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New Jersey ~~Supreme~~ Court
of Errors and Appeals,

Writ of Error

New Jersey, ss:

Seal

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

Because in the record and proceedings, and also in giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you, between the State, Defendant-in-Error, against Thomas L. Snover, Plaintiff-in-Error, upon a certain indictment against Thomas L. Snover in the Court of Quarter Sessions of the County of Warren, manifest error hath intervened to the great damage of the said defendant, as by his complaint we are informed; we being willing that the error, if any there be, should, in due manner, be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, distinctly and openly to send, under your seal, the record and proceedings and plaint ing the same, to our Court of Errors and Appeals aforesaid, with all things touching and concern- in the last resort in all causes, at Trenton, on the 27th day of Dec., inst., together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness, our Chancellor and president Judge of our Court of Errors and Appeals, at Trenton aforesaid, the 9th day of December one thousand nine hundred and twenty-four.

THOMAS F. MARTIN,
Clerk.

J. M. Roseberry & Son,
Attorneys.

RETURN TO WRIT

The answer of the justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mentioned is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said state, in a certain schedule to this writ annexed, as within we are commanded.

Filed December 27, 1924.

WILLIAM G. GUMMERE,
Chief Justice.

(Seal)

c

Opinion

(*Filed, Dec. 1, 1924*)

NEW JERSEY SUPREME COURT

THE STATE, Defendant-in-Error, vs. THOMAS L. SNOVER, Plaintiff-in-Error.	No. 3, November Term, 1923.

Submitted December 10th, 1923. Decided November 21st, 1924.

On writ of error.

Before: Justices Kalisch and Katzenbach.

For the plaintiff-in-error, J. M. Roseberry & Son, Esqrs.

For the defendant-in-error, Sylvester C. Smith, Jr., Esq.

Per Curiam:

This case is before this Court upon a writ of error directed to the Warren County Court of Quarter Sessions.

Thomas L. Snover, the plaintiff-in-error (hereafter referred to as the defendant) was indicted with three others by the Grand Jury of Warren County. The indictment contained three counts. The first count charged that the defendants "Did wilfully and maliciously set fire to and burn a certain barn, not a parcel of a dwelling house, and a certain grist mill, the property of one Har-

riet Willever." The defendant was tried and convicted. He was sentenced upon the first count to pay a fine of $500 and to stand committed to the State Prison at Trenton for a minimum term of not less than one year and a maximum term of not more than seven years. Sentence on the other two counts was suspended.

The only judgment under review is the judgment on conviction upon the first count of the indictment. A writ of error will not lie in a criminal case until sentence has been pronounced. No sentence on the second and third counts of the indictment was pronounced.

The case is before us on a strict bill of exceptions. The record contains only a part of the testimony taken at the trial. The first point made in behalf of the defendant is that the Trial Court erred in admitting a record of insurance sent to the insurance company by the agent, and a duplicate of the insurance policy. The defendant contends that no notice to produce the policy of insurance was served upon the defendant and that secondary evidence could not be introduced in default of the service of such motive. The fact of insurance is only important on the question of motive, and secondary evidence is admissible to prove insurance. In a criminal case the defendant is not obliged to respond to a notice to produce. He cannot be made to give any evidence that would tend to incriminate him. The copy of an insursance policy was admitted in the case of *Commonwealth vs. Hubbard,* 65 Pa. Sup. Court 213. Whether or not secondary evidence shall be admitted rests within the discretion of the Court.

Opinion

This exercise of discretion will generally not be distured by an appellate court. *Johnson vs. Arnwine,* 42 L. 450. The trial court did not err, in our opinion, in admitting the record of insurance and the duplicate of the policy.

The second point argued in behalf of the defendant relates to the 3rd, 4th and 5th assignments of error. These assignments deal with three questions put upon cross-examination to a witness, Isaac E. Wildrick, which were overruled. These questions were as follows: "And you got hold of a note of two thousand dollars secured by a mortgage, that he had given to your mother and put it in Judge Shipman's hands for collection, did you not? Did you not, immediately after her death, take a note given by William C. Howell to her, and sell it as heir-at-law to Andrew Yetter? The will was proved in the Surrogate's office, September 1, 1922, was it not?"

The defendant insists that he was entitled to show the animosity of the witness towards the defendant and these questions were asked for that purpose. The questions asked have no indication of such a purpose. They were properly overruled as irrelevant and immaterial.

The next assignment of error argued for the defendant is the 6th assignment. This relates to the overruling by the trial court of a motion to direct a verdict of acquittal at the close of the evidence on the part of the State. This is a matter not reviewable because this case is before this Court on a strict bill of exceptions. The entire record is not here. The appellate court cannot

properly determine whether or not the trial court erred in its ruling unless all of the evidence offered by the State is before it. *State vs. Jaggers,* 71 L. 281.

The defendant next argues the 7th assignment of error. This assignment of error deals with the refusal of the trial court to charge the following request: "What is set out in the first and second counts of the indictment charges the defendant with burning the barn, mill and dwelling house of Harriet Willever? It does not appear by the testimony that anyone was in the actual and immediate possession of either the mill, barn, or dwelling house mentioned in those two counts at the time of the burning of either of them, or that it was the property of Harriet Willever. Therefore, the defendants cannot be convicted under either of said counts which requires the offense to be against the person in the actual and immediate possession of the buildings of the property of Harriet Willever." Whether the refusal of the trial court to charge this request was proper or not cannot be decided in the absence of all the evidence. The request refers to the testimony. All the testimony is not before us. The purpose of the request, however, was to have the court charge that the amendment to the Crimes Act of 1919, Chapter 106, did not alter the status of the law as defined in the case of *State vs. Fish,* 27 N. J. L. 323, and *State vs. Lentz,* 92 N. J. L. 217. The amendment of 1919 was for the express purpose of changing the law as laid down in these cases. After the 1919 amendment all that was required to sustain the conviction for statutory arson or for

burning buildings was that the State proved beyond a reasonable doubt, first, the burning of the building or dwelling, and, second, either wilful or malicious burning.

All the other assignments of error from the 8th to the 17th inclusive deal with refusals to charge. These assignments cannot be considered in the absence of the entire testimony.

The judgment of conviction under review is affirmed.

Rule of Affirmance and Remittitur

(*Filed, Dec. 8, 1924*)

NEW JERSEY SUPREME COURT

STATE OF NEW JERSEY, Defendant-in-Error, v. THOMAS L. SNOVER, Plaintiff-in-Error.	On Writ of Error to Warren Quarter Sessions.

This cause having been heard before the Court at the November Term, 1923, and the Court having considered the reasons for reversing the judgment of the Warren Quarter Session removed by the writ of error in this cause and having duly considered the argument of the attorneys of the respective parties, and being of the opinion that the judgment of the Warren Quarter Session removed by the writ of error in this cause should be affirmed,

Assignment of Errors

It is ordered that the judgment of the Warren Quarter Session removed by the writ of error in this cause be and the same is hereby affirmed and the record remitted to the lower court to be proceeded with according to the law.

Entered December 8, 1924,
On motion of Sylvester C. Smith, Jr.,
Prosecutor of the Pleas.
A true copy.

EDWARD J. KELLEHER,
Clerk.

Assignment of Errors

5

(*Filed, January 21, 1924*)

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE, Defendant-in-Error, vs. THOMAS L. SNOVER, Plaintiff-in-Error.	On Writ of Error.

That the Supreme Court erred in giving judgment for the State, defendant-in-error, when it should have been given for Thomas L. Snover, the plaintiff-in-error.

J. M. ROSEBERRY & SON,
Attorneys for Plaintiff-in-Error.

Writ of Error

NEW JERSEY, *ss.*

To Harry Runyon, Esq., Judge of the
Seal Court of Quarter Sessions of the
County of Warren.

Because in the record and proceedings, and also in giving the judgment upon a certain indictment against Thomas L. Snover, late of the township of Blairstown, in said County of Warren, did with Alva Crawn, Andrew Crawn and Raymond Crawn, wilfully and maliciously set fire to and burn a certain barn, not a parcel of the dwelling house and a certain Grist Mill and dwelling house, being then and there the property of one Harriet Willever, and did wilfully and maliciously set fire to and burn a certain barn there situate which was at the time insured by the National Liberty Insurance Company, of New York, with intent to prejudice said insurance company.

Pro ut the said indictment and several counts therein, whereof, before you, he hath been indicted, and is thereof convicted by a certain jury of the County, taken between the State of New Jersey and the said Thomas L. Snover, as it is said, manifest error hath intervened to the great damage of the said Thomas L. Snover, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner if any there shall be, and that speedy justice be done to him, the said Thomas L. Snover, command you, that if judgment be thereon given them then that you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same to our Justices of our Supreme Court of the State of New Jer-

sey on the twenty-first day of July, inst., and this writ, that the records and proceedings aforesaid being inspected. We may further cause to be done thereupon for correcting that error what of right and according to the law ought to be done.

Witness William S. Gummere, Esq., Our Chief Justice at Trenton, aforesaid, the second day of July, A. D., nineteen hundred and twenty-three.

EDWARD J. KELLEHER
Clerk

J. M. ROSEBERRY & SON.
Attorneys

Return to Writ

The answer of Harry Runyon, Esq., Judge of the Court of Quarter Sessions of the County of Warren within named, the record and proceedings whereof mentioned is within made all things touching the same I certify to our Justices of our Supreme Court of the State of New Jersey, at the day and year within contained in a certain schedule to this writ annexed, as I am commanded.

HARRY RUNYON,
Judge

Indictment

WARREN COUNTY COURT OF QUARTER SESSIONS

The State
vs. } On Indictment
Thomas L. Snover

SYLVESTER C. SMITH, JR., Prosecutor of the Pleas.

JOSEPH M. ROSEBERRY & SON, Attorneys for Defendant.

Be it remembered that on the twentieth day of June, nineteen hundred and twenty-three, at the trial of the indictment of the above named Thomas L. Snover, before Harry Runyon, Esquire, Judge of Said Court, whereby said Thomas L. Snover was charged with Andrew Crawn, Alva Crawn and Raymond Crawn, as follows:

WARREN OYER AND TERMINER

September Term, 1922.

Warren County, To Wit:

The Grand Inquest for the State of New Jersey, and for the body of the County of Warren, upon their respective oaths, Present that Thomas L. Snover, late of of Town of Blairstown in the said County of Warren, and Andrew Crawn, Alva Crawn and Raymond Crawn, late of the Township of Pahaquarry, in the said County of Warren, on the 15th day of March in the year of Our

Lord, Nineteen Hundred Twenty-two, at the Township of Pahaquarry, aforesaid in the County aforesaid, and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn a certain barn, not a parcel of a dwelling house and a certain grist mill, being then and there the property of Harriet Willever, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

And the GRAND INQUEST aforesaid, upon their respective oaths aforesaid, do further Present, that the said Thomas L. Snover, Andrew Crawn, Alva Crawn and Raymond Crawn, on the 15th day of March in the year of Our Lord, One Thousand Nine Hundred and Twenty-two, at the Township of Pahaquarry in the said County of Warren and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn or cause to be burned a dwelling house, then and there belonging to and the property of one Harriet Willever, contrary to the form of the Statute in this case made and provided, and against the peace of this State, the Government and dignity of the same.

And the GRAND INQUEST aforesaid, upon their respective oaths aforesaid, do further Present, that the said Thomas L. Snover, Andrew Crawn, Alva Crawn and Raymond Crawn, on the 15th day of March in the year of Our Lord, One Thousand Nine Hundred and Twenty-two, at the Township of Pahaquarry, in the said County of Warren and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn a certain barn there situated which was at the time insured by the National Liberty Insurance Company, of New York, a corporation, against loss and damage by fire, with intent to prejudice the said National Liberty Insurance Company of New York, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas.

The trial of the said indictment came on to be tried by a jury for that purpose, duly empaneled; and thereupon the said Sylvester C. Smith, Jr., Prosecutor of the Pleas of the said County of Warren, to maintain the said issue on his part offered the testimony of George N. Harris, as to the insurance on the buildings mentioned in the indictment which questions were propounded to the said George N. Harris, in the following language, and also concerning a paper admitted in evidence marked "Exhibit S-1" on the part of the Prosecutor.

