INDEX

	Page
Complaint	1
Amendment to Complaint	3
Answer	4
Reply	9
Postea	10
Judgment	11
Rule to Show Cause	12
Reasons	13
Motion for Nonsuit	90
Defendants' Exceptions	234
Motion for Direction of Verdict	219
Charge	222
Plaintiff's Exceptions	233
Defendants' Requests to Charge	235
Opinion Supreme Court	258
Order Discharging Rule	260
Notice of Appeal	261

TESTIMONY.

For Plaintiff:

Ernest E. Le Compte,		
	Direct	14
	Cross	20
	Re-direct	30
	Re-cross	35
Anna Levin,		
	Direct	37
	Cross	45
	Re-direct	56
	Re-cross	56

New Jersey State Library

Page

Alfred L. Stansbury,
Direct 62
Cross as to Qualification 68
Direct resumed 69
Cross 71
George R. Davies:
Direct 89
Cross 89

For Defendants:

George R. Davies,
Direct 92
Cross 98
Re-direct 118
Ernest E. Le Compte,
Direct 124
Cross 138
Re-direct 161
Re-cross 162
David Meyers,
Direct 163
Cross 164
Paul Zurlin,
Direct 165
Cross 166
Harry Marsh,
Direct 166
Cross 169
George L. Major,
Direct 171
Cross 173
Virginia Westhall,
Direct 175
Cross 177

Page

Mrs. Pearl Bennett,
Direct 180
Cross 181
Deposition of Bessie M. Turner,
Direct 184
Cross 188

Rebuttal for Plaintiff:

George R. Davies,
Direct 194
Alfred L. Stansbury,
Direct 196
Morris Levin,
Direct 198
Cross 203
Re-direct 208
Re-cross 210
Anna Levin,
Direct 212
G. Whitfield Brooks,
Direct 213

EXHIBITS.

For Plaintiff:

P-1—Policy in suit 239
P-2—Proof of loss 240
P-3—Letter, Ross Agency to Pittsburgh Underwriters, sending proof of loss 245
P-4—Letter, Pittsburgh Underwriters to Assured acknowledging receipt of proof of loss 245
P-5—Letter, Pittsburgh Underwriters to the mortgagee, acknowledging letter reporting destruction of insured premises ... 246

For Defendants:

Page

D-1—Letter, Pittsburgh Underwriters to Le Compte, confirming telegram ordering cancellation of policy in suit 247

D-3—Certificate of authority of Le Compte as agent of defendants 248

D-4—Letter, Pittsburgh Underwriters to Le Compte reiterating demand for cancellation of policy in suit 250

D-5—Letter from special agent Lance insisting on immediate cancellation of the policy in suit 251

D-6—Letter of J. C. Haywood, adjuster, demanding acknowledgment of insured as to cancellation of policy 252

D-7—Daily report of Ohio Farmers' Insurance Company, covering cancellation of policy in their company on destroyed premises 253

D-8—Daily report of Pittsburgh Underwriters 255

D-9—Letter of Le Compte to assured's husband, announcing cancellation of Ohio Farmers' Insurance Co.'s policy written to replace Pittsburgh Underwriters' policy and demanding return of both policies 256

D-10—Letter of Le Compte to assured of September 8, 1922, re cancellation of the Ohio Farmers' policies 257

Complaint.

[Summons issued June 20, 1923.]

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURG; ALLEMANNIA FIRE INSURANCE CO.; SURANCE CO. OF PITTSBURG; et als, REPUBLIC FIRE INSURANCE CO.; and the SUPERIOR FLRE INSURANCE COMPANY, foreign Corporations,
Defendants.

Action at Law.

MONMOUTH COUNTY: ss.

Plaintiff, Anna Levin, residing in the City of Asbury Park, County of Monmouth and State of New Jersey, says that:

1. On June 27, 1922 and also on December 21, 1922, plaintiff was the owner of a hotel known as the Clarendon situate at No. 302 Fifth Avenue, in the City of Asbury Park.

2. On June 27, 1922, the defendants, National Ben Franklin Fire Insurance Co. of Pittsburgh, Allemannia Fire Insurance Co., Republic Fire Insurance Co., and the Superior Fire Insurance Company, were and still are foreign corporations duly incorporated and authorized to do business

in the State of New Jersey, with power to insure risks by fire.

3. On June 27, 1922 in consideration of the sum of $83.50 to defendants paid, the defendants jointly as Pittsburgh Underwriters, issued to plaintiff a policy of insurance on said Clarendon Hotel, insuring plaintiff against loss or damage by fire to the amount of $5000.

4. On December 21, 1922, said Clarendon Hotel was destroyed by fire.

5. Plaintiff's loss thereby under defendants policy was $5000.

6. On February 28, 1923, plaintiff furnished defendants with proof of her loss and interest in said property and otherwise duly performed all the conditions of said policy on her part.

7. Defendants have not paid said loss or any part thereof. Plaintiff demands $5,000.00 damages with interest from February 28, 1923, and costs of suit.

DURAND, IVINS & CARTON,
Attorneys of Plaintiff.

Amendment to Complaint.

NEW JERSEY SUPREME COURT.

ANNA LEVIN, Plaintiff, *vs.* NATIONAL BEN FRANKLIN FIRE INANCE CO. OF PITTSBURGH, et als. *Defendants.*	Action at Law.

Plaintiff, Anna Levin, by leave of the court first had and obtained, amends Paragraph 6 of her complaint, making said Paragraph read as follows:

6. On February 28, 1923, plaintiff furnished defendants with proof of her loss and interest in said property and otherwise duly performed all the conditions of said policy on her part, except the provision in the policy which reads, "If fire occur, the assured shall give immediate notice of any loss thereby in writing to the Company", and the provision therein providing for the furnishing of defendants with a sworn statement of loss wthin sixty days after the date of the fire. These provisions of the policy were waived by the defendant.

Answer.

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH; ALLEMANNIA FIRE INSURANCE CO.; REPUBLIC FIRE INSURANCE CO.; and the SUPERIOR FIRE INSURANCE COMPANY, foreign Corporations,
Defendants.

Action at Law.

National Ben Franklin Fire Insurance Company of Pittsburgh, Allemania Fire Insurance Company, Republic Fire Insurance Company and Superior Fire Insurance Company, defendants to this action, doing business as Pittsburgh Underwriters, answering the complaint, say:

1, These defendants admit Paragraph One, Two and Seven of the complaint.

2. Defendants deny Paragraphs Three, Four, Five and Six.

SECOND DEFENSE:

The paper writing purporting to be a policy of insurance, to which reference is made in the Third Paragraph of the complaint as a policy of insurance, was not in fact the contract of the defendants, in that the person assuming to issue the same in behalf of the defendants, was not the authorized agent of defendants for the

purpose of issuing such policy, nor was the said agent authorized to issue any such policy.

THIRD DEFENSE:

The paper writing purporting to be a policy of insurance, to which reference is made in the Third Paragraph of the complaint as a policy of insurance, was not a valid contract of insurance between the plaintiff and the defendants in that it was supported by no consideration. No premium was ever paid by plaintiff to defendant.

FOURTH DEFENSE:

The paper writing purporting to be a policy of insurance, referred to as aforesaid, contained the provision:

> "This policy shall be cancelled at any company giving five days' notice of such cancompany giving five days notice if such cancellation."

On or about July 5, 1922, these defendants cancelled and gave five days notice of the cancellation of the said policy to plaintiff, and on or about July 10, 1922, the said cancellation became effective.

FIFTH DEFENSE:

On or about July 10th, 1922, a valid policy of fire insurance was issued by the Ohio Farmers Insurance Company, of Le Roy, Ohio, and accepted by plaintiff, in substitution for the paper writing purporting to be the policy mentioned in the complaint. Thereafter, the said policy of the Ohio Farmers Insurance Company was can-

celled and surrendered, and a policy was issued by the Provident Washington Insurance Company, for which last mentioned policy a premium was paid, and the said policy of the Provident Washington Insurance Company was a valid, subsisting policy at the time of the fire, and the Provident Washington Insurance Company contributed its proportion to the payment of the loss.

SIXTH DEFENSE:

1. The paper writing purporting to be a policy of insurance, referred to in the Third Paragraph of complaint, contained a provision:

> "If fire occur, the insured shall give immediate notice of any loss thereby in writing to the company."

And further:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

2. The insured did not give immediate notice of loss in writing to the defendants, but wholly failed and neglected to comply with the requirements aforesaid.

SEVENTH DEFENSE:

1. The paper writing purporting to be a policy of insurance, mentioned in the Third Paragraph of the complaint, contained a further provision as follows:

> "This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

2. In the proof of loss prepared by the plaintiff and verified by her on the 28th day of February, 1923, the plaintiff swore falsely and fraudulently in that she did not truly state the amount of insurance upon the property at the time of loss.

EIGHTH DEFENSE:

1. The paper writing purporting to be a policy of insurance and referred to in Paragraph Three of the complaint, contained a provision:

> "If fire occur, the insured * * * within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property," and other provisions.

2. No such statement of loss was furnished by the insured to the defendants within sixty days after the fire, nor was such time extended in writing by the company.

NINTH DEFENSE:

Answer.

1. The paper writing purporting to be a policy of insurance, mentioned in the Third Paragraph of the complaint contained the provision mentioned and set forth in Paragraph 1 of the Eighth Defense.

2, In the statement of proof of loss sworn to by the plaintiff after the expiration of sixty days, the plaintiff did not state truly the nature and amount of encumbrances at the time of the fire, and did not state truly all other insurance, whether valid or not, covering the said property.

3. The paper writing aforesaid contained this further provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

4. The plaintiff failed to comply with the requirements as mentioned in the Second Paragraph of this defense.

CONDICT & CONDICT,
Attorneys for Defendants.

Reply.

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH; ALREPUBLIC FIRE INSURANCE CO.; LEMANNIA FIRE INSURANCE CO.; and the SUPERIOR FIRE INSURANCE COMPANY, foreign Corporations,
Defendants.

Action at Law.

Plaintiff denies each and every allegation in the Answer and Amended Answer.

DURAND, IVINS & CARTON,
Attorneys for Plaintiff.

Postea.

(Filed July 6, 1926.)

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,

vs.

NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH; ALLEMANNIA FIRE INSURANCE CO.; REPUBLIC FIRE INSURANCE CO.; and the SUPERIOR FIRE INSURANCE COMPANY, foreign Corporations,

Defendants.

Action at Law.

This case was tried before Judge Frank B. Jess, with a jury at the Monmouth Circuit on June 30, 1926. The jury rendered a general verdict against the defendants and in favor of the plaintiff for Four Thousand, Two Hundred and Fifty-one Dollars and Ninety-nine cents ($4,251.99).

FRANK B. JESS,
Judge.

Judgment.

Entered July 6, 1926.

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,

vs.

NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH; ALLEMANNIA FIRE INSURANCE CO.; REPUBLIC FIRE INSURANCE CO.; and the SUPERIOR FIRE INSURANCE COMPANY, foreign Corporations,

Defendants.

Law.
On Postea.
Action at

$4251.99
68.50

$4320.49
R. to S. C.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of four thousand, two hundred fifty-one dollars and ninety-nine cents, besides costs to be taxed nisi.
Entered July 6, 1926.

On motion of
DURAND, IVINS & CARTON,
Attorneys.

Rule to Show Cause.

Filed July 21st, 1926.

NEW JERSEY SUPREME COURT.

ANNA LEVIN, Plaintiff, *vs.* NATIONAL BEN FRANKLIN FIRE INANCE CO. OF PITTSBURGH, et als. *Defendants.*	Action at Law.

Application having been made to me within six days after the rendering of the verdict in this cause, now on motion of Richard Boardman, of counsel with the defendant,

IT IS ORDERED that the plaintiff show cause before the Supreme Court, at the next term, why the verdict in this cause should not be set aside and a new trial granted; and

IT IS FURTHER ORDERED that all exceptions and objections noted for defendants as grounds of appeal be, and the same are reserved.

FRANK B. JESS,
Judge.

Rule entered July 21, 1926.

On motion of
CONDICT & CONDICT,
Attorneys.

Reasons.

(Filed July 22, 1926.)

NEW JERSEY SUPREME COURT.

ANNA LEVIN, Plaintiff. *vs.* NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURG; et als, *Defendants.*	Action at Law. On Rule To Show Cause.

Defendants NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH, ALLEMANNIA FIRE INSURANCE CO., REPUBLIC FIRE INSURANCE CO., and the SUPERIOR FIRE INSURANCE COMPANY, doing business as PITTSBURGH UNDERWRITERS, set down the following reasons why the verdict rendered against them in the above stated cause should be set aside and a new trial granted:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is contrary to the charge of the court.

4. The verdict is contrary to law.

5. The verdict is excessive.

6. The verdict is in divers respects erroneous and illegal and should be set aside.

CONDICT & CONDICT,
Attorneys for Defendants.

Testimony.

NEW JERSEY SUPREME COURT.

ANNA LEVIN,
Plaintiff,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURG; et als,
Defendants.
Action at Law.

Freehold, N. J., June 24, 1926.

APPEARANCES:

For Plaintiff, Messrs. DURAND, IVINS & CARTON,

For Defendant Messrs. CONDICT & CONDICT.

MR. CARTON: In order to save time, your Honor, I assume it will be admitted that this policy was issued by Mr. Le Compte.

MR. BOARDMAN: Yes.

MR. CARTON: I offer it and ask that it be marked.

(Paper marked Exhibit P-1.)

ERNEST LE COMPTE, sworn for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Where do you live, Mr. Le Compte? A. Lakewood.

Q. What is your business? A. Real estate and insurance.

Q. How long have you been in business there? A. About twenty-six years.

Q. In the insurance business during that whole period? A. Yes, sir.

Q. Where do you do business generally? A. In Lakewood.

Q. Anywhere else? A. Yes, sir.

Q. Where? What territory do you cover? A. Well, Lakewood and vicinity, and we do write over on the seashore and places like that.

Q. You write on the seashore, do you, or places like that? A. Yes.

Q. Such places as Asbury Park? A. Yes, sir.

Q. I show you Exhibit P-1, purporting to be a policy of insurance. Was this policy issued by you? A. Yes, sir.

Q. On behalf of whom? A. Anna Levin.

Q. Anna Levin did not issue the policy, did she? A. You said on behalf of whom.

Q. Well, what policy is it? A. Oh, you mean —the Pittsburg Underwriters Insurance Company.

Q. And who was the Pittsburg Underwriters? A. A company I had in my office.

Q. Well, is that the style under which certain companies do business or is it a corporation known as the Pittsburg Underwriters? A. Kown as the Pittsburg Underwriters to me. That is all I—

Q. And do you know the individual underwriters in the Pittsburg, doing business under the Pittsburg?

MR. BOARDMAN: I guess the policy shows on its face, doesn't it?

MR. CARTON: I guess it does show.

Q. Well, just read the policy. I suppose you have so many of those, Mr. Le Compte, you may have forgotten this particular instance.

THE COURT: Just read the title of the policy.

A. Allemannia Fire Insurance Company, the National Ben Franklin Fire Insurance, of Pittsburgh, Republic Fire Insurance Company of Pittsburgh, the Superior Fire Insurance Company of Pittsburgh.

Q. Now having gone over them, for whom did you issue this policy? A. For the Pittsburgh Underwriters. My accounts and everything were the Pittsburgh Underwriters.

Q. Well, that is the way and style under which those four companies do business, isn't it? A. I suppose so.

Q. Don't you know? A. Well, all I had was Pittsburgh Underwriters.

THE COURT: Well, that is conceded, Mr. Carton.

Q. How long have you represented the defendant company or companies? A. I don't really know exactly; several years.

Q. In what capacity did you represent them? A. As an agent.

Q. At Lakewood? Is your headquarters at Lakewood? A. Yes, I did. I don't represent them now.

Q. You mean since this fire? A. Yes.

Q. This policy is for how much and what does it cover?

MR. BOARDMAN: It speaks for itself, doesn't it?

Q. $5,000, covering the Clarendon Hotel, Asbury Park, isn't it? A. Yes, on fifth Avenue, Asbury.

Q. Did you have any other policies on this hotel at the time of the loss? A. Yes, sir.

Q. Issued from your Lakewood office? A. Yes, sir.

Q. How long have you known Mrs. Levin? A. How long?

Q. Yes. A. I have known her since they came to Lakewood, I don't remember just how many years it is.

Q. Is it a number of years? A. Yes, sir.

Q. How long have you done business with her? A. Well, the first business I did, I think I sold them the Clarendon Hotel in Lakewood.

Q. Do you know whether there was a loss under this policy or not—or rather, do you know whether there was a fire at the Clarendon Hotel in Asbury Park? A. Yes, sir.

Q. Do you recall about when that was? A. It was in December, 1922.

Q. How did you know of the fire? A. Why, I think Mr. Levin told me about it.

Q. Who? A. Mr. Levin told me about it first.

Q. And in relation to the fire, how soon thereafter did he tell you? A. Why, it was right at the time of the fire, right afterwards.

Q. Did you visit the scene of the fire? A. Yes, sir.

Q. Was there a loss? A. Yes, sir.

Q. Did you have any adjustments made to ascertain the extent of the loss?

(Objected to.)

MR. CARTON: I will make that appraisement.

MR. BOARDMAN: Objected to. That doesn't show in what capacity he is inquiring or asking what he did. He, an insurance agent, surely is not an agent of the company to do anything about adjusting or making appraisements or anything of that sort.

THE COURT: I think he may show the fact; whether it has any legal effect is a question, so far as the company is concerned.

Q. The question should read, Mr. Le Compte, did you have an appraisement made to ascertain the extent of the loss. A. Did I?

Q. Yes. A. No, sir.

Q. Did you participate in any appraisement that was made by any one else?

MR. BOARDMAN: I object to that. I don't see how that is material.

THF COURT: Well, is there any disputed question of fact here as to the loss or as to the extent of the loss?

MR. BOARDMAN: No. There might be as to the extent of the loss.

MR. CARTON: I took it from your opening that there was not.

MR. BOARDMAN: There might be as to the extent of the loss.

MR. CARTON: I don't want to waste time if it is not in issue. I just thought I would cover it briefly.

Q. You are an insurance man and have seen buildings burned down. Was this building half burned or was it totally burned or what was it?

MR. BOARDMAN: I object. An insurance man is not an expert.

MR. CARTON: I am not asking him as an expert, as a mere casual observer, whether it was a total loss or half burned down or what.

THE COURT: He may say what the condition was as it appeared to him.

Q. How did it appear to you? A. I should imagine about half.

Q. You saw the building? A. Yes, sir.

Q. How soon after the fire? A. Real soon afterwards.

Q. The next day, didn't you? A. I wouldn't say sure now. It has been four years ago nearly.

Q. Do you know the total amount of insurance covering on the building? A. No, sir.

Q. Do you know the total amount that you carried? A. I think that I had about $10,500.

Q. Do you recall what the ascertainment was as to the extent of the damage to this property?

(Objected to.)

MR. CARTON: I only ask if he knows.

MR. BOARDMAN: All right.

A. No, sir.

Q. Did your other companies outside of the Pittsburgh contribute to the loss? A. Yes, sir.

Q. Do you know in what proportion they contributed to the amount of their policies? A. Oh, I didn't have very much to do with it. I think the Milan Ross Agency did all the settling. I have really forgotten just what they did do, but nearly the full amount if I remember right.

Q. Who did the Milan Ross people represent? A. Well, they had policies on it the same as I did.

Q. Did you have any association with the Milan Ross people in regard to this loss? A. Why, I think I was in their office once and talked to them about it.

Q. I show you what purports to be a list of

the policies on that property at the time of the fire and ask you to look at it for the purpose of refreshing your memory, and ask you then if you can tell us the total amount of insurance and the amounts they contributed in proportion, the different companies. A. I can only tell from this. I can't tell from my own memory.

Q. Well, I mean look at it and see if that comports with your recollection. A. Well, I say I wouldn't be sure because I had very little to do with the settling of that loss.

CROSS EXAMINATION BY MR. BOARDMAN:

Q. Mr. Le Compte, what is your understanding of the territory for which you were the authorized agent to write policies for the Pittsburgh Underwriters?

MR. CARTON: I object.

MR. BOARDMAN: It is direct cross-examination.

THE COURT: Yes.

MR. CARTON: No, the question was as to his understanding of the extent; and my objection is that he appears by the policy, Exhibit P-1, to be an agent, and there is no limitation of his authority or restriction of his agency, and he is therefore assumed to be a general agent.

THE COURT: May I see the policy? (Examines the policy.) I sustain the objection.

(Objection noted for defendants as ground of appeal.)

Q. In what territory did you habitally write policies for the Pittsburgh Underwriters? A. I

wrote them in Lakewood and vicinity.

Q. And you have your certificate of authority? A. Not with me.

Q. Have you it? A. I think so.

Q. What was the neighborhood that was designated in that?

MR. CARTON: I object. The certificate is the best evidence of what it contains.

THE COURT: Yes.

MR. BOARDMAN: I think on cross-examination, your Honor, I ought to have some liberty.

THE COURT: Well, it appears now that it is a certificate of authority and therefore that would be the best evidence and not his recollection.

MR. BOARDMAN: Yes, but on cross-examination I don't think I am limited to the best evidence.

THE COURT: Well, I sustain the objection.

(Objection noted for defendants as ground of appeal.)

Q. Were you authorized to write policies in Asbury Park for the Pittsburgh Underwriters?

(Objected to. Objection sustained. Objection noted for defendant as ground of appeal.)

Q. Did you ever write any other policies in Asbury Park which were cancelled for the Pittsburgh Underwriters?

MR. CARTON: Objected to as immaterial.

Objection sustained.

(Objection noted for defendants as ground of appeal.)

Q. From other companies did you have authority to write in Asbury Park?

MR. CARTON: Now, if your Honor please, I object to that. What difference can that make?

(Objection sustained.)

Q. Mr Le Compte, how long do you think i years you have known Mr. and Mrs. Levin? A. Well, I would only be guessing at it. At least twelve or fifteen years.

Q. When did you sell them the Clarendon Hotel in Lakewood? A. It must have been all of that time, around twelve or fifteen years ago.

Q. And there are two Clarendon Hotels, one in Lakewood that they own, and one the Clarendon Hotel in Asbury Park where the fire was? A. Yes.

Q. And you did their insurance on the Lakewood Hotel for them? A. Yes, sir.

Q. And you did what you could write on the Asbury Park? A. Yes, sir.

Q. You have other property that you write for them? A. No, that is about all, the Clarendon in Lakewood and the Clarendon in Asbury Park.

Q. Do you know whether you wrote all of Mr. Levin's policies or not? A. In Lakewood?

Q. Yes. A. I think so.

Q. And did you write all those in Asbury Park as far as you were able? A. No, sir.

Q. As far as you were able? A. I wrote as much as I could, yes.

Q. Do you recall how you came to write this policy in the Pittsburgh Underwriters, who ordered it and how it was— A. Most of the policies were ordered by Mr. Levin.

Q. Did you see Mr. Levin frequently at that time? A. Yes, sir.

Q. How frequently? A. Well, just at this time he was in Asbury Park, but he came over to Lakewood most every day or two and I seen him most every day or two just at that particular time.

Q. Did he make his headquarters in your office? A. When he would come to Lakewood he would generally come in.

Q. Now what were the other policies that you had, the $10,500 that you had at the time of the loss? A. If you will let me see one of those schedules I could tell you, I think.

(Paper shown witness by Mr. Carton.)

A. I had New Jersey, $1,500; Excelsior, $4,000; Stuyvesant, $5,000.

Q. That is all that is mentioned in that list? A. I think that is all I had.

Q. What about the Ohio Farmers? A. That was cancelled.

Q. Will you tell us the circumstances under which that was cancelled?

(Objected to as not cross-examination, being part of the defense.)

THE COURT: You may make him your witness for that purpose if you wish to, about the cancellation.

MR. BOARDMAN: He was asked, your Honor, whether there were other companies represented by him that had losses. Now he has testified there was something said about the Ohio Farmers. It seems to me that if the Ohio Farmers was one of his companies I might inquire even on cross-examination as to that. I want to ask him about the Home, if he represented the Home, what other companies that he had. He had an office, he was doing Mr. Levin's business.

THE COURT: Well, the question asked upon direct as to losses, of course, would not include any inquiry as to a company that had not a loss, where according to the opening there was a cancellation of the policy, and I don't think that is cross-examination. I don't think it is within the scope of the direct examination.

Q. What was the situation in reference to the Pittsburgh Underwriters policy at the time of the fire?

MR. CARTON: He is your witness now.

MR. BOARDMAN: No, it is asked as cross-examination.

THE COURT: You may answer that.

A. At the time of the fire?
Q. Yes.

MR. CARTON: I do want to state this, your Honor: that if this is affirmative defense I object to it as not being proper cross-examination.

(Objection overruled.)

A. Why, the policy was cancelled, the way I understood.

Q. When was it cancelled? A. Why, it was cancelled July 3rd.

Q. When you got that telegram what did you do?

THE COURT: I think that undoubtedly any further inquiry as to the cancellation of that policy would have to be given by this witness as your witness, because that is a

matter of defense. The claim is made that the policy was cancelled. Either now or later I think any further inquiry upon the matter of cancellation or the claimed cancellation should be with the understanding that Mr. Le Compte is the defendants' witness.

Q. Do you know whether you had any other companies with policies unreturned in the hands of the Levins' that you had written on this property on which no proof was made or which did not contribute to the loss?

MR. CARTON: That is objected to as being immaterial. I can't see what bearing that has on this policy.

THE COURT: Let me hear the question.

(Question repeated.)

THE COURT: How is that material to this issue? I think I sustain the objection.

Q. Did you have other policies written for Mr. Levin that were cancelled?

MR. CARTON: That is objected to. What possible bearing can it have?

THE COURT: I don't see.

MR. BOARDMAN: This is cross-examination, your Honor, and this subject was opened up, whether he had other policies on the property. It sesems to me his relationship with Mr. Levin and the companies was opened up. He was asked whether he had other insurance on it. It seems it is all within the cross-examination. It might become material in another phase of the case, whether it would be a defense; it might affect their

case if there were other policies that he did not put into this, presumably this proof. It might affect his affirmative case, because it is up to the plaintiff to show affirmatively his case, and it is a subject that has been opened by direct examination and it is strictly cross-examination and it may be material.

THE COURT: Well, I suppose if he were asked if he had other policies, the question of whether those policies were in force at the time of the fire would be cross-examination.

MR. BOARDMAN: Yes.

THE COURT: And on that theory I will allow the question.

(Question repeated.) Do you know whether you had any other companies with policies unreturned in the hands of the Levins that you had written on this property on which no proof was made, which did not contribute to the loss? A. Yes, sir.

Q. What were they?

MR. CARTON: Now, if your Honor please, that does not conform to your Honor's suggestion. Your Honor's suggestion was what policies were in force at the time of the fire and what policies were cancelled. Inferentially that might be the same result, but in effect it is different. My point is your Honor, it can make no difference what other policies were cancelled. Every one has policies cancelled on demand, and anything that does not go to the actual insurance in force at that time is unimportant.

THE COURT: The question is whether any policies which on direct examination he said were in force—or he did not say they were in force; he said there were certain policies—now I say that counsel should be permitted to show that any of those policies which the witness mentioned were, as a matter of fact, not in force. That is my ruling.

MR. BOARDMAN: The scope of my inquiry, your Honor, is to ascertain if there were other policies written by Mr. Le Compte on the property in Mr. Levin's possession which he did not return and did not contribute. If you will recall, one of the things that they must show to recover is the amount of insurance, whether valid or not, and that is raised in the pleading. It is one of those conditions precedent which the plaintiff in this case is charged to prove by our answer; and in that point this may become—it is within the scope of cross-examination, in the first place, and it may become material in view of that state of the pleadings.

THE COURT: I will allow you to proceed.

Q. What other policies, if any, had you written on this property that had been cancelled?

MR. CARTON: Now, if your Honor please, I don't want to take up time in this. I submit that that is improper cross-examination. The witness has referred to policies that were in force and he was interrogated about that on the list that he has in his hand. Now it makes no difference how many other poli-

cies may have been issued or may not have been issued if they were cancelled. The question is what insurance was in force.

