In the Court of Errors and Appeals of the State of New Jersey in the last resort in all Causes of Law.

THE MECHANICS FIRE INSURANCE COMPANY *ads.* DAVID NICHOLS and ROBERT NICHOLS,	IN CASE. On Policy of Insurance on Writ of Error to the Supreme Court of N. Jersey.

This action was instituted by summons, returnable to February term, 1836.

The plaintiffs complain, in their declaration, that on the 27th February, A. D. 1833, at Newark, &c., the defendants made a policy of insurance, of that date, and thereby, in consideration of $40 paid by the plaintiffs, insured them, by the name of David Nichols & Son, against loss and damage by fire, to the amount of $4000, &c. (*pro ut* the policy, with renewals thereon); also other insurance in the Mutual Insurance Company for $600, endorsed. And thereupon the plaintiffs, at the instance of defendants, and on payment by plaintiffs of $40, and on promise by them to perform all things required in said policy, the defendants promised to pay the amount of the said policy, &c.; and then and there became insurers, &c.—Renewal of said policy set forth, on payment of the same premium of $40, to the 27th February, 1836.

That on the 9th day of July, 1835, a great quantity of stock in general was contained in said buildings, to the value of $4570.93; and from thence, and at the time of the loss, the plaintiffs were interested in said stock in general, as shoe manufacturers, to wit, to the value of the moneys by them insured thereon; and that said stock, of such value, on the said 9th of July, 1835, was burnt, &c., by fire, and during the time it was insured; averring that it did not happen as restricted in the policy, whereby the plaintiffs sustained loss in $4000 on their stock in general, as shoe manufacturers, contained in said buildings; averring that they had no other insurance, with other necessary averments, as to identity of buildings, &c., payment of premium, notice of fire, delivery of particulars of loss, and that they were ready and willing to verify the same, if required, by books of account and other proper vouchers, &c., as required by the several conditions annexed to the policy; that the premiums for continuing said policy were paid and received; and

that plaintiffs had conformed in all things to the conditions, stipulations, &c., according to the form of the policy, by means whereof the defendants became liable to pay to the plaintiffs the money for which the property was insured. The conclusion is added to the damage of the plaintiffs of $10,000.

To this declaration the defendants have pleaded the general issue, with *similiter*.

The plaintiffs gave notice of trial for April circuit for Essex county, 1837.

The cause came on to be tried at the April circuit for Essex county, A. D. 1837, before his honour Chief Justice Hornblower, when the plaintiffs' counsel moved the cause, and the defendants' counsel moved to put off the cause, on the ground that, on the last Tuesday in January, a new president and new board of directors were elected, and a new committee appointed to investigate the evidence relating to the loss, by books of journeymen and dealers of stock and goods purchased, and other sources of information, the former president having been of that committee, which motion was overruled.

The jury being called and sworn, the plaintiffs' attorney opened, and produced a policy of insurance, dated 27th February, 1833, for $4000, in plaintiffs' stock in general, as shoe manufacturers, contained in their frame building on the corner of Washington and William streets (*pro ut* the policy). The policy was shewn to be renewed from year to year, until the 27th February, A. D. 1836.

The fire destroyed the buildings described in the policy on the 9th July, 1835; on the 10th notice of the fire was served on the company by Josiah Collen, the witness.

By O. W. King, esq., plaintiffs showed an account of loss and damage, served on the company on the 29th July thereafter, amounting to $4570.93, with affidavits annexed (*pro ut* the same), and sworn before the nearest justice. (Produced as preliminary evidence).

Defendants objected, that they had no notice to produce the original particulars exhibited. Objection overruled by court.

Jacob Van Houten.—The plaintiffs further shewed, by Jacob Van Houten, that said Van Houten was in the employ of the plaintiffs from 1st January till the time of the fire; was foreman of the manufacturing shop of D. Nichols & Son, and knew David Nichols and Robert Nichols, his son, as the parties and owners, or reputed as such; recollected the fire to have happened on the 9th of July,

in the morning before daylight; the goods were in wooden buildings, of two stories, and in two rooms and a cellar of said buildings; one building was on a corner. The bill of particulars of loss being shewn to witness, he could not tell the exact number of pairs of brogans. Shortly after the fire tried to ascertain the amount of the property burnt, and requested by Mr. Nichols to aid in making out the loss; could not tell the amount of pairs of brogans; saw Mr. Nichols packing up; there were eight trunks matted, but not all filled with brogans; saw him put some other shoes in trunks; counted 50 pair; could not tell how many calf boots there were. The counter had four drawers, and witness counted one which contained 89 pair. Witness packed the drawers; could not tell what quantity of navy boots; had orders for all they could make, which were all on hand. In aiding Mr. Nichols, he had counted them all, and witness was separate from him, and afterwards compared their statements, which were very nearly alike. The uppers Vanburens witness knew correct, they were there at 6 o'clock P. M. the day before the fire. The stock in the small shop was burnt; nothing was got out of this shop after witness got there on fire taking place. The shoes in the small shop were kept in six trunks and drawers; these were on the sides of the room, as well as under the counters. Witness saw all the shoes in the shop, all the time he was there; from what witness knew of the number and value and quantity of the articles and goods destroyed, and from what he saw and did not personally take an account of, witness thinks the estimate to be reasonable. The uppers remaining on hand, were on account of workmen turning out for wages. After making out the statement, there were 21 pair of calf brogans, thought of afterwards, which were not included in the estimate. Witness had control of the shop; cut out, gave out uppers. Two or three days before the fire there were on hand 50 sides of sole leather; a large lot of leather was also in the cellar, which could not be got out, belonging to———

