

New Jersey Court of Errors and Appeals

FANNIE B. DOWNS,
Plaintiff-Respondent,

vs.

NEW JERSEY FIDELITY & PLATE
GLASS INSURANCE COMPANY
OF NEWARK, N. J.,
Defendant-Appellant.

On Appeal.
Case No. 37,
November
Term, 1917.

Brief for Plaintiff-Respondent.

This action was brought upon a policy of burglary insurance.

The policy, by its terms, insured the plaintiff "for direct loss by burglary, theft or larceny, of any of the property of the assured described in the said schedule and stated therein to be insured hereunder" (p. 12, l. 28).

The articles described in the schedule, among other things, were "wearing apparel, furs, * * * rugs, tapestries, * * * beds, bedding" (p. 16, l. 15).

The burglary occurred during the summer of 1915. The plaintiff's house was closed the latter part of June (p. 27, l. 12), and the burglary was discovered on August 31st (p. 27, l. 28). The burglary had evidently occurred some weeks before its discovery. In addition to taking various articles of value, the burglars opened up various bureau drawers in the house, in which had been carefully put away, wrapped up in newspaper and camphor, various articles of clothing, made of woolen goods, such as skirts, furs, coats and other garments (pp. 35-36).

The police officer who investigated and reported the burglary, said (p. 24, l. 32):

“The contents of the drawers were distributed throughout the room, and in the beds, and there were furs in some of the beds, clothing of all description thrown around, the drawers all pulled out, and the drawer, or, I believe there were two or three drawers, that were forced open and the contents strewn around the room.”

As the result of this damage by the burglars these various garments, furs, etc., were eaten by moths and damaged (pp. 35 and 36).

The trial judge in his charge left it squarely to the jury to say whether this damage to the furs and clothing by the moths was the result of the burglary. He said (p. 97, l. 22):

“It is contended by the plaintiff that in addition to stealing part of her property, that thieves or burglars broke open the bureau drawers, closets and trunks where she had furs and winter clothing stored and put away with camphor to keep away moths, and unwrap them and threw these articles around the rooms and left them in that condition and they remained in that condition until she found them upon her return to her home the last of August, 1915; that when she found them they were covered with moths and some of them were damaged by the moths.

If you find by the evidence that some or all of those furs or clothing were damaged by moths you should next determine from the evidence whether this damage by moths was the result of the thieves and burglars removing these furs and clothing from the wrappers and leaving them around

the premises. If the clothing and furs were not damaged as a result of taking them from the wrappers and leaving them around the premises the plaintiff cannot recover for the damages done to the furs and the clothing, but, if, however, you find that the furs and clothing or some of them were damaged by the moths as a result of being unwrapped and left around the premises, the plaintiff is entitled to recover the damages done by moths."

At the request of the defendant the trial judge also charged as follows (p. 99, l. 32):

"'3. That the plaintiff, if entitled to recover at all, is entitled to recover only the actual damage she has sustained by burglary, theft or larceny of any of the property covered by the policy, or for direct loss by damage to the said property.'

I so charge you. If you find that the property was not damaged as a direct result of the burglars having taken them out of their wrappers and leaving them around, there can be no recovery for that damage."

It is now complained by the defendant that the trial judge should also have charged "that the plaintiff was not entitled to recover for the damage done by moths," and also that he erred in admitting any evidence as to this damage by moths.

The only ground upon which the defendant can sustain its contention must necessarily be that the trial judge, as a matter of law, should have decided that the damage to the garments by the moths was not a "direct loss by burglary."

Instead, he left it to the jury, in a carefully worded charge, to say whether these garments were damaged as the result of the thieves and burglars having removed them from the wrappers, and leaving them around the premises.

There was no error in the charge or ruling of the trial judge, and the verdict should be affirmed.

The ruling of this Court in the case of *Sommer Faucet Co. v. Commercial Casualty Insurance Co.*, 89 N. J. Law 693, seems to control the situation here. In that case suit was brought upon a liability policy, insuring against accidents growing out of repairs and alterations usual and necessary to the care and maintenance of the premises and plant. The question was whether the plaintiff could recover damages which it had paid to an injured workman who had been hurt in connection with the reconstruction of a platform. The question was whether it was a usual alteration or repair. This Court said (p. 695):

“It is admitted by the appellant, on the motion to non-suit, simply making the platform safe would have been a repair or alteration usual and necessary, within the terms of the policy, to the maintenance of the plant. They did not do that is the insistence, but did something more. Now, under the evidence, whether they did or not depended upon extrinsic facts, as to which there is a dispute; hence the jury, and not the Court, must determine the point. The construction and effect of a written instrument is a matter of law to be determined by the Court, and not by the jury. This rule of law is firmly settled in this court by a long line of cases. Grueber Engineering

Co. v. Waldron, 71 N. J. Law, 597, 60 Atl. 386. But when the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact, and presents a jury question, under proper instructions from the Court. 9 Cyc. 592; Kingston Cotton Mills v. Liability Assur. Corp., 161 N. C. 562, 77 S. E. 682. That was the precise situation presented to the trial court, on the motion to non-suit and to direct a verdict for the defendant. Hence there is no error in the trial court's refusal of these motions."

Applying this principle to the case at bar the construction of the policy depends upon extrinsic facts, namely, whether the damage to the garments and furs by the moths was the result of the wrappers having been taken off and these garments and furs left lying about. The defendant disputed that the taking off of the wrappers and the leaving of the garments and furs lying about, was the cause of the damage by the moths. It called James D. Bailey, a tailor of experience, to dispute that very contention of the plaintiff. Bailey testified (pp. 92 and 93) as follows:

"Q If the goods were packed in May with camphor and were taken out between May and the 30th of August and were discovered to be moth-eaten would you say that the moths were in the goods when they were packed away or came in after? A I should say the eggs were in the goods when they were packed away and camphor couldn't destroy them.

Q What is your experience with moths in connection with your own clothes? A

My own clothes and the clothes I have had in the store packed away?

Q Suppose that these imaginable clothes which you are asked about had been packed away in camphor and then some burglars had gotten in the house and taken them out of the drawers in which they had been put and taken them out of the packages into which they had been packed with camphor or broken open the packages and thrown them around on the floor and on the bed, don't you think that would make some difference with the ability of the moths to get in? A I should answer that question no, it wouldn't."

This evidence was opposed to the evidence of the plaintiff that the damage was caused by the unwrapping of the articles and their having been left lying about by the thieves (see the testimony of Mrs. Downs, p. 34, l. 33, through page 36). Consequently there was a question for the jury and not for the Court to determine. The determination of that question answered the question of liability under the policy one way or the other.

Two familiar rules of the interpretation of policies of insurance should be applied in this case:

a. That the policy, having been framed by the insurer, the defendant, should be interpreted most strongly against it; and,

b. Where there is any ambiguity in the terms of the policy, the insured, the plaintiff, should receive the benefit of the doubt.

These rules are aptly illustrated by *Harris v. American Casualty Co.*, 83 N. J. Law, 641, decided by this Court, where the suit was upon

an automobile policy insuring against collision. The policy provided for the payment of loss or damage "to any automobile (including equipment) enumerated and described in the warranties, resulting solely from collision with any moving or stationary object" (p. 642). In discussing the case, Chancellor Walker, speaking for this Court, said (p. 646):

"Suppose an automobile ran off a bridge over a stream and one of the rear wheels caught on an upright and the car hung suspended in the water and was considerably damaged by the flow of the water, can it be asserted that no compensation could be recovered for that damage under the terms of a policy such as sued on, because forsooth, the car did not collide with a moving object? Water is certainly an 'object,' and it 'moves,' and the policy undertakes to insure against damage occasioned by collision with a moving object. The liability, it seems, would be within the express terms of the policy. But, assuming that there is such ambiguity in the terms of the policy that would make it at least doubtful as to whether collision with water and land, horizontal objects, was within the terms of the policy, still, it is a familiar rule that the words used in a policy of insurance should be interpreted most strongly against the insurer where the policy is so framed as to leave room for two constructions. *Liverpool, &c., Insurance Co. v. Kearney*, 180 U. S. 132.

Therefore, if there be any doubt as to whether moving water or the surface of the land under it, being horizontal objects, are within the terms of the policy, which doubt is not conceded to exist, still the law gov-

erning the construction of the sort of contract under consideration comes in aid of the plaintiff's contention, and makes the defendant's liability plain."

See also *Coghlan v. Improved Order of Hep-tasophs*, 86 N. J. Law 41, p. 47.

The same rules are applied in other jurisdictions.

See *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, where the Court said (p. 313):

"For this ambiguity the company is responsible because it prepared and executed the contract, and the language used is wholly its own. While it is the duty of the Court to so construe the policy as, if possible, to give effect to every word used, if the sense in which they were used is uncertain and the meaning is ambiguous, that meaning should be given which is most favorable to the insured. (*Herriman v. Merchants' Insurance Co.*, 81 N. Y. 184, 188; *Allen v. St. Louis Insurance Co.*, 85 N. Y. 473, 477; *Kratzenstein v. Western Assurance Co.*, 116 N. Y. 54, 59; *Marvin v. Stone*, 2 Cow. 806.) As said by Mr. May in his work on Insurance, 'No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted.' (May on Insurance, § 175)."

See also *Tilton v. Hamilton Fire Ins. Co.*, (N. Y.) 14 How. Prac. 363.

The appellant's contention that the action of the thieves was not the proximate cause of the damage is answered by the verdict of the jury.

It will be observed that the policy at bar is affirmative and not negative in its terms. It provides that the defendant shall be liable "for direct loss by burglary," etc. It contains no negative terms as to what it will not be responsible for, as was the case in *Ross v. L. & L. & G. Ins. Co.*, 83 N. J. Law 340, where the policy expressly provided that the company should not be liable for loss caused directly or indirectly by explosion of any kind unless fire ensued (p. 341).

And the same observation may be made with reference to the case of *Hewer v. Northwestern Nat. Ins. Co.*, 33 N. E. 411.

The trial judge left it expressly to the jury to say whether the damage was the direct result of the action of the thieves. He said (p. 98, l. 2):

"If the clothing and furs were not damaged as the result of taking them from the wrappers and leaving them around the premises, the plaintiff cannot recover for the damages done to the furs and the clothing."

Remember in this connection that the defendant's contention, supported by the evidence of its witness Mr. Bailey, was that the clothing and furs were not damaged as the result of having been taken from the wrappers, but were damaged as the result of having been originally wrapped with the eggs of moths in them.

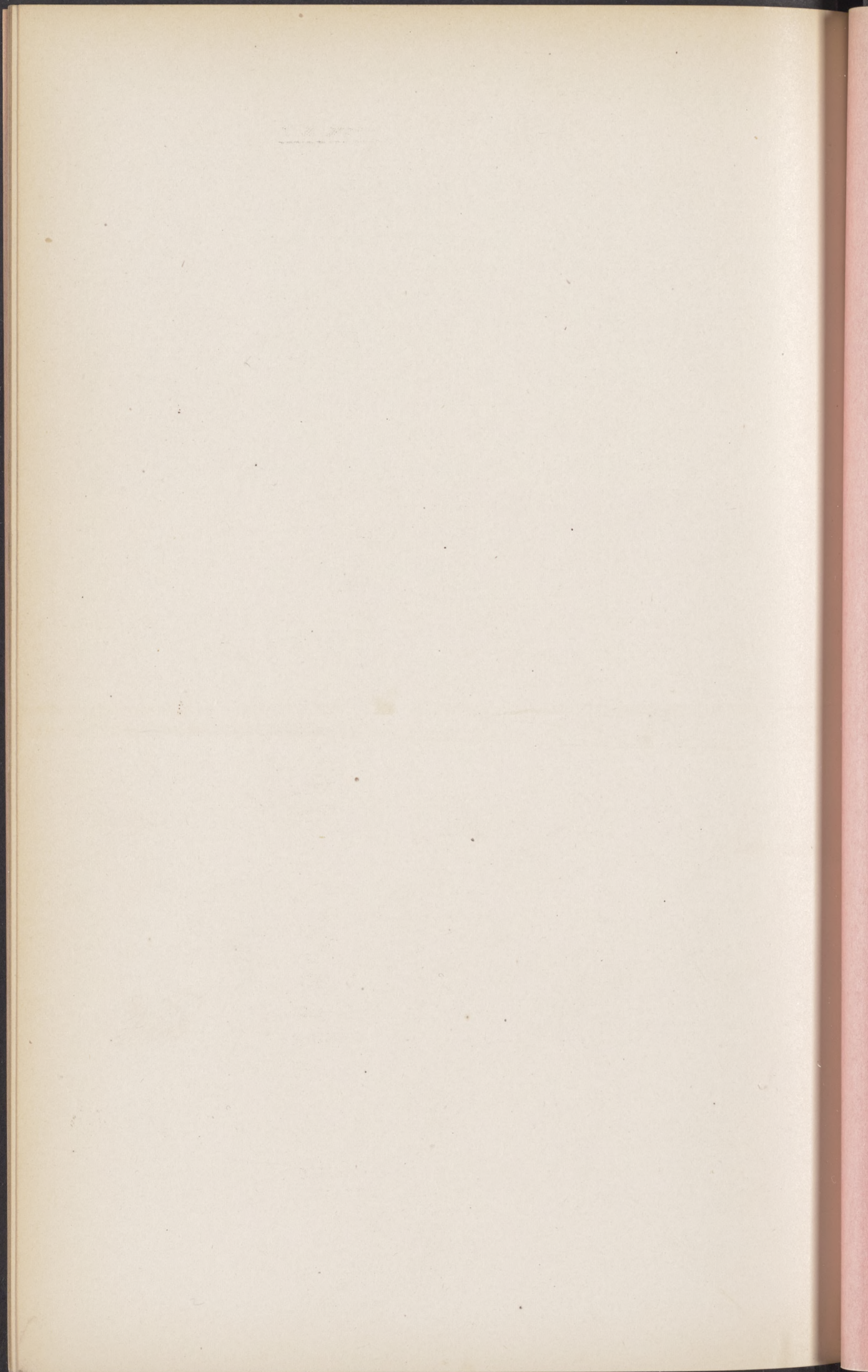
It was entirely the province of the jury to say, under the evidence, whether the moths could have done their damage to the furs and garments if they had remained in their original wrappers; and further to say whether the fact that they were found unwrapped and lying around, was, or was not, the action of the burglars and whether the resultant damage flowed directly from that action.

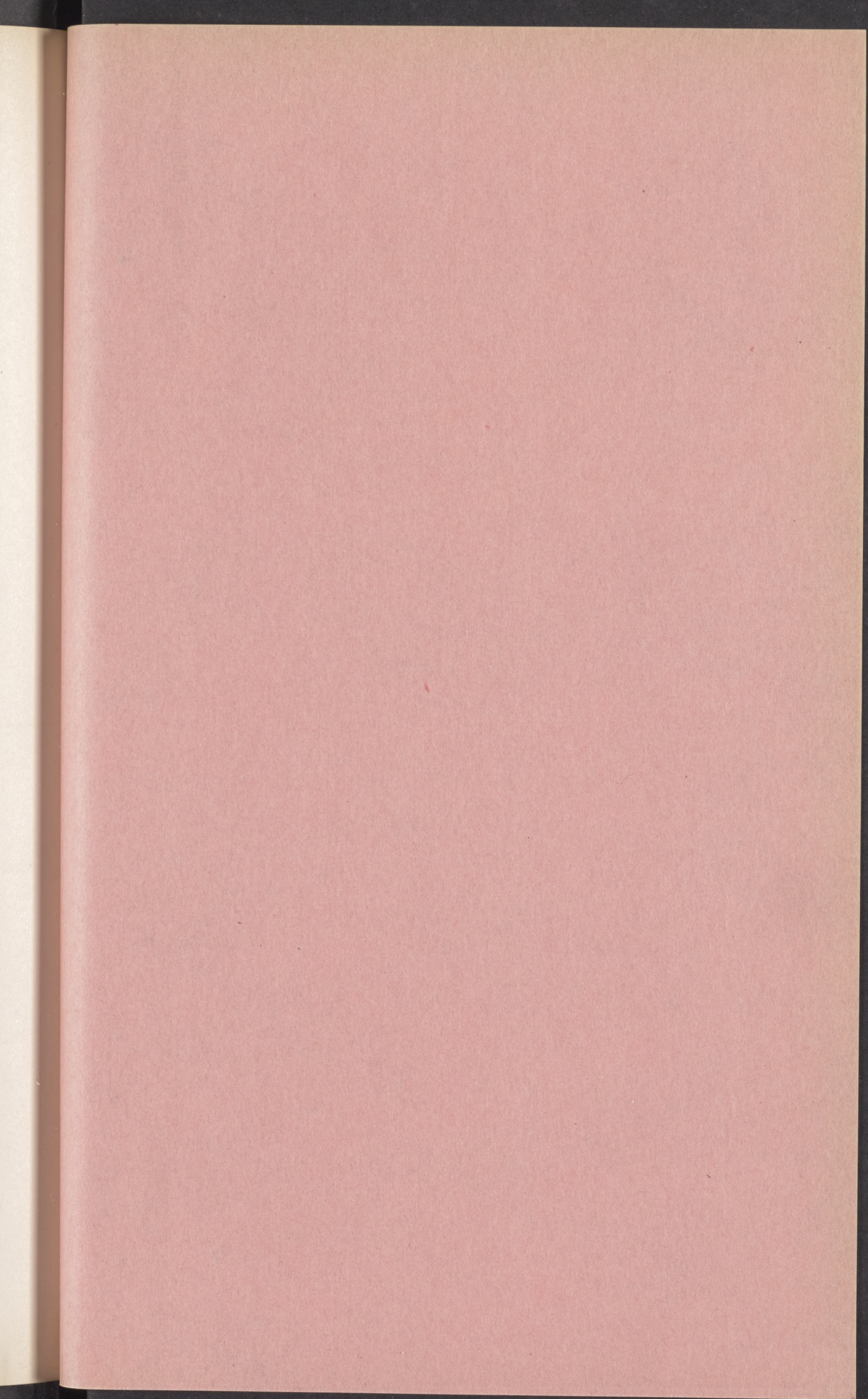
We respectfully submit that the judgment under review is correct, and should be affirmed.

