p. 73, ll. 23-31; *vide* also p. 61, ll. 10-19, 23-30; p. 62, ll. 20-30; p. 71, ll. 15-30; p. 80, ll. 6-9, 18-19.)

Assured called one Herbert Rohlffs as its witness to testify as to whether or not it was customary for a business such as that of the Central Radiator Company to maintain its patterns in a state of more or less constant rotation from one building to another, but on objection of insurer's counsel, the Court refused to permit the witness to answer.

Counsel propounded the question in three variant forms, thus:

“Q What is the custom in the business of manufacturing manholes with regard to the transferability of patterns where a foundry is not all housed in one building?

“Q What is the custom in the trade regarding constant retention of patterns in a single building of several buildings in a pattern manufacturing establishment?

“Q What is the custom regarding incidental changing from building to building as the occasion requires with regard to manhole patterns where the foundry consists of two or more buildings?”

(Case, p. 90, l. 30; p. 91, l. 20.)

When the plaintiff rested its case, the Court, on motion of the defendants, granted a non-suit against the plaintiff, on the ground that the removal of the dies and patterns from insured buildings was *not temporary*, but for the sole purpose of storage (Case, p. 120, l. 27).

An examination of the above excerpts of the plaintiff's witness, Wood's testimony, will disclose that the Court's conclusion that the removal of the patterns was not temporary, *is not based upon any testimony in the case.*

On appeal, it is the contention of the assured that the dies and patterns were covered regardless of the question of the coverage of the building in which they were at time of the fire: *first*, by reason of the true construction to be placed on the policies, to the effect that they were insured generally, regardless of their particular location on the premises; *second*, that even if the policies be construed to have insured patterns and dies contained in certain named buildings insured, none the less, being property in their nature such that they could not be presumed to

remain stationed in them steadily, the policies covered them in their ordinary transference outside such buildings for brief or indefinite periods; and *third*, that the companies were stopped to plead or waived the defense that the patterns were not covered.

Counsel agreed that it would not be necessary for witnesses to be produced to testify as to the Law of Pennsylvania, but that both counsel might submit the Pennsylvania authorities to the trial court on the legal questions involved in the suit as though witnesses had been produced and testified as to these Pennsylvania decisions. This does not appear in the printed case because the argument of counsel in which this agreement was made was not returned by the stenographer with the transcript of the evidence.

It is to be noted that the contracts of insurance were made in the State of Pennsylvania (Case, p. 4, ll. 31-34), although it may be noted that the law of New Jersey on the subject is not different. Defendant's answer, C., p. 4, alleges that policy is governed by Law of Pennsylvania which we admit.

LAW AND ARGUMENT.

The Court erred in granting defendant's motion for non-suit for the reason that, by the policies of insurance, dies and patterns were insured generally and regardless of their particular location on the assured's premises.

Stipulation between counsel appearing (Case, pp. 8-9), provides for the printing of but a single State of the Case, one copy of each pleading and one policy of insurance, etc. The policies and endorsements are printed (Case, pp. 122 to 139);

and beginning at p. 123 and running to l. 14, p. 126, will be found the typewritten endorsements on the policies. This is important because it discloses the complete coverage, and the case turns upon the effect of these endorsements.

It is a familiar rule that if a policy is susceptible of two meanings, that construction is to be adopted which is most favorable to the assured. A policy must be liberally construed in favor of the assured so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance it was his object to secure. If its provisions are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the assured; in other words, the contract should be liberally construed in aid of the indemnity which was in the contemplation of the parties who made it. *McKeesport Machinery Co. v. Ben Franklin Ins. Co.*, 34 Atl. Rep. 16 (Pa.); *Hillman Transportation Co. v. Home Ins. Co.*, 112 Atl. Rep. 108 (Pa.); *Krebs v. Phila. Life Ins. Co.*, 95 Atl. Rep. 91 (Pa.); *Bone v. Detroit Fire Ins. Co.*, 261 Pa. 554, 104 Atl. Rep. 742; *Carter v. Metropolitan Life Ins. Co.*, 264 Pa. 505, 107 Co., 126 Atl. Rep. 810 (Pa.); *Nusbaum v. Hartford Fire Ins. Co.*, 120 Atl. Rep. 481 (Pa.); *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Sup. Ct. 594; *Griffing Iron Co. v. Liverpool, etc. Ins. Co.*, 68 N. J. L. 368; *Harris v. American Casualty Co.*, 83 N. J. L. p. 641. Other cases in N. J. have held "it is sufficient compliance with terms of policy if the property insured is put to the use contemplated by the parties, as expressed in Contract of Insurance," *Hampton v. Hartford Ins. Co.*, 65 N. J. L. 265, 267. Also *Corlies v. Westchester Fire Co.*, 92 L. p. 108, as to construction of policy.

A consideration of the provisions in the policies will make it patent that it was the intent of the parties to the contracts to insure the destroyed dies and patterns regardless of their location on the premises.

The first paragraph of the endorsement or rider to the policies (Case, p. 123, ll. 1-18) declares the coverage to be on named buildings, "and on patterns in main foundry and pattern shop and pattern storage building, situate, Lansdale, Montgomery Co., Pa." That the quoted passage was not intended as the consummate coverage clause is obvious from a reading of subsequent portions. The passage is merely the exordium, else no attempt would have been made to qualify, expand or limit its meaning by later provisions. In construing a policy of insurance the whole of its provisions are to be taken together. *Griffing Iron Co. v. Liverpool, etc. Ins. Co.*, 68 N. J. L. 368. The second paragraph (*ibid*, ll. 19-28) states that the "policy covers on the buildings, improvements and structures with all tangible and/or destructible property movable and/or immovable, *including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy the property of the assured or sold but not removed, etc.*" (Italics supplied.) Lines 10 and 11 of the Pennsylvania Standard policy, name dies and patterns; which are uninsurable and excepted *unless specifically named* (Case, p. 131, ll. 10-18). The third paragraph (Case, p. 123, ll. 29-33) expressly excludes coverage on "fireproof storage vaults and patterns contained therein, etc." The fourth paragraph effects exclusion of flues, pipes, drains, bituminous coal in the open (*ibid*, ll. 34-40, and p. 124, l. 1). The sixth paragraph (Case, p. 124, ll.

10-12) excepts the assured's own make or products manufactured or in process of manufacture.

(1) It is the contention of the assured that if there is an ambiguity in the reference to lines 10 and 11 of the Standard policy in the second paragraph of the rider, it should be resolved in favor of the assured. The reference in the endorsements, although it is to a statutory form not made by either of the parties to the contract, itself is the language of the insurers, and the construction thereof should be strongest against them the users. *Verba Chartarum fortius accipiuntur contra preferendum. American Lithographic Co. v. Commercial Casualty Ins. Co.*, 81 N. J. L. 271. *There is nothing in the paragraph to indicate the intent of the parties that only those dies and patterns are to be covered which are located in the buildings named.* If the insurers intended so to limit the coverage, they easily could have provided therefor, by saying, *e. g.*, "including all articles mentioned in lines 10 and 11, etc., contained in the above-named buildings." Now the insurers would take advantage of the ambiguities in their own expressions, having induced the assured to contract with them on the reasonable assumption that their words mean one thing while they hoped the Court will adopt a construction by which they would mean another thing more to their advantage. *Singe v. Brennan*, 37 Pa. Co. 401.

(2) The third clause of the endorsement excludes coverage on fireproof storage vault and patterns contained therein. The maxim "*exclusio unius est expressio alterius*" applies. The insurers undertook to declare expressly what property is uninsurable and excepted, and it therefore must follow that the exclusion is limited to that expressed.

In the case of *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. ed. 512, the underwriters agreed to pay "all loss or damage" which the assured may sustain by fire upon the property insured, but they excepted from this general liability any loss by fire "that may happen to take place in consequence of any invasion, civil commotion, riot, or any military usurpations." This exception, then, the Court, Mr. Justice Story, said, "may fairly be construed to leave all other losses * * * within the reach of the policy, upon the known maxim of law that *an exception expressly carried out of a general clause, leaves all other cases within the scope of the clause.*" (Italics supplied.) If the language of the policy does not clearly express an exception to the dies and patterns involved in this suit, the Court should not write an exception into it by construction, for the purpose of exempting the insurers from liability. *Great Southern Life Ins. Co. v. Churchwell*, 91 Okla. 157, 28 A. L. R. 97.

It is interesting at this juncture to compare with the case at bar the case of *Excello Clothing Co. v. Marquette National Fire Ins. Co.*, 99 N. J. L. 154. In that case the coverage clause provided for insurance on furniture, fixtures and a number of other kinds of articles, "and on all tools, utensils, articles, implements and appurtenances used in the business not herein specifically mentioned." This Court held that the policy covered paper patterns used in the business of a manufacturing clothier, despite the fact that the word "patterns" occurred in a list of articles in the printed body of the policy, as to which the policy provided the insurer should not be liable "unless liability is specifically assumed thereon." The ground for the decision is, as

expressed by Mr. Justice Parker, at p. 156, "That the language of the coverage clause plainly indicates an intent to insure generally all articles and appurtenances used in the business including patterns, without regard to catalogued exceptions in the body of the policy."

By a parity of reasoning the converse of this proposition obtains no less, so that a catalogued exception in general terms, *itself excepted*, indicates an intent to insure generally all dies and patterns without regard to the coverage clause.

The eleventh clause of the endorsement (Case, p. 124, l. 36) reads as follows:

"Permission granted for such use of the premises as is usual in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

NOTE. The word 'materials' as used above, includes gasoline and such other materials as are prohibited by the printed conditions of this policy."

It will be observed that if the word "materials" which the insurer chose to define as gasoline and like substances, is removed from the quoted endorsements, it would read, "Permission granted for such use of the premises as is usual in the business as conducted therein, and to keep and use all articles usual and incidental to said business, etc."

The testimony of plaintiff's witness Wood, beginning at p. 60, refers to the use of patterns and, of course, no reasonable argument can be advanced that patterns are not articles usual and incidental in the operation of a foundry. The use of patterns is referred to in the endorsements of the policy, and therefore, it cannot be argued

by the Companies that this was not an article usual and incidental to the foundry business. It is true that the endorsement does not say patterns which are incidental to the business, but we believe that the term "articles" is broad enough to cover the term "patterns." This reasoning is entirely consistent with the opinion of Justice Parker in *Excello Clothing Co. v. Marquette National Fire Ins. Co.*, 99 N. J. L. 154.

If there is an ambiguity between the several endorsements it is our contention that the last endorsement on the subject, broad enough to cover the term "pattern," should prevail, in view of the fact that these endorsements if ambiguous, should be considered in a light most favorable to the insured. As a matter of fact in *McClure v. Mutual Fire Ins. Co., of Chester Co.*, 242 Pa. 59; 88 Atl. Rep. 923, the Court adopts the reasoning of a Georgia case to this effect:

"If the [prohibited] articles were employed by the assured in the conduct of a particular business, and the use of such articles is a necessary incident to the conduct of such a business, the parties will be presumed to have contracted with reference thereto, and at the time the insurance policy was issued the insurer will be presumed to have had in contemplation the use of such substances by the assured when he assumed the risk, and, under such circumstances, will be presumed to have waived the condition under which the use of such substance would render the policy void."

The opinion goes on to say:

"If this rule has not already been adopted in Pennsylvania, it is time that it should be; and, if anything said in our cases gives support to a different view, the decisions in those cases must be considered modified to the extent herein indicated."

There can be no legal distinction between an attempt on the part of an insurance company to except certain articles from the coverage of the policy, and an attempt by an insurance company, by confusing language, to limit the coverage of those articles to a certain building. The company must realize, that the assured cannot constantly house these articles in a given location because from time to time the articles must, in the course of the business, be transferred from one building to another. Several cases on the latter point discussed will be referred to in the argument of our next point, such as *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 34 Atl. Rep. 16; *Granden v. Insurance Co.*, 107 Pa. p. 26 at p. 38; *Geobill v. Penn. Mutual Fire Ins. Co.*, 32 Atl. p. 632 at 633 and others, all of which cases established conclusively the correctness of the views here expressed.

It is our contention, however, that the Eleventh Clause of the endorsed coverage makes it unnecessary to depend on these cases because it is there stated, "that the insured may keep and use all articles usual and incidental to the business," and, of course, it would be unusual for the Companies to list the different articles which they meant to include by the term "articles," or it may be that the Company left it ambiguous for their own purposes.

II. The Court erred in granting insurers' motion for non-suit for the further reason that, even if the policies be construed to insure only patterns and dies "contained in" the buildings expressly insured, none the less the patterns and dies, being property in their nature such that they cannot be presumed to remain there steadily, the policies covered them in their ordinary use outside of such buildings.