On cross-examination, the witness further testified, that 50 sides of sole leather, in the cellar, and the books of the company were all burnt, and all the bills of purchase. Witness never said there was not so much property burnt up, and did not recollect saying that he thought the loss was not so great as represented. Witness had cut out 250 pair a week, and cut out about that rate the first two or three weeks. There were 26 journeymen, and sometimes 35 journeymen, and for ten days about 16; the work was generally brought in on Saturday evening. No one but the witness cutting out. The fire occurred on Thursday. Saturday the journeymen brought in their work. The fire

was all in the corner building when witness went there; there had been no fire used on the premises, but part of the back end of the building on Washington street was used as a currier's shop. The company were in the habit of purchasing leather of Baldwin and Henderson, of Teese and of Wade, all in Newark. Mr. Lee took many of the shoes; Mr. Hatch can tell the quantity sent to him in New York; no one else can tell, that witness knows of, but Shipman & Robinson, of Newark. Witness was not out after dark the evening previous. Witness locked up shop five minutes past six o'clock.

Henry P. Lee, a witness on the part of the plaintiffs, testified, that he had no interest in the cause; was in the habit of purchasing shoes of the Messrs. Nichols; had given an order for shoes a month before the fire; had ordered 2300 pair of brogans, of different descriptions, to be filled within three months, and of navy boots a few of them; received on the order about 200 pair; was in a hurry to have them shipped; a week or two before the fire Mr. Nichols told him that the wagons disappointed him in taking them down. Witness saw then these trunks; he thought three or four trunks matted up; saw other shoes there.

James Sanders, a witness for defendants, testified that he was, shortly after the fire commenced, present there, and helped men in the cellar throw out sole leather; two piles were destroyed in the cellar, one of about 30, the other about 20 or upwards. Shugard & Macknett had leather in the cellar, which was also destroyed. When witness first went there very little had been taken out; 20 or 30 finished sides of leather were saved; there might have been more, but witness saw no more there.

Ephraim Bolles, on the part of the defendants, testified, that the policy was applied for by Robert Nichols; Robert always applied for renewals. After the fire they were anxious to see Robert at the office. His father called at the office after the claim put in; was requested to take a message to Robert, but finally took a note reluctantly. Robert then came to the office. Charles T. Shipman, Mr. Myer (the secretary), and witness were present there; requested Robert to show his loss, as he had it in his power to do so. Robert promised then to give the company further information. He answered many questions as to those of whom he bought stock. A day or two after the witness saw the old Mr. Nichols, and expected from him some statements; but the old man was abusive; witness and Mr. Nichols both became warm. Neither Robert nor the old man ever gave the further statement which the company required. Ro-

bert promised when he came to the office to give all the evidence required after presentation of the claim at the first interview. Witness was at the shop of plaintiffs previous to the fire; generally saw a man there who was considered the foreman; never saw the old gentleman in the store.

On cross-examination, the said witness stated, that he mentioned to Robert that he could tell where he bought the leather, who it was bought of, how many hands they employed to make it up, and that something like the real loss could be got at. The committee (of which witness was one) told him they required further proof, and told him how committee thought he might do it. He said they had bought no leather in New York, but named some persons here of whom they had bought; that witness had inquired of those people, and got statements; he did not tell how much they had purchased of anybody. Robert promised he would give the insurance company more information, but he never did. The committee pointed out what would be satisfactory; he said he would furnish the information. About 40 sides of sole leather were carried across the street, and piled up on the stoop. When witness got to the fire the south part was on fire; but the windows on William street were never opened; every one wondered at it. There seemed to be nothing to prevent getting into the shoe-shop, and receiving the property, but it was too late when witness got there. Witness did not get there until some considerable time after the alarm. Witness, with committee, directed Robert's attention to the kind of proof required, and how it could be furnished, and referred him as to invoice of every purchase, and manner of keeping accounts with the journeymen whose books were not burnt, and these he promised to furnish. There was no pretence that journeymen's books had been burnt. Robert said that he could procure the invoices and statements from journeymen's books; witness, with committee, supposed he would do so. The insurance company had not before such requirement refused to pay the demand of Robert or the old man; they understood, and supposed it to be true, that all the plaintiffs' books and vouchers were burnt up, but suspected they were not, because they had understood that the books, &c., were, &c. Witness was formerly a stockholder and president of the company, but had no interest at this time.

Richard Terhune, a witness for the defendant, testified, that he had some conversation, the morning after the fire, with Van Houten, who said there were six or eight trunks of shoes in the shops

packed up, and some of them matted, and some not; thinks he said four matted, though he was not sure he said so; did not address conversation to witness, but to those standing around.

Mr. Van Houten further testified, that the trunks were purchased of Morgan and of Halsey; the trunks were all 2 feet 8 inches; 8 matted—4 in the corner shop, and 4 in the back room—16 altogether.