Inquest

September Term, 1922

WARREN COUNTY, To wit:

THE GRAND INQUEST for the State of New Jersey, and for the body of the County of Warren, upon their respective oaths PRESENT, that Thomas L. Snover, late of the Town of Blairstown in the said County of Warren, and Andrew Crawn, Alva Crawn and Raymond Crawn, late of the Township of Pahaquarry in the said County of Warren, on the 15th day of March in the year of Our Lord, Nineteen Hundred and Twenty-two, at the Township of Pahaquarry aforesaid in the County aforesaid, and within jurisdiction of this Court, did wilfully and maliciously set fire to and burn a certain barn not a parcel of a dwelling house and a certain grist mill being then and there the property of Harriet Willever, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

And the GRAND INQUEST aforesaid, upon their respective oaths aforesaid, do further PRESENT, that the said Thomas L. Snover, Andrew Crawn, Alvin Crawn and Raymond Crawn, on the 15th day of March, in the year of Our Lord, One Thousand Nine Hundred and Twenty-two at the township of Pahaquarry, in the said county of Warren, and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn or caused to be burned a dwelling house, then and there belonging to and the property of one Harriet Willever, contrary to the form of the Statute in such case made and provided, and against the peace of this State, to Government and dignity of the same.

And the GRAND INQUEST aforesaid, upon their respective oaths aforesaid, do further PRESENT, that the said Thomas L. Snover, Audrew Craawn, Alvan Crawn and Raymond Crawn on the 15th day of March in the year of our Lord, One Thousand Nine Hundred and Twenty-Two, at the township of Pahaquarry in the said County of Warren and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn a certain barn there situate, which was at the time insured by the National Liberty Insurance Company of New York, a corporation, against loss and damage by fire, with intent to prejudice the said National Liberty Insurance Company of New York, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas.

Arraignment

SCHEDULE ANNEXED TO WRIT HEREIN REFERRED TO

Oct. 11, 1922.

The State, vs. Thomas L. Snover, Andrew Crawn, Alva Crawn, Raymond Crawn,	Indictment, Burning Buildings, March 15, 1922. Pahaquarry Township. Burning Barn, Dwelling House and Grist Mill.

Pleas:

Thomas L. Snover—Not Guilty.
Andrew Crawn—Not Guilty.
Alva Crawn—Not Guilty.
Raymond Crawn—Not Guilty.

Quarter Sessions

The State
vs.
Thomas L. Snover,
et als.

Trial June 20, 21, 22 and 23, 1923.

Sylvester C. Smith, Prosecutor of the Pleas.

William H. Morrow and Joseph M. Roseberry, Counsel for Defendants.

June 23, 1923, 3:50 p. m., jury retired to jury room and returned to box at 4:32, p. m. to ask instructions of the Court and again retired to jury room at 4:40 p. m. Jury returned to box at 5:25 p. m.

Verdict—"We find all the defendants Guilty as charged in the indictment, asking mercy of the Court for all defendants."

WARREN QUARTER SESSIONS

June 29th, 1923.

The State
vs.
Thomas L. Snover,

Sur Indictment for Burning Barn, Dwelling House and Grist Mill in the Township of Pahaquarrry.

The above named defendant having been convicted of the crime of burning barn, dwelling house and grist mill, in the township of Pahaquarry, the Prosecutor of the Pleas moved for sentence, whereupon the Court ordered the sheriff to set the prisoner to the bar to receive his sentence; he being accordingly set to the bar, the Court does thereupon order and adjudge that the

prisoner, Thomas L. Snover, pay a fine of $500 and the costs of prosecution in this case and stand committed at State Prison, Trenton, N. J., not less or minimum of one and maximum of not more than seven years and that he be further imprisoned from and after the expiration of said term until the costs and fine are paid, on the first count. On the second and third counts sentence is suspended.

HARRY RUNYON,
Judge.

STATE OF NEW JERSEY,
COUNTY OF WARREN
ss.

I, Ramsey Reese, Clerk of the Court of Common Pleas, in and for the County of Warren, aforesaid, do hereby certify that the foregoing is a true copy from the records of said court of the Arraignment, Indictment, Dates of Trial and Sentence in the case of the State vs. Thomas L. Snover, charged with burning barn, dwelling house and grist mill in Pahaquarry township on March 15, 1922.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Belvidere, in said County, the 7th day of July, in the (Seal.) year of Our Lord, One Thousand Nine Hundred and Twenty-three.

RAMSEY REESE,
Clerk.

By GEO. D. GEIS,
Deputy.

Bill of Exceptions

GEORGE N. HARRIS, sworn for the State.

DIRECT EXAMINATION by the Prosecutor:

Q. Mr. Harris, where do you live?
A. Newton, New Jersey.
Q. What is your business?
A. Fire insurance.
Q. Are you a member of the firm of Harris and Morris?
A. I am.
Q. Did you know Harriet Willever in her lifetime?
A. I did.
Q. Did you insure the property of Harriet Willever?
A. I did.

MR. ROSEBERRY: I object.

THE COURT: You may proceed Mr. Prosecutor.

MR. ROSEBERRY: I pray an exception.

THE COURT: There is nothing before the Court to grant an exception on.

Q. Where was the property located?
A. At Millbrook, Pahaquarry Township, Warren County.
Q. What was the nature of the property?
A. It was a dwelling house, grist mill and a barn.
Q. What kind of a dwelling house was it?
A. Frame.
Q. Where did it stand with reference to other buildings?
A. About somewhere from one hundred and fifty to

two hundred feet. I have not seen the building for the past seven years. I insured it about seven years ago and renewed it from time to time. But I judge it is one hundred and fifty to two hundred feet.

MR. ROSEBERRY: I object to all this.

Q. What were the nearest buildings?
A. The grist mill and barn.
Q. What was the grist mill built of?
A. Frame.
Q. What was the barn?
A. Frame.
Q. Where did the barn stand with reference to the house?
A. Somewhere about the same distance; about one hundred and fifty or two hundred feet from the house.
Q. In what company did you insure the barn?

MR. ROSEBERRY: I object on the ground there is better evidence. There is written evidence, a policy of insurance, and until they produce that or account for its loss this oral testimony is irrelevant and incompetent.

THE PROSECUTOR: I will withdraw that.

Q. Have you the insurance policy that you issued on these properties?
A. We have the record of it in our office.
Q. Where is the original policy?
A. Mr. Snover and Mrs. Willever had it. It was delivered to them.
Q. You do not have it in your possession?
A. I did not have it in my possession after it was written; no, sir.
Q. And have not had it since?
A. No, sir.

THE PROSECUTOR: I will call upon Mr. Snover if he has the policy.

MR. MORROW: He has not proved it was in Mr. Snover's possession.

MR. ROSEBERRY: Nor has he given notice to produce it as the law requires.

THE PROSECUTOR: This is a criminal proceeding.

Q. Did you make a duplicate record of the policy that was issued?

A. I did; yes, sir.

Q. You have a record of that?

A. I have a record here; yes, sir.

Q. Was that made at the time of the issuance of the policy?

A. At the time the policy was issued. (Producing paper) This is the first, as to the mill property.

Q. What is the record of the insuring of the barn?

MR. ROSEBERRY: I object to that, because the policy of insurance is better evidence.

MR. MORROW: That is also objected to, because it does not appear that Thomas L. Snover ever had that record or was any party to it at all.

Q. May I ask whom did you deliver these policies to when they were issued?

A. I mailed them to Mrs. Harriet Willever.

MR. MORROW: That is just what I supposed would be developed before you got very far along.

THE PROSECUTOR: If necessary I will withdraw the witness and ask that the clerk of the Circuit Court produce the record in the case of Snover, Executor, against the company.

MR. ROSEBERRY: That won't help you any.

MR. MORROW: I will meet that when it comes.

Q. What does your record show as to the insurance on the barn?

MR. MORROW: I object to that record, because it is not the best evidence; and Mr. Snover nor the other defendants are not shown to be connected with that record. And he is undertaking to tell the contents of a paper which he holds in his hand, whereas the paper itself, after being submitted to counsel on the other side for cross examination, would speak for itself; it would speak for itself when it is properly admitted in evidence.

MR. ROSEBERRY: And another thing, the copy of the record is not competent evidence anyway.

THE PROSECUTOR: We intend to show that Mrs. Willever, the owner of these buildings, has since died; that by her will, which is probated in the Surrogate's office, Mr. Snover is the executor of Harriet Willever. We will also prove by the record in this case that the policies are in his possession, or at least he knows about them or knows where they are, by the fact that he has brought a suit in the circuit court of this county—we will offer the record of that—upon these insurance policies. I think it is perfectly permissible to offer secondary evidence with that offer of proof.

MR. MORROW: You have not come to that yet. The question you have asked the witness, and which we have objected to, is what does the record show? We have stated our grounds of objection. The record itself will show what it is.

THE COURT: You may answer the question, Mr. Harris.

MR. ROSEBERRY: We pray an exception.

THE COURT: You may have an exception.

(Exception allowed and the same is sealed accordingly. Whereupon counsel for the defendant made exception to the said ruling of the said judge, and prayed that said judge would set his hand and seal to this bill of exception, and it is sealed accordingly.)

HARRY RUNYON, (Seal)
Judge.

A. The record shows that the policy now standing is eleven hundred dollars on the dwelling and three hundred dollars on the barn.

MR. ROSEBERRY: I object, because it is incompetent—

THE COURT: An objection to what?

MR. ROSEBERRY: Wait. There is only one question here and that relates to the one insurance on the barn, nothing on the mill and nothing on the house; and therefore, as far as this indictment is concerned, what is upon the house and on the mill is irrelevant.

THE WITNESS: The barn is three hundred dollars.

Q. I show you a document signed, "Harris & Morris, Agent," and ask you to examine that and see if that is your signature?

A. Yes; that is my writing.

Q. Will you tell us what that paper is?

MR. ROSEBERRY: I object to it, because the paper will speak for itself.

Q. Was that prepared in your office?

A. That was prepared in our office; yes, sir. And it is a copy of the policy.

MR. ROSEBERRY: I object to that and move it be stricken out.

THE COURT: Until you state your ground of objection there is nothing before me to rule on.

MR. ROSEBERRY: My objection is that it is incompetent. He said it was a copy of the policy. That is absolutely incompetent and I object to it for that reason.

THE PROSECUTOR: If the Court please, I now offer this paper in evidence and ask that it be marked as an exhibit.

MR. ROSEBERRY: I object to it.

MR. MORROW: May we two have the privilege of cross examining about this?

THE PROSECUTOR: I will ask it to be marked for identification.

MR. MORROW: I do not object to that.

(Paper referred to maked S-1 for identification.)

THE PROSECUTOR: You may cross-examine on it.

BY MR. MORROW.

Q. Was this paper ever in the hands of Mr. Snover?
A. I could not tell you.
Q. You do not know that, do you?
A. I do not know.
Q. Is his signature on this paper?
A. Mr. Snover's signature?
Q. Yes.
A. No, sir.

Q. His name is not even mentioned in this paper, is it?

A. I don't think so.

Q. It is nothing more than a memorandum kept in your office of the issuing of a policy of insurance, isn't it?

A. That is furnished to the company—I presume that copy went to the company. I do not know where the Prosecutor got it, but that is a duplicate that we issue in our office and it is sent to the company.

Q. Is there an original of this paper?

A. There is an original, the policy—

Q. No. Is there an original of this paper?

A. That is an original.

Q. An original of what?

A. Copy of the insurance.

Q. Well, it is not the original insurance, is it?

A. It is the original insurance that we forward to the company.

Q. This you don't give to the insured?

A. No, sir.

Q. And the insured has nothing to do with this paper?

A. No.

Q. And had nothing to do with making up this paper?

A. No, sir.

Q. Do you know whether it was ever seen by the insured?

A. I do not know as it was. I do not think so.

Q. And after you made this up you mailed it to your principals, the insurance company?

A. Yes, sir.

Q. And you have never seen it from that time until now?

A. No, sir.

MR. MORROW: I object to that paper going in evidence because neither the defendant, Mr. Snover, nor the defendants Crawn are proved to

have had any connection with the making of that paper.

THE PROSECUTOR: If the Court please, the evidence is that when the policy is issued this paper goes to the company and the original policy goes to the insured. I think it is proper to offer it now to show the record of insurance of this property.

THE COURT: It will be admitted.

MR. ROSEBERRY: I want to say one thing. The original policy is the contract between these parties, and in order to hold him you will have to show him on one end of the contract. In the case of Reid against the insurance company it was held that the mortgagee clause was an independent contract between the insured and the mortgagee. The policy itself is a contract between the parties, and what they have produced here is no contract between the parties whatever, and has nothing to do with the liability for the burning of this property by these defendants.

MR. MORROW: Snover, or Mrs. Willever, or whomsoever this policy was given to, could not recover a dollar on this paper.

MR. ROSEBERRY: They could not recover five cents.

THE COURT: We are not trying a civil action for the recovery of insurance. The paper has been admitted in evidence.

MR. ROSEBERRY: We pray an exception.

THE COURT: You may have an exception.

(Exception allowed and the same is sealed accordingly.)