1 It is a controlling presumption that policies of insurance have reference to the nature and use of the property covered, and to the incidents and usages of that particular risk, and contemplate its use by the owner in the ordinary manner, and for the purposes to which such use is ordinarily applied. It is universally held that the insurer is chargeable with knowledge of the usual and customary methods of conducting the business which it insures. *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594.

In the leading Pennsylvania case, *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 34 Atl. Rep. 16, the Court held that an insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used.

"We have a right to assume," said the same Court in *Grandin v. Ins. Co.*, 107 Pa. 26 at p. 38, "that the parties contracted with reference to the peculiar nature and situation of the subject matter insured."

In another leading and well-considered case, *Graybill v. Penn. Tp. Fire Ins. Co.*, 32 Atl. Rep. 632 at p. 633, the Pennsylvania court said:

"But the word 'contents' is not a certain and definite description of any particular

class of goods. Its meaning must be ascertained by considering the context, the nature and methods of the business for which the building whose contents are to be insured is to be used. * * *

In *Western Atl. Pipe-Line v. Home Ins. Co.*, 145 Pa. St. 246; 22 Atl. 665, the insurance company sought to escape liability on the ground that the assured did not own the oil, but the Court held that, since the insurance company is chargeable with knowledge of the nature of the business of the assured, it will be held to have insured the latter against whatever loss it might sustain by reason of fire.

Vide to the same effect, *Norris v. Insurance Co.*, 3 Yeates 84 (Pa.); *Koshland v. Columbia Ins.* 130 N. E. 41 (Mass.), and *Williams v. Mannheim Ins. Co.*, 130 N. E. 45 (Mass.); which hold that in construing an insurance policy, not only its provisions, but also the established customs of the business conducted by the assured, must be considered; as the insurer is charged with notice of the practices of the business respecting which the policy is issued, and its liability is determinable in that light.

2. Considering the case as a whole, which are adverted to *post*, both reason and principle favor the rule that if the property is of such a character that it reasonably may be presumed that the insurer knew that it was contemplated that the property would be used in the ordinary way in which property of a like character is generally used, and that the real and beneficial enjoyment of it precludes any supposition that it would be kept at all times in one particular place, as distinguished from removal for temporary storage elsewhere, then the words "contained in" cannot exclude such property from the protection

of the policy when it is temporarily removed for the use contemplated.

Of course, where personal property whose use does not make it transitory is insured against loss by fire in one place, no recovery can be had for loss occurring in another. *Gibboney v. German Ins. Co.*, 48 Mo. App. 185.

From the testimony in the case, referred to in the Statement of Facts, and from the nature of the questions submitted to the witness, Rohlfss (Case p. 90), it is clear that the dies and patterns were removed to the old blacksmith shop for a purpose necessary or incident to the ordinary use and enjoyment of them; and with knowledge of this the insurers were to be charged.

In the Pennsylvania case of *Western & Atlantic Pipe-Line v. Home Ins. Co.*, cited *supra*, a tank containing oil insured against fire was carried four or five hundred feet from its original location, as described in the policy, but the Court held that this fact did not relieve the underwriter from liability for a subsequent loss by fire. The Court said:

"If it was intended to make the continued location of the tank at the precise point where it then was a condition of the underwriter's liability, it would have been an easy matter to have said so. It is not the province of the courts to indulge in conjectures favorable to such insurance companies as are disposed, upon mere technicalities, to avoid the payment of honest claims. Cases are not infrequent in which statements in regard to the use and character of buildings, etc., are construed as merely descriptive of the risk at the time the application is made, and not as a warranty that there shall be no change during the life of the policy. *Wood Ins. Secs. 444, 446* and cases there cited. In *Everett v. Ins. Co.*, 21

Minn. 76, a threshing machine was insured as 'stored in a certain barn or section 36,' etc., and it was held that this was a mere matter of description, operating to identify the property, and not a promissory stipulation on the part of insured, nor a description on the part of the insurer."

In *Reck v. Hatboro Mut. etc. Ins. Co.*, 30 Atl. Rep. 205 (Penn.), the insurance was on livestock and it provided that the insurance "shall be confined to a distance not exceeding twelve miles from the boro of Hatboro." The death of the livestock occurred in Philadelphia, from an injury received there. The trial court, construing the provision to mean that the property must be kept within the distance limit to entitle the insured to indemnity in case of loss, entered a judgment of non-suit against the plaintiff. On appeal the judgment was reversed, the Court saying:

"There is, at least, room for doubt whether the by-law was intended to prohibit such removal of the property or to attach such consequences to it; and, as forfeitures are not favorites of the law, the doubt should be resolved against the insurer. We think the by-law in question fairly admits of a construction which prevents a forfeiture. There need be and should be no ambiguity in a contract of insurance. The prohibitions and conditions in it are prepared by the insurer, and they ought to be clearly expressed. In the case at law, if the defendant company had intended that a removal of the property beyond the twelve-mile limit should avoid its policy, it could easily have said so, and saved litigation."

In *Graybill v. Penn. Tp. Mut. Fire Ins. Co.*, cited *supra*, a smokehouse and its contents were insured. The smokehouse was not burned, but its contents which had been removed to a storage

room in one end of the butcher shop, were wholly consumed. The question considered by the Court on appeal was whether the smoked meats in the storage room, which were taken there as fast as they were cured in the smokehouse, were "contents of the smokehouse," within the meaning of the policy, and were to be paid for by the company as part of the loss for which it was liable. The Court answered this question in the affirmative. The defendant contended that as the smokehouse was not burned, its contents could not be; but this contention, held the Court, is a *non sequitur*. "The contents might be destroyed while outside the building. And when that happens the question of the plaintiff's right to recover must depend on *whether the purpose of the removal was such as to detach the goods permanently from the building.*" (Italics supplied.)

The Court continued:

"The evidence showing the capacity of the smokehouse, the necessity for the removal of the smoked meat, as soon as it was properly cured, to some place nearby for *storage*, while a fresh supply of meat for smoking was put in its place, the location of the storage room and quantity of smoked meats kept in store ready for sale, was properly admitted. * * * They tended to corroborate the plaintiff's version of the contract, and to sustain his claim. They were persuasive in their character, and, as we infer from their verdict, satisfied the jury that the words 'contents of the smokehouse' were understood and intended by both parties to cover the smoked meats passing through the smokehouse to the room near by, in which they were stored till needed for the supply of customers."

This case in no significant detail differs from the case *sub judice* and it is respectfully submitted, is dispositive of this issue.

In *Haws v. Fire Ins. Co.*, 114 Pa. 431, 7 Atl. Rep. 159, the coverage was stock "contained in assured's barn." The Court held the stock was insured even when not in the barn. It said:

"A policy of insurance which only covered stock when in the barn would not furnish indemnity, and no man of common sense would insure in such a company."

That the rule applied is not to be limited to instances of livestock, is clear from the rationale of the case as expressed in the following passage:

"The terms and conditions to which such an insurance is subject must be such as are reasonably applicable to such kinds of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made."

In *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, cited *supra*, the insurance was on the foundry and machine shop and/or pattern shop, and their contents, and the undertaking of the insurer, as stated in the printed part of the policy, was to insure the property, real and personal, "*While located and contained as described herein and not elsewhere.*" The nature of the business required the assured to use its patterns in the foundry and machine shop only, and when not in use they were kept in the pattern shop as a convenient place for storage. The fire affected only the foundry and machine shop and its contents, but these included certain patterns then in actual use in the ordinary course of the plaintiff's business, but which were described in the policy *as in the pattern shop*, where they were kept when not in use. As the pattern shop was not involved in the fire, the insurer disclaimed liability for the loss of the patterns, because they were described in the policy as being in

that building. The Supreme Court of Pennsylvania, in reversing a judgment for the defendant said:

"If this insurance was upon a going mill or factory, in which the tools, machinery and patterns were in regular and continuous use for the purpose of the business of the owners, the contract of insurance must be construed in the light of that fact, liberally in aid of the insured. It was not an insurance upon the goods in store, in terms, and unless it becomes so in the light of the facts appearing in the evidence, there is no legal reason, that we can see, why the plaintiff should be held to be concluded by the words that could not have been intended to apply to a business in actual progress, and that ought not to be so construed even if the insurer intended thereby to escape from the obligation assumed by the policy. It would enable an insurer after receiving the money of the manufacturer for an insurance upon his business appliances, to say to him in effect: 'Close your factory or forfeit the money you have paid us. To secure the benefit of your policy you must leave everything unmoved.' Nothing short of a stipulation of this sort incorporated into the policy, in words capable of no other construction, could induce us to aid in the perpetration of such injustice."

Now, the assured respectfully submits that this case governs completely the situation presented by the case *sub judice*. There are only two points of difference between the two cases, but neither is of a controlling importance. *First*, in the McKeesport case, the patterns were transferred from storage to the foundry where they were in temporary use; while in the case at bar they were removed from the foundry where they had been in use to the old blacksmith shop for temporary storage. *Second*, in the cited case the patterns when lost were in a building which itself was

insured. But it is to be noted that the ground of recovery as the Court made clear, was not that the patterns were insured generally, regardless of their location on the premises, nor that the building which housed them at the time of their loss was itself insured, but that the patterns described as being in the pattern shop, and insured "while located and contained as described herein and not elsewhere" were none the less covered though at the time of their loss they were in a building *other than the pattern shop*. *Similiter*, *Graybilt v. Penn. Tp. Mut. Fire Ins. Co.*, cited *supra*. *Non constat* in either of the cited cases that the fact that the building itself was insured had the slightest significance.

The courts of Pennsylvania do not stand alone in maintaining this view. Thus, in *London & Lancaster Fire Ins. Co. v. Graves*, 44 Ky. L. R. 706, the Court held that in insurance on personal property, *where the ordinary use of the property requires it to be moved from place to place, the words defining the situation of the property are words of description only, and not of warranty*.

Where a policy insuring chattels does not by express or clearly implied terms restrict the insurer's liability to loss occurring on the owner's premises, insurance follows the property so long as it is put to ordinary use, and the description of place where the property is located is merely for identification, and the removal of the chattels for appropriate and temporary use does not affect the insurance. *Winston v. Mutual Fire & Tornado Assn.*, 170 Io. 521, 153 N. W. 97. *Vide* also *McClure v. Girard Fire & M. Ins. Co.*, 43 Io. 349.

Reference will be made to only two cases decided by the Court of Errors and Appeals, which

exemplifies the liberality with which this court construes contracts of insurance. The cases hereinbefore cited bear this out no less. In *Connell v. Commonwealth Casualty Co.*, 96 N. J. L. 510, the policy of insurance on a jitney bus provided for indemnity while the automobile might be operating in "Passaic, New Jersey; Garfield, New Jersey; Lodi, New Jersey; and vicinity." The accident occurred in Newark, while the vehicle was on its way to Brooklyn to engage in the passage service there. The Court held that the insurer, none the less, was liable. In the earlier and leading case of *Snyder v. Dwelling House Ins. Co.*, 59 N. J. L. 544, at pp. 549-550, this Court, *per* Mr. Justice Depue, said:

"It is a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract. * * * 'If the terms used are imperfect, it is the fault of the defendants. It is their contract, and the construction of it must be strongly against them.' * * * Policies of insurance against fire are taken out by all classes of persons, educated and uneducated, and no rule of law is more salutary than that conditions in these instruments, expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract. The member of the sentence within the brackets, to say the least, is confusing and ambiguous when taken in connection with the words which precede it, and should not be allowed to void the policy. * * *"

III. The Court erred in granting insurer's motion for non-suit for the further reason that, the companies are estopped to plead and waived the defense that the patterns were not covered.

The endorsements attached to the policies, if not conclusive against the companies, are certainly so framed as to lull the insured into the belief that these patterns, wheresoever situated, were covered.

In the course of the trial, defendant's counsel admitted that Messrs. Krumdick and Monroe, represented the insurance companies involved in the loss, as adjusters (Case, p. 35 bottom; p. 36 top). An examination of the exhibits will disclose numerous communications between these gentlemen and Mr. M. L. Ballard, who was acting on behalf of the plaintiff. Exhibits P. 26, P. 27 (Case, pp. 146-147) are letters from Monroe and Krumdick respectively, to M. L. Ballard regarding an appointment in connection with the loss; Ballard testified that both Krumdick and Monroe requested him to get the assured to reduce claim and then it would be considered (Case, p. 40, ll. 19-22).