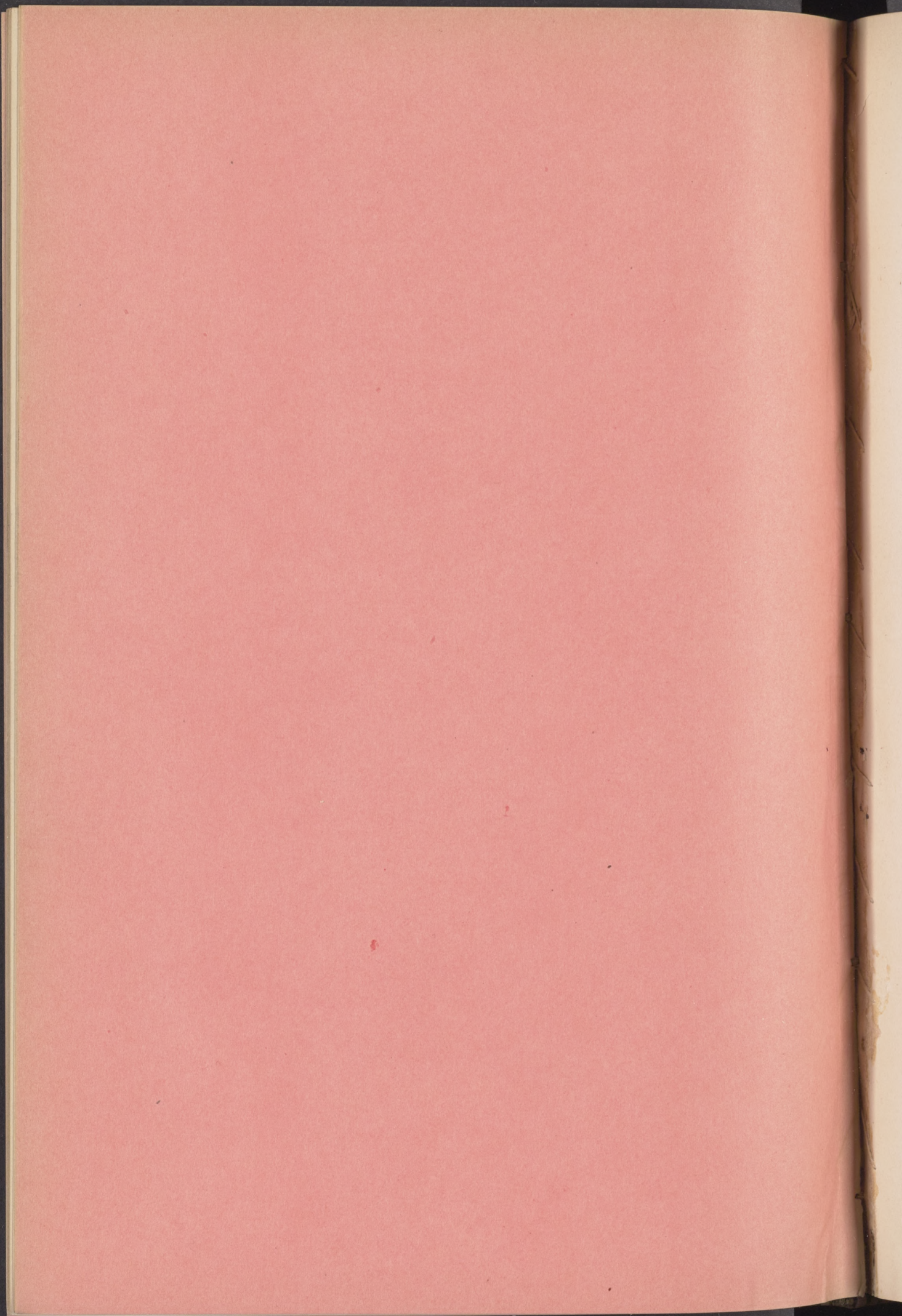
McCARTER & ENGLISH,
Attorneys of Plaintiff-Respondent.

WALTER L. BUNNELL,
(Of New York)

CONOVER ENGLISH,
Of Counsel.







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Notice of Appeal.

Notice of Appeal.

Filed June 20, 1917.

New Jersey Supreme Court.

ESSEX COUNTY.

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FANNIE B. DOWNS,
Plaintiff and Respondent,

vs.

NEW JERSEY FIDELITY & PLATE
GLASS INSURANCE COMPANY, OF
NEWARK, N. J.,
Defendant and Appellant.

*Notice of
Appeal.*

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*To McCarter & English, Esqrs., Attorneys of
the Plaintiff.*

Sirs:

TAKE NOTICE that the defendant, New Jersey Fidelity & Plate Glass Insurance Company, of Newark, N. J., appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

30

PILCH & PILCH,
Attorneys for Defendant-Appellant.

HENRY G. PILCH,
Of Counsel.

Dated May 28th, 1917.

Service of the within notice is hereby acknowledged this 29th day of May, 1917.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

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*Grounds of Appeal.***Grounds of Appeal.**

Filed July 11, 1917.

New Jersey Court of Errors and Appeals

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 FANNIE B. DOWNS,
Plaintiff-Respondent,
vs.
 NEW JERSEY FIDELITY & PLATE
 GLASS INSURANCE COMPANY, OF
 NEWARK, N. J.,
Defendant-Appellant.

*On Appeal
 from
 New Jersey
 Supreme
 Court, Essex
 Circuit.*
*Grounds of
 Appeal.*

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The appellant states the following grounds of appeal:

1. The following question was asked the plaintiff on direct examination:

Q Now, I will take up the second phase of the matter, which deals with the things that were taken. In a general way, tell us what were taken.

The plaintiff answered as follows:

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A. The things that were put away in the spring before leaving were taken out of the bureau's drawers, packages and things that had been packed away in camphor, all our winter clothes were taken out and thrown all about the rooms, three bedrooms and the storeroom of the house. The things had moths all over them and when we went in, I wasn't so much concerned about the things they had taken away because we had taken all of the silver out of the house, solid silver, I wasn't so concerned

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Grounds of Appeal.

about that, but I was concerned with the winter clothes because with a large family like we have, that was a total loss, the things that were eaten by moths.

The defendant objected to the testimony as to the damage by moths. (The point involved in this question was argued with the Court and the Court then stated, "I will take the evidence subject to an application to strike it out.") 10

The Court then permitted the plaintiff to testify at length as to the damage done by moths, and at the close of plaintiff's testimony allowed such testimony to stand, over the objection of the defendant, to which ruling an exception was noted as a ground of appeal.

2. Because the Court refused to charge the jury as requested in the second request to charge as follows: 20

1. "That the plaintiff is not entitled to recover for the damage done by moths."

To which ruling an exception was noted as a ground of appeal.

PILCH & PILCH,
Attorneys for Defendant-Appellant. 30

HENRY G. PILCH,
Of Counsel.

Service of the within grounds of appeal is hereby acknowledged.

July 5, 1917.

McCARTER & ENGLISH,
Attorneys of Plaintiff-Respondent.

Complaint.

Judgment Record.

New Jersey Supreme Court.

ESSEX COUNTY.

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FANNIE B. DOWNS,

vs.

NEW JERSEY FIDELITY & PLATE
GLASS INSURANCE COMPANY, OF
NEWARK, N. J.

*Action at
Law.*

On Postea.

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New Jersey Fidelity & Plate Glass Insurance Company of Newark, N. J., the defendant in this cause, was summoned to answer unto Fannie B. Downs, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued June 1, 1916.)

Fannie V. Downs, residing at No. 286 Essex Avenue, Orange, New Jersey, says:

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1. The defendant is a corporation duly organized under the laws of the State of New Jersey, having its principal office in the City of Newark, in said State.

2. In the month of June, 1914, said defendant issued its policy of insurance known as a burglary policy and numbered B 69553, to the plaintiff, which policy by its terms extended for the term of twelve months beginning the 9th day of June, 1914, at noon, and ending on the 9th day of June, 1915, at noon.

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3. By the terms of the said burglary policy, in consideration of the sum of \$25 premium,

Complaint.

and of the statements contained in the schedule attached thereto and made a part thereof, the defendant did agree to indemnify the plaintiff in the total sum of \$2,000 and no more, for direct loss by burglary, theft or larceny of any of the property of the assured described in the schedule annexed to the policy.

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4. The property described in the said schedule was as follows:

“Watches, jewelry, precious stones, sterling silver, wearing apparel, furs, laces, plated ware, rugs, tapestries, curtains, shades, beds, bedding, linen, engravings, etchings, paintings, fixtures, books, bronzes, statuary, clocks, bric-a-brac, articles de vertu, china, crockery, glassware, lamps, cameras, sporting outfit, musical and professional instruments, furniture, mirrors, carpets, fixtures for plumbing, gas, water and electricity, and other personal effects common in residences generally.”

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5. In consideration of the sum of \$25 paid to the defendant by the plaintiff, the defendant did renew and continue said policy numbered B 69553, from the 9th day of June, 1915, until the 9th day of June, 1916, at noon. Copy of the said policy, together with the renewal thereof, is hereto annexed and marked Schedule A.

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6. The house mentioned in the said schedule attached to the said policy was temporarily closed on account of the absence of the family from the 27th day of May, 1915, to the first day of October, 1915.

7. On or about the 31st day of August, 1915, the house of the said plaintiff was entered by burglars or thieves, which entry resulted in direct loss by damage to certain of the prop-

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Complaint.

erty of the plaintiff specified in the said schedule annexed to the policy, copy of which said property is hereto annexed and made a part hereof as Schedule B.

10 8. The plaintiff upon discovery of the said loss, immediately gave notice to the defendant, through its nearest agency, S. T. & C. A. Smith & Co., of Orange, N. J.

9. Affirmative proof of loss under oath on forms provided by the company was furnished to the defendant within sixty days from the date of the discovery of the said loss, and the plaintiff has duly performed all the conditions of the said contract or policy of insurance on her part to be performed.

20 10. The amount of the said loss, nor any part thereof, has not been paid to the plaintiff, and the plaintiff demands as damages the sum of \$1,500, together with lawful interest and costs of suit.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

SCHEDULE A.

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Burglary Policy.

Cash Capital \$300,000.

No. B 69553

\$2,000.00

New Jersey Fidelity & Plate Glass
Insurance Company (Seal)
of Newark, N. J.

40 In consideration of twenty-five and 00/100 dollars premium and of the statements contained in the schedule attached hereto and hereby made a part hereof, which statements the

Complaint.

assured makes on the acceptance of this policy and warrants to be true, the New Jersey Fidelity & Plate Glass Insurance Company, herein called the Company, does hereby agree to indemnify Mrs. Fannie B. Downs, of Orange, County of Essex, State of New Jersey, herein called the Assured, in the total sum of two thousand dollars (\$2,000.00) and no more, for the term of 12 months, beginning on the 9th day of June, 1914, at noon, and ending on the 9th day of June, 1915, at noon, Standard time, at the place where this policy has been countersigned, subject to the following special and general agreements which are to be construed as co-ordinate as conditions:

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General Agreement.

1. The Assured upon the discovery of any loss on said premises shall, at the expense of the Company give immediate notice thereof by telegraph, to the Company at its Home Office in Newark, N. J., or to the nearest agent of the Company, and shall also give immediate notice thereof to the public police authorities having jurisdiction.

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2. Affirmative proof of loss under oath on forms provided by the Company must be furnished to the Company at its Home Office in Newark, N. J., within sixty days from the date of the discovery of the same. Such proof of loss shall contain a complete inventory of all the property damaged or taken, stating the original cost and the actual cash value of each article at the time of the loss and the amount of loss thereon; a statement in detail of the damage done to the property of the Assured; a statement clearly defining the interest of the As-

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Complaint.

10 sured in the articles or property for which indemnity is claimed; a statement in detail of the knowledge and belief of the Assured as to the manner in which the loss was sustained and the date of its occurrence; a statement in detail of other concurrent or similar insurance, if any, whether valid or not, on the property insured and of the purposes for which and the persons by whom the premises described herein were occupied at the time of the loss. The delivery of any such form or its receipt or retention by the Company shall not be a waiver of any of its rights. The Assured shall facilitate the adjustment of any claim made by producing on the request of any person designated by the Company any and all books, papers and vouchers bearing in any way upon the claim made, and by submitting himself and associates in interest and his employees and members of his household to examination and interrogation by the Company's representatives under oath if required.

20 3. The Assured shall grant the Company's officers or representatives the right to inspect the premises at such times as they may deem needful; any such officer or representative may require the Assured to make the premises reasonably secure, and shall have the right to suspend the insurance under this Policy until such requirements are complied with to the satisfaction of the Company. Notice of such suspension and the reason therefor and of reinstatement must be in writing. The Company will on demand pay to the Assured the premium unearned pro rata during the period of suspension.

30 4. The Company shall not be liable: (a) For
40 an amount in excess of the cash or market value

Complaint.

of the property at the time of the loss; (b) For damage to property or premises unless they belong to the Assured or Assured is legally liable for the damage; (c) For damage to window or skylight glass, plate glass or lettering or signs thereon; (d) If the premises are occupied by the Assured for any purpose other than that stated in the schedule; (e) For loss or damage unless the Assured shall have used all reasonable care to protect premises and property insured against said loss or damage; (f) For loss from or contributed to by explosives (except only when used or caused by burglars or robbers), fire, or an alarm of fire in the building, water, invasion, insurrection, strike, riot, war, the act of any civil, military or usurping power, or the action of the elements; (g) For loss by damage by fire or water whether arising from or brought about by the use of explosives or from any other cause to the premises or property insured.

5. All sums which from time to time may be paid or expended by way of indemnity to the Assured under this policy shall be accounted in diminution of the insurance hereunder. The Company may repair any damage to property and it may replace any damaged or stolen article with one of like quality and value instead of paying for the same in money. Any article for which the Assured has been indemnified by payment or replacement shall belong to the Company if recovered, but the Assured shall be entitled to it upon payment to the Company of the amount of the indemnity or the cost of the replacement. If any stolen article is returned to the Assured or recovered by the Assured, the same shall be reported to the Company immediately and the amount of indemnity received

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Complaint.

thereupon shall be returned to the Company by the Assured, unless the Company elects to receive the article so recovered.

10 6. In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss, the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. This Company shall not be held to have waived any provisions or condition of this policy, or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

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30 7. If the Assured carry other insurance whether valid or not against loss for which indemnity is provided hereunder, the Company shall be liable only for its pro rata share of any such loss. The Company shall not be subrogated to the extent of its interests to any claims and rights of the Assured against any third party in respect to any loss that may occur hereunder and the Assured shall execute all papers necessary for this purpose.

40 8. No suit shall be brought under this Policy until three months after the proof of loss as required herein has been furnished nor at all un-

Complaint.

less commenced within twelve months after the occurrence of the loss, unless otherwise provided by statute.

9. In the event of a loss, the Assured shall, at the Company's expense, take such legal action as may be required by the Company in the arrest and prosecution of the offenders, and shall give the Company all other reasonable assistance. **10**

10. This policy may be cancelled at any time by notice in writing to the Assured stating specifically when the cancellation shall be effective. It may also be cancelled by the Assured by like notice in writing to the Company provided the premium shall have been paid. If cancelled on the Company's motion, the Company shall pay or tender to the Assured the unearned premium pro rata. If cancelled at the request of the Assured, the Company shall retain the customary short rate premium and return the balance to the Assured, but in no case shall the earned premium be less than Five Dollars. The check of the Company mailed to the business address of the Assured or to the location of the premises as given herein shall be sufficient tender. **20**

11. This Policy shall be void if the conditions or circumstances of the risk are changed without the written consent of the Company or if the Assured attempts in any way to defraud the Company or if the Policy is assigned without the written consent of the Company. **30**

12. No condition or provision of this Policy shall be waived or altered by anyone unless by written consent of an officer of the Company at the Home Office, nor shall notice to any agent **40**

Complaint.

nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or any part of it.

10 13. In any matter relating to this insurance no person shall be deemed an agent of the Company who is not duly authorized in writing.

In Witness Whereof, the New Jersey Fidelity & Plate Glass Insurance Company has caused this Policy to be executed at Newark, N. J., but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

S. C. HOAGLAND, President.

H. C. HEDDEN, Secretary.

20 Countersigned by
S. T. & C. A. Smith & Co.,
Agents at Orange, N. J.

Attached to and forms part of Policy No. B 69553 of the New Jersey Fidelity & Plate Glass Insurance Company of Newark, N. J.

.....Agent.

30 For Direct Loss by Burglary, Theft or Larceny of any of the property of the Assured, described in the said schedule and stated therein to be insured hereunder, occasioned by its felonious abstraction from the interior of the house, building, apartment or rooms actually occupied by the Assured, also described in the said schedule, and hereinafter called the premises, by any domestic servant or other employee of the Assured or by any other person or persons excepting any person whose property is insured hereunder; and For Direct
40 Loss by Damage to the said property and to the said premises caused by burglars or thieves.

Complaint.

SPECIAL AGREEMENTS.

A. (1) It is understood and agreed that for the purpose of this insurance, property belonging to any permanent member of the household of the Assured who does not pay board or rent, excepting domestic servants or other employees, or property belonging to a relative of the Assured permanently residing with him, is deemed to be the property of the Assured. In the event of claim for loss of such property, the release of either the Assured or the actual owner of the property shall relieve the Company from all further liability. (2) Premises within the meaning of this Policy is limited as follows: If the Assured occupies the entire building designated in the schedule, the term is limited to the interior of the said building excluding porches and areaways; if the Assured occupies only a part of the said building, the term is limited to the interior of the room or rooms actually occupied by the Assured on the floor designated in the schedule and excludes entrances, halls and stairways. (3) The premises shall be deemed to be unoccupied when neither the Assured nor a member of his household is actually in the premises.

