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New Jersey State Library

Notice and Grounds of Appeal.

(Service ack'd March 24, 1926.)

(Filed March 26, 1926.)

New Jersey Supreme Court.

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LLOYD FISHER (Assignee),
Plaintiff,

v.

PHOENIX ASSURANCE COMPANY,
LTD., OF LONDON,
Defendant.

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To

LUM, TAMBLYN & COLYER, Esqs.,
Attorneys for Defendant.

Take Notice, that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment in this cause on the following grounds:

1. Because the Trial Court, upon the trial of this cause ruled that the defendant was entitled to pro rate with the Stuyvesant (Insurance Company) policy issued to the grantors of the assured (the assured being the plaintiff's assignors).

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2. Because the Trial Court, upon the trial of this cause, ruled that the adjustment of the loss between the plaintiff's assignors and the defendant is conclusive against the plaintiff's present claim.

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3. Because the Trial Court, upon the trial of this cause, should have, in any event, allowed the plaintiff legal interest subsequent to sixty days from the adjustment of the loss (to-wit, subsequent to sixty days from September 22, 1924, if the recoverable loss is $2,401.44, and subsequent to sixty
10 days from October 1, 1924, if the recoverable loss is $3,123.66) and should have rendered a verdict which included such interest; and because the Supreme Court should have given and entered judgment in favor of the plaintiff and against the defendant for such sum as would include such interest in addition to the amount recoverable.

4. Because the Trial Court, upon the trial of this cause, found for the plaintiff for its (the de-
20 fendant's) share of the loss, to-wit the sum of $2,401.44, and rendered a verdict in favor of the plaintiff and against the defendant for that amount, whereas the said Trial Court should have found for the plaintiff for the full loss, to-wit, the sum of $3,123.66, and legal interest from sixty days subsequent to October 1, 1924, and should have rendered a verdict in favor of the plaintiff and against the defendant for that amount.

30 5. Because the Supreme Court gave and entered judgment in favor of the plaintiff and against the defendant for the sum of $2,401.44, whereas it should have given and entered judgment in favor of the plaintiff and against the defendant for the sum of $3,123.66 and legal interest from sixty days subsequent to October 1, 1924.

RYMAN HERR,
Attorney for Plaintiff.

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Plaintiff's Summons.

(Served May 27, 1925.)

The State of New Jersey to Phoenix Assurance Company, Limited, of London.

You are Summoned to answer the annexed complaint of Lloyd Fisher in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see notice endorsed hereon.)

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Witness, Hon. Thomas W. Trenchard, Judge of the said Supreme Court at Trenton, this 29th day of April, nineteen hundred and twenty-five.

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EDWARD J. KELLEHER,
Clerk.

Ryman Herr,
Attorney.

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Plaintiff's Complaint.

(Served May 27, 1925.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

LLOYD FISHER (Assignee), Plaintiff, *v.* PHOENIX ASSURANCE COMPANY, LIMITED, OF LONDON, Defendant.	Action at Law. Complaint.

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Plaintiff residing in the Borough of Flemington, County of Hunterdon and State of New Jersey, says:

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FIRST COUNT.

1. On or about the 18th day of January, 1924, Harvey W. Hoyt and Elizabeth B. Hoyt entered into a contract of insurance with the defendant whereby defendant insured by Policy Number 412965 for a period of three years certain property of Harvey W. Hoyt and Elizabeth B. Hoyt for the sum of six thousand ($6,000) dollars. Said property is more fully described in Schedule "A" hereto annexed.

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2. On or about the 17th day of June, 1924, the property set out in Schedule "A" was damaged by fire and defendant became liable under said policy. Thereafter and on or about the 20th day of June, 1924, Harvey W. Hoyt and Elizabeth B. Hoyt presented a proof of loss to defendant and

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otherwise duly performed all the conditions of said policy on their part.

3. Thereafter the defendant agreed with Harvey W. Hoyt and Elizabeth B. Hoyt that the amount of loss suffered by them was $3,123.66. No part of said loss has been paid.

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4. Thereafter and on the 1st day of October, 1924, Harvey W. Hoyt and Elizabeth B. Hoyt for a valuable consideration assigned all their right, title and interest in said insurance policy and any claim they might have thereunder to Lloyd Fisher.

Plaintiff demands as damages the sum of $3,-123.66 with lawful interest thereon from August 20th, 1924.

SECOND COUNT.

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1. Plaintiff reiterates and makes part of this Count Paragraphs 1 and 2 of the first Count.

2. As a result of said fire the personal property of Harvey Hoyt and Elizabeth Hoyt covered by said insurance was damaged to the extent of $1,829.75 and the frame house covered by said policy was damaged to the extent of $4,000.00.

3. Defendant has refused to pay any sum due under said policy and ever since said fire has denied its liability under the same.

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4. Plaintiff reiterates and makes part of this count Paragraph 4 of the First Count.

Plaintiff demands as damages upon this Count the sum of $5,829.75, together with lawful interest thereon from August 20, 1924.

Plaintiff demands as damages the sum of $5,-829.75, together with lawful interest thereon from August 20, 1924.

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RYMAN HERR,
Attorney of Plaintiff.

Schedule "A," Annexed to Complaint.

SCHEDULE "A."

"Private Or Summer Dwelling, With Barn and Furniture (Protested).

(Not Exceeding Two Families.)

$4,000.00 On the two and ½ story asbestos roof frame building additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work, and fences connected therewith, while occupied exclusively for dwelling purposes by not exceeding two families, situated On the East side of Lawton Avenue in the Borough of Grantwood, Bergen County, N. J. Being the last house newly constructed at the East end of said Lawton Avenue.

$2,000.00 On household furniture, useful and ornamental, including beds, bedding, linen, wearing apparel, plate and plated ware, printed books and music, pictures, paintings and engravings and their frames, bronzes, statuary and other works of art and objects of virtu (at not exceeding cost price); all musical and scientific instruments, sewing machines, mirrors, jewelry and precious stones in use, fuel and family stores and supplies, tools, toys, bicycles, guns and other sporting goods and utensils the property of the insured or any mem-

ber of the family, all while contained in the above-described building.

It is understood and agreed that the first item of this policy also covers awnings, door and window screens, and storm doors and windows, while attached to above described building, or in amount not to exceed $200 while stored in outbuildings upon the above described premises. 10

$..Nil.. On ....story and..........roof .... building, additions and extensions thereto, and all permanent fixtures therein, thereon and belong thereto, while occupied as a private stable or barn, and situated on the above-described premises ...... 20 ....

$..Nil.. On Horses, in case of loss no one horse to be valued at over $................ while contained in the above-described stable or barn.

$....... On Vehicles (excluding gasoline motor vehicles of every description), robes, horse and carriage equipment, hay, grain and feed, barn and garden tools, while contained in the above described 30 stable or barn.

$....... ....
....

Privilege granted to use steam, coal stoves, hot air furnaces or grates for heating; to use public or municipal gas or kerosene oil for light, heating or cook purposes; to remain unoccupied; to remain vacant during any change of ten-

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ant or while awaiting a tenant not to exceed six consecutive months at any one time in any one year; and to use not exceeding one quart of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment.

10 Other insurance permitted without notice until required.

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

Privilege to use electric current for light, heat or power.

20 Lightning Clause—New Jersey Standard.—This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term "Lightning," and in no case to include loss or damage by cyclone, tornado, or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said prop-

30 erty this company shall be liable only pro rata with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and made a part of Policy No. 412965 of the Phoenix Insurance Company, issued at its Park Ridge, N. J. Agency.

A. R. KUEHN,
Agent.

40 Filed June 4, 1925.

Defendant's Answer.

(Filed July 8, 1925.)

The Phoenix Assurance Company Ltd. of London authorized to transact business in the State of New Jersey, says that:

ANSWER TO FIRST COUNT.

First Defense.

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1. Defendant admits that it issued a certain policy of insurance to Harvey W. Hoyt and Elizabeth B. Hoyt, but denies that the complaint sets forth the full terms and conditions of said contract and demands the production of the original thereof as to its exact terms and conditions.

2. Defendant admits that there was submitted to it certain proofs of loss but denies each and every other allegation in Paragraph 2.

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3. Defendant denies the allegations in Paragraphs 3 and 4 of the first count.

Second Defense.

1. Defendant is not liable to the extent as stated in the complaint.

Third Defense.

1. The loss or damage sustained, if any, for which the defendant is liable under the terms of said policy is materially less than the amount claimed by the plaintiff.

30

Fourth Defense.

1. Said policy amongst other things provided as follows:

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Answer.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurers covering such property."

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2. At the time of said alleged loss there was other insurance on said property, to wit: insurance of The Stuyvesant Insurance Company to the extent of five thousand dollars ($5,000).

3. The defendant is therefore only liable for its appropriate share of said loss to be determined in accordance with the terms of said policy.

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FIFTH DEFENSE.

1. Said policy amongst other things provided as follows:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurred * * *; said ascertainment or estimate shall be made by the insured and this company * * *. The amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by this company in accordance with the terms of this policy."

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2. After the occurrence of the alleged fire the assured and this company ascertained the amount

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due and that the amount for which the defendant company was liable was the sum of two thousand four hundred one dollars and forty-four cents ($2,-401.44) for which the insured filed satisfactory proofs of loss claiming said amount due from this defendant company, and the defendant company in accordance with the terms of said policy ten- 10 dered to the insured, Harvey W. and Elizabeth B. Hoyt said sum.

Sixth Defense.

1. Said policy amongst other things provided as follows:

> "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 assured and 20 this company each selecting one, and the two so chosen shall first elect a competent and disinterested umpire. The appraisers together * * *."

2. The insured failed to comply with the terms of said contract and did not select a disinterested appraiser to determine the amount of loss in accordance with the terms of said policy.

ANSWER TO SECOND COUNT. 30

First Defense.

1. Defendant answering Paragraph 1 of the second count repeats its answers to Paragraphs 1 and 2 of the first count.

2. Defendant denies the allegations in Paragraphs 2, 3 and 4 of the second count.

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Reply.

SECOND DEFENSE.

Defendant repeats the second defense to the first count.

THIRD DEFENSE.

Defendant repeats the third defense to the first
10 count.

FOURTH DEFENSE.

Defendant repeats the fourth defense to the first count.

FIFTH DEFENSE.

Defendant repeats the fifth defense to the first count.

SIXTH DEFENSE.

Defendant repeats the sixth defense to the first
20 count.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant.

Plaintiff's Reply.

(Filed July 24, 1925.)

Plaintiff residing in the Borough of Flemington, County of Hunterdon and State of New Jersey says that:

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REPLY TO FIRST DEFENSE.

1. Plaintiff denies each and every allegation except so much thereof as admits statements in the complaint.

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Reply.

REPLY TO SECOND AND THIRD DEFENSE.