THE COURT: He has testified that there were certain policies at the time of the fire. He has referred to that list, as I understand it.

MR. CARTON: Yes.

THE COURT: Now the question is whether any policies on that list to which he has referred were cancelled at the time of the fire. I am limiting the inquiry to that scope.

MR. CARTON: That is, yes, but I don't think the question is so narrow that it can be limited to that scope.

THE COURT: Well, it should be. It should be confined to the policies in that list named on direct examination, whether any of those policies had been cancelled at the time of the loss.

MR. CARTON: I have no objection to that.

MR. BOARDMAN: I am not interested, your Honor, to press that question. I assume that they had not been. I would like to have a ruling on my question in view of the matter that I have opened to your Honor.

(Question repeated as follows:)

Q. What other policies, if any, had you written on this property that had been cancelled?

THE COURT: Now there is an objection to that question the objection sustained and an exception is allowed.

MR. BOARDMAN: I pray an exception on the ground stated, that it is proper cross-examination and also within the scope of the pleadings raising the matter.

Q. What is the paper you have in your hand from which you have read the list of these companies? A. Proof of loss.

Q. Does the Ohio Farmers appear in that proof of loss? A. No, sir.

Q. Where was the Ohio Farmers policy that you wrote at the time of the loss, at the time of the fire?

(Objected to. Objection overruled.)

A. I don't know.

Q. Had it been returned to you? A. I don't think so.

Q. What was the last you did with it? A. Th last I did with it I gave it to Mr. Levin.

Q. And did you try to get that back from Levin after you got notice of cancellation?

MR. CARTON: Objected to as immaterial. Here is a policy that does not appear in the loss, did not contribute, and what possible effect can it have what happened to that policy?

THE COURT: It appears in the pleadings that there was a policy in the Ohio Company, issued by that company and accepted by the plaintiff in substitution for the policy now in suit.

MR. CARTON: Yes, if your Honor please, and that is one of the defenses offered in this suit and this witness, my friend has very cleverly kept this man under cross-examination; and now I object for the further reason that this is not cross-examination and that it is taking up one of his separate matters of defense, and that his defense can be proved only affirmatively.

THE COURT: You object to it on the ground that it is not cross-examination and I sustain the objection.

(Objection noted for defendants as ground of appeal.)

MR. CARTON: If your Honor please, I was not quite able to follow Mr. Boardman. I thought when he had the witness answer that the policy was cancelled, as I understood, that he was then his witness. I found out that he not. I think that answer should be stricken out as being improper cross-examination of this witness as my witness. I think that is a matter of defense.

THE COURT: No, I will let it stand, Mr. Carton.

BY THE COURT:

Q. May I ask you one question? Where did you get this policy before it was filled in? A. From the company.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. Who printed, or caused to be printed, on this policy, P-1, these words and letters "L. E. Le Compte, Agent, Insuurance, Lakewood, N. J."? A. That is the way the policy came to me.

Q. Came to you from where? A. The company.

Q. What company? A. Pittsburgh Underwriters.

Q. Where is its main office or headquarters? A. Pittsburgh.

Q. After you wrote this policy, did you report it to the company? A. Yes, sir.

Q. What do you mean by your answer "The

policy was cancelled, the way I understood"? A. I got notice from the company to cancel the policy and I immediately wrote the policy over with another company and I went to see Mr. Levin and gave him the new policy and asked him for the old policy in the Pittsburgh Underwriteers.

Q. You got notice from these defendant companies to cancel this policy, did you? A. From the Pittsburgh Underwriters, yes, sir. After I had notified them of the writing immediately I sent them a daily report.

Q. You remember the date that was too, don't you? A. It was in, I think, just about Christmas in 1922.

Q. Yes, December 21, 1922. Did you give to Mrs. Levin the day after the fire a list of the insurance in force through your office covering her Clarendon Hotel in Asbury Park? A. I don't know whether I did or not. I think the clerk in the office sent a list over.

Q. And that list included the Pittsburgh Underwriters policy the one sued on, didn't it? A. I don't know.

Q. Don't you know about that? A. No, I don't remember the list. The clerk in the office sent it over.

Q. Who requested the clerk in the office to send the list over? A. I am not sure now who it was.

Q. To whom was the list sent? A. I am not sure about that; either Mr. Stansbury or some representative.

Q. How do you know that some one requested a list of the insurance? A. Well, I remember it faintly.

Q. What is that? A. I remember that there was a list asked for and sent over.

Q. But you don't remember who requested it? A. I don't remember.

Q. You say Mr. Stansbury? A. Yes.

Q. In connection with the adjustment of the Clarendon losses right after the fire, didn't you? A. I think I did.

Q. And you gave him the list of the policies in force, written through your office at that time, did you not?

MR. BOARDMAN: I object to it as immaterial, anything that passed between these these men in December or January 1922 or 1923, and Mr. Stanbury.

THE COURT: Well, as I recall it, one ground of defense is that there was a misstatement of the existing insurance upon the property at the time of the loss.

MR. BOARDMAN: Yes.

THE COURT: Well, that raises the question of fraud and I think he is permitted to show how she may have gotten the information upon which she based her report. Yes, I overrule the objection.

(Objection noted for defendants as ground of appeal.)

A. I don't remember giving Mr. Stansbury any list.

Q. Didn't you meet Mr. Stansbury at the Milan Ross office the day after the fire and didn't you take up with him at that time the extent of his coverage and your coverage?

(Objected to as leading. Objection sustained.)

MR. CARTON: I withdraw it.

Q. You did see Mr. Stansbury the day after the fire, did you not? A. I saw Mr. Stansbury soon after the fire. I couldn't say it was the day after.

Q. Well, soon after, and what did you see him for?

(Objected to.)

THE COURT: Who is Mr. Stansbury? How does he come into it?

Q. Who is Mr. Stansbury? A. He works in the Milan Ross insurance office.

Q. What is his position there, do you know? A. He has charge of the insurance department.

Q. And has had for a number of years, has he not? A. He has as long as I have known him.

Q. Did you understand that the Ross office in Asbury Park did insure some of this property too? A. Yes, sir.

Q. And you had insurance on it? A. Yes, sir.

Q. Now, what did you see Mr. Stansbury for?

(Objected to. Objection sustained.)

Q. Did you give Mr. Stansbury a list of the insurance that you had written and then in force on the Carendon Hotel at the time you called upon him?

(Objected to.)

THE COURT: Are you going to connect up Mr. Stansbury and Mrs. Levin in any way?

MR. CARTON: Mr. Stansbury adjusted this loss, your Honor, with Mr. Le Compte.

THE COURT: My idea is that this is material, based on the answer that there was a misstatement as to the amount of existing insurance, and I have assumed that the purpose of this was to show that whatever Mrs. Levin said was based upon information that she got either directly or indirectly from this agent. I don't see that it would make any difference what he said to Mr. Stansbury unless you are going to show——

MR. CARTON: The purpose of the inquiry is to offset his statement that the policy was cancelled, as I understand; oh, well, that is purely a matter of law, I suppose, whether the policy was cancelled or not.

MR. BOARDMAN: That is a matter of rebuttal, your Honor.

MR. CARTON: That is the difficulty. That is the reason this question has gone in. Here is an antagonistic witness and I have got to practically cross-examine my own witness.

THE COURT: I know, Mr. Carton, but don't you see by this witness you have proved the policy? Now it seems to me it is proper to show on cross-examination that there was not any such policy and that is the effect of his testimony, that the policy was cancelled. On that theory, I think it is admissible.

MR. CARTON: Then, if that is true, I can't wait for rebuttal because that would be ground upon which to predicate a nonsuit and there wouldn't be any rebuttal; there wouldn't be any defense.

THE COURT: No, it is all right to rebut it, but I don't see how you can rebut it by statements which are made by Mr. Stansbury.

MR. CARTON: If we can show that he made statements to Mr. Stansbury— and I am laying the foundation now—that it is inconsistent with his statement now that this policy was cancelled, it has the effect of taking away whatever effect that statement would have against him with other evidence.

THE COURT: Of course, it seems to me if their proof was made on the part of the witness by showing that it was cancelled, that is perhaps a conclusion to be drawn from the facts.

MR. CARTON: I may be attaching too much importance to it, your Honor. Of course, I know that is not the way to prove cancellation of a policy.

THE COURT: I will say this, Mr. Carton, now, in order that there may be no misapprehension in the minds of counsel; that, on the testimony as it stands now, I would not feel that I was justified, as a matter of law, in holding that the policy had been cancelled.

MR. CARTON: I have no further questions.

RE-CROSS EXAMINTION BY MR. BOARDMAN:

Q. Now, you testified in your re-direct examination that you reported writing this policy to the home office? A. Yes, sir.

Q. What reply did you get from the home office? A. I got a telegram to concel it.

THE COURT: I wish to make it clear that testimony along this line with reference to the cancellation is testimony for the defense.

Q. And you rewrote the loss in the Ohio Farmers and delivered the Ohio Farmers to Mr. Levin? That has been testified to already. I am just laying the beginning of my question. Did you ever get the Ohio Farmers policy back from Mr. Levin?

MR. CARTON: That is objected to. I didn't ask this witness a question about the Ohio Farmers and the Ohio Farmers appears as one of the affimative defenses in this suit; but it could make no difference to this suit whether he issued a policy or whether he got it back or not. I object to the question.

THE CORUT: Insofar as the cancellation is concerned, it doesn't make any difference as I view it. The cancellation could be accomplished in a certain definite way. The question is whether it was done in that way.

MR. BORDMAN: Well, I was not driving at that, your Honor. They are going to show —there is proof of loss now in the witeess's hands that has been produced here; they are going to show that they served a similar proof of loss on us and that did not contain the Ohio Farmers. They are going to show that they gave us that information. That is going to be a part of their case. Here is their witness on the stand. Why shouldn't I be able to show that the Ohio Farmers policy was in the hands of the Levins, the same as the Pittsburgh Underwriters, that he put in one and didn't put in the other.

(Continues argument.)

THE COURT: I think you may show it get this policy as part of your case, however, and not as cross-examination.

MR. BOARDMAN: May I have this witneess recalled for further cross-examination after the proof of loss shall be in?

THE COURT: Yes.

BY MR. CARTON:

Q. Mr. Le Compte, I just want to ask you one question. Did the defendant companies refuse to pay the loss under this policy, the Pittburgh Underwriters?

MR. BOARDMAN: I object. It is admitted in the pleadings.

TH COURT: Well, that is admitted.

ANNA LEVIN, sworn for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mrs. Levin, where do you live? A. Asbury Park.

Q. And what is your business there? A. Hotel.

Q. What hotel? A. Clarendon-Brunswick.

Q. Have you been in business in Lakewood? A. Yes, sir.

Q. And during the winter season? A. Yes, sir.

Q. What is your business there? A. The same, hotel.

Q. Are you acquainted with Ernest Le Compte? A. Yes, since we were in Lakewood.

Q. How many years is that? A. Fourteen years in Lakewood.

Q. And have you had business dealings with him? A. Yes, sir.

Q. In respect of what? A. Well, we always carried our insurance with him, bought some property through him.

Q. In Lakewood and Asbury Park? A. In Lakewood. Well, insurance we carried in Lakewood and Asbury Park.

Q. I show you Exhibit P-1, policy of insurance, and ask you through whom you procured that policy of insurance. A. Through Mr. Le Compte.

Q. Do you recall when? A. Well, that was some time in June 1922.

Q. Did you pay him the premium called for by the policy? A. Why, yes, we always do.

Q. What did that policy cover? A. The Clarendon Hotel in Asbury Park.

Q. And where is that located? A. On Fifth Avenue.

Q. Was there a fire there? A. Yes, sir.

Q. When was the fire? A. 1922, in December the 21st.

Q. And where were you living at that time? A. In Lakewood.

Q. Was the house entirely burned down? A. No, partly burned.

Q. Was it afterwards repaired, the building afterwards reconstructed? A. Yes, sir.

Q. How much insurance did you carry on the Clarendon Hotel at Asbury Park at the time of the fire? A. The whole amount was $36,500.

Q. And the loss by fire, what was the extent of that?

MR. BOARDMAN: I object. She is not an expert.

THE COURT: She can tell what was destroyed, Mr. Carton.

MR. CARTON: I withdraw the question.

Q. In the first place, what was the size of this hotel? A. How many rooms, you mean?

Q. Yes. A. It was sixty rooms.

Q. Sixty rooms? A. Sleeping.

Q. How many stories? A. It was three stories bedrooms; that is four stories.

Q. What part of the building was physically destroyed? A. Well, it was the whole back destroyed, and back from the kitchen side.

Q. Where was the fire, on the front or the rear? A. In the rear and all the bedrooms. It was down to the first floor.

Q. Did any part of the building collapse, burn down? A. Yes, the back did.

Q. How much of the whole building was destroyed by this fire that you observed?

MR. BOARDMAN: I object. She is not an expert to testify to what part of the building. You may ask how big is the house. She can tell what part. That is not the way to prove the case. It is not proper proof.

(Objection noted for defendants as ground of appeal.)

(Question repeated.)

A. It was $31,000 00.

MR. BOARDMAN: I object and move to strike it out.

THE COURT: That may be stricken out.

MR. CARTON: That is not what I wanted. I consent that it be stricken out.

Q. The building was four stories high and had a certain number of rooms in and what portion of it was destroyed? I don't mean in dollars and cents. A. I thought the adjustment.

Q. No. A. Well, it was the most of the rear part and back bedrooms, and the front, of course, the roof and the third floor was down and the second floor was down.

Q. You say the total amount of insurance was $36,500? A. Yes, sir.

Q. And was that total insurance outside of the insurance under the policy in question adjusted and paid?

MR. BOARDMAN: I object. That can't be material. We were not parties to that. That can't affect us.

(Objection sustained.)

Q. Who represented you in the adjustment of your loss on the Clarendon Hotel at the time of the fire? A. It was Brooks and Stansbury from the Milan Ross Agency.

Q. And Mr. Stansbury, is he the gentleman referred to in the Milan Ross Agency? A. Milan Ross Agency.

Q. And Mr. Brooks, who is he? A. As contractor, builder.

Q. What time of the day or night did this fire take place? A. It was two o'clock in the morning. When we were notified it was two o'clock in the morning, in the daytime.

Q. Two o'clock in the afternoon? A. In the afternoon.

Q. Two o'clock in the afternoon? A. Yes, we were notified over the 'phone.

Q. How did you learn of the fire? A. Well, we had a telephone from Asbury Park.

Q. And after you learned of the fire, what did you do, if anything, about giving Mr. Le Compte

any notice? A. When we came back from Asbury Park, we called up Mr. Le Compte and he came to our house.

Q. Did you go to Asbury Park immediately after you were notified of the fire? A. Yes.

Q. What did you say you did there? A. Came back at 6 o'clock and notified Mr. Le Compte and he immediately came to our place.

Q. You called him up and told him what? A. That there was a fire in Asbury Park.

Q. Where? A. In Asbury Park.

Q. Well, where, what fire? A. The Clarendon.

Q. Your hotel? A. Yes.

Q. What did he do thereafter, if anything? A. Well, he came down to our house; he came to the Clarendon at Lakewood.

Q. Your hotel in Lakewood is the same name, I believe? A. Yes; the same name. And he came up to our room and I think he gave us the list that he carries of insurance, told how much he had at that time. He was there for a good while and then went back.

Q. He gave you the list of insurance that he carried, you say? A. Yes.

Q. And what insurance was that of which he gave the list? A. Well, we had with him $15,500.

Q. $15,500? Do you remember the policies making up that total? A. No, I don't remember exactly the policies, but I know the one that is now was in it.

Q. The Pittsburg Underwriters? A. Yes, sir.

Q. Was the Pittsburgh Underwriters in one of them? A. Yes, sir.

Q. You say he gave you that list? A. Yes, he told us we had $15,500 in the Pittsburgh Underwriters and the other names.

Q. Did you have insurance written through Mr. Ross's agency also on the property? A. Yes.

Q. Did you see Mr. Stansbury about the loss too and the coverage?

(Objected to.)

Q. Did you see Mr. Stansbury about the loss? A. Yes, he was there the same day.

Q. What did you see him about?

(Objected to. Objection sustained.)

Q. You say you did see Mr. Stansbury? A. Yes, sir.

Q. Did Mr. Stansbury's office, the Milan Ross office, carry insurance on the Clarendon at that time? A. Yes, sir.

Q. Did you see Mr. Le Compte thereafter in regard to this loss? A. Well, the next morning he was in Asbury Park.

Q. Where did you see him? A. At the place that was there, at the Clarendon.

Q. Where else, if any place, were you with Mr. Le Compte in Asbury Park? A. Well, we were in Milan Ross's office.

Q. Went where? A. Milan Ross's office.

Q. And who was present there? A. Mr. Stansbury.

Q. Le Compte and yourself? A. Le Compte.

Q. What were you there for? A. Well, just to talk over how much they had and how much he had and how the loss——

Q. Was any list given in the Ross office by Mr. Le Compte? A. Yes, sir.

Q. To whom? A. To Mr. Stansbury.

Q. And did it include the policy in question? A. The policy in the Pittsburgh Underwriters.

MR. BOARDMAN: I object. The list itself is the best evidence of that. Where is that list? I move the answer and the question be stricken out.

THE COURT: No; the answer may stand.

(Objection noted for defendants as ground of appeal.)

Q. What did you do thereafter, if anything, with regard to notice to the defendant companies to your—— A. Well, they left it all to the Milan Ross Company, Mr. Stansbury, to attend to it.

Q. What was done therafter, if you know? A. Well, they adjusted it and settled it.

Q. Well, they only adjusted with the companies they represented, didn't they? A. No, they had the whole thing.

Q. Mr. Le Compte's companies too? A. Well, Mr. Le Compte placed with him to adjust it.

Q. Well, the defendant companies, they didn't adjust, didn't pay, did they? A. No. Well, this we learned after.

Q. When did you learn that? A. Well, after it was adjusted and when it came to settle.

Q. Well, did you learn after that they disclaimed liability, the defendants? A. No, till the rest of the companies settled and they didn't; they refused.

Q. Well, was it brought home to you by Mr. Le Compte or by anyone after the fire and after these actions that you have referred to, that the defendants disclaimed liability because they cancelled the policy? Did you hear that? A. Not for a long tme.

Q. You heard of it? A. A long time after the fire.

Q. You did hear that? A. Yes, after.

Q. What did you do with regard to making out your proofs of loss? A. I don't understand.

Q. What did you do with regard to making out your proofs of loss to the defendant company? Did you make out a proof of loss? A. Yes.

Q. Who made that out for you? A. Mr. Stansbury.

Q. And did you sign it? A. Yes.

MR. CARTON: I asked the defendant to produce the original proof of loss.

(Paper produced.)

Q. I show you a paper purporting to be a proof of loss and ask if that is your signature appearing on it? A. Sure, yes,

Q. What did you do with this proof of loss after you made it out? A. What did we do with the proof of loss?

Q. Yes. A. I think we handed it to you; I don't remember.

Q. You handed it to me? A. Yes, wasn't it?

Q. What did you do with it? A. Mr. Stansbury gave us to sign the proof of loss in Milan Ross's office and I give him to attend to it because he was taking care of it. I really don't know what we did with it when you ask me now.

MR. CARTON: This proof of loss has been turned over by defendant's counsel and I ask to have it offered at this time and marked.

THE COURT: It may be.

(Paper marked Exihibit P-2.)

Q. Do you recall when it was you made this proof of loss? A. When it was?

Q. Yes.

THE COURT: Doesn't it show?

MR. CARTON: Yes, it purports to have been.

A. I don't exactly remember the date.

Q. The 28th day of February, 1923? A. It is four years. It was in January, I know.

Q. Do you recall whether this proof of loss, P-2, was made out and filed at the same time you filed your proof of loss with the other companies? A. They were all together.

Q. You state in your proof of loss filed with the company that its proportion under the policy amounts to $4,251.99; is that right? A. Yes.

MR. BOARDMAN: I had no chance to object to that.

MR. CARTON: She did say so. That is nothing but a question from the paper.

MR. BOARDMAN: I wish the witness would be cautioned not to answer the question till I have a chance to object.

THE COURT: Well, the paper speaks for itself, doesn't it?

MR. BOARDMAN: Yes.

MR. CARTON: I was just identifying the items. I think it does speak for itself, your Honor.

Q. Has this amount or any amount under this policy been paid? A. No, not on this.

CROSS EXAMINATION BY MR. BOARDMAN:

Q. The other companies paid up? A. Yes.

Q. How much money did you collect? A. How much money did we collect?

Q. Yes. A. $27,000, something around there.

Q. $27,000 what? A. Not quite $27,000. I don't know exactly.

Q. Where were you when the fire happened? A. In Lakewood.

Q. And did you go to the fire? A. Yes, we went down to the fire when we know there was a fire.

Q. And then you called up Mr. Le Compte? A. Yes.

Q. And you told him there had been a fire? A. A fire.

Q. You didn't write him any letter? A. No, he came immediately. He is so near that you can't write to him.

Q. Did you depend upon him to give notice to the insurance company? A. Naturally, we depend always on him to write the policy, so we have to depend on him.

Q. He wrote a good many policies for you? A. Yes.

Q. You had some of the policies cancelled from time to time? A. In the length of twelve years I suppose there was some, but we always got notice.

Q. Mr. Le Compte would write another one for the one that he cancelled, would he? A. Not unless we told him so.

Q. And he wrote your insurance for you? A. Yes, he still writes it.

Q. And still writes it for you? A. Yes, he has the Clarendon.

Q. Before this time did you depend upon him to write your insurance for you? A. Whenever we tell him, he writes it.

Q. He was your regular agent and broker? A. Yes, and he brings a policy to us and hands it to us.

Q. And you did a large business with him, didn't you? A. Oh, yes. He carries our insurance for us, $150,000—another hotel in Lakewood.

Q. And you found him honest and trustworthy and dependent? A. We never had any loss. He was honest. That was our first loss with him.

Q. The first loss you ever had? A. No.

Q. The first loss with him? A. Yes.

Q. Did you ever have a loss with anybody else? A. No, but we had a damage to a car. He attended to it, but that is about all.

Q. Did you have an accident in the summer of 1922? A. An accident?

Q. An accident in the summer of 1922. A. An accident, you mean an automobile accident?

Q. Yes. A. Yes, in the south.

MR. CARTON: That is objected to, unless it is to be followed up by some purpose.

Q. When did you go south? A. In September.

Q. And you had an accident that kept you down there a couple of months? A. No, just three weeks. I was in the hospital three weeks.

Q. How many times did you see Mr. Le Compte during that summer? A. In the hospital?

Q. No, before you were in the hospital. Say between the first of July and the last of September. It was the last of September you were in the hospital? A. Yes.

Q. How many times did you see Mr. Le Compte during that time? A. How should I know? He comes in to Asbury Park, comes in the house, comes to Lakewood and comes to Asbury Park. He knows this girl just as good as he knows me and anything that he has got to see——

Q. And you have been down in his office? A. And four years ago, how should I remember how many times I seen him?

Q. Did he give you a bill for this policy? A. That was paid.

Q. Where is that bill? A. I haven't got it here.

Q. Have you the receipt? A. I had a receipted bill.

Q. Have you the check? A. No.

Q. Did you pay $83.50? A. Whatever was on the bill we always paid.

Q. Oh, you did? Now, Mrs. Levin, this is quite serious. I don't want to lead you into anything you don't want to say. A. Well——

Q. Just a minute now, Mrs. Levin. Do you mean to say that Mr. Le Compte presented you a bill for the premium of this policy? A. Yes.

Q. $83.50? A. Yes.

Q. And you and Mr. Levin paid him that bill; do you want to say that? A. It is positive of it.

Q. That is the truth, is it? A. Positive of it.

Q. When you say that, do you mean anything different? Do you want to explain anything, what you mean by that? A. I couldn't say. It is paid. We always paid his bills. He will tell you himself.

Q. Let's get it, Mrs. Levin. I want it right. Did Mr. Le Compte present you a bill for $83.50 for this Pittsburgh Underwriter policy and did you pay that bill? A. We did pay it. It was paid, all the policies, and that was in it.

Q. And you have no receipt? A. I don't know.

Q. Do you carry a check book? A. Yes.

Q. Did you pay your insurance by checks? A. Sometimes by checks, sometimes—mostly by check, sure.

Q. Did you pay this $83.50 by check? A. I don't know if it was exactly $83.50 or $200 together with another one. I couldn't recall it, but I know it was paid, because he carries more insurance and brings in a bill. I know it was paid. I don't know if it was exactly $83 or if it was more together, or it was together with other policies. I couldn't remember just the check for $85.

THE COURT: $83.50 was the amount of the premium.

Q. Have you the policy in your hands? Let me look at that. Let me look at the policy and see what the premium was (Examines policy.) Yes, it was $83,50. Now will you tell us? And you have sworn that you paid that premium? A. It was.

Q. Now will you tell us how you paid it? A. We paid it with another by check.

Q. When? A. I don't recall what time, what day, but so soon as he brings it he always gets paid.

Q. Have you the check that you paid it with? A. I suppose so.

Q. Would it be your check or your husband's check? A. Well, sometimes he signs and sometimes I do. We both sign. One often signs.

Q. Then when you say that this was paid you only mean from the general course of business you paid your bills and that must have been paid along with the others; is that it? A. No, it was paid.

Q. Do you mean just what I say, that you usually paid your bills and therefore that must have been paid? A. Not must have been, it was.

Q. You don't recall paying it? A. I don't recall what day; I know it was paid for.

Q. You have got no receipt for having paid it? A. No, it must be checks. He doesn't give us a receipt when he gets a check. Maybe he gave a receipted bill. I don't remember just now.

Q. What do you recall about paying this bill? A. What do I recall?

Q. Yes, you testified with the greatest positiveness that it has been paid. I want to know everything that you recall about paying it, everything that you can recall. A. Because when he hands us a bill we give him a check. I know always, on account I am there twelve years.

Q. And you know that he would give you bills and you paid them; then if he never gave you a bill you never paid it, did you? A. How would he never give us a bill? If he writes a policy and brings us a bill we pay the premium.

Q. Now, Mrs. Levin, let's get down to what you really remember. If he didn't present a bill for this you didn't pay it, did you? A. Well, if it is coming to him he comes and always gets the money.

Q. Please answer the question. A. We paid him for the policy.

Q. Now, once again. Will you read the question?

(Question repeated) Then if he never gave you a bill you never paid it, did you? A. I did.

Q. Do you recall the bill? A. Yes, we gave him to write a policy and he brought that policy and brought a bill and got paid for it.

Q. That was all there was to it? A. That is all I know about it.

Q. Right away? A. I don't know how long later, when we told him to write it.

Q. Well, you did it before you went south in September, you paid it? A. Yes.

Q. And you paid it before he told you he had caneclled it? A. Cancelled? He never told us he cancelled it.

Q. Before he told you anything about the Ohio Farmers? A. I don't know anything about it.

Q. Did you pay the Ohio Farmers premium too? A. I don't know any Ohio Farmers.

Q. Did you pay the Washington policy? A. Washington, yes.

Q. When did you pay that? A. I don't know exactly when it was paid, but when it was issued.

Q. Did you pay that by check? A. Yes, but that is not from Le Compte, is it, Wahington?

Q. Who was it from? A. That was Zurlin.

Q. Did you pay it to Zurlin? A. Yes.

Q. And the Ohio Farmers, did you pay that? A. No, that is not in existence.

Q. What? A. We haven't got in existence the Ohio Farmers.

Q. Did you pay the New York Underwriters?

(Objected to as immaterial.)

A. I couldn't carry the whole business in my head.

(Objected to.)

THE COURT: Objection sustained as to the New York Underwriters.

MR. BOARDMAN: Certainly, I am entitled to the broadest right of way, it seems to me here. Here is a woman that testifies that she paid this premium and she paid this bill, $83.50 and then she rambles on and says, "We paid the bills; it must have been paid."

THE COURT: Well, I know, but why should you bring in a company that is not involved in this suit. How are you going to show—suppose she says she did pay the New York Underwriters; do you think there is anything material to show that she did not pay the Underwriters? No, I think it is not material except as to the companies that are directly concerned.

Q. Mrs. Levin, if I understand your testimony, Mr. Le Compte rendered his bills right away and you paid the premium right away upon the bill rendered? A. I don't know right away or it was a couple of weeks later, I don't know; but it was paid in the summer.