Answer to question by the Court.—The books were kept sometimes in the shop, sometimes in the house; books were in the shop the night of the fire. Robert Nichols was sick, and not at the shop that night. In making out the loss, witness did not have journeymen's books or any other books; he made out the statement from recollection and what work he had done. Witness could not say as to the trunks' contents, did not pack them. Made allowances for uppers which were out with the workmen. Made out his own statement originally, the morning after the fire.

John Young, a witness for defendants, testified, that Van Houten had called three or four days before the fire, and said he was out of leather; said he had been to several places, but had not seen any he liked so well; said he would speak to Mr. Nichols, and send him round, that they were out of sole leather; that Robert Nichols was the active person.

On cross-examination, witness said, it was within a week, at any rate they did not get any; that Van Houten said they were pretty much out of leather, and wanted a lot immediately.

Charles Francis, a witness for defendants, testified, that he was the foreman of plaintiffs, and left six months before the fire; from twenty to thirty-five journeymen were usually employed in making shoes; there was a strike for wages, which continued about five months after he left the plaintiffs; there were fewer hands then. As soon as they could get shoes sized they would send off the trunks.

On cross-examination said, when shoes were made to order they would usually keep them till the order was filled.

In chief-examination, witness further said, it was the usual practice to send off as soon as three or four trunks were packed; has known 13 trunks to be on hand before sending. Whilst witness was there 400 pair of damaged shoes were returned damaged in shipping; they were put in the lockers, and remained there when witness left; they were seal brogan pumps, which when made were worth eleven shillings a pair; they were too low in the instep; were

manufactured, witness thought, eighteen months before he left; never attempted to clean them up or to sell them; if nicely dressed up would probably sell for a dollar a pair.

Mr. Van Houten, called again, said he knew about the returned shoes, and put them down at a dollar a pair; 180 pair of the returned shoes; thought them worth that; same shoes were there when he entered and when fire took place.

Richard Francis, a witness for defendants, testified, that he worked for the Messrs. Nichols some time before the fire, a month or two, out of the shop; carried his work in the shop; cannot recollect, but believes he was in there a week or two before the fire.

Harvey Watson, jun., on the part of defendants, stated, that about the time of the fire there was a great call for shoes; had given an order in the spring, and would go frequently, until about ten days before the fire, to get them; and, to hurry the plaintiffs, used to go perhaps once a week to get what were made, and about this time he saw about half a dozen trunks for Mr. Lee packed, some full, some not, in the front room in William street. Witness heard the firm complain that they could not get work done: there was not in the apartment in which witness was, many shoes, not 1000 pair in the front shop, in the front or back rooms; only saw the drawers under the counter.

Cross-examined.—Witness said he had no particular object in going there for shoes; they might have had lockers there that contained 5000 pair, for what witness knew.

Cummings Johnson, on the part of defendants, stated, that he carried on business in a part of the building at the time of the fire. Plaintiffs had a few sides of sole-leather, about 60 hides, a few days before. When they bought the 60 they were nearly out; they had not over a dozen then. Witness should think that 30 or 40 sides were saved, judging from the pile; they were cutting on the 60 sides two days before the fire; saw the man they bought the sides of a day or two before the fire; was in the shop a day or two before the fire; there were five or six trunks in the front shop, witness could not tell how many in lockers. Heard Robert say they were not doing much. The old gentleman had not much to do with the business. Witness always understood from Robert that he took the books to the house.

Cross-examined.—Witness testified, that when he was in the shop Van Houten said they were going to pack shoes. Will not

say the books were not sometimes kept at the shop. Witness saw Robert going to the house several times with the books, and asked him if he took the books home; he said generally. Witness saw Robert in the shop the afternoon and evening before. Mr. Van Houten told witness that they packed up now as fast as they could get in. Witness is a currier, on the same premises. Mr. Nichols kept a horse and wagon, and sometimes sent shoes himself, and sometimes sent otherwise. The old man told witness, not two months before the fire, that he intended to have an overhauling of the books, and said something about Robert's wanting too much money.

Richard M. Crane, a witness for defendants, testified, that he was in the plaintiffs' shop a few days before the fire, to buy buckskin shoes, and some other kinds; saw a few pair, a dozen or two, hanging up around the shop; don't recollect particularly, but thinks he saw trunks, and the foreman and one or two cutting out; nothing said, as witness recollects, about shoes on hand, except as to kind witness wanted.

Defendants rested here.

The evidence being closed, and the counsel for plaintiffs and defendants having summed up, the court proceeded to charge the jury, when the counsel for defendant requested the court to charge the jury to this effect, *viz:*

"That when the defendants required of the plaintiffs to verify their accounts of loss or damage by their books of account and other proper vouchers, such as pass-books of journeymen, or other documents not burnt, and which the plaintiffs had promised to furnish, the plaintiffs should have complied with that requirement, as a condition of the ninth article of the policy of insurance." The court declined to charge the jury to that, or the like effect.

The defendants' counsel prayed exceptions to the charge of the court.

The jury, being sworn, retired, and, having agreed, brought in a verdict for the plaintiffs for four thousand three hundred and eighty-six dollars and sixty-six cents damages, and six cents costs.