1. Plaintiff denies every allegation in second and third defense.

REPLY TO FOURTH DEFENSE.

1. Plaintiff admits Paragraph 1 of fourth defense and denies Paragraphs 2 and 3. 10

REPLY TO FIFTH DEFENSE.

1. Plaintiff admits Paragraph 1 of the fifth defense and denies Paragraph 2.

REPLY TO SIXTH DEFENSE.

1. Plaintiff admits Paragraph 1 of sixth defense and denies Paragraph 2.

REPLY TO SECOND COUNT. 20

Plaintiff denies each and every allegation contained in the answer to the second count except such parts thereof as have heretofore been admitted.

RYMAN HERR,
Attorney of Plaintiff.

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Agreed State of Facts.

(Filed January 19, 1926.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

LLOYD FISHER (Assignee), Plaintiff, *v.* PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, Defendant.	Action at Law

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1. On the 24th day of July, 1923, George B. Bergkamp & Son, Inc., was the owner of the property in question.

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2. On said date there was issued to the said owner by the Stuyvesant Insurance Company a three-year policy for the sum of five thousand dollars ($5,000.00) covering said premises, the policy being in the usual New Jersey standard form.

3. Said policy contained a standard mortgagee clause in favor of the Fidelity Title and Mortgage Co. of Ridgewood, New Jersey.

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4. Said insurance policy was delivered to the said mortgagee and remained continuously in the mortgagee's possession until after the fire on the 17th day of June, 1924, which fire gave rise to the questions here involved.

5. The Stuyvesant policy contained the following stipulation:

"This policy unless otherwise provided by

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> agreement endorsed thereon or added thereto shall be void * * * or if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance * * * or if this policy be assigned before a loss."

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6. On or about the 15th day of December, 1923, the property in question was sold by George B. Bergkamp & Son, Inc., to Harvey and Elizabeth Hoyt.

7. On the 18th day of January, 1924, the said Elizabeth and Harvey Hoyt, took out a policy of insurance in the Phoenix Assurance Company, Ltd., the defendant in this cause for the sum of six thousand dollars ($6,000.00); said policy being in the usual New Jersey standard form.

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8. Said policy amongst other things contained the following provision:

> "This company shall not be liable under this policy for a greater proportion of any loss by an accident of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurance covering such property."

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9. A few weeks thereafter application was made to the mortgagee, the Fidelity Title and Mortgage Co., for a guarantee of title and that was the first knowledge the mortgagee had of any change of ownership.

10. The mortgagee immediately wrote the agent of the Stuyvesant Insurance Company, who had

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countersigned the original Stuyvesant policy, notifying the agent of the change of ownership and requesting that an endorsement be sent to the office of the mortgagee, to be attached to the original policy to protect the new owner and the mortgagee.

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11. Neither the mortgagee nor the owner ever received any acknowledgment from the Stuyvesant Insurance Company, or any of its agents of the receipt of the mortgagee's letter and there was never added to the Stuyvesant policy any endorsement showing any change of ownership.

12. The Stuyvesant Insurance Company claims that the first knowledge it had of the change of ownership, was when the proof of loss was submitted to them by the mortgagee, following the fire of June 17, 1924.

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13. Neither party has any written memorandum covering the passing of title. Mr. Hoyt is under the impression that he made an allowance to Mr. Bergkamp for the unearned premium on the Stuyvesant policy.

13-A. On August 29th, 1924, the Stuyvesant Insurance Company wrote to Harvey and Elizabeth B. Hoyt a letter advising them that the company was not liable on its policy, a copy of which said letter is hereto attached and made part hereof.

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14. On or about the 15th day of September, 1924, the assureds, Harvey and Elizabeth Hoyt, prepared and executed a properly drawn proof of loss addressed to the defendant, the Phoenix Assurance Company, Ltd., in which the whole damage was stated as being three thousand one hundred and twenty-three dollars and sixty-six

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cents ($3,123.66), in which the loss was apportioned and the assureds claim as against the defendant, the Phoenix Assurance Company, Ltd.; the sum of two thousand one hundred and four dollars and forty-four cents ($2,104.44) claimed as against the Stuyvesant Insurance Company; the sum of seven hundred and twenty-two ($722.00); a true copy of said proof of loss is hereto annexed and made part hereof.

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15. After said proof of loss was submitted to the defendant, it was approved by the defendant and so marked by placing thereon a rubber stamp with the word "approved" signed by an officer of the company and dated September 22, 1924.

16. After said proof of loss was submitted as above stated and approved, the defendant tendered to the assureds, Harvey and Elizabeth Hoyt, their draft in full settlement of said loss, for the sum of two thousand four hundred and one dollars and forty-four cents ($2,401.44), which said draft was accepted by the said assureds. Said draft was dated, New York, September 22, 1924.

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17. On April 29, 1925, Ryman Herr, attorney for the assureds, wrote to the defendant amongst other things:

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> "I have this day mailed the Sheriff of Mercer County summons and complaint in the above matter and I am accordingly returning to you herewith your draft for $2,401.44."

18. On or about the first day of October, 1924, the assureds prepared and executed another proof of loss and submitted the same to the Phoenix

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Assurance Company, Ltd., the defendant in this cause, in which said proof of loss was alleged to be three thousand one hundred and twenty-three dollars and sixty-six cents ($3,123.66), claiming the whole of said sum from the defendant and not giving credit for any pro rata share against the Stuyvesant Insurance Company.

18-A. If the defendant is to pro rate with the Stuyvesant Company the defendant's share of the loss will be $2,404.44 and defendant admits its liability for that sum. If the defendant is not to pro rate with the Stuyvesant Company, defendant admits its liability to be $3,123.66, unless its defense excludes it from paying more than $2,404.44.

19. The Stuyvesant Insurance Company has not paid and still denies the liability of any claims under this policy.

20. On or about the first day of October, 1924, the assureds assigned their rights against the defendant to the plaintiff herein, Lloyd Fischer.

RYMAN HERR,
Attorney for Plaintiff.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant.

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Agreed State of Facts.

(Copy of First Proof of Loss.)

Approved
$2,401.44
Sep. 22, 1924
W. P. Strode

POLICY NUMBER	AMOUNT OF POLICY
412965	$6,000.00
AGENCY	EXPIRING
Park Ridge, N. J.	Jan. 18, 1927

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PROOF OF LOSS

TO THE

PHOENIX ASSURANCE COMPANY OF ENGLAND

By the above policy of insurance you insured Harvey and Elizabeth Hoyt (hereinafter called the assured), the written portion thereof, and all endorsements, transfers and assignments thereon being as follows, viz:

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Form No. 1A.

PRIVATE OR SUMMER DWELLING, WITH BARN AND FURNITURE (PROTECTED).

(Not Exceeding Two Families.)

$4,000.00 On the two story asbestos roof frame building, additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work, and fences connected therewith, while oc-

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cupied exclusively for dwelling purposes by not exceeding two families, situated on the east side of Lawton Ave. in the Borough of Grantwood, Bergen County, N. J. Being the last house newly constructed at the East end of said Lawton Ave.

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$2,000.00 On household furniture, useful and ornamental, including beds, bedding, linen, wearing apparel, plate and plated ware, printed books and music; pictures, paintings and engravings and their frames, bronzes, statuary and other works of art and objects of virtu (at not exceeding cost price); all musical and scientific instruments, sewing machines,

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mirrors, jewelry and precious stones in use, fuel and family stores and supplies, tools, toys, bicycles, guns and other sporting goods and utensils the property of the insured or any member of the family, all while contained in the above-described building.

It is understood and agreed that the first item of this policy also covers awnings, door and window screens, and

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storm doors and windows, while attached to above-described building, or in amount not to exceed $200 while stored in outbuildings upon the above-described premises.

$..nil.. On ....story .... roof ....building additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto,

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while occupied as a private stable or barn, and situated on the above-described premises ....

....

$....... On Horses, in case of loss no one horse to be valued at over $.........., while contained in the above-described stable or barn. 10

$....... On Vehicles (excluding gasoline motor vehicles of every description), robes, horse and carriage equipment, hay, grain and feed, barn and garden tools, while contained in the above-described stable or barn.

$....... ....

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Privilege granted to use steam, coal stoves, hot air furnaces or grates for heating; to use public or municipal gas or kerosene oil for light, heating or cooking purposes; to remain unoccupied; to remain vacant during any change of tenant or while awaiting a tenant not to exceed six consecutive months at any one time in any one year; and to use not exceeding one quart of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment. 30

Other insurance permitted without notice until required.

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

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Privilege to use electric current for light, heat or power.

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

20 Attached to and made a part of Policy No. 412965 of the Phoenix Insurance Company, issued at its Park Ridge, N. J. Agency.

A. R. HUEHN,
Agent.

(Full copies of all endorsements, transfers, assignments, and the descriptions and schedules in all other policies will be furnished on demand.)

A fire occurred on the 17th day of June, 1924, at
30 about the hour of 7:30 o'clock A. M., by which the property described in said policy was destroyed or damaged, as hereinafter more particularly set forth.

The said fire originated as follows, viz:
unknown

The total insurance (whether valid or not), covering said property or any part of the same, at the time of said fire, including the above policy, was the sum of $11,000.00, as more particularly set

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forth in schedule designated "Insurance and Apportionment," attached hereto and hereby made part hereof.

The building described, or containing the property described, was occupied at the time of said fire, as follows, viz:

Not occupied, but contained the furniture of the assured, and for no other purpose. 10

Except as noted below, the property described belonged at the time of the fire to assured in fee simple (not held under lease), and no other person or persons had any interest, lien or incumbrance therein or thereon, except

Fidelity Title & Mortgage Co., mortgagee.

This policy not assigned.

Since the issue of said policy there has been no assignment, or transfer, or incumbrance of said property, for any change in the title, use, occupancy, location, possession or exposure of the same, except 20

None

The actual cash value of said property at the time of the fire was the sum of $8,174.00 and the whole amount of loss and damage to and upon the same by said fire, was the sum of $3,123.66 all as more particularly set forth in schedule designated "Statement of Loss" attached hereto and hereby made part hereof. 30

Assured hereby claims of this company, under the policy referred to, the sum of $2,401.44.

The said fire did not originate by any act, design or procurement on the part of the assured, or this affiant; nothing has been done by or with the privity or consent of the assured or this affiant, to violate the condition of the policy, or render it void; no articles are mentioned herein or in annexed

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schedules but such as were in the building damaged or destroyed, and belonging to, and in possession of the said assured at the time of said fire; 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
10 made.

Any other information that may be required will be furnished on call, and considered a part of these proofs.

It is expressly understood and agreed, that the furnishing of this blank to the assured or the preparing of proofs by an adjuster, or any agent of the above company is not a waiver of any rights of said company.

Witness our hand at Park Ridge
20 this 15 day of September, 1924.