Q. Tell us what you know about the writing and cancellation of the Ohio Farmers policy. A. I don't remember anything.

(Objected to as not cross-examination.)

A. I don't remember anything.

THE COURT: I will allow that. She says she doesn't remember.

A. I don't remember the Ohio policy.

Q. Will you tell us how you came to go to Zurlin for the Provident-Washington policy?

(Objected to as immaterial.)

THE COURT: What is the objection, Mr. Carton?

MR. CARTON: The objection is its immateriality. It seems to me it cannot have any

relation to this case, how she came to get other insurance or how much insurance she had. The question is on the Pittsburgh policy.

(Objection overruled.)

A. Because he was a new man in business started, and he came around a few times and worked on this. His friend was a chum of my boy from school, from a Pennsylvania school, and he was a new man in business, so we told him to write a $5,000 poicy. He just started in business.

Q. Had Le Compte told you he had exhausted his resources as far as that was concerned? A. No.

Q. When was that written? A. I don't recall exactly the date.

Q. Was that policy in the Provident-Washington written before you went south that summer? A. Yes.

Q. August 1st, would that be the date? Would that sound right to you, August 1st? A. I couldn't recall when it was.

Q. It was written that summer though, wasn't it? A. I think so. I said that I was in the hospital in the south ahead so I couldn't tell exactly, but it was in the summertime that he wrote it for us, Zurlin.

Q. Well, if you ever paid this policy, you paid it before you went south? A, In that summer, yes.

Q. Before you had your accident? A. Yes.

Q. How much did that affect your memory, that accident? A. It didn't affect my memory, but I don't know exacty when it was written, that policy, what date.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. The Provident-Washington Company, which you say was written by Mr. Zurlin, tell us who Mr. Zurlin is. A. He is a Lakewood man.

Q. How did you come to have him write a policy of insurance for you? A. Because he was a new man in the business and my boy and his friend and Mr. Meyer—Mr. Meyer asked him to give him a policy to start him in the business.

Q. Who is Mr. Meyer? A. Mr. Dave Meyer.

Q. What relation is he to Mr. Zurlin? A. I don't know. They are friends together.

Q. Do you know whether he was working for him or not? A. Who is working, Mr. Meyer?

Q. Whether Meyer was working for Zurlin. A. I think they are together or friends together, but he asked my boy and my boy told him, he asked us to give him $5,000.

BY THE COURT:

Q. How did you come to get a $5,000 policy in the Provident-Washington at this time? A. I don't know.

Q. I say what was your idea in getting that policy, any additional policy at that time? A. Well, we never carried insurance to cover fully and it is a new man and he asked him for a little insurance and we gave him $5,000 more for that, because it was not fully covered anyhow.

RE-CROSS EXAMINATION BY MR. BOARDMAN:

Q. Will you look through that, this paper I show you and see if that refreshes your memory how you came to go to Meyer or Zurlin to get this new insurance?

MR. CARTON: Did she say she went to them? She says they called on her.

A. I didn't see anyone.

(Question repeated.)

A. Well, they asked us for insurance, Mr. Zurlin had asked a couple of times and then Mr. Meyer asked my boy and he gave him.

Q. Now wasn't it after Mr. Le Compte had told you that you would have to get insurance elsewhere to replace the Ohio Farmers that you went to Meyer and Meyer went to Zurlin?

MR. CARTON: I object to the question because it is predicated on false premises. There is no proof of it.

(Objection overruled.)

A. No.

Q. Did you ever go to Meyer or Zurlin before that time for other insurance? A. That is the only policy at that time.

Q. Have you written any with them since? A. Since?

Q. Yes. A. Yes, I think I have since.

Q. You have? A. I think so.

Q. Other policies since? With which one? A. With Zurlin, I think.

Q. What other policies have you written with Zurlin? A. I couldn't recollect.

Q. Couldn't tell any others? A. I couldn't recollect, but I think we have some.

Q. But you are sure that you have written other policies with Zurlin since? A. Yes, I think so.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. Did the total insurance on your hotel, totaling $36,500, include the policy written by Zurlin? A. Yes.

Q. Do you know what the fair value of your hotel was at that time? A. Well, I know we spent more than twice as much to fix it.

Q. And you say it was half burned down? A. Yes.

Q. I show you a letter purporting to be signed by George P. Davis, addressed to you, dated March 20, 1923. Did you receive that letter? A. May I see it?

THE COURT: You don't want to see it yet.

A. No.

Q. That is a letter addressed to you, isn't it? A. It is headed to me.

Q. Do you remember receiving it? A. No.

Q. You don't? A. No.

RECESS TILL 1:30 P. M.

(Trial of the cause resumed at 1:30 P. M.)

ANNA LEVIN, Resumed.

BY MR. BOARDMAN:

Q. Mrs. Levin, you recognize this Exhibit P-2, the proof of loss that you swore to, you verified? A. Yes.

Q. Will you look at the place on the third page of the schedule where the Pittsburgh Underwriters has been written? I call your attention to the fact that it is written in very heavy ink and

heavier than the rest and over an erasure. Will you tell me the name of what company was written in there before the Pittsburgh Underwriters was written in? A. I haven't written the name of the companies and I didn't see, notice any writing. I haven't written the name of the companies here. I only signed it.

Q. What other name can you think of that might have been written in there and erased? A. Well, there wasn't any except the Pittsburgh Underwriters in this place. It is in the same handwriting that was written all of them, so far as I can see.

Q. Can you think of any company that could have been put in there and erased and then the Pittsburgh Underwriters written over it? A. No, because we didn't have any policies in existence, any others than those that is here.

Q. Did you have a policy in the Home Insurance Company that had been cancelled, that was still in your possession at the time of the loss? A. No.

Q. Did Mrs. Altschuler have one? A. No.

Q. Didn't she have another one besides the Pittsburgh that had been cancelled and was still in her possession at the time of the loss? A. Not that I know.

Q. But you can't explain that erasure? A. I don't see any erasure.

Q. Well, look at it again. Can't you see an erasure? A. No, I can't see. It is the same handwriting. I didn't write this.

Q. What encumbrances were there on the property at the time of the loss? A. Encumbrances?

Q. Encumbrances, mortgages. A. Mortgages? The Altschuler mortgage.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. Did the total insurance on your hotel, totaling $36,500, include the policy written by Zurlin? A. Yes.

Q. Do you know what the fair value of your hotel was at that time? A. Well, I know we spent more than twice as much to fix it.

Q. And you say it was half burned down? A. Yes.

Q. I show you a letter purporting to be signed by George P. Davis, addressed to you, dated March 20, 1923. Did you receive that letter? A. May I see it?

THE COURT: You don't want to see it yet.

A. No.

Q. That is a letter addressed to you, isn't it? A. It is headed to me.

Q. Do you remember receiving it? A. No.

Q. You don't? A. No.

RECESS TILL 1:30 P. M.

(Trial of the cause resumed at 1:30 P. M.)

ANNA LEVIN, Resumed.

BY MR. BOARDMAN:

Q. Mrs. Levin, you recognize this Exhibit P-2, the proof of loss that you swore to, you verified? A. Yes.

Q. Will you look at the place on the third page of the schedule where the Pittsburgh Underwriters has been written? I call your attention to the fact that it is written in very heavy ink and

Q. You are familiar with the mortgagee clause that goes on to a policy of insurance? A. The mortgagee clause?

Q. Yes. A. Well, naturally if they be insured for a policy, as much as they have for a policy, is that it?

Q. And there was a mortgagee clause on the policy in this case, the Pittsburgh Underwriters, in favor of Mrs. Altschuler, was there? A. I don't know. We gave a policy about—we ordered a policy from Le Compte.

Q. And he wrote it for you? A. And he wrote it for us.

Q. And then he gave it to you? A. Yes.

Q. And you sent it to Mrs. Altschuler? A. I think it was in their possession, yes, and when the fire happened they brought it to Mr. Stansbury.

Q. Not when the fire happened, it was not with Mr. Stansbury? A. After the fire.

Q. But when the fire happened it was with Mrs. Altschuler, wasn't it? A. Yes. After the fire happened, they brought it to Mr. Stansbury.

Q. And did you get it back when you paid off the insurance—I mean when you paid off the mortgage? A. I don't know exactly the date. I could look it up. I don't recollect.

Q. Was the Ohio Farmers sent to Mrs. Altschuler too? A. No, she never had any in the Ohio Farmers.

Q. Did she have the Provident & Washington? Did Mrs. Altschuler have the Provident & Washington? A. Well, I am not sure.

Q. Not sure about that? A. I don't know which ones she had, but she had $15,000 worth. I don't know the names of the companies.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. The writing on the proof of loss, outside of your name, was that done by you? A. No.

Q. Do you know who did it? A. I don't know who made out the proof of loss in their office, there in Milan Ross's office. They brought all the policies and they made out the names and I just signed it.

ALFRED L. STANSBURY, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Stansbury, where do you live? A. 1209 Fourth Avenue, Asbury Park.

Q. What is your business? A. Insurance, real estate and mortgages.

Q. With whom are you connected? A. Manager of those departments in the Milan Ross agency, at 208 Main Street, Asbury Park, New Jersey.

Q. How long have you been in the insurance business? A. Twenty-five or six years.

Q. Did the Milan Ross Agency carry insurance on the Clarendon Hotel building on Fifth Avenue, Asbury Park, owned by Mrs. Levin, that was destroyed by fire December 21, 1922? A. We did.

Q. Did you have anything to do with the adjusting of the loss under such policies? A. I acted as Mrs. Levin's adjuster.

Q. The proof of loss offered in evidence, Exhibit P-2, which I now show you, was that prepared by you? A. Yes, sir; it was.

Q. At whose request or for whom? A. Mrs. Anna Levin.

Q. And from where did you secure the data as to coverage that you used in the proof of loss? A. Regarding the amounts of the policies?

Q. Yes. A. From my own office and from Mr. Ernest Le Compte.

Q. How much did your office carry, do you recall? A. They carried $16,500 on the building, if I am not mistaken.

Q. And how much did Mr. Le Compte's office carry? A. I wish to correct my other statement.

Q. Do so. A. The amounts as stated in this proof of loss were the amounts carried by this office, by our office, as stated here.

Q. You said it was $15,000 or $16,000. Do you want to correct it? A. I want to correct it to read:—It is my error. My momory is a little vague as to the amounts of the insurance.

Q. To what figure do you wish to correct it? A. Because we had some insurance on the contents.

Q. Well, suppose you did; won't you tell us what insurance you had? A. We had $15,500 on the building and we had $5,500 on the contents.

Q. How much did Mr. Le Compte have? A. $15,500.

Q. And how did you ascertain that he had that amout of insurance? A. By personally asking him and telephoning his office later on, the following day after the fire.

Q. Where did you personally talk with him about the matter? A. The following morning, at the place of the fire.

Q. What did you get from him at that time?

MR. BOARDMAN: Just a minute. I object. Now if that is intending to bind the defendant, of course, your Honor is familiar with the law that in an agency of insurance the agecny terminates when he collects the premium, when the policy is written. He is only the agent for the insurance company for writing the insurance; but he is not the agent of the insurance company for the making of admissions or for the adjustment of losses or for accepting proofs or any of those things. His agency ceases when the original contract is perfected. It doesn't mean for idefinitely.

THE COURT: No, but I think he may show, this witness may show, the plaintiff may show where the data was secured from which the proof of loss was made up. I overrule the objection.

(Objection noted for defendants as ground of appeal.)

A. Mr. Le Compte stated to me in the office, in my office, that is, the Milan Ross Agency, in my part of the office; and in order to make certain that they were the correct amounts and companies, I telephoned his office in the afternoon and a lady's voice answered the wire and I asked her——

(Objected to.)

Q. You need not tell us about that. Now will you tell us the insurance that Mr. Le Compte gave you in this talk that you had there?

MR. BOARDMAN: He has already testified to the amount that he had.

THE WITNESS: Well, I haven't surely testified.

Q. What are the amounts and policies? A. The Jersey Fire, $1,500; Excelsior, $4,000; Stuyvesant, $5,000; Pittsburgh Underwriters, $5,000.

Q. After you prepared that proof of loss what did you do with it? A. I mailed it to the Pittsburgh Underwriters at Pittsburgh by registered

Q. Did you ask for a return receipt? A. Yes,

Q. Did you ask for a return renceipt? A. Yes, sir.

Q. What are these papers I show you? A. This is the letter enclosing the proof of loss signed by me, to the Pittsburgh Underwriters, February 28, 1923.

Q. What is this? A. This is the registry notice and this is the return receipt of the postoffice.

MR. CARTON: I offer these.

MR. BOARDMAN: You have got the proof of loss. You may put it in.

(Three papers fastened together marked Exhibit P-3.)

Q. What did you ascertain the total insurance on the building to be?

MR. BOARDMAN: I object. I think what he ascertained is not material to this case. He was not a judge, he was not a court, he was not our agent, and the results of his investigations cannot be material evidence in a court of law.

(Objection overruled. Objection noted for defendant as ground of appeal.)

A. $36,500.

Q. Were you familiar with the Clarendon Hotel before it was destroyed? A. I became familiar with it before it was destroyed.

Q. You carried insurance on it? A. Yes.

Q. Do you know to what extent it was destroyed?

MR. BOARDMAN: I object. That is too indefinite. He can't tell the percentage or anything of that sort. It is not evidence.

Q. Well, did you have any investigation made in regard to the extent of the loss?

MR. BOARDMAN: I object. The result of his investigation certainly is not evidence. That is nothing but hearsay.

THE COURT: He may of course testify from his own knowledge as to the result of the loss.

Q. What was the extent of the loss as a result of this fire?

MR. BOARDMAN: I object to that, that he is not an expert to testify as to the extent of the loss.

THE COURT: I think he should be qualified to express an opinion as to the loss.

Q. For how long a period have you had to do with the adjusting of fire losses? A. Ever since I have been with the Milan Ross Agency, and occasionally in years gone by I settled one or two losses which have passed my memory.

Q. Well, on how many losses do you say you have had to do with the adjusting since you have been with the Milan Ross Agency? A. I couldn't state the number, but the amount of insurance involved runs up into several hundred thousand dollars.

Q. Well, as to the number of buildings involved in these losses, how many would you say there were? A. Two or three hundred.

Q. And have they been cases where there has been total destruction and partial destruction? A. Yes, sir.

Q. And in that experience have you become familiar with the value of structures and the loss occasioned to them by fire? A. I became familiar with them before that.

Q. Were you at the time of this fire familiar with such matters? A. Yes, sir.

Q. Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st of December, 1922?

MR. BOARDMAN: I object. I object first because he is not qualified as a building expert. And in the second place, I would like to cross-examine him before, but I don't like I don't want to waive my objection, because there is nothing better settled than that an insurance adjuster is not qualified to testify as to the damage that has been done. That is not done; it just is not tolerated. These adjustments are not made by an adjuster going and looking at a building; it is made by a carpenter for one side and carpenter for another, the contractors and different people going over it most carefully, and it is all worked out; and it is not done by the adjuster going and saying "That building is forty-seven per cent destroyed." It was probably a pretty good building before it was burned. That is not evidence, but the evidence is of the contractor.

THE COURT: He is asked to express an opinion now as an expert. Counsel has attempted to qualify him as an expert, apart from the fact that he happened to be an adjuster, as I understand the situation.

MR. BOARDMAN: I don't think so.

MR. CARTON: He has gained some experience to qualify him as an expert, as an adjuster. He said independently, long before he was an adjuster, he had this experience.

CROSS EXAMINATION BY MR. BOARDMAN:

Q. You have been an insurance man for twenty-five or twenty-six years? A. Yes, sir.

Q. How old are you? A. Forty-three.

Q. When did you leave school? A. In the neighborhood of fourteen or fifteen, after the death of my father.

Q. And what did you do between your fourteenth year and your seventeenth year? A. Made inspections for the insurance companies.

Q. At fifteen? At seventeen years of age I was inspector in the City of New York in the Fire Insurance Exchange.

Q. And your experience in reference to building has been in connection with your insurance work? A. Yes.

Q. Now, when losses are adjusted, isn't it always, if it is a considerable loss, upon estimates made by contractors? A. As a rule.

Q. And they ordinarily go into the amount of joists and the amount of lumber required to replace, the amount of damaged plaster, bathroom —every detail, isn't it? A. Yes, sir.

Q. And strictly speaking, that is what a proof of loss should contain a schedule, usually of the items of loss; isn't that so? That is the usual practice? A. Quite often.

Q. So the experience of an adjuster is the experience that he derives from the carpenters and the contractors who furnish him the data; is that so? A. In some circumstances.

Q. Now, you are not a carpenter? A. No, sir.

Q. Nor a mason? A. No, sir.

Q. Nor a plumber? A. No, sir.

Q. Never been connected with any of the building trades? A. For about two years I was with the Central Railroad on construction work.

MR. BOARDMAN: I insist, your Honor, that he is not qualified to testify as an expert.

(Objection overruled. Objection noted for defendants as ground of appeal.)

BY MR. CARTON:

(Question repeated as follows): Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st day of December, 1922? A. In the neighborhood of forty or fifty per cent.

Q. And how much was that? A. Thirty-one thousand——

MR. BOARDMAN: I object—I beg your pardon—that he is not an expert in real estate. Now it is getting into a different field.

A. My business is partly real estate, mortgage loans and sale of real estate and closing title for the Milan Ross agency. $31,039.50.

Q. Were there actual contractors or builders called in to verify this loss? A. There were.

Q. How did the estimate they brought in coincide with your figures?

MR. BOARDMAN: Objected to. This is certainly nothing but hearsay.

THE COURT: Yes, that is hearsay, Mr. Carton.

Q. Do you know the estimate brought in by the builders in this loss? A. I do.

Q. Who were the builders? A. Benjamin Robinson for the other companies interested, and Mr. J. W. Brooks for the assured.

Q. Did they agree upon a figure as to damage?

(Objected to as hearsay.)

THE COURT: Yes, that is on hearsay. There is original testimony available.

Q. What was the amount of the Pittsburgh Underwriters' policy? $5,000, wasn't it? A. $5,000.

Q. And what would be its proportion or contribution to the amout of insurance that you have referred to in the amount of the loss? A. $4,251.99.

Q. Do you know whether there were mortgagee clauses on all of the policies of this insurance? A. If my recolecetion serves me right thre were.

Q. All running to Mrs. Altschuler? A. To the best of my knowledge.

Q. Do you know whether Mrs. Altschuler's mortgage was paid off or not? A. It was.

Q. Do you know from what funds? A. Yes, sir.

Q. What? A. Drafts from the insurance funds after depositing in the bank.

CROSS EXAMINATION BY MR. BOARDMAN:

Q. You mailed the proofs of loss to the Pittsburgh Underwriters, did you? A. I had my clerk mail it, yes, sir.

Q. You had your clerk do it? A. Yes, sir.

Q. And why did you send it to the Pittsburgh Underwriters, instead of sending it to Mr. Le Compte? A. This much had been inferred: that they would deny liability; and I preferred to have the proof of loss go direct to the company in order to know that they had been received by them.

Q. The other proofs of loss, you mailed them around to the insurance companies? A. I mailed them to the adjuster representing the other companies, which is always the custom to do.

Q. The adjuster? A. The adjuster.

Q. And the adjuster in this case was the General Adjustment Bureau, wasn't it? A. Yes, sir; represented by Mr. Kling.

Q. The General Adjustment Bureau did not represent the Pittsburgh Underwriters? A. They solicited, but they decided to have their own adjuster, Mr. Haywood, I believe. But they solicited the adjustment of that loss like they do in all cases, like they do with the same kind of a loss.

Q. You mean the General Adjustment Bureau did? A. They did.

Q. And they heard of it by seeing your proof of loss? A. I don't know how they heard of it, whether from the companies or how.

Q. You didn't send—for instance, you didn't send the proof of loss in the case of the Provident Washington to Mr. Zurlin? A. I sent it to the adjuster representing that company, which is the practice.

Q. Yes, that is the practice. The practice is when a fire occurs to be represented by an adjuster and not by the agent; isn't that right? A. The company.

Q. The company, yes. A. In some instances they allow an agent to adjust losses. I adjust many losses for our office.

Q. You didn't feel there was any impropriety because you had written this $16,500 insurance and had represented the insurance companies at the time those policies were written, there was no reason why you should not represent Mrs. Levin in the adjustment? A. Not if she saw fit to ask me, without any fee.

Q. Why didn't you send the policy to Mr Haywood, instead of the Pittsburgh company? A. What policy?

Q. The proof of loss. Excuse me. A. I didn't know Mr. Haywood. I had no communication with him. Mr. Le Compte told me they were going to deny liability and I thought it advisable to send it to the company.

Q. The Pittsburgh Underwriters did not participate in the adjustment? A. They did not put that into the liability, but we brought them in as participating in the loss, or adjuster on that basis.

Q. That is, you put them in with a proof of loss? A. We brought them in, because we became convinced that the policy was not cancelled.

Q. Well, judge, you held court, did you, and decided that? A. I made a thorough search of the mortgagee and the assured, to ascertain the number of policies and the amounts that were in force, like any honest adjuster would do.

Q. Where did you get the Pittsburgh policy? A. Mailed to us after a demand of the mortgagee. Before that it was exhibited in the hands of the mortgagee.

Q. Who was the mortgagee? A. Mrs. Altschuler.

Q. And who looked after her loss? A. I beg your pardon.

Q. Her husband looked after her loss? A. Yes.

Q. And did you see it in Mr. Altschuler's possession? A. The policy?

Q. Yes. A. Saw all the policies in her possession.

Q. What other policies were there in Mrs. Altschuler's possession? A. I just can't enumerate them, but to my recollection all of them. I went there to pay off the mortgage.

Q. Were there any in Mrs. Altschuler's possession that were not included in the proof of loss? A. They were not?

Q. Yes. A. No, sir.

Q. Was there not a policy from the Home Insurance Company? A. No, sir; I never saw any.

Q. Do you represent the Home Insurance Company? A. I do.

Q. Did you ever write a policy on the Home Insurance Company? A. For this assured?

Q. Yes. A. Never.

Q. Did you ever have any of your policies on this property cancelled? A. No, sir.

Q. Has the Home any other agency? A. They have, or did have, but not now. They had a Home Underwriters' Agency, Calvert & Shubert, doing business as the Asbury Park Realty Company.

Q. Do you know whether they issued a policy on this? A. I don't know anything about issuing any other policies. I believe at one time they might have had some policies, but I never saw them. I don't know. It was inferred at one time that they wrote some policies on this property, but there were no policies in evidence at the time of the loss in the possession of the mortgagee or the assured except those enumerated in the proof of loss filed with all the companies.

Q. Was the Provident Washington turned up by the Altschulers? A. Yes, sir. I say yes; I assume so. I don't know just whether they were all paid to the mortgagee or not, and I don't care to state in any case I am not positive.

Q. Did Mr. Altschuler say anything to you about retaining the Home Insurance policy? A. Who?

Q. Mr. Altschuler? A. No, sir.

Q. Did you have some talk with Mr. Altschuler? A Yes, sir.

Q. Did he tell you anything about the insurance? A. Only these policies.

Q. No, I didn't ask you. Did he tell you anythng about the nsurance? A. What do you mean did he tell me?

Q. Did he tell you anything about the insurance on the Levin property? A. No, sir; we never went into any discusion about the insurance except these policies and whether the Pittsburgh Underwriters' policy had been cancelled.

Q. Yes, you did discuss that? A. Yes.

Q. And what did he say about it? A. I asked him if he received cancellation notice and he said no.

Q. And did he say anything more? A. Not to my recollection.

Q. Now search your recollection. Did he say anything about getting a letter when the Provident Washington policy was sent to him? A. He didn't discuss that policy or any of the other policies.

Q. What did you discuss when you discussed whether the Pittsburgh had been cancelled? A. I asked him first to show his policies; we wanted to make up, to get the accurate amount of insurance in order to properly adjust the losses; and he brought out these policies, and there was no Home Insurance policy or no—but there was a Pittsburgh Underwriters'.

Q. There was a Provident Washington too? A. A. Yes, there was. As I say, I know it came up. We had the policy. I had it in my possession before I made the proofs of loss out.

Q. Now, what was said about the cancellation? You went there to represent Mrs. Levin, didn't you? A. I went to represent Mrs. Levin and also my companies.

Q. Oh, you were representing both? A. No, my companies asked me to ask Mrs. Altschuler if she received a cancellation notice for this policy.

Q. Well, you know a policy doesn't have to have any written notice, don't you? A. I never was so instructed by my companies.

Q. You never have? You didn't know that oral notice of cancellation was sufficient? A. I have never been instructed to cancel a policy that way by my companies.

Q. I didn't ask you that. Are you familiar with the terms of the printed standard policies used in this state? A. Partially.

Q. And you know that a policy can be cancelled by the insurer on five days' notice? A. Five days' notice, yes, sir.

Q. But you have considered that that must be in writing, have you? A. I have always been informed to do that way by my companies.

Q. I see, that has been your understanding, yes. A. They would never allow me to take credit for return premium if I did not show a cancelled policy to them or its equivalent. I don't think any other company will.

Q. Are you familiar with the other clauses in the policy? A. Which do you have reference to?

Q. Well, are you famliar with the co-insrrance clause, eighty per cent? A. Yes.

Q. Eighty per cent co-insurance clause? A. Yes.

Q. What is that? A. The eighty per cent co-insurance clause reads that at the time of the fire if the property insured under said policy is not insured up to eighty per cent of its value at the time of the fire the insured becomes a co-insurer for the difference.

Q. The eighty per cent clause was in all the policies in this case? A. Not on the contents part clause, but on the building policies.

Q. You made up the proofs of loss? A. Yes, sir.

Q. And what did you put in as the value of the building, sound value? A. $45,000, the amount arrived at by the two contractors.

MR. BOARDMAN: I move that be stricken out, the amount arrived at by the contractors.

THE COURT: It may be.

Q. The eighty per cent of that you can tell us, can you? A. Eighty per cent of that?

Q. Yes. A. Eighty per cent of $45,000.

Q. That would be $36,000? A. $36,000, right.

Q. And leaving out the Pittsburgh Underwriters, how much insurance did Mrs. Levin have? A. $31,500.

Q. Therefore, if you don't put in the Pittsburgh Mrs. Levin would have been a co-insurer for $4,500? A. I don't care to answer that in that way. If I didn't put it in—I don't know what you mean by that.

Q. Leave that open. If you didn't put it in, Mrs. Levin would have had $31,500 and Mrs. Levin would have been a co-insurer for $4,500, wouldn't she? A. She would have, on that basis.

Q. And she didn't collect with the Pittsburgh in practically the same amount as the most she could have collected with the Pittsburgh left out? A. That is true, but that was never taken in consideration in arriving at the amount of the loss and the value of the building.

Q. Do you mean you didn't think that through? A. I certainly do.

Q. You do what? A. I certainly do mean to say that I didn't take that into consideration or the other contractors or the adjuster, Mr. Kling, the Adjustment Bureau, at the time of estimating the loss.

Q. What were you hired for? A. I was not hired.

Q. What were you employed for. What was your duty? A. I was asked by Mr. and Mrs. Levin to represent them in these losses. It had been their first fire. And we give personal service to our clients in all losses.

Q. Let me ask you, did you see no impropriety in a man acting both for the insurance company and for the insured? A. In lots of instances, no. In some I would. Where there is a question as to the origin of the fire there may be.

Q. So it is a fact that by putting the policy in, the Pittsburgh Undrewriters in, she did not run a risk of serious loss and she did stand to gain? A. She loses this way; if the Pittsburgh Underwriters do not contribute.

Q. Will you do that example? A. Well, I will have to figure it out.

Q. Yes, you are an expert of twenty-five years' standing. It won't take you but about a minute. A. It might take me about twenty minutes to figure that out.

Q. To apportion the amount of loss? A. I will have to reapportion the whole loss, your Honor.

THE COURT: Well, you don't have to do that. You are not required to do that.

Q. Can't you do that in two minutes? A. I cannot.

Q. Is it general practice for the adjusters for the companies to make up the proofs of loss? A. It has been so in my territory.