The schedule of the amount claimed as the loss was sent to Monroe October 23, 1928, Exhibit P. 30 (Case, p. 149), which schedule of claim was acknowledged by Monroe in his letter of October 24, 1928, Exhibit P. 31 (Case, p. 150). Thereafter, a Mr. Smith associated with Mr. Krumdick, also went into the adjustment of the loss. Exhibit P. 36, p. 156. It appeared that after a discussion with the Adjusters, Ballard for the purpose of settling, reduced the claim of \$14,000 to the sum of \$7,893 (Case, p. 38, top to l. 30). In all the talks of settlement Messrs. Monroe and Krumdick participated (p. 39, l.

30 to p. 41 bottom; p. 42 bottom to p. 43, l. 24), and finally a letter was received from Monroe to Ballard, Exhibit P. 45 (Case, p. 164), dated January 12, 1929, stating that the companies passed a resolution that there was no liability under the policy and that no claim would be entertained.

Mr. Ballard's testimony is to the effect that subsequent to the letter of January 12, 1929, denying a willingness to pay, Krumdick and Monroe further discussed the question of settlement with Ballard, suggesting to Ballard that the figure of \$7,893 be reduced and after the conference fixed by Ballard sometime in February, 1929 (Case, p. 47, ll. 7 to 24), on March 18, 1929, Ballard wrote to Monroe saying that the assured would not reduce the claim any further. Exhibit P. 49 (Case, p. 169). Therefore, at the time the motion for non-suit was made it appeared that up to February, which was a month after the letter of denial of liability by the companies, their adjusters still were talking compromise of the figures, and thereupon since the amount of the settlement could not be agreed upon, Ballard filed proofs of loss with the several companies Exhibit P. 49, p. 169. Then follow letters from numerous companies involved in the loss to the effect that receipt of the proofs of loss were acknowledged, but that to be entitled to consideration the papers should have been received sixty days after the date of the fire, the sixty-day period expiring December 1, 1928. These letters are Exhibits P. 53 and 54 (Case, pp. 172 to 178), some of which letters of refusal to pay were from companies represented by Krumdick and others from companies represented by Monroe. The reason assigned by the companies for a refusal to consider the

claim was that the proofs of loss were not filed within sixty days after the date of fire, no mention being made that the companies denied covering the loss.

The motion to non-suit was based upon two grounds, one, that the evidence in this case is not sufficient in law to find a waiver of the requirement to file a proof of loss, and second, that there is no evidence in this case to establish that the building in which these patterns were contained were covered by the contracts of insurance which are in evidence (Case, p. 118, l. 30 to bottom).

The Court denied the motion of non-suit on the first ground, as will be observed (Case, pp. 119-120) and the correctness of this view will only be argued by us in the event that our opponent's brief takes up this point, because we feel that the Court's view on the denial of the motion were correct, but the Court granted the motion to non-suit on the second ground.

We realize that a mere offer to compromise is not evidential of the liability of the person making the offer, but here there was a continued attempt made by the Companies, through their agents, to the assured's agent, to have the amount of the claim reduced, and that if it was reduced a settlement would be effected, and this continued beyond January 12, 1928, when the letter denying liability under the policy was sent, which would lead the average individual to believe that the letter denying liability was nothing more than an attempt on the part of the Companies to create a status for themselves for future protection, and then having written the letters they continued to suggest to the as-

sured's agent to reduce the claim, never more denying coverage of the loss.

It is our contention that the conduct of the Companies was an admission or a position assumed that the Companies no longer insisted that there was no coverage. In 22 C. J. p. 317, Art. 12, under the title "Admission by Conduct," there is this statement:

"Where a party on the trial of an action advances contentions which are inconsistent with his prior conduct in relation to the matter in controversy, such prior conduct may be shown as being in the nature of an admission."

Under this note there are numerous cases cited. The article continues:

"Evidence of this character takes a wide range and may be received, for example, where the matter in controversy is the ownership of property; the existence of a relevant mental state, such as assent or the lack thereof, intent, motive, knowledge or recklessness; or the existence of such matters as claim, disclaimer, fraud, notice, reasonable cause, ratification, or *waiver*."

The entire article suggests the thought that if the conduct or words of a party fairly indicates that he has withdrawn from a previous stand, it is evidence of waiver. It may not be sufficient evidence for the Court as a matter of law to so determine, *but it certainly becomes a question of fact for the jury to pass upon.*

The letters refusing to recognize the proofs of loss carry through the contention we make that the Companies now stand upon the failure to file the proofs of loss within time, and the general rule is that where a Company assigns a single cause for their refusal to pay, it is bound by

that election. *Bohles v. Prudential Ins. Co.*, 83 N. J. L. 246; *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 628; *Snowden v. Kattaniny Ins. Co.*, 122 Pa. St. 502; *Niagara Fire Ins. Co., v. Frank Miller*, 120 Pa. St. 504. Suppose instead of our proof being conversations and several letters, which considered together we maintain spelled out a waiver, the Company had written to Ballard, the assured's agent saying that the refusal to pay was based solely upon the failure to file proofs of loss within sixty days after the loss, would that not have been an election? If that would be an election, why would not several conversations, plus the attitude assumed by the companies, through their agents, with Ballard, spell out a similar election.

In *Graham v. Security Life Ins. Co.*, 72 N. J. L., p. 298 at 305, this Court said:

“There is always a reluctance on the part of courts to take from the jury, as a matter of law, any facts or circumstances from which a waiver may be inferred, and this is shown in the charge to the jury in the case of *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439. ‘I do not think that any number of instances—one or more—can be said, as a matter of law, to make or not to make a waiver. It is for you, as reasonable men, to consider what the company did intend—what would its conduct make a reasonable man believe in reference to it.’ ”

It cannot be said with reason that waiver or estoppel can apply to only part of an insurance contract, and not to another, and therefore, if the Companies, by their conduct, may waive the submission of proofs of law, we contend that it can also say to the assured, by words or conduct, that it will stand upon a single defense to his claim. The Companies could have said in their

letters refusing to consider the proofs of loss, that they further assigned as their reason, that there was no coverage of the articles claimed to have been lost.

We do not find in any cases that there must have been a consideration moving from the assured for the election of the defendant companies to waive its claim of no coverage. Of course, the plaintiff could have brought suit immediately after the letter of January 12, 1928, if the Companies had not continued to mention a reduction of the amount of the claim. Whether plaintiff was assured of success in that suit or not, it did refrain from instituting suit because of the negotiations, and it is our contention that while the evidence of Mr. Ballard as to the conduct of the Company, and the letter refusing to consider the proofs of loss, did not establish an admission of liability, it was for the jury to say whether it did not establish the waiver or estoppel hereinbefore suggested. By lulling the assured into this belief the Companies would settle, the latter succeeded in influencing the assured to reduce the amount of its claim. On the motion to non-suit we were entitled to all legitimate inferences favorable to our contention. *Jones v. P. S. Ry. Co.*, 86 Law p. 646.

On the question of estoppel, in regard to coverage itself, the case of *Cannan v. The Farmers Mutual Fire Association, etc.*, 58 Eq. p. 102, is very enlightening. In that case, the Court held against the claim of estoppel but because of the fact that the defendant was a mutual company. At p. 109, of the opinion, the late V.-C. Emery makes it very clear that if the defendant had been a stock company, such an estoppel might be set up by the plaintiff in an action on the

policy. The Pennsylvania authorities seem too in harmony with this conclusion. *Ben Franklin Fire Inc. Co. v. Flynn*, 98 Pa. St. 628; *Snowden v. Kattaniny Ins. Co.*, 122 Pa. St. 502; *Niagara Fire Ins. Co. v. Frank Miller*, 120 Pa. St. 504.

IV. The Court erred in refusing to permit assured's witness, Rohlffs, to answer questions relating to the custom of manufacturing establishments similar to the assured's, to transfer patterns from one building to another in the ordinary course of its business.

Witness, Rohlffs, is manager of a pattern-making foundry (Case, p 90, l. 10), and had been in the business for about eighteen years (Case, p. 90, l. 13). He was asked on direct examination by plaintiff's counsel the following questions, and objections by the defendant's counsel were sustained.

Q What is the custom in the business of manufacturing manholes with regard to the transferability of patterns where a foundry is not all housed in one building?

Q What is the custom in the trade regarding constant retention of patterns in a single building of several buildings in a pattern manufacturing establishment?

Q What is the custom regarding incidental changing from building to building as the occasion requires with regard to man-hole patterns where the foundry consists of two or more buildings? (Case, p. 90, l. 30 to bottom; p. 91 top to l. 21.)

We have hereinbefore argued that the companies undertaking the risk were charged with the customs prevailing in a manufacturing establishment. These questions were calculated to complete the evidence to the end that there would be no question as to what these customs were.

We think there was enough in the case to establish the customs, with knowledge of which the Companies should be charged at the time of writing the insurance, but if we are incorrect, then it was prejudicial error on the part of the Court to refuse to permit answers to the questions. *Cramer v. National Surety Co.*, 134 Atl. Rep. 771.

We respectfully urge that for the reasons assigned and argued in this brief, the verdicts and judgments should be set aside and a new trial granted.

KALISCH & KALISCH,
Attorneys of Plaintiff-Appellant.

ISIDOR KALISCH,
On the Brief.

79 FEB.T.1932

New Jersey Court of Errors and Appeals

CENTRAL RADIATOR COMPANY, a
corporation,
Plaintiff-Appellant,

vs.

NIAGARA FIRE INSURANCE
COMPANY, *et als.*,
Defendants-Respondents.

Action at Law.

On Appeal from
Supreme Court.

BRIEF FOR DEFENDANTS-RESPONDENTS.

Preliminary Statement.

Plaintiff-appellant was non-suited at the Essex Circuit (Smith, J.) on the ground that it had failed to prove that the building known as the "old blacksmith shop" and its contents, which were damaged by fire on October 3, 1928, were covered by the policies of defendants-respondents.

The coverage riders were not prepared by defendants, but were submitted to them in final form by the witness Ballard, who acted as plaintiff's broker. Although this was a new line of insurance for him he did not visit plaintiff's plant at Lansdale, Pa., before submitting the coverage forms to defendants (S. C., p. 56, ll. 17-20). Other brokers had previously placed the line with other companies, and Ballard obtained their form from plaintiff (S. C., p. 59, ll. 12-27). He substituted his name as broker and forwarded the form to a company representative to place the line (S. C., p. 59, ll. 28-36; p. 58, ll. 25-40).

Ballard also testified that the policies in suit had been written at an average premium rate

which had previously been promulgated by the Rating Bureau of Pennsylvania (S. C., p. 60, ll. 3-10). A specific rate applies only to one building or its contents, while an average rate is obtained where several buildings and/or their contents are to be insured for a lump sum under a compound policy (S. C., p. 32, ll. 3-12).

The policies in suit were all in the same compound form. Each policy insured plaintiff for a designated amount against loss by fire "to the following described property while *located* and *contained* as described herein * * *, but not elsewhere, namely:" (italics ours). Seven buildings and their contents are then described. One of these is the main foundry, another, the pattern shop and pattern storage building. Among the personalty insured are "patterns in main foundry and pattern shop and pattern storage building" (S. C., p. 122, l. 30 to p. 123, l. 18).

Paragraph 4 of each of the complaints alleged that (S. C., p. 2, l. 35 to p. 3, l. 5):

"4. On or about the third day of October, 1928, while the said policy was in force and effect a fire occurred on the aforementioned premises, by virtue of which certain buildings, fixtures, patterns and dyes insured under the policy aforementioned, were completely damaged and destroyed to the extent of \$14,093."

Plaintiff's proofs at the trial did not establish a loss by fire in any of the buildings described in the policy. The fire was confined to an old frame building constructed in 1905 (S. C., p. 70, l. 12), the use of which as a blacksmith shop was discontinued about ten years before the fire, when a new blacksmith shop was built (S. C., p. 74, ll. 20-35). No question was raised at the trial as to which of these buildings was covered by the words "blacksmith shop" contained in the descriptive portions of the policies.

But an effort was made to bring the former blacksmith shop within the words "pattern shop and pattern storage building", plaintiff's proofs being that it had some time before the fire removed to the old blacksmith shop certain patterns for temporary storage. Plaintiff's pattern shop foreman testified, however, that the old blacksmith shop was located about fifty feet from the pattern shop, either on, or about ten feet from, the line of the right of way of the Philadelphia and Reading Railway Company (S. C., p. 70, ll. 5-10) and that it was totally distinct from the structure known as the "pattern shop and pattern storage building". Under questioning by the Trial Court he said (S. C., p. 73, ll. 20-31):

"Q. Were there three buildings, one described as the pattern shop, one as the pattern storage, and one as the old blacksmith shop which you used for pattern storage? A. No, sir, part of the pattern shop is used for pattern storage. It is just the pattern shop.