HARVEY HOYT
ELIZABETH HOYT
Assured

State of New Jersey
County of Bergen, } ss.:

Personally appeared before me the day and date above written Harvey & Elizabeth Hoyt signers
30 of the foregoing statement, who made solemn oath to the truth of same, and that no material fact is withheld of which the said insurance company should be advised.

A. R. HEUHN,
Notary Public, N. J.

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Agreed State of Facts.

STATEMENT OF LOSS

HARVEY AND ELIZABETH HOYT — GRANTWOOD, N. J.

Fire: June 17th, 1924.

As agreed in detail between assured and adjuster. Originated at about 7:30 A. M. from causes unknown. 10

Item—"Building"		Sound Value	Loss
Sound Value (estimated)		$5,000.00	
Plaster	$421.00		
Flooring	30.00		
Interior Decorations	256.00		
Windows	60.00		
Doors	120.00		
Trim	28.00		
Glass	9.00		
Tear out and remove debris	50.00		
	$974.00		
Builder's profit	122.00		
	$1,096.00		
Add to settle	204.00		
Loss	$1,300.00		$1,300.00
Item—"Household Furniture"			
Sound value		3,174.00	
Furniture	249.45		
Beds	171.00		
Bedding	244.60		
Linen	61.84		
Clothing	162.20		

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Floor covering	113.35		
Draperies	62.06		
Pictures	256.50		
Musical Instruments	58.00		
Bric-a-brac	3.00		
Books	7.60		
10 Sewing Machine	48.00		
Trunks and suit cases	33.60		
China and Glass	213.20		
Cooking Utensils	16.20		
Canned fruits & jelly	64.16		
Miscellaneous	58.90		
Loss on item	$1,823.66		$1,823.66
Total sound value and loss		$8,174.00	$3,123.66

20 No Co-Insurance clause
No mortgage clause

Details on file with
General Adjustment Bureau
Newark, New Jersey

GENERAL ADJUSTMENT BUREAU
R. B. Gardner,
Adjuster.

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Agreed State of Facts.

INSURANCE AND APPORTIONMENT

Policy #	Expires	Company	Total Insures	Pays
412965	1-18-27	Phoenix Assurance	$6,000.00	$2,401.44
588460	7-24-26	Stuyvesant	5,000.00	722.22
			$11,000.00	$3,123.66

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Company	Dwelling Insures	Pays	H. H. F Insures	Pays
Phoenix Assurance	$4,000.00	$577.78	$2,000.00	$1,823.66
Stuyvesant	5,000.00	722.22	....	....
	$9,000.00	$1,300.00	$2,000.00	$1,823.66

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Endorsed:

PROOF OF LOSS
TO THE
PHOENIX ASSURANCE CO.
OF ENGLAND.

Assured Harvey and Elizabeth Hoyt
Grantwood, N. J.
Agency Parkridge, N. J.
Policy No. 412965
Date of Fire June 17th, 1924.
Amount of Policy $6000.00
Amount Claimed $2401.44

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(Rubber Stamp Endorsement):

Received
Newark, N. J.
Sep 22 1924
General Adjustment
Bureau

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(Copy)

August 29, 1924.

Harvey & Eliz. B. Hoyt,
Cornwall-on-Hudson, N. Y.

Dear Sir & Madam:

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Re: Stuy. Pol. #588460—Fire of 6-16-24.

In compliance with the fire which occurred on your property under which you are making a claim under above noted policy we wish to put you on record that you have no valid insurance with this company.

This insurance policy was issued to George B. Berfikamp, loss if any payable to Fidelity Title & Mortgage Company. There is a policy in existence

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in the Phoenix Assurance Company issued to you as owner which is insufficient to pay for the loss and damage to this property, and you should look to them for payment of the full amount of your damage.

We wish to warn you therefore that if we should be called upon to make any payment to the Fidelity Title & Mortgage Co., mortgagee, under their separate contract with us we shall subrogate to their

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rights in that amount and proceed against you to recover.

Yours very truly,

MFG—HB

STUYVESANT INSURANCE CO.,

By

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Opinion.

(Filed January 19, 1926.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

LLOYD FISHER (Assignee),
Plaintiff,
v.
PHOENIX ASSURANCE COMPANY,
LTD., OF LONDON,
Defendant.

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For the Plaintiff, RYMAN HERR, Esq.

For the Defendant, LUM, TAMBLYN & COLYER, Esqs.

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JESS, J.:

A jury having been waived, this case was submitted to the Court for decision on an agreed state of facts and briefs on the law.

The question to be decided is whether the defendant is liable to the plaintiff under a policy of fire insurance for the whole amount of a loss suffered by the plaintiff's assignors or whether its liability is limited to a proportionate part of the loss, by virtue of a pro-rating provision in its policy.

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The facts, as stipulated, are that on the 24th day of July, 1923, George E. Bergkamp & Son, Inc., obtained from the Stuyvesant Insurance Company a three-year fire insurance policy for $5,000.00, covering property then owned by the Bergkamp corporation. The policy was in the usual New Jersey standard form and contained a mortgagee clause in favor of the Fidelity Title and Mortgage Co. of Ridgewood, New Jersey. The policy was deliv-

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ered to the mortgagee and remained in its possession until after the fire on the 17th day of June, 1924, which fire gave rise to the questions here involved. This policy contained the following stipulation: "This entire policy, unless otherwise provided by agreement endorsed hereon or added
10 hereto, shall be void * * * or if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance * * * or if this policy be assigned before a loss."

On or about December 15th, 1923, the property insured was sold to Harvey and Elizabeth Hoyt. On the 18th day of January following, the new owners, secured a $6,000.00 fire policy on the property from the Phoenix Assurance Company, Ltd.,
20 of London. This policy contained the following provision: "This company shall not be liable under this policy for a greater proportion of any loss by, and expense of removal from premises endangered, by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property."

A few weeks thereafter, application was made to the mortgagee for a guarantee of title. This was
30 the first knowledge the mortgagee had of the change of ownership. The mortgagee immediately wrote to the agent of the Stuyvesant Insurance Company who had countersigned the original Stuyvesant policy, notifying the agent of the change of ownership and requesting that an endorsement be sent to the office of the mortgagee, to be attached to the original policy to protect the new owner and the mortgagee. Neither the mortgagee nor the owner ever received any acknowledgment from

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the Stuyvesant Company, or from any of its agents, of the receipt of the mortgagee's letter and there was never added to the Stuyvesant policy any endorsement showing change of ownership.

The Stuyvesant Company claims that the first knowledge it had of the change of ownership was when the proof of loss was submitted by the mortgagee, following the fire of June 17th, 1924. 10

Neither the seller nor the purchasers of the property have any memorandum as to the passing of title. Mr. Hoyt is under the impression that he made an allowance to Mr. Bergkamp for the unearned premium on the Stuyvesant policy.

On or about September 15th, 1924, Harvey and Elizabeth Hoyt prepared and executed a properly drawn proof of loss addressed to the defendant, the Phoenix Insurance Company, Ltd., in which the 20 whole damage was stated to be $3,123.66, and in which the loss was apportioned as follows: The Phoenix Insurance Company, Ltd., $2,104.44; the Stuyvesant Insurance Company, $722.00. (The amount of the loss apportioned to the defendant as stated in the stipulation, namely, $2,104.44, obviously was a typewriting error, since it is conceded by the parties, and the other evidence shows, that this sum should be $2,401.44.) The proof of loss was approved by an officer of the Stuyvesant 30 Company on September 22, 1924. A draft as of that date for $2,401.44 was tendered to and accepted by the insured.

On October 1st, 1924, the insured executed and submitted to the defendant a new proof of loss, alleging the loss to be $3,123.66, and claiming the whole amount thereof from the defendant, not giving credit for any pro rata share against the Stuyvesant Company. On April 29th, 1925, the

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attorney for the insured wrote the defendant that he was instituting suit against it and accordingly was returning the draft. This company has not paid and denies liability for any claim under its policy.

The insured have assigned their rights under the
10 Phoenix policy to the plaintiff in this suit. The plaintiff insists that the defendant is liable for the whole amount of the damage done to the property in question. The defendant seeks to limit the liability to a pro rata share of the total loss.

The plaintiff relies upon the provision in the Stuyvesant policy that the entire policy, unless otherwise by agreement endorsed therein or added thereto, should be void if any change other than by the death of the insured should take place in
20 the interest, title or possession of the subject of insurance.

The plaintiff's claim thus is predicated upon the proposition that the Stuyvesant policy was rendered absolutely void by the change in the ownership of the property without the insurer's consent endorsed upon or annexed to the policy and that consequently there can be no pro-rating with that policy. The Stuyvesant Company is not a party to this action and therefore its liability, if any, to
30 the plaintiff on its policy cannot be determined in this proceeding, so as to be binding either upon that company or the plaintiff. Assuming that the Stuyvesant Company could successfully resist enforcement of its policy by the plaintiff on the ground that the placing of other insurance upon the property without its consent, manifested in accordance with the provisions of its contract, voided the policy, I am not permitted to hold as a matter of law that that would be the result when to do so

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would require me to resolve every issue of fact in favor of the company, in the absence of such disclosure of the facts as could only be obtained by litigating the questions involved.

In the case of Plockzeli *v.* St. Paul Fire & Marine Insurance Company, 91 Atl., 812, Vice-Chancellor Howell held that a provision similar to that in the Stuyvesant policy must be enforced unless there is evidence that it has been waived by the insurer. He found no evidence of waiver in that case, but stated that in a given case the facts might warrant the conclusion of a waiver.

The validity or invalidity of the Stuyvesant policy is not, however, the controlling factor in this case. The plaintiff here seeks to hold the defendant liable under its policy for the whole amount of the loss resulting to the plaintiff's assignors. The defendant's liability is to be determined by reference to its contract of insurance. This contract provided that the company should not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance, whether valid or not, covering the property in question.

It will, of course, be conceded that under this provision, the defendant would be entitled to prorate the loss with the Stuyvesant Company, if that company's policy is a valid obligation enforcible against it. The limiting of the liability of the insurer for any loss to its proportional share of the whole insurance is explicitly expressed in the prorating provision. That this liability shall thus be limited without regard to the validity of other insurance seems to be expressed with equal clearness and conclusiveness. The clause "whether valid or not" plainly imports a purpose to exclude

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from the scope of the pro-rating provision any question as to the liability of other insurers on the same property.

As was said by the U. S. Supreme Court with respect to another provision of a fire insurance contract:

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> "This clause, as a known part of the stipulations of the policy, ought to receive a fair and reasonable interpretation, according to its obvious import." (Carpenter *v.* The Providence Washington Insurance Co., 16 Pet., 495.)

It is true that there has been a conflict of judicial opinion as to the effect to be given provisions in fire policies somewhat analogous to that under
20 consideration. Some of this contrariety of view has been due to the special facts in given cases or to the varying terms of the insurance contracts subject to review.