Q. But in this instance you made up the proof of loss? A. Yes.

Q. Can you tell us why that departure from the ordinary practice? A. Yes; Mr. Kling of the Adjustment Bureau said said that he did not care to take sides. because at times he gets adjustments of losses from the Pittsburgh Underwriters and he didn't want to take a stand on it.

Q. Then there was a good deal of talk about there having been a cancellation at that time, was there not? A. Yes, it was some time after the fire.

Q. Quite a while after the fire? A. Sir?

Q. Quite a time after the fire? A. Yes, because at the time of the fire we didn't know any question about the status of the Pittsburgh Underwriters.

Q. Wasn't the question raised almost immediately? A. No, sir.

Q. Not with you? Whom did you talk with about the loss after the fire? Who came to see you? A. Who came to see me?

Q. Yes. A. I went down to the fire. I was ill the day of the fire and didn't know anything till the next morning. I went down to the fire and met Mr. Le Compte and Mr. Levin and Mr. Brooks, the contractor.

Q. And did Mr. Levin talk to you about it? A. Only in a general way, as any other client would in a time of fire.

Q. And did you offer to do this work? A. Yes, sir.

Q. Mr. Levin didn't ask you, so you volunteered? A. He said, "Do you think I need an adjuster?" I said, "You never need an adjuster with the Milan Ross Agency. We give them that service."

Q. Oh, yes; I see. And so you volunteered to do it for Mr. Levin? A. Yes.

Q. And you had a good many conferences with him? A. He was not even there at the time we arrived at this amount of the loss. She was not or he was not.

Q. Were you? A. Yes, sir. The assured didn't delegate anybody but myself with authority to close for him.

Q. Did you accept these figures for Mrs. Levin? A. I did.

Q. Did you talk it over with her or with him? A. I did not. I notified them that evening that we had closed. The loss was closed before 5.29 in order for Mr. Kling and Mr. Brooks to get that train and I notified them that evening.

Q. I come back to that eighty per cent clause for a minute. This is simply to show that this is an example that you would have to do with just a little change in a few figures. If the value of the property was $45,000 the eighty per cent clause would require $36,000 of insurance. The assured, we will say, has $32,0000 of actual insurance and $4,000 of doubtful insurance. Now if he leaves out the doubtful insurance he would become a co-insurer for $4,000, wouldn't he? A. He would.

Q. And he would become a co-insurer for one-ninth of the total insurance? A. Provided that is figured out correctly.

Q. Well, have I done it right? 32, 36; 4 is one-ninth of 36? A. I will assume that your figuring is correct.

Q. And I will put it so simply that you can carry it in your mind. A. Yes.

Q. Am I wrong? A. No.

Q. $4,000 is one-ninth of $36,000? A. Yes.

Q. Now suppose there is a loss, we will say, of $27,000. The assured carries $3,000 and the other companies, where they are undisputed, paying $24,000; is that right? A. Yes.

Q. Now it is as simple as that. Now if the doubtful company is included, the same example exactly, only the doubtful company would stand for the $4,000; that would be included. I will put it this way: If the doubtful company were included the assured would stand to save $3,000 and not to lose a cent; isn't that right? A. Yes.

Q. In that issue? A. Yes.

Q. In the schedule annexed to the proof of loss and part of the proof of loss, the several insurance companies are written. Is that your handwriting? A. Yes, sir.

Q. Will you look at the Pittsburgh Underwriters and explain to us how it comes that the Pittsburgh Underwriters seems to be written in heavier ink, with a heavier hand, than the others? A. Because I left my fountain pen home that day and a little hair got in the pen that day and it started to blur heavy. You notice it did here, the hair out again here.

Q. Now will you tell us what you wrote before you wrote the Pittsburgh Underwriters on that same line? A. I had one time written the amount in lead pencil there.

Q. But there is something in ink that is partially erased. Will you tell us what company you started to make? A. I don't recall having made any erasure in ink.

Q. But can't you see there is one with your eye? A. Yes, it looks it but I don't recall it. Of course I could have made an error; I am not infallible. You know as a notary I wouldn't allow anything changed after I took a sworn affidavit.

Q. Why when you made up that proof of loss didn't you put in the name of the encumbrancer and the nature of the encumbrance? A. Did I put the amount?

Q. Yes. A. Probably an oversight on my part.

Q. You didn't state what it is? A. Probably an oversight on my part.

Q. Isn't it usual to have a proof of loss accompanied by an itemized estimate of the loss from a contractor? A. It is in most instances. I didn't think it necessary in this case. I had not been employed by them.

Q. If you knew that this policy was questioned wouldn't that have a tendency to make you more careful rather than less careful? A. You would ordinarily think so.

Q. You search your memory. Didn't you think that you did realize that under the eighty per cent clause it didn't make much difference whether or not you put the Pittsburgh in? A. I did not. The amount of the loss and the value of the property was arrived at without taking into consideration the amount of the insurance. We arrived at the amount of loss, then the two contractors went at the building to get the sound value less depreciation, and they finally agreed on $45,000, and the appraisers and Mr. Kling, who represented every company except the Pittsburgh Underwriters, and Mr. Kling and I finally agreed on figures, and I on behalf of Mrs. Levin and Mr. Kling on behalf of the other underwriters, stated in that proof of loss.

Q. You said that was all stated in the proof of loss? A. No, I said we agreed on the figures as those figures stated in the proof of loss.

Q. Was there a chattel mortgage on this property? A. I found out that there was.

Q. Did you state that in the proofs of loss? A. The premises covering the contents are all aware of it and adjusted their loss without any qualification. It was written in my company office. And I will say right here that I found out then for the first time that it was customary in making any loans on hotels to include the chattels in order that in the event of foreclosure the mortgagee would have something to run the hotel with. And they were both made

and recorded and went in the same day. The search in the Clerk's Office disclosed it.

Q. That both the chattel mortgage and the real estate mortgage? A. Yes. The chattel mortgage was only given to help secure the first mortgage.

Q. Now you have been in this business a long while, haven't you? A. Twenty-five or six years.

Q. When the companies consider a loss they consider two things, the moral risk and the property risk, don't they? A. The moral risk and the physical.

Q. The moral risk and the physical, yes. The question of whether or not there is a chattel mortgage on the property is a question that is considered in considering the moral risk, isn't it? A. In most instances it would depend upon whether it was made, the lien was on the chattels, at the time of the purchase. In other words, often insurance companies where a chattel mortgage is made on the purchase, they often are inclined to write the insurance because that dosn't show that the assured is running a losing business.

Q. Isn't the fact of the existence of a chattel mortgage one of those facts which ought to be disclosed in a proof of loss? A. It would where the companies are covering under the things that are chattels.

Q. Why not in other cases? A. I would think it irrelevant.

Q. Well, that $15,000 that was on the property was partly evidenced by chattel mortgage and partly was real estate mortgage, I understand? A. The chattel mortgage was a separate mortgage.

Q. I know, but it secured the same debt? A. It secured it but I knew none of that until afterwards.

Q. Afterward when? A. I knew none of that until the proofs of loss had been filed.

Q. You mean to say that Mrs. Levin concealed that fact from you? A. Mrs. Levin didn't conceal it. Mrs. Levin said she didn't know how the mortgage read; and I went down to Jersey City and called on Mr. Altschuler and he said that he took over a building and loan mortgage. The building and loan held a mortgage when Mr. and Mrs. Altschuler owned the property. Mr. and Mrs. Altschuler sold it to Mrs. Levin. I can readily understand why the owner would not be entirely familiar with that procedure, as a mortgage man, in addition to my insurance knowledge.

Q. What is the clause in the policy about the chattel mortgage provision, can you tell us? A. I couldn't read it off-hand and nobody else could read the whole printed conditions of the policy. It was not concealed from your company. Your company covered the building.

Q. Whom did you shake your hand at? A. I didn't shake it at anybody. Please don't insult me. My character will stand investigation.

Q. As an insurance man don't you consider the existence of a chattel mortgage a very serious matter in considering the validity of a risk? A. You mean moral?

Q. Yes. A. In some instances I would.

Q. And it is universally so considered, isn't it? A. Yes, I believe it is. The companies covering contents of that where a chattel mortgage would

apply have paid that loss.

Q. What? A. The companies covering contents of that where the chattel mortgage would apply or cover paid that losss.

Q. They were represented by you? A. Yes. Not in that adjustment they were not. Mr. Kling represented the companies in the adjustment of the loss.

Q. But your companies, though, would be larely influenced by your recommendation, wouldn't they? Haven't you great influence wth your companies? A. I don't want to appear to be conceited. . I don't know, as a matter of fact.

Q. I understand. A. I don't know whether I have or not. I would have to try them out.

Q. But you have influence with your companies, haven't you, or you wouldn't be their agent? A. Morally, I have influence.

Q. And you represented this company that covered the insurance? A. Companies.

Q. Companies that covered the personal property, fire companies, and you also represented Mrs. Levin? A. I represented Mrs. Levin in the adjustment of the losses.

Q. Now will you tell me if there is any other explanation than you have given why it was not put in there, a mortgage held by Mrs. Altschuler, or a mortgage recorded—— A. I honestly have no other than I answered before. It probably was an oversight. Your Honor, I have stated that I did not know at first, after completing them, that there was a chattel mortgage.

BY THE COURT:

Q. Well, this proof of loss of course included the companies that covered the contents? A.

That proof of loss is an exact copy of the others filed by Mrs. Levin with the other companies.

Q. Yes, but I mean among the policies listed here is the policy covering the contents? A. Yes, every one of them. It shows in under the second item, second column, whether they cover building or contents. They are all supposed to be alike, the proofs of loss are.

Q. Let me ask you. You have testified that the total amount of insurance was $36.500? A. Yes, sir.

Q. That included $5,000 on the contents? A. No, sir.

Q. It didn't? A. No, sir. There was $5,500 on the contents with a sound value shown at the time of $10,000. $5,500 contents, with a sound value of the contents shown to be $10,000.

Q. Well, am I correct when I say that the total amount of all these policies is $36,500? (The witness explains to the court at side bar.)

Q. Well, then, what is the total amount including the insurance on the contents? A. $42,000.

Q. That is correct, is it? A. On the building and contents.

By Mr. Boardman:

Q. Those facts were not given, that this $15.000 was secured by two mortgages, one real estate mortgage and one chattel mortgage? That information was not given to the Pittsburgh Underwriters, was it? A. The Pittsburgh Underwriters?

Q. Yes. A. Only the information in this proof of loss as far as I am aware.

Q. Is it in there anywhere? A. No, sir.

Q. Now it was not because you didn't know about the chattel mortgage that you didn't say that $15,000 was secured by a real estate mortgage? That is not the reason, is it? A. No, sir; there is no attempt at concealment of any of the facts.

Q. And wouldn't it be natural to put in where is says right there, where your attention is called to it with a particular line, it says, "State the nature and amount of encumbrances at time of fire," and you put in $15,000—"State the nature"—you were a notary public as well as other things? A. Yes, sir.

Q. The nature of it; there is no attempt to state the nature of it? A. The mere fact that I am a notary would have no bearing on that part of it.

Q. But can you imagine why you didn't put in the nature of the encumbrance, when it turns out now that it was both a real estate and a chattel mortgage? A. I cannot.

Q. Did you learn in your investigation that Mrs. Altschuler is some relation to Mrs. Levin or Mr. Levin? A. I learned there was some distant relationship between them; just what I don't know.

Q. And let me understand; these mortgages were originally given to whom? A. I didn't make a search of the premises. I understand that the Home Building and Loan Association of Asbury Park originally had a mortgage on there when Mrs. Altschuler owned the premises. I was given to understand—this is on my investigation—that Mrs. Altschuler sold the premises to Mrs. Anna Levin and the Altschulers took over these mortgages.

Q. And the Altschulers, her cousin, took over the mortgages? A. Took over the mortgages as part payment.

Q. At the same time? A. Part payment.

Q. Therefore, when they bought the property, the condition of those mortgages was a matter which entered into the transaction, wouldn't it be, if that is a correct understanding? A. Well, in a mortgage of that kind I don't think they would ordinarily know that the——

Q. I mean and see the mortgage. A. The Home Building Loan assigned the mortgages over to Mrs. Altschuler. Mrs. Levin didn't make the mortgages, as I understand it; the Home Building and Loan assigned them over.

Q. Yes, but she procured her distant relative to take an assignment of the mortgages at the time she bought the property? A. She took it back as part purchase price, she having owned the property, is what I am given to understand. I didn't search the premises, I am only told that.

Q. How long had the Levins owned this Hotel Clarendon in Asbury Park? A. I couldn't answer that question.

Q. Well, about. How long have you been writing insurance for them? A. I wrote the insurance the previous October to the fire.

Q. They bought it recently? A. They didn't buy the hotel through our agency.

Q. No, but they bought it recently, didn't they? A. I think they had owned it a couple of years, two or three years.

Q. Two or three years? A. I think so; I am not positive.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Kling, Mr. Stansbury, was the representative of the General Adjustment Bureau, was he not? A. Yes, sir.

Q. And the General Adjustment Bureau in turn represented the companies outside of the Pittsburgh? A. Yes, sir; that is all they do represent. is companies in the adjustment of losses.

GEORGE R. DAVIES, sworn for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Davies, you represent the Pittsburgh Underwriters? A. I do. I am the executive head.

Q. I show you a letter. Was that letter written by you to Mrs. Levin? A. It was.

Q. Did you write this letter? A. I did.

MR. CARTON: I wish to offer it.

MR. BOARDMAN: No objection.

(Letter marked Exhibit P-4.)

CROSS EXAMINATION BY MR. BOARDMAN:

Q. What is the Pittsburgh Underwriters? A. The Pittsburgh Underwriters is an association of four companies issuing a policy of insurance underwritten by the assets of four companies, namely, the Allemania Fire Insurance, the National Ben Franklin and other companies named heretofore.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

MR. BOARDMAN: May it please the court, I move for a non-suit upon the following grounds:

1. That it now apears from the evidence that Mr. Le Compte at the time he wrote the policy was acting as agent for both parties, for Mrs. Levin and the Pittsburgh Underwriters.

2. That the policy of insurance contains a provision requiring that "If fire occur, the insured shall give immediate notice of any loss thereby in writing to the company"; that admittedly no notice was given to the company immediately.

3. That no proof of loss was filed within sixty days of the fire.

4. That the proofs of loss do not comply with the requirements either of the form or with the requirements of the policy. It is required that the proof of loss shall show "the cash value of each item therein, the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of the said property."

5. That the proofs of loss are defective in failing to disclose the existence of the Ohio Farmers' policy, which their own witness testified was in existence, and in failing to disclose the nature of the encumbrance. The only information given was that the encumbrance was $15,000. The nature of the encumbrance now turns out to have been a bond, secured by both a real estate mortgage and a chattel mortgage, and it appearing that the existence of a chattel mortgage is always a matter of vital importance in the question of moral risk and a matter which the insurer had the right to be informed.

6. The plaintiff affirmatively appears to have sworn falsely in filing the information in respect to the nature of the encumbrances. The last proof that we have is that within two or three years before, when Anna Levin bought the property, her distant relative or representative, Mrs. Altschuler, bought the encumbrances, and that the relieving of the seller of the encumbrances was part of the transaction. Therefore it appears affirmatively that the matter must have been in the mind of the assured at the time she made her proof of loss.

7. We respectfully submit that there is no basis for damages shown; that there are no damages uncompensated for. The proof of loss, which is binding on the plaintiff, although in evidence in her behalf, states the sound value at $45,000. Mr. Le Compte, the witness called by the plaintiff testified that the building was about half destroyed. That would make the damage about $22,500, and they have received, according to the plaintiff's testimony, $27,000. Therefore, there is no damage remaining unaccounted for.

Now those are the points, and I will turn to my argument.

(Mr. Boardman argues and Mr. Carton replies.)

MR. BOARDMAN: I also make a motion for non-suit on the ground that it affirmatively

appears that the policy was cancelled and notice was given of its cancellation.

And further that it appers affirmatively that the policy was cancelled by the home office and the policy of the Ohio Farmers was substituted for it by Mr. Le Compte, who was the agent of the assured for the purpose of writing insurance and procuring new insurance. That appears affirmatively.

THE COURT: I will deny your motion, Mr. Boardman. I think that this is a jury question.

(Objection noted for defendants as ground of appeal.)

DEFENDANTS' TESTIMONY:

GEORGE R. DAVIES, sworn for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Mr. Davies, you are the executive head of the Pittsburgh Underwriters? A. Yes, sir.

Q. And you told us that was an organization of four companies, which organization carries on an independent insurance business? A. I stated an association rather than an organization; practically a department of four companies which are a corporation.

Q. What is the territory in which Mr. Le Compte is authorized to write policies?

MR. CARTON: I object to that, your Honor, I don't think that makes any difference. There is no limitattion of his agency according to the policy and according to the proofs which appear in this case.

MR. BOARDMAN: I won't press the question if we can get the certificate.

Q. He had a certificate, did he? A. He did.

Q. And his agency was defined in that certificate? A. It was.

Q. I will ask, is Asbury Park in the Lakewood district? A. It is not.

Q. Generally speaking, is Asbury Park as desirable a locality to write insurance in as Lakewood? A. It was not, so far as we were concerned, because we had cancelled it due to the fact that we had a very excessive loss ratio.

Q. When did you first hear of this policy that has been marked in evidence P-1? A. When did I first hear of the policy being issued?

Q Yes. A. Oh, around about July 1, 1922.

Q. Did it come to your attention? A. It came to the attention of our assistant manager.

Q. What was done? A. On July 3rd the following telegram was sent to Mr. Ernest Le Compte, 313 Second Street, Lakewood, New Jersey, dated July 3rd: "Cancel quickly 6330175 and 76. Asbury Park prohibited territory." (signed) Pittsburgh Underwriters."

Q. Have you a copy of that telegram? A. I have.

MR BOARDMAN: I offer it in evidence.

THE WITNESS: I also have a copy of the confirmation by letter if you want it.

MR. CARTON: I object to this copy, your Honor.

MR. BOARDMAN: I haven't the original. Do you want us to prove by Mr. Le Compte

MR. CARTON: I surely object to the copy. that we haven't got that copy?

MR. BOARDMAN: Well, I insist on it for this reason. Mr. Carton, with extreme caution has called for it. (Reads): "You are hereby notified and authorized to produce on the trial of the above-entitled action the originals and copies of any and all correspondence passing between Ernest Le Compte, Lakewood, New Jersey, and the defendants, etc."

In responding to that, I say I haven't the original. It went to a man who is no longer our agent, we have no control over it, and offer this from our files.

MR. CARTON: The effect of serving notice to produce, if it is not admissible in any other way, that does not make it admissible. Because I ask for papers does not make them admissible.

THE COURT: No, I am sure of that. I think there is objection to this telegram, the copy, based upon the ground that it is a copy of the telegram——

MR. CARTON: Yes, your Honor.

THE COURT: I shall sustain the objection. The witness certainly can testify as to the fact that a telegram was sent and what the contents of the telegram were.

Q. The contents of the telegram that you have, you know that was sent on July 3rd? A. It was.

Q. Was that followed up by a letter? A. It was.

Q. Have you a copy of that letter? A. I have, dated July 3rd, addressed to Mr. Le Compte, the same as the telegram. It reads——

MR. CARTON: Objected to.

THE COURT: Do you call for the production of the letter?

MR. BOARDMAN: He is not a party to the suit.

THE COURT: Mr. Le Compte is not a party?

MR. BOARDMAN: Not a party. I will put Mr. Le Compte on. (To Mr. Le Compte): Have you the orginal of that, Mr. Le Compte, the letter following the telegram?

MR. LE COMPTE: I am not sure. (Produces letter).

Q. Is this the original of that letter (Letter shown witness)? A. It is.

MR. BOARDMAN: I offer the original of the letter in evidence.

MR. CARTON: May I see it, Mr. Boardman?

MR. BOARDMAN: Yes.

(Mr. Carton examines letter.)

MR. CARTON: No objection.

(Letter marked Exhibit D-1.)

A. Do you want me to read it?

Q. Yes. A. This letter is dated July 3, 1922, addressed to Mr. Ernest E. La Compte, 313 Second Street Lakewood, N. J. (Reads letter).

Q. Did you follow that up with other letters with similar instructions? A. We did.

Q. Can you give us the dates? A. Yes.

Q. Give us the dates when you wrote to Mr. Le Compte concerning this. A. Am I permitted to read the letters?

MR. CARTON: You haven't been asked that.

Q. Just give us the dates. A. July 31, that was followed up, 1922, August 23, 1922; October 7, 1922, October 27, 1922; on which date we also wrote our special agent, John A. Lance, of Reading, Pennsylvania, who covered this territory, in reference to the cancellation. Mr. Lance

---

MR. CARTON: I object. There is no question.

Q. Don't volunteer. A. We then followed up the letter again on December 14, 1922. So that we were after him continually up until that time. The fire occurred December 21, 1922.

Q. Was any notice in writing ever given to the company immediately upon this loss? A. You are speaking of this in December?

Q. Yes. A. There was not, either in writing or otherwise, excepting the purported proofs of loss.

Q. And they came in—— A. Some time in the fore part of March, 1923. I think it was about March 3rd, from memory.

Q. I suppose this will show it, March 2nd? (Paper shown witness.) A. March 2nd.

Q. Did the company participate in the adjustment? A. We did not.

Q. You have had experience in fire insurance, I take it? A. I have.

Q. Will you tell us what difference between the amount of recovery by including the Pittsburgh Underwriters and the non-including of the Pittsburgh it would make, provided that the Pittsburgh Underwriters' policy was eventually disallowed? A. If you will allow me to have the

proof of loss which is admitted in evidence, I will give you the exact figures in a second.

(Paper produced to witness.)

A. The assured collected on the building which our policy originally covered, $26,787.51. Had not the Pittsburgh Underwriters' policy been included, they would have been co-insurers to the extent of $4,500 and the amount of loss which would have been paid the assured would have been $27,158.69; or, in other words, she would only have been penalized $317.18 by not including our policy; and by including it they have made a claim on us for $4,251.99.

Q. Now if, instead of citing the other loss, or $31,000, was it, or $30,000? A. $31,039.50 is what they claim was the loss on the building.

Q. If that loss had been tucked up to $36,000, then the eighty per cent clause would not have worked? A. Would not have applied.

Q. And they would not have stood to lose a cent in that event in putting in the Pittsburgh Underwriters? A. They would not.

Q. The figures that are put in the proofs of loss—and you have heard the testimony of how this proof of loss was made out—are not the original claims of the assured but the corrected claims after an adjustment had been arrived at in this case, we will say, with the other companies is that right?

MR. CARTON: Objected to as characterizing what proofs of loss generally contain.

MR. BOARDMAN: All right. I think it is already in the testimony, Mr. Carton.

CROSS EXAMINATION BY MR. CARTON:

Q. You are the executive head of these four companies, are you? A. Of the Pittsburgh Underwriters Department.

Q. Which is made up of these four companies? A. It is.

Q. And how long have you been acting in that capacity? A. As the executive head?

Q. Yes. A. Fourteen years February first, last.

Q. And still acting? A. I am.

Q. How long had Mr. Le Compte been your representative or agent? A. Well, for several years; I can't recall exactly.

Q. Several years prior to 1922? A. Several years prior to 1922.

Q. And had he written considerable insurance for you in his territory? A. Well, it was a fair amount of business.

Q. As agent for these companies, for your company? A. Yes.

Q. You say he is not your agent now? A. He is not.

Q. Since what time? A. He has not been our agent since—I think it was September, 1922, when he was suspended.

Q. When? A. September, 1922, when he was suspended.

Q. What do you mean, suspended? A. Requested to cease writing any further policies, cease writing, binding or renewal, any more insurance for our account.

Q. Why was he suspended? A. Well, there were several reasons. At that time we had some trouble in connection with remittances.

Q. What do you mean by trouble? A. In collection of balances.

Q. You mean he didn't make his monthly return to you? A. Oh, he made his monthly returns, but the payments were not coming in in a satisfactory way.

Q. Had you had that trouble before July 1, 1922? A. I don't recall of any prior to 1922 at all, no.

Q. Well, you say you suspended him some time in September, 1922? A. I think September was the first suspension.

Q. Was the first time you ever had any trouble with him? A. I think it was, from memory; I wouldn't say absolutely sure.

Q. Was that the reason that you instructed him to cancel these policies you refer to, because he didn't make remittances? A. Well, of course, we also had in mind that his carrying out of our instructions on this cancellation was not entirely satisfactory.

Q. He didn't carry out your instructions satisfactorily in cancelling this policy? A. We had ordered the policy cancelled, as I stated before in the testimony a while ago, July 3rd, and we hadn't yet succeeded in securing the policy; it had not been returned.

Q. You wrote him on all these various dates from July 3rd to September 14th? A. Yes, sir; we did.

Q. And still you couldn't get him to cancel it? A. I didn't say we couldn't get him to cancel it. We had not succeeded in getting the cancelled policy in to complete our records.

Q. Did you want the cancelled policy in? A. We surely did.

Q. Why? A. Because we wanted to be sure beyond peradventure of question that there is no possible likelihood or chance of ever being a suit brought under it.

Q. You want to be sure the policy is in your possession and there is no possibility or likelihood of suit? A. That is the only sure way we can have of placing ourselves in a position so that no suit will ever be bronght under our policy.

Q. What practice do you require of your agents in canceling policies? A. Well, what do you mean by that?

Q. Don't you know what I mean by the question? A. No.

Q. What is the practice that you impose upon your agents as to their method of cancelling your policies? A. When we write an agent for the cancellation of a policy, it matters not to us whether that agent gives immediate notice in writing to the assured of the cancellation of that policy or he goes to the assured and secures the policy right from the assured.

Q. But you appreciate you haven't answered my question at all? A. I don't appreciate anything of the sort. I thought you asked me what we expected the agent to do. We expect him to get in our policy.

Q. What lour requirements are. A. Our requirements are for him to cary out our instructions.

Q. What your requirements are. A. Our restructions were to cancel that policy.

Q. But you left it to him to cancel it any way he pleased? A. It matters not to us how he gets that policy in, so it is cancelled, how he carries out our instructions.

Q. But he never did satisfy you that he properly cancelled this policy, did he? A. We have every reason to believe that he did order the policy cancelled.

Q. Answer the question, please.

(Question repeated.)

A. We never suceeded in getting the policy in.

Q. You haven't answered my question yet. A. Well, if you want me to answer yes or no, of course I will say yes.

Q. Yes what, that he had cancelled it according to your satisfaction? A. Well, sir, Mr. Carton, if you were handling a thousand policies per day going in and out, and having to make cancellations going in and out, I don't think that you would continue to do business unless your records were complete.

Q. You have a regular method in your office as to the manner in which you desire to have your policies cancelled, haven't you? A. As to the manner?

Q. Yes. A. I told you before——

Q. Have you or haven't you? A. We haven't any particular manner.

Q. Do you provide a notice for the agent to use for that purpose? A. Do we provide a notice?

Q. Yes. A. Not necessarily so.

Q. Well, you do, don't you? A. No, sometimes we will, if they want to send out a registered letter and authorize cancellation, we will give them blanks for that.

Q. Isn't it the practice of all reputable companies to have a form of notice to send to the owner and mortgagee, five days' notice? A. No, only when it is a registered letter.

Q. Isn't that the method you pursue? A. No, not once in a hundred times, I will venture to say.

Q. You risk this careless method of account, do you? A. If you were familiar with the home office of the insurance company you would not consider it a careless method.

Q. You consider it such, don't you? A. When we haven't secured immediately——

Q. You consider it a careless method, don't you? Now be fair and answer the question. A. I want to be fair, but I don't want you to put words in my mouth which are not there.

Q. You only answer the questions. A. We were after that policy, of course, and kept after that, right after Mr. Le Compte to send it in.

Q. Well, don't you infer by that that he had taken care of it satisfactorily to your view? A. He could have taken care of it and relieved us of liability and yet we would not be satisfied until we had the policy in our possession.