Q. The pattern shop and pattern storage is one building is that right? A. Yes.

Q. And then these patterns were also kept in the old blacksmith shop, which you have marked A on the plan? A. Yes, sir.

Q. And that is temporary storage? A. Yes, sir."

At the trial plaintiff's counsel limited the claim to \$800.00 for fire damage to the old blacksmith shop itself, and \$12,000.00 for patterns stored therein, waiving other items of personal property alleged to have been in this building at the time of the fire (S. C., p. 118, ll. 3-23).

On page 2 of plaintiff's brief it is stated that "On appeal the contention that this building itself was covered is abandoned". This admission seems dispositive of the controversy unless this Court adopts the contention that the patterns which were damaged by fire were insured by the

policies in suit wherever they might have been located from time to time.

On page 4 of plaintiff's brief, reference is made to an oral agreement between counsel that the Pennsylvania reports could be submitted to the Trial Court to avoid the necessity of calling experts on any questions of Pennsylvania law which might arise, the contracts of insurance having been made in that State. This is a correct statement of the understanding, but it should be pointed out that in the unreported portion of the argument during which this stipulation was called to the Court's attention, the Trial Judge took the view that since no Pennsylvania reports had been offered by plaintiff on its case the Court could not, on defendants' motion for a non-suit, on the first ground (*i. e.*, plaintiff's failure to file proofs of loss as required by the policies; S. C., p. 118, ll. 31-33) consider Pennsylvania decisions in any other light than as persuasive authorities on a parity with decisions of other states on any points not adjudicated in this State (Ruling on Motion for Non-Suit, p. 119, ll. 34-37).

ARGUMENT.

REPLY TO POINT I.

The policies did not insure dies and patterns irrespective of location, but only while located and contained "in main foundry and pattern shop and pattern storage building".

An effort is made in plaintiff's brief (p. 5) to invoke the well-worn principle of strict construction against the defendants. This is unjustifiable for several reasons:

(1) The policies in suit are in the standard form (S. C., p. 138, l. 37). Accordingly the printed provisions should receive their usual meaning. Since there is no ambiguity in the language insuring plaintiff against loss "to the following described property while located and contained as described herein * * *, but not elsewhere", no room exists for liberal construction in aid of the assured's claim.

Del Guidici v. Importer's & Exporter's Ins. Co., 98 N. J. L. 435, at 436 (E. & A.).

(2) Ballard, who acted as broker for plaintiff in obtaining the policies, was engaged for thirty years in the business of general insurance (S. C., p. 21, ll. 7-15). The coverage form having been obtained by him from plaintiff and submitted by him to defendants (S. C., p. 58, ll. 25-40; p. 59, ll. 12-36), any ambiguity in the description of the property insured must be resolved against plaintiff.

Klaas v. Boston Ins. Co., 103 N. J. Eq. 521, 525; *aff'd.* 104 N. J. Eq. 492; *London Assurance Corp'n. v. Thompson*, 170 N. Y. 94, in which the Court said at page 102:

“As the terms of insurance, including the description of the risk, were wholly prepared by the plaintiff, an insurer of wide experience, for it has done business since 1720, and the defendant had no information upon the subject, except the typewritten slip furnished by the plaintiff, we think that the responsibility for the ambiguity should be borne by the party who caused it. (*Janneck v. Metropolitan Life Insurance Company*, 162 N. Y. 574; *Herrman v. Merchants' Insurance Company*, 81 N. Y. 184; *Kratzenstein v. Western Assurance Company*, *supra*.) While the defendant adopted the plaintiff's words when he pasted the slip in the policy, he could not do otherwise if he made any contract whatever. They were still the words of the plaintiff, and the defendant should not be required to father its offspring. The principle of resolving doubts in a unilateral contract by throwing the burden upon the one who caused them, applies with the same force to this case, under its peculiar circumstances, as to the cases cited and, as we think, furnishes the proper solution of the controversy.”

(3) The question in this case is not whether a forfeiture for violation of a condition subsequent shall be avoided by liberal construction in favor of the assured, but rather whether the policies, admittedly covering designated buildings and their contents, also extended to insure a special class of property located in a building not described in the policies. Even if the Court should be disinclined to construe against plaintiff the coverage form which it supplied to its broker to be submitted to defendants, the applicable principle would then be that the law will not insert by construction matter which the parties to the contract omitted by design or neglect.

Kupfersmith v. Delaware Ins. Co., 84 N. J. L. 271, 275 (E. & A.); *Perry v. North Am. Acc. Ins. Co.*, 104 N. J. L. 117, 120 (E. & A.).

In *British America Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, the Court stated that since removal of goods did not forfeit the policy, which would have again covered the goods if returned, the rule demanding a construction which would prevent a forfeiture had no application.

(4) Applying to the descriptive portion of the policies the criteria of construction approved by this Court in the cases referred to, the Trial Court's interpretation of the policies as covering patterns only while contained in the buildings described in the policies carries out the manifest intent of the parties as stated in their contracts. If this is established, there would be no possibility of strict construction against the insurers. Accordingly, attention must first be directed towards the alleged existence of ambiguous language in the coverage form.

Plaintiff's contention (Brief, p. 7) is that there is an ambiguity in the reference to lines 10 and 11 of the standard policy in the second paragraph of the coverage form (Ex. P-1, p. 123, ll. 19-24). These lines provide that "This policy shall not cover * * * unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns" (Ex. P-1, p. 131, ll. 12-16). Thus patterns were uninsurable except to the extent that the companies specifically assumed liability. Plaintiff urges that the only way liability for damage to patterns could have been limited to those contained in the main foundry and pattern shop and pattern storage building (which the companies specifically insured in the first paragraph of the coverage form) was to insert after the reference to lines 10 and 11 in the second paragraph the words "contained in the above named buildings".

This was entirely unnecessary in view of the preceding warranty of location and the primary descriptive paragraph.

1. The warranty of location.

Prior to the adoption of the standard policy such words as "contained in" or "located as described herein" were interpreted by some courts as warranties defining the risk, and by other courts as merely additional words of identification of the insured property. The standard policies met this difficulty by employing the expression "while located and contained as described herein * * *, but not elsewhere". The authorities are uniform that this clause amounts to a warranty defining the risk assumed, so that property not within the description which follows this clause is not covered.

London Assur. Co. v. Thompson, 170 N. Y. 94, 101; 62 N. E. 1066;

L'Anse v. Fire Ass'n of Phila., 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838.

In *Rosenthal v. Ins. Co. of N. A.*, 158 Wis. 550, 149 N. W. 155, L. R. A. 1915 B. 361 (1914) the Wisconsin Supreme Court said:

"It has been ruled many times that policies of insurance are to be liberally construed in favor of the insured, because the insurer has prepared the contract. This reason for such construction would seem to drop out in case of a contract prescribed in its details by statute; at least, so far as the statute covered such details * * *."

"It is well known that fire risks and fire insurance rates vary greatly in different portions of a large city. And for this reason the fire insurance of chattel property of a kind that is not usually destroyed by fire, except in

connection with the burning of a building, while contained in a designated building, is a very important stipulation in the policy. It affects the rates and affects the risk. When to this stipulation is added the words 'and not elsewhere', great emphasis and certainty are given to the stipulation, and it is also to be considered that the statute authorizes a policy to be limited to a designated place to insure the property against loss only while at that place, and not elsewhere, leaving it to the parties to insert such written description of the place and the scope of the insurance in this respect as they see fit."

2. The primary description of the place and the scope of the insurance.

The first paragraph of the coverage form (Ex. P-1, p. 123, ll. 3-17) insured the following specifically named buildings and their contents:

<i>Building</i>	<i>Contents</i>
Machine shop	Machinery and equipment Supplies
Main foundry	Machinery and equipment Patterns
Pattern shop and pattern storage building	Patterns Lumber
Engine and boiler room	Machinery and equipment
Core room	
Office	Machinery and equipment Supplies
Blacksmith shop	

There is no ambiguity whatever in this primary descriptive paragraph. Patterns while located and contained in two buildings are covered.

3. The secondary supplemental description.

Immediately after the primary specific description of the insured property is the paragraph containing the reference to lines 10 and 11 of the

policies upon which plaintiff's argument rests. This paragraph reads as follows (S. C., p. 123, ll. 19-29):

"This policy covers on the buildings, improvements and structures together with all tangible and/or destructible property movable and/or immovable, including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy the property of the assured or sold but not removed; also on assured's interest in and on assured's legal liability for similar property held by assured as follows: viz: in trust or on commission or on joint account with others or on storage or for repairs."

Plaintiff's contention in effect is that this paragraph should be read independently of the warranty of location and the specific description which precede. Let us take, for example, the words "This policy covers on the buildings, improvements and structures". Do they operate to cover all buildings found on plaintiff's land, together with all improvements and adjacent structures? If so, then the old blacksmith shop, as well as other buildings on the premises, came within the policies. But we have plaintiff's admission that the old blacksmith shop was not insured. The word "buildings" clearly referred to those specifically named in the preceding paragraph, and the purpose of this language was obviously to make certain that their "improvements" and adjacent "structures" were also insured.

So with the words "together with all tangible and/or destructible property movable and/or immovable including all articles mentioned in lines 10 and 11 of the Pennsylvania Standard policy". The "tangible and destructible" property here described would include items not specifically mentioned among the contents of the several buildings

named in the preceding paragraph. This paragraph by its general language was calculated to take in loose ends not theretofore included. But the words "together with" connect the subsequent language of general description with "the buildings, improvements and structures", which in turn refer to the specific buildings described in the preceding paragraph. Therefore, the tangible and/or destructible property including the articles mentioned in lines 10 and 11 must be located and contained in the buildings, improvements and structures specifically mentioned in the policies.

In *Kahn v. Aetna Casualty & Surety Co*, 99 N. J. L. 6 (Sup. Ct. 1923), a burglary policy limited the insurance to "gold and silverware, watches, jewelry, precious stones and other merchandise of like character while contained in the safe". The assured contended that artificial teeth came within the general words "and other merchandise of like character". The principle of construction stated by Chief Justice Gummere is pertinent to this case (p. 7):

"In determining the meaning of a contractual provision like that before us, the maxim '*noscitur a sociis*' is usually applied; that is, the general words following words of a more particular character are regarded as limited in their meaning by the former. Stated in another way, general terms must be confined to the class to which their more specific associates belong. Freeholders of *Morris v. Freeman*, 44 N. J. L. 631, 633. It is true that the maxim is not applicable where, from a reading of the whole instrument, it is apparent that it was the intent of the parties that the general words should not be so limited. 17 Am. & Eng. Encycl. (2d ed.) 6. But an examination of the policy in the present case discloses nothing which indicates an intent to include in the risk property of a different class from that in which gold and silverware, &c., &c., are embraced."

So in this case the specific coverage is of certain classes of property while located and contained in specified buildings. The second paragraph adds generally to the classes insured, but the warranty of location in the designated buildings is still operative. In the Kahn case, had the artificial teeth been mentioned in the policy and had they been stolen from the drawer of a desk, there is little doubt that the words "while contained in the safe" would have absolved the insurer of liability.

The soundness of the construction urged by defendants is established by several additional considerations:

(1) Lines 10 and 11 exclude (in addition to patterns) bullion, manuscripts, mechanical drawings and dies. Of these only patterns were specifically named in the primary coverage paragraph. The assured apparently desired protection against loss by fire of the remaining items. This accounts for the words "including all articles mentioned in lines 10 and 11". The word "all" does not refer to all patterns wherever located. All ordinarily excluded items mentioned in these two lines are included, with the qualification that they must be located and contained in accordance with the description in the warranty clause. Otherwise patterns, mechanical drawings and dies, etc., would be insured if burned while in the old blacksmith shop, the assured's garage, or in cars or trucks.

(2) The coverage rider contains this provision (S. C., p. 124, ll. 4-9):

"It is further understood and agreed that this insurance also covers property, not otherwise specifically excluded, in cars on trucks within one hundred feet (100) of *buildings and platforms insured hereunder.*"

If plaintiff's construction of the second paragraph of the rider is sound, then this fifth paragraph was wholly unnecessary. If all tangible and/or destructible property including patterns, etc., were insured generally wherever they might be located on insured's lands, why this specific inclusion of property "in cars on trucks within 100 feet of *buildings and platforms insured hereunder*". The italicized words are a recognition of our contention that basically the insurance was upon specific realty and contents while contained therein. This paragraph extended the coverage to property in cars within a limited distance from the insured buildings and adjacent platforms.

(3) The Trial Judge properly stressed the fact that the policies in suit were written at an average rate (S. C., p. 120, ll. 31-33). An average rate represents an averaging of the hazards assumed under a compound policy covering for a lump sum a number of buildings and/or their contents. The specific rates on the several buildings and on their contents are applied to the separate values furnished by the assured on the buildings and contents to be insured. The premiums so calculated on the specific rates are then added together. The values furnished by the assured are also added. The division of the aggregate specific premiums by the total values gives the average rate.