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B. The Company shall not be liable for any loss:—(1) If the premises are left without an occupant for more than four Months unless written permission for a further period of non-occupancy is endorsed hereon or attached hereto; but in no event shall the liability of the Company hereunder exceed one hundred dollars (\$100.00) for loss of jewelry, precious stones or watches, occurring in the premises during any period of non-occupancy exceeding eighty-four (84) consecutive hours whether such loss occurs

30

40

Complaint.

within the period of eighty-four (84) consecutive hours or not. (2) Of money in excess of five per cent. of the amount of insurance granted under Item A of Statement 12 of the schedule but in no event in excess of fifty dollars (\$50.00). (3) Of coin and stamp collections unless the same are specifically insured under Item B of Statement 12 of the schedule. (4) Of securities for money. (5) Unless the Assured shall produce direct and affirmative evidence that the loss of the articles for which claim is made was due to the commission of a burglary, theft or larceny, the disappearance of said articles not to be deemed such evidence.

10 C. While the premises are unoccupied within the meaning of this policy, and mechanics or other work people are admitted into the premises for the purpose of painting, papering, renovating or making any alterations or changes of any nature, in the premises, the Company shall not be liable under this policy for any loss unless such loss is occasioned by a person or persons who have made felonious entry into the premises by force and violence, of which there shall be visible marks made by tools or explosives, upon the premises.

20 30 D. If the Assured is the occupant of an apartment or flat house, this insurance covers in amount of five per cent. of the amount of insurance granted under Item A of Statement 12 of the schedule, but in no event in excess of fifty dollars (\$50.00), in a locked store-room in the same house provided by the landlord and used exclusively by the Assured.

Complaint.

RESIDENCE THEFT RIDER.

B 417-5M 2-16 (Sample Copy)

SCHEDULE.

- 1. Name of Assured, Mrs. Fannie B. Downs.
- 2. Location of the building, 286 Essex Ave.,
Orange, New Jersey. Street and Number, City or Town, State. 10
- 3. There is a regular day and night police force in the City or Town of.....men.
- 4. The building is fully described as follows. Private residence. (State whether private residence, boarding house, non-housekeeping apartment house or flat house.)
- 5. The part of the building occupied by the Assured and defined herein as the premises isentire. (State whether entire house or apartment or flat, and on which floor.) 20
- 6. If an apartment or flat house, there is a regular front door, hall or elevator attendant, except as follows.....
- 7. The premises as defined in this Policy are not used in whole or in part as a boarding house or lodging house, nor by any physician, surgeon, oculist or dentist for the reception or treatment of patients, except as follows.....no exceptions. 30
- 8. The business address of the Assured is 90 West St., N. Y.
- 9. The occupation of the Assured is Mechanical Engineer.
- 10. The Assured has no burglary, theft or larceny insurance, has never been refused any and has applied for none except as followsno exceptions.

Complaint.

11. The Assured has not sustained any loss nor received indemnity for any loss by burglary, theft or larceny except as follows.....no exceptions.

10 12. The insurance granted by this Policy attaches specifically as stated below in Items a, b and c, and subject to such limits, the total amount of insurance and the total liability of the Company hereunder is limited to \$2,000.00.

20 a. \$2,000.00 on Money (subject to the limits as specified in special agreement B 2), Watches, Jewelry, Precious Stones, Sterling Silver, Wearing Apparel, Furs, Laces, Plated Ware, Rugs, Tapestries, Curtains, Shades, Beds, Bedding, Linen, Engravings, Etchings, Paintings, Fixtures, Books, Bronzes, Statuary, Clocks, Bric-a-Brac, Articles de Vertu, China, Crockery, Glassware, Lamps, Cameras, Sporting Outfit, Musical and Professional Instruments, Furniture, Mirrors, Carpets, Fixtures for Plumbing, Gas, Water and Electricity and other Personal Effects common in residences generally, but excluding Fuel, Wines, Liquors and Family Stores, and also excluding articles mentioned in Items b and c.

30 Premium \$25.00

b. \$ Nil. On articles in the said premises, specifically insured as follows:

Premium \$.....

c. \$ Nil. On.....Premium \$.....

Total Premium \$ 25.00

Complaint.

Burglary Department.

Premium \$25.00.

No. 33813.

12½c Revenue Stamps.

NEW JERSEY FIDELITY & PLATE GLASS
INSURANCE COMPANY OF NEWARK, N. J.

10

Plate Glass—Burglary—Accident

S. C. HOAGLAND, President

H. C. HEDDEN, Secretary

Cash Capital, \$300,000.00

Organized 1868.

Assured: Mrs. Fannie B. Downs, wife of
Wm. Downs.

20

In Consideration of twenty-five and
[L. s.] 00/100 dollars being the Premium on
two thousand and 00/100 dollars Insur-
ance Burglary Policy No. 69553 insuring at 286
Essex avenue, Orange, N. J., is hereby renewed
and continued in force for twelve months to
wit, from the ninth day of June, 1915, until the
ninth day of June, 1916, at noon, Standard Time.

Not Valid unless countersigned by a duly
authorized agent of the Company.

30

S. C. HOAGLAND, President.

H. C. HEDDEN, Secretary.

Countersigned by S. T. & C. A. Smith & Co.,
Agent, Orange, N. J.

40

Complaint.

SCHEDULE B.

	1 fur set	\$40.
	1 fur set	25.
	1 dress suit	60.
	1 dinner jacket	25.
10	1 suit	60.
	1 overcoat	40.
	1 coat (Isabel)	15.
	1 dress	75.
	2 sets flannels	8.
	1 cap (Isabel)	.50
	1 cap (Florence)	.50
	1 cap (Tom)	.50
	1 coat (Tom) From De Pinna's	16.00
	1 coat (Harry) From De Pinna's	12.
	1 coat (Harry) From De Pinna's	12.
20	1 coat (Florence) From De Pinna's	10.
	1 coat (Florence) From Best	6.
	1 overcoat (William Downs) Rogers Peet	25.
	1 overcoat (Stuart) De Pinna's	26.
	1 overcoat (Tom) De Pinna's	18.
	1 suit (F. B. D.) Oppenheim Collins	30.
	1 suit (Griselda) Oppenheim Collins	35.
	1 suit (Beatrice) Wanamaker	42.
	1 dress (Isabel) Opp. Collins	12.
	1 dress (Beatrice) Wanamaker	12.
30	1 skirt (Beatrice)	6.
	1 blouse (Isabel) De Pinna's	6.
	1 evening wrap	12.
	1 dressing gown	5.
	4 pr. blankets Wanamaker & Gimbel	24.
	1 ring (taken from Stuart's desk drawer)	8.
	1 watch (James)	15.
	1 scarf pin (James)	5.
	1 suit (Stuart) taken from trunk	25.
	1 pr. extra trousers	7.
40		

Answer.

1 overcoat (Tom) from trunk	15.	
1 overcoat (Stuart) from trunk	18.	
2 toilet sets, including brushes, powder boxes and bottles	45.	
1 spirit decanter	26.	
1 fern dish	6.	
2 candelabra (breaks set)	18.	10
1 water set	18.	
1 milk pitcher	5.	
1 water pitcher	6.	
1 sugar bowl (breaks large set)	10.	
1 cream pitcher	10.	
	<hr/>	
Total	\$895.50	

(Filed June 8, 1916.)

Answer.

20

Defendant, New Jersey Fidelity & Plate Glass Insurance Company, a corporation duly organized under the laws of the State of New Jersey, having its principal office in the City of Newark, in said State, says that:

1. It admits the first paragraph.
2. It admits the second paragraph.
3. It admits the third paragraph. 30
4. It admits the fourth paragraph.
5. It admits the fifth paragraph.
6. As to the statements in the sixth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.
7. It denies the seventh paragraph.
8. It denies the eighth paragraph.
9. It denies the ninth paragraph.

40

Judgment.

10. As to the statements in paragraph ten, defendant denies that it owes the plaintiff any sum or sums of money.

PILCH & PILCH,
Attorneys of Defendant.

10 (Filed June 21, 1916.)

The case was tried before Judge Willard W. Cutler (one of the Circuit Court Judges to whom the cases on the list at the December Term, 1916, of the Essex Circuit of the Supreme Court were referred for trial by a Justice of the Supreme Court holding the Essex Circuit, the above cause being one of the cases on said list), with a jury at the said Essex Circuit on March 8th and 9th, 1917.

20 The jury rendered a general verdict, against the defendant and in favor of the plaintiff for the sum of four hundred and sixty-one dollars and fifty cents (\$461.50).

	\$461.50	plaintiff recover of the defendant the
	50.90	sum of four hundred and sixty-one
	—	dollars and fifty cents and her costs,
	\$512.40	which are taxed at the sum of fifty
30		dollars and ninety cents, making in
		the whole the sum of five hundred and twelve
		dollars and forty cents.

Judgment entered March 12, 1917.

WM. S. GUMMERE,
C. J.

Certificate of Clerk.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my
[L. s.] hand and seal of said Court at Trenton, 10
this twenty-fifth day of July, A. D.
nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

20

30

40

Opening.

NEW JERSEY SUPREME COURT.
ESSEX CIRCUIT.

10	<p>FANNIE B. DOWNS, <i>vs.</i> NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY.</p>	}
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Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., on Thursday, March 8, 1917.

Before Hon. Willard W. Cutler, Judge, and a jury.

20: McCarter & English, by Conover English and Walter L. Bunnell, of the New York bar, for plaintiff.

Pilch & Pilch, by Henry G. Pilch, for defendant.

Jury impanelled and sworn.

Mr. English opened for plaintiff.

Mr. Pilch opened for defendant.

30: *Mr. English.* I offer in evidence the policy of insurance referred to in the complaint, which is admitted by the answer, and which is policy No. B 69553, covering a period from June 9, 1914, to June 9, 1915.

(Admitted in evidence and marked Exhibit P. 1.)

40: *Mr. English.* I also offer in evidence the continuance of that policy, signed by the insurance company, in consideration of the payment of \$25 premium, which extends the

William J. Curtin, direct.

policy from June 9, 1915, to June 9, 1916, this continuation being No. 33813.

(Admitted in evidence and marked Ex. P. 2.)

Mr. English. I also offer in evidence the original proof of loss, which was produced by the plaintiff on my notice and which was filed by the plaintiff, as it appears by the same, October 16, 1915, of the total amount stated, \$848.50.

10

(Admitted in evidence and marked Ex. P. 3.)

Mr. Pilch. I would like counsel to state what the purpose is of offering the proof of loss.

Mr. English. It complies with the terms of the policy.

20

Mr. Pilch. I object to the introduction of the proof of loss other than as applying with the provisions of the policy. The proof of loss is not evidence and the plaintiff must state his object in introducing the proof of loss.

The Court. I think it is admissible. What it proves is another matter.

30

WILLIAM J. CURTIN, sworn in behalf of plaintiff.

Direct examination by Mr. English.

Q Mr. Curtin, you are a police officer of the city of Orange? A Yes, sir.

Q Were you such in the year 1915? A Yes, sir.

Q Do you know Mrs. Downs, the plaintiff in this case? A Yes, sir.

40

William J. Curtin, direct.

Q Know where she lives? A Yes, sir.

Q Where? A Essex avenue, corner of Reynolds terrace.

Q Was your attention called to any entry of her house in the latter part of August, 1915? A Yes, sir.

10 Q How was that matter brought to your attention? A I looked over that vicinity there when the summer residents were away and I had tried the house repeatedly when they were away and never found anything wrong until that afternoon. I was on a return trip when I noticed that the front door was open. I went up and found that Mrs. Downs and her daughter had just gone in a short time ahead of me. I asked them if everything was all right and the
20 daughter came downstairs. I went upstairs and it was very apparent that it had been entered and everything turned topsy-turvey.

Q Did you find any place where it had been—the entry had been made? A I found that afternoon a front window facing the west side of the house which had been entered from there.

Q A window pried open? A On the second floor.

30 Q You say everything was turned topsy-turvey. What do you mean by that? A The contents of the drawers were distributed throughout the room and in the beds and there were furs in some of the beds, clothing of all description thrown around, the drawers all pulled out and the drawer or I believe there were two or three drawers that were forced open and the contents strewn around the room.

40 Q I suppose you reported the burglary at headquarters? A I did; yes, sir.

William J. Curtin, cross.

Q Can you say whether it had occurred that day or some earlier time? A I am sure it was earlier on account of the way the articles laid and the dust was in the furniture and window frames.

Q How long had the house been closed so far as you know? A It had been closed at least two months previous to that. 10

Cross examination by Mr. Pilch.

Q Officer, how do you know that the house had been closed two months? A It was on my route.

Q You passed there every day? A I would not say exactly two months; but close on two months.

Q Would you have known if any member of the family had been in the house during those two months? A No, it would be possible for them to come and go in that house. I was only on days. 20

Q You don't know then, as a matter of fact, whether the house was closed or not? A I knew it was reported as such that the family was away for the season.

Q You don't know of your own knowledge? A Only the report from the station house that the place was vacant and they were away for the summer. 30

Q Then, there may have been somebody there and you not know it? A It could be possible.

Q Did you have any key to the house? A No, sir.

Fannie B. Downs, direct.

By Mr. English.

Q Did it have the appearance of being closed? A Oh, yes, each time. There was two entrances at the time made at that place, one through the cellarway and the other from the second floor. Apparently they couldn't get up
10 from the inside, from the cellar.

Q So they got one entrance in the cellar and the other in the second floor. Did you examine the window on the second story where the entry was made? A Yes, sir.

Q What condition was that in? A That looked as if it was forced. There were tracks of the jimmy on the window.

Q What about down in the cellar? A That window was also forced.

20 Q Evidence of a jimmy there? A Just two little cuts from the inside and there was mud found on the cellar floor when I got down there from the inside.

FANNIE B. DOWNS, sworn in her own behalf.

Direct examination by Mr. English.

30 Q Mrs. Downs, you are the lady mentioned in this insurance policy? A Yes.

Q You are the lady who brings this suit? A Yes.

Q You live on Essex avenue in Orange? A Yes.

Q Tell us what your family consists of. Yourself and your husband. A And eight children.

40 Q Now, I think we will have to have all the names because they figure in this loss. A James,

Fannie B. Downs, direct.

Griselda, Stuart, Beatrice, Isabel, Tom, and Harry and Florence.

Q Now, during the summer of 1915, was the family away and the house closed? A Yes.

Q Where had the family gone to? A Lake Hopatcong.

Q When was the house closed up? A It was closed up when the public school closed. 10

Q That was the latter part of June? A Yes. I am not quite sure of the date.

Q Was it opened by any member of the family between that time and the time when the officer was there, that you know of? A I am not quite sure. I think that my son that is in Chicago went in one night and slept there and I am not sure he went any other time. I feel pretty sure he went that time because I remember asking him—I am not sure that he slept all night in the house—I asked him if the house was all right and he said everything was all right excepting the cupboard, the silver chest was open. 20

Q When was that? A I don't remember.

Q Did you come down to the house the latter part of August? A I came home on this day, the 31st of August, with the children to enter them in school. School opened on the 1st of September of that year. 30

Q Who was in the party which went into the house that day? A My sons, James and Stuart and Tom, and my daughter Isabel and myself.

Q Came down in an automobile? A Yes.

Q You went into the house, I presume, and did anything attract your attention as unusual? A Not until I got up to the second floor. 40

Fannie B. Downs, direct.

Q And then what? A And then I went into my son's bedroom and then I saw that the bureau drawer had been burst open.

Q Which son? A James.

10 Q When you say burst open, what do you mean? A It had been locked and it had been struck.

Q Evidence of it being forced open? A Yes, and that excited my suspicion and I went into the rest of the house and other members of the house came with me and we all discovered the house was very much upset.

Q Did the policeman appear at any time while you were there that day? A Well, we went downstairs. The policeman came up the steps to ask if everything was all right.

20 Q This officer that was on the stand? A Yes.

Q What did he do? A I told him to come up and look.

Q Do you know what, if anything, was done to give notice of the fact to the insurance people? A My sons, James and Stuart, went right down to Smith, the agent in Orange.

Mr. Pilch. I object to that.

30 *The Court.* What somebody else did is not competent.

Q Just tell us who Smith was. You mentioned Smith. A The agent for Orange, the agent for our insurance, the man who has all our insurance.

40 Q I see on this Exhibit No. 1, the policy, and No. 2, the continuance, the names F. C. & C. A. Smith & Company. Are they the people you refer to? A Yes.

Fannie B. Downs, direct.

Q Following the departure of your two sons, James and Stuart, in the direction of the insurance agent, what happened, if anything, to indicate that the insurance company had knowledge of this affair? A Why, they went down and told them.

Q Of course, you can't say what they said. 10
What happened next at the house? A Then they sent a young man up.

Q Whom do you mean? A Smith.

Q Did anybody else come, representing either the agent or the company that day? A Not that day.

Q Do you know the name of the young man that Smith meant? A No, I do not.

Q What did he do? A He looked all 20
through the house and put down, of course, what had happened and told us to make out a list. He told us—

The Court. What he said is not competent.

Q Don't tell us what he said, just tell us what he did. He looked all over everything? A Yes.

Q When next, if you know, did anybody from 30
the company appear? A I am not sure of the date. The next person that came was the adjuster, named Ward.

Q What did he say with reference to his position in the company, if any? How do you know he was an adjuster? A He had his card with him.

Q What did that say, as you remember A
The young man that came said—

Mr. Pilch. I object to that.

Fannie B. Downs, direct.

By the Court.

Q When was that? A I can't remember.

Q How long after you came home? A Approximately a month or two. It might have been as late as the 1st of October because I remember the young man told me he had a month to find out what we had lost.

Q I show you a letter, dated October 28, 1915, addressed to F. C. & C. A. Smith, agents, New Jersey Fidelity & Plate Glass Insurance Company. Is that letter in your handwriting?

A Yes.

Q And signed by you? A Yes.

Q Can you look at that letter and tell us whether you can refresh your recollection as to the name of the person who called on you? A The first man?