Q. There is a regular and approved method or manner of cancelling policies, is there not, under the policy? A. Why, no, not in the policy. If you want to cancel it by registered letter, give a man notice in writing——

Q. Don't you furnish your agents with a form notice to send to the owner or mortgagee? A. In some cases.

Q. You don't in all cases? A. No; we don't by any manner of means.

Q. You had this policy Exhibit P-1 printed with Le Compte's name on, didn't you? A. We did.

Q. And sent it to him? A. Yes.

Q. As your agent? A. We did.

Q. And you furnished him with supplies, didn't you? A. We did.

Q. Among those supplies was a form of notice which he was to send out to the mortgagee or owner? A. The chances are that there was not.

Q. Was there or not? A. Very seldom do we ever send out registered letter notices of cancellation to our agents, due to the fact that we do not want to encourage cancellations in that way, and therefore we very seldom send them out, excepting when he requests it. That is what you want?

Q. What do you instruct your agent to do? A. We instruct him, as I stated in this letter, "Please cancel that policy and quickly."

Q. And let him use his own judgment as to how it should be done; is that right? A. As long as he is our agent, we recognize him as having sufficient knowledge how to cancel a policy.

Q. And when you found out by writing him for months instructing him to cancel this policy, did you have any doubt whether he knew of the proper way to cancel it or not? A. We didn't receive any information from him.

Q. Did he ever send you back any evidence that he had cancelled the policy, but a receipt or notice or registered letter or return of the policy or anything of that sort? A. He had not.

Q. Why didn't you then instruct him how to cancel it? A. We did instruct him on December 14, 1922, the letter which I referred to you as being the last letter written him.

Q. Seven days before the fire? A. Seven days before the fire. We didn't have a chance to

follow out what we were going to do, that unless he sent in that policy, we would immediately notify the assured by registered letter, which follows that day. We can't go over his head and notify the assured of the cancellation of a policy. It naturally would have gotten him in wrong with his client, and therefore we hesitated about doing that in this case, which is customary.

Q. My dear sir, this man was not your agent at that time; he had been suspended. A. He was only suspended. He was our agent in a sense. He could not renew, bind——

Q. In what sense was he your agent? A. He was our agent except that he could not bind or renew any more business.

Q. For every other purpose he was your agent yet? A. He was our agent so far as he was concerned. He was only suspended.

Q. Did you suspend him more than once? A. I don't believe that suspension was ever lifted, from memory.

Q. Did you finally expel him? A. No, we didn't expel him.

Q. How do you get rid of an agent when you are through business with him? A. Simply close the agency up and not renew his license at the end of the current year.

Q. Did you do that with respect to Le Compte? A. We did. We didn't renew his license, and I am not sure in New Jersey whether it is January, February or March 1st. It is different in almost every state.

Q. When was it you didn't renew his license? A. Well, the end of the year in which licenses were necessary for the new year, whatever month that would be; I don't know.

Q. With relation to 1921, 1922 or 1923? A. Oh, well, that would be the fore part of the year 1923.

Q. The fore part of the year 1923? A. Yes.

Q. That was after the dispute arose with regard to the loss under this policy, wasn't it? A. After the dispute?

Q. Yes. A. The fire occurred December 21, 1922.

Q. Yes, and you knew that there was a claim being made on you at that time, didn't you? A. We did not.

Q. Didn't you take up with Le Compte after the fire the policy, whether he had actually cancelled the policy or not? A. Well, we may have done that.

Q. You usually get very busy when there is a fire, don't you? A. Wait a moment now. We may have taken that up with Mr. Le Compte; in fact, we were talking about that letter of December 14th, which shows that we did that; and then we received a letter—I remember now—when we wrote that letter of the 14th to Mr. Le Compte in which we notified him that unless he sent that policy in without any further delay that we would notify the assured. He replied to that letter.

Q. I haven't asked you what he replied. A. I am going to answer your question if you want it answered.

Q. I haven't asked you that. A. But you wanted to get me to answer as to whether we wrote Mr. Le Compte after the fire, didn't you?

Q. Yes. A. If you want me to answer it, I will answer it in my own way.

Q. Did you write him after the fire? A. Completing that answer which I was just going——

Q. No, I am not going to let you complete it because it is not responsive. A. Well, it is confirmatory, at least, right in with that. He wrote us a letter——

Q. Did you write him after the fire? A. We certainly did.

Q. I show you this notice. You are familiar with this form of notice, are you not? A. Well, I want to state——

Q. Are you or aren't you? A. I am familiar with cancellation notices, but I have never sent out a notice like that. That wouldn't pass muster with the Pittsburgh Underwriters.

Q. Would not? A. No.

Q. What would pass muster with the Pittsburgh Underwriters? A. One which we deem is absolutely legal in every respect.

Q. Fireproof? A. You might say fireproof.

Q. Was that the one that you sent to Mr. Le Compte to use? A. No, I don't know that we ever sent Mr. Le Compte any.

Q. Why didn't you? A. If he ever asked for any, we sent them to him. If he didn't we didn't send them to him.

Q. Mr. Davies, when you say you notified him to cancel this policy July 3, 1922, and when you had to write him for months after that until December, and hadn't got a satisfactory result, why didn' t you instruct him and send him one of these notices that he could use? A Rather than do that we would have written direct to the assured and sent a registered cancellation notice to the assured.

Q. Don't you know it is the regular practice, at least in this district, for the agent to send these notices of cancellation to the insured? A.

I want to let you know this: that I have not—and I am the executive head of the Pittsburgh Underwriters, I am a member of the firm of Davies & Mother, and we do $250,000 a year in premiums, and we never send a specific notice out to an assured that policies are to be cancelled unless it is absolutely impossible to replace that insurance.

Q. Even though you are instructed by your company to cancel a policy? A. Absolutely.

Q. You don't send out a notice to the insured? A. Absolutely not.

Q. Do you know the practice prevailing in this section? A. I ought to.

Q. Well, you ought to because you instructed Mr. Le Compte to cancel this policy? A. We did.

Q. But you don't understand that that practice would suggest that he should send them a written notice and get a registered mail so you had some return back from this assured so as to know that he had got a notice of it? A. There was no necessity for it at all.

Q. How do you know that a policy is cancelled if you don't get something back from the assured? A. How do we know it is cancelled?

Q. Yes, to your satisfaction. A. That is the reason we kept up following up our first telegram and letter because we wanted to get the policy in from the assured, beyond peradventure of question.

Q. Suppose you can't get your policy in; how do you know whether it has been cancelled, whether the agent has carried out his instructions or not, unless you get the policy back from the assured? A. When it comes down to that

point, we either secure a registered letter notice of cancellation or a lost policy receipt, signed by all parties in interest.

Q. And that is the regular way, isn't it? A. Sure, when you can't get the policy.

Q. You didn't do that in this instance, did you? A. We didn't have time when we made up our minds to handle it that way.

Q. When did you make up your mind to handle it in that way? A. December 14, 1922.

Adjourned till June 29, 1926, at 10:00 A. M.

Freehold, N. J., June 29, 1926.

Trial of the cause resumed at 10:00 A. M.

THE COURT: On application of the plaintiff and after hearing counsel, the court has permitted an amendment to paragraph 6 of the complaint, so that, as amended, paragraph 6 shall read as follows:

"On February 28, 1923, plaintiff furnished defendants with proof of her loss and interest in said property and otherwise duly performed all the conditions in said policy on her part except the provision of the policy which reads: 'If fire occur the assured shall give immediate notice of any loss thereby in writing to the company', and the provision therein providing for the furnishing of the defendants wth a sworn statement of the loss within sixty days after the date of the fire. These provisions of the policy were waived by the defendants."

And on behalf of the defendants an answer to the amendment is premitted which denies the statements in paragraph 6 as amended.

GEORGE R. DAVIES, Resumed for Defendants.

BY MR. CARTON:

Q. Mr. Davies, I think when we adjourned Friday evening we were asking you about efforts you had made to have Mr. Le Compte cancel this policy, and I think you said that on December 14th you had then determined upon some other method of effecting the cancellation of this policy; is that so? A. That is true.

Q. And what was the method that you had decided to undertake at that time? A. I have got a letter here if you want me to read it.

Q. No, I haven't asked you that A. We wrote him at that time that unless the cancelled policy was returned that we would immediately take the matter up direct with the assured.

Q. Whch was on December 14th? A. December 14th, 1922.

Q. And why was it necessary for you to write him in that way? A. The mere fact that we had been endeavoring to secure that cancelled policy since July 3rd and had not yet secured it was sufficient for us to take steps by which we could get it in.

Q. Has anything further been done by Mr. Le Compte after the receipt of your December 14th letter prior to the time of the fire? A. Any action, you mean, as to the cancellation of the policy?

Q. Yes, if you know. A. Well, I don't know that he did anything after December 14th.

Q. Did you get any response from Mr. Le Compte to your December 14th letter? A. I did.

Q. Did you in turn reply to that again? A.

I don't believe we did. Do you want to know what his reply was?

Q. I want to know what I am asking you, Mr. Davies. A. Oh, all right.

Q. As far as your records state then on December 21, 1922, this policy was in force, was it not? A. The cancelled policy was not in our possession.

Q. Well, you didn't have any cancelled policy, had you? A. The policy had been ordered cancelled.

Q. Well, will you please answer my question, if that is not the fact, that, according to your books, on December 21st, this policy was in force and outstanding? A. We did not have the cancelled policy on December 21, 1922 at the time of the fire.

Q. But you are not answering my question at all, Mr. Davies. A. Well, I am giving you the facts as they exist.

Q. No, I want an answer to my question, or whether, according to your books, this policy was in force or was a cancelled policy on December 21, 1922. A. According to our records, the policy had been ordered cancelled, and many letters reiterating that request for cancellation That is the way the record stood.

Q. You are too clever Mr. Davies. You know that is not a response to my question. A. You asked me as to how our records stood and I am giving you that information.

Q. No; I didn't ask you how your records stood; I asked you whether your records showed that this was a policy in force or a cancelled policy on December 21st. A. And I again reply that policy had been ordered cancelled on July

3rd by way of letter, and that we continued every month to write Mr. Le Compte to send in a cancelled policy and it had not been received, and that is the way the record stood on December 21st.

Q. And that you consider an answer to my question? A. I do.

Q. Why was it necessary, if you considered it a cancelled policy, why was it necessary to take up this new method on December 14th? A. That answer is very simple. We always continue to follow up everything until we have everything completed right in our own office.

Q. At least you figured there was something left undone to effect a cancellation of this policy, didn't you? A. Not to effect cancellation, no; to complete our records.

Q. Well, what did you want done further? If a policy is cancelled, isn't that all there is to it? A. We want to have the record of its cancellation and have the cancelled policy or lost policy in our possession.

Q. Will you tell me what you had on your record to show that this policy was cancelled? A. We had—again I will repeat—we had ordered that policy cancelled——

Q. No—— A. It is the same thing. I am trying to give the records as they are complete.

Q. Tell us what you put on your books, if you put anything on your books, that showed the cancellation of the policy. A. Well, our daily report of the agent, with the correspondence in connection with the transaction, showing the letter or telegram of cancellation and the follow-up letters in connection with that telegram.

Q. Well, that doesn't satisfy you of cancellation, does it? A. No, as I said before, we continued to follow it up until December 24, 1922, showing that it was not entirely satisfactory.

Q. You never got what you wanted, did you? A. We never succeeded in getting any cancelled policy or lost policy receipt, no.

Q. Isn't one of the things you want either the return of the policy itself or a receipt from the assured or a return from a registered letter showing service on the assured? Aren't those the things that you require, either some or all of those things? A. The receipt of the return card and the letter——

Q. No, but are those things that I have just referred to, are those the things that you require to effect the complete cancellation? A. Well,—

Q. Are they or are they not? A. If you will just give me permission just for a moment to tell them why a registered letter notice is not sufficient it will answer, I think, but I am not going to answer the question in the way in which you place it.

Q. Why not? A. A receipt from an assured to a registered letter is by no manner of means a satisfactory cancellation notice.

Q. You think not, do you? A. Well, I am not thinking so; I am telling you what the supreme courts have said.

Q. Well, you don't need to tell us what the supreme courts have said. What else do you think about it? A. About what now?

Q. Do you think the return of the policy would be in any way satisfactory? A. If we had the returned policy that would be prima facie evidence.

Q. If you had a memorandum signed by the assured that it had been cancelled, that would be satisfactory, wouldn't it? A. Absolutely not, unless it was a lost policy receipt.

Q. How did you treat this policy on your books other than about giving out those notices? Did you consider it a policy that had been cancelled or not? A. We considered that it was a policy that had been ordered cancelled and were awaiting its return.

Q. But you never got that cancelled? A. Never got that cancelled and never collected any premium for it.

Q. How did you carry it on your books with regard to the premium? A. The whole matter was simply open to the register, if you are speaking of the register in particular now.

Q. What say? A. If you are speaking of the register, it was simply a memorandum made on the register, the date of the policy, the policy number, the name of the assured, the amount of insurance, the rate premium and the beginning and expiration.

Q Have you had in your practice such a thing as a suspense file or suspense policies? A. We have a suspense file.

Q. Was that under the suspense file? A. It certainly was under the suspense file.

Q. It was not in the cancelled file, thongh, was it? A. It couldn't be in the cancelled file until we had our records complete.

Q. When did you first learn of this fire? A. I think it was about December 23rd.

Q. Two days after the fire? A. Something like that.

Q. How did you learn it? A. Just one minute and I will tell you. Did I say December 23rd?

Q. Yes. A. December 26th was the day on which we heard of the fire.

Q. And how did you learn it? A. By the receipt of a letter addressed to us by Mr. Le Compte in which he inquired——

Q. Now, I haven't asked you that. I asked you when you learned of it, and if you need that letter to tell you when you learned it, I have no objection to your using it, but I didn't ask you to read the letter. A. All right; I won't read the letter but I will use it then.

Q. No, my question has been answered, sir; and you will answer my questions. A. Now what do you want now, Mr. Carton? I am trying to answer them so it will be satisfactory in every respect.

Q. There is no question. What did you do with regard to these letters when you received notice on December 28th from Mr. Le Compte that there had been a loss? A. We didn't receive any notice of loss from Mr. Le Compte, in the general acceptance and use of the term.

Q. I will amend my question and say you received notice of the fire at that time; is that a fact? A. I wouldn't say that it was notice of the fire except incidentally.

Q. Did he mention a fire? A. He mentioned a fire.

Q. And you knew at that time that there had been a fire? A. I knew on December 26th, on receipt of this letter that there was a fire.

Q. You also received notice from Mrs. Altschuler, the mortgagee, didn't you, of this fire? A. I believe that we did receive notice from the mortgagee.

Q. Do you recall when you received that? A. Well, that would be considerably later. I think it was the latter part of January. I am not sure of that.

Q. I show you what purports to be a letter written by you under date of December 29, 1922, to Mrs. Altschuler, and ask you to look at that and see if that will refresh your memory as to the dates when those notices came in. A. I think there is no question but what that is a copy of my reply to a letter from her dated December 29, 1922. It was earlier than I thought.

MR. CARTON: I ask to have this marked.

MR. BOARDMAN: Haven't you got the letter itself?

MR. CARTON: No, I haven't.

(Letter marked Exhibit P-5.

Q. Did you answer when you received proofs of loss about this policy, Mr. Davies? A. It was sixty-three days, I think to be exact, after the fire; maybe sixty-four.

Q. And I think you have already identified Exhibit P-4 as being your letter acknowledging receipt of the proof of loss, have you not? (Letter shown witness.) A. Yes, this was March 20, 1923.

Q. Did you ever give the mortgagee any notice of cancellation of this policy? A. Did we?

Q. Yes. A. No, we did not.

Q. Mr. Davies, when you found that Mr. Le Compte was not carrying out your instructions for the cancellation of this policy and you were obliged to write him several times between July 3rd and December 21st, why didn't you cause

the policy to be cancelled at once? A. In the first place, we didn't know that Mr. Le Compte was not carrying out our instructions. We knew that we had not received the cancelled policy.

Q. Well, why didn't you notify the insured direct that you wanted this policy cancelled? A. We don't do that until the last extreme, as I stated in my previous testimony.

Q. A provision in the policy gives you the right to do that very thing, doesn't it? A. Oh, we can cancel a policy for no reason at all by giving five days' notice.

Q. Your company never did that directly? A. You mean in this case?

Q. Yes. A. No, not from the company, except through its representative.

Q. Mr. Davies, you gave some computation Friday afternoon concerning the amount of insurance and the extent of a loss of a proportionate amount to be paid by different companies. I don't recall definitely just what you did say in that regard. However, the loss, as I understand, in this instance was said to be some $31,000; was that your recollection?

MR. BOARDMAN: I object. It is not cross-examination. That is not a proper question.

MR. CARTON: I think it is cross-examination, your Honor, for this reason. I haven't my notes exactly, but I remember this witness taking up the figures assuming that such and such was the case, and in that event there would be no contribution by their company anyway, in any event. I think the way he had it figured out, that

the company would not have to pay anything anyhow. I don't know whether he brought us in debt or not.

A. Well, you got a little wrong if you got that impression; but give me the proof of loss and if it is perfectly agreeable to Mr. Boardman I will tell you what I said.

MR. BOARDMAN: Go ahead.

Q. The proof of loss does show the loss $31,059 on the building? A. You mean the purported proof of loss?

Q. The purported proof of loss, we will put it that way. And it also shows that the total amount of insurance was $36,500; that is including, of course, the Pittsburgh Underwriters? A. I see.

Q. Now if the Pittsburgh Underwriters' policy was taken off, $5,000, that would make the total insurance $31,500? A. Right.

Q. What did you say with regard to the loss, assuming those figures to be correct? A. Let me have the exhibit and I will soon tell you. (Paper handed witness.) Well, this is not the exhibit; it is a copy of it.

MR. BOARDMAN: I think you have it.

(Witness procures paper.)

THE WITNESS: I have it. Now what is your question, Mr. Carton?

Q. I intended to ask you again if you could recall what your testimony was to the effect, as I recall, that taking these figures to be true for the purpose of this calculation, there would be nothing due on your policy, or words to that effect. A. No, I guess what you mean is

this: that had the assured not included our policy of $5,000, the maximum amount which she could have collected would have been $27,158.69. By including it, she has already actually received $26,787.51, and she has made a further claim against us for $4,251.99. I think this is exactly what I testified to before.

Q. I was a little hazy on that, I guess. A. It is perfectly all right.

RE-DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Mr. Davies, did the home office ever get any premium on this policy? A. We did not.

Q. Did you ever ask for any? Did you call for any? A. Do you mean from the assured?

Q. No. A. Or from Mr. Le Compte?

Q. Yes. A. Mr. Le Compte, in sending in his remittances, did not remit for that premium only because of its being cancelled.

Q. And you never got a cent? A. We never received any premium for this policy.

Q. There are two reasons, generally speaking, why insurance companies cancel: one is because of moral risk and the other because of physical risk? A. Because of moral hazard and physical hazard in particular.

Q. And if either of these hazards is too great, the insurance company doesn't want the risk; is that so? A. That is correct.

Q. Therefore, when you cancel, it either throws some aspersion upon either the property or the person of the insured, does it not? A. In nearly every case.

Q. And the reason why your office and all other offices follow the method of easy courtesy to prevent an affront, isn't it, to the assured? A.

Well, we can't antagonize the clients of our agents and expect to retain the friendship of our agents.

Q. When you open an agency, you furnish a certain equipment, do you? A. We do.

Q. Have you an order for supplies such as I have in my hands? A. That is it.

Q. And then what goes to the agent? A. We send as many supplies that are named on this order sheet as we think they will need. If they desire any more, they fill in an order for supplies and send it back.

Q. Now there is mentioned on there a cancellation sticker. What is a cancellation sticker? A. The cancellation sticker is only used in the very large agencies and we never send them out unless they ask for them, and then that only states "cancelled", with the date whether it is short rate or pro rata, and with the amount of the return premium.

Q. It is pasted right on the policy? A. It is pasted right on the policy and it comes off. It is not a notice, though.

Q. It isn't anything that was sent out to the assured? A. Oh, no; it is simply for immediate purposes.

MR. BOARDMAN: I offer that list in evidence.

MR. CARTON: I object to it. What is it?

THE WITNESS: Mr. Carton brought out the fact that it is usual for the companies to furnish their agents with cancellation notices, to which I replied it was not. And this is a printed order for supplies on our office, and which can be submitted in evidence, if you so desire, to prove that my testimony is absolutely correct.

MR. CARTON: I object to the paper, your Honor. I interrogated this witness, it is true, as to the method that he used, and in cross-examination he has got a right, of course, to deny the contentions which I argued. And in that connection, I object to offering a slip which may be one of many styles he has in his office.

THE WITNESS: The only style we have.

MR. CARTON: To corroborate his statement. I don't think it is admissible.

THE COURT: I will admit it.

(Paper marked Exhibit D-2.)

Q. Who is J. Campbell Haywood? A. J. Campbell Haywood is an insurance adjuster and investigator, and so forth, located in the City of New York; lives in Connecticut, as a matter of fact, now.

Q. Did you employ him to make an investigation or an adjustment of this? What did you employ him for? A. We employed Mr. Haywood to make an investigation of this loss, but he refused, as well as ourselves, to participate in any adjustment.

Q. One thing more. You have been in both the position of agent and as executive officer of the Pittsburgh Underwriters for a good many years? A. Yes, I still contiuue that work.

Q. Suppose the home office gives an agent notice to cancel a policy and theagent fails to do so, and a loss occurs, what is the consequence?

MR. CARTON: I don't think it is pertinent here, your Honor. I think we all know what the consequence is.

THE COURT: Is there objection?

MR. CARTON: I object to the question.

THE COURT: Objection sustained.

Q. Is it a pretty serious thing for an agent to refuse to give notice to cancel when he receives this? A. It certainly is.

Q. It is pretty serious for him, isn't it? A. It is.

Q. Does he become personally liable to the company?

MR. CARTON: Now, if your Honor please,

MR. BOARDMAN: All right. I will withdraw it if you don't want to hear it.

RE-CROSS EXAMINATION BY MR. CARTON:

Q. This paper to which you have just referred, Mr. Davies, and is now Exhibit D-2, this, I take it, is part of your equipment of supplies in your home office? A. It is, but they are also furnished to our representatives or when they want to order any supplies.

Q. When was this paper published or printed? A. Oh, they are printed right along. This particular one was printed in March, 1924. But the chances are it is just a renewed order.

Q. You know the Firemen's of Newark, don't you? A. The Firemen's of Newark?

Q. Yes. A. Insurance company, Newark insurance company?

Q. Yes. A. Oh, they all have their own forms.

Q. Do you know that concern? A. Oh, I know the Newark Insurance Company, yes, sir.

Q. Do you know the insurance company known as the Firemen's of Newark? A. Oh, the Firemen's of Newark? Yes, there is a Newark and also a Firemen's of Newark; very well.

Q. The Firemen's of Newark? A. Very well.

Q. In fact, that company is an underwriter for two of these defendants, is it not? A. Absolutely not.

Q. What? A. Absolutely not. Have you heard the Firemen's Insurance Company mentioned in any way, shape or form in this action?

Q. No; I am asking you now if it is not a fact that the Firemen's of Newark is now an underwriter of the National Ben Franklin and the Superior, two of these defendant companies. A. what you want to know is that the Firemen's Insurance own a majority of the stock of the National Ben Franklin and the Superior. That is a fact.

Q. That is a fact? A. Either directly or through some other interest.

Q. And would it interest you if an underwriting company used a form different in object from what you used? A. Absolutely not.

MR. BOARDMAN: I object. That is not cross-examination; absolutely too remote.

(Objection sustained.)

Q. Mr. Davies, you stated some of the reasons for cancellation, I think the moral risk and some other; what was the other? A. I stated that it was in Asbury Park—

Q. No, I mean just now. A. I stated that it was the moral and physical hazards. I answered a question of Mr. Boardman.

Q. You cancel for these things? A. The very reason that we cancel——

Q. You do cancel for those things just mentioned? A. Certainly.

Q. You also cancel when you are overloaded? A. Yes, with certain lines. Where there is any physical defect or there is a moral risk, that is true, when we are overloaded and we have more than we care to take care of, naturally we cancel.

Q. Now you say Mr. Le Compte didn't pay the premium on this policy in question; that is a fact, is it? A. It is.

Q. He didn't pay the premium on a whole lot of policies that you carried, did he? A. There isn't one single premium that he hasn't paid us.

Q. Why did you suspend him? A. We suspended him in September, 1922, because we were having trouble with remittances then, but shortly afterwards that was all fixed up and straightened out and he paid us everything he owed us.

Q. September, 1922, when you suspended him for lack of remittances was subsequent to the issue of this policy, wasn't it? A. It was.

Q. This policy had been issued in June, 1922? A. Yes.

Q. Does he make monthly reports and returns of policies? A. He does.

Q. The first of each month? A. Or shortly thereafter.

Q. What report did he make of this, July 1st, July in 1922? A. His report for June would include that policy.

Q. And, of course, he did include this policy? A. Oh, naturally; I presume so.

Q. You didn't cancel because he didn't send the remittances along, did you? A. The remittances were not due until sixty days after the date on which the policy was issued, the end of the month in which the policy is issued.

Q. So that the fact of his not remitting the premium was not the reason why you ordered this policy cancelled? A. Absolutely not. He really did not have an opportunity to collect the premium before he received notice of cancellation.

Q. How does an agent get credit for return premium after it is once reported in his account? A. By taking credit on his account for the return premium or marking it "spoiled" if it is cancelled during the current month.

Q. Do you know what was done in this regard, whhether you ever gave Mr. Le Compte any credit? A. Yes. I have the original report here, which shows that, to straighten out and settle. Mr. Le Compte's account, we had to include this return premium on this cancelled policy.

Q. And have you your account there? A. No, I haven't got the account, but I have the daily report.

ERNEST E. LE COMPTE, recalled for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You have already been sworn, Mr. Le Compte? A. Yes, sir.

Q. In June you were the agent for writing insurance for the Pittsburgh Underwriters in Lakewood and vicinity? A. Yes.

Q. Did you bring your certificate with you? A. Yes. (Produces paper).

MR. BOARDMAN: I offer it in evidence. This is the certificate of authority.

MR. CARTON: I object, your Honor. It seems to me it is unimportant about any certificate of authority when the policy has gone forth with his name on as general agent. If his authority was circumscribed in any way by this certificate, it would have no binding effect in any event.

MR. BOARDMAN: It does not say general agent at all.

MR. CARTON: Well, agent. If he is not a special agent, he is a general agent. The certificate says agent.

THE COURT: I will admit the certificate.

(Paper marked Exhibit D-3.)

Q. Mr. Le Compte, you are here under subpœna from the plaintiff? A. Yes, sir.

Q. Have you the subpœna with you? A. I have two.

Q. Does the subpœna call for you to produce certain letters here today? A. Yes, sir.

Q. Have you produced those letters in reply to the subpœna? A. Well, the first subpœna called for certain letters which I have, and the last subpœna called for "all communications, copies of any and all letters or telegrams by you forwarded to the defendant having any relation to the fire at the Clarendon Hotel of December 21, 1922, and the originals of any replies or correspondence received by you from the defendants subsequent to December 21, 1922, concerning said fire or loss thereunder." That is the last subpœna, and the first subpœna calls for these letters.

Q. You have produced those three letters, have you? A. Those three letters, yes, sir.

MR. BOARDMAN: Mr. Carton, do you want to put those three letters in as part of your case?

MR. CARTON: I will determine that when I come to cross-examine him.

Q. Well, here is a letter dated December 14, 1922, from George R. Davies to Mr. Ernest E. Le Compte? Did you receive that letter in due course? A. Yes, sir.

MR. BOARDMAN: I offer it in evidence.

(Letter marked Exhibit D-4.)

MR. BOARDMAN: You have no objection to that, Mr. Carton?

MR. CARTON: No.

MR. BOARDMAN: I will read it to you, gentlemen. (Reads letter.)

Q. And the second letter called for was a lettre from Mr. Lane, special agent, dated October 28, 1922. Did you receive that letter in due course? A. Yes, sir. (Produces letter.)

MR. BOARDMAN: I offer that letter in evidence. Any objection, Mr. Carton?

MR. CARTON: No.

(Letter marked Exhibit D-5.)

(Letter read by Mr. Boardman.)

Q. And the third letter that is called for was a letter from Mr. Haywood, dated January 25, 1923. Did you receive that letter in due course?

(Letter shown witness.)

A. Yes, sir.

MR. BOARDMAN: Have you any objection to this letter that you called for?