The defendant moved for a rule to shew cause why the verdict of the jury should not be set aside, and a new trial granted; and, on a rule granted for the purpose, the depositions of Moses B. Salmon and others were taken before J. I. Plume, esq., one of the commissioners, &c., (*pro ut* the depositions).

THE MECHANICS FIRE INSURANCE COMPANY *ads.* DAVID NICHOLS and ROBERT NICHOLS,	IN CASE. On Policy of Insurance on Writ of Error to the Supreme Court of N. Jersey.

NEW JERSEY, *Essex county*, ss.—Examination taken before me, John I. Plume, commissioner for taking bail and affidavits in the Supreme Court, at my office in the city of Newark—taken on the part of the defendants: present A. Gifford, esq., on part of the defendants, and T. Frelinghuysen, esq., on part of the plaintiffs.—Taken this first day of September, A. D. 1837.

Examination taken pursuant to a rule of court, a certified copy of which was produced.

Moses B. Salmon, being sworn on the part of the defendants, says, he was in Newark at the time of the fire of the Messrs. Nichols' shop; that he resided about four or five hundred yards from said shop so burnt; was at his boarding house, as above stated, on the night of the fire; was in bed at the time of the alarm of the fire, and was at the fire shortly after the alarm; proceeded directly from his boarding house to the shop which was on fire; first went to the door fronting William street, and took hold of the door—found it fastened; Mr. Robert Nichols was standing against the door; when I attempted to open the door, he told me not to; I asked him, Mr. Robert Nichols, where the key of the door was; he said Mr. Van Houten had it; I then insisted on opening the door, and he told me again not to; I could have broken open the door; the fire at that time appeared to be in the far end of the building; my object in opening the door was to get the goods out of the building; had been in a great many times; did not know that he had been in the shop for three or four weeks, perhaps more, perhaps less; presumed, from my knowledge when I had been in heretofore, that I could get the goods out; there were at the time quite a number of persons about that could have assisted; I think if I could have opened the door when I first got there, I could have got out the things from Mr. Nichols' part. I had been in the employ of Mr. David Nichols, one of the firm; I knew Robert Nichols well—could not have been mistaken in his being the person at the door at the time I got there.

Cross-examined by T. Frelinghuysen, esq.—It was between three and four o'clock in the morning, does not think it was moonlight; there was a considerable number there, about forty, perhaps more;

Mr. Stevens, who boarded in the house with him, went over with him; he does not recollect any other person that was there. I left Newark in May last. Mentioned this matter the next day after the fire to Mr. Moses Searing. The fire, when I got there, appeared to be in the south end of the building, on Washington street; the fire was in July; I left Mr. Nichols' employ the middle of May before; there was a little misunderstanding between Mr. Nichols and myself when I left in May; the north end of the building, on William street, was not on fire when I got there; the cellar door was open when I got there; they were engaged getting leather out of the cellar when I got there, and I assisted myself; the door on William street was the one I assisted at; have not seen Mr. Stevens in a year; did not state my object to Robert when I was about to open the door.

Cross-examined by A. Gifford, esq.—Has no ill feeling toward Mr. Nichols, or either of the firm; when he turned to, and assisted in the cellar it was after Mr. Nichols had refused to let him open the front door; I took out several pieces of leather from the cellar when I went down to assist, and was in the cellar when the floor burnt through; did not see Robert Nichols after I saw him at the front door. Mr. David Nichols called on me last night, after I came in town, and Mr. Robert Nichols called on me this morning, and they both told me I must have been mistaken in having seen Robert the morning of the fire. Did not know of any insurance on the property until the day after the fire.

(*Signed*) M. B. SALMON.

Sworn and subscribed, before me, the day and year aforesaid.

J. I. PLUME, *Commissioner, &c.*

William H. Ford, being sworn on the part of the plaintiffs, saith, he recollects the fire of the Messrs. Nichols' shop; that he lived about one hundred yards from it; there was about half a dozen persons there when I got there; staid there during the fire; well acquainted with Robert Nichols—did not see him there. Cellar door was shut when I got there; thinks if Mr. Robert Nichols had been there I should have seen him. The fire was in the south end of the building, on Washington street; thinks the fire was on William street also, but won't be certain; did not see any fire on William street when I first got there.

Cross-examined by A. Gifford, esq.—The fire appeared most to-

wards the centre, above; there were shutters on the windows below on William street, not above; thinks he saw every person that was there when he got there; was not in Washington street; when I first got there went to the front on William street; did not stay by the front door on William street all the time.

Cross-examined by T. Frelinghuysen, esq.—I was assisting in the shop adjoining, on William street, a carpenter's shop.

(*Signed*) WM. H. FORD.

Sworn and subscribed, before me, the day and year aforesaid.

J. I. PLUME, *Commissioner, &c.*

Isaac Nichols, being sworn, saith, that when he got there the building was pretty much enveloped in flames in the upper part; the fire appeared to have commenced near the centre of the long building, on Washington street; when I got there, and passed by to my son's shop, think the cellar door was not open—feels confident it was not open; do not think there were twenty persons in both streets when I crossed Washington street into William street to the fire; when I got there the upper part appeared, as I before stated, very much enveloped; can't say whether it was below, nor can I say what the object was in keeping the door shut; did not see Robert there—he had been sick for a week or more.