Q The person you are referring to. You said somebody came from the insurance company? A I don't know the young man or the young man's name. It was never mentioned. Mr. Ward is this man here.

Q The gentleman in court who sits by the defendant's counsel? A Yes.

Q Is he the man named in this? A The adjuster.

Q And he came and called on you. While he called on you was there any discussion as to this loss or the burglary or anything of that kind? A Yes, he talked all the time about that. He had that paper that you have. In the meantime I had made out that list.

Q I show you a list of articles and amounts. Is that the paper you refer to as that list? A That is one, yes.

40

(Marked P.4 for identification.)

Fannie B. Downs, direct.

Q Do you say when Mr. Ward called upon you you had this paper, P. 4, for identification?

A Yes.

Q Had you already made it out? A I had already made it out.

Q Was this paper the subject of a conversation between you and him? A Yes.

10

Q Tell us what was said between you about this paper. A We looked over the things together and Mr. Ward suggested that the suit that was stolen might possibly—

Mr. Pilch. I object.

The Court. How can anything Mr. Ward said bind the company? As it stands now I don't think what he said is competent.

Q This paper purports to set forth a list of the articles lost and damaged? A Yes.

20

Q By the burglars? A Yes.

Q Mrs. Downs, I show you the proof of loss, Exhibit P. 3, which is made out on a blank form. Where did you get that form from? A It was sent to me by the plate glass people.

Q Before or after this visit of Mr. Ward?

A Why—

Q Was any discussion had between you and him as to the form of the proof of loss? Did he discuss that with you? A No, I don't think so. I don't remember.

30

Q How do the articles set up on this proof of loss compare with the list which we marked P. 4 for identification? A Exactly the same, I think.

Q Following the conversation with Mr. Ward did you write this letter of October 20, 1915, which I previously showed you, to the Smith people, as you call them? A After the conversation with Mr. Ward.

40

Fannie B. Downs, direct.

Q That followed his visit? A Yes.

Mr. English. I offer the letter in evidence.

10 *Mr. Pilch.* I object. This is a letter written by Mrs. Downs, which contains a great deal. I don't see how the company can be bound by a letter written by her.

The Court. You have the fact now in evidence before the jury that Mrs. Downs wrote a letter to the agent and that letter she has identified. Whatever she said in that letter is not binding. I do not think it is competent.

(Marked P. 5 for identification.)

20 Q I want you to direct your attention to the proof of loss, which you filed, and tell me whether all of the articles mentioned on it were stolen in the sense they were taken away physically from the house or not?

30 *Mr. Pilch.* I object. The complaint in this case reads, "Loss by damage to certain of the property of the plaintiff specified in the schedule annexed hereto." There is no allegation in the complaint that any articles had been stolen. It is an action for damage to property, not an action for the value of stolen goods.

Mr. English. I will ask your Honor's permission to amend.

The Court. I will allow the plaintiff to dictate to the stenographer such an amendment as he desires to make and you can put in a denial of the fact so that the record is straight.

40 *Mr. English.* I will amend the seventh paragraph of the complaint by adding in

Fannie B. Downs, direct.

the fourth line of the seventh paragraph after the words, "Property of the plaintiff," the following words, "and direct loss by burglary, thieving or larceny of certain other property of the plaintiff."

The Court. You deny the seventh paragraph as amended? 10

Mr. Pilch. Yes.

Q Now, look at the proof of loss, Exhibit P. 3, and tell me whether all the articles named in it were taken away physically from the house or not? A All these were taken away.

Q And those on the first page of the list were damaged? A All these are the things that were damaged.

Q And the second page of the list were damaged? A Damaged 20

Q They were not taken away? A No, sir.

Q We will just go down to the list of things taken away. The first is a ring. What was that worth?

The Court. Why would it not be well to use that and let counsel for defendant cross examine as to the value of that?

Mr. Pilch. All right.

Mr. English. Then, I will not pursue the details of the proof of loss. 30

The Court. The witness better explain the paper.

Q Now, I will take up the second phase of the matter, which deals with the things that were taken. In a general way tell us what were taken. A The things that were put away in the spring before leaving were taken out of the bureau's drawers, packages and things that had been 40

Fannie B. Downs, direct.

10 packed away in camphor, all our winter clothes were taken out and thrown all about the rooms, three bedrooms and the storeroom of the house. The things had moths all over them and when we went in, I wasn't so much concerned about the things they had taken away because we had taken all of the silver out of the house, solid silver, I wasn't so concerned about that, but I was concerned with the winter clothes because with a large family like we have, that was a total loss, the things that were eaten by moths.

20 *Mr. Pilch.* I object to the testimony, as to the damage by moths. That brings up the crux of this whole situation. It is a contract whereby the defendant insured the plaintiff for direct loss by burglary, theft or larceny. It also insures the plaintiff for direct loss by damage to the said property and to the said premises caused by burglars or thieves. I submit and I have authorities that this loss or this alleged damage by moths is indirect and is not the approximate cause of the loss, and, therefore, is not covered by this insurance contract. This, of course, is the real gist of this case, what the contract means.

30 *The Court.* I will take the evidence subject to an application to strike it out.

Q Now, you have said that these articles set forth on the second page of this exhibit, P. 3, were largely damaged by moths. What did those things consist of? Articles of clothing? A Yes.

Q Overcoats? A Overcoats, ladies' suits, three of my daughters that are grown up, and there was three lots of women's clothing.

40

Fannie B. Downs, direct.

Q As well as clothes such as moths would eat? A Yes.

Q Any furs? A Two sets of furs.

Q Any overcoats? A I don't remember how many.

Q Any blankets or things like that? A Yes.

Q Dress suit? A Yes.

10

Q Who was it that packed those things up?
A I did.

Q How did you pack them? A I packed them in newspaper; an old-fashioned way of packing them, and put camphor, lots of camphor, in the box and tied the box up. They were put in bureau drawers. In case of a very large box we put that on a bed in my daughter's room and other things we put in bureau drawers and covered with newspapers and camphor and the things downstairs we packed in Willow packing trunks. When we go away we have to take the trunks with us. I always put the things in my bureau drawers, as much as I can. We have gone away for ten years.

20

Q You have a sort of system? A Yes.

Q Have you packed those things away before? A Always.

Q Have the moths been in them before? A In a case of my little girl's clothing I pack the moth with it, but these things were all thrown out and the moths all on them.

30

Q Did you pack any other clothes that were found not to be damaged? A Yes, some things we could see.

Q What was their condition? A I have this on now.

Q This dress you have on?

Mr. Pilch. I object. That is not evidence, the condition of other garments.

40

Fannie B. Downs, direct.

The Court. The witness may tell how she found other articles and their condition.

Q You refer specifically to the dress you have on. How was that packed as compared with the other things? A Just the same way.

10 Q Was it damaged? A They didn't touch that part at all.

Q How was the dress when you unpacked it? A It was all right.

Q Were the other clothes of the same character that were packed in the same way, suits which were not opened by the burglars? A Yes, dress suits they didn't touch at all in another bureau.

Q Any other furs? A My own furs.

20 Q They were not disturbed? A No, they were in the same place.

Q What was the condition of those dress suits which were undisturbed and those furs which were not disturbed as compared with those which had been disturbed? A They seemed to be all right.

Q They were not eaten up by moths? A No.

Q One of the articles which was damaged was a dress suit. Whose dress suit was that? A. Mr. Downs'.

30 Q Do you know how much it cost? A \$60, and the dinner jacket, that is all one lot of clothes.

Q What damage was done to that? A Why, we sent it to the tailor and he looked at it and said—

The Court. No, not what he said.

40 Q Just describe the condition of it. A It was very badly moth eaten and would have to be taken all apart.

Fannie B. Downs, direct.

Q There is a reference there to a couple of sets of furs. What about them? How much did they cost? A One cost \$40 and the other \$25; belonged to my daughters.

Q Were they moth eaten or not? A Yes.

Q How did they fare as a result of those moths? A They didn't show at all, but I was so afraid that they would be spoiled because they were nice new furs and we took them into the furrier and he fixed them up. 10

Q He repaired those? A Yes.

Q Were they as good as new when he got through? A That I can't tell. They are still wearing them.

Q How much did he charge for the repairs? A I think \$6.

Q You have spoken of the dress suit, the dinner coat. Was that the same thing? A Yes, all belongs to the same thing. 20

Q The suit cost \$60. How much for the dinner jacket? A \$25.

Q Was that moth eaten, too? A Yes, they were all there.

Q I see a suit on this list, \$60. A That is Mr. Downs' clothes, all out of the same bureau, dress suit, dinner jacket, overcoat, coat, sets of flannels and the Prince Albert. 30

Q The \$60 suit, what happened to that? A The dress suit?

Q No, I am past the dress suit. There is another suit on the list. A Oh, yes.

Q What suit is that? A Prince Albert. That is Mr. Downs' dress suit, dinner jacket, overcoat and that small coat.

Q We are talking about the dress suit and the dinner coat. Let's talk about the overcoat. How much was that? A That is \$40. 40

Fannie B. Downs, direct.

Q What was its condition? A Well, that is not very bad.

Q Somewhat damaged? A Yes.

Q What about the coat? A The small coat?

Q Yes. A That is not so bad. All those things Mr. Downs has worn.

10 Q What about the Prince Albert? A That is in the same condition. They were together in that bureau.

Q They were more or less damaged by moths? A Yes.

Q Two sets of flannels? A They are very much in holes.

Q I see an evening dress, \$75. Whose dress was that? A Mine.

20 Q What was the condition of that? A That was in such a condition that I didn't do anything to it. It wasn't a new dress. I was going to have it fixed up and I didn't feel I cared to spend any money on it because I was afraid it would all go in holes.

Mr. Pilch. Just tell us the condition.

Q What color dress was it? A A drab imported dress.

30 Q Where were the holes in it? A Well, on the front, just where it was turned up.

Q Were the holes in a conspicuous part so if you put the dress on it would have been conspicuous because of the fact it was all moth eaten? A I don't think so. I haven't looked at it. I put it away thinking when this thing was settled if it was worth while I would have it fixed up. It is there home and I can't tell you.

40 Q Four blankets. What was the matter with them? A Well, they were thrown all over.

Fannie B. Downs, direct.

Q Is that four blankets or four pairs of blankets? A Four pairs of blankets, taken out of the trunk and thrown all around. They seem just covered with moths. Of course, I expected they would be no use at all because moths after they have gotten into things they fall apart. We had a steamer rug in connection with that.

10

Q Were the blankets moth eaten? A Well, we are using them.

Q I know, but are they damaged? A I don't think they are very much damaged.

Q Now, child's coat, \$10. That cost \$10? A Yes.

Q What was the matter with it? A That was moth eaten.

Q That was badly damaged or not? A Well, it was pretty badly damaged.

20

Q What about the boy's overcoat?

Mr. Pilch. I think if she would tell the condition of the garment, not say they were pretty badly damaged—

Witness. It is very hard to tell just what the damage was. The overcoat you just asked about?

Q The child's overcoat. A Yes, the boy's overcoat and he fixed it up and charged me \$2.50 for it, but the lapel of his coat is entirely gone, so he really ought to have had a new overcoat instead of trying to wear it at all. It is all worn out.

30

Q Tell us about the boy's overcoat. The child's overcoat is \$10. Boy's overcoat, \$12, what about that? A That is about the same condition.

Q There is another overcoat there for \$12. Whose coat was that? A I think that was Stuart's.

40

Fannie B. Downs, direct.

Q What happened? A Hold it up to the light and you can see the holes right through it.

Q There is a child's coat, \$6, what about that? A That was in the same condition. It is bad enough. I haven't had anything done to it.

10 Q Here is an overcoat, \$25. Whose coat was that? Bought at Rogers Peet? A That was a summer overcoat of Mr. Downs'.

Q Was that damaged or not? A Yes.

Q Badly or not? A Yes, pretty badly.

Q Where was it eaten? A I think it was eaten under the arm.

Q There is another coat here, \$26, bought at DePinna's. What about that? A I think that has been worn. I don't think we did anything with that.

20 Q Was it eaten? A Yes, they were all moth eaten.

Q But that could still be used? A Yes.

Q Ladies' suit; whose suit was that? A Mine.

Q What color was that? A That is a dark one.

Q Was that much damaged? A I can't use

30 it. Q Here is another suit, \$35, whose suit was that? A My daughter's suit.

Q Have you that here? A The skirt was so awfully eaten. I have the coat.

Q You had to throw the skirt away? A Yes.

Q Couldn't wear it at all? A No.

Q Here is another lady's suit, \$42. Whose suit is that? A My daughter's.

40 Q Is that much damaged? A Yes.

Fannie B. Downs, direct.

Q How much? A Entirely ruined, that was.

Q Can't use it at all? A No.

Q Here is a dress, \$12, Oppenheim Collins.

Whose was that? A Isabel's.

Q Was that useful or not? A No.

Q Here is another dress, \$12, Wanamaker's.

A That is Beatrice's. 10

Q Was that a loss or not? A That is a loss.

Q Couldn't use that?

Mr. Pilch. I object to counsel making these statements. Let the witness answer.

Q Could you use it or not? A No.

Q Here is a skirt, \$6. Whose is that? A I don't remember, either Beatrice's or Isabel's.

Q Do you remember the condition of it? A Yes. 20

Q What was the condition of it? A We couldn't use it.

Q Here is a blouse, \$6, DePinna's. Whose is that? A Isabel's.

Q Was that usable or not? A No.

Q Here is a wrap, \$12. Whose is that? A Griselda's.

Q Was that usable or not? A I think she could use that. I think she has used it. 30

Q Do you remember how it was damaged? A Moth eaten.

Q Where? A Down the side.

Q Did it look badly or not? A I don't think it showed very much.

Q Dressing gown, \$5; whose was that? A That was mine.

Q Is that damaged much or not? A Yes, that is moth eaten, holes.

Q Can you use it yet? A Yes. 40

Fannie B. Downs, direct.

Q The furs you have already described. A Yes.

Q You said you had some dresses here. Are they in this bag here? A Yes.

Q Show me that one you showed me before.

10 *Mr. Pilch.* I object. There is such a long space of time which has elapsed between the time of the burglary—

Mr. English. I will show they were in that condition.

Q Are these articles, which you have here in this bag, and which I have placed before you, in the same condition now they were at the time you discovered the burglary as far as these moth-eaten holes go? A Moths generally are not quite apparent right at first.

20 *Mr. Pilch.* I object to that.

The Court. I will allow you to answer.

Q You said moths are not apparent at first. What do you mean by that? A Because their eggs are laid, it takes some weeks for them to mature and bring the holes.

By the Court.

30 Q In other words, when you went there you didn't find any moth holes, when you came home?

A I found the moths on the dresses.

Q But not the holes? A No.

By Mr. English.

Q How long after was it that the holes developed? A Right away.

Q How soon? A We came home in September and in October we began to put our winter clothes on and we couldn't use them.

40

Fannie B. Downs, direct.

Q That was true of the things which were broken open? A Yes.

Q The ones which had not been disturbed were all right? A Yes.

By the Court.

Q You found the moths on them. Didn't you take any steps to protect the goods then from the eggs which were laid there? A Oh, yes; just as soon as the first man came from the insurance we brushed the eggs all off. They were all over our clothes. It was a very serious thing to find all your winter clothes with such a family as I have—

10

Mr. Pilch. I object to that.

The Court. Yes, strike it out.

20

By Mr. English.

Q How soon after the discovery of the burglary, which was August 21st, was it that you brushed these clothes off or took whatever steps you did take to protect them? A I can't tell you exactly. It was during the month of September.

Q Within a couple of days or a few weeks? A Right away.

30

Q How soon did the man from the insurance company arrive? A He came right away.

Q That same day? A Yes.

Q Right after it, then, is that right? A Right away. We packed them altogether in the trunks and took them off.

Q When did you discover those holes in the dress which I have asked you to show to the jury? A It must have been in October.

40

Fannie B. Downs, direct.

Q Are the holes in the same condition now as they were when you discovered them in October? A Yes, I suppose so.

Q Have they been eaten by any new moths?

Mr. Pilch. She can't tell that. I object.

10 A I don't think so. I can say that they were protected from moths.

Q They were packed up last summer? A Yes.

Q As a result of the packing of last summer was there any damage by moths? A All our other clothes—

Q No, these particular clothes? A They are just the same.

Mr. English. Now, I ask permission to exhibit them to the jury.

20 *Mr. Pilch.* I don't think she can say these goods are in the same condition now they were in in October, 1915.

By Mr. Pilch.

Q Isn't it possible that other moths may have gotten in these garments since 1915, the day of the discovery? A There may be more holes in the clothes.

30 Q No, isn't it possible that other moths may have gotten in? A I don't think so. I put them all away. They have been kept together by themselves because I was afraid the moths that were in them would spread to our other good clothes. I was very careful to keep them all by themselves in the one trunk.

40 Q Isn't it possible that the moths eggs were in the garments on the day of this loss, that they have hatched out since and the moths chewed holes in the garment? A I didn't catch that.

Fannie B. Downs, direct.

Q Isn't it possible there may have been eggs in these garments on the day of the loss and that the moths have hatched out since and chewed other holes, isn't that possible?

The Court. Does the witness know?

A I am not a scientist. I don't know. 10

Mr. Pilch. I think that is a perfectly proper question.

By the Court.

Q Has this garment been worn since the time you discovered the burglary? A No, it has never been worn. It couldn't be.

The Court. Then, I will allow that to be shown to the jury.

By Mr. English. 20

Q Is this coat a part of any suit which you referred to in this list? A This coat belonged to a suit of my daughter Beatrice's, and the skirt was so badly eaten up that I didn't keep it.

Q All you have left is the coat? A The coat.

Q Is that coat eaten any? A Very badly moth eaten. 30

Q Any of these other clothes that have or have not been worn? A This is the \$30 suit of mine.

Q This is the drab suit you spoke of? A Yes.

Q Has this coat moth holes in it? A This sleeve, under the arm, could have been mended, but this can't.

Q What do you mean by that? A The sleeve cannot be mended. 40

Fannie B. Downs, direct.