When the test has been the meaning to be attributed to provisions essentially similar to that in the pro-rating stipulation of the defendant's policy, the weight of authority is that they must be interpreted according to their plain purpose.

The stipulation inserted in a fire policy by which
30 the insurer is liable only for its pro-rata share of the loss whether other insurance is valid or not, was devised to obviate the difficulty arising out of a determination as to the validity of such other insurance. 19 Cyc., 841.

In the case of Jersey City Insurance Co. *v.* Nichol, 35 N. J. Eq., 291, the Court of Errors and Appeals held that where a second policy by its express terms was void at the time it was executed, there could be no apportionment of loss on that and a
40 prior valid policy. The rule was stated in the

syllabus of the opinion to be that, where an apportionment of loss is provided for in a policy, this can only be construed to apply to other insurance valid in its inception.

The pro-rating provision of the policy before the Court in that case did not contain the stipulation that the provision should be binding whether the other insurance was valid or not. The Court, therefore, had no occasion to construe the effect of such a stipulation. All that the Court held was that an attempt to insure which did not eventuate in a valid contract of insurance afforded no basis upon which to limit the liability under a prior valid policy to its proportionate share of the loss.

In the case *sub judice,* the insurance with which the defendant seeks to pro-rate the loss was unquestionably valid at its inception and probably continued to be valid so far as the interests of the mortgagee are concerned.

If the facts and the pro-rating provision of the policy in Jersey City Insurance Co. *v.* Nichol had been similar to those appearing in the case here under consideration, it is fairly deducible from the opinion that the right of apportionment would have been sustained in the case cited.

The New Orleans Insurance Association issued a policy in which it was provided that the assured should not be entitled to recover any greater proportion of the loss or damage than the amount thereby insured bore to the whole sum insured "without reference to the solvency or liability of other insurers." At the time of taking out this policy, the assured had another policy on the same goods in the Mississippi Home Insurance Company, in which there was a provision that the policy should be void if other insurance should be ob-

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tained without the consent of the said company. The plaintiff failed to notify the Home Company of the later insurance and the Home company repudiated all liability on the ground that it had not consented to the additional insurance. It was contended that the Home policy having become for-
10 feited was no longer any insurance and was to be excluded as a factor in determining the extent of defendant's liability.

The Supreme Court of Mississippi in this case (Cassitly *v.* New Orleans Insurance Association, 65 Miss., 49), held that plaintiff's claim could not prevail, and said: "We cannot, in applying the rule which construes the instrument most strongly against the insurer, close our eyes to the manifest purpose of this clause and so refine upon language
20 as to defeat the object sought to be accomplished."

Similarly, the Supreme Court of Michigan in a majority opinion written by Chief Justice Cooley held that the stipulation in a fire insurance policy that in adjusting a loss, other existing policies should be taken into account, even though forfeited, to be a competent provision and not unreasonable, its purpose being to protect the company against the necessity of contesting with the insured any question of the validity of the other
30 insurance. Liverpool, London & Globe Insurance Co. *v.* Verdier, 35 Mich., 395.

In the case of London and L. Fire Insurance Co. *v.* Turnbull, 55 S. W., 542, the Kentucky Court of Appeals held that where the policy provides for pro-rating the loss with other insurance, whether the same is valid or invalid, the insured is bound by its terms.

A similar opinion was expressed by the Supreme Court of Indiana in Phenix Insurance Co. *v.*
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Lamar, 7 N. E., 241. In that case the Court held that the contract is that other insurance, whether valid or not, taken without the written consent of the insurance company, should not be the subject of future contest. Such a stipulation is not against public policy. It is to have effect in accordance with its plain and obvious meaning. 10

The Supreme Court of South Carolina held that though the issuance of a policy by the defendant insurance company rendered other insurance voidable, yet the defendant was liable only for a proportionate part of the loss under the policy thus limiting liability, whether the other insurance was valid or not. Gandy *v.* Orient Insurance Co., 29 S. E., 655.

In the case of Continental Insurance Co. *v.* Hulman & Cox, 92 Ill., 145, the Supreme Court of 20 Illinois expressed the opinion that the words used in a fire insurance policy in referring to other insurance "whether valid or not" were inserted to prevent any controversy as to the validity of other insurance and are not to be disregarded.

Under a policy containing a provision that the insurer shall not be liable thereunder for a greater proportion of the loss "than the amount hereby insured shall bear to the whole insurance, whether valid or invalid," it was held that the insurer was 30 liable for only such proportion of the loss where the insured had other insurance on the same property under a policy issued by another company which was invalid because he was not "the sole and unconditional owner" of the property. Bateman *v.* Lumbermen's Insurance Company, 189 Pa. St., 465.

The rule seems to be the same in New York. In Rickerson *v.* The German-American Insurance Co.,

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6 App. Div., 550, it was decided that where two policies of insurance upon the same property are concurrent and contain a contribution clause, the clause should be enforced in favor of one of the insurance companies, although the other may escape liability; the company held liable should
10 not be charged with any greater liability than its proportionate amount of a loss which it contracted to pay.

The fact that the other insurance in the case *sub judice* was not issued to the plaintiff's assignors, but to their predecessors in title, does not alter the rule, which is to be adduced from the cases cited. The provision in plaintiff's policy is that the defendant shall pro-rate with other insurance covering the same property. The right of
20 the insurer to apportion the liability is not limited to insurance issued to the assured.

The Stuyvesant policy admittedly was on the same property as that covered by defendant's policy. It was therefore within the purview of the clause limiting liability.

Nor is this a case where the other insurance existed without the knowledge or consent of the assured. One of the owners of the property thinks that in the settlement with the previous owner he
30 made an allowance for the premium on the existing policy.

In any event, after the fire the plaintiff's assignors recognized the existence of the prior policy and in their formal proof of loss claimed under that policy the proportion of the loss the Stuyvesant Company had contracted to pay.

The defendant is entitled to prevail also in its second contention that an adjustment of the loss between the plaintiff's assignors and the defendant
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was arrived at which is conclusive against the plaintiff's present claim.

The fire which gave rise to the loss occurred on June 17th, 1924. On August 19th, 1924, the Stuyvesant Company by letter advised the insured that the company disavowed liability on its policy. On September 15th, 1924, the insured executed a proof of loss in which the whole damage was stated to be $3,123.66, and in which the insured claimed of the defendant company, under its policy, the sum of $2,401.44. A draft for the amount, dated September 22, 1924, was tendered to and accepted by the insured.

At the time of this adjustment, the insured knew that the Stuyvesant Company denied liability on its policy, and notwithstanding that knowledge, claimed from the defendant only such proportion of the loss as the amount of defendant's policy bore to the whole insurance, including the amount insured by the Stuyvesant policy. The pro rata share of the loss thus agreed upon was paid to and, as expressly stated in the stipulation, accepted by the insured. Any right which the insured may have had to recover their whole loss from the defendant was surrendered when, with full knowledge of the situation, they agreed to accept and, in fact, did accept, a lesser sum in settlement of their claim. Weir *v.* Allen, 89 N. J. L., 597; Worcester Loom Co. *v.* Heald, 78 N. J. L., 173; Trenton St. Rwy. Co. *v.* Lawlor, 74 N. J. Eq., 828; Dobbs *v.* New Amsterdam Casualty Co., 2 N. J. Mis. R., 649; North *v.* Jersey Knitting Mills, 98 N. J. L., 157, 159.

I find that the pro-rating provision in the policy sued on must be given effect, according to its plain terms, as a part of the contract; that under that provision, the defendant's liability is $2,401.44;

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that the plaintiff's assignors accepted a draft for that sum in satisfaction of their claim, and that the plaintiff in this suit is entitled to recover only that amount.

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Postea.

(Filed March 10, 1926.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

LLOYD FISHER (Assignee),
Plaintiff,

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v.

PHOENIX ASSURANCE COMPANY,
LTD., OF LONDON,
Defendant.

This case was submitted to Judge Frank B. Jess on an agreed state of facts at the September Term of the Hunterdon Circuit.

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1. The Court rules that the defendant is entitled to pro rate with the Stuyvesant policy issued to the grantor of the assured.

2. The Court rules that the adjustment of the loss between the plaintiff's assignors and the defendant is conclusive against the plaintiff's present claim.

3. The Court finds for the plaintiff and against the defendant for its pro rata share of the loss to

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wit, $2,401.44 and renders a verdict for the plain-

tiff and against the defendant in the sum of $2,401.44.

FRANK B. JESS,
Circuit Court Judge.

Judgment.

(Entered March 17, 1926.)

Judgment was entered in the Supreme Court on March 17, 1926, in favor of the plaintiff and against the defendant for $2,401.44.

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New Jersey Court of Errors and Appeals

LLOYD FISHER, Assignee, Plaintiff-Appellant, *v.* PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, Defendant-Respondent.	On Appeal from Supreme Court.

BRIEF FOR PLAINTIFF-APPELLANT.

The Issues.

The questions in this case principally relate to the construction to be given to the pro rating clause in the fire insurance policy issued by the defendant to the plaintiff's assignors. The grounds of appeal may be resolved into three questions, of which the first is the principal one. They are as follows:

1. Whether a present owner of property, holding a fire insurance policy under which a loss occurs, must pro rate that loss with a policy issued by another company to and held by a preceding owner of the same property and which policy has never been made payable to the present owner.

2. Whether the presenting by such present owner of a proof of loss, which pro rated and apportioned the loss between the two policies and upon which a draft was delivered to the insured, is a waiver and compromise, notwithstanding the facts that a corrected proof of loss was immediately thereafter presented and the draft returned.

3. Whether interest can be recovered on a loss after the date for payment of the loss has expired.

Facts.

July 24, 1923.—Certain real and personal property, set forth in the State of Case, was owned by Geo. B. Bergkamp & Sons, Inc.

On that date, the Stuyvesant Insurance Company issued to the said owner, the Bergkamp Company, its three year policy of fire insurance in the sum of $5,000, the policy being in the usual New Jersey standard form.

Said policy contained a standard mortgagee clause in favor of the Fidelity Title & Mortgage Company.

Said policy was delivered to the Fidelity Company and remained in its possession until after the fire, June 17, 1924, which gave rise to the questions involved in this case.

December 15, 1923.—The Bergkamp Company sold the property in question to Harvey and Elizabeth Hoyt.

Part of the consideration for this sale was an allowance of unearned premium on the Stuyvesant policy.

January 18, 1924.—The Hoyts took out a policy of fire insurance with the Phoenix Assurance Company, Ltd., of London, the defendant in this suit, in the sum of $6,000 covering the same property as that covered by the Stuyvesant policy; this policy also being in the usual New Jersey standard form (while the Phoenix policy covered the same property, yet, as will be observed from looking at the apportionment of loss on page 27 of the state of case, the amounts on the real and personal property varied).