Cross-examined by A. Gifford, esq.—Does not know that Robert was so sick as to be confined to his bed; does not know whether he was out or not on that night; is the brother of David Nichols, and uncle of Robert. Robert was unwell for a week after, but not confined to his bed.

(*Signed*) ISAAC NICHOLS.

Sworn and subscribed, before me, the day and year aforesaid.

J. I. PLUME, *Commissioner, &c.*

This examination was adjourned over, by consent of parties, until the second of September, at three o'clock P. M., at the office of J. I. Plume, in Newark.

September 2d, 1837.—The parties appeared, and proceeded on the part of the plaintiffs: present O. W. King, esq., for plaintiffs, and A. Gifford, esq., on the part of defendants.

John A. Johnson, being duly sworn, saith, he is personally acquainted with David and Robert Nichols, and has been so ac-

quainted for the last fifteen years; that he resides on the corner of William and Plane streets, in Newark, about one hundred and fifty yards from the shop of the Messrs. Nichols, which was burnt about two years since; was present at said fire; when I first got there think there was about twenty persons at the fire, not over that number; when I got there the first story was pretty much enveloped in flames, particularly the part towards William street; there were shutters on the lower windows, and they were closed; the two windows on the side of Washington street and the one on William street had the shutters on; the part which had the shutters on was occupied by David Nichols & Son; is not certain, but on reflection thinks two windows were on William street; when I arrived at William street at the shop door it was shut; thinks there was no chance at that time of getting any thing out, as the fire appeared near the door; the heaviest part of the fire was in David Nichols & Son's part of the shop; thinks something was said about forcing open the door, and Mr. Isaac Nichols or James T. Thompson thought it would not be advisable—he thought it would not; had frequently been in the shop, twice or three times a week; the partition between the shoe shop occupied by the Messrs. Nichols and the currying shop was made of boards or plank, not lathed or plastered; the partition was about eighteen feet from the front on William street; the stairs which led to the second story commenced in the currying shop, about two feet from the partition—was enclosed on the sides by boards, and open at the top; the second story windows were hoisted, both on William and Washington streets; the second story was occupied by the curriers; remained at the fire until the building was consumed; the building burnt very rapidly, and my impressions were it was the carpenter's shop when I first saw it; did not see Robert Nichols there; the cellar door on William street was not open when I got there, and was forced open shortly after.

Cross-examined by A. Gifford, esq.—The building was filled in with brick; the fire was on Washington street, as well as William street, at the time I arrived there; does not know whether the fire was in the small building comprising part of the shop of Messrs. Nichols when he got there, which said building was afterwards consumed; the small building was occupied by the Messrs. Nichols as a storage room for shoes, trunks, lasts, leather, &c.; there was a door from this building communicating with the main building, and also a door in front, on William street; the door in front, on William street, was kept locked; I remained in William street, from

the time I first got there, as long as we could get leather out of the cellar, and on the cellar steps, from the time of the opening of the cellar door which was I cannot tell how long after—it was not many minutes after my arrival; cannot say how many persons were at the fire on Washington street, while I was in front on William street; the fire did not break through the roof, but communicated to the roof by coming out of the second story windows and lapping over on the roof near the centre of the building; the heaviest part of the flame came out on the east side of the building opposite the stairs; there was a window in second story on the east side, opposite the head of the stairs; thinks there was nine windows on each side of the building, up stairs; cannot say who, or how many were in the cellar; can't say how much leather was got out of the cellar; thinks they were half an hour getting leather out of the cellar; does not recollect whether he left the cellar steps before they came out of the cellar or not; does not know where the fire originated, but judges, from appearance when I first got there, at the staircase; had not seen Robert in four days; had been at the shop every day; saw Robert the morning after the fire, about six o'clock, at his house, in the entry; he was dressed with loose clothes on, and appeared as if he had been in bed.

Examined again by O. W. King, esq.—Could see the corner of the shop from my dwelling; in passing from my house to the fire, on the south side of William street, could see a part of the building on Washington street, and when at the corner of Washington street could see all the building on Washington street; had to cross Washington street to get to the front of the building on William street; the building was about forty feet in length on Washington street. Did not see Moses B. Salmon at the fire; knows said Salmon.

Cross-examined by A. Gifford, esq.—Saw Isaac Nichols there; he was, a part of the time, taking care of his own property adjoining; his property was a carpenter's shop, which was also consumed; the carpenter's shop was not on fire when I got there; witness made a remark at the time that the carpenter's shop stood it best.

(*Signed*) JOHN A. JOHNSON.

Sworn and subscribed, before me, this 2d September, 1837.

JOHN I. PLUME, *Commissioner, &c.*

This examination was adjourned over, by consent of the parties, until the 16th day of October, at two o'clock P. M., at the office of J. I. Plume, in Newark.

October 16*th*, 1837.—The parties appeared, and proceeded on the part of the plaintiffs: present O. W. King, esq., for plaintiffs, and A. Gifford, esq., on part of defendants.