MR. CARTON: No, sir.

(Letter offered in evidence and marked Exhibit D-6.)

(Letter read by Mr. Boardman.)

Q. How long have you been in the insurance business, Mr. Le Compte? A. About twenty-six years.

Q. And in 1922, did you know that when you got a notice from the home office to cancel a policy and did not cancel it and fire occurred that you became personally liable? A. Yes, sir.

Q. Now what happened in regard to this policy of the Pittsburgh Underwriters? Tell us about writing the policy. A. I wrote the policy on June 27th. I got notice from the company to cancel——

Q. Did you have a daily report, make a daily report? A. Yes, sir. I wrote the policy on June 27th and sent in a daily report as usual. I got a telegram from the company on July 3rd, followed by a letter, to cancel the policy.

Q. Is this a copy of the telegram that you received on July 3rd? (Paper shown witness.) A. I think it is. I am not positive now.

Q. But it was the tenor of it anyway? A. Yes.

Q. Have you the original of the telegram received? A. I don't know whether I have or not. I don't think I have.

Q. It has already been read into the evidence. It was to the effect that—you heard the testimony read. Mr. Davies read it into the record.

MR. CARTON: I don't hear you.

MR. BOARDMAN: The telegram he received was to the tenor and effect of that which Mr. Davies read.

A. Yes, I was notified to cancel the policy quickly.

Q. What did you do? A. I immediately wrote the policy over in the Ohio Farmers' Insurance Company.

Q. And have you your daily report on that? A. I don't think I brought it. I am not sure that I have it now.

Q. What did you do with the Ohio Farmers' policy? A. I took it over to Asbury Park to Mr. Levin. I told him that the Pittsburgh wanted their policy cancelled and I had written this policy to take its place and I wanted him to get me the Pittsburgh policy as soon as he could.

Q. Did you leave the Ohio Farmers' policy with him? A. Yes, sir.

Q. And what did he say? A. He said he would get it for me.

Q. Do you remember just what words you said, what you told him then that day about the word that you had got from Pittsburgh? A. I simply told him that the Pittsburgh didn't want the insuranc e and had ordered it cancelled and I had to write it over in another company.

Q. And you told him that you got a telegram? A. I don't remember.

Q. And did you leave the Ohio Farmers' with him? A. I left the policy with him, yes, sir.

Q. Is this the Ohio Farmers' daily report sheet? (Paper shown witness.) A. Yes, sir.

Q. That is the report that you made to the Ohio Farmers' on the 3rd day of July? A. It is eithed the report or a copy of it.

Q. That is what went to the home office? A. Yes.

MR. BOARDMAN: I offer that in evidence.

MR. CARTON: I object to it. Your Honor, this report can't be binding on this defendant. It seems strange that they produce the report of the Ohio Farmers and they don't produce the report of the Pittsburgh Underwriters in question.

MR. BOARDMAN: I have got it here and I am going to put it in evidence. I have got it here on my desk.

MR. CARTON: I object to this offer.

THE COURT: Objection overruled.

(Paper marked Exhibit D-7.)

Q. Is the page of this paper that I show you, with the white paster, the daily report of the Pittsburgh Underwriters? A. Yes, sir.

MR. BOARDMAN: I offer that in evidence. This is the daily report of June 27th, show- the Pittsburgh Underwriters' policy.

THE COURT: What is the date, Mr. Boardman?

MR. BOARDMAN: June 27th is the date of the policy and it apparently was mailed on the 28th of June and received about the 3rd of July.

(Paper marked Exhibit D-8.)

It was received by the company apparently July 1, by stamp.

Q. What happened in reference to the Ohio Farmers'? A. I received word from the Ohio Farmers' to cancel the policy.

Q. What did you do then? A. I wrote Mr. Levin a letter——

Q. What was the date of your getting that word from the Ohio Farmers'? A. I think this is the letter, August 5th. But I think I received word before I got this letter. I don't remember exactly.

Q. Did you then try to get back both policies? What did you do then after you got the notice of cancellation? A. I wrote Mr. Levin a letter which I have a copy of——

Q. Under what date? A. July 12th.

MR. BOARDMAN: Have you got that letter, Mr. Carton?

MR. CARTON: What is that?

MR. BOARDMAN: A letter from Mr. Le Compte to Mr. Levin, July 12, 1922.

MR. CARTON: We certainly have not.

Q. Will you produce the copy of the letter which you sent?

(Witness produces paper.)

MR. BOARDMAN: I offer that in evidence.

(Paper marked Exhibit D-9 and read by Mr. Boardman.)

Q. What other efforts, if any, did you make to get back the policies? A. I went to Asbury Park at least twice a week all summer and every time Mr. and Mrs. Levin were in the office I asked them about those policies.

Q. Did you tell them that they had been cancelled? A. Yes.

Q. And did you tell them that you were being hounded for them, I mean that you were being asked for them? A. I certainly did. In addition to taking a ride to Asbury Park about twice

a week, besides, Mr. Levin is in Lakewood quite often, and Mrs. Levin both, is once or twice during the summer and every time I went to Asbury Park if he was not in the hotel I asked Mrs. Levin to be sure to get those policies for me, that the companies wanted them at once; and every time I would go, if I saw Mrs. Levin she would say she would tell him; and when I would see him he would say "I will get it for you in a day or two". And it went on all summer and I thonght sure when he came back to Lakewood I would get the policies without any trouble, and before I knew it they went on a trip and had a serious accident and were gone longer than they expected to be, and when they came back they were both nervous and you could hardly talk to them about business, and I never did get the policies.

Q. Did Mr. or Mrs. Levin ever pay the premium on this policy? A. No, sir.

Q. How did Mr. and Mrs. Levin act about paying their bills anyway?

(Objected to as immaterial. Objection sustained.)

Q. Did you hear Mrs. Levin's testimony last week? A. Yes, sir.

Q. Did you ever present a bill of $83.50 for the purpose of collecting it and get a check for it? A. No, sir.

Q. Did their bills run pretty high at times? A. Yes, sir.

Q. Do you know how much they owed you during the summer of 1923?

(Objected to as immaterial.)

THE COURT: I don't see that that is material. The question is whether they paid this premium to this agent or not, this particular premium.

Q. Did they ever pay this particular premium? A. No, sir.

Q. How many times did you talk with Mr. or Mrs. Levin about the cancellation of the Pittsburgh Underwriters' policy and try to get it back? A. Why, it was all summer, two or three times a week, at least.

Q. And did he come to your office frequently? A. Yes, sir.

Q. Was he an intimate of yours? A. Very intimate.

Q. Was he an intimate business associate? A. He was very intimate, or I would have taken more trouble or done something else to get the policy back.

Q. How much money did they owe you during the summer of 1922?

(Objected to. Objection sustained.)

Q. In September did you write Mrs. Levin a letter trying to get back the Ohio Farmers' policy? A. I wrote to either Mrs. or Mr. Levin.

MR. BOARDMAN: Have you the original of this letter, Mr. Carton? (Letter shown.)

MR. CARTON: No.

Q. Is this a copy of the letter that you sent Mrs. Levin under date of September 8, 1922? A. Yes, sir.

MR. BOARDMAN: I offer that in evidence.

MR. CARTON: I object. your Honor. May I see it?

Q. Now, after the loss, did you have one or two talks with Mr. Levin? A. I saw Mr. Levin quite often.

Q. And what did you ask him to do? A. In regard to what?

Q. Giving up—surrendering and giving a release? A. Oh, I went up to his hotel in Lakewood and asked him to sign this release, thinking that he would readily sign it, after all the trouble I had had trying to get the policy.

Q. And what was his attitude? What did he say? A. He was very indifferent then. He simply said he wouldn't sign it.

Q. This letter of Mr. Haywood mentions a letter that he wrote you to get Mr. Levin to sign. Is that a copy of a proposed letter that you were trying to get Mr. Levin to sign? (Paper shown witness.) A. This is either a copy or the original.

Q. And he would not sign that? A. No, sir.

Q. What reason did he give for not signing it? A. He wouldn't give any reason.

Q. Do you remember this letter of February 16th to Mr. Haywood? (Letter shown witness.) A. Yes, sir.

MR. BOARDMAN: That is on e of the letters that comes within the scope of your inquiry. Have you any objection to that letter dated February 16th?

(Letter shown Mr. Carton.)

MR. CARTON: That is objected to, your Honor, the letter from Mr. Le Compte to the company's adjuster after the fire. It amounts to manufactured evidence after the loss in this case, the correspondence between this agent and the adjuster for the

MR. BOARDMAN: Yes.

(Mr. Carton examines letter.)

MR. CARTON: The reason of my objection, your Honor, is that this letter has no relation to the policy in question. It has to do with the Ohio Farmers' Insurance Company, apparently.

THE COURT: Objection overruled. The letter may be marked.

(Objection noted for plaintiff as ground of appeal.)

(Letter marked Exhibit D-10.)

(Mr. Boardman reads letter.)

Q. Do you know what Mr. or Mrs. Levin did about rewriting this Ohio Farmers' policy? A. I understood that he had got——

(Objected to.)

THE COURT: Yes, what he understood.

MR. BOARDMAN: I don't suppose he knows, really, except what he was told.

Q. After the fire, what talk did you have with Mr. Stansbury? A. I went over to see Mr. Stansbury at his office and told him of the different companies that I had on the building and told him about the Pittsburgh Underwriters, that I had cancelled the policy but had been unable to get it, and explained to him and even showed him letters, the same letters we are talking about now.

Q. Did you give him a list, a written list of policies, showing the Pittsburgh Underwriters on it? A. I don't remember of giving him any list. I simply went there and talked it over with him, and Mr. Levin was with me.

Pittsburgh Underwriters, and any communication between them cannot have any evidential force or be binding on this plaintiff.

MR. BOARDMAN: It is a contemporaneous record of conversation. I think there is force in what my adversary said. He has called for this; he calls for everything and he permitted to go in as much of this correspondence as he sees fit and desires to keep out all the rest. He subpœnaed all the correspondence of the company. This one he lets in and that one he lets out. I think perhaps——

THE COURT: I think there is force in the objection.

MR. CARTON: I might say this: Comments have been made of my subpœaing the loss, I did subpœna that loss on the theory that the company knew nothing about this loss, and to show that they had knowledge.

(Objection sustained.)

Q. Do you remember any conversation you had with Mr. Levin on February 16, 1923? A. I couldn't say as to the exact date now.

Q. You have just read this letter? A. Yes.

Q. Well, what was the effect of that conversation that you had at that time? What was the conversation you had at that time? A. That was in regard to getting him to sign a release showing that he knew that the Pittsburgh policy had been cancelled.

Q. And what did he say? A. He simply would not give me any satisfaction at all.

Q. Did he mention some policies having been

cancelled? A. He said he knew some had been cancelled, but he didn't know which ones they were.

Q. But did he ever take any affirmative position that that was not so? A. No.

Q. Did he ever take any affirmative position that it had not been cancelleld? A. No.

Q. Or that what you said was not so A. No.

Q. And this conversation between you and Mr. Levin was some twelve days before the filing of the proof of—— A. I don't know when they filed the proof.

Q. Well. it was testified to the other day that it was on the 28th day of February. Who was with you if you had that conversation? A. Mr. Major, special agent of the Concordia Fire Insurance.

Q. And this letter that you read was written on the same day, this letter to Mr. Haywood? A. The same day it is dated. I don't know.

Q. Well, the same day it was dated and the same day of the conversation? A. I think it was the same day.

Q. The only letter you have about this conversation: it was a conversation you had had that day; is that right? A. That is the way I remember it. I don't remember exactly only about the letter, whether it was the same day or not.

Q. But you recognize your letter? A. Yes, sir.

Q. And you are refreshed by that, that that was the time? A. Yes.

Q. And Mr. Major was with you at the time? A. Yes, sir.

Q. And he is here in court today? A. Yes.

Q. From whom did you get your orders for insurance? A. Mr. Levin.

Q. And they ran over how long a period of time? A. Ever since I have done business for them.

Q. And you wrote all their Asbury Park business? A. No, sir.

Q. I don't mean Asbury Park; the Lakewood business. A. I have written most all of Lakewood. There is one or two policies I had to get through other agents.

Q. And how extensive is this business? A. A. Why, I think I have at least $50,000 or $60,000 insurance in Lakewood. I had a little over $10,000 in Asbury Park.

Q. And the premiums would amount to a considerable sum? A. Well, most of the policies in Lakewod are writen for three years and most of the premiums are pretty large; and then I have written a lot of their automobile insurance too.

Q. From whom did you get such remittances as you did get? A. Sir?

Q. From whom did you get the remittances that you did get? A. Well, it was always practically through Mr. Levin. If he didn't sign the check he would have Mrs. Levin sign it.

Q. I think it has been testified that they both signed. Did Mrs. Levin ever pay you any money except as she was ordered by Mr. Levin? A. No, sir.

Q. What was their practice on paying bills? Was it as Mrs. Levin said, that you took them a bill and they would pay the bill?

MR. CARTON: That is objected to as immaterial. It is my contention that it makes no difference whether this premium was

paid or not.

(Question withdrawn.)

Q. Was there any premium ever paid on this policy? A. No, sir.

MR. BOARDMAN: Have you any objection to this, Mr. Carton? (Paper shown Mr. Carton.) That is the paper that Mr. Levin wouldn't sign.

MR. CARTON: I object to it.

MR. BOARDMAN: I will offer it. It is a letter that Mr. Haywood asked Mr. Le Compte to get Mr. Levin to sign and Mr. Levin didn't sign it. I offer that as part of the history of the case.

THE COURT: It was not signed, of course?

MR. BOARDMAN: No, it was not signed.

THE COURT: Objection sustained.

MR. CARTON: Mr. Boardman, may I see those letters that you introduced through this witness?

(Letters produced to Mr. Carton.)

CROSS EXAMINATION BY MR. CARTON:

Q. Mr. Le Compte, I think you said you had written very considerable insurance for Mr. and Mrs. Levin? A. Yes, for Mrs.

Q. For Mrs. Levin? A. Yes, sir.

Q. On their Lakewood and Asbury Park properties? A. Mostly on Lakewood.

Q. Well, you had written considerable on their Asbury Park properties too, had you not? A. Not very much.

Q. Well, you had written policies other than this one in question on them? A. Oh, yes.

Q. And had other policies on it at the time of the fire? A. Yes.

Q. Which were paid? A. They were paid for eventually, yes.

Q. Well, I mean the companies contributed in paying the losses? A. Oh, yes.

Q. The policy in question you wrote, you say, on the 27th day of June? A. Yes, sir.

Q. And have you your report to the company of the writing of this policy? A. The report was here this morning. I gave it to either Mr. Haywod or Mr. Benjamin.

Q. No, I mean your own office report. A. Yes, sir; that is the one they have. I gave it to someone, I don't remember who.

Q. Let's be sure about that. Which of these is it, if it is either one of them? (Paper shown witness.) A. This is mine, I am sure, because it is stamped here with our stamp.

Q. Where did you get this from? When did you see this report before today? A. Well, we wrote the report in my office.

Q. Yes, I know you did, but where has it been since you wrote it? A. I couldn't tell you. Either Mr. Haywod or Mr. Davies had it.

Q. Well, is this the copy you sent to the company? A. That is the copy I sent to the company.

Q. And you retained one in your office also, did you not? A. Yes.

Q. Is this the one that you sent to the company? A. That is the one I sent to the company.

Q. Where is the one you retained in your office? A. That I can't tell you.

Q. Why not? A. Well, I let somebody have it. I can't tell you who it was. The one I kept in my office I didn't stamp.

Q. What is your practice after writing policies for your companies with regard to reporting same to them? A. I always send off the report the same day I write the policy.

Q. And you did that in this instance? A. Yes.

Q. What is your practice the first day of the following month with regard to reporting premiums? A. Well, I always include, make out the monthly report the first of each month, including the previous month.

Q. And did you, on July 1st, in making out your report, include the premium for this policy? A. I suppose so.

Q. And sent that on to the company? A. Yes, sir.

Q. You say that you received a telegram from the office on July 3rd to cancel this policy? A. Yes, sir.

Q. Was the reason stated why cancellation was required? A. I don't remember, only from the copy of the telegram they showed me now. I can't tell exactly now what was in that telegram, but I know they told me to cancel the policy. I don't remember the exact wording of it.

Q. Well, that is not a very exceptional thing; you often receive notice to cancel policies, don't you? A. Yes, sir.

Q. Quite a customary thing, is it not? A. No, I don't know what you call customary. It is, if the company don't want it.

Q. And what do you say you did when you got this notice from the company? A. Immediately wrote it in another company, the Ohio Farmers'.

Q. Did you write to Mr. Levin about it? A. I took the Ohio Farmers' policy over——

Q. Did you write to Mr. Levin that this policy had been ordered cancelled? A. I don't think so.

Q. Why didn't you? A. I went over and seen him.

Q. Where did you see him? A. Asbury Park.

Q. Made a trip over there specially? A. Yes, I took the policy to him.

Q. Took which policy to him? A. The new policy.

Q. You mean the Ohio Farmers'? A. Yes.

Q. Had he requested you to write that in the Ohio Farmers'? A. No, sir.

Q. Where did you see Mr. Levin when you took him that? A. At the hotel.

Q. In Asbury Park? A. Yes, sir.

Q. Who was present? A. I don't remember.

Q. Do you mean to say that you gave Mr. Levin the Ohio Farmers' policy? A. Yes, sir.

Q. Whatever became of that policy? A. I don't know.

Q. Did you ever get it back? A. I don't remember getting it back.

Q. Was it cancelled? A. It was cancelled by the company.

Q. And you cancelled it, didn't you? A. No, sir.

Q. Who did cancel it? A. The company.

Q. The company directly? A. Yes.

Q. Not through you? A. No, sir.

Q. Did you ever ask Levin about what became of that policy? A. Yes, I certainly did.

Q. What did he say? A. Simply told me he would get them for me.

Q. No, I am talking about the Ohio Farmers'. A. I am talking about the Ohio Farmers'.

Q. Were there two Ohio Farmers' written on this? A. No, sir.

Q. Why were you anxious to get the Ohio Farmers' back if the company had taken care of the cancellation direct. A. Well, when I was working really about the Ohio Farmers', they hadn't cancelled it yet direct.

Q. What say? A. They hadn't cancelled it yet direct and he was most anxious about it. They wrote me to get it.

Q. They first requested you to cancel? A. Yes.

Q. And when you didn't do it, they took it up directly? A. Referred to the Ohio Farmers'.

Q. How many times did you refer to the Ohio Farmers'? A. Well, I asked them about it several times, but I was not as particular about that after the company had cancelled it as I was the other.

Q. How long had the Ohio Farmers' been in existence before cancellation, if you know. A. I think about a month.

Q. Why did you assume to write a policy in the Ohio Farmers' for Mr. Levin? A. Well, I have been in the habit of doing that. Whenever any company would not carry an insurance I would simply put it in another company and keep him protected.

Q. Did you put a mortgagee clause in the Ohio Farmers'? A. Yes.

Q. There was a mortgagee clause on the Pittsburgh Underwriters' policy, was there not? A. Yes.

Q. Where was the Pittsburgh Underwriters' policy? A. I uderstood the mortgagee had it.

Q. Didn't you know the mortgagee had it? A. No, sir.

Q. You understood it, at least? A. Yes.

Q. How did you expect to get it back from Mr. Levin? A. Mr. Levin told me he would get it for me.

Q. You didn't tell us that before? A. Yes, I did.

Q. He told you he would get it from the mortgagee? A. Yes. He didn't say, as I remember, he would get it from the mortgagee; he would simply say, "I will get it for you in a day or two."

Q. You knew it was in the possession of the mortgagee, didn't you? A. I was not positive, no.

Q. You knew it was payable to the mortgagee, didn't you? A. Yes.

Q. And that being so, you knew it was customary for the mortgagee to hold the policies? A. Yes, sir.

Q. Why didn't you write the mortgagee and get it? I didn't know the mortgagee's address.

Q. Did you ever ask for it? A. Yes.

Q. Asked whom? A. Mr. Levin.

Q. Wouldn't he give it to you? A. He would put me off and say, "I will get it for you in a day or two" and he never bothered about it.

Q. You mean to say you asked him for Mr. Altshuler's address? A. Yes. He didn't absolutely refuse to give it to me, but we were good friends, and he would say, "I will get it for you in a day or two," and just put me off that way.

Q. When the Ohio Farmers' was cancelled, you didn't write any additional insurance for Levin then, did you? A. No, sir.

Q. You and Levin had been very friendly for a great many years, hadn't you, prior to this time? A. Yes, very friendly.

Q. And he had given you a lot of business, hadn't he? A. Yes.

Q. How much insurance do you suppose you were carrying for him at that time? A. Well, I suppose I was carrying at least $50,000 or $60,000 in Lakewood and about $10,000 in Asbury Park and some automobile insurance.

Q. And I suppose you have had other cancellations on his property, have you not? A. I have in Lakewood, not in Asbury Park.

Q. Not in Asbury Park? A. No.

Q. Ever had any difficulty in getting policies back? A. Well, in Lakewood I always knew where to get the policies.

Q. How did you know where to get them? A. Well, the Lakewood Trust Company had most of his policies and I would simply go there and give them a new policy and get the old one and get it cancelled.

Q. You never had any difficulty to get back a policy outside of this one, did you? A. Well, if they were out of town Levin was never giving any more effort to get them.

Q. Did you ever try to get any policies outside of this one? A. Not in Asbury Park.

Q. Where? A. In Lakewood.

Q. Where? A. In Lakewood I have had difficulty. I got several back.

Q. You never had any difficulty in getting them? A. Simply because I got them myself from the bank.

Q. Can you describe any reason why Mr. Levin would not turn this over to you after you had informed him it was to be cancelled? A. The only reason, the way I look at it, was neglect.

Q. He could get all the insurance he wanted of that kind, couldn't he? A. I should imagine so.

Q. Well, can you tell us any reason why he would hold onto this cancelled policy and not turn it over and contend it was insurance? A. No, I can't, only that he neglected to get that for me, that is all I can see.

Q. But his property, as you understand this policy, would stand considerable more insurance, would it not? A. Why, I should think so.

Q. Levin has paid you a lot of money in the form of premiums, has he not? A. Yes, sir.

Q. When was it you first wrote to Mr. Levin anything about cancellation? A. I think the first letter I wrote him was July 12th.

Q. What did you understand you had to have, as an agent of considerable experience in representing your company, from the assured in order to show your company that cancellation had been effected? A. Well, there is about three different ways to cancel a policy, that I have——

Q. That you pursue, ways— A. Yes.

Q. What are they? A. Well, one is to send a registered letter, another is to notify the party personally with a witness, and the other is simply to get a lost policy receipt or get the policy.

Q. Well, the two ways that you suggest are perfect ways, are they not, one the registered letter and the other getting a lost policy receipt or the policy. A. Are what?

Q. Those are perfect ways? A. Well, a good many companies don't want the registered letter. They would rather have a personal service or personal notice with a witness.

Q. You have other companies that require that? A. Well, I can't say that I have any that require it exactly, but they would rather have me and often have asked me to get it.

Q. If that was so, why was the company and its adjuster after the loss insisting that what they needed was a lost policy receipt? A. I don't know.

Q. Why did they want anything more than you have done if they had cancelled the policy? A. I don't think the company knew what I had done.

Q. The adjuster knew what you had done? A. Only from what I told him in that affair.

Q. You told him exactly what you had done? A. Yes, I told Mr. Stansbury the same thing.

Q. Isn't the regular way in your practice to cancel a policy, when you receive notice from the company, to send a five days' written notice by mail and ask for a return receipt? A. Not with local people, no, sir.

Q. Not with local people? A. No, sir.

Q. If you can't get the policy back, isn't that the regular way? A. No, sir.

Q. What is the regular way? A. Why, simply take a witness and go see the person personally and notify them personally with this witness, and then, if necessary, I have this witness take an affidavit that I notified them personally.

Q. Why do you go to all that formality when you could effect it easily by letter? A. For instance, I served notice on the Lakewood Building Loan here a short time ago——

Q. No, I ask you why you do that. A. I am explaining to you why. I had to serve about twenty notices. That costs twenty cents postage, besides the writing. I simply went there and informed the Building Loan of it and the witness took an affidavit.

Q. Your time isn't worth anything, going out and notifying people? A. Well, it didn't take me very long. It wasn't a block away.

Q. Who is the witness you took to notify Mr. Levin of the cancellation of this policy, according to your method? A. Well, I didn't take any witness at first.

Q. You didn't? A. No.

Q. Well, then you didn't effect any improvement on your practical ways, did you? A. I notified him before witnesses many a time, but at first I didn't think it was necessary. I didn't suppose that Levin would hold the policy up; I supposed he would get it right away.

Q. You don't know to this day any reason why he held it up, do you? A. No, sir.

Q. Then you didn't take a witness with you and tell them about the cancellation of this policy? A. No, sir; not the first time.

Q. When did you have any witnesses? A. We have one right in my own office.

Q. According to your plan? A. No, not acording to my plan. I had this girl a witness in my office.

Q. When he came in? A. Yes.

Q. He didn't come in to get a notice of cancellation, did he? A. Not necessarily, no.

Q. When do you say you gave him notice of cancellation? A. When I seen him July 3rd, right after I wrote the Ohio Farmers' policy.

Q. But you took no witnesses with you? A. No, sir.

Q. And you simply made a request? A. Absolutely.

Q. How did you come to write this letter of July 12th, Exhibit D-9? A. Why, I got a telephone call from Mr. Marsh, of the Ohio Farmers' that they wanted the policy cancelled.

Q. So that you immediately wrote that letter? A. Because I didn't have time to go over to Asbury Park.

Q. And did you send this by registered mail? A. No, sir.

Q. Why didn't you? A. I didn't think it was necessary with Mr. Levin to send a registered letter.

Q. Then you singled Mr. Levin out as being out of the ordinary class of patrons and you didn't think it was necessary to notify him in the regular way, did you? A. No, I thought he was one of the best friends I had.

Q. And he has been, hasn't he? A. Yes, up till this time.

Q. This letter says: "I have just received a letter from the Ohio Farmers' Insurance Company stating that they do not want a policy on your hotel in Asbury Park. I wrote $5,000 with them to take the place of the $5,000 that was formerly in the Pitsburgh Underwriters. Kindly return the Ohio Farmers' and Pittsburgh Underwriters policy as soon as possible, as I have to return them to the companies. It will be necessary for you to have $5,000 written in Asbury Park." Is this what you call a notice of cancellation? A. No, sir.

Q. Wait till I ask my question. Is this what you call a notice of cancellation of the Pittsburgh Underwriters policy? A. I didn't send that as notice of cancellation.

Q. You didn't intend it to act as such, did you? A. No, sir.

Q. You knew there was such a notice, didn't you? A. Yes.

Q. This was a mere request to return the Ohio Farmers' policy to you as well as the Pittsburgh Underwriters? A. Yes.

Q. And that was all; you didn't give him any five days' notice here, did you? A. I had already notified him personally.

Q. I know you had. You said that. Do you understand what this clause is in the policy? What does it say—that the asured or the company may cancel the policy? What does it say?

MR. BOARDMAN: I object. The policy itself is the best.

MR. CARTON: Well, I assumed he knew without reading it. If he doesn't, he may take the policy.

Q. Do you know the provision in this policy regarding cancellation? A. I know that it requires five days' notice.

Q. Did you ever give five days' notice? A. To Levin?

Q. Yes. A. He had over five months.

Q. Did you ever give him a notice that after five days his policy would be cancelled and be of no effect? A. No, I didn't do that because I wrote the policy over in another company for him to take the place of that company.

Q. And you canceled that? A. I didn't cancel the second policy.

Q. Somebody else did? A. Yes.

Q. Did you ever give him a notice in accordance with the terms of that policy?

(Objected to.)

MR. CARTON: I think I have a perfect right to ask this.

THE COURT: Yes, you have.

Q. Did you? A. Only verbal notice before witnesses.

Q. And the verbal notice was that the policy had been canceled and you wanted it back? A. Right.

Q. That was all; you never told Levin that "after five days from this date your policy will be null and void," did you? A. No, I simply told him that I had written it over.