Q Point out any holes in the skirt of this drab suit of which you have already shown us the coat. A Here is one.

Q Any more? Yes, you couldn't wear that, could you? A I haven't tried to.

10 Q Is that the one you referred to as a total loss? A Yes.

Q You have some more things in that suitcase. What are they? A This is an overcoat, which I said, wasn't eaten very much. When they wear it wears right out.

Q It is along the lapel? A Yes.

Q Anything else? A And this is a coat, the skirt was so badly eaten. It is my oldest daughter's, Griselda, and the skirt is entirely ruined and the coat not damaged much.

20 Q This is the coat which isn't much damaged, but she has a coat without any skirt, is that it? A Yes.

Q Can she make any practical use out of that? A She has not.

30 Q Can a young lady, having a coat of a suit, get along without the skirt? I guess that answers itself. Now, this proof of claim which you have filed sets up the cost price. Can you tell us, give us any idea of the present—when I say present, I mean the value in October, 1915, of these various things that were damaged; that is, the full price, how much they have depreciated from previous wear? A They were not, any of them, very up to date in fashion but they were all good for us to wear and we would have done so, and of course, we had to buy new clothes—

Mr. Pilch. I object to that last statement.

40 *The Court.* Yes, it may be stricken out.

Fannie B. Downs, direct.

Q Take this suit of your daughter's Griselda's, the skirt of which was completely ruined. What would you say was the value of that at the end of the summer of 1915?

The Court. She has not shown any value whatever with second-hand clothes.

Mr. English. It seems to me if we show the cost and the usability and the original cost price there is enough for the jury to fix the value of them. 10

The Court. You may show what they cost and how much they have been worn, but I do not think this lady has any right to show now, to fix a value on anything of that kind.

Q How old are those blankets? A I can't tell you. 20

Q Old blankets or comparatively new blankets? A There were four blankets all quite new. We have used them.

Q From August, 1915, how long before that had they been used? A They had all been used the winter before.

Q Were they much worn or not? A No, they were nice new ones.

Q What about this child's coat, how long had that been used? Originally cost \$10. A I don't think I can remember. 30

Q Here are some dates down here. What do they refer to? Do they give the date of the purchase which you wrote down at the time?

A It says, "When purchased."

Q Then, we have got that in evidence when they were purchased. Now, we will find how much they have been used. This coat was purchased in 1913. How much had it been used? A It was used that winter. 40

Fannie B. Downs, direct.

Q Do you remember whether it was much worn or not? A No, it wasn't.

Q This boy's coat was purchased in 1912?

Mr. Pilch. I don't know that there is any evidence when these goods were purchased.

10 *Mr. English.* Yes, the proof of loss gives the dates.

The Court. I think you have to show more than that. I think you have to show by this lady when they were purchased. The mere fact it is put on the proof of loss is not enough. She may use that proof of loss as a memorandum.

Q Just going back to the child's coat, when was that purchased? A 1913.

20 Q You said that had been worn one winter? A Yes.

Q And was practically as good as new. Now, the boy's overcoat, \$12. When was that purchased? A 1912.

Q Had that been worn? A I suppose one or two winters.

Q Was it much worn or not? A It was good enough for the next boy. That is what I do.

30 Q There is another boy's overcoat, \$12, when was that purchased? A The same year.

Mr. Pilch. I object to the witness reading from the proof of loss.

Mr. English. She may refresh her recollection.

By the Court.

40 Q You speak of going to school. Was that every day? A Yes, I have four boys. I bought very good clothes and let the next one wear them.

Fannie B. Downs, direct.

Q How old were those boys at that time?
A Twenty-two and nineteen.

By Mr. English.

Q When was this last one purchased, this last \$12 overcoat? A 1912, 1913.

Q Was that much worn? A No, that wasn't. 10

Q Here is a child's coat, \$6. When was that purchased? A That I can't remember.

Q Was it much worn or not? A That was very badly eaten.

Q But, before it was eaten what was its condition? A It was a very good one.

Q How old is the child that wore that? A It belonged to Isabel and she had outgrown it.

Q This was a young lady's coat A No, it was when she was quite a number of years younger. It was a very good coat. I had kept it for her sister. 20

Q Here is another coat, \$25. When was that purchased? A That I don't know.

Q Do you know what the condition of it was? A Yes, it is eaten.

Q Before it was eaten, what was its condition? A All right.

Q Was it usable? A Yes.

Q Good for how long, do you know? A That I can't tell you. 30

Q Here is another overcoat, \$26, purchased at DePinna's. When was that bought? A That was bought in 1913.

Q Is that for a man or woman? A That is my oldest son. He was about twenty.

Q What was the condition of his coat before it was eaten? A All right.

Q Here is a lady's suit, which originally cost \$30 at Oppenheim Collins, which you said was eaten up. 40

Fannie B. Downs, direct.

Mr. Pilch. I object to counsel's statement, "it originally cost \$30."

The Court. He may prove by this lady what they did cost.

Mr. Pilch. My contention is that the proof of loss is not evidence of the value stated.

10 Q You filled in the cost amounts of these articles, didn't you? A Yes.

Q Are the cost items set forth on this proof of claim the actual cost? A Yes.

Mr. Pilch. I object. The actual cost must be proved by the bills or by the person that sold the goods.

The Court. I think you may ask the witness about each individual article.

20 Q What did you pay for the blankets A \$6 each, I think, a pair.

Q \$6 a pair. Four pairs, that is \$24? A Yes.

Q What did you pay for the child's coat from DePinna, bought in 1913, as you stated? A \$10.

Q What did you pay for the boy's coat, bought in 1912? A \$12.

Q What did you pay for the other boy's coat, bought in 1912? A \$12.

30 Q What did you pay for the boy's coat in 1913? A \$12.

Q What did you pay for the child's coat bought from Best's? A \$6.

Q What did you pay for the overcoat bought from Rogers Peet? A \$25.

Q What did you pay for the overcoat bought from DePinna, 1913? A \$26.

Q What did you pay for the lady's suit bought from Oppenheim, Collins? A \$30.

40 Q When did you buy it? A 1913.

Fannie B. Downs, direct.

Q What was the condition of it at the time it was chewed up by the moths? A It was perfectly good to wear.

Q What did you pay for another lady's suit, which follows that on the list? A \$35.

Q When did you buy that? A 1913.

Q What was the condition of that at the time it was chewed by the moths? A They are those three suits. 10

Q Which you referred to here and exhibited to the jury? A Yes.

Q What was the condition of that? The \$35 one, Oppenheim, Collins? A The \$35 one, the coat is in very good order, but the skirt was entirely ruined.

Q Before it was ruined what was the condition of the skirt? A Very nice. 20

Q The next is a lady's suit, purchased in Wanamaker's. When did you purchase that? A 1913.

Q How much? A \$45.

Q What was the condition of that before the damage was done to it? A Very nice.

By the Court.

Q What kind of a suit is it? A One of these. 30

Adjourned to Friday, March 9, 1917.

Fannie B. Downs, direct.

SECOND DAY.

Friday, March 9, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

10 *Mr. English.* I would like to interrupt the examination of Mrs. Downs to put on another witness.

The Court. Yes.

WARREN D. WARD, sworn in behalf of plaintiff.

Direct examination by Mr. English.

20 Q Mr. Ward, what is your business? A Insurance.

Q With what company? A New Jersey Fidelity & Plate Glass Insurance Company.

Q The defendant here? A Yes, sir.

Q What is your position in that company? A Assistant secretary and assistant treasurer.

30 Q How long have you been assistant secretary and assistant treasurer? A Well, six or seven years. I am not quite positive about the time.

FANNIE B. DOWNS resumes the stand.

Direct examination (continued) by Mr. English.

40 Q Mrs. Downs, yesterday at adjournment I had gotten as far down in this list of articles as the lady's suit, \$42, purchased from Wanamaker's. Now, I will ask you about the dress, next on the list. How much did that cost when new? A That cost \$12.

Fannie B. Downs, direct.

Q And it was purchased from whom? A Oppenheim, Collins.

Q When? A 1914.

Q What was the condition of that dress prior to the time you packed it away in the summer? A That was a very nice dress.

Q And that was totally destroyed, you said, so that it had to be thrown away. Next, another dress purchased from Wanamaker. What did you pay for that? A \$12. 10

Q Purchased when? A 1914.

Q What was the condition of that when you packed it up? A That was in the same way.

Q Good condition? A It was very nice when we put it away.

Q You already said it had to be thrown away. Next on the list is a skirt. 20

Q How much did that cost? A Skirt cost \$6.

Q Purchased when? A 1914.

Q And its condition before the moths ate it was what? A It was good.

Q And that you have already said had to be thrown away. Next on the list is a blouse that cost how much? A I don't remember how much that cost. Yes, it was \$6, but I don't remember when we bought it. 30

Q Do you remember what condition it was? A That was spoiled, all eaten under the arms.

Q I mean, before it was eaten. A It was very good.

Q Next on the list is a wrap. How much did that cost when new? A That cost \$12.

Q Do you know when you bought it? A I don't remember when we bought it. It belonged to my oldest daughter. We still have it, but it is moth eaten down the front. 40

Fannie B. Downs, direct.

Mr. Pilch. It seems to me this was all gone into yesterday.

Mr. English. I am doing this at counsel's request.

The Court. Go ahead.

10 Q You don't know when it was bought. What was the condition of it before the moths ate it?
A It was quite wearable.

Q The next is a dressing gown. That costs how much new? A That cost \$5.

Q How much was that? A That I am still wearing.

Q Was that a good article before it was eaten? A Perfectly good.

20 Q The furs, how much did the first set of furs cost? A \$40.

Q Purchased when? A 1914.

Q And the condition before it was eaten?
A Perfectly good.

Q And the second set of furs cost how much?
A \$25.

Q Purchased when? A 1914.

Q What about their condition before they were eaten? A They were very good.

30 Q The next is a dress suit. How much did that cost? A \$60.

Q Do you remember when he got it? A I don't remember.

Q It was a modern, up-to-date dress suit?
A No, I don't think so.

By Mr. Pilch.

Q Was that your dress suit? A No, it was Mr. Downs' dress suit.

Fannie B. Downs, direct.

By the Court.

Q Were you there when it was purchased?

A No.

By Mr. English.

Q The next is an overcoat, Rogers, Peet? A
That is Mr. Downs'.

10

Q Were you there when that was purchased?
A No.

Q The next is a coat. Whose coat was that?
One of the children's? A That was a serge
coat, one of the children's coats, one of the boy's
coats.

Q Do you know how much that cost? A
That was a \$15 coat.

Q When was it bought? A 1914.

20

Q What was the condition of that before it
was damaged by moths? A No, that wasn't a
boy's coat. That was one of the little girl's
coats. I bought it at DePinna's in 1915. That
cost \$15.

Q What was its condition before it was
chewed by moths? A Very good.

Q The next is an evening dress? A That is
mine.

Q How much did that cost new? A That
cost \$75.

30

Q What was the condition at the time you
put it away in the summer? A It was old-
fashioned and I was going to have it made over,
but owing to the moth holes in it I didn't know
whether it would be worth it and I didn't want
to spend the money until I found out whether I
was going to get anything for it. It is a very
nice dress.

Q Good material? A Very nice, indeed.

40

Fannie B. Downs, direct.

Q The trouble was with the cut. You were going to have it modernized? A Yes.

Q The next is two suits of flannels? A Those cost \$4 a suit and they were very much riddled with moths.

10 Q When you put them away in the summer what condition were they in? A They were not very new, but they were perfectly good.

Q The next is a Prince Albert suit? A That is Mr. Downs'.

20 Q Yesterday you spoke about the preliminary list which you had made up and which I had marked P. 4 for identification. Did Mr. Ward, the assistant secretary, who says he is the assistant secretary and assistant treasurer, call upon you at any time when you had that list with you? A Yes. It is the list I went over in my house with Mr. Ward.

Q This list, P. 4 for identification, shows the same items and the same figures as those set up in the proof of claim? A Yes.

Q Did you go over this list, P. 4, for identification, with Mr. Ward? A Yes.

Q This contains a list of the things actually stolen from the house? A Yes, sir.

30 Q And also the things damaged by moths? A Yes.

Q What did he say about the things which were actually stolen from the house?

Mr. Pilch. I object to that. Any offer of settlement is not binding if it did not go through.

40 *Mr. English.* I propose to show the damage first of the things that were stolen, and secondly, that they were worth the amount set down on the paper. I am not dealing with offers of settlement.

Fannie B. Downs, direct.

The Court. That would be a question of settlement. I do not think it is proper.

Q When did Mr. Ward call on you? A Mr. Ward came three times.

Q At any one of those times when he came did he examine the place where the burglars had gotten in the window? A No, I don't think so, 10

Q He didn't make any examination of that? A No.

Q Did he say anything about whether or not his company was satisfied that there had been a burglary? A I don't think that question came up at all.

Q Did he go over the list of things with reference to the values you had placed on them, referring to the things that had been physically taken away from the house? 20

Mr. Pilch. I object to that.

A Yes.

The Court. I will allow that question to stand.

Q Was the list which he went over the same as that paper now before you, P. 4 for identification? A Yes.

Q That was the list he went over? A This is the paper we used. 30

Q Did you describe to him the articles which are there set forth on this paper? A Yes, we went all over them.

Q He made these lead pencil figures on this paper?

Mr. Pilch. I object to that. Counsel is trying to show values.

The Court. I will allow that question. 40

Fannie B. Downs, direct.

A I don't remember. I don't know about that. They are not mine.

Q Did you describe to him the character of the articles that are set forth on this list that were stolen from the house? A Why, surely.

10 Q Did you discuss with him the values which you set opposite those various articles? A Yes.

Mr. Pilch. I object to that.

The Court. I do not think that is quite proper. You are coming down to a question of a settlement which was not carried out. I do not think it is proper. You have now arrived at the point where the jury is to determine the value of the goods and the damages to the goods. You have now the fact that they discussed the goods and that
20 the identical goods referred to in this paper were referred to in the proof of loss.

Q Mrs. Downs, at the time you went over this list of articles, which had actually been stolen, with Mr. Ward and discussed with him the character of the articles and the values of them which you had set opposite to them on the paper, did he say whether or not he was satisfied with the values which you there set down?

30 *Mr. Pilch.* I object to that.

The Court. I sustain the objection.

Counsel for plaintiff prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did he say anything to you with reference to the filing of a proof of claim with the defendant company?

40 *The Court.* I think she may answer that question.

Fannie B. Downs, direct.

A I think he did, surely. How else could I have done it?

Q Did he say anything to you as to what you should put in the proof of claim? A Everything.

Q Did he tell you how to get it up? A Yes, he said he would send me the list. 10

Q Was this paper, which is now in evidence, the proof of claim which came after his first visit? A I couldn't have gotten it by any other way.

Q What did he tell you to put in that proof of claim? A Under the headings, he told me to fill out the headings, which I did to the best of my knowledge.

Mr. Pilch. I think the proof of loss, which is a paper writing, speaks for itself. 20

The Court. There is nothing, as it stands now, that the proof of loss was not made out in accordance with the policy, which they agreed to. Unless it is disputed I think it is unnecessary and improper. There is no dispute that the proof of loss was not made out in the proper form.

Mr. Pilch. No. 30

Q Now, Mrs. Downs, these articles which I referred to for identification, the things taken out of the house, were they physically taken away? A Yes.

Q They were all in the house when you shut it earlier in the spring? A Yes.

Q When you came back and discovered the burglary they were all gone? A Yes.

Q Has the insurance company paid you any money on this policy? A No. 40

Fannie B. Downs, cross.

Mr. Pilch. I think now is the proper time to ask for a ruling on the motion yesterday.

The Court. I shall refuse your motion and allow it to go to the jury as to whether or not the goods which were damaged were damaged as the result of the action of the thieves, if there were thieves, in taking them out of their cases.

Mr. Pilch. For the sake of the record, my motion is that the testimony of Mrs. Downs as to the alleged damage by moths is improper, irrelevant and immaterial, on the ground that the policy covers direct loss by damage to the said property and to the said premises caused by burglars or thieves and that this is not such direct damage as is covered by the policy.

The Court. Motion refused.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Pilch.

Q Mrs. Downs, you reside in Orange? A Yes.

30 Q Resided there some time? A Yes.

Q I notice on this paper writing, the first article marked "ring," and I notice on the paper writing the purchase price marked "\$8." Where did you get that figure from? A I bought the ring for my son at Exeter, New Hampshire, when he was at Phillips Exeter at school and it was left on his desk when we went away and it was taken away.

40 Q You bought the ring at the academy? A No, at the jewelry store at Exeter.

Fannie B. Downs, cross.

Q You paid for the ring how much? A \$8.

Q When did you buy that ring? A I don't remember. It was when he was at Phillips Exeter.

Q You don't remember when you bought it?
A It must be over five years ago.

Q You realized when you signed this proof of loss that you swore to it? A I most assuredly did.

10

Q You took an affidavit? A I went before Mr. Stetson in Orange and swore that that was right.

Q And your testimony now that you bought that ring and paid \$8 for it, is correct? A Yes.

Q Then, will you kindly explain how this paper writing, which you swore to, states that the ring was bought in Hartegen's in Newark?
A I don't think it does. It is so, yes.

20

Q Then, that testimony was wrong that you bought it at the academy? A I got mixed up. I didn't have the list.

Q You realized that this is an important matter? A Surely.

Q That you are on oath? A Surely.

Q This is sworn to? A That is correct.

30

Q You are also under oath now? A Yes.

Q And that these statements should not be lightly made? A No. If you notice, I think there is something else that was bought in Exeter. I got mixed up.

Q Then, your testimony just now was incorrect? A Yes.

Q The next item is a watch. How much did you pay for that watch? A I don't remember. I can't tell you that.

40

Fannie B. Downs, cross.

Q When you put the price down on the list you put that down from memory? A No. It is my son's watch. It is not mine.

Q Where did you get that value from? A His father bought it for him.

10 Q I mean the purchase price? A His father bought it for him.

Q Then, as a matter of fact, when you put down a certain price as the cost price of that watch you didn't really didn't know what that watch cost? A They told me.