Whereupon counsel for the defendant made exception to the said ruling, of the said judge, and

prayed that the said judge would set his hand and seal to this bill of exceptions; and it is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge

(Paper heretofore marked S-1 for identification is marked Exhibit S-1.) and is as follows:

National Liberty Insurance Company of America
Agency No. 283, Newton, N. J.

Loss No. 192749. Occurred March 14, 1922. Report Received, ...19... Amount of Loss .....
Daily Report: Policy No. 1331. No. Pol. Renewed, 1062. Additional Insurance (Specify Companies Amounts and Rates) $.....

What does this Company carry within 100 feet?

(State No. of Policy and Amount)..... Is the written wording of all the policies alike?..... Map, Vol.,.....Sheet No.....Block No.....Street No.....Class No..... Amount, $1800.00. Rate .75, 1 per cent. Premium, $14.25. PREMIUM, FOURTEEN and 25|100 DOLLARS. ASSURED, HARRIETTE WILEVER. TERM, THREE YEARS, from the 10th day of August, 1921, at noon, to the 10th day of August 1924, at noon, against Loss or Damage by FIRE.

Amount EIGHTEEN HUNDRED DOLLARS.

Exact Copy of Form on Policy.
As per printed form and clauses hereto attached:

GERMANIA FIRE INSURANCE COMPANY
Of New York

Dwelling, Household Furniture, Barn and Contents Form.

$1,100, On the two story frame building with slate roof, and its additions, adjoining and communicating,

occupied as a Dwelling House, including Foundations, Gas and Water Pipes and Connections, Gas Fixtures, and Electrical Equipments, Plumbing Works, Stationary Heating Apparatus, Door and Window Screens, Storm Doors and Windows, and all other permanent fixtures belonging thereto and while and only while contained therein, situate on the east side of Main Street, in Millbrook, Pahaquarry Township, Warren County, New Jersey. (Dwelling not occupied by more than two families.)

$400. On Household and Kitchen Furniture, useful and ornamental, Beds, Bedding, Linen, Carpets, Curtains, Rugs, Pianoforte and other Musical Instruments, Piano or Organ Stool and Cover, Sewing Machine, Famliy Wearing Apparel and material for same, Trunks, Umbrellas, Canes, Valises, Traveling Equipments, Plate, Plated Ware, China, Glass and Crockery Ware, Printed Books and Music, Paintings, Pictures, Engravings and their Frames, (at not exceeding cost), Furs, Fire Arms and Accoutrements, Fishing Tackle Bicycles, Tricycles, Skates, Stoves and Ranges, Bronzes, Statuary and other works of art, Mirrors, Watches and Jewelry in use, Fuel and Household Stores, all while and only while contained in the above described Dwelling and its additions.

$300. On the one story frame, shingle Building and its additions, including Foundations, occupied as a private Barn, situate on the above described premises.

$ Nil. On Vehicles, Robes, Horse and Carriage Equipments, Hay, Grain and Feed, Barn and Garden Tools, while contained in above described Barn.

$ Nil. On Horses.....in case of loss on one horse .....to be valued at over $.....while contained in the above described Barn.

Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises, but this shall not be held to include the constructing or reconstructing of the building or buildings, or additions, or enlargement of the premises.

N. Y. & N. J. Standard Lightning Clause

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

This slip being attached to Policy No. 1331 of the Germania Fire Insurance Co., of New York, and issured at its Newton, N. J. Agency forms part of said Policy.

Dated ..... 19...

Harris and Morris, Agents.

And also said Prosecutor to maintain the issue on his part offered the testimony of Isaac E. Wildrick, which questions were propounded to the said witness by the prosecution and defendant and the rulings of the Court made and exceptions taken and allowed in the following language.

ISAAC E. WILDRICK, sworn for the State.

DIRECT EXAMINATION by the Prosecutor.

Q. Did you ever hear Mr. Snover have a conversation, or hear any conversation with Mr. Snover, relative to the burning of this building?

A. Well, not particularly Mr. Snover; no sir.

Q. Or when he was present?

A. Not when he was present.

Q. Did he ever talk to you about this?

A. Once.

Q. When was that?

A. Well, it was about three months before the buildings burned.

Q. Where was that conversation held?
A. In the room by my mother.
Q. Was your mother there?
A. Yes sir.
Q. What was said at that time?
A. Well, they wanted to know what I would take to go over to Millbrook and burn the buildings, and I told them I would not do it, and Mr. Snover said, "I will give you the Sadie cow—" There was a cow there called Sadie, that I liked; and mother said, "Yes, and I will give you fifty dollars in the bargain," And I said, "No; I won't do it."
Q. That was in January, about?
A. I think so, yes; around there.

CROSS EXAMINATION by Mr. Roseberry.

Q. You had some difficulty, after the death of your mother, with Mr. Snover, the defendant, had you not?
A. Why, I started to have a case, Mr. Roseberry; yes.
Q. And you got hold of a note of about two thousand dollars, secured by a mortgage, that he had given to your mother, and put it in Judge Shipman's hands for collection, did you not?

THE PROSECUTOR: I object to that as irrelevant and immaterial; and it is not relevant to this case.

THE COURT: Objection sustained. We are not going to try any note cases.

MR. ROSEBERRY: We pray an exception.

THE COURT: Note an exception.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON (Seal.)
Judge.)

Q. Did you not, immediately after her death, take a note given by William C. Howell to her and sell it, as heir at law, to Andrew Yetter?

THE PROSECUTOR: I object to that as irrelevant and immaterial to the issue, and no foundation laid.

THE COURT: Objection sustained.

MR. ROSEBERRY: I am going to show animosity against the defendant.

THE COURT: How can you show animosity by selling of the note?

MR. ROSEBERRY: He had no right to sell it, and I want to show the method he pursued in doing it, in order to show his hostility; and I also have a right to do that, as affecting his credibility.

THE COURT: The objection is sustained.

MR. ROSEBERRY: I pray an exception.

THE COURT: You may have an exception.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

Q. Now, the will of Harriet Willever bears date about December 30, 1920, does it not?

A. Did you write a will for her?

THE PROSECUTOR: I object to that. The record will show. It is the best evidence and it is available in this court.

MR. ROSEBERRY: This is cross examination, affecting his credibility.

THE PROSECUTOR: I do not think this witness is competent to answer whether that will

was dated that date or another date. It was not his will, and I object to it as incompetent.

THE COURT: What is the question?

(Last question read.)

A. I don't know what date it is.

Q. The barn was burned on or about the fifteenth of March, 1922, was it not?

A. That is what they say. I wasn't there.

Q. And the house and grist mill on the twenty-third of March, 1922?

A. Yes, sir.

Q. The will was proved in the Surrogate's office September 1, 1922, was it not?

THE PROSECUTOR: I object to that question.

MR. ROSEBERRY: He took an appeal from it.

THE PROSECUTOR: It is incompetent.

MR. ROSEBERRY: It is to affect his credibility.

THE COURT: Objection sustained.

MR. ROSEBERRY: We ask an exception. I ask it for the purpose of affecting his credibility and showing his interest in this case, and animosity against Mr. Snover, the defendant.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

And also said Prosecutor to maintain the issue on his part offered the testimony of one George Kimble, Emmet Welter, Chester J. Kimble, Hannah S. Kimble and Frank S. Kimble as to show the situation of the building specified in the indictment, their occupancy and condition of

which questions were propounded to the said witnesses in the following language:

GEORGE KIMBLE, sworn for the State.

DIRECT EXAMINATION by the Prosecutor:

Q. What were the improvements on that property in the winter of 1922?

A. Improvements? I do not know as anything.

Q. Well, were there buildings? What buildings were there?

A. There was a grist mill, dwelling house and a barn.

Q. Had there been a sawmill there?

A. Yes, sir; there was.

Q. Whose sawmill was it?

A. I guess it belonged to Thomas L. Snover.

Q. When was that moved away?

A. I guess in the neighborhood of about two months before the fire.

Q. Was there a cider press at the mill?

A. Yes, sir; there was.

Q. Was the mill operated at the time?

A. No, it was not, because there was no pond.

Q. How long had it been since that mill was run as a mill?

A. Well, Snover ground a little feed in it I think around 1920 or 1921.

Q. Had anybody used the mill since that time?

A. Not as I know of.

Q. It was idle and vacant so far as you knew?

A. So far as I know.

Q. Where was the dwelling house with reference to the mill?

Al It was on the road leading across the mountain, just above the mill a little ways.

Q. How far away from the mill?

A. I think about two hundred feet.

Q. Where was the barn?

A. The barn stood in back of the mill.
Q. Did anyone live in the house?
A. No, sir; they did not.
Q. How long had it been since anyone lived in that house?
A. Well, I don't think—It was in 1921.
Q. Who lived there then?
A. Thomas L. Snover.
Q. Who lived there at that time with him?
A. Hattie Willever.
Q. Do you mean Harriet Willever?
A. I do not know whether her name was Harriet or Hattie.

EMMET WELTER, sworn for the State.

CROSS EXAMINATION by Mr. Roseberry:

Q. How long have you lived at George Kimble's?
A. I think about two years; somewhere around there. I can't tell you exactly the time, but I think so.
Q. Were those buildings occupied at the time of the fire?
A. I do not think so; no.
Q. Well, do you know whether they were or not?
A. The house and mill I don't think were occupied at all; no sir, I know they were not.

MR. MORROW: Mr. Kimble said they were not, Judge Roseberry. He was very explicit about it.

MR. ROSEBERRY: That is all.

CHESTER J. KIMBLE, sworn for the State.

DIRECT EXAMINATION, by the Prosecutor.

Q. Do you know the Harriet Willever property at Millbrook?
A. Yes, sir.

Q. Was that property used or occupied, or any part of it occupied before it was burned in 1922?

A. The barn.

Q. Who occupied the barn?

A. I did.

Q. What did you keep in the barn?

A. I had my horses in there, and some straw.

Q. Who leased that property to you?

A. Harriet Willever.

Q. Whom did you pay the money to?

A. Harriet Willever and Tom Snover.

Q. How many horses did you have there?

A. I didn't have none at the time the barn burned They were dead.

Q. When had they died?

A. About two months before the fire.

Q. Did you have any insurance on this barn?

A. Not a cent.

Q. Or any of its contents?

A. Not a thing.

CROSS EXAMINATION by Mr. Roseberry:

Q. At the time that you had any horses in there you had a lease on the barn, didn't you?

A. I didn't have no lease on the barn. I had it on the pasture.

Q. Didn't you have a lease on the house and barn and everything?

A. No, sir.

Q. On the mill, too?

A. No, sir.

Q. And didn't you look after the house?

A. No, sir. I did not look after the house.

Q. Weren't you engaged to visit the house once or twice a week?

A. No, sir; I had no keys to the house.

Q. Didn't you have keys to the house?

A. No, sir.

Q. How did you get into the house, then, the night of the fire?

A. The door was open the night of the fire.

Q. Didn't Mr. Snover have furniture in there, or did he not?

A. He had a bed in there and a chair or two and a stand.

Q. Didn't you or somebody have something in the mill?

A. Not the night of the fire; no sir.

Q. Well, just before the fire?

A. It was a year before the fire.

Q. You have considerable feeling against Mr. Snover, haven't you?

A. Not a thing.

HANNAH S. KIMBLE, sworn for the State.

CROSS EXAMINATION by Mr. Roseberry:

Q. You said that you had some difficulty with Hattie Willever about occupying the mill?

A. I never had any difficulty.

Q. What was it you had?

A. She came over there to my place in May, as near as I know it was the latter part of May, the year before the fire, probably.

Q. And found you were occupying the mill?

A. No; we wasn't occupying the mill, more than after we had leased the barn he came over there and said he was a little hard up for money—

Q. What did you pay rent for?

A. For the pasture and the barn.

Q. What did you have in the barn?

A. Our horses and some straw.

Q. And you kept the horses in there until they died?

A. Some of them died and some we had to kill.

Q. So they did die?

A. Sure they died.

Q. And did you leave your straw in there?

A. Yes; we had no place to put it.

Q. Was there straw in there at the time of the fire?

A. Yes.

Q. Was there much of it?

A. Well, we paid ten dollars for half of it and the rest was own. We farmed and got in on shares.

Q. And didn't you have some feed or something in the mill?

A. No.

Q. Who did have that feed in the mill?

A. We never had no feed in the mill.

Q. You were down to my office, weren't you, on the eve of the civil suit between Harriet Willever and the Insurance Company—weren't you?