The benefit to the assured of a compound policy at an average rate over specific insurance of the separate items is that the full amount of the insurance will be available to him under a compound policy irrespective of which unit of his plant is destroyed by fire. Plaintiff had compound policies aggregating \$150,200. If the fire had destroyed the foundry and machine shop and resulted in a loss to the full amount of the insurance on all the buildings and contents, plaintiff would

have been entitled to payment in full, whereas specific insurance on the several buildings and contents would have limited recovery to the amounts for which the foundry and machine shop were covered.

But the very basis of the average rate under compound insurance is that it is determined with reference to hazards surrounding the several buildings and their contents. Therefore, when plaintiff desired to insure "patterns in main foundry and pattern shop and pattern storage building" the specific rate applied to the values furnished was based on the hazard while the patterns were so located and contained, and not to the hazard incident to storage in a twenty-three year old frame building formerly used as a blacksmith shop, which was never locked, and which was close to the right of way of a railroad (S. C., p. 70, ll. 4-25).

(4) Additional support for the lower Court's construction of the policies is found in the 90% reduced rate contribution clause attached to all of the policies reading as follows (S. C., p. 125, l. 33 to p. 126, l. 5):

"In consideration of the reduced rate and (or) form under which this policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to 90 per cent. of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

Referring to the patterns, the Trial Court in granting the non-suit said in part (S. C., p. 121, ll. 9-14):

"I can very well see that the assured would not want those covered. If they were insured for full value, it would increase the insurance line to a considerable rate, and they are supposed to insure up to 90% of their value."

It is not clear from plaintiff's proofs whether these patterns had been moved to the old blacksmith shop before June 30, 1928, when the policies in suit became effective. The witness Wood testified that these patterns were stored there three or four months before the fire (S. C., p. 74, l. 40, to p. 75, l. 6). Since the fire occurred October 3, 1928, it is evident that the proofs on this point were left in a state of uncertainty by plaintiff, despite the fact that the burden was on it to establish that the loss was to property covered by the policies.

Matthews v. Bloomfield, 246 Mass. 510,
141 N. E. 494 (1923).

Assuming first that the burned patterns were at the inception of the policies in the pattern shop and pattern storage building, and assuming, as plaintiff contended, that they were removed to make room for new patterns, the result was that the new patterns were insured under the policies from the time they were built in the pattern shop or were brought into the pattern building. Accordingly, their value entered into the total sound value of all the property covered by the policies, for 90% of which the insured was either obliged to carry insurance or serve as co-insurer. If the fire had affected the insured portion of the plant and not the old blacksmith shop, would defendants have been able to include the patterns in the blacksmith shop in ascertaining total sound value for the purpose of applying the 90% contribution clause? These patterns were valued by plaintiff at \$12,000 and miscellaneous items in the burned

buildings at \$2,500 (Ex. P-6a, p. 187). The total was just under 10% of the aggregate insurance.

In *Firemen's Ins. Co. v. Temple Laundry Co.*, 195 Ind. 194; 144 N. E. 838, it was held that where buildings and contents are insured not by items but under a blanket policy, providing that the insurer shall not be liable for more than 90 per cent. of the actual cash value of the insured property, the amount of loss is determined not according to the cash value of each item, but by regarding the buildings and contents as one item.

In the assumed case of a fire in the plant proper, there is no doubt that defendants could not have included the value of the property in the blacksmith shop in determining the proportion which the total insurance bore to 90% of the value of all the insured property at the time of the loss. Plaintiff would then have argued, quite properly, that neither the blacksmith shop nor its contents were covered by the policies, and that it was not a co-insurer for the excess value.

Assuming the new patterns had forced the older patterns into the blacksmith shop for storage prior to the inception of the policies, plaintiff would in the same circumstances have been justified even more clearly in arguing that the blacksmith shop and its contents were not covered and had no place in the application of the contribution clause.

This explains also the third paragraph of the coverage rider, excluding liability on the fireproof storage vault and patterns contained therein (S. C., p. 123, ll. 29-32). The assured required no protection on a fireproof vault and its contents contained in the pattern shop and pattern storage building, and obviously desired the value of the vault and its contents excluded from the operation of the 90% contribution clause. Plaintiff urges (Brief, p. 7) the applicability to this exclusion of the maxim "*exclusio unius est expressio alterius*".

This maxim can hardly overcome the warranty as to the location of the insured property. Moreover, the maxim "*Abundans cautela non nocet*" seems more pertinent.

Plaintiff's argument (Brief, pp. 9-10) that the permission to keep and use ordinarily prohibited articles and materials contained in the eleventh paragraph of the coverage form has the effect of covering patterns wherever located is far-fetched. It indicates the extremes resorted to by plaintiff to sustain its construction of the policies. The standard policy contains a printed condition against keeping or using on the insured premises certain hazardous articles, including benzine, gasoline and naphtha (S. C., p. 132, ll. 29-37). The eleventh paragraph of the coverage rider expressly avoids forfeiture by the use of such articles and materials on the premises in such quantities as are usual and incidental to assured's business (S. C., p. 124, l. 37 to p. 125, l. 4). The note to this clause defines "materials" as including gasoline "and such other materials as are prohibited by the printed conditions of this policy" (S. C., p. 125, ll. 5-7). Surely permission to use such materials cannot be tortured into a coverage on patterns, which do not fall in the prohibited class. Furthermore, a privilege is not tantamount to coverage. For example, if the same clause were in a policy insuring a building, it could not be argued that the gasoline, naphtha, etc., were also covered. The insurer could not claim forfeiture, but neither could it be required to pay for the loss of these materials. So that cases like *McClure v. Mutual Fire Ins. Co.* (Plaintiff's Brief, p. 10) have no relevancy.

Cases are not lacking in which such privilege clauses have been construed and held subsidiary to the warranty of location and use of the insured

property. In *Leavitt vs. National Fire Ins. Co.*, 151 N. Y. S. 71 (1914) a policy covered as follows:

“Stock of varnish, gums and other merchandise, including boxes, cans, kegs, and labels, samples, packages, empty or full, the property of the assured or held in trust, or on commission, or on joint account with others, or on storage, or for which the assured may be liable, or sold, but not delivered or removed, tools, implements, utensils, appurtenances, furniture, and fixtures, all contained in or attached to the buildings, additions, and extensions situate Nos. 434/40 Driggs Avenue and No. 214 North Twelfth Street, borough of Brooklyn, City of New York. *Privileged to do such work and to use such materials as are usual in the business of a varnish warehouse.*”

The Court held that the word “warehouse”, as so used, meant a building where goods and merchandise were stored, and did not include adjacent buildings used for manufacturing varnish, so that no recovery could be had under the policy for loss sustained by fire in the adjacent buildings.

The decision of this Court in *Excello Clothing Co. v. Marquette National Fire Ins. Co.*, 99 N. J. L. 154, is cited as supporting plaintiff's contentions. There paper patterns were held covered by a policy insuring the store of a manufacturing clothier, including besides furniture and fixtures “all tools, utensils, articles, implements and appurtenances used in the business not herein specifically mentioned”. The coverage rider (as set forth in the opinion of the Supreme Court, 98 N. J. L. 327, 329) continued as follows: “all contained in and on the brick building, extensions and additions thereto adjoining and communicating and in vaults, * * * situate No. 128-130 Third Street, Passaic, N. J.” If the paper patterns had at the time of the fire been located in a separate

building on the same or any other street, the situation in the two cases would have been parallel. This Court would then probably have followed the principle it applied long before the standard policy came into use, *i. e.*, that words of description defining the character of the risk assumed constitute a warranty.

Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 572 (E. & A., 1876).

In *Sampson v. Security Ins. Co.*, 133 Mass. 49 (1882), a policy covered generally on type and other printing materials, paper and publications "contained in the chambers of Rand Avery & Company in stone brick and iron building No. 117 Franklin Street, Boston". The chambers extended over the fifth floors of four independently owned, but adjoining buildings, one of which had an entrance at 93 Federal Street. It was connected with the adjoining chambers of the assured through an opening in the partition wall on the fifth floor. The Court held that the property damaged in this building was not covered by the policy.

The language in the second paragraph of the rider referring to lines 10 and 11 of the policy is immediately followed by the words "the property of the assured or sold *but not removed* (S. C., p. 123, ll. 23-24); and in the eighth paragraph granting permission to make repairs and extending the insurance to cover additions to the insured buildings we find the language "and so far as it applies on contents (this policy) shall extend to cover in such additions" (S. C., p. 124, ll. 16-25). The Pennsylvania Supreme Court attached great significance to these clauses in *Levinton v. Ohio Farmer's Insurance Co.*, 267 Pa. 448, 110 Atl. 295 (1920). There the policy covered "broom corn,

their own or held in trust or on consignment or sold but not removed, contained in Frame Warehouse Building detached about one hundred feet from the Factory Building". The warehouse building was torn down. A smaller one was constructed on the same site, and a second one also about one hundred feet from the factory building. Broom corn in the second warehouse was destroyed. The Court said (p. 296):

"If it was not the continuing presence of the broom corn in the building mentioned, why the necessity of adding the words 'but not removed' after 'broom corn * * * held in trust or on consignment or sold', and why was authority given to make additions, alterations, and repairs to the building and this policy to cover the same (broom corn), if the insurer did not intend to limit its liability to broom corn contained in the frame warehouse building detached about 100 feet from the factory building? The language was not merely descriptive of the subject-matter, but the words used, with other facts quoted, make it a direct provision, not only as to location at the time of insurance, but also that the thing insured would continue to remain there."

This language is equally applicable to the description in this case of "the following described property while located and contained as described herein * * * but not elsewhere, namely: * * * on patterns in main foundry and pattern shop and pattern storage building".

The following are a few additional citations supporting the principle that one suing on a policy covering property "while located and contained as described herein and not elsewhere" must allege and prove that the loss occurred in the designated building:

Firemen's Fund Ins. Co. v. Box, 252 Pac.
433 (Okl., 1926);

Lycoming County Ins. Co. v. Updegraff,
40 Pa. 311 (Sup. Ct., 1861);
English v. Franklin Fire Ins. Co., 55
Mich. 273 (1884).

A situation parallel in many respects was involved in *London Assurance Corporation v. Thompson*, 170 N. Y. 94. The insured submitted to the insurer a form covering rosin in barrels while awaiting shipment "in or on" certain warehouses or sheds. Fire destroyed rosin stored in yards around the warehouses. The Court held the insurer was not liable because the description of the location of the rosin amounted to a warranty and also because whatever ambiguity existed from the use of the word "on" must be resolved against the insured, who had furnished the description.

It is respectfully urged, therefore, that under the true construction of the policies in suit patterns were not covered generally, and that the Trial Court properly non-suited plaintiff.

REPLY TO POINT II.

The patterns stored in the uninsured building cannot be deemed covered by any presumption that this was an ordinary use, since the surrounding circumstances and the policies themselves preclude such presumption.

Plaintiff's contention under Point II is, in effect, that defendants should be presumed to have known that plaintiff, because of lack of space in the pattern building, might store patterns in one of the uninsured buildings. The conclusion that such patterns would, therefore, be covered is a *non sequitur*. Plaintiff concedes for the purpose of

this argument that the policies did not insure patterns generally, irrespective of location. The effort is to bring otherwise uninsured property within the protection of the policies by overriding express language with unsupportable presumptions.

Analysis of plaintiff's argument discloses that it carefully avoids any commitment as to the point of time when the patterns in question came under the protection of the policies. Were these patterns in the pattern building, or in the old blacksmith shop, on June 30, 1928, when the policies became effective? The proof that they were moved to the blacksmith shop three or four months before the fire leaves this question unanswered (S. C., p. 81, ll. 16-28). Yet it seems vital to plaintiff's contention to show they were in the pattern building at the inception of the policies. That would provide some slight justification for the argument that their subsequent removal for storage after once being covered did not terminate the insurance. This defect in proof is entirely chargeable to plaintiff since counsel for defendants on cross-examination of Wood, the pattern shop foreman, endeavored to obtain more exact information on this question.

In *Matthews v. Bloomfield*, 246 Mass. 510, 141 N. E. 494 (1923), the Court said:

"The plaintiff must show that the accident was covered by the policy before she can prevail. We can only construe and apply the terms of the policy. It cannot be stretched to include an accident not within the fair meaning of the words of the insurance contract."