Q You didn't know yourself? A Yes, I did.

Q How did you know? A By inquiry from the members of the family, how much they gave for it. I didn't buy all those things.

20 Q You didn't buy it yourself? A It says in that thing "a person." I am not hiding anything.

Q No, it does not say that. Where was that watch bought? A I don't know. It might be John Wanamaker's.

Q You don't know, as a matter of fact, where it was bought, do you? A If I have it on the list I knew it at the time.

30 Q That is not the answer to my question. I ask you now where that watch was bought? A I think at Wanamaker's but I am not sure.

Q No, I don't know what you think. If you don't know, say "I don't know." A I have to say I don't now.

Q Now, the next item is a suit. Was that your suit? A Which one?

Q Well, the suit on this paper writing.

Mr. English. I object to that. There are three or four or five suits on that paper writing.

Fannie B. Downs, cross.

The Court. Counsel may designate if he can.

Q The fourth article on this paper writing is marked "a suit." Whose suit was that?

Mr. English. I object to that. It is very unfair.

10

The Court. Is there any other designation of it?

Q This suit is marked "DePinna." This suit purchased at DePinna's. Whose suit was that?

A It was a suit that was taken out of the house, if that is the one you are referring to?

Q I am referring to that particular suit. A How much did I give for it?

Q Yes, was it your suit? A It was my son's suit.

20

Q Then, you don't know as to the price that cost? A I forget.

Mr. English. Just whether you do know or not.

Witness. I don't remember.

Q You don't remember when that was bought, do you? A No.

Q The next item is an overcoat. Whose coat was that? It wasn't your coat? A It belonged to the son whose suit was taken.

30

Q Then, you, of course, don't know the price of that. You didn't buy it? A Yes, I did.

Q Where? A DePinna's.

Q When? A I don't know.

Q How much did you pay for that coat? A I think it was \$15 or \$16. It is hard to remember clothes of eight children.

Q The next item is another overcoat. Whose coat was that? A Stolen one?

40

Fannie B. Downs, cross.

Q These are all stolen articles, alleged to be stolen. A That is my youngest son.

Q Do you remember what that cost? A \$15.

Q Do you know the date when it was purchased? A I don't remember that.

10 Q Now, these articles of clothing, suit, trousers, two overcoats, they had been worn?

A Yes.

Q Been worn quite a good deal, hadn't they?

A No.

Q Well, they had been worn some? A Yes.

Q They were not brand new coats or brand new trousers? A No.

20 Q The next article or articles are parts of two silver-plated toilet sets. What do you mean by parts? A Well, they took the glass of one set and the brushes and left the comb.

Q They still left some of the articles? A Yes.

Q Do you remember the price of those articles? A Why, I think in the neighborhood of \$40.

Q They had been used? A Yes.

30 Q Used quite a good deal? You had them a long time? A No, they were very good. One of my daughter's and one of mine.

Q They had been used, though? A Oh, yes, they had been used.

Q The next is a spirit decanter? A They took the outside of it and left the bottles. Spoiled the thing.

Q They left part of that? A The bottles.

Q Do you know what you paid for that? A I forget. It is down there.

40 Q You don't remember now? A I don't remember.

Fannie B. Downs, cross.

Q Those were purchased in 1903? A Yes.

Q And this loss occurred 1915? A Yes.

Q And during the interval, between 1903 and 1915, these articles had been used, had they not?

A You mean that decanter?

Q Yes. A It had been used, but it was in very good shape. 10

Q It had been used? A Surely.

Q The next on the list is a fern dish. What did that consist of? A Little thing that sets into a plated silver—

Q Was the spirit decanter or the other article plated? A Yes, they were all plated.

Q Now, this fern dish. I see that was bought in 1903. A Yes, at the same time.

Q You had used that, of course, since 1903? 20

A Not all the time. We had other things.

Q But you had used it? A Oh, yes.

Q The next, two candelabras bought in 1903. They had been used since 1903? A Yes.

Q Was that candelabra silver-plated? A Yes.

Q The next is a water set, bought in 1903. What was that? A That is a tray with pitcher and things to hold drinking cups as a set.

Q That had been used since 1903? A We didn't use it. It was out on the sideboard. 30

Q It had been used? A We didn't use it. It just sat there to fill up the sideboard.

Q Then, that set from 1903, you have lived in that house since 1903? A We have lived in that house twelve years.

Q And in that time those articles had remained stationary on this sideboard, never used?

A We used it once in a great while. I mean, we didn't use it enough to wear it out. 40

Fannie B. Downs, cross.

Q I didn't ask you that. I asked you if you had used that. Is that correct? A It is correct.

Q The next is a milk pitcher, purchased in 1903. You used that? A Used it all the time, yes.

10 Q The next is a sugar bowl and cream pitcher. I suppose those are two articles? A Two separate articles. We used the milk pitcher very seldom and the sugar bowl all the time.

Q Those were bought in 1903? A I don't remember.

Q It says so on this writing. That is correct? A I say that. I swore to that.

20 Q Now, Mrs. Downs, these articles have been used more or less, had they not? A Yes.

Q And yet you ask my company, do you not, to pay in this proof of loss, to pay the entire purchase price? A No, your man—

Q Never mind.

Mr. English. She is answering your question.

A He told me to put the purchase price down.

30 *By Mr. English.*

Q Who is he? A Mr. Ward and the other young man. I don't know his name.

By Mr. Pilch.

Q Don't you think that there should be a deduction for depreciation and wear and tear? A The offer was made to Mr. Ward to do so.

40 Q Never mind the offer to Mr. Ward. A I said so at the time, yes.

Fannie B. Downs, cross.

Q Do you say so to me now? A I don't say so to you now, no, because you haven't treated us properly.

Q You don't think there should be an allowance for depreciation? A I don't say that I won't take it, but I just simply say you haven't kept up—

10

Q That is not the point. A It is the point with us.

Q This is cross examination and you must answer and not argue.

The Court. Is it not a fact in this case that all you can recover is the actual value of the goods at the time they were stolen?

Mr. English. I think so.

Q Now, Mrs. Downs, we come to the very interesting part of this paper writing. The first articles mentioned on this paper are four blankets, purchased in 1903, from Wanamaker's. Now, you still have those blankets, have you not? A Yes.

20

Q They are very much damaged, are they?

A I don't think so.

Q They are still usable? A Yes.

Q The next article is a coat, S. K. coat.

A Skating coat, I guess.

Q That is in pretty good shape? A No.

30

Q You still have it? A Yes.

Q This skating coat, you still use that? A No.

Q You still have it? A I kept it for evidence. I didn't bring it with me.

Q You still have it. A Yes. It is no good.

Q The next article is a child's coat. You had that repaired for \$2.50, I understand. That is correct? A It depends on the coat you are talking about.

40

Fannie B. Downs, cross.

Q It is a coat bought from DePinna. That was repaired? A If you will notice, there are more coats by DePinna. \$12 coat was repaired. The \$10 coat was not repaired.

Q How much was the repair? A \$2.50, and I told you the lapel had been all worn out.
10 That is an awful looking thing.

Q You are still using it? A Yes, but it is an awful looking thing.

Q The next article is a boy's overcoat. A That is one that has been repaired.

Q We have the next item, a boy's overcoat. Do you still have that? A Yes.

Q Still using it? A No.

Q Not at all? A I haven't paid to have that fixed at all.
20

Q Are you still using it? A No.

Q Boy could wear it? A I think he could, yes.

Q Pretty good coat? A It was a very good coat.

Q Pretty good coat now? A I don't think so. You can see the moth holes.

Q It can still be used? A If it was repaired.

30 Q The next is a boy's overcoat, another boy's overcoat? A Yes.

Q Quite a few overcoats. What is the condition of that coat? A There are five men in my family. That is the reason why we have so many.

Q What is the condition of that coat? A That coat I haven't kept. We gave it away to somebody.

Q Well, pretty good coat, wasn't it? A No, it wasn't a good coat.
40

Fannie B. Downs, cross.

Q Good enough coat to give away? A To a poor person.

Q They were glad to get it? A Very glad.

Q Then, the coat had some value, didn't it?
A Not to us.

Q But it had some value? A Not to my son, who owned it. 10

Q Why not? A Because it was all spoiled.

Q Too proud to wear it? A I guess so.

Q The next is a child's coat, marked "Best."
You still have that? A Yes.

Q Using it A Well, she wore it for a little while last fall.

Q And that coat you still have? A Yes.

Q The next is an overcoat, marked "Rogers, Peet." You still have that coat? A Yes.

Q Using it? A No. 20

Q Whose coat is that? A Mr. Downs'.

Q Your husband's coat? A Second overcoat of his.

Q It was a second overcoat? A Yes.

Q It wasn't a new coat? A No.

Q Where is that coat? A Home.

Q Now, the next is another overcoat by De-Pinna. Where is that coat? A That coat, I think, is all right. 30

Q You have \$26 damage? A That was what you told me to put down.

Q I didn't tell you anything of the kind. I never met you before. A That other man.

Q The next is a lady's suit, Oppenheim, Collins & Company. Do you still have that suit?

A I brought it yesterday.

Q The next is a lady's suit. That is Oppenheim, Collins & Company. Where is that suit?

A I brought the coat with me yesterday. The skirt was destroyed. 40

Fannie B. Downs, cross.

Q Now, you say the skirt was destroyed. What do you mean by destroyed? Entirely destroyed? A Was moth eaten. They couldn't use it.

Q It couldn't be darned? A Perhaps we were too proud to wear them.

10

Mr. English. Counsel admits immediately upon the discovery of the burglary notice was given to the S. T. & C. A. Smith & Company, agents for the New Jersey and Fidelity Plate Glass Insurance Company.

Q The next item is a suit from Wanamaker. A I brought the coat with me yesterday.

Q One of these suits you have here? A Yes.

Q Don't you think that suit could be repaired? A No.

20

Q Be good for somebody to wear? A No, we would have given it away.

Q But it has some value? A No.

Q Not a bit? It couldn't be repaired at all?

A No, two suits, couldn't possibly have done anything with them.

Q The next is a dress, Oppenheim, Collins & Company. Where is that dress? A That is entirely eaten up all down the front.

30

Q You have that home? A I am not sure whether I have that at home or not. I gave a lot of things away.

Q It had some value, did it not? A A child's dress could be made out of it.

Q Good enough to give away? A Well, they took it. They may have sold it to the ragman. I don't know.

Q You want us to pay \$12? A I don't.

Q You have it in your proof of loss? A Because you asked me to put it there.

40

Fannie B. Downs, cross.

Q The next item is another dress? A Wan-
maker's.

Q Have you that dress yet? A No, those
two dresses were entirely done for and the two
skirts.

Q You gave them away? A I gave those
two dresses away. 10

Q Who did you give them to, a relative? A
I need not answer that question.

Mr. English. I object to that question.
I think it is immaterial.

The Court. I will allow that. I think it
goes to the question of damages. I think
the question of whether she gave them away
is of no value or whether she gave them to
some friend. It may be considered. 20

Q (Question repeated.) A I didn't give
them to relatives.

Q Whom did you give them to? A Some
poor person.

Q Who?

Mr. English. I object to the answer and
ask that it be stricken out.

The Court. No, let it stand.

Q Who did you give these articles to? A I 30
don't think I shall answer that question. Why
should I?

Q Because the Court says you must.

The Court. It is a proper question, if
you remember.

A It was a woman that I give things to all
the time.

The Court. I don't suppose the name
makes any difference. 40

Fannie B. Downs, cross.

Q The next article is a blouse from De-Pinna? A That blouse, I think I sold that to the ragman.

Q You sold that? A It was very badly eaten.

10 Q How much did you get for it? A Half a cent, perhaps. I don't know.

Q I am not asking perhaps. What did you get for this? A My son, my little son, sold them. He has the rags of the family and sells them.

Q What did you get for them? A I don't know.

Q You don't remember? A I haven't the slightest idea.

20 Q Ordinarily your memory is very good? A I must have heard how much he got for them.

Q Your memory is very good? A No, it is very poor.

Q Always poor, very poor memory? A It depends upon how hard it is to think.

Q Very poor now? A No, I don't think it is. I can't remember that.

Q Then, it is a very good memory, is it not? A I will leave you to judge.

30 Q The next is a wrap. What is a wrap? A Evening wrap belonging to my daughter.

Q Where is that? A At home.

Q Still have it? A Yes.

Q Use it? A No.

Q Not at all? A No.

Q Does your daughter use it? A No.

Q Any member of your family use it? Where do you keep it? A In a trunk.

40 Q The next is a dressing gown from this same firm, DePinna. A That is not from De-Pinna. I think it was Wanamaker.

Fannie B. Downs, cross.

Q Now, Mrs. Downs, where is that wrap? A Dressing gown. That is used, but it is moth eaten.

Q You still have it, using it? A Yes.

Q The next, set of furs. What kind of furs are they? A Why, they are—I don't know what kind of furs. 10

Q You don't know? A No.

Q They are your furs? A No.

Q Whose furs are they? A My daughter's.

Q Still have them in your house? A Yes.

Q You have looked at them a number of times? A Why, yes.

Q Know anything about furs? A No, I don't.

Q What is the condition of those furs, Mrs. Downs? A Well, she took them— 20

Q Not what she did. Tell me the condition of those furs? A Why, they are very much moth eaten.

Q You still have them? A Yes.

Q Were they worn? A Yes.

Q Every day? A She doesn't go out every day.

Q Every day she goes out does she wear them? A Every day she goes out she wears them. 30

Q Another set of furs. A My other daughter, my second daughter.

Q Wear them this winter? A Yes.

Q The next is a dress suit. Whose is that? A Mr. Downs.

Q Where is that dress suit? A To my house.

Q Have you seen the dress suit of Mr. Downs since this burglary? A Yes. 40

Fannie B. Downs, cross.

Q He wears it, does he? A Occasionally.

Q Next is the dinner jacket? A That is Mr. Downs.

Q He still wears that occasionally? A Yes.

Q Next is an overcoat. Whose overcoat is that? A Mr. Downs.

10 Q Wear it this winter? A Yes.

Q Next is an evening dress. Whose is that? A That is mine.

Q At the time of the burglary that was old-fashioned, wasn't it? A Yes.

Q Had that a long time. Styles have changed? A Not very much, but I wanted to change it.

Q It was old-fashioned, out of date? A Oh, yes.

20 Q Where is that? A Home.

Q Wear it at all? A I will if you give me some money to have it fixed. It is so moth eaten.

Q It can be repaired? A I don't know whether it could or not. I haven't taken it to a dressmaker.

Q When you said if we give you some money to have it repaired you would wear it, you meant that? A If she thought it was worth it, but as the case wasn't settled I did not know whether it would be worth while.

30 Q The dress could be repaired, could it not? A I don't know. I can't tell you whether it would be worth it. It is an expensive dress.

Q But you still have it? A Oh, yes.

Q Haven't given that away? A No.

Q The next is a Prince Albert, imported. Whose suit was that? A Mr. Downs.

40 Q Does he still wear that? A I don't know whether he has worn it or not.

William Downs, direct.

Q You don't know? A No. He has got it.

Q Where is the Prince Albert suit? A At home.

Q That could be worn? A I think so.

Q Pretty good suit, isn't it? A Pretty good suit.

Q When you packed these garments away you packed all your clothes away in the same manner? A Yes. 10

Q You were very careful, were you not, to pack them away, pack them very carefully, safely? A Usual way.

Q Had moths in the house before? A We have carpets where they were in.

Re-direct examination by Mr. English.

Q Mrs. Downs, those things that were stolen, like a ring and watch and scarf pin and parts of toilet sets and candelabra and things of that character, how were they at the time you went away in the summer? What was their condition as compared to when they were purchased? A The candelabra and those things, you mean? 20

Q Yes, those metal things, glass things, things of that character? A You mean, had we used them?

Q It appears you had used them, but were they worn out? A No, they were perfectly good. Presents, some of them. 30

WILLIAM DOWNS sworn for the plaintiff.

Direct examination by Mr. English.

Q Mr. Downs, you are the husband of Mrs. Downs, the plaintiff? A Yes.

Q When did you first become aware, you personally become aware of the fact that this 40

William Downs, direct.

burglary had occurred? A Why, possibly forty-eight hours.

Q Did you ever see the marks on the windows where the policemen discovered where the entry had been made? A Yes.

10 Q That was where? A A window had evidently been opened in the cellar and there was the marks of either a chisel or a jimmy, I think the burglars call it, on the window of my son Jamie's room.

Q By the time you got to the house had they cleared up this mess that has been discovered, these things scattered around? A I think they had collected the moth eaten things.

20 Q Are you personally familiar with the matters which are set forth on this proof of claim that was filed? A A goodly number of them.

Q Take the things that are marked "Stolen," taken away from the house. Do you know anything about that ring? A No, I don't know anything about the ring except the boy had the ring.

Q What kind of a ring was it, what metal? A I don't know.

30 Q About the watch, do you know anything about that, who had a hand in getting that watch? A Nobody but myself.

Q Do you remember what you paid for it? A I think the amount here, as far as my memory goes back, is the price of it.

Q That is what? A \$15.

Q Do you know the condition of the watch previous to it being stolen? A Yes, the watch—

40 Q What was the watch made of? A It was a very good silver watch.

William Downs, direct.

Q Going down the list. Do you know anything about the scarf? A I know the boys had these pins when they were at Exeter Academy, but what they are I really can't say.

Q Can you qualify on the DePinna suit?

A No, I don't know anything about that.

Q Let us come down to this toilet set. Do you know anything about that? A Yes, I bought that, I think, myself, for the children, one of the girls. 10

Q And the price there set down is the price paid? A As far as I can remember it.

Q What about the decanter? A I bought that, too.

Q How much of that was taken away? A Well, the body of the decanter—it was a spirit decanter with three bottles, three cut glass bottles. The standard of those bottles disappeared. 20

Q And the bottles were left? A And the bottles were left, but the bottles are of no value because they are long bottles and anybody using them would just take the bottle out and pour whatever they were attempting to drink into the glass and it would be put back into the decanter. You dare not put them on the table because without the standard they would not stand up. They were of no value at all. 30

Q The candelabra and the fern dish. Do you know anything about those? A Yes.