A. Yes, sir.

Q. And didn't you tell me at that time that you had some stuff in the mill?

A. We had some wagons in there; yes.

Q. You had some wagons in the mill?

A. Yes, sir. Mr. Snover told us we could put them in there, and we had no place to put them.

Q. And that was just before the fire?

A. No. It was the year before.

Q. Well, the year before the fire?

A. Yes.

Q. How many wagons did you have there?

A. I do not know. I would have to count them up. Two or three—and some sleds.

Q. And that was in your lease too, wasn't it?

A. No. He just told us we could put them there if we wanted to.

Q. And you kept three or four wagons there?

A. We did not keep them there. I moved them out as soon as she came.

Q. And she did come over there?

A. Yes.

Q. And did she want you to pay rent for it?

A. No, sir; she said nothing about no rent.

Q. Didn't Tom tell you she wanted rent?

A. No, sir.

Q. Then they told you to move out?

A. Roscoe came and notified us to move them out for fear—

Q. Never mind. Just answer the question.

A. You don't want me to tell the truth, do you?

THE COURT: Just answer the questions.

Q. Then you moved them out?

A. Yes, sir.

Q. Did you have the key to the house?

A. No, sir. I found the key and locked the door once, when we found it unlocked. I found the key by the barn door where it had been lost when he was over there once and had his horses in the stable.

Q. And you locked it?

A. Yes.

Q. And you looked after it once or twice a week?

A. I always looked at it when I went by.

Q. You looked to see that the doors and windows were closed?

A. I never went right up to them. After he moved his sawmill away everything was left open.

Q. After he moved the sawmill away there was furniture in there?

A. There was a bedstead in there and a cupboard and an old chair or two, I guess.

Q. And some other stuff in there, too?

A. A stand.

Q. He went across and stayed there sometimes, didn't he?

A. He came there and ate his dinner once in a while.

Q. And he had a cooking stove in there?

A. Yes, sir; an old thing.

Q. And they had water?

A. Why, there was water there in the spring. It runs there yet.

Q. A brook runs right by it?

A. Right at the end of the house.

Q. And I suppose they had an old table to eat off of too?

A. They did for a while and they moved that away.

Q. How many chairs did they have?

A. Two or three. They kept moving them away, little by little.

Q. Didn't you have your harness in the barn?

A. There was a few pieces left there, yet, but none to amount to anything.

Q. There was a few pieces there at the time of the fire?

A. Yes; just a few pieces. None that we counted as any good at all.

Q. You left the harness in the barn.

A. No, we—

Q. Where did you leave your plows?

A. At our own place.

Q. Where is your harrows?

A. Harrows?

Q. Yes. You know what a harrow is.

A. Down at our own place, outdoors.

Q. At that time did you keep them in the barn?

A. No.

Q. Did you keep your cows there?

A. No.

Q. This fire was in March, wasn't it?

A. Yes, sir.

Q. You said that Hattie was over there?

A. Yes, sir.

Q. That was Harriet Willever?

A. Yes, sir. I know who you mean.

Q. And she said something about cows?

A. Yes, sir.

Q. Where did she have any cows?

A. At Tom Snover's, she claimed. They were Tom's cows.

Q. Where did she have any furniture?

A. I don't know who the furniture belonged to,

whether it was hers or hisn. They had it in both houses.

RE-CROSS EXAMINATION by Mr. Roseberry:

Q. The night before this fire didn't you go down or didn't some of your family go down and take a two-horse wagon out of the building, the barn or the mill?

A. The night before the fire?

Q. Did you? Roscoe was there on Sunday, you know—and Palmer.

A. Yes.

Q. Then didn't you go down after that and take a two-horse wagon out of the building?

A. No; we never had no wagons in that barn. It stood behind the barn and they run it out of the way.

Q. That you took out?

A. No, it stood there until after it burned.

Q. You moved it out of the building beyond any fire?

A. Well, it stood right betwixt the two fires.

Q. And you moved it away out of the building where it was?

A. It wasn't in no building.

Q. Well, alongside of the building.

A. Yes; a little ways off. You will have to ask him.

Q. Ask who?

A. I told him to.

THE PROSECUTOR: I object, if this witness did not do it.

THE WITNESS: I didn't. I told my son about it.

Q. Then you went and moved it?

A. No, sir; I didn't. I told my son it would be better, but I don't know whether he did or not.

Q. Was that done on Sunday or Monday?

A. Well, I could not tell you, but I told him to do it. It was after Palmer went away I told him to do it, but whether he did or not I couldn't tell you.

Q. Which boy was it?
A. My son. I have only got one. Chester.
Q. You told him to move it out?
A. I told him to move it away from there. There was no telling what they might do by their being there and Palmer telling—

THE COURT: That is all. You have answered the question.

FRANK S. KIMBLE, sworn for the State.

DIRECT EXAMINATION by the Prosecutor:

Q. Did both of these buildings burn to the ground?
A. Yes, sir; both of them.
Q. The mill or the house was not occupied previous to that?
A. No, sir.
Q. How long had they been vacant?
A. Well, the last it was occupied Mr. Snover occupied it himself.
Q. How long before the fire?
A. Well, a year or a year and a half or two years.

CROSS EXAMINATION by Mr. Morrow:

Q. Now, you knew the fire was going to take place that morning, didn't you?
A. No, sir; I did not.
Q. Didn't you go down and get a big wagon out of there before this fire?
A. No, sir.
Q. Who did?
A. My son moved it if anybody moved it.
Q. How do you know?
A. I believe my wife told him he ought to move it.
Q. Why ought he to move it?
A. George Palmer come there and said it was going to burn and burn quick. I am telling you short. I ain't telling it just as he told it; but I will tell you just as he told it if you want me to tell you.

Q. Then your son went and got the wagon out?
A. Who?
Q. Your son.
A. Yes sir. He didn't have it out of the barn; it was on the outside.

BY THE COURT:

Q. Did you see him get it out?
A. No, sir. I don't know whether he got it out. Anyhow, it was run out.

BY MR. MORROW:

Q. Did you see it after it was brought out?
A. Yes.
Q. When did you see it?
A. I seen it that night when the barn burned.
Q. When had you last seen it before that?
A. The day before.
Q. Where was it the day before when you saw it?
A. It stood right alongside the outside of the barn, by the window.
Q. Where was it when you saw it the morning after the fire?
A. Out in the patch.
Q. Then it had been moved?
A. Yes.

CROSS EXAMINATION by Mr. Roseberry:

Q. Where had this wagon been before it was moved from the outside of the barn?

THE COURT: That has been pretty well gone over, has it not?

MR. ROSEBERRY: No. Before that time.
Q. Where had the wagon been before—
A. The wagon stood there right by the barn the day before. We were hauling manure on it.
Q. Where were you hauling the manure?

A. Out of that barn where we had our horses in there.

Q. Where had the wagon been kept?

A. Standing out in the "big wagon house" outdoors.

Q. How long had you been hauling manure from the barn yard?

A. Hauled there half a day and then come a storm.

Q. When did you haul again?

A. We didn't haul again at all because the barn burned down and the manure was all burnt up.

Q. It was your manure?

A. Yes.

Q. Then you were in possession of the barn, weren't you?

A. We rented the barn and the pasture. We had the privilege of letting the horses go in the barn.

Q. Where were the horses—What had you done with the horses when you were hauling the manure?

A. We had them in Mr. Garris' barn at that time.

Q. Now, you had some wagons there, didn't you?

A. No, sir; not when the fire was. We moved the wagons all away a year ago.

Q. You had some feed or something or other in the mill, didn't you?

A. Feed in the mill?

Q. Yes.

A. There was no water there to grind or nothing.

Q. You had feed stored in the mill?

A. No, sir.

Q. Didn't you have something stored in the mill?

A. No, sir; not at the time the fire was. The year before we had a wagon in there, one year before the fire took place.

Q. You looked after the house, did you not?

A. No, sir; no more than when I went by it I looked toward it to see how it was getting along.

Q. And you did that every time you went by?

A. I went by every day, pretty near, to the fields.

Q. Mrs. Willever wanted you to kind of look after the house, didn't she?

A. Of course she did; yes.

Q. You and your son Chester and your wife, whenever you went down to the barn or went down after the cows, you looked around the buildings to see that everything was—

A. No, sir; I did not get over the fence and look around it.

Q. You looked around the buildings to see that everything was all right, as you went by?

A. Yes.

Q. And if anything had occurred to it you would have notified Mrs. Willever?

A. Yes, sir.

Request of Court to Charge Jury

MR. MORROW: I wish to move the Court to direct a verdict of acquittal in this case on the grounds which I shall specify so that the record may be complete. The stenographer will kindly take down what I have to say.

The first count in this indictment charges the defendants with firing and burning a certain barn belonging to Harriet Willever.

The second count charges the same defendants with setting fire to and burning a dwelling house, a certain dwelling house belonging to Harriet Willever.

The third count charges the setting fire to and burning of a certain barn which was at the time insured by the National Liberty Insurance Company of New York, a corporation, against loss and damage by fire, with intent to prejudice the said National Liberty Insurance Company of New York.

As to the first count it is alleged the property burned was that of Harriet Willever. And also the second count alleges that the dwelling house was the property of Harriet Willever.

Now, the dwelling house is clearly proven to have been not a dwelling house. No one had lived there for a period of one or two years.

Under decisions of our court it is necessary to prove, in order to sustain an indictment for the burning of a dwelling house, that it was at the time of the fire what the statute calls it, a dwelling house, a place where people reside. The Court

of Errors and Appeals, in a case decided a good many years ago, Sonneborn against the insurance company, said it must be a place where human beings habitually reside. That makes it a dwelling house.

The barn and grist mill were the property of of Harriet Willever. The evidence shows that whatever burning was done was done by the procurement of Harriet Willever, either alone or in conjunction with one of the defendants, Mr. Snover, but it was her procurement without any question whatever. It is not necessary to say it was her sole procurement, but it was by her procurement.

Now, the law is very careful to use the words "property of another;" that is, the property of some other person than the defendants. No man may be convicted in this state for burning his own property, upon that charge alone. He may burn his own dwelling house, if he chooses to when he is not there or his family is not there. He may burn his barn or grist mill or anything else that he pleases, without making himself liable to the criminal law. He may do that himself and he may procure others to do it for himself—just as much as though Harriet Willever had been herself at the mill and the barn and herself applied the match to the building, causing the fire. She may do it herself or as she pleases. But it is her act, and I submit the defendants cannot be convicted of burning a building that was done by and with the procurement and assent of the owner. They cannot be convicted of burning the dwelling house, because there is not the least proof that there was a dwelling house there. There was a barn and mill there, and they, like the building called the dwelling house, were the property of Harriet Willever.

Now, the next count in the indictment charges

the defendants with burning certain property with intent to prejudice an insurance company which, it is alleged in the indictment, had a written insurance on the building.

In a very celebrated case in New Jersey some years ago, where the defendants were defended by the present Vice Chancellor Backes—and everybody knows he would do all he could—the indictment in that case set forth that the property was insured by companies, naming them. Now, naming them is not all that is required. It must be proved that there was insurance effected on the burned buildings by the company named. There is no such proof as that here in this case. It is true that there is a statement made by the agent which he sent to his home office, but neither the defendants or Harriet Willever ever saw that statement, and it is no more in effect than as if the agent, Mr. Harris, had come here himself and sworn that he had written a policy of insurance. That does not prove the making of the policy of insurance. In the Brand case, in Trenton, every policy was produced on the stand and proved it was executed.

I submit there is no case made by the State against the defendants, on those grounds.

Judge Roseberry has a case here as to the dwelling house, which covers the ground precisely.

MR. ROSEBERRY: I wish to emphasize what Judge Morrow says, and I also cite from the case of the State vs. Lentz, 92 New Jersey Law, June Term, 1918.

Upon the first two counts of the indictment—The one hundred and twenty-third section of the act declares that "Any person who shall wilfully or maliciously burn, or cause to be burned, or aid, counsel, procure or consent to the burning

of any dwelling house, or any kitchen, shop, barn, stable, or other outhouse, that is a parcel thereof, or belonging or adjoining thereto, or any other building by means whereof a dwelling house shall be burnt, shall be guilty of arson."