If the old patterns, which had been used by plaintiff since at least 1913 (S. C., p. 71, ll. 10-12), were stored in the old blacksmith shop at the inception of the policies, plaintiff's position must

be, not that the insurance followed the property on removal, but that it attached to cover the old patterns in the blacksmith shop as well as the new patterns in the pattern building, simply because occasionally some of the old patterns might be recalled for use in the foundry (S. C., p. 83, ll. 13-24). This is an extraordinary result.

Our arguments in the Reply to Point I concerning the significance of the average rate applied in the writing of the policies and of the 90% co-insurance clause are equally applicable here to negative the construction urged by plaintiff. The hazard of fire in the old blacksmith shop was not considered in fixing the average rate, and the assured evidently did not desire insurance on this building and its contents. The failure to include them in the coverage form submitted by plaintiff's broker should in itself be dispositive, but we are able in this case to ascertain the reasons for the omission, *i. e.* (1) the effect on the average rate of including an old, unlocked, frame building and contents, so close to a railroad right of way, and (2) the necessity of a larger amount of insurance under the 90% contribution clause if this property were covered and the assured desired to avoid being a co-insurer.

Whether defendants would have been liable for any of the old patterns brought back to the pattern building or the main foundry for use and there destroyed by fire is not involved in this case. It is to be noted that in *McKeesport Machinery Co. v. Ben Franklin Insurance Co.*, 34 Atl. 16, upon which plaintiff largely relies, the patterns had been taken from the pattern shop (one of the insured buildings) into the foundry and machine shop (which were also insured together with their contents) where they were destroyed by fire. The decision could have been rested on the ground that

the patterns at the time of the fire were among the contents of the insured buildings within the meaning of the policy. Moreover, the patterns were not removed from the insured premises but were at all times subjected to ordinary use within the confines of the hazard assumed by the insurer. It is clearly inferable from the *ratio decidendi* in the *McKeesport* case that the Court would not have allowed recovery had the patterns been stored and destroyed in an uninsured building.

The other cases cited by plaintiff under Point II either involved the construction of ambiguous language in the coverage portion of the policies (as in *Graybill v. Pennsylvania Township Mutual Fire Insurance Co.*, 32 Atl. 632 (Pa.)) or language as to location commonly used prior to the adoption of the Standard Policy and held to be merely descriptive of the risk, and not a warranty against removal of the property (as in *Western Atlantic Pipe Line v. Home Insurance Co.*, 145 Pa. St. 246, 22 Atl. 665; *Reck v. Hatboro Mutual Insurance Co.*, 30 Atl. 205; and *Haws v. Fire Insurance Co.*, 114 Pa. 431, 7 Atl. 159).

These cases lose all pertinency because the policies which they involved did not contain any provision regarding removal of the insured property. The policies in suit, on the other hand, expressly provide in the warranty clause of the description for one contingency when the insurance continues despite removal (S. C., p. 122, ll. 29-37):

“against all Direct Loss and Damage by Fire, and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding Seventy Five Hundred Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere.”

Assuming, as plaintiff apparently does, that the patterns were in the pattern building when the policies became effective, this language clearly means that loss by fire at other locations than those named in the policies is not insured against, unless the removal was necessary to preserve the property from fire. Thus even if the patterns were transferred from the pattern building to the old blacksmith shop after the inception of the policies, the insurance was suspended by such removal, irrespective of whether it was for a purpose necessary or incidental to their ordinary use and enjoyment, as argued by plaintiff. Express language must control over the novel "presumption" that defendants as insurers must be charged with knowledge of the storage of the patterns by the assured in the old blacksmith shop to suit its own convenience. It might just as well be argued that a retail haberdasher, or a jobber or a manufacturer of goods may with impunity store a portion of his stock in premises not covered by his fire insurance policies, because the insurers will be chargeable with knowledge that as stores, lofts or plants become crowded additional space must be found for the merchandise.

The Standard Policy guards against just such contingencies, and the provision suspending the insurance on removal except when necessary to preserve the property from fire is as applicable to a foundry as to any other type of business. Referring to the storage of the patterns in the blacksmith shop as "temporary" cannot aid plaintiff when property removed for preservation from fire is protected for only five days.

The great weight of authority is against plaintiff's contention under this point even in the absence of an express provision against removal.

In *Rosenthal v. Insurance Company of North America*, 158 Wis. 550, 149 N. W. 155, L. R. A.

1915 B 361 (1914), it was held that under a standard policy, covering horses while in a designated building, and not elsewhere, there was no liability for the horses destroyed in another building to which they had been removed while the building named in the policy was undergoing repairs. The same Court in an earlier case, *Noyes v. Northwestern National Insurance Co.*, 64 Wis. 415, 54 Am. Rep. 631, 25 N. W. 419, had held that a policy on a sealskin coat "contained in" the dwelling occupied by the assured covered against loss while the coat was in a store for repairs, on the ground that the property insured was "of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such use may be presumed to have been in the contemplation of the parties when they made the contract of insurance". The assured having urged that the *Noyes* case was conclusive, the Court said:

"The instant case, however, presents a different question. When the contract of insurance is so varied that the words describing the location of the insured chattels are prefaced by the word 'while', and followed by the words, 'and not elsewhere', so as to read 'while located and contained as described herein and not elsewhere', does the rule of *Noyes v. Northwestern Nat. Ins. Co.*, *supra*, obtain? We think not. * * *"

"Upon this question of construction the implication that the property is covered, although not in the designated place, but elsewhere, arising from the known nature and uses of the property, is negated by the express words of the policy in the instant case. The law permits a contract of insurance against loss by fire to be limited to loss in a specified building if the parties so agree; also to be unlimited as to place of loss, if the parties so agree; also to be worded as in *Noyes v. Northwestern Nat. Ins. Co.*, *supra*. Neither

is illegal, harsh, or unusual. It is in all such cases a question of the intention of the parties, and the first and most decisive test of the intention of the parties to a written contract is the language employed. If the words 'while contained in the frame brick-front barn situate at the rear of 425 Fifth street and not elsewhere' are not sufficient, what form of expression would be? The statute form of policy employing these words was adopted after the decision in the Noyes case, *supra*, and it seems to reject the words there considered, and select a new, more exclusive, and emphatic form of expression, for the purpose of enabling the parties to get away from the rule of the Noyes case if they wish to do so. To hold that they cannot do so by the form of expression used here, but may do so by some form of expression differing in words, but identical in meaning, would seem to be a sort of decree of outlawry against these useful and expressive words."

In *Hews v. Atlas Insurance Co.*, 126 Mass. 389 (Sup. Jud. Ct., 1879), a policy insured plaintiff as follows:

"\$500 on brick pottery building and ells, three stories with basement and flat roof; \$500 on machinery, shafting, belting, machines, tools and all implements used by him in his business; \$950 on stock in trade consisting principally of earthenware and on materials for manufacturing the same; \$50 on office furniture, including safe, contained in said building, situate on D Street, near the Fitchburg Railroad in North Cambridge, Mass."

Plaintiff was a manufacturer of earthenware. His factory consisted of two three-story brick buildings connected by a corridor. One was the pottery with three ells attached, one of which was the office. The other was the store-house. In the course of manufacture almost all stock went to

and fro between the buildings. Fire destroyed the store-house and machinery and stock contained therein and slightly injured the pottery building. Held, that the words of the policy "contained in said building, situate on D Street", applied to the machinery and stock, as well as to the furniture; and that nothing was covered by the policy but the "pottery building" and its contents.

In *Eddy St. Iron Foundry-Hampden Stock & Mutual Fire Insurance Co.*, 1 Clifford 300 (U. S. Circuit Ct., First District, 1859), plaintiff's application for a policy, which was in writing, stated the patterns, cupola, and furnace to be insured were in a building in the rear of #82 Eddy St., used by the applicants as a furnace house. By the terms of the policy the application was made a part of that instrument. When destroyed by fire, the property was not in the furnace house but in a storehouse, which could not properly be described as standing in the rear of #82 Eddy St. but in the rear of 82 and 84 Eddy St.

The Court said:

"Place and situation, as given in the application constituted an essential element in the description of the property insured, and as that description is a part of the contract, it was necessarily material for it was the property so described, and no other that was included in the risk. No one, * * * will contend that all the property of that class owned by the plaintiff, without regard to place or situation was included in the policy. Such a construction of the contract would be both unjust and unreasonable, * * *.

"If it be admitted that the terms are not broad enough to include all such property of the plaintiff, then there is no other sensible construction which can be adopted consistently with the language employed, except the one which restricts its meaning to the property contained in the furnace building as described in the application."

So in *Leventhal v. Home Insurance Co. of New York*, 66 N. Y. S. 502 (1900), it was held that where a fire policy covering household linen and wearing apparel stipulates that it covers the property while in a certain building, a recovery cannot be had for loss to such property while hanging on a clothesline between the building mentioned in the policy and another building in which the fire originated. Here again express words excluded any implication of liability from the commonly known nature and use of the property.

In *L'Anse v. Fire Association of Philadelphia*, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838 (1899), the Court held that a policy of insurance on a steam fire engine, hose pipe, and hose car, while located and contained in the fire engine house, "and not elsewhere," does not cover such property while being used in attempting to extinguish a fire several hundred feet from that building. The Court said:

"Here the words are plain and unambiguous, and are not susceptible of construction other than that which the words themselves import. 'While located and contained as described herein, and not elsewhere,' means that the policy covered the property only while in that particular building, and did not cover it while it was anywhere else."

To the same effect with reference to a passenger car and engine burned while on a trip, where the policy described them as contained in a certain car and engine house, see *Annapolis & Elkridge R. R. Co. v. Baltimore Fire Insurance Co.*, 32 Md. 37, 3 Am. Rep. 112.

To the same effect are:

Levinton v. Ohio Farmer's Insurance Co.,
110 Atl. 295 (Pa. Sup. Ct., 1920);
Palatine Insurance Co. v. Kehoe, 197
Mass. 354, 83 N. E. 866, 15 L. R. A.
(N. S.) 1007 (1908);

Benton v. Farmer's Mutual Insurance Co., 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237 (1894);
Phoenix Insurance Co. v. Stewart, 53 Ill. App. 273 (1893).

It is respectfully urged, therefore, that under the express language of the policies in suit the loss to the patterns in an uninsured building in which they had been stored cannot be charged to defendants on any theory of contemplated incidental use, and that the judgment of non-suit should be affirmed.

REPLY TO POINT III.

Defendants are not estopped from defending on the ground that the policies did not cover the damaged property.

The record discloses no reference by plaintiff in its pleadings to waiver of the defense that the policies did not cover the damaged property, or to estoppel to set up such defense. Paragraph 4 of the answer (S. C., p. 4, ll. 37-40) specifically "denies that any building, fixtures, patterns or dyes insured under the policy aforementioned were damaged or destroyed as alleged in paragraph 4 of the complaint". The Second Separate Defense sets forth that the property damaged was not insured by defendants' policies (S. C., p. 6, ll. 10-13). The Reply merely "denies the Second Separate Defense" (S. C., p. 7, l. 35).

At the trial defendants moved for a non-suit on plaintiff's opening which admitted that proofs of loss were not filed within sixty days as required by the policies in suit, as set forth in the Third Separate Defense (S. C., p. 6, ll. 17-40). The Trial Court permitted an amendment "to the effect that

you failed to file proofs of loss within sixty days, but that that provision of the policy has been waived" (S. C., p. 19, ll. 31-34). No other amendment was requested or granted. Accordingly, Point III of plaintiff's brief improperly raises for the first time on appeal the issue of waiver and estoppel to deny that the damaged property was covered.

In the event, however, that the Court decides to consider this issue, we shall deal with it on the merits.

Plaintiff concedes (Brief, p. 23) that even an "offer to compromise is not evidential of the liability of the person making the offer". Nevertheless it is argued that defendants' adjusters by discussing the loss with plaintiff's broker have created an estoppel against, or waiver by, defendants, which prevents them from setting up that the patterns were not covered. So that here the discussions between agents of limited authority are attempted to be used, not as evidence of liability, but as definitely fixing liability although none exists under the policies. If the much abused doctrine of estoppel can be applied in such situations to create an otherwise non-existent liability, it would be unsafe to discuss any threatened suit, irrespective of how baseless it might be.

This Court has clearly distinguished between the power of agents or adjusters to waive conditions precedent to the existence of liability and waiver of conditions subsequent to the occurrence of a loss. As to the former, it has held that an assured is bound by policy limitations on the power of agents to waive provisions except by properly executed endorsements in writing attached to the policy. In *Shyowitz v. Union Indemnity Co.*, 104 N. J. L. 339 (E. & A. 1927) an agent's endorsement of transfer of title was held ineffective because the policy required the written

consent of the company through its president or secretary.