James T. Thompson, being duly sworn, saith, he was present at the fire of Messrs. D. Nichols & Son's shop, in Washington street; lived near the premises burnt; thinks the fire had not burst through when he got there; the fire appeared to be in front on William street; the building appeared generally on fire; when I got there think there was not over three persons there; I stood at the door on William street, and protested against having the doors forced open; does not believe, if the door had been opened, the goods could have been got out at any time after my arrival at the fire; could not tell where the fire commenced; the body of the fire appeared in front on William street; when the building was nearly burnt down I saw Robert Nichols at his door, on the porch, on the opposite corner of Washington and William streets.

Cross-examined by A. Gifford, esq.—Thinks it was not over five or ten minutes after he got there before the fire broke through; cannot say in what part the fire broke through first; did not break through front first; from the body of smoke, I concluded the fire was in front; when I got there the fire appeared more in the rooms below than above; there was shutters on the windows below, which prevented seeing in; has no recollection of the particular appearance of fire above stairs on William street; don't think I remained at the door over five or eight minutes; they were ten or fifteen minutes getting leather out of the cellar—they may have been longer; I went from the door above stated to aid with the leather; had not been there over eight or ten minutes before they commenced taking leather out of the cellar.

Examined again by O. W. King, esq.—Before I left my residence I saw the light in the lower and upper windows of the building on Washington street; took no notice during the fire of the back gable end, being all the time on William street.

(*Signed*) JAMES T. THOMPSON.

Sworn and subscribed, before me, the day and year above written.

JOHN I. PLUME, *Commissioner, &c.*

David A. Nichols, being duly sworn, saith, he is the son of Robert Nichols; recollects the time of the fire; was at it assisting;

there was about a dozen there when he got there; the fire had broke through the roof; took out the carriage from the building adjoining; assisted in breaking open the cellar door on William street and getttng out leather; did not see his father during the fire; his father had been unwell for a week previous, and confined to his bed; is well acquainted with Moses Salmon—did not see him at the fire.

Cross-examined by A. Gifford, esq.—Did not see William A. Myer at the fire; did not take notice of any person in particular; there was not a great many there; from the time I first heard the alarm, think it was eight or ten minutes before I got there; don't remember of seeing Mr. Thompson at the fire.

(*Signed*) DAVID A. NICHOLS.

Sworn and subscribed, before me, the day and year above written.

J. I. PLUME, *Commissioner, &c.*

This examination was adjourned over, by consent of the parties, until the 10th day of November, at two o'clock P. M., at the office of J. I. Plume, Newark.

November 10th, 1837.—The parties appeared, and proceeded on the part of the defendants: present A. Gifford, esq., for the defendants, and David J. Hays, esq., on the part of plaintiffs.

William Shugard, being duly sworn, saith, he is acquainted with Robert Nichols and James T. Thompson—there is no resemblance between them, Mr. Thompson being a stout portly man, and Mr. Nichols the reverse, rather a spare man. I was at the fire of Mr. Nichols' shop—think I was there before it burst out of the building; witness was interested, having leather in the cellar; can't say where the fire originated—but the fire first came through in the cellar under where the stairs went up; the fire appeared, when I first got there, to be in the centre of the building, on the first floor; deponent was interested from having a good deal of leather in the building, in every part from the cellar up, except the part occupied by the Messrs. Nichols; got a part of the leather out, about three hundred and fifty dollars' worth, from the cellar door on William street, and about one hundred dollars' worth from the cellar door in the rear of the building; when I got there, if we could have got into the shop of the Messrs. Nichols, most of the goods in it might have been got out; if I had been interested in Messrs. Nichols' shop

could have broken open the door, and if there had been anything movable think it could have been moved out; when I first got there the cellar door was not open; witness assisted to open it; thinks he was engaged in the cellar from twenty-five to thirty minutes, long enough to throw out two hundred and fifty hides; thinks there was a hundred persons there when he got there, but can't say as to numbers; saw Robert Nichols the next morning, immediately after the building burnt down, and spoke to him in the street; saw him two or three times around there, and spoke to him twice; when I saw him the first time it was about six o'clock; he had his ordinary dress on.

Cross-examined by D. J. Hays, esq.—When I first got there will not say the fire was not burning on the outside of the building; if it appeared anywhere, it must have been through the windows, for it had not burnt sufficiently to get through anywhere else; can't say how much was burnt inside when I got there, I merely judge from the appearance of the building; when I first got there went immediately to the cellar—did not stop to notice any other part of the building, but formed my judgment from the fire coming through into the cellar; did not particularly notice how many persons were there when I first went into the cellar, but there were numbers on the walk—no person at the door—they were in the street (William street) standing round looking; can't say he was the first one that entered; the back-door was open; Mr. Nichols occupied a part of the cellar under his shop; when I came out of the cellar believe the roof had not fallen in; the beams of the first floor were cracking before I left the cellar.

(*Signed*) WILLIAM SHUGARD.

Sworn and subscribed, before me, this 10th day of November, 1837.

J. I. Plume, *Commissioner, &c.*

George Carter, being duly sworn, saith, that at the time the building of Messrs. Nichols, corner of Washington and William streets, was burning saw Robert Nichols; the engines, except one or two, had stopped playing when I saw him; it was in the yard of his house, where we were getting water for the engine; I asked for a glass of water, and he, Robert Nichols, got me a pitcher of water and tumbler to drink out of.