A few weeks thereafter, the Fidelity Company, the mortgagee, first became apprised of the change

in ownership of the property. It immediately wrote to the agent of the Stuyvesant Company and attempted to notify (but the letter was never received by the agent) said agent of the change of ownership and requested that an endorsement be sent to the office of the mortgagee to be attached to the original policy to protect the new owners and the mortgagee.

Neither the mortgagee nor the owners ever received any acknowledgment from the Stuyvesant Company or any of its agents, nor was there ever added to the Stuyvesant policy any endorsement showing or assenting to any change of ownership and the Stuyvesant Company claims that the first knowledge that it had of the change of ownership was when the proof of loss was submitted to it, *after* the fire.

June 17, 1924.—A fire occurred damaging the property described in both policies.

September 15, 1925.—A properly drawn proof of loss was executed by the Hoyts addressed to the Phoenix Company, in which the whole damage was stated as being $3,123.66 and apportioned and the insured claimed $2,401.44 against the Phoenix Company and $722.22 against the Stuyvesant Company.

September 22, 1924.—The proof of loss was approved by the Phoenix Company, and, on or about that date, the Phoenix Company sent its draft to the Hoyts for $2,401.44.

October 1, 1924.—The Hoyts filed another proof of loss with the Phoenix Company in which the loss was claimed to be $3,123.66, the same as in the former proof of loss, and *in which the Hoyts claimed the whole amount from the Phoenix Company* and did not give any credit for any pro rata share against the Stuyvesant Company. And the Hoyts thereupon assigned their claim to Lloyd Fisher, the plaintiff in this suit.

April 29, 1925.—Apparently the Phoenix Company declined to concede that it was liable for the whole loss and insisted that they should pro rate with the Stuyvesant Company, for, on this date, the attorney for the insured returned the Phoenix Company's draft to it. This suit was brought about a month thereafter.

POINT I.

The Hoyts had only one policy of insurance and that was the policy issued by the Phoenix Company, and the pro rating clause in that policy has no application to the loss in this suit.

In 1923, when the property involved in the fire loss for which this suit is brought was owned by Bergkamp & Sons, Inc., the Stuyvesant Insurance Company issued its policy of fire insurance to the Bergkamp Company covering that property. It was a three-year policy, and, at the time of the fire on June 17, 1924, the three years had not expired. About the time of its issuance the policy had been made payable to the mortgagee, the Fidelity Title & Mortgage Company, as its loss might appear, by the usual mortgagee endorsement.

In 1924, after the Bergkamp Company had sold to the Hoyts, the Hoyts took out a new policy with the defendant herein, the Phoenix Assurance Company, Ltd., covering the same property.

The new owners, the Hoyts, never asked the Stuyvesant Company to assent to the Stuyvesant policy covering them as the present owners, and the Stuyvesant Company claims that it was never asked to so assent by anybody, and, in fact, the Stuyvesant Company never did so assent. Nor does the Phoenix Company claim that the Stuy-

vesant Company so assented. It only claims (Fourth Defense) that the Stuyvesant policy covered the "same property."

The plaintiff claims that he is entitled to recover from the Phoenix Company his full loss, which, according to the agreed facts, is $3,123.66.

The Phoenix Company claims that it is entitled to pro rate the loss with the policy issued to the preceding owner of the property (the policy issued by the Stuyvesant Company to the Bergkamp Company) by reason of a pro rating clause in its own policy.

If the loss must be pro rated, the plaintiff can only recover $2,401.44, and must lose the balance of $722.22.

Such a result does not appear to us to be reasonable, and it is against such a result that we argue.

There are two clauses in the two policies which bear on the principal issue on this appeal.

One is a clause in the Stuyvesant policy, which reads as follows:

> "This policy unless otherwise provided by agreement endorsed thereon or added thereto *shall be void* * * * or if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance * * * or if this policy be assigned before a loss."

The other is a clause in the Phoenix policy, which reads as follows:

> "This company shall not be liable under this policy for a greater proportion of any loss by, and expense of removal from premises endangered, by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, *covering such property.*"

The Phoenix Company made its principal argument of non-liability below on the theory that the

provision in the Stuyvesant policy that that policy should be void, in case of the change of ownership of the property, made that policy only voidable and not void.

The Trial Court rested its decision of non-liability mainly on the theory that the pro rating clause in the Phoenix policy applied if the Stuyvesant policy covered the *same property* as the Phoenix policy and irrespective of whether or not the Stuyvesant policy covered the new owner's interest and whether or not the new owner could recover against the Stuyvesant Company.

The Stuyvesant policy specifically provided that, if any change took place in the interest, title or possession of the property insured, other than by death, the policy "*shall be void,*" not merely voidable, unless the Stuyvesant Company assented thereto by an agreement "endorsed thereon or added thereto." There is nothing ambiguous in the language used. It is as plain as it could be stated.

> "Stipulations of this sort are restrictions on the right of redress of the insured against the insurer upon the contract. As such, they impose a burden on the insured for the insurer's benefit, and must therefore be strictly construed. Such conditions, besides, are prepared by the insurers for their protection, and ought to be set forth in language so clear that the insured will not be misled as to the burden imposed on him."
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> *Warwick* v. *Monmouth County Mut. Fire Ins. Co.*, 44 N. J. L., 83, at page 85.

Under the consistent and uniform decisions in this State, there can be no question but that the Stuyvesant Company, never having given such assent, *the policy was void* as far as the Bergkamp Company, the Hoyts, or anyone else was or is concerned, except the mortgagee (and, as to the

latter, the policy only continued alive by reason of the separate contract contained in the mortgagee endorsement).

In *Plockzek* v. *St. Paul Fire & Marine Ins. Co.*, 91 Atl. Rep., 812, the language of the policy was the same, as far as the question of the use of the word "void" is concerned, and the Court held, page 813:

> "This provision is a part of the contract, *and must be enforced,* unless there is evidence that its provisions have been waived.
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> * * * * * *
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> "*By the terms of the policy the change of ownership invalidates the instrument,* unless a note of the change is indorsed on or appended to the policy. This is part of the contract, and is appealed to by the defendant, and must therefore enter into the judgment to be pronounced by the court."

In *Gruauer* v. *Westchester Ins. Co.*, 72 N. J. Law, 289 (3 L. R. A., N. S., 107), this Court held, at page 292:

> "That such conditions are reasonable and valid, even though they tend to create *forfeiture of the policy,* cannot be denied."

See also: *Hanson* v. *National Liberty Fire Ins. Co.*, 126 Atl. Rep., 453.

See also *Millville Mutual Marine Fire Ins. Co.* v. *Mechanics & Workingmen's Building & Loan Assn.*, 43 N. J. Law, 652, where the question was conceded, the only question being the authority of the person waiving such endorsement.

See also *26 Corpus Juris, page 229,* which says:

> "These provisions against alienation or change of title or interest, whether appearing in the policy itself, or in the By-Laws of the Mutual Company, have uniformly been upheld as reasonable and valid."

Nor do we see how a void policy is in a better position than one which has been cancelled. And it has been held that a cancelled policy is not a

policy contemplated by the pro rating clause in an existing policy.

> *Columbia Nat. Fire Ins. Co.* v. *Dixie Co-Operative Mail Order House, et al.*, 261 S. W. (Texas), 174, decided in 1924.

Not only was the Stuyvesant policy absolutely void by its explicit terms, but *there was never any contractual relation between the Hoyts and the Stuyvesant Company.* Obviously, from this standpoint also, the Hoyts never had any right of action against the Stuyvesant Company.

In *Kase* v. *Hartford Fire Ins. Co.*, 58 N. J. Law, 34, the Court held, page 36:

> "A policy of insurance is a contract of indemnity, personal to the party to whom it is issued, or for whose interest the insurer undertakes to be responsible in case of loss, and *cannot be transferred to a third person,* so as to be valid in his hands against the insurer, without the insurer's consent." (Approved in *Palmer* v. *McFadden,* 86 N. J. Eq., 377-383.)

See also: *Knapp* v. *Heidritter Lumber Co.*, 4 N. J. Adv. Rep., 189, at page 191.

The reasoning of the Trial Court, to the effect that, because the Stuyvesant Company is not a party to this suit, it cannot be presumed that the Stuyvesant policy was not in effect in favor of the Hoyts, appears to us fallacious, irrespective of the fact that there never was any contractual relation between them. The plaintiff is not suing the Stuyvesant Company, nor did he ever have any right to do so. To say that the plaintiff cannot recover against the Phoenix Company because he did not also sue a party which is not liable, appears to us to be without logic. The question of whether or not the Stuyvesant policy was in force is a *matter of defense to the Phoenix Company* and must be proved by it. The Phoenix Company certainly has not proved any such fact. And, further

than that, the facts show affirmatively that there was not any such contract in force in favor of the Hoyts and upon which they could recover against the Stuyvesant Company.

Now as to the words "same property."

We do not apprehend that the liability on the Phoenix policy is in any way limited by the fact that the "same property" is covered by both policies. To us, the question appears to be whether or not *the Hoyts* had two policies covering the same property. Whether or not any one else had a policy covering the same property is immaterial. The obvious object of the pro rating clause is to prevent an insured from collecting the same loss, whether total or partial, twice or more times, and we submit, that in order that there might be a pro rating of loss, the contracts of insurance must be held by the same party insured.

The fact that other people, even those having an insurable interest in the same property such as a mortgagee, hold policies covering the same property, does not create a policy in favor of the Hoyts nor does it inure to their benefit. A policy of insurance is personal to the party to whom it is issued.

> *Kase* v. *Hartford Fire Ins. Co.*, 58 N. J. Law, 34;
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> *Knapp* v. *Heidritter Lumber Co.*, 4 N. J. Adv. Rep., 189-191.

See *26 Corpus Juris*, page 363, Par. 465, which holds:

> "To constitute concurrent insurance, the policies must be on the same property or some part thereof, *on the same interest in the property*, against the same risk, *and in favor of the same party*. Thus, separate policies on the interest of the mortgagor and mortgagee are *not concurrent—not entitled to pro rate* * * *."

In *Hastings* v. *Westchester Fire Ins. Co.*, 73 N. Y., 141, the Court held (p. 147):

> "It is claimed * * * that, inasmuch as another policy existed at the time, in favor of such owner, although entirely unknown to both the plaintiff and defendant, the latter is entitled to the benefit of the condition contained in its policy, which declares that in case of other insurance, whether prior or subsequent to the date of its policy, the assured was entitled to recover no greater proportion of the loss sustained than the sum insured bears to the whole amount insured thereon. This position cannot, I think, be maintained."

and page 152:

> "*Policies* of insurance *are not deemed* in their nature *incident to the property insured*, and do not cover any interest which another person may have in the property * * *, unless such other person has an assignment of the policy."