So in *Robbins v. Farmer's Mutual Fire Insurance Co.*, 4 N. J. Misc. Rep. 533, the Supreme Court said (p. 535):

"We cannot concur in the view of the court that the promised extension of time by the secretary and the local agent, if proved, was a waiver of the forfeiture clause. While it is settled that conditions in the policy which are to be performed after a loss has occurred may be waived by an officer or agent of the company, it is equally well settled, we think, *that no such power exists with relation to the conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running.* *Carson v. Jersey City Insurance Co.*, 43 N. J. L. 300; *Dimick v. Metropolitan Insurance Co.*, 69 *Id.* 398."

In this case all of the policies contain the following provision (S. C., p. 134, ll. 9-23):

"No one 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 added thereto; nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto; nor shall any provision or condition of this policy, or any forfeiture, be held to be waived by any requirement, act, or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto."

This provision, under the Shyowitz case, disposes of any argument that adjusters could waive the warranty as to location and description of the

insured property—one of the essential terms of any insurance contract. May the assured then invoke estoppel? Distinguishing estoppel from waiver this Court said in *Freeman v. Conover*, 95 N. J. L. 89, at page 93:

“The doctrine of estoppel *in pais* rests upon the ground of fraud; in other words, upon the principle that where anyone has done an act, or made a statement, which it would be a fraud on his part to controvert or impair, because the other party has acted upon it in the belief that what was done or said was true, conscience and honest dealing require that he be not permitted to repudiate his act or gainsay his statement.”

What acts or statements, of a character chargeable to defendants, can be shown in this case as the basis of estoppel? Under date of October 16, 1928, Monroe, adjuster for several of the defendants requested plaintiff's broker to send him a copy of the form (S. C. p. 145, ll. 30-31). Arrangements were made to have the adjusters inspect the scene of the loss at Landsdale, Pennsylvania on October 22, 1928 (S. C. p. 148). Monroe wrote plaintiff's broker on October 24th that this inspection disclosed that the building in which the fire occurred was not covered under the form submitted (S. C. p. 150). Plaintiff's broker then sought a meeting with the company adjusters (S. C. p. 152, 157, 158) which was held November 30th at the Philadelphia office of the General Adjustment Bureau. At this conference the adjusters still “contended that this property was not covered”, but agreed that if plaintiff would submit a revised schedule of claim the entire question would be submitted to the companies for determination (S. C. p. 36, ll. 13-27). Under date of January 12, 1929 the adjusters advised plaintiff's broker that at a meeting of the interested

companies held the previous day a resolution was adopted that no liability existed and that no claim would be entertained (Ex. P-45, p. 164).

Plaintiff could immediately have instituted suit, but instead endeavored through its broker to obtain a reconsideration (Exs. P-46 to P-52, pp. 165-171). It is not fair, therefore, to say as plaintiff does (Brief, p. 23) that after denying liability the companies continued to suggest compromise. On January 15, 1929, Monroe wrote Ballard (S. C., p. 167, ll. 23-28):

“We, therefore, regret that it is not within our province to again take up the matter with the Companies, as we have already done so on the lines indicated in your letter of the 2nd instant, above referred to, and the result has been communicated to you.”

It is also urged that the letters written by Monroe under date of April 10, 1929 (Ex. P-54, pp. 172-178), rejecting the proofs of loss constitute an election to stand only on the defense of failure to file proofs within time. This is not the proper construction of our decisions. The denial of liability had already been communicated to plaintiff in the clearest terms. There is no rule of law that such denial must be reiterated every time the assured thereafter sees fit to communicate with the company adjusters. In the face of the previous denial of liability, rejection of the proofs as out of time was not an act which, to use the language of this Court in *Lehrhoff v. Continental Casualty Insurance Co.*, 101 N. J. L. 375, 378, “lulled the assured into inaction or cause him to omit doing anything which he might have done if the company had acted otherwise than it did.”

Efforts to create by waiver or estoppel, based on adjuster's acts, an otherwise non-existent liability, have been disposed of with little difficulty

in several cases. In *Weed v. London & Lancashire Fire Insurance Co.*, 116 N. Y. 106, 22 N. E. 229, the company employed an adjuster who requested the assured to furnish information, including documents as to title and proofs of loss. From these papers the adjuster learned of a violation of the sole and unconditional ownership clause. He nevertheless had further negotiations with the assured. The referee found a waiver of the defense as to ownership because the adjuster negotiated with the plaintiff and requested proofs of loss after he had the facts relating to the title. The Court of Appeals said (p. 116):

"It is well to bear in mind, in discussing the waiver which the referee found grew out of the facts set forth in the findings I have quoted, that the condition of the policy with reference to the statement therein of the title or interest of the assured was one precedent to the attaching of the risk. It lay at the threshold of the contract, and if not then performed or then obviated there was no enforceable agreement. The delivery of the policy and the breach of the conditions were concurrent acts, and if the assured had not the sole and unconditional ownership of the property at the moment the policy was delivered the condition was broken and the insurance was void. To say, therefore, that the condition was waived after a loss had occurred is to hold substantially that a new contract had been made. Rice was not an officer or general agent of the company. He was a resident of Albany engaged in an independent business as an insurance adjuster, giving his services to any person who wished to employ him * * *."

"We are also of the opinion that, assuming Rice to have been an agent with general powers, the evidence did not justify the finding of the referee that there was a waiver of any defense based upon the failure to state in the policy the title or interest of the as-

sured in the property. To establish a waiver of a forfeiture the proof must show a distinct recognition of the validity of the policy, after a knowledge of the forfeiture, by the person by whom it is claimed the forfeiture was waived."

Rosenthal v. Insurance Co. of North America, 158 Wis. 550, 149 N. W. 155, has been cited for its holding as to the warranty of location under the standard policy. It also contains the following helpful analysis of the point under discussion:

"We cannot think there is alleged anything which would make the policy enforceable by waiver on the part of the insurer. The objection here does not go to the validity of the policy, which might be overcome by the larger evident intention that indemnity was intended, nor to a forfeiture or loss of a right or claim thereunder, but concerns only the scope of the insurance; that is to say, the interpretation of the written contract actually entered into. In cases of ambiguity, this might be affected by extrinsic circumstances; but there is here no ambiguity. The property might be insured generally, or only while it was contained in a specified building, and not elsewhere, and the language employed shows that the parties selected the latter kind of insurance. Section 1941-62 provides how waiver shall be made, viz.: Not at all, as to some stipulations of the policy; by writing only, added to the policy, as to others. There might be waiver of a forfeiture, or of a breach of contract; but waiver as a ground for extending the scope of a written contract beyond the usual and ordinary meaning of the language employed would be quite a novelty."

REPLY TO POINT IV.

The Trial Court properly ruled out the questions as to custom addressed to the witness Rohlfs.

This Court defined the conditions precedent to introduction of evidence of custom in *Cramer v. National Surety Co.*, 103 N. J. L. 83, 134 Atl. 771, as follows:

1. The sense of the words and expressions used in the policy must either be ambiguous or obscure on the face of the instrument or made so by proof of extrinsic circumstances. Our arguments under Points I and II deal with the policy provisions. The conclusion there urged is that the language of the warranty clause is clear and that none of the subsequent paragraphs of the coverage rider raise any ambiguity as to the property insured. Testimony as to custom was not, therefore, admissible.

2. No preliminary questions were asked of the witness Rohlfs to qualify him as an expert able to give competent testimony under the following additional requirement of the *Cramer* case (p. 85):

“But the usage, in order to be binding, must be either a general usage of the whole mercantile world, or a particular usage of universal notoriety in the trade upon which, and of the place at which, the insurance is effected; the usage of a particular place, or of a particular class of person, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it or the usage is shown to have existed under such circumstances, or for such a length of time, as to have become generally well known to all persons concerned in or about the branch of trade to which it relates, and so as to warrant a presumption that contracts are made with reference to it.”

The witness testified he was manager for A. Lamy & Son, Elizabeth, who are in the pattern making and foundry business, and that he had been engaged in this kind of work for 18 years (S. C., p. 90, ll. 7-13). He was not asked whether he was familiar with the general customs and usages of the trade upon which, and of the place at which, the policies in suit were effected by the non-resident defendants. Plaintiff's counsel immediately launched into the overruled questions without showing the witness' familiarity with usages of universal notoriety in the locality of assured's plant. The first question was:

"What is the custom in the business of manufacturing manholes with regard to the transferability of patterns where a foundry is not all housed in one building?"

This question was immaterial under the Trial Court's construction of the policies since it did not serve to clarify any ambiguity. Moreover the question was improper because it used the ambiguous phrase "transferability of patterns" when the evidence showed the patterns in question were placed in the old blacksmith shop for storage. The issue was not as in the *McKeesport* case whether patterns taken from the pattern shop to the foundry for actual use were covered while in the foundry. Moreover this question was objectionable because the clause "where a foundry is not all housed in one building" did not convey the facts already established, *i. e.* that the old blacksmith shop was a frame building about fifty feet from the plant proper.

The second question was:

"What is the custom in the trade regarding constant retention of patterns in a single building

of several buildings in a pattern manufacturing establishment?"

All of the objections urged against the first question are equally applicable to this second question. It emphasizes "constant retention of patterns" when the important issue was whether patterns stored in an uninsured building not a part of the main plant and some of which were occasionally recalled to the plant for use, were insured by the policies.

The third question was:

"What is the custom regarding incidental changing from building to building as the occasion requires with regard to manhole patterns where the foundry consists of two or more buildings?"

The objections urged to the previous two questions are also applicable to this question. It certainly misstated the established facts in referring to the storage of the patterns in the blacksmith shop as "incidental changing from building to building as the occasion requires".

It is respectfully submitted, therefore, that defendants' objections to these questions were properly sustained by the Trial Court because:

1. The policies did not contain ambiguous language warranting the introduction of evidence of customs and usages.
2. The witness Rohlffs was not properly qualified to testify to any usage or custom which would be binding on defendants.
3. The questions were improper in the light of the evidence in the case and had no relevancy to the issues.

Conclusion.

For the reasons argued herein it is respectfully urged that the judgments of non-suit in the fifteen cases consolidated on this appeal (S. C., pp. 8-13) should be affirmed with costs.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney for and of Counsel with
Defendants-Respondents.

HORACE M. SCHELL
(of the Pennsylvania Bar),

DAVID STOFFER,
Of Counsel.

79 FEB.T.1932

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

CENTRAL RADIATOR COMPANY, a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i> NIAGARA FIRE INSURANCE COM- PANY, <i>et als.,</i> <i>Defendants-Respondents.</i>	}	<i>Action at Law. On Appeal from New Jersey Supreme Court.</i>
--	---	---

PLAINTIFF-APPELLANT'S REPLY BRIEF.

1. Counsel for defendants-appellees in their brief seem, by indirection, to want to qualify or dissipate the effect of the stipulation, entered into between counsel for the respective parties, that it will not be necessary to call experts to testify on questions of Pennsylvania law. The stipulation or agreement was founded on the unexpressed belief that both counsel were equally aware of the provisions of Section 26 of the Evidence Act (Compiled Statutes p. 2229).

“Judicial Reports: The reports of the judicial decisions of other states and countries may be *judicially noticed* by the courts of the state as evidence of the common law of such states or countries and the judicial construction of the statutes, or laws thereof, and the usual printed books of such reports shall be plenary evidence of such decisions (P. L. 1900 p. 370).”

This statutory provision came up for construction in several New Jersey cases, whose reports clearly evidence the intent of our courts to construe it liberally, to effectuate its purpose. Thus

in *O'Keefe v. O'Keefe*, 96 N. J. E. 617, at pp. 619-620, this Court, per Parker, J., said:

"It is argued, under this point, that the bill fails to show that complainant is entitled to an accounting of the rents of the New York property, and this for the reason that it fails to aver any statute of New York on which such right is founded; and unless such statute be pleaded and proved, the common law is presumed to be in force. *One answer to this is that the right under New York law is asserted, at least, inferentially, in paragraph 4 of the bill.* No specific reference to a 'statute' is needed if the pleading states the law of the other state to be thus and so. Moreover, by section 26 of the Evidence act (Comp. Stat. p. 2229), the court may take judicial notice of the reports of decisions in other states, as evidence of their common law and judicial construction of statutes. Applying this statute, we observe by the decision in *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. Rep. 337, that the law as to entreties in that state is substantially identical with our own; in fact, that our decision in *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, was adopted by the highest court of New York as an exponent of the rights of parties under their law and statutes."

In *Orient Ins. Co. v. Rudolph*, 69 N. J. E. 570, at 572, the Court of Chancery held that:

"These orders recite all the preliminary proceedings requisite for the making of the order, and if they are in themselves sufficient evidence of the facts recited, then no further proof is required. These judicial proceedings in the State of New York must, under the federal constitution and statutes, 'have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.' U. S. Rev. Stat. p. 905. *Under our Evidence Act (P. L. 1900) judicial notice may be taken of the decisions of other states, and independ-*

ent of statute the more reasonable view is that judicial notice of the statutes and decisions of other states upon the effect of their judicial proceedings must be taken in order to make the federal provisions effective."