Q Did you buy them? A I bought them.

Q Are the prices set down there the cost price as near as you can say? A As near as I remember those prices—they had been bought quite some time ago and when we set down these things to give a price for them we gave prices as such as we knew how. 40

William Downs, direct.

Mr. Pilch. I object to that.

The Court. You better ask another question.

10 Q How did you arrive at those prices that are stated there? A These prices are to the best of my knowledge and belief—we have no bills for these things.

By the Court.

Q That is, the price there is the cost that they cost you? A I believe that they cost that or more; certainly not less.

Q Is there anything on the proof of loss that shows what the damage to these articles was?

Mr. English. These things were taken away.

20 *The Court.* What they were worth at the time they were taken away.

A They would probably be worth far more money because those things are worth more than when we bought them.

By Mr. English.

Q The cost price of the spirit decanter, what was that? A \$26.

30 Q And the fern dish and the candelabra was what? A \$19. There were three candelabra all together. They took two and left one.

Q The water set, do you know anything about that? A Yes.

Q Did you purchase that? A Yes.

Q What was the cost price of that? A About \$18.

Q Milk pitcher, do you know about that? A Yes.

40 Q What did that cost? A \$5 or more.

William Downs, cross.

Q And water pitcher? A Same way.

Q It cost what? A \$6.

Q And the sugar bowl and cream pitcher, did you buy that? A Yes.

Q What were the value of those various articles which were actually stolen as near as you can say at the time of the robbery as compared with their cost price? A Did you ask what the physical condition was? 10

Q Give us that first. A They were practically as good as new. The silver was taken great care of in our house. That would have lasted for my lifetime, anyhow. They were first-class goods and in good shape.

Q Can you tell what the value of them was at the time they were taken away as compared with the cost price? 20

Mr. Pilch. I object to that. This man is not an expert on silverware.

The Court. Find out if he knows.

Cross examination by Mr. Pilch.

Q Do you know anything about the price of silverware? Are you in the silver business?

A I bought a great deal of silver in my time.

Q But you are not in the silverware business? 30

A No, sir.

Mr. Pilch. There is a further objection to that. The proof of loss shows no evidence of the present cash value. I don't think they can go beyond that.

Q (Question repeated: "Can you tell what the value of them was at the time they were taken away as compared with the cost price?")

The Court. I will allow that. 40

William Downs, direct.

By Mr. English.

Q What have you to say about that? A I didn't say from my own knowledge of those things.

By the Court.

10 Q Do you know what the value was at that time?

By Mr. English.

Q Do you know? A I know they have to pay a great deal more to-day for these things than I did at that time.

The Court. That is not the question.

20 Q Take that spirit decanter. Can you say what it was worth at the time it was stolen? A Why, it was just as good practically as the day that we bought it.

Q It was worth \$26? A Yes. It was a thing—we don't use much spirits in our house. I doubt whether those bottles have been filled twice in our experience. Those practically were standing on the sideboard for years not used at all.

30 Q Can you say what the toilet set was worth at the time it was taken? A I think the value that is put down on that list, whatever that value is.

Q Worth the cost price? A Yes.

Q Can you say what the fern dish was worth at the time it was taken as compared to the cost price? A The same answer to that.

Q And the candelabra? A The same way.

Q And the milk set? A Same way.

Q And the water pitcher?

William Downs, direct.

The Court. I think he has to show some more knowledge than that before he can testify.

Q Have you bought any sugar bowls and cream pitchers lately? A No.

Q Now, on the other part of this claim, the goods that were eaten. Whose dress suit is referred to as imported? A Mine. 10

Q That costs how much? Where did you buy it? A I bought it in England.

Q When did you buy it, how long ago? A About ten years ago.

Q How much did it cost when you bought it? A I really think—I have \$60 down here, but I really think it cost about \$80.

Q Can you undertake to say what it was worth at the time it was moth eaten? A It would have lasted me for the rest of my life. 20

Q What about the dinner jacket, what did you pay for that? A About \$25.

Q Where did you get that? A Also in England.

Q At the same time you got the suit? A Yes.

Q What about an overcoat there that belongs to you? Where did you buy that? A Rogers Peet. 30

Q What did you pay for that? A About \$40, \$45.

Q How long ago did you get it? A Four or five years ago. I don't know exactly the time.

Q Were you still wearing it? A That I am not very sure of. I haven't looked into the thing very much. 40

William Downs, cross.

Q Prince Albert suit. A Yes, I got that in England at the same time I bought the other things.

Q You paid how much for that? A Well, all the way from \$60 to \$80. I don't remember exactly. I think the bill for the two suits was
10 38 pounds, about \$190.

Q Did you ever have a conversation with Mr. Ward, the assistant treasurer and secretary of the defendant company? A This gentleman here?

Q Yes. A Yes.

Q Where and when? A In the house.

Q Was the matter of claim the subject of the conversation? A Yes.

Q What did he say with reference to the
20 liability of his company as to that claim?

Mr. Pilch. I object.

The Court. I think it is competent so far as the liability is concerned.

Q What, if anything, did he say with reference to admitting liability on the part of his company?

Mr. Pilch. I object to the form of the
30 question.

The Court. I will allow that question.

A He admitted their liability for the loss of the silver and the things that were stolen, that were admitted as being stolen.

Cross examination by Mr. Pilch.

Q This silver for the toilet set, did you purchase that or your wife? A I purchased it.

Q From where? A From Seilow.
40

William Downs, cross.

Q How much did you pay for it? A Price mentioned there. I don't carry those in my memory.

Q You don't remember what you paid for this toilet set, do you? A I don't remember the figures that are on that list. I don't carry them in my memory.

10

Q But you do remember what you paid for the dress suit? A Yes, I do.

Q Pretty good memory you have? A In some ways.

Q Then, when this paper writing, which has been sworn to, silver-plated toilet set was a present, that is not true, is it? A What is that?

Q I say, when this paper writing which has been sworn to says that this silver-plated toilet set was a present that is not true, is it? A Of course, it is true.

20

Q You say you purchased it for a present for your daughter? A Every word is true in there. I object very much to any inference of untruth, very much indeed.

Q Do all your sons and daughters live with you? A Yes.

Q Did they pay board? A One does, yes.

Q Who is that? A My oldest boy, James, the name is.

30

Q How long has he been paying board? A About four months.

Q Not any longer than that? A Well, perhaps a month—I don't know whether it is more than four or five months.

Q Any member of your household pay board or rent in August, 1915? A I don't think so.

Q Do you know? A May I have a little latitude in answering that? This one son that

40

William Downs, cross.

was in Chicago just about that time went into business and when he went into business he paid a small amount of money. You can't call it board. Just about that time. It really comes to a question of splitting hairs there.

10 Q Just about that time? A To the best of my knowledge and belief he didn't at that time, but possibly a month afterwards.

Q Was any other property belonging to Stuart stolen? A Why, I think that ring was his. I fancy that ring was Stuart's, but I can't swear to that. You see, these things, like a ring, and so on, were really given by the family to the boys when they were away at school.

20 Q Just go over that and tell us what on that list belonged to Stuart and what clothing belonged to Stuart? A Well, now, I can only give you what the loss was. I have nothing whatever to do with the children's clothes, know nothing whatever about that.

Q You are their father. A That is all right. Fathers usually pay the bills and they don't do anything further, and I am one of those fathers. My wife does the rest.

30 Q You can't tell what belongs to Stuart? A I can't. I don't think I would know it if I saw it.

Q Do you know if any of this clothing belonged to Stuart? A I know there is clothing in there that did belong to him.

Q Now, let's get down to brass tacks and tell us, you can tell us what belongs to Stuart? A I can't tell you.

The Court. You better ask the plaintiff about that.

William Downs, cross.

Q Each of these articles belongs to you starting at the top and running down? A Well, I know I didn't get anything at DePinna's. The dress suit—

Q When was that purchased? A About ten years ago.

Q And had been worn? A Yes. 10

Q You go out a good deal, wear a dress suit a good deal? A No, I do not.

Q You did formerly in the past ten or fifteen years? A When I was younger I went out a good deal more, yes.

Q Where was this dress suit bought, do you remember? A Why, yes, it was bought in Kingston-on-the-Hull, Yorkshire, England.

Q You still have that? A Yes.

Q This dinner jacket. How long did you have that? A Bought it at the same time. 20

Q Ten years? A Yes. Bought at the same time as a dress suit. It is part of the dress suit.

Q Do you wear that more or less? A Now and again, yes.

Q Quite a good deal? A No, not a good deal at all. Perhaps four or five times last year. 30

Q How many times in the last ten years would you say? A Well, of course, it is understood this is a guess.

Q Well, just approximately? A Perhaps once a month.

Q That would be? A 120 times for ten years.

Q Pretty good dress suit, wasn't it? A It was as good as could be made. No better could be made anywhere. 40

Fannie B. Downs, direct—cross.

Q This coat, was that yours? A Yes.

Q Where is that coat? Did you have it home? A I think it is at home. I am not too sure about that. Mrs. Downs has a lot of charity patients. She gives things away and I don't know but what that has been given away—
10 I mean people we try to help out, so I don't know whether it is home or not. The clothing part of the business I know very little about. I have other things to attend to.

Q What is this coat? A No, that is not mine.

FANNIE B. DOWNS, recalled for

Further direct examination by Mr. English.

20 Q When did Stuart first begin to pay board?
A Why, in October, 1916. He paid board regularly up till then. He didn't get much money and he paid just a little bit occasionally that summer before.

Q That would be the summer of 1916? A Yes.

Q He didn't pay anything in 1915? A No.

30 Q When did James begin to pay board? A This fall.

Cross examination by Mr. Pilch.

Q Were any members of your family paying board in August, 1915? A No. James is my oldest son and he has just gone into business and Stuart is the next one and he has been in business a year and the rest of them are too young and don't earn money.

40 Q Were they all residing with you at that time? A All of them.

Isabel Downs, direct.

By Mr. English.

Q When you had your conversation with Mr. Ward, what, if anything, did he say as to whether or not the company admitted liability for any of the property stolen?

Mr. Pilch. I object to that.

10

The Court. I will allow that question.

Q Whether or not he admitted his company ought to pay for any of it? A He admitted they ought to pay for the loss sustained.

Q That is that were physically taken away?
A Yes.

ISABEL DOWNS, sworn in behalf of plaintiff.

Direct examination by Mr. English.

20

Q Miss Downs, you are a daughter of Mrs. Downs? A Yes.

Q You live at home in Orange? A Yes.

Q I think it already appears you came down in the automobile and arrived at the house when the burglary was discovered? A Yes.

Q Who discovered anything strange first, you or your mother? A I think we both discovered it about the same time.

30

Q Did you meet the policeman? A Yes.

Q You talked to him and brought him into the house? A Yes.

Q Did you make any examination of the house to see where the entries had been made?

A I went around with the policeman.

Q What did you see? A Why, we went down the cellar first and we noticed in the room the thieves had taken the ice cream salt pick, a jimmy of the ice cream salt and they had evi-

40

Isabel Downs, direct.

dently tried to get up on the first floor and couldn't because the door was locked.

Q Did you see a window in the cellarway which gave any evidence of having been opened?

A Yes, had been pushed open.

10 Q Where was that? A It was underneath the porch.

Q How did it appear to be opened? A It had been pushed open and the screws pulled out.

Q Any window upstairs that seemed to be forced? A Yes, front room over the porch. That had been jimmied.

Q At the catch? A No, it seemed to have been pushed up from the bottom.

Q Could you see the marks of the jimmy? A Yes.

20 Q What was the condition of things with reference to these matters which have been referred to as moth eaten? Were they in their drawers where they belonged? A No, on the beds. Everything had been pulled out and thrown all over the floor and the bureau drawers were open and the trunks in the storeroom.

Q What about the packages in which the things had been tied up? Were they opened or not? A Yes, they were all around.

30 Q Were you with your mother when she packed those things up in the spring? A I collected them for her, but didn't see her pack them.

Q Have you any knowledge of things that were tied up and not disturbed by the thieves? A Yes, in mother's room, her cupboard hadn't been touched at all.

Q Do you know anything about the things that hadn't been disturbed? A They were very good.

40 Q Were they moth eaten? A No.

Isabel Downs, cross.

Q What about the things that were disturbed by the thieves? A They were moth eaten.

Q Did any of the things on this list which were moth eaten, any of this wearing apparel worn by you? A Yes.

Q Just tell us which ones of these things you wore? A One dress was mine. 10

Q A dress purchased from whom? A Openheim, Collins.

Q Could you use it afterwards or not? A No.

Q What was the condition of it? A It had been moth eaten.

Q Tell us the next thing? A And the blouse from DePinna.

Q What was the condition of that? Could you use that? A I don't think I was able to. 20
I never wore it again, so, I guess, I couldn't—

Mr. Pilch. I object to what she guesses.

The Court. Yes, strike it out.

Q Any things that were actually stolen out of the house belong to you? A No.

Q You have personal knowledge of all of these things as a member of the family? A Yes. 30

Cross examination by Mr. Pilch.

Q Now, Miss Downs, run down that list. What on that list belongs to you? A This dress belongs to me.

Q Have you worn that dress since? What is the condition of that dress? A All moth eaten.

Q Where is it now? A I don't know. It must have been put in the rag bag.

Q You don't know where it is? A No. 40

James D. Bailey, direct.

Q What other articles that are yours? A This blouse.

Q Where is that? A I don't know where that is.

PLAINTIFF RESTS.

10 JAMES D. BAILEY, sworn in behalf of defendant.

Direct examination by Mr. Pilch.

Q Mr. Bailey, what is your business? A Clothing.

Q Where? A I am now at 810 Broad street.

20 Q How long have you been in the clothing business? A Forty years, woolens and clothing.

Q Where? A Stoutenburgh & Company, Marshall & Ball one time, Watson another.

Q Are you familiar with the price of men's clothing? A Yes, sir.

Q You sell men's suits? A Yes, sir.

30 Q What would a pair of trousers be worth in 1915, August, that cost \$7 in 1915 and had been worn?

Mr. English. I object to that. In the first place he can only answer that if he could answer it at all after he had seen the trousers and knew the character of the material and how many times they had been worn, and so on.

The Court. It does not appear so far he knows anything about the value of second-hand clothing.

40

James D. Bailey, direct.

By Mr. English.

Q You don't sell second-hand stuff at Stoutenburgh's? A I have worn some that have been carried over. It has been worn and laid up, it has gone out of style and been carried over and sold to second-hand men.

10

Q But those things had not physically been worn by anybody? A Not a great deal, worn some.

By Mr. Pilch.

Q In your experience with woolens and clothing have you had any experience with the work-age of moths? A Yes.

Q What experience have you had? A Well, I have found that in packing away my clothes, if I packed them away after the 1st of April the moth egg is very apt to be in them and when I opened up the moth is there and has done his work. Pack them up before April, it is very much different.

20

Q If things were packed in the latter part of May and were taken out some time between May and August, and were then found to be moth-eaten would you say that the moths were in the things when they were packed away or got in afterwards?

30

Mr. English. I object. It is not a proper hypothetical question. In the first place, it does appear how they were packed, whether they were packed with camphor or not, whether the bulk had been broke when they were packed and the time when the moths were there.

The Court. Yes, I think that ought to go in.

40

James D. Bailey, cross.

Q If the goods were packed in May with camphor and were taken out between May and the 30th of August and were discovered to be moth-eaten would you say that the moths were in the goods when they were packed away or came in after?

10

Mr. English. That I object to because there isn't any evidence they were taken out in the sense you attribute to that work. The bulk was broken and they were left around there. They had been there so long that the policeman said there was fuzz on the packages, and that is not included in this question and does not appear from the evidence. They had all been—

The Court. I will allow the question.

20

Mr. English. I would like to make a further objection. He is not qualified to answer such a question.

The Court. I will allow the question.

Counsel for plaintiff prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q (Question repeated.) A I should say the eggs were in the goods when they were packed away and camphor couldn't destroy them.

Cross examination by Mr. English.

Q What is your experience with moths in connection with your own clothes? A My own clothes and the clothes I have had in the store packed away?

40

Q Suppose that these imaginable clothes which you are asked about had been packed away in camphor and then some burglars had gotten in the house and taken them out of the

James D. Bailey, cross.

drawers in which they had been put and taken them out of the packages into which they had been packed with camphor or broken open the packages and thrown them around on the floor and on the bed, don't you think that would make some difference with the ability of the moths to get in? A I should answer that question no, it wouldn't. 10

Q Would your judgment be affected by the fact that similar kind of goods had been packed in the same way and hadn't been disturbed by the burglars and found to be all right? A There is a difference in goods.

Q I said the same kind of goods? A If the egg was there it would have to do the work.

Q Would the fact that the same kind of goods packed in the same way, which had not been disturbed by the burglars and were not moth-eaten indicate to your mind that the egg hadn't been there? A The egg probably hadn't been there. 20

Q Would it indicate to your mind that the eggs got to the other things after they were thrown around? A No, sir.

Q You think if these things hadn't been disturbed at all they would have been chewed up just the same? A Yes, sir.

Q You want to swear to that? A I want to swear to it and I found it in my own things. 30

Q Would this fact affect your judgment, that in previous years the same kind of clothes were packed in the same way and were not disturbed by the burglars and were not moth-eaten?

Mr. Pilch. I object to that.

The Court. I will allow the form of the question. 40

Charge to Jury.

Q (Question read.) A That would show that the egg wasn't there.

Q So it just happens, in your judgment, that the egg got there in this particular year and those particular clothes, but never any other time? A I would not say that. They are
10 liable to get them any time. The moth is flying around in April and May.

Q Would the fact they never did get in before indicate that they had gotten in when the packages were broken open? A I think not.

By the Court.

Q Would not the fact that in your opinion that the clothes had spots on them make them more likely to be moth-eaten? A A great deal
20 more so. They will go where there is dirt.