"The one hundred and twenty-third section of the act declares that any person who shall wilfully or maliciously burn or cause to be burned the dwelling-house 'of another' shall be guilty of arson. The one hundred and twenty-fifth section provides that any person who shall wilfully or maliciously set fire to any of the buildings 'of another' which are designated in the one hundred and twenty-third and one hundred and twenty-fourth sections of the act, with intent to burn the same, shall be guilty of a misdemeanor. These three sections appear in the revision of the Crimes act of 1846 (R.S., p. 265) and have remained in the statute ever since, practically unaltered. In 1859 the Supreme Court had before it a case which presented the exact question now under discussion. State vs. Fish, 27 N. J. L., 323. The indictment in that case charged the defendant with burning the barn of John Dunn, not a parcel of a dwelling house. The proofs showed that the title to the building was in Dunn, but that the defendant was in the exclusive possession of it. The court held that the crime of arson does not depend upon the question of title, but of possession; that is to say, it is a crime committed against the person in the actual and immediate possession of the dwelling house, without regard to ownership thereof; and that therefore a person who sets fire to a dwelling house of which he himself is the occupant, is not guilty of burning the dwelling-house 'of another' within the meaning of section 30 (now section 123) of the Crimes act. The court then pointed out that the third of these sections, which made punishable an attempt to

burn the dwelling house of another (as well as must also be construed as referring to the possession rather than to the ownership of the building; and considered that as the three sections were substantially parts of one and the same enactment, the words 'of another' contained in the present one hundred and twenty-fourth section must be given the same meaning as that attributed to them in the other sections, that is, they must be held to refer to the possession rather than to the ownership of the building. Having reached this conclusion the court suggested that the omission from the statute of any provision punishing a person for willfully and maliciously burning a building of which he was in possession, but the ownership of which was in another, presented a situation which apparently called for action by the legislature."

So that, in considering those three sections, it says it is a crime committed against the person in the actual and immediate possession of the buildings, for the burning of which these two first counts of the indictment are laid. There is no proof of anybody being in the actual and immediate possession of the dwelling, mill and barn. For that reason the defendants are entitled to a verdict of acquittal.

Upon the third count, the underwriter of a policy of insurance by the policy makes a contract with the insured that in case of loss or damage by fire that he will pay the amount of the insurance. It has been held to be a contract in New Jersey in every case that has been before the court, and it rests upon the same basis of any other contract under seal; and it was also held, in the case of Reid against two fire insurance companies of Newark, that the general mortgagee clause is an independent contract with the insured, that in case of loss or damage by fire that they will pay

the insured. Now, all the testimony that has been brought here in this case is a copy of something that was sent to an agent of the company in New York City. The policy of insurance has not been proved. It has not been produced. There was no notice given for the production of it, and no evidence has been submitted to this court showing that there was a contract of insurance between the National Liberty Insurance Company, which that third count says was the underwriter, and Harriet Willever.

As Judge Morrow says, if Harriet Willever procured these parties to do this, if it was done by her procurement, by her advice, by her counsel, then the indictment should be framed upon that section of the statute, because in the case of Brand, before the Supreme Court, Justice Swayze held that there were two distinct offenses under this act. One was for the burning or causing to be burned. The other was for procuring, counseling, aiding and abetting in the burning—and that the latter was absolutely distinct from the former. It is only alleged that he burned or caused to be burned. There is no proof that these persons burned or caused to be burned; and as far as this building was concerened, it was held by the common law that a man had the right —he had absolute dominion over his property; he could do with it as he pleased; he could destroy it if he chose to do so; but he did not do so.

THE COURT: How about the 1919 amendment to the Crimes act? What have you to say about that?

MR. ROSEBERRY: What is the 1919 amendment of the Crimes act?

THE PROSECUTOR: Right here (indicating).

MR. ROSEBERRY: Well, I will look at this.

THE COURT: I agree thoroughly with your statement that arson at common law and under our statute down to 1919 could not be shown unless it was the property of another.

MR. ROSEBERRY: May it please your honor, in my opinion this act has no effect on this case. This says, "Any person who shall wilfully or maliciously burn or cause to be burned—" Now, where is there anything in this case to show that these defendants—that if Mrs. Willever procure them to burn this, where is the wilfullness or the maliciousness on their part, either in burning or causing to be burned the buildings? There has got to be a wilfullness, a determination to destroy, and to do it with an evil mind.

MR. MORROW: Is the word "malicious" used there?

MR. ROSEBERRY: Yes.

MR. MORROW: That is malice against the owner of the property.

THE COURT: I would like to hear argument on the question as to the change made in the 1919 amendment, where it states, "by means whereof a dwelling house shall be burned, whether it be his own or that of another." That materially changes the Crimes act.

MR. ROSEBERRY: It does not change it a particle as to possession. That decision of 1918, in the case of State vs. Lentz—

THE COURT: That decision was handed down before this amendment.

MR. ROSEBERRY: That may be, but still it held that it was not the title, but it must be the

actual posession and immediate possession. Now, under those two sections of this 1919 act there was no actual possession or immediate possession. It does not change the law with reference to that decision in State vs. Lentz. It does not refer to title; it refers to the actual and immediate possession of the person in occupation of the building, whether it be that person or another. Now, there was not anybody in possession of this building at all.

(After argument)

MR. MORROW: If your honor please, the act of 1919 reads, "Any person who shall wilfully or maliciously burn or cause to be burned, or aid, counsel, procure or consent to the burning of any dwelling house, whether it be his own, or that of another—" Now there are two elements in that act. One is wilfully doing it and maliciously doing it, but if the same person does it with the consent of the owner he commits no crime. That has not changed the common law rule, because it has left in it these two words, "Wilfully" and "Maliciously", and no man can say "I wilfully burned down my neighbor's barn," if he tells him to do it. There is no act contrary to the interests of the owner. This statute proceeds, "or any kitchen, shop, barn, stable, or other outhouse, a parcel thereof or adjoining thereto," and so forth, "shall be burnt." That is the thing that is necessary to be done to constitute the crime under this law—some act which shall result in the burning of a dwelling house. And this house was not a dwelling house. It was entirely foreign to a dwelling house.

In the case of State vs. Brand, to which I referred, I think that the statute denounced two distinct crimes, one, the wilfully or maliciously setting fire to and burning of insured property with

intent to prejudice the underwriter; the other the aiding, counseling, and so forth. The counseling of such an act may well be a crime, whether the act is wilfully done or not.

I submit that under the law of New Jersey the defendants cannot be convicted. I submit they should be acquitted on all the counts of this indictment, for the reasons I have given.

THE COURT: The motions for the direction of a verdict of acquittal will be denied by the Court.

MR. MORROW: I pray an exception to the denial of the motion.

MR. ROSEBERRY: I pray an exception.

THE COURT: You may take exceptions.

(Exceptions allowed, and the same are sealed accordingly.)

Whereupon counsel for the defendant made exception to the said ruling of said judge and prayed that said judge would set his hand and seal to this exception, and it is sealed accordingly.

HARRY RUNYON, (Seal)
Judge.

Counsel for defendant, Thomas L. Snover requested the Court to charge as follows:

1. What is set out in the first and second counts of the indictment charges the defendant with burning the barn, mill and dwelling house of Harriet Willever. It does not appear by the testimony that anyone was in the actual and immediate possession of either the mill, barn or dwelling house mentioned in those two counts at the time of the burning of either of them, or that it was the property of Harriet Willever. Therefore the defendants cannot be convicted under either of said

counts which requires the offense to be against the person in the actual and immediate possession of the buildings, or the property of Harriet Willever.

2. If Harriet Willever set fire to or caused to be burned said three buildings in the first two counts of the indictment these defendants would not be guilty of wilfully or maliciously setting fire to or burning the buildings of Harriet Willever under the 123, 124 and 125 sections of the Crimes Act and amendments to the 123 and 124 sections, under the first two counts of the indictment, even though one or all co-operated with her in the burning.

3. Under the third count of the indictment no contract of insurance or legal evidence of a contract of insurance has been shown by the State by which an intent to prejudice the National Liberty Insurance Company of New York on any policy of insurance underwritten by it on the barn mentioned in the third count of the indictment.

4. It has not been shown by the State that the National Liberty Insurance Company of New York had an insurance upon the barn in the third count at the time of its burning, or

5. That is had been occupied as a barn up to within ten days of the fire, or

6. If it was vacant for more than ten days that such vacancy existed by permission of the said insurance company.

7. That the barn had been vacant or unoccupied for barn purposes for several months before the fire as appears by the evidence.

8. The defendant Snover cannot be convicted under any of the three counts of the indictment for aiding, counseling, procuring or consenting to the setting fire to or burning of such property or of such insured property as alleged.

9. The counts of the indictment charges the wilfull and malicious setting fire to and burning the buildings mentioned in each count. There is no evidence to show

that the defendant Snover did wilfully or maliciously set fire to and burn such buildings or any of them.

10. There is nothing to show that the defendant Snover acted wilfully or maliciously to defraud the National Liberty Insurance Company of New York.

11. To convict Snover, the defendant, he must be proved to be guilty of setting fire to and burning the buildings beyond a reasonable doubt.

12. Defendant Snover is innocent in the law unless proved guilty of setting fire to and burning beyond a reasonable doubt wilfully and maliciously.

I have been requested by counsel for the defendant, Thomas L. Snover to charge certain requests.

No. One I refuse to charge.

Number Two I refuse to charge.

Number Three I refuse to charge.

Number Four I refuse to charge.

Number Five I refuse to charge.

Number Six I refuse to charge.

Numbers Seven and Eight I refuse to charge.

"9. The counts of the indictment charge the wilful and malicious setting fire to and burning the buildings mentioned in each count. There is no evidence to show that the defendant Snover did wilfully or maliciously set fire to and burn such buildings or any of them."

I charge you that with this modification, as I have already charged you, I believe, that it was not necessary that the defendant Snover actually set fire to and burn these buildings or any of them; that if he aided, counseled or procured someone else to do it, then he is to be found guilty, if you so determine under the evidence.

Number Ten I refuse to charge.

"11. To convict Snover, the defendant, he must be proved to be guilty of setting fire to and burning the buildings beyond a reasonable doubt."

I charge you that, with the modifications I have already stated on Request Number Nine.

"12. Defendant Snover is innocent in the law unless

proved guilty of setting fire to and burning beyond a reasonable doubt wilfully and maliciously."

I charge you that with the modification as to aiding, counseling and procuring, as I have already stated in the previous request.

(The jury retired.)

MR. ROSEBERRY: I pray an exception to the Court's refusal to charge the items requested to be charged, the several items.

THE COURT: Yes.

(Exception allowed and same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

MR. ROSEBERRY: And as stated by the Court.

THE COURT: Yes.

Exception allowed and the same is sealed accordingly.)

HARRY RUNYON, (Seal)
Judge.)

MR. ROSEBERRY: I also except to that part of the Court's charge as to the ninth item; that it was not necessary to fire or cause to be fired, if he aided, counseled or procured someone else to do it then he is guilty as charged in the counts of the indictment. I pray an exception to that.

THE COURT: Exception allowed.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

MR. ROSEBERRY: I think that covers all the exceptions—that you refused to charge the

ninth request and charged it the way you did charge it.

MR. MORROW: I desire to take a general exception to the charge of the Court.

THE COURT: Yes.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

MR. MORROW: I also desire to except to the failure of the Court to charge as requested in the several requests that were charged.

THE COURT: One, Two and Three.

MR. MORROW: Is that all? I did not notice.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

MR. ROSEBERRY: I want to ask a general exception to the whole charge of the Court.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

(The jury subsequently returned into Court,)

THE COURT: Ladies and gentlemen of the Jury. I am informed that you have a request of some sort to make to the Court. Is that it?

THE FOREMAN: Yes, sir.

THE COURT: State it.

THE FOREMAN: Some of the jurors are not thoroughly enlightened on the statutes in the books, on the ones they can be held liable in the charge.

THE COURT: I do not understand just what you mean.

THE FOREMAN: When you charged the jury you read out of the statute books, and we are not thoroughly enlightened on that.

THE COURT: In what respect?

THE FOREMAN: Well, for instance if one or all can be held.

THE COURT: Under the charge—

THE FOREMAN: Well, for instance if a man does not necessarily have to do anything, he can be held instrumental in the case, and referring to that in the statute books. You read out of the books there and charged us with that.

THE COURT: Do you mean my reading of the statute?

THE FOREMAN: Yes, sir.

THE COURT: You do not thoroughly understand it?

THE FOREMAN: I do myself, but some of the rest don't understand that.

THE COURT: Is it with relation as to whether one or all of the defendants may be guilty or convicted?

THE FOREMAN: Whether a man had to do the act himself or whether he could be instrumental in doing it.

THE COURT: My recollection is that I have covered that point. If any of the jury are not

clear on that I now say to you that under the statute defining these crimes, under which this indictment is laid, that it is not necessary, if you believe under the evidence beyond a reasonable doubt, if any one of these defendants aided or consented to the commission of this offense that is laid in the indictment, if you are satisfied beyond a reasonable doubt of that, they may be found guilty, even though they were not present at the time the torch was set to the building or the match applied. In other words, that all who aided or consented to the commission of the act itself, even though they were not present, if you believe under the evidence beyond a reasonable doubt and are satisfied as to that, you may find them guilty.

Does that enlighten your minds on that point?

THE FOREMAN: Yes; that seems to be the trouble.

THE COURT: Is there anything further?

THE FOREMAN: We have not examined anything further yet.