(*Signed*) GEO. CARTER.

Sworn and subscribed before me, this 10th day of November, 1837.

J. I. Plume, *Commissioner, &c.*

Charles Nichols, called on the part of the plaintiffs, and being duly sworn, saith, he is the son of Robert Nichols; that he is nineteen years old; lives with his father; was home at the time of the fire; my father had been unwell for some days before the fire—can't say he was confined to his bed—was so that he did not go out at all; did not see him out the night of the fire—don't know that he was out; saw him during the fire standing in the house-door with his wrapper on; the house was burning rapidly, and the roof had fallen in when I saw my father at the door. Knows Moses Salmon; did not see him at the fire. Could have seen my father, if he had been out, as I was round all the time.

Cross-examined by A. Gifford, esq.—Before I saw my father had been round helping get out gigs and wagons from the building south of the shop on Washington street; it was about thirty or forty feet from the shop to the next house; the shed where the carriages was in was between the shop and the house above alluded to; don't think my father could have gone out and I not see him; if my father had been at the door of the shop on William street while I was getting out the carriages I could not have seen him.

(*Signed*) CHARLES NICHOLS.

Sworn and subscribed before me, this 10th day of November, 1837.

J. I. Plume, *Commissioner, &c.*

I certify the above to be a true copy.

J. I. Plume, *Commissioner, &c.*

To the Mechanics Fire Insurance Company:

Please take notice that the following is a particular account of the loss and damage sustained by fire, on the morning of the ninth day of July, instant, in the property insured for us in your policy of insurance, and numbered 6271 by you, and renewed and continued by you, in and by certificates numbered 7026 and 7795—that is to say:—

Account of stock in large shop destroyed.

400 pair	calf brogans, 13*s.* 6*d.*,	$675.00
400 "	calf navy boots, 13*s.* 6*d.*,	675.00
400 "	second quality navy boots, 11*s.* 7*d.*,	575.30
140 "	kip navy boots, 10*s.* 6*d.*,	183.75
140 "	seal pump brogans, 8*s.*,	140.00

200 "	Van Buren buckles,	$247.50
60 "	calf Van Burens, 12*s.* 6*d.*,	27.50
1 doz.	calf skins,	12.50
12 seal	trunks, 21*s.* 6*d.*,	32.25
130 pair	calf Van Buren uppers, for buckles, corded and fitted, 5*s.* 6*d.*,	68.75
200 "	calf Van Buren uppers, fitted and corded, 5*s.*,	125.00
163 "	calf navy boot uppers, fitted and corded, 5*s.* 6*d.*,	103.12½
50 "	calf navy boot uppers, not fitted, 3*s.* 6*d.*,	21.87½
104 "	second quality Van Buren uppers, fitted and corded for buckles, 4*s.*,	52.00
52 "	second quality Van Buren uppers, fitted and corded, 4*s.*,	26.00
30 "	second quality Jackson straps, fitted and corded, 4*s*,	15.00
24 "	second quality Van Buren uppers, not fitted, 2*s.* 6*d.*,	7.40
21 "	calf short boots, fitted and corded, 10*s.* 6*d.*,	26.31
30 "	calf short boots, not fitted, 5*s.*,	18.75
	Lot of shoe lasts, 1 pair boot trees, and 3 pair shoe trees,	18.00
30 "	shoes, just brought in,	45.00
1 stove and pipe, $5; 1 writing table, $1,		6.00
		$3171.81

Below, the stock in small shop, entirely destroyed.

226 pair	second quality shoes, Van Buren buckles, 11*s.*,	310.75
114 "	second quality shoes, Van Buren buckles, 11*s.*, [*The above packed up.*]	169.25
200 "	second quality shoes, Van Buren buckles, 11*s.*,	275.00
180 "	second quality shoes, Van Burens, 11*s.*,	247.00
40 "	seal pump brogans, 8*s.*,	40.00
40 "	second quality Jackson straps, 11*s.*,	55.00
7 doz.	calf skins,	27.50
8 "	linings,	30.00
	Lot of boot cord,	10.00
1 writing desk,		5.00
6 seal	trunks, 21*s.* 6*d.*,	16.12
80 sides	sole leather, in the cellar, entirely destroyed,	153.00
	Amount total of loss,	$4570.93

(*Signed*) DAVID NICHOLS, ROBT. NICHOLS, } *Composing firm of David Nichols & Son.*

Newark, July 29th, A. D. 1835.

State of New Jersey, *Essex county*, ss.—David Nichols and Robert Nichols, of Newark, being duly sworn before me, on their several and respective oaths do declare, depose, and say, that they, the said deponents, are the persons who now do compose, and who have, from the first day of February, in the year eighteen hundred and thirty-three, composed the firm of David Nichols & Son; that they are the persons for whom the Mechanics Fire Association Company insured, in and by their policy numbered 6271, and for whom said company continued and renewed said policy; that the foregoing account is a particular account of their loss and damage by fire on the morning of the ninth day of July, instant, in the property belonging to them and insured in and by the said policy; and that the matters and facts contained in the above and foregoing notice and account are true and correct; that there has been made, and now continues to be an insurance in and by the Newark Mutual Fire Assurance Company in the property contained in said account for the sum of six hundred dollars, and that no other insurance has been made on the said property; and that the deponents have sustained loss and damage by the said fire in said property to the amount of four thousand and five hundred and seventy dollars and ninety-three cents.