See, also, the language of the pro rating clause in *Hardy* v. *Lancashire Ins. Co.*, 44 N. E. (Mass.), 209, and the construction put upon it at page 210.

And the case of *Mayes* v. *Nat. Union Fire Ins. Co.*, 257 S. W. (Mo.), 141, decided in 1923, appears to be in point. The owner held one policy of insurance, the one he held in the defendant company. A mortgagee took out *another policy in the owner's name*. There being a clause in the defendant's policy providing for pro rating in case of other insurance on the *same property*, the defendant refused to pay more than the pro rata share of the loss. And the court held that the defense failed, that the pro rata clause had no application to such a situation even though the second policy was in the owner's name.

See also: *Fox* v. *Phoenix Fire Ins. Co.*, 52 Maine, 333; *L. R. A., N. S., 1917 B*, page 323.

We submit that the Hoyts had only one contract of insurance, and that that contract was with the

Phoenix Assurance Company, and that the Phoenix Company cannot use a policy held by some other person in some other company to force the Hoyts to pro rate their loss on their own policy. *To do so would enable the Phoenix Company to avoid payment of a part of the loss which it had contracted to pay, without any remedy being left to the Hoyts.* Such a situation was never in the contemplation of the parties when the contract was made, and we submit that the Court will not read into the contract any such construction.

POINT II.

The plaintiff's right to recover the full loss has not been waived or compromised.

The Phoenix Company, in its brief submitted to the Trial Court, stated: "Prior to that time (September 15, 1924) the loss had been adjusted between the insured and the General Adjustment Bureau, representing the defendant (the Phoenix Company)." As we all know, it is common practice for proofs of loss to be made up by the adjusters for the insurance companies on blanks furnished by them. That this is so in this instance, is shown by the form and length of the proof of loss attached to the Agreed Facts.

In the first proof of loss submitted to the Phoenix Company, the loss was apportioned between the Stuyvesant and Phoenix companies. It was for the interest of the Phoenix Company to get a contribution from the Stuyvesant Company, if possible. And the General Adjustment Bureau, working for the interests of its employer, saw to it that a proof of loss was submitted which so apportioned the loss that its employer was relieved of the payment of $722.22 to the loss of the Hoyts.

Of course, the Phoenix Company immediately approved this first proof of loss and sent its draft.

Immediately thereafter, however, the Hoyts submitted another proof of loss in which they claimed the full loss from the Phoenix Company, and the draft was never used and was subsequently returned.

Under the above circumstances, the Phoenix Company claims that the Hoyts waived and compromised $722.22 of their loss. We cannot agree to this.

In the first place, there is no proof that the General Adjustment Bureau had any authority to act for the Phoenix Company except as to adjusting what the loss was. This they did by adjusting the loss at $3,123.66. There is no evidence of any authority to pass upon the question as to who should pay or was responsible for that loss. And, in the absence of evidence of such authority, it cannot be presumed.

In the second place, the defendant's claim of waiver and compromise is not well founded in fact. A compromise imports concessions by both parties, a giving up of some right by each party, and a meeting upon some part of the middle ground. We submit that this case will be searched in vain for any evidence that the Phoenix Company conceded anything in return for a waiver of $722.22 on the part of the Hoyts.

> "A concession made by one of the parties is a good consideration for the concession made by the other."
>
> *Decker* v. *Smith & Co.,* 88 N. J. L., 630-632.

In the third place, the question is not one of waiver and compromise, but one of liability for a liquidated debt. This has been fully considered, and a very elaborate opinion written, in the recent case of *Old Colony Ins. Co.* v. *Berryman Realty Co.,* 198 Ky., 7 (234 S. W., 748; 21 A. L. R., 292), and we take the liberty of quoting rather freely from it, as follows:

"It is next insisted that the payments made by the various insurance companies who are now appellants, and others, to the Berryman Realty Company after the adjustment had been made, were accepted by said Realty Company in full discharge of all liability on the part of the respective insurance companies. At the time the payments were made by the insurance companies, a written receipt was taken by each company from the Berryman Realty Company and the Security Trust Company, for whose benefit the insurance was issued, which receipt, except for the name and slight modifications, reads as follows: 'Received of Old Colony Insurance Company, of Boston, Massachusetts, A. D. Baker & Company, managers, Lansing, Michigan, March 8, 1916, the sum of seventy-three hundred and forty-eight and 10/100 dollars, being *in full payment and compromise settlement* of all claims and demands for loss or damage which occurred January 11, 1916.

* * * * * *

"As all the insurance companies acknowledged liability on account of the loss of the theatre by fire, but one thing remained to be done to definitely and certainly fix the extent of such liability and that was the adjustment. This was accomplished * * *. *All parties having agreed to this, the claim became a liquidated demand.*

* * * * * *

"A partial payment of a debt then due is not a bar to a recovery of the balance due, although the creditor receives the same and issues a receipt in full satisfaction of the entire obligation. * * *.

* * * * * *

"There was no consideration passing from the insurance companies to the Berryman Realty Company sufficient to support an agreement on the part of the Realty Company to accept part of the debt due to it in full satisfaction of the entire claim, * * *."

And that was the situation in the case at bar. *When the loss was adjusted at $3,123.66 the claim became a liquidated demand.*

And it is well settled in this State that payment of part of a liquidated demand is not satisfaction thereof, although the creditor accept it as such.

In the case of *Decker* v. *Smith & Co.*, 88 N. J. Law, 630, this Court held, at page 632:

> "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no new consideration given."

See also: *Rose* v. *American Paper Co.*, 83 N. J. Law, 707; *Cooke* v. *McAdoo*, 85 N. J. Law, 692.

In the fourth place, there must be an intention on the part of the creditor to accept a lesser sum in satisfaction of a disputed amount. Aside from the fact that the amount had been adjusted and was no longer in dispute, this case is barren of any intention on the part of the Hoyts to accept the draft for $2,401.44. In fact, upon receipt of the draft, the Hoyts immediately disaffirmed any such intention by submitting a proof of loss for the full claim of $3,123.66.

In *Decker* v. *Smith & Co.*, 88 N. J. Law, 630, this Court, at page 632, held:

> "To constitute a valid accord and satisfaction it is essential that the debtor shall have offered what was given, and that *the creditor shall have accepted* it with the *intention* that it should operate as an accord and satisfaction."

In the fifth place, the draft was not, in fact, accepted and used by the Hoyts.

See *Old Colony Ins. Co.* v. *Berryman Realty Co.*, *supra; Decker* v. *Smith & Co.*, *supra.*

In the sixth place, there was never any consideration for the acceptance of a lesser sum in

settlement of the liquidated claim, even if the draft had been accepted. There is nothing in the case which shows in any way that the Hoyts agreed to knock off $722.22 of their claim if the Phoenix Company would anticipate the sixty days time in which they had to make payment, nor does such voluntary anticipated payment constitute a consideration for the acceptance of a lesser sum in satisfaction of the debt.

> *Old Colony Ins. Co.* v. *Berryman Realty Co., supra.* 21 A.L.R. 292, at pg 299.

We submit that, when the amount of the loss was adjusted at $3,123.66, it became a liquidated claim, and that the plaintiff became entitled to recover that full loss from whomsoever it was justly due, and that it was justly due from the Phoenix Company.

POINT III.

The plaintiff is entitled to interest.

Where there is an illegal withholding of payment of a legitimate claim or indebtedness, the plaintiff is entitled to interest.

> *Fidelity Mut. Life Ins. Co.* v. *Wilkes-Barre, etc., Co.,* 98 N. J. Law, 507, at page 509.

By the defendant's "Fifth Defense," Paragraph 1, admitted by the plaintiff's reply, it will be observed that the loss is payable sixty days after receipt of the proof of loss. By Paragraph 18 of the agreed facts, it will be observed that proof of loss was submitted on October 1, 1924. Therefore, the loss became payable November 30, 1924, if the plaintiff is entitled to recover the full loss. If the plaintiff is only entitled to recover the pro rata loss, then he is entitled to recover interest from November 22, 1924.

The precise question of interest in cases of insurance losses has been passed upon by the Court of Appeals of New York, where the Court held, in *Hastings, et al.* v. *Westchester Fire Ins. Co.*, 73 N. Y., 141, at page 152:

> "The question of interest was properly disposed of. According to the terms of the policy the loss was payable sixty days after due notice and proofs furnished of the same. The interest, therefore, became due from that time."

See also: *Hardy* v. *Lancashire Ins. Co.*, 44 N. E. (Mass.), 209, at bottom of page 210 and top of page 211.

POINT IV.

The judgment appealed from should be reversed, and the Supreme Court directed to enter judgment in favor of the plaintiff for the sum of $3,123.66 (see par. 18-A of Agreed Facts) and interest from November 30, 1924, together with the costs of this appeal and the costs in the Supreme Court.

Respectfully submitted,

EDWARD P. JOHNSON,
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New Jersey Court of Errors and Appeals

LLOYD FISHER, Assignee, *Plaintiff-Appellant,* *vs.* PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

BRIEF FOR DEFENDANT-RESPONDENT.

POINT I.

The defendant company is not liable under its policy for a greater proportion of the loss than the amount thereby insured bears to the whole insurance.

On July 24, 1923, George B. Bergkamp & Son, Inc., was the owner of the property in question and on that date there was issued to the said owner by the Stuyvesant Insurance Company a three-year policy in the sum of $5,000.00, covering the premises, which policy was in the usual New Jersey standard form. This policy had attached to it a standard mortgagee clause in favor of Fidelity Title and Mortgage Company of Ridgewood, New Jersey, as mortgagee (Case, p. 14).

On or about December 15, 1923, the property in question was sold by said George B. Bergkamp & Son, Inc., to Harvey and Elizabeth Hoyt. On January 18, 1924, the Hoyts took out a policy of insurance in the Phoenix Assurance Company, Ltd., the defendant herein, in the sum of $6,000.00. This policy was in the usual New Jersey standard form (Case, p. 15, l. 10).

The Stuyvesant policy contained the following stipulation:

> "This policy unless otherwise provided by agreement endorsed thereon or added thereto shall be void * * * or if any change other than by the death of an assured take place in the interest, title or possession of the subject of insurance * * * or if this policy be assigned before a loss" (Case, p. 14, l. 40).

The policy issued by the defendant company contained the following provision:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers covering such property" (Case, p. 10).

After the purchase of the property by the Hoyts application was made to the Title Company for a guaranty of title whereby that company learned that there had been a change of ownership. Thereafter the mortgagee communicated with the Stuyvesant Company notifying the agent of the change of ownership and requested that the necessary endorsement be sent to be attached to the original policy to protect the new owner and mortgagee. No endorsement, however, was added to the Stuyvesant policy showing this change of ownership and that company now claims that the first knowledge it had of the change of ownership was when the proof of loss was submitted to them by the mortgagee following the fire of June 17, 1924 (Case, pp. 15-16).