Q. You never told him that, did you? A. No, sir.

Q. And you never gave him a notice to that effect; and that is what the condition of the policy requires, doesn't it? A. I believe it does, yes, sir.

Q. Mr. Le Compte, you say that you went twice a week from Asbury Park to Lakewood all summer, trying to get this policy back; is that a fact? A. Yes.

Q. How far is Asbury Park from Lakewood? A. Eighteen miles.

Q. And you drove there? A. Yes, sir.

Q. Now, do you want this jury to believe that, that you spent twice a week all summer trying to get this policy in this way, when you knew you could get the same result by carrying it out in a regular way, by giving registered notice? Do you want this jury to believe that? A. One reason I didn't send a registered letter, I didn't have the mortgagee's address.

Q. Didn't have what? A. The mortgagee's address.

Q. You didn't have to have the mortgagee's address to notify Mr. Levin, did you? A. No, but I have always thought, I always understood that I had to notify the mortgagee in order to work.

Q. You know that is an entirely separate proposition, notifying the mortgagee, don't you? A. Yes, it all goes with the cancellation of a policy.

Q. Well, you know that fact, the difference between notifying the owner and notifying the mortgagee, don't you? Did you think you couldn't effect a cancellation of this policy unless you notified the mortgagee? A. Absolutely.

Q. You don't mean that, do you? A. Yes, I do.

Q. You never did notify the mortgagee? A. I don't know yet the mortgagee's address.

Q. You never notified him, did you? A. No, sir.

Q. Then according to your story the policy was never cancelled, was it? A. It was cancelled verbally.

Q. But verbally, written or any other way. A. I didn't send any cancellation notice.

Q. Is it your understanding that you have to notify the mortgagee, no matter in what manner, of cancellation in order to cancel the policy?

MR. BOARDMAN: I object. This witness is not a lawyer. He can't be examined on the law. They are pure questions of law.

THE COURT: Yes, I don't think it is material, Mr. Carton.

Q. What is your understanding as to notifying a mortgagee?

MR. BOARDMAN: It is what he did, not what he thought.

Q. Mr. Le Compte, I ask you again, when you were not able to get what you wanted when you went over there all summer, why you didn't cancel this policy in the regular way. A. Because I kept thinking all the time I would get the policy through Mr. Levin, and then when he went—

Q. Didn't that mean some effort and some expense to you, twice a week all summer to Asbury Park? A. That was not the only reason I went to Asbury Park.

Q. Did you call for social purposes? A. Well, Mr. Levin owed me quite a lot of money at that time, that I went for, as well as telling him about the policy.

Q. I suppose you got some money? A. No, sir.

Q. Didn't get it? A. No, I didn't.

Q. Did you ever get paid? A. Yes, I got paid.

Q. Paid in full? A. Well, I think at the present time there is a small balance on our book.

Q. You haven't brought any suit against him for insurance premium? A. Never brought a suit against him.

Q. You can collect anything he owes you? He is absolutely good? A. I think so.

Q. You know so, don't you? A. Yes, sir.

Q. Why didn't you write a letter on July 3rd when you got the telegram from the Pittsburgh Underwriters, the same as you did on July 12th when you got a notice from the Ohio Farmers'?

A. Well, I was going over to Asbury Park and I simply took the policy over and I thought possibly I could get the other policy at that time and close it up.

Q. You had a talk with Mr. Stansbury right after this loss, did you not? A. Yes, sir.

Q. Do you say it is not a fact that you didn't give to Mr. Stansbury, in letting him have the list of insurance in force on this property, the policy of the Pittsburgh Underwriters? A. No, I simply explained to Mr. Stansbury just the position that the policy was in, that I had notified Mr. Levin of the cancellation, wrote it over and had never been able to obtain the policy.

Q. Just try and think when you did make that explanation? It was four or five days after the fire, wasn't it? A. I don't remember.

Q. And that was four or five days after the day you had this first talk with Mr. Stansbury, wasn't it? A. I don't remember being in there but once in his office.

Q. You were not there more than once? A. I don't remember but one time about this fire. I have been there since.

Q. Where did you meet Mr. Stansbury? A. The first time I ever met him?

Q. Yes, in this matter; the day of the fire or the day after? A. I don't remember whether it was up to the hotel after the fire. I was up there at the hotel.

Q. Were you in his office? A. Yes, I was in the office, I remember that very distinctly.

Q. And you had other insurance and he had other insurance on this loss? A. Yes.

Q. And he gave you a list of his companies, did he not? A. Yes.

Q. And you gave him a list of your companies, did you not? A. He called up the office in Lakewood.

Q. No, I haven't got to that yet. You gave him a list of your companies there in the office that day, did you not? A. Not a written list.

Q. I didn't ask you that, but you told him the companies you had? A. Yes.

Q. Did you give him a memorandum of the amount of policies you had covering this loss? A. I told him the policies I had.

Q. And in them you included the Pittsburgh Underwriters? A. No, sir; I told him about the Pittsburgh Underwriters, the trouble I had had with Levin about getting the policy back, how I had notified him of its cancellation and wrote it over in another company.

Q. Don't you know this: that Mr. Stansbury called your office in Lakewood in the afternoon and again verified the list of insurance you had on this loss? A. I know he called the office, yes.

Q. Do you know whether he got a list of the policies or not? A. They told him over the phone.

Q. What did they tell him? A. I wasn't there. I don't know.

Q. Then you don't know what they told him? You don't know whether that list included the Underwriters' policy or not, do you? A. No, sir.

Q. Wasn't it several days after, four or five days after the fire, and after you had this talk with Mr. Stansbury about the coverings, that you came to Mr. Stansbury and said that the Pittsburgh Underwriters' policy must be taken out because it had been cancelled. Isn't that a fact? A. I don't remember being there but once.

Q. Didn't that conversation take place? A. I know I talked with Mr. Stansbury about the Pittsburgh.

Q. After your first talk? A. I don't remember but the one talk.

Q. Did Mr. Stansbury ever go to your office at Lakewood about this matter? A. I don't think so.

Q. When did you make known to the adjuster of the General Adjustment Bureau that the Pittsburgh Company denied responsibility? A. Not until they took it up with me.

Q. How long after the fire was that? A. I couldn't say, offhand, but it was not right away.

Q. Did you tell the General Adpustment Bureau all the facts in regard to the cancellation of this policy? A. If I remember right I referred him to Mr. Haywood.

Q. And Haywood was the representative of your company? A. I think Mr. Haywood represented the Pittsburgh Underwriters and gave him my address. I think I have a copy of the letter here. Mr. Kling called me on the phone.

Q. Who did? A. Mr. Kling, of the General Adjustment Bureau.

RECESS TILL 1:30 P.M.

Trial of the cause resumed at 1:30 P. M.

ERNEST E. LE COMPTE, resumed.

BY MR. CARTON:

Q. Mr. Le Compte, at the noon recess you had referred to Mr. Kling. Who is Mr. Kling in this

matter? A. He was an adjuster for the General Adjustment Bureau.

Q. And Mr. Haywood was the adjuster for the Pittsburgh Underwriters? A. Yes, he represented the Pittsburgh Underwriters.

Q. And really you had some companies interested in this adjustment of this loss outside of the Pittsburgh, didn't you? A. Yes, sir.

Q. And how many companies? A. Three.

Q. And did these companies, other companies, pay their proportion of this loss on the amount which was fixed at $31,500?

MR. BOARDMAN: I object. That is not the way to prove anything.

THE COURT: Well, how is that material, Mr. Carton?

MR. CARTON: Well, it seems to me, your Honor, it is material. They have gone into the various companies that were interested in this matter and he referred to these two adjusters and he had two other companies, at least, with losses in this property, and I think it is pertinent as to the extent of the —it is some evidence, at least, as to the extent of the loss. I might say very candidly, your Honor, it was a question whether I would produce Mr. Brooks, which I don't know whether it is necessary or not, the man who made the estimates, and this is being asked to obviate that very thing. I think Mr. Stansbury has already covered it, but I just want to make this inquiry of this witness.

THE COURT: Well, do you press the objection?

MR. BOARDMAN: Yes, your Honor.

THE COURT: All right. I sustain the objection.

Q. In the proofs of loss of your companies, other companies, do you know how much the loss was fixed at?

MR. BOARDMAN: I object.

MR. CARTON: I think it is pertinent, your Honor.

MR. BOARDMAN: Not material and not binding on us in any way.

THE COURT: Testimony of that sort has been brought out in this case, I think, without objection. I will sustain the objection.

Q. When did you notify the Pittsburgh Underwriters Company of this fire? A. When did I notify them?

Q. Yes. A. I don't remember exactly, but I think I wrote them a letter, it is either when Mr. Kling called me up or when Mr. Haywood took it up with me, one or the other, right after the fire. It was soon after the fire.

Q. A couple of days after the fire? A. Well, I won't say a couple, but it was soon after.

Q. And it was after Mr. Levin had informed you of the fire and after you had inspected the premises? A. Yes.

Q. The Pittsburgh Underwriters didn't pay on this loss, did they? A. Not that I know of.

Q. Well, you know they didn't pay, don't you? A. Well, that is what I always thought. I thought it, I didn't know.

MR. BOARDMAN: That is why we are here.

Q. And do you know upon what ground they refused to pay? A. Well, they insisted the policy was cancelled.

Q. And that was the ground, wasn't it? A. What?

Q. That was the ground upon which they refused to pay it? A. I suppose so.

Q. I am calling your attention, Mr. Le Compte, to Exhibit D-5, a letter produced on your direct examination from John A. Lance to you on October 28, 1922. You remember that letter, don't you? A. From who?

Q. John A. Lance. A. Oh, yes.

Q. He is the special agent of the Pittsburgh Underwriters? A. He was at that time yes, sir.

Q. He writes in this letter to the effcet that this policy was ordered cancelled on July 3rd and that you had been written to several times and you had not replied to any of his letters. Why didn't you reply to his letters? A. I simply expected to get the policy most any time from Mr. Levin and I expected to send the policy back.

Q. And when you got that you expected to report it back to Pittsburgh, when you got the policy? A. Yes, sir.

Q. When he inquired in this letter "Has the policy been cancelled and if so why don't you return it or lost policy receipt?" what reply did you make to that, if anything? A. I don't remember making any.

Q. You don't? A. No.

Q. And his statement in here, he says, "Please bear in mind that should a loss occur on this policy, you will be held personally responsible."

You remember that? A. Yes, but I didn't suppose there would be any loss on it when I renewed it or placed it in another company, that that was the same as a cancelled policy.

Q. Didn't you tell us that the renewal had been cancelled? A. I don't think it had at that time.

Q. On October 28th? A. Oh, yes; I guess it had.

Q. Of course it had. Why didn't you, when you got this letter informing you of your own personal liability, why didn't you make some effort then to cancel this policy? A. I never thought there would be any claim made on the policy.

Q. Then in the letter of December 14, 1922, Exhibit D-4, they say they have written you several times and you never paid any attention to the matter; you never reported to the company what you had done with regard to any cancellation of this policy, did you? A. I think I wrote them that I had replaced the policy, but that is all.

Q. Well, they infer in here that you have paid no attention to it whatever. They say "This matter has now been hanging fire since July 3rd (this letter is dated December 14) under which date we first ordered the cancellation, and we see no reason why you have not complied with our wishes." Did you make any response to that? A. What date was that?

Q. December 14th. A. I don't think so.

Q. Then they go on further and say, "Unless we have the cancelled document in the very near future, we will be obliged to write direct to the assured." You remember that letter, don't you? A. Yes.

Q. Did you do anyhing further toward cancellation when you got that letter? A. No, sir.

Q. Do you know whether they ever did write to the assured or not directly? A. I do not.

Q. In Exhibit D-6, the letter from Haywood to you, under date of January 25, 1923, after the fire, you had had some talk with Haywood about this policy before this letter was written, hadn't you? A. I think he was down to the office or called me up, one or the other.

Q. And he impressed upon you what was necessary for you to do in order to effect a complete cancellation of this policy, didn't he? A. How is that?

Q. He informed you that it would be necessary to get something from Mrs. Levin, some waiver or something from the owner to show that the company was not liable in any way? A. Well, if I remember rightly, Mrs. Levin hadn't made any claim at that time, and I told him I didn't think they ever would; but he said if I got a waiver of that kind, it would simply be finished and nothing more about it.

Q. For my own informatioon more than anything else, there are so many things attached to this exhibit——

MR. BOARDMAN: Do you want us to take them off?

MR. CARTON: No. What number is this?

MR. BOARDMAN: Here it is right here; Exhibit D-8.

MR. CARTON: A whole lot of stuff on there that I have never known was there before.

Q. What are these papers? A. These papers?

Q. Yes, that whole exhibit? A. I don't know what these are. I haven't anything to do with this. This is a daily report that I sent to the company.

Q. You produced this this morning?

MR. BOARDMAN: No, Mr. Davies produced them.

Q. You didn't produce these? A. No.

MR. CARTON: Were these offered by you, Mr. Davies?

MR. DAVIES: Yes.

MR. CARTON: I withdraw the question.

RE-DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You were asked if you had been requested to write the Ohio Farmers' policy, the policy in the Ohio Farmers'. Were you ever requested by anybody to write a policy in the Pittsburgh Underwriters, I mean by the Levins? A. What, for that particular company?

Q. Yes. A. No, sir.

Q. And when you said you were not requested to write the policy in the Ohio Farmers', you never were requested to write a policy in any company, were you? A. Not any particular company.

Q. Mr. Le Compte, looking back on it, I understood you to say that the only thing you could attribute Mr. Levin's conduct to at that time was neglect? A. Yes, sir.

Q. Looking back at it, could you find some other motive? A. I don't know what to think now.

Q. Well, I won't press that.

CROSS EXAMINATION BY MR. CARTON:

Q. Yon say you are in the insurance business and in the butcher business? A. No, mercantile.

Q. Are you acquainted with Mr. and Mrs. Levin? A. Yes.

Q. And are you acquainted with his son, Victor? A. Yes.

Q. You are very well acquainted with him, are you not? A. Yes.

Q. You are pals? A. Sort of pals.

Q. Well, you went to school together, didn't you? A. Not school, but he went to the same school that I went to after I had finished.

Q. Well, how long have you known him? A. Oh, I have known him for a long time.

Q. And haven't you endeavored for some time to have Mr. Levin give you a part of his insurance business through the intercession of his son? A. Yes.

Q. And it was as a result of that intercession through his son that you got this policy, was it not? A. That I don't know.

Q. Well, do you know that you sought him for the insurance? A. I did.

Q. And I suppose you ascertained when you got this insurance that he had property of insurable value to the amount of your policy, did you not? A. I don't recall just now—it has been quite a while ago; I don't know.

Q. The fact is that you really didn't write any—— A. I didn't write the policy, see?

Q. But you turned it over to another? A. Yes.

PAUL ZURLIN, sworn for defandants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. What is your business, Mr. Zurlin? A. Real estate and insurance.

Q. Where do you live? A. 120 Second Street, Lakewood.

Q. Where is your office? A. Office 120 Second Street.

Q. And you are the Mr. Zurlin that Mr. Meyers refers to that he turned this insurance over to? A. Yes, sir.

Q. And on August 1, 1922, did you write a policy of insurance of $5,000 in the Provident & Washington on property of Anna Levin? A. Yes, sir.

Q. Is this your daily report, your daily record? (Paper shown witness.) A. Yes, sir.

MR. BOARDMAN: I offer it in evidence.

MR. CARTON: I object to the report, your Honor.

MR. BOARDMAN: It is his record, it is his agent's record.

MR. CARTON: I don't care if it is. There is no dispute that this policy was written and participated in the loss; but I can see no purpose of his report. There is no contradiction that this policy was written. My suggestion is that it is irrelevant.

MR. BOARDMAN: All right. I will withdraw it. I don't think we need to cumber the records with it. I don't see any point in that.

Q. That was written on the 1st of August, 1922? A. Yes.

Q. And the first insurance you ever wrote for Mr. Levin? A. Yes.

CROSS EXAMINATION BY MR. CARTON:

Q. Have you been in the insurance business some time, Mr. Zurlin? A. Yes, sir.

Q. And had you been acquainted with Mr. and Mrs. Levin prior to August 1, 1922? A. Yes.

Q. For some time? A. Yes.

Q. Had you done any insurance business for them? A. Not before that time.

Q. David Meyers, the last witness, do you know him as an insurance man? A. Yes, sir.

Q. And how did you come to write this $5,000 policy? A. He asked me to write it. Mr. Meyers asked me if I wanted any business on Mr. Levin's property.

Q. You didn't see Mr. and Mrs. Levin about the matter, did you? A. No.

Q. And was this policy in force at the time of the fire? A. Yes, sir.

Q. And did it participate? A. Yes, sir.

Q. In the proportionate share of the loss? A. Yes, sir.

HARRY MARSH, sworn for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. What is your business, Mr. Marsh? A. Special agent for the Ohio Farmers'.

Q. And where is your office? A. In Philadelphia; that is our——

Q. That is your local office? A. Local office.

Q. And where is the Ohio Farmers' home office? A. Leroy, Ohio.

Q. When Mr. Le Compte wrote the Ohio Farmers' policy on July 3, 1922, on Mrs. Levin's property, was that fact brought to your attention at the time? A. Yes, sir.

Q. What part did you take in the matter? A. As it was written outside of Mr. Le Compte's territory, it was necessary to get the consent of our Assbury Park agent. I called on him—I don't know, maybe it was a week or two weeks afterwards— and he would not give the consent. I called Mr. Le Compte on the phone, as I recall—now this is away back—as I recall, I called him on the phone and told him that he would have to cancel the policy, and so reported to my office.

Q. Who is E. L. Schultz? A. He is general agent.

Q. For where? A. For the east. You see I work out of the eastern general agency. Mr. Schultz is president of the E. K. Schultz Company.

Q. I show you Exhibit D-7. That is the daily report on this policy? A. Yes, I imagine this is the original.

Q. Was that policy cancelled? A. Yes.

Q. And did you have trouble getting back this policy? A. Now that is—I know we had quite a lot of trouble. I wrote several times to Mr. Le Compte.

Q. Did you take any action as a result of having the trouble that you had to get back the policy? A. Well, I imagine that they issued——

(Objected to.)

Q. You must not tell what you imagine. A. Well, I can't say positive.

Q. You don't know about any other policy? A. Here is what I know.

Q. Well, tell us what you know. A. I followed this very closely and at the—I don't know, finally I came in the office one week and they

said the cancellation was effected. So that relieved me of the worry about it. Now, how it was cancelled, I couldn't tell you.

Q. But I was not thinking of that. Do you know anything about any other Levin policies in the Ohio Farmers'? A. Oh, yes.

Q. What about them? A. Well, they were cancelled the same way.

Q. Why? A. Why?

Q. Yes. A. I really couldn't say at the present time. I don't know. No, it is too far back. I couldn't tell you why I cancelled them. But I ordered the cancellation of them, I know that.

Q. I show you a letter dated September 6th. That signature is the signature—whose signature is it? A. It was a gentleman that used to be with us, no longer there—William Satler.

Q. And he signed Mr. Schultz's name? A. Yes, E. K. Schultz & Company, by William Satler.

Q. And on that date were you still trying to get back these policies? A. Evidently the policies had not arrived yet when this letter was written.

Q. As far as you know, did the policies ever arrive? A. I couldn't say. Now it may have gone out to the home office, which we know nothing about.

Q. Let me ask you, did you ever see this letter of December 27, 1922, from Mr. Le Compte to your office? (Letter shown witness.) A. No. I have never seen this before.

MR. BOARDMAN: Have you any objection to this letter?

MR. CARTON: Certainly I object.

CROSS EXAMINATION BY MR. CARTON:

Q. Mr. Marsh, what are you, a special agent of the Ohio Farmers'? A. Yes.

Q. Where is your headquarters? A. Philadelphia.

Q. And you know but very little about any policy or policies written in your company for Mrs. Levin? A. Well, only what I would come across in the general course of business. You see, every policy that is written is reported to me within my territory.

Q. I supose there are thousands of those go through every week? A. Yes.

Q. You say you have had trouble in getting other policies back from Mrs. Levin. What other policies did you have trouble getting back? A. Well, we understand there were two other policies cancelled and we had quite a lot of correspondence on those two policies.

Q. Were other policies cancelled? A. Yes.

Q. What did they cover? A. I think they covered in Lakewood, if I am not mistaken. I really couldn't say. I know there is three policies mentioned in that list.

Q. And who wrote those policies, Mr. Le Compte, all of them? A. Mr. Le Compte, all of them.

Q. Did those other policies cover Lakewood property or Asbury Park property? A. I really couldn't say. I couldn't say. I don't know.

Q. Well, didn"t you say the reason why this policy in question was cancelled, the one that has been issued in your company, was because it was written on Asbury Park property and your Asbury Park agent objected? A. You are speaking about the Clarendon Hotel?

Q. Yes. A. That is in Asbury Park?

Q. Yes. A. Why the other two were cancelled I can't say.

Q. You think they were on Lakewood property? A. I imagine so, because we hadn't but one policy in Asbury Park.

Q. Can you ascribe any reason why the policies in Lakewood were ordered cancelled when they had been written by a local agent? A. None whatever. I can't now.

Q. Did you produce this, Mr. Marsh? (Paper shown witness.) A. I think our office sent it.

Q. Sent it to whom? A. Sent it to Mr. Davies.

Q. You are trying to help out as much as you can? A. I really don't know. That is a matter of the office.

Q. What does this report show—I am referring now to D-7—as to when your Ohio Farmers' policy was cancelled? A. Well, the only thing that I can see down here, that it is marked August, 1922.

Q. Flat, wasn't it? A. Yes, sir.

Q. And the "cancelled" stamp on there written shows the cancellation as of August, 1922, does it not? A. Yes, sir.

Q. Do you remember when this policy was issued? A. That particular policy?

Q. Yes. A. I don't know. On July 3rd, isn't it?

Q. What? A. July 3rd. I didn't look at that daily. I din't pay particular attention to it.

Q. You didn't have so very much trouble then, in getting the policy back if you cancelled it in August, did you? A. I don'I know. I wasn"t the one who handled it.

Q. You don't know much about this matter anyhow, do you?

(Objected to.)

A. As far as I am concerned, that is all.

Q. Personally, I mean. A. Yes.

BY MR. BOARDMAN:

Q. You don't know whether the policy was returned or not, do you? A. I couldn't tell you.

GEORGE L. MAJOR, sworn for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. What is your business, Mr. Major? A. State agent Concordia Fire Insurance Company of Milwaukee, Wisconsin.

Q. And what is your territory? A. New Jersey.

Q. Do you know Mr. Le Compte? A. Yes, he is our representative in Lakewoood, and has been for years.

Q. Do you remember having a conversation with Mr. Levin, the husband of the plaintiff in this case? A. Yes, sir.

Q. In the early part of 1923? A. Yes, sir.

Q. After this fire? A. Yes, sir.

Q. What did you go to see him for? A. Well, I was a disintersted party, but Mr. Le Compte owed me considerable money as a balance, and Mr. Levin owed Mr. Le Compte considerable money, and it was an idea to try to collect this money to reimburse me, so I could collect my balance.

Q. And was anything said there about this Pittsburgh Underwriters policy? A. Mr. Le Compte at the time had some papers in his hand which he said he would take along with him and he could talk to Mr. Levin and tell him that he was wrong in using this policy, as it had been cancelled and he asked me as a state agent of the company to advise him to that effect.

Q. As a kind of expert, that was the idea? A. Yes, as an expert to go there and advise him.

Q. Do you recognize this paper as the one that Mr.— A. That looks like the paper that Mr. Le Compte had in his hand.

Q. And he wanted—— A. Wanted Mr. Levin to sign it.

Q. And what did Mr. Levin say? A. Well, as I recollect it, Mr. Levin seemed to ignore Mr. Le Compte and didn't want to talk on the subject. That is all I can remember.

Q. Did he say that the policy had been cancelled? Did he speak about any other policy having been cancelled? A. I don't think he would admit that it had been cancelled.

Q. He would not admit, but did he deny it? A. Well, as I recollect, he sort of intimated there was some cancellation, but he didn't know which company.

Q. He didn't know which policy had been cancelled? A. That is all I can remember.

Q. What Mr. Le Compte wanted Mr. Levin to sign was a paper acknowledging the cancellation and releasing—— A. And releasing the company from liability, inasmuch as they had no liability because they thonght the policy cancelled.

CROSS EXAMINATION BY MR. CARTON:

Q. Who determined that they had no liability? A. Why, as a disinterested party, I simply told Mr. Levin that inasmuch as the company asked for cancellation, and the policy was no good to him, he turn it over to Mr. Le Compte or sign an affidavit, it would not affect him in any way.

Q. You were going there to try to help to get this defendant company out of trouble, weren't you? A. No, sir; I wasn't in any way that way. I came, as I told you——

Q. With him to get money? A. To get money from Mr. Levin, in order that Mr. Le Compte could reimburse me for the balance he owed me.

Q. But you were not there in the pomp and form of a state agent of the Concordia Insurance Company, but to sort of advise Mr. Levin on what the law was on the policy? A. It was not as state agent, correct. No, he was only as a disinterested party to tell him I knew it was, that was all.

Q. Didn't you say that you were a sort of expert? A. Yes, certainly.

Q. And you were liberal enough to give Mr. Levin the benefit of your knowledge on the cancellation of a policiy? A. Absolutely.

Q. And you told him? A. I told him.

Q. And you told him you didn't believe he had any claim against the company, didn't you? A. Certainly.

Q. And you tried to help out your friend Le Compte and the Pittsburgh Underwriters by endeavoring to have Levin sign a waiver or release, didn't you? A. That is natural with any special agent.

Q. You did that, didn't you? A. Yes, certainly.

Q. And he refused to do it? A. He practically ignored him, certainly.

Q. Of course, he ignored him. A. Of course, he ignored him.

Q. You were included in this loss yourself, were you not? A. Me?

Q. Yes. A. I am not interested at all.

Q. Your company is? A. My company is not interested whatsoever.

Q. Who owns the Concordia? A. In 1923, the Concordia Insurance Company was owned and controlled by the Concordia Insurance Company.

Q. Who owns it today? A. At the present day it is owned by the Newark Firemen's Insurance Company.

Q. Who owns the Ben Franklin? A. I don't know.

Q. Isn't it the Firemen's Insurance Company of Newark? A. I know they own some holdings of interest, I don't know whether directly or indirectly.

Q. Also in the Superior? A. Yes, sir. It is directly or indirectly, I don't know which way.

Q. So that your company, the Concordia, owned by the Newark Firemen's, is intersted in this loss? A. Absolutely not, my company is not interested. I am not interested.

Q. Didn't the Newark Firemen's Insurance Company take over the responsibility of all those companies when they absorbed them? A. That may be.

Q. Certainly. A. That may be, sure.

Q. Well, at any rate, you were trying to get

Mr. Levin to sign something that would be an admission that he didn't have any claim against the company? A. Yes, at that time, and at that time, the Concordia didn't belong to the Firemen's Insurance Company.

Q. And he told you nothing doing? A. And he just simply ignored Mr. Le Compte.

Q. Now, when was that, about? A. Oh, the early part of 1923.

Q. I suppose the information you had, from which you were going to give this advice to Levin as to cancellation, was what you had gotten from Ernest Le Compte? A. That is the only information I had, none other.

VIRGINIA WESTHALL, sworn for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Where do you live, Miss Westhall? A. Lakewood, New Jersey.

Q. Are you employed? A. Yes, sir; I am.

Q. Where? A. F. W. Todd, Lakewood.

Q. In the summer of 1923, by whom were you employed? A. Mr. Le Compte, of Lakewood.

Q. The Mr. Le Compte who testified here this morning? A. Yes.

Q. In what capacity were you employed? A. I was stenographer.

Q. And did you fill up the policies? A. Yes.

Q. Do you know Mr. and Mrs. Levin? A. Not personally.

Q. Well, do you know them by seeing them? A. Just in a business way.

Q. Just in a business way? A. Yes.

Q. During that summer, were they in and out of your office? A. Very often.

Q. And do you recall the writing of the Pittsburgh Underwriters policy? A. On the Clarendon Hotel in Asbury Park?

Q. Yes. A. Yes, on the hotel in Asbury Park.

Q. And do you know what was done about it, what happened? Did you get any message from—— A. Why, a telegram came to the office on July 3rd to cancel the policy. The telegram came from the Pittsburgh Underwriters.