THE COURT: I am not speaking as to that. I mean any other requests you have to make.

THE FOREMAN: That is all I know of.

THE COURT: You may retire.

(The jury again retired.)

MR. ROSEBERRY: I want to except to the additional charge of the Court, declaring that anyone who aided or abetted or consented to the firing of the building or buildings, beyond a reasonable doubt, is guilty.

THE COURT: You mean you except to the charge as given to the jury, not as you have stated it, but as it may appear.

MR. ROSEBERRY: As it may appear; yes.

THE COURT: Exception allowed.

(Exception allowed and the same is sealed accordingly.

HARRY RUNYON, (Seal.)
Judge.)

Assignment of Errors

NEW JERSEY SUPREME COURT

The State Defendant in Error. vs. Thomas L. Snover Plaintiff in Error	In Error.

Afterwards, to wit, on the twenty-first day of July, nineteen hundred and twenty-three, before our said Supreme Court of the State of New Jersey, comes the said Thomas L. Snover, by J. M. Roseberry & Son, his attorneys, and say, that the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions, and also in giving the judgment aforesaid there is manifest error in this to wit:

1. That the said Court, before whom, &c, and upon

the trial of the said issued so joined between the State of New Jersey and said Thomas L. Snover, permitted a witness, George N. Harris, on the part of the State, to be asked the following question: Q. "What does your record show as to the insurance on the barn?"

2. There is also error in this, that the said Court, before whom &c., admitted in evidence a paper writing made out by Harris & Morris, agents, without the knowledge of the defendant, and sent into the National Liberty Insurance Company of American, which was not the policy or contract of insurance between said insurance company and Harriet Willever, and no proper foundation was laid for the admission of such testimony, which paper writing was marked Exhibit S-1 on the part of State.

3. There is also error in this, that the said Court before whom, &c., overruled a question put by defendant to Isaac E. Wildrick in cross examination to show his hostility to defendant and to effect his credibility as follows: "Q. And you got hold of a note of two thousand dollars secured by a mortgage, that he had given to your mother and put it in Judge Shipman's hands for collection, did you not?"

4. There is also error in this, that the said Court, before whom, &c., overruled a question put by the defendant to Isaac E. Wildrick, in cross examination, to show his animosity toward defendant and as affecting his credibility, as follows: "Q. Did you not immediately after her death, take a note given by William C. Howell to her and sell it, as heir at law, to Andrew Yetter?"

5. There is also error in this, that the said Court, before whom, &c., overruled a question put by defendant to Isaac E. Wildrick, in cross examination, to show his interest in this case and animosity toward the defendant, as affecting his credibility, as follows: "Q. The will was proved in the Surrogate's office September 1, 1921, was it not?"

6. There is also error in this, that the said Court, before whom &c., overruled a motion on the part of the

defendant, to direct a verdict of acquittal of defendant, at the close of the evidence on the part of the State.

7. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that "What is set out in the first and second counts of the indictment charges the defendant with burning the barn, mill and dwelling house of Harriet Willever. It does not appear by the testimony that anyone was in the actual and immediate possession of either the mill, barn or dwelling house mentioned in those two counts at the time of the burning of either of them, or that it was the property of Harriet Willever. Therefore the defendants cannot be convicted under either of said counts which requires the offense to be against the person in the actual and immediate possession of the buildings or the property of Harriet Willever."

8. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that "If Harriet Willever set fire to or caused to be burned said three buildings in the first two counts of the indictment those defendants would not be guilty of wilfully or maliciously settting fire to or burning the buildings of Harriet Willever under the 123, 124 and 125 sections of the Crimes Act and amendments to the 123 and 124 sections, under the first two counts of the indictment even though one or all cooperated with her in the burning."

9. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that under the third count of the indictment no contract of insurance, or legal evidence of a contract of insurance, had been shown by the State by which an intent to prejudice the National Liberty Insurance Company of New York on any policy of insurance underwritten by it on the barn mentioned in the third count of the indictment."

10. There is error also in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that "It has not been shown by

the State that the National Liberty Insurance Company of New York had an insurance upon the barn in the third count at the time of its burning, or

11. "That it had been occupied as a barn up to within ten days of the fire."

12. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge, "That the barn had been vacant or unoccupied for barn purposes for several months before the fire as appears by the evidence."

13. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that, "The defendant Snover cannot be convicted under any of the three counts of the indictment for aiding, counselling, procuring or consenting to the setting fire to or burning of such property or of such insured property as alleged."

14. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that the Counts of the indictment charges the wilful and malicious burning of the buildings mentioned in each count. There is no evidence to show that defendant, Snover, did wilfully or maliciously set fire to and burn such buildings, or any of them," but charged as follows:

"I charge you that with this modification, as I have already charged you I believe, that it was not necessary that the defendant, Snover, actually set fire to and burn these buildings or any of them; that if he aided, counselled or procured some one else to do it, then he is to be found guilty, if you so determine under the evidence."

15. There is also error in this, that the said Court, before whom, &c., refused to charge the jury defendant's request to charge that "There is nothing to show that the defendant Snover acted wilfully or maliciously to defraud the National Liberty Insurance Company of New York."

16. There is also error in this, that the said Court, before whom, &c., refused to charge defendant's request

to charge that "To convict Snover, the defendant, he must be guilty of setting fire to and burning the buildings beyond a reasonable doubt." Except as the Court charged as follows: "I charge you that with the modification I have already stated on request number nine."

17. There is also error in this, that the said Court, before whom, &c., refused to charge defendant's request to charge that, "Defendant Snover is innocent in the law unless proved guilty of setting fire to and burning beyoud a reasonable doubt wilfully and maliciously." Instead, he charged such request as follows: "I charge you that with the modification as to aiding, counselling and procuring as I have already stated in the previous request.

18. There is error also in this, that the said Court, before whom, &c., charged the jury upon their coming into Court for instruction, in answer to the question of the foreman, "Whether a man had to do the act himself or whether he could be instrumental in doing it." To which request, the said Court charged the jury as follows: "My recollection is that I have covered that point. If any of the jury are not clear on that, I now say to you that under the Statute defining these crimes, under which this indictment is laid, that it is not necessary, if you believe under the evidence beyond a reasonable doubt, if any one of these defendants aided or consented to the commission of this offense that is laid in the indictment, if you are satisfied beyond a reasonable doubt of that they may be found guilty even though they were not present at the time the torch was set to the building or the match applied. In other words, that all who aided, or consented to the commission of the act itself, even though they were not present, if you believe under the evidence beyond a reasonable doubt, and are satisfied as to that you may find them guilty."

J. M. ROSEBERRY & SON,

Attorneys of Plaintiff in Error.

Joinder in Error

NEW JERSEY SUPREME COURT

The State
Defendant in
Error.

vs.

Thomas L. Snover
Plaintiff in Error.

In Error.

An thereupon, afterwards, to wit, on the twenty-second day of August, nineteen hundred and twenty-three, the said State of New Jersey, by Sylvester C. Smith, Jr., prosecutor of the pleas of the County of Warren, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas.

Dated, August 22nd, 1923.

New Jersey Court of Errors and Appeals

THE STATE, DEFENDANT IN ERROR, v. THOMAS L. SNOVER, PLAINTIFF IN ERROR.	ON WRIT OF ERROR TO SUPREME COURT.

BRIEF OF STATE, DEFENDANT IN ERROR

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas for the State.

STATEMENT OF FACTS

The writ of error in this case brings up the judgment of the Supreme Court affirming a judgment of conviction for burning a barn and grist mill, entered in Warren Quarter Sessions.

The plaintiff in error, and three other defendants, were found guilty on June 23, 1923, in the Warren Quarter Sessions upon an indictment containing three counts (p. 10). The first count charged Snover, the plaintiff in error, and three others, with wilfully and maliciously setting fire to and burning a certain barn, not a parcel of a dwelling house, and a grist mill, the property of one Harriet Willever. The second count charged the same defendants with burning a dwelling house; and the third count charged burning a barn with intent to defraud an insurance company. The time of committing these offenses alleged in each count of the indictment was March 15, 1923. (pp. 4, 5.)

On June 29, 1923, the court sentenced the plaintiff in error on the first count of the indictment to pay a fine of $500, and costs of prosecution in this case, and to stand committed to State's Prison at Trenton, for a minimum term of not less than one year nor more than seven years; and to further stand committed until fine and costs were paid; the sentence on the other two counts was suspended; (p. 10, 11).

On writ of error to the Warren Quarter Sessions under Section 135 of Criminal Procedure Act on strict bill of exceptions, the Supreme Court affirmed the judgment of the Warren Quarter Sessions.

POINT I

The State contends that the only judgment under review is the judgment on conviction of the first count of the indictment; i. e., the burning of the barn, not a parcel of a dwelling house, and grist mill of Harriet Willever.

On this count alone has judgment been pronounced. (pp. 10, 11).

A writ of error will not lie in a criminal case until sentence has been pronounced. *State v. Matarazza, 93 N. J. L. 47 affnd. 94 N. J. L. 263.*

A suspended sentence (as in the second and third counts of the indictment) is not a final determination of the case and a writ of error will not lie to review the conviction until sentence is pronounced.

State v. Bongiorno 96 N. J. L. 318.

The statutes provide:

"That a writ of error shall not be granted or issued in any case until final judgment be rendered." *2 Comp. 2207.*

Since sentence on the second and third count of the indictment was suspended there is no judgment of the court on these charges in the indictment, and the State insists that the only error must relate to the judgment pronounced in the first count of the indictment charging wilful and malicious burning of buildings, contrary to Section 124 of the Crimes Act.

POINT II
FIRST ASSIGNMENT OF ERROR

THE STATE CONTENDS THAT THIS ASSIGNMENT DOES NOT SET FORTH WITH SUFFICIENT PARTICULARITY THE GROUNDS OF ERROR RELIED UPON TO APPRAISE THE COURT AND COUNSEL FOR THE STATE THE GROUNDS RE-

LIED UPON FOR REVERSAL; AND MOVES THAT THIS ASSIGNMENT OR ERROR BE STRICKEN OUT.

Donnelly v. State 26 N. J. L. 463; State v. Hendrickson 95 N. J. L. 10, 13; Valenti v. Blessington 96 N. J. L. 498, 499.

POINT III
SECOND ASSIGNMENT OF ERROR

The admission of the record of insurance sent to the company by the agent, and a duplicate of the policy, was not error and not prejudicial or injurious to the defendant.

In the count on which judgment has been rendered, the burning of buildings, in violation of Section 124 of the Crimes Act; the fact of insurance is merely important on the question of motive, and secondary evidence is admissable to prove insurance. *5 C. J. 578; People v. Goldsworthy, 130 Cal. 600, 62 p. 1074; State v. Cohen, 9 Nev. 179, 188.*

In State v. Brand, 76 N. J. L. 268:

Mr. Justice Swayze speaking for this court discussing objection to evidence of suits against various insurance companies, said:

> "We think the evidence was relevant for the purpose of proving the allegation of the indictment that the property was insured by the underwriters named, and that the burning thereof would prejudice the underwriters."

Notice to produce to a defendant in a criminal case is nugatory, because the defendant need do nothing to convict himself. A denial by him, or a delivery of the policy would be something which the state could not constitutionally compel him to make or do—*Underhill on Criminal Evidence, 294, and cases cited. In Seymour v. State, 66 Fla. 133;* the defendant was convicted of burning a building with intent to injure the insurer. The court permitted an insurance agent to testify from his records. The court held that, as this was not an action on the policy by the parties thereto but a criminal prose-

cution, the insurance agent was properly permitted to testify from his records because the defendant could not be compelled to produce the policy ,nor give any evidence that would tend to criminate him.

In a similar case, *Martinez v. State, 76 Fla. 159, 79 So. 751,* the same question was raised, and the court held the evidence to be admissible.

See also, *Commonwealth v. Hubbard, 65 Pa. Sup. Ct. 213,* where a copy of the insurance policy was admitted and the court held notice to produce was nugatory and unnecessary. The court said:

> "It would seem therefore that the purpose of giving notice is fully satisfied in a criminal case, when the possession of the document has been traced to the defendant where it cannot be reached by any process and secondary evidence of its contents may be admitted. The court did not err in admitting the record of the insurance policies through which it was intended to defraud the insurance company."

The evidence of Harris, the insurance agent, showed that at the time of making out a policy of insurance, the original goes to the insured; the local agent keeps a copy or record and a record is sent to the company. (p. 18.)