On August 29, 1924, following the fire of June 17, the Stuyvesant Insurance Company wrote to the Hoyts advising them that the company was not liable on its policy, a copy of which letter will be found on page 28 of the printed case.

Thereafter the loss was adjusted and a formal proof of loss executed by the Hoyts dated September 15, 1924, was filed and approved by an officer of the company on September 22, 1924 (Case, pp. 17 and 19).

The defendant company claims that it is entitled to pro rate the loss with the Stuyvesant Company by reason of the clause contained in its policy above set forth, and for this reason that the plaintiff can recover only the sum of $2,401.44.

The form of the contribution clause has varied from time to time during the years and the earlier cases dealing with the subject have no special application to the case before the Court because the form of the contribution clause used in the policy under consideration is essentially different from the original form. The question involved here is whether or not the liability on the Phoenix policy is limited by the fact that the Stuyvesant policy covers the same property. We respectfully submit that the provisions of the defendant's policy are such that the rights of the plaintiff to recover thereon cannot extend beyond the proportionate share of the loss as indicated in the policy.

Reference is made in the brief of appellant to the subject of concurrent insurance as set forth in 26 Corpus Juris, page 363, section 465. A portion of this paragraph only, however, has been quoted. We would particularly call attention to the following portions of that section which are

peculiarly applicable to the case in hand. At the top of page 364, we find the following:

> "But if the same interest is not insured, it does not matter that a portion of the insurance is in the name of the owner and a portion in the name of an agent for the benefit of the owner; and the policies, it is held, may be so drawn that they will pro rate, if they relate to the same risk, although they are issued on distinct interests."

In the foot note, the cases cited in support of this doctrine are *Hartford Fire Insurance Company* v. *Williams,* 63 Fed. R. 925; *Sun Insurance Office* v. *Varble,* 103 Ky. 758, 41 L. R. A. 792.

The case of *Sun Insurance Office,* v. *Varble,* (*supra*) illustrates the doctrine set forth in the text. Here an owner leased her property for a period of some fifteen years. By the terms of the least of the value of $8,000.00. A corporation ings and erect a new building which was to be at lease, the lessee was to take down certain build-was organized to take over the lease, and pursuant to the terms thereof a new building was erected of the value of more than $15,000.00. The corporation became involved and made an assignment for the benefit of creditors, and the defendant, by orders of the Court, was made receiver of the leased property. In the lease it was stipulated that the tenant was to take out insurance and maintain the same on the improvements to the extent of $8,000.00, to be assigned to the landlord to guarantee the stipulations of the lease. Before the assignment a mortgage was executed to secure the payment of certain obligations of the tenant to a bank. Various policies of insurance amounting to $22,000.00 were procured upon the building which had been erected; and to the extent of $8,000 they were for the benefit of the owner and the balance for

the benefit of the trustees holding the mortgage. These policies were procured by the receiver, who is the defendant in the action. In these policies it was provided that "in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein." The Sun Insurance Office issued a policy to the owner on the building insuring her interest as lessor and owner in remainder to an amount not exceeding $5,000.00. The building was partially destroyed by fire and the loss adjusted. The various insurance companies which had issued the policies amounting to $22,000.00 paid their portion of the loss. Question on appeal was whether the other companies should pay the balance unpaid or whether the Sun Insurance Office should pay it. The building was restored with monies paid by the insurance companies other than appellant, and the sum furnished by the receiver. The owner assigned to the receiver the benefit of the policy upon which the action was brought and it is in her right that the receiver seeks to recover. The objection made by the appellant was that its policy was issued to the owner on her reversionary interests therein and that the policies which were issued to the receiver were on the leasehold interest which he held in the building and the claim was made that as the policies issued by the other companies and the one issued by the appellant are on different interests in the building, it is not double insurance and hence the complainant is not compelled to contribute with the other companies to pay the loss.

In the course of the opinion the Court proceeds as follows:

"From our view of this case it is unnecessary to decide whether or not the doctrine as to double insurance is as claimed nor is it necessary to determine whether Mrs. Thruston's interest as lessor which the appellant insured (as well as her interest as owner in reversion), could not be said to be substantially the same interest, which the underwriters insured for the receiver, as the interest of the receiver and that of Mrs. Thruston were mutual and common in this, to wit, the restoration of the building for use during the lifetime of the lease. The insurance companies had the right to place in their policies provisions defining and limiting their several liabilities, providing that they should not be liable for a greater portion of any loss sustained than the sum insured bore to the whole amount of the insurance on the property issued to or held by any party or parties having an insurable interest therein."

"They did not seem willing to contribute proportionately to a loss with the companies alone which issued policies on the same interest in the property, but, by express and unmistakable language limited their liability so that they would not be required to pay a greater portion of any loss sustained than the sum they respectively insured bore to the whole amount on the property. The insurance held by any party having an insurable interest therein must be taken into account. Their liability must be measured by the rule written in the policies, and under it each company had the right to pro rate with other policies issued, including the one issued by the appellant, as Mrs. Thruston had an insurable interest in the property. It is not the business of a court to make contracts for parties, but to construe and enforce them."

The cases are in conflict with respect to the application of this peculiar contribution clause insofar as mortgagee interests are concerned. This subject was first considered apparently with relation to the forms of the New York Standard Fire Insurance policy. The contribution clause in the New York form of policy runs as follows:

> "This company shall not be liable under this policy for greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, * * * "

With respect to contribution the mortgagee rider on such a policy runs as follows:

> "In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise."

The effect of these provisions were considered in two leading cases, to which reference will be made, and diametrically opposite results reached. In *Hartford Fire Ins. Co.* v. *Williams,* 63 Fed. Rep. 925, the United States Courts decided that the words of the contribution clause in the mortgagee rider meant exactly what they said. The Lower Court first held that the contribution clause was not effective and could not defeat a full recovery against the Hartford Fire Insurance Company. The Appellate Court overruled the Lower Court and laid down the rule as follows:

> "We can conceive of no other object that the parties could have had in using the words 'issued to or held by any party or

> parties having insurable interest therein,' unless it was to avoid the very construction of the clause which the Circuit Court appears to have adopted. As above remarked, the concluding words of the paragraphs seem to have been added out of abundant caution that there might be no ground upon which to insist that the right to pro rate was limited to policies held by the mortgagee or for his benefit. In construing a contract like the one now in hand it is our duty to look to all the provisions of the agreement and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument which is as clearly expressed as language could express it, merely because it limits to some extent the scope of general language implied in another part of the instrument."

The Appellate Court thereupon decreed that the plaintiff in error, the insurance company, was entitled to have a construction of the contribution clause which limited its contribution to the loss, to the company's pro rata sum apportioned among all the insurance.

These provisions were further considered by the Court of Appeals in *Eddy* v. *London Assurance Co.,* 143 N. Y. 311. Here certain of the policies covering mortgagee interests had no contribution clause therein and others had the form of contribution clause above mentioned. However, no distinction was made between these two classes of of policies covering such mortgagee interests by the court.

In the course of the opinion of the Court of Appeals, it is said as follows:

> "By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would

properly apply to the case of an insurance of the mortgagee's interest, would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee. So, when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgagee clause that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not in effect or substance to be even partially invalidated—*i. e.*, reduced in amount—and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not and was not intended to apply."

With reference to the policies the mortgagee clause of which contained the contribution provisions, the Court says:

"When in the face of such an agreement entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not perhaps give full effect to the strict language of the apportionment clause, but if full effect be given to that clause it should be held to call for a consequent reduction of the liability of the insurers in such a case

> as this, then full effect is denied to the important and material, if not the controlling clause in the contract which provides that the insurance of the mortgagee shall not be injuriously impaired or affected by the act or neglect of the owner."

Reference is made in the brief of the appellant to the case of *Hardy* v. *Lancashire Ins. Co.*, 44 N. E. (Mass.) 209. The opinion discloses the fact that the action was brought by a mortgagee who sought to recover by virtue of the mortgagee clause attached to the policy. The rider provided that in the event of other insurance the company should be liable only pro rata whether such insurance applied in the same manner or not. The Court held that the limitation as to the amount to be paid on the policy affected only the interest of the insured and the taking out of additional insurance by the mortgagor payable to himself without the knowledge of the mortgagee could not affect the right to recover full amount of the policy on total loss. Evidently the Court here followed the so-called New York rule protecting the mortgagee interest. This case apparently followed the New York case because it appears that the insurance taken out by the mortgagor was without the knowledge of the mortgagee.

The appellant also refers to the case of *Mayes* v. *National Union Fire Ins. Co.*, 257 S. W. (Mo.) 141. Here the plaintiff was the owner of the property at the time the defendant issued its policy and continued so to be until the time of the fire. A mortgagee before the fire without the knowledge or consent of the plaintiff secured a policy in another company in the name of the plaintiff as owner and covering the interest of the mortgagee as such. The plaintiff, the owner of

the property, knew nothing of the second policy until after the loss. In the course of the opinion the Court indicated that the question raised on appeal was whether a party can be bound by the act of another generally without his knowledge or consent. The provision of the policy was as follows:

> "In case there shall be any other insurance consented to by this company, whether valid or not, on the property covered by the policy, the assured shall recover from this company only such proportion of any loss as the sum hereby insured shall bear to the whole amount of insurance thereon."

In delivering the opinion, the Court says:

> "The language of this provision if taken literally is broad enough to cover any policy issued on the same property no matter by whom procured. We cannot, however, yield to that construction. Such a construction would open the door to fraud and imposition * * *. We must hold that the clause in question only covers other policies for the issuance of which the insured could in some way be held responsible."

In the instant case it appears from the facts as submitted that the Hoyts had knowledge of the Stuyvesant policy covering the property which they purchased. In the settlement with the vendor they paid him for the premium on the unexpired term of the policy. The title company which held a mortgage on the property at the time of the purchase was employed to guarantee the title for them. Evidently on their behalf the Title Company undertook to have noted on the Stuyvesant policy the change of ownership. With the situation in this plight the Hoyts took out a policy in the defendant company which contained the provisions with respect to pro rating which have been set forth in detail above. The validity

of the provision under consideration has not been questioned in any of the cases to which we have referred above. Even in the New York cases which adopt the most favorable rule for the plaintiff the application of the contribution clause to a mortgagee interest was held to be limited by the other peculiar provision in the mortgagee clause protecting the mortgagee against the acts of the mortgagor.

In the case of *Mayes* v. *National Union Fire Ins. Co. (supra)*, the Court admitted that the clause was broad enough to cover the cases under consideration, but refused to apply the stipulation literally because in that particular case the mortgagee had taken out the policy without the knowledge or consent of the mortgagor. The Hoyts had knowledge at all times of the Stuyvesant policy and were bound by the terms of the policy issued by the defendant.