(*Signed*) DAVID NICHOLS,
ROBT. NICHOLS.

Taken, sworn, and subscribed, before me, this 29th day of July, 1835.

(*Signed*) James Whittemore,
One of the justices of the peace in and for the county of Essex.

New Jersey, *Essex county*, ss.—I, James Whittemore, one of the justices of the peace in and for the county aforesaid, duly commissioned and sworn, residing in the town of Newark, in the said county, do hereby certify, that I am acquainted with the character and circumstances of David Nichols and Robert Nichols, above named; that, having investigated the circumstances in relation to their loss by fire on the morning of the ninth day of July, instant, as stated and contained in the foregoing notice, account, and affidavit, I do know and verily believe that they really and by misfortune, and without fraud or evil practice, have sustained by such fire loss and damage to the amount of four thousand five hundred and seventy dollars and ninety-three cents, as above mentioned and

stated by them. And I do hereby certify, that I am not concerned in the said loss.

In testimony whereof, I have hereto set my hand and seal
(*Seal.*) this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and thirty-five. (1835.)

(*Signed*) JAMES WHITTEMORE,
One of the justices of the peace in and for the county of Essex.

STATE OF NEW JERSEY, *Essex county*, ss.—Personally appeared before me, James Whittemore, one of the justices of the peace in and for the county of Essex, Jacob Van Houten, who, being duly sworn, did depose and say, that he has been in the employment of David Nichols & Son, in Newark, for more than six months last past and up to the date of the fire on the ninth day of July, instant, and that he does know and verily believes that the annexed statement of their loss, *viz:* four thousand five hundred and seventy dollars and ninety-three cents, sustained by them by the fire on the ninth day of July, instant, is true and correct, from his own personal knowledge of their stock on hand.

(*Signed*) JACOB VAN HOUTEN.

Sworn and subscribed before me this 29th day of July, 1835.

JAMES WHITTEMORE,
One of the justices of the peace in and for the county of Essex.

Statement of other insurance by the plaintiffs in the Mutual Insurance Company and of the amount which only should be required of the defendants.

Claim of plaintiffs, dated 29th July, 1836,		$4570.93
Insured in the Mutual Insurance Co.,	$600	
Insured in the Mechanics Insurance Co.,	4000	
	$4600	
If $4600 loses $4570.93, $4000 loses		3974.78
Interest from 27th September (trial at circuit) to May term of Supreme Court, 9th May, 1837,		385.55
The jury rendered a verdict for	$4386.66	
The true amount of verdict should have been, according to the second provision in the body of the policy, calculating interest up to May term,	4360.33	
	$26.33	

Extract from the Policy.

"And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the whole amount hereby insured shall bear to the whole amount insured on said property."

CAUSES FOR NEW TRIAL.

The defendants in the above stated cause rest their motion thereon for setting aside the verdict and granting a new trial upon the following causes:

1. The defendants have discovered since the trial that they can prove by several witnesses that at the time of the burning of the building and goods insured, as in the plaintiffs' declaration mentioned, the said Robert Nichols stood by the front door of said building, whilst the fire had not reached the front thereof, and forbid and prevented persons from entering who were desirous so to do, when, if they had been permitted to enter the said building, they could have saved all the goods and contents, or a greater part.

2. From the late change of the officers of the said company, on the last Tuesday of January, especially the president, who was appointed on a committee to investigate the evidence relating to the loss, by books of journeymen and dealers, of stock and goods purchased and sold, could not be procured by a new committee with readiness or advantage for the trial; which matters would have shewn conclusively the true amount of loss.

3. That the verdict was without evidence.

4. That when the defendants' counsel requested the court to charge the jury, that the plaintiffs, when required to verify their account of loss or damage by their books of account and other proper vouchers, such as pass-books of journeymen or other documents not burnt, and which the plaintiffs had promised to furnish, they should have complied with that requirement, as a condition of the ninth article of the policy of insurance, the court declined to charge the jury to that or the like effect.

5. That the verdict of the jury was against law.

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the third Tuesday of May, in the year of our Lord eighteen hundred and thirty-eight, before the Governor and Council, in the Court of Appeals in the last resort in all causes of law, at Trenton, in the state of New Jersey, comes the said "the Mechanics Fire Insurance Company," by Archer Gifford, their attorney, and say—that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit:

1. The declaration aforesaid, and the matters therein contained, are not sufficient in law for the said David Nichols and Robert Nichols to have or maintain their aforesaid action thereof against the said "the Mechanics Fire Insurance Company."

2. There is error, also, in this, to wit, that by the record and proceedings aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said David Nichols and Robert Nichols against the said "the Mechanics Fire Insurance Company," whereas, by the law of the land, judgment should and ought to have been given for the said "the Mechanics Fire Insurance Company" against the said David Nichols and Robert Nichols; and thereupon the said "the Mechanics Fire Insurance Company" prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, may be reversed, annulled, and held for nothing, and that they may be restored to all things they have lost on occasion of the said judgment, &c.

A. GIFFORD, *Attorney.*