In *Lower v. Segal*, 59 N. J. L. 66, at pp. 68-69, the Supreme Court, per Garrison, J., said:

"The suit is brought by a personal representative, which is the proper form under our statute; but the action is not under our statute, but under that of Pennsylvania, where the widow and not the personal representative is given the right to sue. Penna. Stat., Pamphl. L. 1851, p. 674, Sec. 19; *Id.* 1855, p. 309, Sec. 1. The construction put upon these statutes by the courts of Pennsylvania is in no state of uncertainty. *Railway Company v. Decker*, 84 Pa. St. 419, 425; *Birch v. Pittsburgh Railroad Co.*, 30 Atl. Rep. 826.

"In these cases it is said, referring to the provision of the act of 1855, 'if the deceased leaves a husband, he alone is clothed with the right of action; if the wife is a survivor, she is entitled to bring suit.'

"*Judicial notice is taken of the law of Pennsylvania as illustrated by these reported cases* under the twenty-third section of our act concerning evidence, which provided that 'the reports of the judicial decisions of other states * * * may be judicially noticed by the courts of this state as evidence of the * * * judicial construction of the statutes and laws thereof.' Gen. Stat., p. 1401."

2. At the opening of their brief, counsel for defendants state, as if it were a matter proved as a fact and beyond question, that "the coverage riders were not prepared by defendants." Reference to the State of Case, however, discloses (p. 23, ll. 11-20), that when Ballard was

asked if the riders were written by him, he answered:

"A That was a form that was attached to the policies when I took over the business and had been the form as I understand, for a number of years prior.

By the Court.

Q Then you did not write it up.

A I did not write it up."

Again on cross examination he was asked (p. 56, ll. 10-15),

"Q Do I understand that the form which you submitted was a copy of a form which had been in use on prior contracts of insurance and which had expired?

A Yes, sir.

Q What, if anything, did you have to do with the preparation of the form?

A I did *not* change the form."

Reference to the endorsement or rider on page 123 of the State of Case will make it clear that it could not have been prepared by the plaintiff. There are therein exceptions and prohibitions which are for the exclusive benefit of the defendants, and therefore, in the nature of things, would not have been inserted by the plaintiff. It is well known that riders are written by the insurance carriers, who are well versed in the language of such writings, rather than by the assured.

3. Counsel for defendants state that, "an effort is made in plaintiff's brief (p. 5) to invoke the well-worn principle of strict construction against the defendants. This is unjustifiable for several reasons."

The first reason, they say, is that the policies in suit were in the standard form; therefore, the printed provision, which they select to quote as

favorable to their position, should receive its "usual" meaning.

In the first place, it is to be noted that the Supreme Court of Pennsylvania in 1920, in the case of *Levinton v. Ohio Farmers Ins. Co.*, 110 Atl. Rep. 295, p. 296, in no ambiguous terms said that this is not the rule. The Court said:

"If doubt exists as to the meaning, it should be resolved in favor of the assured, rather than in the interests of the insurer. *The Standard Policy Act does not modify this principle, as the subject matter of the insurance is expressed in the language of the insurer.*"

To the same effect is *Smith v. National Fire Ins. Co.*, 175 N. C. 314, 95 S. E. 562; and *Insurance Company of N. A. v. O'Bannon* (Tex. Civ. A.), 170 S. W. 1055.

Professor Vance in his work on *Insurance*, p. 430 (1st ed.) quotes the language of the Court from the case of *Gazzam v. Germanian Union Fire Ins. Co.*, 155 N. C. 330, 338; 71 S. E. 434. That Court said:

"It has been contended that in as much as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited practices, the insurer cannot be regarded as selecting the terms of the contract and subjected to an unfavorable ruling construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the construction given by preceding cases to similar terms in other policies, and therefore, ought to be regarded as being used in the sense of their previous construction.

It is also apparent from an examination of the instruments themselves, as well as

the history of their adoption that their terms were really chosen by the underwriters with particular reference to their own interests."

Advertence may also be made to *Davis v. Ins. Co. of N. A.*, 115 Mich. 382, 73 N. W. 393; *Shawnee Mut. F. Ins. Co. v. Grady, County School Board Dist.*, 44 Okl. 3, 143 P. 194.

And the rule is well settled that where the Standard Policy sued on was issued under the statutes of another state (in the case *sub judice* Pennsylvania), the construction of such policy by the courts of that state will be followed. *Continental Ins. Co. v. Perry*, 138 Tenn. 205, 197 S. W. 487.

Counsel further seemingly failed to note that counsel for plaintiff was not, in his brief, concerned with *printed portions*, but with the attached *riders or endorsements*, for the reason that where there is a conflict in an insurance contract between written and typewritten portions, the typewritten will prevail. *Thomas v. Taggart*, 209 N. C. 389; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50; *West Branch Lumbermen's Exch. v. American Central Ins. Co.*, 183 Pa. 366; *Heyn v. N. Y. Life Ins. Co.*, 192 N. Y., 83 N. E. 725.

On page 7 of our brief we do refer to certain lines 10 and 11 of the printed portion of the policy, but we expressly state there that "*the reference in the endorsements*, although it is a statutory form not made by either of the parties to the contract, *itself is the language of the insurer*, and the construction thereof should be strongest against the users."

Indeed, counsel for defendants continually revert to the provisions of the standard form.

They avoid a common battlefield; and in view of the rules adverted to above, there is no doubt as to where the location thereof is to be found.

The Court of Appeals of New York in *Heyn v. N. Y. Life Ins. Co.*, cited *supra*, at p. 726, said:

“Section 20, together with the main portions of the contract, is upon a printed blank furnished by the defendant, and if its provisions are doubtful, uncertain or repugnant to the written portions of the agreement, that which is written should control the interpretation of the endorsement.”

The printed portion that defendant leans on so heavily is that the insurance shall cover on property, “while located and contained as described herein * * * but not elsewhere.”

On page 17 of our brief we refer at length to the case of *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* (Supreme Court of Pa.), 34 Atl. 16, in which *precisely that provision* came up for construction. Defendants cite no Pennsylvania case, either earlier or later, to the contrary, and so the McKeesport Case should be dispositive. What the state of insurance law in New York or elsewhere happens to be is totally irrelevant. An insurance contract is governed as to its nature, validity and interpretation by the law of the place where it is made. *N. Y. Life Ins. Co. v. Dodge*, 246 U. S. 357; *Orient Ins. Co. v. Rudolph*, 69 N. J. Eq. 570; *Hardiman v. Phil. Fire Asso.*, 212 Pa. 383; State of Case, p. 4, ll. 31-35. The McKeesport Case was approved by the same court in 1913 in *McClure v. Mutual Fire Ins. Co.*, 88 Atl. 921, 924.

The rule is well established that if a printed portion excludes certain articles from the risk, or prohibits their being kept, and the typewritten

portion extends the policy to cover property of such character as necessarily to include prohibited articles, the typewritten portion will completely invalidate the exclusion or prohibition found in the printed portion. *Harper v. New York City Ins. Co.*, 22 N. J. L. 441; *McClure v. Mutual Fire Ins. Co.*, 242 Pa. 59, 88 Atl. 921; *Plinsky v. Germania Fire Ins. & M. Ins. Co.*, 32 F. 47.

It is, further, a rule well known that words of exception or prohibition are to be construed most strongly against the party for whose benefit they were intended. *Kansas City First Nat'l Bank v. Hartford Fire Ins. Co.*, 95 N. C. 673; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Montgomery v. So. Mut. Ins. Co.*, 242 Pa. 86, 88 Atl. 994.

4. Counsel for defendants say that it is clearly inferable from the *ratio decidendi* in the McKeesport Case that the Court would not have allowed recovery had the patterns been stored and destroyed in an uninsured building.

A reading of the case, however, will make it clear that the ground of recovery was *not* that the building to which the patterns had been removed, and which housed them at the time of their loss, was itself insured; but that the patterns described as being in the pattern-shop and insured "*while located and contained as described herein and not elsewhere,*" were none the less covered *though at the time of their loss they were in a building other than the pattern-shop*; where the removal was for a purpose necessary or incidental to their ordinary use and enjoyment. Said the Supreme Court of Pennsylvania:

"It was not an insurance upon the goods in store, in terms, and unless it becomes so in the light of the facts appearing in the

evidence, there is no legal reason, that we can see, why the plaintiff should be held to be concluded by the words that could not have been intended to apply to a business in actual progress, *and that ought not to be so construed even if the insurer intended thereby to escape from the obligation assumed by the policy.*"

Counsel for defendants characterize the presumption, that the defendants as insurers must be charged with knowledge of the practices of the business regarding which the policies were issued, as "novel." That is an *argumentum ad hominem* and hardly disposes of the McKeesport Case, cited *supra*; *Grandin v. Ins. Co.*, 107 Pa. 26, 38; *Graybill v. Penn. Tp. Fire Ins. Co.* (Pa. Supreme Court), 32 Atl. 632; *Western Atl. Pipe Line v. Home Ins. Co.*, 145 Pa. St. 246; *Norris v. Ins. Co.*, 3 Yeates 84 (Pa.); *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Sup. 594.

Counsel for defendants contend that the Standard Policy expressly guards against removal from insured buildings. *That is precisely the argument the Pennsylvania Supreme Court answered in the McKeesport Case:*

"It would enable an insurer after receiving the money of the manufacturer for an insurance upon his business appliances, to say to him in effect: 'Close your factory or forfeit the money you have paid us. To secure the benefit of your policy you must leave everything unmoved.' Nothing short of a stipulation of this sort incorporated into the policy, in words capable of no other construction, could induce us to aid in the perpetration of such injustice."

On this point again might be repeated the rule, referred to above, that words of exception or prohibition are to be construed most strongly

against the party for whose benefit they were intended.

Defendants cite *Rosenthal v. Ins. Co. of N. A.*, 158 Wis. 550, for the proposition that under a Standard Policy covering horses while in a designated building and not elsewhere, there is no liability for the horses destroyed in another building to which they had been removed, while the building named in the policy was undergoing repairs.

That case is from a jurisdiction which is not, for the purposes of adjudication of the case *sub judice*, of *terrae dominicales regis*. More in point is the language of the Supreme Court of Pennsylvania, in *Haws v. Fire Asso.*, 7 Atl. 159. It is true, said the Court, that in an insurance upon such personal property as household goods or of stock and merchandise, the words "contained in" a particular building would seem to imply that the property insured should remain in such building, and that, if removed therefrom, the policy would not cover it, as in such cases the contract contemplates that the property shall remain in the building, and there are obvious reasons why a change of location would affect the insurance. The very nature of such property implies permanency in its location. But, said the Court, it is not so with a man's horse:

"It is of no use to him if kept in a stable. We can understand that if, in a fire policy, hay, straw or grain is insured in a barn, the insurance would cease if removed to some other building. Such would be the reasonable meaning to the contract of insurance, and what the parties probably contemplated when they made it. But none of this reasoning applies to a lightning clause upon horses or other stock. *The terms and conditions to which such an insurance is subject*

*must be such as are reasonably applicable to such kind of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made. * * **

A policy of insurance which only covered stock when in the barn would not furnish indemnity and no man of common sense would insure in such a company."

Subsequently, in the McKeesport Case, the same reasoning was applied to the goods and patterns in a foundry. Defendants cite other cases consonant with the Rosenthal Case, but from jurisdictions other than Pennsylvania, and which are, therefore, ineffective to dislodge the doctrine of the McKeesport Case, *Western & Atl. Pipe Line v. Home Ins. Co.*, and the Graybill Case, cited *supra*; that when the property is of such a kind that its ordinary use requires it to be moved from place to place, whatever the reason therefor may be, as for repairs, temporary storage or what, the words "contained in" or their equivalent, will be held to refer to the usual place of deposit, and the parties will be presumed to have contemplated that the policy would cover the property while temporarily away from the designated location. *Vide also Everett v. Continental Ins. Co.*, 21 Minn. 76; *Lesh v. Rock Creek Tp. Farmers Mut. Ins. Co.* (Ind. A.), 120 N. E. 391; and *Winson v. Mutual Fire, etc. Asso.*, 170 Io. 521, 153 N. W. 97.

We respectfully urge that for the additional reasons assigned and argued in this reply brief, the verdicts and judgments should be set aside and a new trial granted.

KALISCH & KALISCH,
Attorneys for Plaintiff-Appellant.

ISIDOR KALISCH,
On the Brief.