He further testified that the policy was delivered to Mr. Snover, defendant in error, and Mrs. Willever. (p. 13, l. 31). The Prosecutor called upon Snover, the plaintiff in error, to produce the policy, but he stood mute, and his counsel simply said the State had not proved it was in Mr. Snover's possession. (p. 14). After that the State offered the record made at the time the policy was issued to the company which was a duplicate of the policy evcept the standard clauses were omitted. Upon objection the offer of proof was made to the court to show that Mrs. Willever since the burning of the buildings had died; that Snover, the plaintiff in error, by her will was appointed executor and had qualified as such, and further that he had as such executor brought suit upon this policy.

It is not necessary to show that the original writing is in the actual possession of the defendant or adverse

party; it is sufficient that the circumstances are such as to indicate that the writing is in his possession or under his control.

22 C. J. 1041, and cases cited.

Sufficiency of the evidence on the preliminary proof rests in the sound discretion of the trial court, whose determination will generally not be disturbed by an appellate court, although it is reviewable.

Johnson v. Arnwine, 42 N. J. L. 451, 459 Longstreth v. Korb. 64 N. J. L. 114.

In Johnson v. Arnwine, supra. Depue, speaking for this court said the *onus* is on the plaintiff in error of showing the result reached was erroneous, and there should be no reversal unless it clearly appears that the court below was in error, and that injustice was done by the erroneous decision."

A reasonable assurance that evidence of a higher nature is not withheld or suppressed is all that is required as a ground for the admission of secondary evidence. Clark v. Hoonbeck, 17 N. J. E. 430.

The order of admission of evidence is within the discretion of the court and it was no abuse of discretion to admit the copy or company's record of insurance as the case stood at that time.

The State of the case contains only a meagre portion of the testimony. Subsequently there was direct evidence as to the motive for burning the buildings and the suits for insurance by Snover as executor of Harriet Willever against the insurance company. Judge Roseberry in cross-examining Hannah Kimble ,(p. 30, l. 13) refers to the civil suit.

The State insists the evidence showed the original policy was beyond its control, and traced it to Harriet Willever, and upon her death to her executor, Snover, the plaintiff in error. There was no error in offering the record and copy forwarded to the company.

POINT IV.

ASSIGNMENTS 3, 4 AND 5

The questions set forth were properly overruled.

The third assignment is the overruling of a question asked for the purpose stated by counsel to prove the hostility of the witness and offset his credibility. The question asked was as follows:

> Q. "And you got hold of a note of two thousand dollars secured by a mortgage, that he had given to your mother and put it in Judge Shipman's hands for collection, did you not?"

The State objected on the ground the question was immaterial and irrelevant, and the court sustained the objection.

There was nothing in the question to show hostility or affect credibility, nor was there any offer of proof.

Assignment 4 was based on the same grounds; the following question, which was overruled:

> "Did you not immediately after her death take a note given by William C. Howell to her, and sell it as heir-at-law to Andrew Yetter?"

The objection was sustained. Counsel for plaintiff in error stated the witness had no right to sell the note, and thereby wanted to prove hostility. To admit such a question might lead to the trying of many collateral issues. The witness might have had a legal right to sell the note. The defendant was not entitled to show by anything except a conviction that witness stole the note or anything else.

The fifth assignment alleges error in ruling out the following question:

> "The will was proved in the Surrogate's office, September 1, 1922, was it not?"

This was clearly incompetent. The record of probate was the best proof.

No such purpose appeared to the court. The question was properly over-ruled.

The argument of Snover's counsel that the purpose of the question was to show his interest in this case and annimosity toward the defendant, was absurd. The question was before the court, and on that alone.

POINT V
SIXTH ASSIGNMENT

Refusal of the court to direct a verdict of acquittal is not reviewable where a case comes up on a strict bill of exceptions. Such a motion is addressed to the discretion of the court.

State v. Joggers, 71 N. J. L. 281.
State v. Schoor, 81 N. J. L. 263.

POINT VI

THE STATE OF THE CASE DOES NOT SET FORTH ALL OF THE EVIDENCE, AND THERE IS NOT SUFFICIENT EVIDENCE RETURNED TO PERMIT THIS COURT TO PASS UPON THE REFUSAL OF REQUESTS TO CHARGE.

The seventh assignment of error is upon refusal of the court to charge:—

> "What is set out in the first and second counts of the indictment charges the defendant with burning the barn, mill and dwelling house of Harriet Willever. It does not appear by the testimony that anyone was in the actual and immediate possession of either the mill, barn or dwelling house. * * *

The State insists that this court cannot pass upon this question of whether refusal to charge this request was error or not without all of the evidence before it. The request says: "It does not appear by the testimony." If it did appear from the testimony, then the request to charge was properly refused. The Supreme Court can only determine the question with all the evidence before it. The Court of Errors and Appeals clearly said in State v. Fletcher, 78 N. J. L. 743, that it is not at all to be inferred that a bill of exceptions includes all of the evidence that was produced at the trial.

The same objection goes to the 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th assignments of error.

POINT VII

THE AMENDMENT OF 1919 CHANGED SECTION 124 OF THE CRIMES ACT, SO THAT THE DEFENDANT WAS PROPERLY CONVICTED OF BURNING THE BARN AND GRIST MILL, EVEN THOUGH THE OWNER, AND ONE IN POSSESSION HIRED AND PROCURED THE DEFENDANTS TO BURN THE BUILDINGS.

At common law: one could not be convicted of arson, where the dwelling burned was his own, and in his possession, 4 Black. Com. 221.

State v. Fish , 27 N. J. L. 323 and this was so under our Crimes Act of 1898.

State v. Lentz, 92 N. J. L. 17: holding words "of another" to denote possession.

The Lentz case was decided in 1918. In 1919, the legislature, presumably with that case in mind, amended Sections 123 and 124 of the Crimes Act by changing the words "dwelling-house of another" to "dwelling-house, *whether it be his own or that of another,*" and in Section 124, "other building, of another" to "other building," whether it be his own or that of another." *Chap. 106, P. L. 1919, p. 257.*

The State insists this amendment changed the statutory offense in New Jersey, and that possession of another being no longer an essential of the offense, evidence of possession was immaterial and all that was needed to sustain a conviction for statutory arson or for burning buildings was that the State prove, beyond a reasonable doubt:

1. Burning of building or dwelling.
2. Either a wilful or malicious burning.

Therefore the seventh and eighth assignments of error are without merit in law and the request to charge was properly refused.

POINT VIII

The defendant Snover can be convicted under the indictment even though the evidence showed his only con-

nection with the fire was that of accessory before the fact.

The plaintiff in error relies on State v. Brand, 76 N. J. L. 268. The conviction in this case was affirmed, and the argument for reversal was that the indictment did not charge the actual burning of the building.

Distinction between felonies and misdemeanors in this State has been done away with by statute:

State v. Lehigh Valley R. R. Co. 90 N. J. L. 372;
State v. Spence, 81 N. J. L. 265.

All who aid and abet or participate in misdemeanors are principals and all equally guilty as such.

Engemann v. State—54 N. J. L. 247.
State v. Hess—65 N. J. L. 544.
State v. Wilson—80 N. J. L. 467.
State v. Spence—81 N. J. L. 265
State v. Rudnor—92 N. J. L. 20.

In State v. Spence, 81 N. J. L. 265 the indictment charged that the defendant wilfully and maliciously did burn a certain building, etc. The verdict returned found the defendant "guilty as as an accessory as charged." The contention of the defendant was that the indictment did not charge him as an accessory. The judgment was affirmed, the court holding that an indictment charging a misdemeanor charges the defendant according to the legal effect of the offense, and, although he was an accessory in fact, he was a principal in law.

The State insists there is no legal error prejudicial to the plaintiff in error and that the judgment of the ~~Warren Quarter Sessions~~ Supreme Court should be affirmed.

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas
For the State.

New Jersey
Court of Errors and Appeals

THE STATE, Defendant-in-Error, vs. THOMAS L. SNOVER, Plaintiff-in-Error.	Upon writ of Error to the Supreme Court.

BRIEF OF J. M. ROSEBERRY & SON, ATTORNEYS OF PLAINTIFF-IN-ERROR

Point I

The Supreme Court's opinion assumed too much when the Court says, that the defendant objected to the admission of the record of insurance and a duplicate of the insurance policy. We deny that there was a duplicate of the insurance policy admitted and the record is insufficient, as stated in our brief under point one, also see pages 20 etc., in case book. A proper foundation was not laid to introduce secondary evidence. *Corbo vs. East Orange & Ampire Land Co.*, 86 N. J. L. 566 in addition to cases cited hereafter under Point I.

Point II

We insist that we had a right to show the hostility of the witness, Isaac E. Wildrick, towards the defendant as evidenced by his acts for the purpose of affecting his credibility with the jury. The matter as considered under Point 2.

Point III

In considering the 7th assignment of Error, the Supreme Court bases its decision on the ground that all the evidence is not before the Court. Defendant was too poor to print the whole case, consequently the bill of exceptions are under the 135 section of the Criminal Procedure Act which says that "the bill of exceptions taken in any case shall contain only so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken at the trial." And then it enjoins the judge or Court to strike out all unnecessary evidence. It says further that "it shall be the duty of the judge to settle a bill of such exceptions and to sign and seal the said bill" and then it says, "that the bill of exceptions taken in any case shall contain only so much of the evidence as may be necessary to present the question of law."

The Supreme Court had no legal right to say, or assume as it does, that the bill of exceptions did not contain all the evidence upon the exception under consideration. The law requires the judge "to settle a bill of such exceptions." And it "shall contain so much of the evidence only as may be necessary to present the questions of law upon which exceptions were taken at the trial." And to strike out all other evidence.

The presumption is that the trial judge performed his duty, and the Supreme Court could not presume that he did not do so.

Again, the Supreme Court erred in holding that the Crimes Act of 1919, Chapter 106 altered the Status of the Law as laid down in *State vs. Fish,* 27 N. J. L. 323 and *State vs. Lentz,* 92 N. J. L. 217.

The Supreme Court in the case of the *State vs. Duelks,* 97 N. J. L. page 44, paragraph 11 followed *State vs. Fish* and *State vs. Lentz* and held that occupancy was essential in construing chapter 106 laws of 1919, see Point 4 further on in this brief for discussion of this question.

The Supreme Court erred in not considering the assignment of errors from the 8th to the 17th inclusive, because of the absence of the entire testimony.

I wish to refer to what we said under Point 3 above concerning the 135 section of the Criminal Procedure Act and to each one of those assignments for the consideration of the Court as they are hereafter considered in this brief.

BRIEF OF PLAINTIFF-IN-ERROR IN SUPREME COURT

Thomas L. Snover, the defendant in Error, was indicted with Andrew Crawn, Alva Crawn and Raymand Crawn, by the Grand Jury of Warren County, at the September term, 1922. They were found guilty upon the three counts of the indictment, and the court sentenced them upon the first count and sentence was suspended upon the other two counts.

The first count charges that they

> "did wilfully and maliciously set fire to and burn a certain barn, not a parcel of a dwelling house, and a certain grist mill, being then and there the property of Harriet Willever."

The first and second assignment of Errors are to the admission by the Court of the testimony of George N. Harris to the following question, "What does your record show as to the insurance on the barn?" And to the admission of a paper writing made out by Harris and Morris, agent, unknown to Plaintiff in Error. An objection was made to this testimony, on the part of Plaintiff in Error, because the policy of insurance was the best evidence and no notice had been given to produce it, nor was its loss shown. (See State of Case, pages 12 to 22.)

The Court of Errors and Appeals stated the law in the difference in proof in Civil and Criminal Cases, in *Kane vs. Hibernia Insurance Co.*, 39 N. J. Law. (10 Vroom) 698, as follows:

> "In Civil cases, it is the duty of the jury to find for the party in whose favor

> the evidence preponderates; but in Criminal Cases, the accused should not be convicted upon any preponderance of evidence unless it generates full belief of the fact, to the exclusion of all reasonable doubt."

In the admission of testimony, the rights of person are to be, if anything, more carefully guarded than the rights of things. The admission of the testimony of the insurance upon the barn and mill was not only illegal but it had the effect of influencing the minds of the jury in finding the Plaintiff in Error guilty under the first count.

Point 1

Policies of insurance not under seal are governed by the same law of evidence as specialties. The policy itself is considered to be the contract between the parties.

> De Wees vs. Manhattan Insurance Co., 35 N. J. L., 372.
> Franklin Fire Insurance Co. vs. Martin, 40 N. J. L., 580.

Notice must be given to produce the policy of insurance if not in the possession of the State. Taylor in his Law of Evidence, Vol. I, page 416, Sec. 452, says:

> "No doubt can be entertained that an indictment for Arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required, as to dispense with the formal notice to produce."

Citing a number of cases laying down this rule of law. There must be a regular notice to produce the original.

Greenlief on Evidence. Vol. I., p. 604, Sec. 560.

The notice must be directed to the party, or his attorney, and should be served previous to the commencement of the suit.