We therefore respectfully submit that the defendant is not liable for a greater proportion of the loss than the amount insured by it bears to the whole insurance; in other words, that the plaintiff is not entitled to recover more than the amount allowed by the court below.

POINT II.

The plaintiff's right to recover the full loss has been waived or compromised.

The plaintiff contends that the claim made by the Hoyts in their proof of loss is not a waiver of their right to collect the entire amount from the defendant.

At this point it is important to reconsider the situation as appears by the agreed state of facts.

On or about December 15, 1923, the property in question was sold by the former owner to the Hoyts (Case, p. 15, l. 10). On January 18, 1924, the Hoyts took out the policy with the defendant company (Case, p. 15, l. 15). Subsequently, the mortgagee wrote to the agent of the Stuyvesant Company notifying the agent of change of ownership and requesting that the same be noted on the policy to protect the new owner and the mortgagee (Case, p. 15, l. 38). It is claimed that neither the mortgagee nor the owner ever received any acknowledgment and there was never added to the Stuyvesant policy a provision showing change of ownership (Case, p. 16, l. 10). The Stuyvesant Company claims that the first knowledge it had of change was when the proof of loss was submitted to them by the mortgagee, following the fire of June 17, 1924 (Case, p. 16, l. 20).

It further appears in the state of facts that "Mr. Hoyt is under the impression that he made an allowance to Mr. Bergkamp for the unearned premium on the Stuyvesant policy" (Case, p. 16, l. 22). From this it certainly appears that the new owners attempted to acquire title to the old policy and that the action taken by the mortgagee to effect this result, must, therefore, have been with the knowledge and consent of the new owners.

It further appears by the state of facts that a fire occurred on June 17, 1924 (Case, p. 14, l. 30). Furthermore, on August 29, 1924, the Stuyvesant Company wrote to the Hoyts a letter advising them that the company was not liable on this policy (Case, p. 16, l. 28 and p. 28).

On September 15, 1924, the Hoyts prepared and executed a proof of loss addressed to the defendant company, in which the whole damage was

stated as being Three Thousand One Hundred and Twenty-three Dollars and Sixty-six Cents ($3,123.66), which was apportioned between the Stuyvesant Company and the defendant company, whose share was Two Thousand Four Hundred and One Dollars and Forty-four Cents ($2,401.-44) (Case, p. 16, l. 33).

It further appears that the proof of loss submitted to the defendant was approved by an officer of the company September 22, 1924 (Case, p. 17, l. 19). After the submission of the proof, the defendant tendered the Hoyts their draft in full settlement of the loss in the sum above mentioned, which draft was accepted by the insured September 22, 1924 (Case, p. 17, l. 19).

Apparently this draft was retained by the insured until April 29, 1925, when the plaintiff's attorney forwarded the same to the defendant by mail (Case, p. 17, l. 28).

From these facts as agreed upon, it would appear that on September 15, 1924, the Hoyts had full knowledge of the attitude of the Stuyvesant Company. Prior to that time the loss had been adjusted between the insured and the General Adjustment Bureau, representing the defendant. A copy of the adjustment is annexed to the agreed state of facts (Case, pp. 25, 26 and 27).

Apparently then, on or about September 15, 1924, the insured had accepted the loss adjustment made by the defendant company and, with full knowledge of the attitude of the Stuyvesant Company, had acquiesced in the claim of the defendant company, that the loss should be apportioned between the two companies. With the claim in this plight, the insured evidently accepted the offer of the insurance company to settle on this basis and filed their proof of loss

accordingly. The adjustment arrived at was immediately approved by the company and a draft was immediately delivered to the insured for the full amount of their claim. This draft, according to the agreed state of facts, was accepted by the insured and held by them until April 29, 1925.

From the facts as above recounted it would appear very clearly that there was, at the time of the adjustment of the loss, a contention on the part of the insurance company, defendant, that the loss should be apportioned between the two companies. The insured apparently claimed the benefit of the old insurance and had taken steps to make the same effective. In view of the fact that there was this well-known situation and in view of the contention of the defendant, we respectfully submit that a compromise was effected between the parties and that by reason thereof, the plaintiff is not entitled to recover beyond the loss apportioned to the defendant.

With reference to a compromise enforceable by law, reference is made to the case of *Weir* v. *Allen,* 89 N. J. L. 597. At page 600, in the course of the opinion of the Court of Errors and Appeals, it is stated:

> "The issue is whether the compromise resulting in the action stated was a compromise enforceable by law. The necessary elements are the reality of the claim made, the good faith of the compromise and the extinguishment of the pre-existing claim of the promisee. The extinguishment of the promisee's rights in the premises by force of the compromise is, in such case, the benefit of the promisor, which gives it the effect of a consideration" (Case cited).

In *Worcester Loom Co.* v. *Heald,* 78 N. J. L. 173, there is a similar situation to the above. In

this case it appears that the plaintiffs agreed that if prompt payment would be made of a bill rendered the plaintiffs would, at their own expense, provide certain work they had in hand for the defendant. Afterwards plaintiffs presented a bill for labor and material, which defendant refused to pay, and suit was brought to recover the same. The jury found for the defendant and on review the Supreme Court considered the question of compromise and proceeded as follows:

> "We are not concerned with the question whether or not the objections of the defendant to the plaintiffs' claim were unfounded. The rule is, that a compromise of a disputed claim made in good faith furnishes a good consideration to support a contract, even though it should appear that such claim was in fact wholly unfounded. The Court will not inquire into the adequacy or inadequacy of the consideration of a compromise, fairly and deliberately made" (Cases cited).

The doctrine of these cases was approved in *Trenton Street Railway Co.* v. *Lawlor* by our Court of Errors and Appeals in 74 N. J. Eq. 828.

In the case of *Dobbs* v. *New Amsterdam Casualty Company,* 2 N. J. Misc. R. 649, the plaintiff held two policies issued by the defendant company. The facts show that the defendant company was not liable on the second policy, but, ignorant of their non-liability, the company entered into an agreement with the plaintiff to settle the loss at an adjusted figure. The Court says, at page 651:

> "The trend of authority supports an agreement to settle, without litigation, a matter in dispute, even though it appear that the claim is, in fact, without substance, 8 Cyc. 518.

"In Bowers Dredging Co. *v.* Hess, 71 N. J. L. 327, the Court of Errors and Appeals, speaking through Mr. Justice Fort, said: 'An agreement to so settle without litigation a disputed claim of infringement made in good faith furnishes a good consideration to support a contract, even though it should appear that such claim was, in fact, wholly unfounded. The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.' Citing cases.

"To the same effect are Worcester Loom Co. *v.* Heald, 78 N. J. L. 172, and Weir *v.* Allen, 89 N. J. L. 597.

"The right to have such an agreement enforced does not rest upon the merits of the original claim, but rests upon the new agreement to compromise without litigation. After the existence of such an agreement is satisfactorily established, neither party may withdraw, except for fraud or unfair concealment.

"Nor will an error of law or mistake of facts relieve a party of his undertaking, where, by reasonable diligence, he might inform himself. 8 Cyc. 526, *et seq.*

"In the instant case it is established that there was a claim for $650; that there was an agreement to compromise and settle for $600; that there was no fraud or concealment. In such a case I am of opinion that the agreement must be enforced, although one of the parties may have acted on a mistaken assumption of its rights, and without due inquiry as to all of the facts within its knowledge and possession.

"To decide otherwise would be contrary to sound policy and shocking to conscience. It would abort fair efforts at compromise, which are encouraged in law."

In the brief of the appellant reference is made to the case of *Old Colony Ins. Co.* v. *Berryman Realty Co.* (193 Ky. 7, 234 S. W. 748; 21 A. L. R.

292), but that this has no application here. By reference thereto it appears that after a fire the loss was adjusted and the same was apportioned among various insurance companies. It developed later that two of the companies were not liable. When this was discovered, the insured brought action to recover the proper proportion that the several companies should have paid in making up the adjusted loss. Certain of the companies attempted to set up as a defense against the re-adjustment that the receipts which had been given by the insured had the effect of a complete discharge. Dealing with this subject, the Court says in the course of the opinion:

> "The evidence clearly shows that Berryman, the president of the realty company, refused to accept the drafts of the insurance companies except on condition that if the apportionment was incorrect or the Reliance and Delaware were not liable, a new apportionment would be made among the companies liable and the full balance paid by the insurance companies to the realty company. No one claims that any agreement was actually entered into whereby the partial payment was to be in full accord and satisfaction, except what is shown by the written receipt The prima facie case shown by the receipt is entirely overcome by the evidence showing that the receipts were given with the distinct understanding that the amount received was not in full unless the Reliance and Delaware Companies paid the amount assessed against them by the adjusters."

It, therefore, clearly appears that the facts of the case are totally dissimilar from the facts of the case before the Court.

It is admitted in the instant case by the plaintiff that a proof of loss showing liability of the Phoenix Assurance Company to be $2,401.44,

was accepted by the defendant company. It would, therefore, follow that inasmuch as both parties assented to this figure, an agreement arose between them which is as clearly marked as in the case of *Dobbs* v. *New Amsterdam Casualty Company (supra)* and that the assignee is bound by this agreement. The question, therefore, of the validity of the Stuyvesant policy can have no bearing on this agreement. The plaintiff admits the same when he admits the filing of the proof of loss by the Hoyts. The effect of this transaction is well stated in the opinion of the court below at page 39 of the printed case:

> "At the time of this adjustment, the insured knew that the Stuyvesant Company denied liability on its policy, and not withstanding that knowledge, claimed from the defendant only such proportion of the loss as the amount of defendant's policy bore to the whole insurance, including the amount insured by the Stuyvesant policy. The pro rata share of the loss thus agreed upon was paid to and, as expressly stated in the stipulation, accepted by the insured. Any right which the insured may have had to recover their whole loss from the defendant was surrendered when, with full knowledge of the situation, they agreed to accept and, in fact, did accept, a lesser sum in settlement of their claim."

POINT III.

The plaintiff is not entitled to interest.

In *Fidelity Mutual Life Ins. Co.* v. *Wilkes-Barre, etc., Co.,* 98 N. J. L. 507, at 510, in the course of the opinion the Court says:

> "Interest when allowed is in contemplation of law, damages for the illegal detention of a legitimate claim or indebtedness" (Cases cited).

In the instant case it does not appear that there is any illegal detention of legitimate indebtedness.

By reference to section 16 of the agreed state of facts (Case, p. 17, l. 19) it appears that on the very day that the proof of loss was submitted, the defendant tendered to the Hoyts its draft in full settlement of the loss for the sum of $2,401.44, which said draft in the words of the stipulation, "was accepted by the said assured." Therefore, there could not have been any illegal detention of an indebtedness. The draft having been received and accepted had either the effect of payment or tender. In any event, the acceptance of the draft estopped the assured from claiming interest.

POINT IV.

The judgment entered in the court below should be affirmed.

Respectfully submitted,

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