Q Then, a garment that has spots on it is more likely to be moth-eaten than one that has not? A Yes, sir.

DEFENDANT RESTS.

COUNSEL SUMS UP.

Court's Charge to the Jury.

30 The Court charges the jury as follows:

CUTLER, *J.*

Gentlemen of the jury: The defendant is an insurance company, a corporation doing business in this state, and as such it issued this policy to the plaintiff, the policy being termed by it a "burglary policy," by which they agreed to indemnify the plaintiff in a sum not exceeding the sum of \$2,000 for loss resulting from the steal-
40 ing, and taking away or damaging of the prop-

Charge to Jury.

erty referred to in this particular policy, between June 9, 1914, and June 9, 1915, and this policy was continued in force for another year, from June 9, 1915, until June 9, 1916. This particular policy together with a renewal or continuation has been offered in evidence and you will have it before you in your jury room and consider it at length. **10**

I want to call your attention to two or three paragraphs of the policy or parts of the policy which may be of some value to you in determining the issue raised between the parties. If you refer to paragraph 2 of the policy you will find it provides, among other things, as follows:

“Such proof of loss shall contain a complete inventory of the property damaged or taken, stating the original cost of the actual cash value of each article at the time of the loss and the amount of loss thereon, a statement in detail of the damage done to the property of the assured.” **20**

Paragraph 4 of the policy provides, among other things, as follows:

“That the company shall not be liable for loss or damage unless the assured shall have used all reasonable care to protect the premises and property insured against loss or damage.” **30**

And, again, paragraph 5, among other things, provides:

“The company may repair any damage to property and it may replace any damage or stolen article with one of like quality and value instead of paying it in money.”

The policy, gentlemen, is a contract between this insurance company and the plaintiff and the company must make good its contract. The plaintiff cannot ask it to make good any more **40**

Charge to Jury.

than it promises to do. The plaintiff cannot ask the company to pay any more in case of loss than it has agreed to do, but the company is bound to make good any loss that it had agreed to pay for in the manner it had agreed to pay for under the terms of this policy.

10 The plaintiff in this case must establish by a preponderance of the testimony that she is entitled to recover against this company, and the amount that she is entitled to recover. She must show before she can recover that the property or part of the property insured was either stolen or damaged by burglars or thieves during the time the property was insured.

20 Now, you have heard the evidence on that branch of the case and if you are satisfied from the evidence that certain of the property so insured was stolen and taken away during the term which this policy covered, you must then determine what property was stolen and the value of that property at the time it was stolen. In determining its value you may consider what the property originally cost and the condition that the property was in at the time it was stolen. The plaintiff is, however, only entitled to recover the value of the property so stolen

30 at the time it was taken away from the premises of the plaintiff, not the original cost of the articles unless the article was still of the value it was at the time it was stolen; so, in taking up these various articles mentioned in the schedule and annexed to the complaint and also in the proof of claim, you should determine, first, what the article cost and then, what the article was worth at the time it was stolen. For instance, the watch. What did it cost? How

40 long it had been in the family and what was a

Charge to Jury.

watch that had been carried for that length of time worth at the time it was stolen. The plaintiff is entitled to recover only, for that watch, what it was worth at the time it was stolen. Not what she may have considered it to be worth, but what it was actually worth at the time it was stolen, and so on with all the other articles in this list referring to the articles actually stolen, at a sum that you believe they were worth, would be the sum that the plaintiff would be entitled to recover for the articles so stolen. 10

After determining the value of the goods stolen, if you find any goods were stolen, you should next determine whether any property so insured was damaged by the burglars or thieves, because that was part of the policy. The company agreed to indemnify this lady against loss for damages to the property insured, caused by the thieves or burglars. 20

It is contended by the plaintiff that in addition to stealing part of her property, that thieves or burglars broke open the bureau drawers, closets and trunks where she had furs and winter clothing stored and put away with camphor to keep away moths, and unwrap them and threw these articles around the rooms and left them in that condition and they remained in that condition until she found them upon her return to her home the last of August, 1915; that when she found them they were covered with moths and some of them were damaged by the moths. 30

If you find by the evidence that some or all of those furs or clothing were damaged by moths you should next determine from the evidence whether this damage by moths was the result of the thieves and burglars removing 40

Charge to Jury.

these furs and clothing from the wrappers and leaving them around the premises. If the clothing and furs were not damaged as a result of taking them from the wrappers and leaving them around the premises the plaintiff cannot recover for the damages done to the furs and the clothing, but, if, however, you find that the

10 furs and clothing or some of them were damaged by the moths as a result of being unwrapped and left around the premises, the plaintiff is entitled to recover the damages done by moths.

If you find the plaintiff should recover damages done to the furs and the clothing or any of them you will next determine the amount of the damages. These furs and clothing had all

20 been worn. None of them were new. The plaintiff is not entitled to recover what these articles originally cost, but she is entitled to recover only the damages to these goods. That is all the insurance company promised to pay; not the original cost of the goods, but the damage which was done to the goods as a result of the burglary. In determining this you may further consider what the goods cost originally and what the goods were worth when the thieves

30 and burglars broke into the house and what the goods were worth at the time this plaintiff found them on her return, but the plaintiff can only recover the damages to this property.

You will take up the articles mentioned in this proof of loss and in this schedule as having been damaged. You may consider what the article originally cost, how long it had been worn, its condition at the time it was put away and the condition in which the plaintiff found it on her return and the damage to the article.

40

Charge to Jury.

The difference between what it was worth when it was put away, and the value when she found it would be the damage to that particular article.

It was, however, the duty of the plaintiff, as provided for in this insurance policy, to use reasonable care to protect the goods from injury and if any of the goods were damaged after the plaintiff found them upon her return because of her failure to use reasonable care to protect them from further damage, such further damage, if you find there was any, so resulting from her lack of care in not protecting the goods, could not, of course, be included in the damages which you award her. 10

I have been requested to charge certain principles of law, which I shall dispose of at this time. 20

“1. That the plaintiff, if entitled to recover at all, is entitled to recover only the actual value of the goods stolen.”

That I charge you so far as it relates to the goods actually stolen, but she would be entitled, in addition to that, to any damage to the other goods, if you find that they were damaged, by the action of the burglars. 30

The second request I refuse to charge except as I have charged.

“3. That the plaintiff, if entitled to recover at all, is entitled to recover only the actual damage she has sustained by burglary, theft or larceny of any of the property covered by the policy, or for direct loss by damage to the said property.”

I so charge you. If you find that the property was not damaged as a direct result of the 40

Charge to Jury.

burglars having taken them out of their wrappers and leaving them around, there can be no recovery for that damage.

“4. The plaintiff must prove the damage or loss which she has sustained.”

I so charge you.

10

Now, gentlemen, if you find that the plaintiff has established her case by a preponderance of the testimony, then you should find a verdict for the plaintiff for the amount of the value of the goods stolen to be determined as of the time when they were stolen, and also such additional sum as the goods which she had covered by the policy were damaged by reason of the act of the burglars or thieves; not the cost of the goods, but the damage to these goods. If, on the

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contrary, you find that the plaintiff has not established her case, why, then, of course, your verdict should be for the defendant. It is entirely a matter for you to determine, but the damages must be determined under the rules which I have laid down for you. You are to be the sole judges of the damages determined in the way and method I have mentioned.

THE JURY RETIRES.

30

Mr. Pilch. I take an exception to the refusal of the Court to charge the defendant's second request to charge.

Exception noted as ground of appeal.

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Exhibits P. 1, P. 2 and P. 3.

REQUESTS TO CHARGE ON BEHALF OF DEFENDANT.

That the plaintiff, if entitled to recover at all, is entitled to recover only the actual value of the goods stolen.

That the plaintiff is not entitled to recover for the damage done by moths.

That the plaintiff if entitled to recover at all is entitled to recover only the actual damage which she has sustained by burglary, theft or larceny of any of the property covered by the policy, or for direct loss by damage to the said property.

The plaintiff must prove the damage or loss which she has sustained.

10

EXHIBIT P. 1.

Exhibit P. 1 is the policy of insurance which is set out in full in complaint and printed on pages 6, to 16.

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EXHIBIT P. 2.

Exhibit P. 2 is the renewal of policy of insurance and is printed in full in complaint on page 17.

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EXHIBIT P. 3.

Burglary Proof of Loss
to the
New Jersey Fidelity & Plate Glass
Insurance Co. of Newark, N. J.

I. By your policy of Insurance No. B 69553 dated the 9th day of June 1915 and expiring the 9 day of June 1916 you insured Mrs. Fannie B. Downs the subscriber hereinafter called the assured against loss from B. T. & L. to the

40

Exhibit P. 3.

amount of two thousand dollars, according to the terms and conditions thereof.

II. The premises covered by the policy are described as follows; Private residence.

10 III. The premises in which the burglary occurred was occupied by me for the following purposes. Residence.

IV. The following are the names of all tenants in the said premises. Assured & family.

V. On the prior to August 31.st. 1915 day of 19 at about M. a loss occurred in the said premises by which property insured under said Policy was stolen to the amount of about Nine hundred dollars.

20 VI. The loss was first known to me on the 31 day of August 1915 at 10 o'clock A. M. and I notified the police authorities at the Station in Orange Street on the same day of Aug. 31. August 1915.

VII. The premises were unoccupied for 2 months and days at the time the loss (State how many) was discovered.

30 VIII. The manner in which the loss was incurred is fully given as follows.

House unoccupied & some one broke in either through cellar window or second floor window.

IX. There were visible marks on the premises of the actual force and violence used in making entry therein as follows. Marks on 2nd. floor window & house in disorder.

1915. I also notified the Company at its office in Orange by Mrs. Downs son on the 31 day of 40 whether the dangers arose from the acts of

Exhibit P. 3.

X. The reasons for my belief that the loss was occasioned by thieves on or entering the premises, without force or violence are as follows. Condition of the rooms on 2nd. floor.

XI. The names of the persons known or suspected to have been implicated therein are as follows. None.

10

XII. The property stolen belonged at the time of the loss to Mr. Downs, Mrs. Downs, 4 sons 2 daughters, and no other person or persons had any interest therein except as follows.

XIII. I have suffered loss previously by burglary, theft or larceny while insured in. Never had loss.

XIV. The amount of burglary, theft or larceny insurance, whether valid or otherwise held by the assured at the time of the loss is as follows. N. J. F. & P. G. Ins. Co. Company. Policy No. 69553. Amount \$2000. Company
 - - - - Policy No. - - - - Amount \$ - - - -

20

XV. The following is a complete description of all the articles stolen and the amount of loss thereon, which represents my claim under the policy.

30

40

Exhibit P. 3.

Item.	Description (itemized) of property stolen.	Pur- chase Price.	Where purchased.	When purchased or, if a present, date of gift.	Present cash value.	Appraised damages.
Ring		8.	Hartdegen's, Newark, N. J.	Dec. 4.	\$8.	\$8.
Watch		15.	Wanamaker's, Phila., Pa.			15.
Scarf Pin		5.	Phillips, Exe- ter Academy			5.
Suit		26.	De Pinna, N.Y.	1914		20.
Trousers		7.	De Pinna, N.Y.	1914		5.
Overcoat		18.	De Pinna, N.Y.	1915		15.
"				May, 1914	15.	15.
Parts 2 silver plated toilet sets		40.	Presents			40.
Spirit Decanter		26.	Reed & Bar- ton	1903	26.	26.
Fern Dish		6.	Reed & Bar- ton		6.	6.
2 Candelabra, each		9.			18.	18.
Water Set		18.			18.	18.
Milk Pitcher		5.			5.	5.
Water "		6.			6.	6.
Sugar bowl and cream pitcher		10.			10.	10.
Forward						212.
	Exposed to moths.					
4 blankets, each	\$6.	Wanamaker's	1913			24.
3 Sk. caps	.50	Wanamaker's	1914			1.50
1 child's coat	10.	De Pinna	1913			10.
1 boy's overcoat	12.	De Pinna	1912			12.
1 " "	12.	De Pinna	1912			12.
1 " "	12.		1913			12.
1 child's coat	6.	Best's				6.
Overcoat	25.	Rogers Peet				25.
"	26.	De Pinna	1913			26.
Ladies' suit	30.	Oppenheim, Collins	1913			30.
"	35.	Oppenheim, Collins	1913			35.
"	42.	Wanamaker	1913			42.
Dress	12.	Oppenheim, Collins	1914			12.
"	12.	Wanamaker	1914			12.
Skirt	6.		1914			6.
Blouse	6.	De Pinna				6.
Wrap	12.					12.
Dressing gown	5.					5.
Furs	40.	Fleet's, N. Y.	1914			40.
"	25.	Revillon Freres	1914			25.
Dress suit	60.	Imported				60.
Dinner jacket	25.	Imported				25.
Overcoat	40.	Rogers Peet				40.
Coat	15.	De Pinna	1914			15.
1 evening dress	75.					75.
2 sets flannels	8.					8.
Prince Albert suit	60.	Imported				60.

Exhibit P. 3.

XVI. The burglary, larceny or theft did not originate and was not brought about through any act, design, contrivance or procurement on the part of the assured, or on the part of any member of his household, firm or employe of his or his firm, except as herein stated, nothing has been done by or with the privity or consent of the assured to violate the condition of this policy, or to render it void; no articles are mentioned herein, but such as were in the building or part thereof described in the policy, and belonging to and in the possession of said assured at the time of the said burglary, larceny or theft; no property saved has been in any manner concealed, and no attempt to deceive the said company as to the extent of said loss has in any manner been made.

XVII. I agree to furnish, on demand, which shall be deemed a part of these proofs, any further information or evidence required by the policy, and admit that the delivery of this blank, as well as its acceptance by the company, shall not be a waiver of any of its rights or defences under this policy.

Dated at Orange N. J. this 15th. day of October 1915.

Signed Fanny B. Downs.

New Jersey Court of Errors and Appeals

FANNIE B. DOWNS,
Plaintiff-Respondent,

vs.

NEW JERSEY FIDELITY & PLATE
GLASS INSURANCE COMPANY OF
NEWARK, N. J.,
Defendant-Appellant.

*Action at
Law.*

On Appeal.

Brief for Appellant.

Facts.

The case was tried before Judge Willard W. Cutler, to whom it was referred, at the Essex Circuit, on March 8 and 9, 1917, and the jury returned a verdict of \$461.50., from which judgment the appellant is now appealing.

The Grounds of Appeal appear on pages 2 and 3 of case.

The action was brought to recover on a burglary policy of insurance issued by the defendant to the plaintiff. (Exhibit P. 1.)

The policy insured the plaintiff For Direct Loss by Burglary, Theft or Larceny of any of the property of the Assured, described in the said schedule and stated therein to be insured thereunder, occasioned by its felonious abstraction from the interior of the house, building, apartment or rooms actually occupied by the Assured, also described in the said schedule and hereinafter called the premises, by any domestic servant or other employee of the Assured or by any other person or persons excepting any person whose property is insured hereunder; and

For Direct Loss by Damage to the said property and to the said premises caused by burglars or thieves. (See line 30 on page 12 of printed case.)

The plaintiff in addition to attempting to prove the loss of articles stolen, also tried to prove that moths damaged certain articles of clothing of the plaintiff, and that this damage was covered by the policy.

The defendant objected to the testimony as to the damage by moths (line 20, page 34 of case).

The Court stated: "I will take the evidence subject to an application to strike it out" (line 30, page 34 of case).

The testimony of the plaintiff from then on until the close of her direct examination was confined entirely to the damage by moths.

At the close of plaintiff's direct examination, defendant's counsel renewed his motion that the testimony of the plaintiff as to the alleged damage by moths was improper, irrelevant and immaterial, on the ground that the policy covered direct loss by damage to the said property and to the said premises caused by burglars or thieves and that this was not such direct damage as was covered by the policy (line 10, page 60).

The Court refused the motion and an exception was taken.

The Court also refused to charge the jury as requested by defendant "That the plaintiff is not entitled to recover for the damage done by moths" (line 30, page 99 of case).

An exception was taken by defendant to this refusal (line 30, page 100 of printed case).

Argument.

The plaintiff was not entitled to recover for the damage done by moths. This was not Direct Loss by Damage to the said property and to the said premises caused by burglars or thieves, and was not covered by the policy.

Law.

In a policy of insurance, direct loss or damage by fire meant the loss or damage occurring directly from the fire as the destroying agency, in contradistinction to the remoteness of fire as such agency.

Remoteness of agency is the explosion of gunpowder, gases or chemicals caused by fire, explosion of steam boilers, the destruction of buildings to prevent the spread of fire or their destruction through the falling of burning walls.

Cal. Ins. Co. v. Union Compress Co., 10 U. S. Sup. Ct. Rep. 365 at page 372.

Fire is not the cause of the breaking of a window within the meaning of an insurance policy, exempting the insurer from liability for losses which happened by or in consequence of any fire, where the loss was caused by the explosion of gas ignited by a match or light.

Vose v. N. J. F. & P. G. Ins. Co., L. R. A., 60, p. 838.

It is the proximate not the remote cause that is to be looked for.

Ross v. L. & L. & G. Ins. Co., 83 N. J. L., p. 340.

Heuer v. Northwestern Nat. Ins. Co., 33 N. E. Rep., p. 411.

A new and wholly independent cause intervening between the peril insured against, and the loss may break the chain of natural causation, in which event the damage is held to be remote and the underwriter is exonerated.

Richards on Insurance, 3 ed., page 619.

Where rats gnawed a hole in a pipe communicating with the plaintiffs cargo of rice, which was damaged by sea water, flowing in through the hole, sea damage, not the action of the rats, was held to be the proximate cause of the loss.

Richards on Insurance, page 616.

In the case of *Insurance Co. v. Tweed*, 7 Wall., p. 52, Mr. Justice Miller says:

One of the most valuable of the *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause.

If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

It is respectfully submitted that the judgment under review should be reversed and set aside.

PILCH & PILCH,
Attorneys of Appellant.

HENRY G. PILCH,
Of Counsel.