Id., p. 607, Sec. 562.

Roscoe's Criminal Evidence (7 Ed.) on p. x290 says,

> "Where the intent laid is to defraud insurers, the insurance must be proved. To prove this, the policy must be produced. Evidence of the books of an insurance Company not being admissible, unless notice has been given to produce the policy, or the non-production of the policy is accounted for."

Bishop Crim. Pro., Vol. 2 (2nd Ed.), Sec. 50.

Cumberland Mutual Insurance Co. vs. Giltinan, 48 N. J. L., 495, also 86 N. J. L., 566.

And it must be shown that the risk has attached.

Roscoe Criminal Evidence, (7 Ed.) Star p. 290.

The legislature has prescribed the form and substance of a policy of insurance.

Comp. Stat. of N. J., Vol. 2, p. 2862, Sec. 77.

"And no other or different provisions, agreement, condition or clause shall in any manner be made a part of said contract or policy," than prescribed by the Statute.

Id.

Not one of the "foregoing stipulations and conditions" and the "following stipulations and conditions," numbering 112 lines, appear by such testimony, as part of the policy of insurance on the barn and mill.

One of the conditions in every policy of insurance is that if the property insured is left vacant for ten days it avoids the policy.

Sonneborn vs. Insurance Co., 44 N. J. L., p. 220.

Where the occupancy is undisputed it is for the Court.

Hartshorne vs. Agricultural Insurance Co., 50 N. J. L., 427.

The words "occupied" and "unoccupied" in a policy of insurance will be given force with reference to the nature and character of the building, the purposes for which it is designed, and the uses contemplated by the parties as expressed in the contract

Hampton v. Hartford Fire Insurance Co., 65 N. J. L., 265.

Vacancy avoids policy.

Cases above cited.
Dolever vs. Granite State Fire Ins. Co., 89 Atl. Rep. 8.

In case of arson.

State vs. McDonald *et al.*, 104 Atl. Rep., 849.

Proof of property must be by deed, or notice given to product it in order to admit secondary evidence.

Commonwealth vs. Emery, 68 Mass. Rep. 81, and Commonwealth vs. Preece, 140 Mass. Rep., 278.

Point 2

The 3d, 4th, and 5th assignment of Errors relate to the overruling of questions in cross-examination, put by the counsel of Plaintiff in Error to Isaac E. Wildrick who testified in behalf of the State, that his mother, Harriet Willever, the owner of the property, and Plaintiff in Error, together offered him a cow and fifty dollars to burn the buildings. The questions contained in the three assignments of Error put to the witness, on the ground of his hostility to Plaintiff in Error as affecting his credibility.

The Counsel of Plantiff in Error wished to show by the witness that his mother, Harriet Willever, left a will, having died before the indictment giving a life interest in her estate to Plaintiff in Error, and, after his death then to go to the witness' children. Further, that the witness at his mother's death, purloined a note, and another note and mortgage, also sold the one note of $200 and put the other note and mortgage of $2,000 given by Plaintiff in Error to his mother in the hands of Judge Shipman to collect from the Plaintiff in Error for the benefit of the wit-

ness. On the day that he placed the note and mortgage in a lawyer's hands to collect, witness also went before the Grand Jury, which indicted Plaintiff in Error with the Crawns. Witness also, about that time, stated that he intended to send the Plaintiff in Error to State Prison.

It is a cardinal principle of law that, on cross-examination, the witness can be examined upon any matter showing his feeling of prejudice, or hostility, or his interest in getting, in this case, away with the Plaintiff in Error, so that he would have no trouble in realizing upon the property of his mother, and thus avoid the disposition of her property by her will.

This evidence we insist, was relevant and very material in affecting his credibility with the jury. The jury had a right to know whether the witness was prejudiced in giving his testimony in order to determine the weight to be given in making up their verdict. This principle of law is so fully established that it is unnecessary to cite authorities to the Court. (See state of case, pp. 22-25.)

Point 3

Under the 6th assignment, the Court and lawyers engaged in the case, at the time of the trial, seemed not to have been aware of the recent rule (107 a) of the Supreme Court, promulgated May 10, 1923. The judge gave no reasons why he refused the motion to direct a verdict.

The testimony of the State, as given upon the motion to direct a verdict, is clear and undisputed that the barn, mill and house were vacant and had been so for a long time. It was not a matter of discretion in the Court. It was its duty to direct a verdict, as a matter of law. (See State of Case, pp. 26-27.)

> Sonneborn vs. Insurance Co., 44 N. J. L., p. 221.

The Court of Errors and Appeals in *Hampton vs. Hartford Fire Ins. Co.,* 65 N. J. L., 267, quoting from the Sonneborn case, says, occupancy or unoccupancy

> "are always to be construed with reference to the nature and character of the building, the purpose for which it is designed and the uses contemplated by the parties as expressed in the contract. The occupancy of a dwelling, of a barn and a mill, is in each case essentially different in its scope and character. The term 'occupied' always implies a substantial and practical use of the building for the purposes for which it is intended and as contemplated." (See State of Case, 26-46.)

Point 4

The 7th assignment of Error is the refusal of the Court to charge that the plaintiff in Error could not be convicted under the 1st and 2d counts of the indictment, because, at the time of the burning, no one was in the actual and immediate possession of the buildings or any of them. (State of case, page 46, 1st request to charge. Refusal to charge by Court, p. 48; exception p. 49. Testimony, pages 26-37.)

We refer to the question of occupancy discussed under Point 3, and the law upon that point.

In the State vs. Fish, 27 N. J. L., 323.

The Court held that the crime of Arson, as well as burning other buildings, in the 123, 124 and 125 sections of the Crimes Act, is a crime committed against the person in the actual and immediate possession of the buildings without regard to the ownership thereof.

The same construction of those sections was followed in

State vs. Lentz, 92 N. J. L., 17.

And so held as amended by laws of 1919 Chap. 106, p. 257.

In State v. Duelks, 97 N. J. L. p. 44, par. 11, p. 52.

Wharton's Criminal Law, 11 Ed. Vol. 2, p. 1272, Sec. 1068 says,

"Although there is some confusion in the earlier cases, the authorities now con-

cur in accepting the position, to adopt the language of Cooley, J. in a Michigan case, decided in 1872, that 'Arson is an offense against the habitation, and regards the possession rather than the property.' "

In Woodford vs. People of the State of New York, 62 N. York Rep., 117, 126.

The Court says that upon

"an allegation of ownership of a dwelling house upon an indictment for Arson, the legal presumption is that the person named is in the possession of it because the possessor is the owner for this purpose. If it turns out in proof that the person named is not in possession although he may be the owner in fee a conviction cannot be had."

The New York statute is as broad, in its application, as the amendment to the Crimes Act of 1919, p. 257, of N. J. which makes the 123 and 124 sections of the Crimes Act apply to certain buildings, whether it be his own, or that of another. The act, as amended, is in other respects, exact in words and punishment, like the act before the amendment. The rule of interpretation is, that where an offense is defined in the same language as was employed before, or substantially the same, it will be presumed that no change was intended, unless the legislative intent in that direction is clear.

Chief Justice Savage in the case of People vs. Gatis, 15 Wend. 159.

held that Arson could not be committed by one burning his own house—and so it was held in

People vs. Henderson, 1 Park C. R. 560.

It was considered by the judge who gave that opinion, that the common law was to be called in aid in interpreting the statute.

The Statute, 9 George 1 Ch. 22.

Enacted that if any person should set fire to any house, barn, or outhouse, etc.

In Spaulding's Case, 1 Leach, 258.

The judge held that the statute did not create a new offense. The offense, as stated above, is against the habitation, and against the one in the actual and immediate possession of the buildings burned, as decided in the Fish, Lentz and Duelks cases, *supra,* and as said in the Woodward case, under the New York statute.

> "If it turns out in proof that the person named is not in possession, although he may be the owner in fee, a conviction cannot be had."

Harriet Willever named in the indictment in the first count, as owner, was not in possession of any of the buildings at the time of the fire, therefore, a conviction of Plaintiff in Error cannot be had.

Point 5

The 8th assignment of error is upon the request to the Court to charge that, if the Plaintiff in Error co-operated with Harriet Willever, the owner in burning the buildings, mentioned in the first count, then the Plaintiff in Error was not guilty of wilfully and maliciously setting fire to and burning her buildings. (Request to charge, 2 on page 47. Testimony, p. 23.)

The Court of Massachusetts have stated clearly the law upon this point in

> Commonwealth vs. Makely, 131, Mass. 421, 422.

as follows:

> "The Crime consists in the wilfull and malicious burning of the dwelling house of another. It is a crime against the habitation of a person, and includes an injury to that person. The public wrong grows out of the private wrong. The wrongful act toward Ackert in respect of his habitation is of the essence of the crime charged in this indictment; and the malice charged, and which must be proved, cannot be predicated of an act not thus wrongful or injurious toward him. The defendant cannot be held to have acted injuriously or maliciously toward Ackert in carrying out his wishes in relation to his property, and aiding him in his attempt to convert his dwelling house into money."
>
> "The evidence of a wrongful act, of malice, toward insurers, is not evidence

> charged in the indictment. On the contrary, it tends to disprove that, and to prove that the defendant and Ackert joined in an act, that was wrongful and malicious towards a person not named in the indictment, and that constituted an offense calling for different allegations and different proofs."
>
> Bishop on Criminal Procedure (2 Ed.) p. 24, Sec. 50.

The gravamen alleged in the first count is "did wilfully and maliciously set fire to and burn a certain barn and a certain grist mill the property of Harriet Willever."

In this posture of the case the words of the Court in the Makely case, last above cited, applies exactly. The first count in this indictment is alone to be considered, because judgment was suspended on the other two counts. The testimony of Isaac E. Wildrick, on behalf of the State, contained in the bill of Exceptions, shows the cooperation between Plaintiff in Error and Harriet Willever, the owner, if his testimony is to be believed, and it is, so far as the State is concerned.

Point 6

The 11th and 12th assignments of Error are to the Courts refusal to charge that the barn had been and was vacant, at the time of the fire. It appears from the testimony of the witnesses of the State, as shown in the case book, pp. 26-37 that the barn, as well as the grist mill, had been vacant for months, in fact, the grist mill had not been used as a grist mill in two years, the barn for several months according to the decisions of our Courts in

Sonneborn vs. Insurance Co., 44 N. J. L., p. 220.
Hampton vs. Hartford Insurance Co., 65 N. J. L., 265.

There was no actual and immediate possession of the barn and grist mill, as possession is defined under those sections of the Crimes Act, in the case of

The State vs. Fish, 27 N. J. L., 324, 325,

And

State vs. Lentz, 92 N. J. L., 18, 19.
State vs. Duelks, 116 Atl. Rep., 865; par. 11.
Bishop on Criminal Procedure (2nd Ed.), Vol. 2, p. 18, Sec. 36.
Roscoe's Criminal Evidence, (7th Ed.) Star p. 288.
Wharton's Criminal Law, Vol. 2, (11th Ed.) p. 1271.

"It must be described as the barn or building of the person in possession 'oth-

erwise the' defendant could not be convicted."

Id.

Point 7

The 13th assignment of Error is to the Court's refusal to charge the jury that the Plaintiff in Error could not be convicted under any of the counts for aiding, counselling, procuring or consenting to the burning of the buildings. There are New Jersey cases; a recent one is the *State vs. Spence,* 81 N. J. L. 265, which lays down the law that in misdemeanors,

> "all who aid and abet in the Commission of a Criminal Act, although not personally present, may be indicted, tried and punished as principals."

The amended act, in this case, says,

> "Any person who shall wilfully or maliciously burn or cause to be burned, or aid, counsel, procure or consent to the burning of any barn, etc."

In *State vs. Brand,* 76 N. J. L., p. 268, the court says:

> "We think this statute denounces two distinct crimes, one the wilfull or malicious setting fire to or burning the insured property with intent to prejudice the underwriter; the other the aiding, counseling, procuring or consenting to the setting fire to or burning of such insured property."

This division of the crime by statute will not admit, in this case, the application of the rule of law as laid down in the case of

State vs. Spence, 81 N. J. L., 265.

The Plaintiff in Error did neither burn nor cause to be burned the barn and mill as in the first count charged. If he did anything, he counselled and advised which is not alleged in the first count of the indictment or in any other count. Therefore, the charge of the Court is Error.

The 14th assignment of Error has been before considered, as also the 15th, 16th, 17th and 18th.

I submit that the conviction and sentence of the Plaintiff in Error, under the first count of the indictment, should be reversed.

Respectfully submitted,

J. M. ROSEBERRY & SON,
Attorneys of Plaintiff-in-Error.

The Otsego Press, Cooperstown, N. Y.

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