Q. And what was done? A. And I immediately wrote another policy in the Ohio Farmers' and Mr. Le Compte took it over that afternoon to get the Pittsburgh, he was going to replace it with the Ohio Farmers'.

Q. Did he bring back the Pittsburgh? A. No, he didn't.

Q. Did he make any other efforts to get the Pittsburgh? A. Yes, he did.

Q. Did you ever hear him talk with Mr. or Mrs. Levin about it in the officie? A. Very often.

Q. And what would Mr. Levin say? A. Oh, he would say he would give it to him in a day or two, but he kept putting it off all the time.

Q. Was Mrs. Levin in the office during the summer? A. Yes, she was.

Q. Was it spoken of to her?; do you remember? A. Yes, it was.

Q. Was it a matter of considerable concern in the office?

(Objected to.)

MR. BOARDMAN: All right. I will accept it.

Q. Was it an unusual experience to have difficulty in getting back a policy? A. From Mr. Levin?

Q. Well, I mean generally speaking, did you have more trouble with this matter so that it fixed itself in your mind? A. Oh, yes, we did.

Q. Who else were in the office during the summer? A. Mrs. Turner.

Q. Mr. Le Compte's office adjoins his house, is part of the house, is it? A. Yes, it does.

Q. And was Mrs. Bennett in and out? A. Yes, she was.

Q. Did she help in the office somewhat? A. No, she didn't help with the office.

CROSS EXAMINATION BY MR. CARTON:

Q. You were with Mr. Le Compte in 1922, and how long prior to that time had you been with him, Miss Westhall? A. I went with Mr. Le Compte the first of June, 1921.

Q. You had been with him about a year before this policy was written? A. Just about.

Q. Did you have charge of the insurance end of the Le Compte office? A. Why, I wrote the policies. I didn't post them, though

Q. Had you had experience in the insurance end of Mr. Le Compte's business for any length of time? A. Why, I was there possibly a year before that policy was written.

Q. Did you have another girl in the office that took care of the insurance? A. Mrs. Turner.

Q. Was she the girl in charge of the insurance? A. Why, she did the bookkeeping end of it.

Q. And do you remember when this policy was issued? A. Yes, I do.

Q. This Pittsbburgh Underwriters policy? A. Yes.

Q. I suppose you remember because you have checked the matter up since; that is the only

way you remember it, isn't it, Miss Westhall? A. I couldn't help but remember it, there was so much fuss about it at that time.

Q. That fuss was at the time it was issued? A. Oh, yes; of course.

Q. You issue a great many policies in that office, do you not? A. What do you mean by a great many?

Q. I would like to have you state. You did issue a great many policies, did you not? A. About a hundred a month, I should say.

Q. Now you say you remember a telegram came in to cancel this policy. What did Mr. Le Compte do, if anything, if you know, with regard to notifying Mr. and Mrs. Levin of the receipt of that telegram? A. Why, Mr. Le Compte immediately had me write another policy in the Ohio Farmers' the day he received the telegram, and that——

Q. Now, I haven't asked you that, Mss Westhall. I asked you what, before he wrote this other policy, and when he got this telegram, what, if anything, he did toward communicating to Mr. and Mrs. Levin the information that the company wanted a cancellation? A. He hadn't had a chance yet.

Q. Well, he didn't do anything at that time, did he? A. Why, he took the policy over.

Q. What say? A. I say he took the Ohio policy over that afternoon.

Q. Well, he told you he did that, I suppose? A. Well, I saw him do it.

Q. Did you go with him? A. No, I didn't go with him.

Q. You don't know where he went? A. I certainly have an idea.

Q. Your understanding of the history of the matter is that, when this notice to cancel came in, Mr. Le Compte didn't give any notice to Mr.

and Mrs. Levin, but instead assumed to write a policy for them in the Ohio Farmers'; is that right? A. He notified them personally.

Q. Before he wrote the policy? A. No, not before he wrote it.

Q. Well, you don't know whether he notified them personally or not, do you? A. I took his word for it.

Q. Well, that is very commendable. Do you know of your own knowledge what Mr. Le Compte ever did thereafter with regard to cancellation of this spolicy? A. Yes, he went over to Mr. Levin.

Q. Well, that is what he told you? A. I haven't any reason to doubt his word.

Q. I understand that. Now did you say that Mr. and Mrs. Levin were in the office very often? A. Mr. Levin was in the office very often; Mrs. Levin came in possibly three or four times during the summer.

Q. Of 1922? A. Yes.

Q. Are you quite sure about that, Miss Westhall? A. Yes, I am.

Q. Do you know what she ever came to your office for? A. Why, on business.

Q. Do you know what business? A. I culdn't say exactly.

Q. What? A. When Mr. Levin would come over, she would come with him.

Q. When he would be transacting business? Is that your observation about that, Miss Westhall? A. Yes, it is.

Q. Do you think you ever saw Mrs. Levin in your office in the summer of 1922? A. Yes, I did.

Q. Can you try and search your memory as to what she came there for, what she was doing when she was there? A. No, I can't.

MRS. PEARL BENNETT, sworn for defendants.

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Where do you live, Mrs. Bennett? A. Lakewood.

Q. And were you associated with Mr. Le Compte in 1922? A. Yes, sir.

Q. In what capacity? A. Well, I am housekeeper down there for he and his children.

Q. And his house and his office are in the same building? A. Yes; same floor.

Q. And you were in and out of the office frequently? A. Quite a number of times.

Q. Will you tell us what you know about this Pittsburgh Underwriter matter? Do you remember it? Do you remember the affair? A. Well, I just remember that Mr. Le Compte was always asking Mr. Levin for a policy that was cancelled.

Q. And did you ever go to Asbury Park with Mr. Le Compte when he went to the Hotel Clarendon? A. Quite often.

Q. And what was the obpect of those trips? A. Well, he used to come over after this policy. I used to go with him on other business, too

Q. What are the two things, as you understand it, that Mr. Le Compte was going to see Mr. Levin about? A. He used to go over after a check and he would ask for the policy too.

Q. He was asking for a check and asking for the policy? A. Yes.

Q. And have you heard there or elsewhere, have you heard him asking for the policy back of Mr. Levin? A. Well, only in the office. I never went in the hotel.

Q. In the office, though, you heard him ask

Q. What would Mr. Levin say when he was asked about this? A. Well, he just put him off and would say he would bring it in.

Q. Was Mrs. Levin ever present? A. Once or twice, I have seen her in the office.

CROSS EXAMINATION BY MR. CARTON:

Q. You were Mr. Le Compte's housekeeper in 1922? A. Yes.

Q. Are you serving in that capacity at this time? A. Yes, sir.

Q. What are your general duties as housekeeper? A. Well, just to look after him and the children and take care of the home.

Q. Is Mr. Le Compte a widower? A. Yes, sir.

Q. Well, did you have to do with the office too? A. No, sir.

Q. What were you doing in and out of the office? A. Why, I just go in there once in a while.

Q. What? A. Just go in there once in a while. It is on the same floor.

Q. Will you tell us any occasion when you ever heard Mr. Le Compte and Mr. Levin talking in the office about this policy? A. Several occasions, any time I would be in.

Q. Tell us one. A. I can't tell exactly just when, but several times.

Q. Well, tell us the circumstances under which it took place. A. Well, just in the office when Mr. Levin would come in or be in when he would come in and I would hear Mr. Le Compte asking him for this policy.

Q. What were you doing in the office? You were not working there, were you? A. Why, I had a right to go in.

Q. What were you, sitting around? A. Well, probably.

Q. Well, your duties were taking care of the children and taking care of his house? A. I haven't any particular duties.

Q. Well, those were your duties, were they not? A. Well, probably.

Q. Will you tell us a time, any one time, when Mr. Levin came in and you heard Mr. Le Compte talking to him about this policy? A. No, I can't tell you any just certain time, I heard it so many times, but I just couldn't tell you any certain time, but several times, any number of times.

Q. A great number of times? A. A great number of times.

Q. And the purport of those conversations, I take it, would be that Le Compte was trying to get back this policy? A. Yes, sir.

Q. You heard that on numerous occasions, I suppose? A. Yes, sir.

Q. Can you tell us any one else who was ever present when that conversation took place? A. Only the girls in the office.

Q. Anyone outside the girls in the office? A. Well, not that I remember just now.

Q. What would Levin say? A. Oh, I don't remember just what he would say, just he would bring it in, always something satisfactory.

Q. He had evidently been kidding again. Didn't Le Compte say "You promised last week to bring it in" when Mr. Le Compte would tell him? A. Yes, they done different things like that together. They were the greatest friends.

Q. You suppose that he would? A. I heard them.

Q. Did Le Compte get pretty strong and say, "Here you have got to stop kidding now and bring in that policy"? A. I presume he did, at times.

Q. Don't presume. Did he or didn't he? A. I think he did, yes.

Q. What would Levin say then? A. Well, sometimes just say he would bring it.

Q. Would Le Compte let him get away with that? A. He evidently did.

Q. The fact is, Mrs. Bennett, Levin and Le Compte were very intimate friends, were they not? A. Very.

Q. And Mr. Levin did a big business with Mr. Le Compte? A. He certainly did.

Q. Did anything happen in any of these conversations that suggested to you any reason why Levin would not comply with the request of his friend Le Compte and bring that policy in? A. Why, no.

Q. You don't know of any reason from anything you heard? A. No, sir.

Q. Now did you say as housekeeper you made these trips to Asbury Park with Mr. Le Compte? A. Very often.

Q. How many times? A. Oh, a number of times.

Q. During that summer of 1923? A. Yes, sir.

Q. He went twice a week, did you go every time? A. No, not every time.

Q. What did you do, drive over in a car? A. Yes, sir.

Q. Did you get out of the car and go in the hotel? A. No, sir.

Q. How do you know he told the Levins? A. Only that I knew just the errand that he was on.

Q. Is that what you mean your testimony to be measured by? A. Yes, sir.

Q. You didn't hear anything of the personal conversation between Le Compte and Levin on any of these trips to Asbury Park, did you? A. No, not Asbury Park. I never went in the hotel.

Q. But that was your understanding, that Le Compte was going over after this policy and that is what you assumed that was said? A. Yes.

Q. That is a fact, isn't it? A. Yes, sir.

Q. So you don't know anything that was said between these two?

BY MR. BOARDMAN:

Q. Mr. Le Compte still does some business for Mr. Levin? A. Yes, sir.

BY MR. CARTON:

Q. He still collects money from him, doesn't he? A. I couldn't tell you that.

MR. BOARDMAN: We have had taken the testimony of Mrs. Bessie M. Turner under a stipulation, and I will now read that to the jury, if I may.

(Reads deposition.)

BESSIE M. TURNER, being duly sworn, according to law, on her oath testifies as follows:

BY MR. BOARDMAN:

Q. Where do you live? A. My home at present is at Miami, Florida.

Q. How long have you lived there? A. Since February 1925.

Q. How long have you been married? A. Three years in October.

Q. In July 1922 what was your name? A. It was Bessie W. Matthews.

Q. Where did you live then? A. 607 Monmouth Avenue, Lakewood.

Q. You were employed by Mr. Ernest E. Le Compte? A. Yes.

Q. What were your duties? A. Bookkeeper and clerk.

Q. What is his business? A. Insurance and real estate.

Q. Did you have charge of his insurance work? A. Part of it—not all of it.

Q. Did you know at that time a man named Mr. Levin? A. Yes.

Q. And do you recall the incident in respect to his insurance on hotel property in Asbury Park? A. Yes.

Q. Do you recall the Pittsburgh Underwriters policy? A. I recall the policy but I can't remember just the amount of it.

Q. Mr. Levin came in to get the insurance on this property? A. Mr. Levin usually arranged with Mr. Le Compte and then he gave us the policies to write.

Q. Did he come into your office? A. Yes, he had been in the office.

Q. Was he in the office during the summer of 1922? A. Yes.

Q. You knew Mr. Levin? A. Yes.

Q. How many times have you seen him in there do you suppose? A. Numerous times.

Q. Did you ever see Mrs. Levin in there? A. Yes.

Q. Who arranged for the insurance, do you remember? A. Mr. Levin usually arranged for the insurance.

Q. Can you recall what happened to one $5,000 policy that was written in your office? A. It was written and given to Mr. Levin and shortly after it was given to him the Pitsburgh Underwriters ordered it cancelled through a letter.

Q. Was there a telegram? A. Yes, there was a telegram came too.

Q. In pursuance of those instructions, what was done? A. We wrote to Mr. Levin and also notified him verbally. I myself did in the office of the cancellation and asked for the policy and he said he would return it, but he could not get it at the present time.

Q. Did you write another policy to take the place of it? A. Yes, in the Ohio Farmers'.

Q. What happened to that? A. It was also cancelled—by the Ohio Farmers' Insurance Company.

Q. Did he bring back that policy? A. I can't recall just what he did about that.

Q. Were you a typist? A. No, I did not write the policies, but I did typewrite several letters.

Q. Would you recognize your own work? Is that your typing, do you remember? (Produces letter.)

MR. BOARDMAN: Mr. Carton, have you the original of a letter writen by Mr. Le Compte to Mr. Levin under date of July 12th, 1922?

MR. CARTON: We have not, and Mr. Levin's position is that he never received any such letter.

Q. After the Ohio Farmers' policy was cancelled, was any other policy written through your office? A. No—not in Asbury Park.

MR. CARTON: That question is objected to for the reason that the records of Mr. Le Compte's office would serve as the best evidence to cover this fact.

Q. Did you have any further conversation with Mr. Levin as to the ability or the inability of your office to get further insurance? A. Yes.

Q. What was that conversation?

MR. CARTON: That is objected to—it is immaterial.

A. We simply told him we could not furnish any insurance for him in Asbury Park and that he would have to look for it elsewhere on his property here.

Q. Do you know whether he got another policy? Did he ever tell you whether he did get another policy or not?

MR. CARTON: Question objected to.

A. As nearly as I can recall, of course, I am not positive about it, that he got it with Jurlin, in Lakewood.

Q. Did he tell you about what he did? A. I can't recall just now.

Q. Was Mr. Le Compte the agent of both these companies? A. The Ohio Farmers' and Pittsburgh Underwriters.

Q. Does the name of Mrs. Altschuler mean anything to you? A. I remember the name as a mortgagee.

Q. Did Mr. Levin tell you anything about where the policy was? A. Not the Pittsburgh policy. He just said he could not get it at the present moment.

Q. How long a period did your efforts to get back the Pittsburgh policy cover? A. I can't recall definitely just how long, but I asked him several times and we also wrote him.

Q. More than once? A. Yes.

Q. At that time did you see him frequently? A. Yes, when I asked him for it, I asked him frequently. I told him the policy was cancelled and he said he would bring it in.

CROSS EXAMINATION BY MR. CARTON:

Q. Mrs. Turner, how long had you been in the employment of Mr. Le Compte up to 1922? A. I think about a year—I can't recall just definitely.

Q. What were your duties generally in this office? A. I took care of the books, was general clerk and notary public.

Q. How many other clerks were there in the office? A. One other beside myself.

Q. And Mr. Le Compte also worked in his own office? A. Yes.

Q. Did you have charge of the insurance work generally? A. No, I did not write the policies.

Q. And were you a stenographer? A. No, I was not a stenographer.

Q. The letter that you have referred to and marked Exhibit D-1, did you say that you wrote this letter? A. I say that it looks very much like my typewriter and I did write letters for Mr. Le Compte, although I was not officially a stenographer.

Q. How would you get the data from Mr. Le Compte when you wrote these letters on the typewriter? A. He usually gave it to me at noon when the other girl was out and I would take it in longhand.

Q. All you can say about this paper marked D-1 for Identification is that it looks like a letter written on the typewriter that you used? A. Yes, an L. C. Smith.

Q. How many typewriters were in the office? A. Two.

Q. Both the same make? A. No.

Q. What was the make of the machine you used? A. L. C. Smith.

Q. And what was the other machine? A. I can't just recall, but I know it was not the same as mine.

Q. Was the other clerk in the office with you at the time? A. I can't just remember that, but I do not believe she was or she would have taken the letter.

Q. Is it a fact that Mr. Le Compte did not have any stenographer in the office at the time you were taking the letter? A. Not always. Sometimes she would be there.

Q. Then he had a stenographer in the office during the time you were there? A. Yes.

Q. Did Mr. Le Compte make it a practice to dictate letters to you or give you the data in longhand for letters to be written? A. No, he did not make a practice of it.

Q. Was that quite an unusual happening? A. No, if the stenographer happened to be out he would ask me to do it.

Q. You know Mr. Levin personally I assume? A. Yes.

Q. You said he had been in your office on many occasions? A. Yes, very often.

Q. For what purpose? A. Usually just a personal call, sometimes on business and sometimes he would just run in to say "How do you do".

Q. Did Mr LeCompte write considerable insurance for him at that time? A. Yes.

Q. Mr. LeCompte had written many other policies than the one in question had he? A. Yes.

Q. How did you come to talk with Mr. Levin when he was in the office? A. Mr. Le Compte asked me when he came in if I would deliver the message about the policy.

Q. What message? A. Concerning the cancellation of the Pittsburgh policy. I reminded him of the fact that it had not been brought back yet.

Q. How many times did you ask for this policy? A. More than once.

Q. How many times do you think that Mr. Le Compte asked him? Did you ever hear him request him to return it? A. Yes.

Q. More than once? A. I can't recall.

Q. What would Mr. Levin say when you would request him to return the policy? A. He would just say that he would bring it back, but he could not get it then.

Q. Did he say why? A. No, he usually acted a little flustered.

Q. Mr. Levin had been doing considerable insurance business with Mr. Le Compte at that time hadn't he? A. Yes. If I can recall correctly he had a boy in his office that took charge of his policies and he said he had to get it through him.

Q. Mr. Levin's office? A. Yes.

Q. Where did Mr. Levin live at that time? A. The Clarendon Hotel, Lakewood. In the summertime he was in Asbury Park and in the Winter in Lakewood.

Q. He made his home in Lakewood? A. Yes.

Q. And ran the Clarendon Hotel there? A. Yes.

Q. How far removed was the Clarendon Hotel from Mr. LeCompte's office? A. Several blocks. I can't say definitely how many.

Q. It would not have been a very long trip to go up from your office to his office would it? A. No.

Q. Did you ever go to Mr. Levin's office or hotel for this policy? A. No.

Q. Never been requested to had you? A. No.

Q. You do not know whether Mr. Le Compte had done so or not? A. No.

Q. You say this policy in question when it was written was handed to Mr. Levin? A. No, I do not say that.

Q. What did you say about the policy? A. I did not say I handed him the policy. The policy was sent or given to him; it was in his possession.

Q. You say it was sent or given to him? A. I did not mail the policies or write them. I did not hand him the policy.

Q. When do you say it was sent or given to him, you assume that it was? Personally you have no knowledge of it? A. No.

Q. You remember any other instances where policies on Mr. Levin's property or property of his wife had been cancelled or recalled? A. Not in Lakewood, but in Asbury Park.

Q. In how many instances had that taken place? A. More than once.

Q. Prior to this time in the Summer of 1922 or after that? A. There was one policy ordered cancelled after the Pittsburgh policy.

Q. It is your recollection that there were several of Mr. Levin's policies cancelled through your office? A. Yes, there were.

Q. Did you have any conversation with Mr. Levin about returning any other policies? A. No I do not recall any special instance that I ever asked him for any except the Pittsburgh.

Q. How is it that you recall this particular insurance policy? A. Because we tried so hard to get it back.

Q. When you demanded the return of other policies did you try hard to get these back? A. We had to ask him a couple of times at least for them—he was always pretty slow.

Q. And then you eventually got them? A. Yes.

Q. But this one you could not get? A. No.

Q. Did you say that you made a request of Mrs. Levin to return this policy? A. I do not recall asking Mrs. Levin.

Q. Why do you say that when you wrote the policy in the Ohio Farmers' that it was intended to take the place of the Pittsburgh Underwriters policy? A. We wanted to cover him and we put him in the company we thought would take it.

Q. Do you know of your own knowledge that the Ohio Farmers policy was to replace the Underwriters or whether it was additional insurance? A. It was to replace the Pittsburgh Underwriters.

Q. How do you know that? A. At least, Mr. Le Compte said so.

Q. You do say that Mr. Levin had several policies going through your office on his various properties? A. Yes, he did.

Q. Do you know how long a period it was that you say you were trying to get this policy back from Mr. Levin? A. No, sir.

Q. Whether it was years, months, or weeks? A. It was over a week.

Q. You think the period covered about a week?

A. I think it covered about a week. I can't recall just how long it did take.

Q. Do you know what report was made to the company of your failure to get this policy back? A. I can't recall just definitely what the report was.

Q. You say you recall that Mrs. Altschuler was the mortgagee on the property covered by this Underwriters policy? A. No, I say I recall the name as a mortgagee on a policy.

Q. Do you recall whether or not she was a mortgagee on this policy? A. No, of course, I don't remember definitely. I recalled the name right away.

Q. Did you send any notice to Mrs. Altschuler about the cancellation of this policy? A. I don't know.

Q. Nor did you see Mrs. Altschuler? A. No.

Q. Now you say you wrote to Mr. Levin more than once to return this policy? A. Yes.

Q. Have you the copies of letters other than the copy you have identified here? A. I believe Mr. Le Compte has them. I have not.

Q. How many times do you say you wrote to him? A. More than once.

Q. And in each of these instances did Mr. Le Compte give you the data for the letters in longhand? A. I believe once I wrote it myself.

By Mr. Boardman:

Q. Who was John A. Lane? A. I believe he was a special agent for the Pittsburgh Underwriters.

Q. A special agent for this part of New Jersey? A. I believe he was.

Q. Were you familiar with mail that came in

and the communications that came in from the Pittsburgh Underwriters to Mr. Le Compte? A. Yes, usually I opened the correspondence.

Q. Were there many letters that came in?

MR. CARTON: That is objected to for the reason that the letters themselves will be the best evidence to show this.

Q. Did you get any comuunications from Mr. Lance to cancel the policies? A. I can't just recall. I know it was from the Pittsburgh Underwriters—I can't just recall.

PLAINTIFF'S TESTIMONY IN REBUTTAL

GEORGE R. DAVIES, recalled.

DIRECT EXAMINATION BY MR. CARTON:

Q. I am referreing, Mr. Davies, I am directing your attention to Exhibit D-8 and ask you to explain generally what this exhibit is. A. In the first place it is the original daily report coming in from agent Le Compte giving all the information in connection with the writing of this insurance.

Q. This policy in question? A. This policy in question.

Q. Now when it was introduced I did not examine it, but on examining it since I see there are a lot of papers attached to it on the head of it and behind the report. What are those papers? A. Well, this paper here is what is termed a lost policy receipt, which was made up by our accounting department. When we closed up Mr. Le Compte's account he was shy in his remittances

to the amount of this premium which he had not collected, therefore it was put through and a lost policy receipt was sent by our accounting department, as you will see, per C. H. Hamilton, O. K.ed by me. We did not put that through until May 7, 1923, in our May account.

Q. You did not put this lost policy receipt there until that time? That was long after the fire? A. That was long after the fire. We did not collect any remittances from Mr. Le Compte until after the fire, and he was shy the amount of this premium and therefore we had to put this through to complete our records.

Q. And this lost policy receipt that you have just referred to, it purports to be signed "Anna Levin, by Hamilton". A. "Anna Levin, by Hamilton."

Q. You don't mean to say that Mrs. Levin signed that paper? A. You just read it yourself, "Anna Levin, per C. H. Hamilton." That is the proof.

Q. Is he in Mrs. Levin's employ? A. Absolutely not. He is our auditor, was at that time.

Q. In the Pittsburgh office? A. Yes.

Q. He just signed her name in there as a matter— A. Oh, surely. This is our record entirely.

Q. I didn't understand that. A. Oh, no, we don't maintain in any way that we have a lost policy receipt.

Q. Well, that fooled me a little. What are these return postal cards on this paper? A. Those are letters that were written to Anna Levin. This was sent March 23, 1923, to which she sent a return. But that hasn't anything to do with this. It was after the fire; but we attached all the return receipts right to our original entries.

Q. Then there seem to be several letters attached to the— A. Well, that has got nothing to do with Levin. I can take them off if you wish.

Q. That is what I want. A. These don't pertain to that at all.

Q. That was all I wanted.

ALFRED L. STANSBURY, recalled for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Stansbury, were you present in court this morning when Mr. Le Compte was on the stand? A. I was.

Q. Did you hear Mr. Le Compte say that when he saw you the first time he saw you, likely the day after the fire, that he told you at that time the Pittsburgh policy, Underwriters policy, was cancelled? A. I heard him testify to that effect.

Q. Is that a fact? A. It is not.

Q. What actually did take place between you and Mr. Le Compte that day? A. I would like to relate the whole thing from the time of the fire; that I went to the fire the following——

MR. BOARDMAN:—Can't you answer the question?

A. I would like to state where I met Mr. Le Compte the first time after the fire.

MR. BOARDMAN:— If that is necessary for your question just go ahead and state it.

THE COURT:—It is, I think, rebuttal and must be limited to the pertinent question.

(Question repeated.)

A. We met at the fire, went over the building with Mr. Levin, that is, Mr. Le Compte and I did. I asked him if he had a list of the insurance policies that he had on the hotel and he said he had. I told him if he came up to the office I would give him a list of my companies. He read off a list of his polices, which included the Pittsburgh Underwriters Insurance Company.

BY MR. BOARDMAN:—

Q. Have you the list? A. He read it off to me. I have a pencil memorandum, the original that I made.

THE COURT:—I think this has all been testified to, Mr. Carton, on your direct case.

MR. CARTON:—Yes, it has, your Honor, and I only wanted it for the purpose of rebuttal.

BY MR. CARTON:—

Q. Let me ask you this: did Mr. Le Compte thereafter inform you that this policy had been cancelled, the Pittsburgh Underwriters? A. He did.

Q. When with relation to the time he gave you the information? A. About four days afterwards, in the front part of our office, 208 Main Street.

Q. And what did he tell you then? A. He told me the Pittsburgh Underwriters was cancelled. I said, "Are you sure, Ernie?" He says, "Yes;" and I went back and struck it off the list.

Q. You struck it off the list of insurance you had at that time? A. The memorandum I had of his policies.

Q. I think I did ask you on your direct examination—if I didn't it is a fact—that you called Mr. Le Compte's office to verify the coverings? A. I did testify to that.

BY MR. BOARDMAN:—

Q. You haven't any list in Mr. Le Compte's handwriting and never did have of these policies, did you? A. No.

MORRIS LEVIN, sworn for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. You are the husband of the plaintiff here, are you not? A. I am.

Q. In business in Asbury Park and Lakewood? A. Yes, sir.

Q. How long have you been acquainted with Mr. Le Compte? A. About fourteen years.

Q. Mr. Le Compte has said that he wrote a policy for you, I think early in July 1922, in the Ohio Farmers' and delivered it to you. Is that a fact? A Well, I tell you, counsellor, I couldn't recollect for any policy, what he wrote or didn't write. He wrote for me a lot of policies and how can I? Just if I say I will have to say a lie. I don't know anything if he did or not.

Q. Do you remember particularly this Ohio Farmers' policy ever having been presented to you by Mr. Le Compte? A. I couldn't tell you, because I couldn't tell no dates or days ,because I don't know. He presented me policies and sent it in and that is all I know.

Q. Well, maybe this will refresh your recollection. He says at the time that he delivered this policy to you, the Ohio Farmers', that he told you that the Pittsburgh Underwriters policy had been cancelled and demanded it back from you. Is that so? A. When was that? After the fire he told me it was cancelled.

Q. Said to be early— A. Twelve days after the fire he told me it was cancelled, not before. I never knowed anything before.

Q. No, I think his conversation had relation to the tarly part of July 1922. He says he went to your hotel, delivered the Ohio Farmers' and requested the return of the Pittsburgh Underwriters. Did he ever do that? A. We hadn't many cancelled, you know. I woudn't keep no policy, I wouldn't go back of—

Q. Did he do it? A. I say I don't know, I couldn't tell you. What shall I tell you? Now tell me, what can I do? Why should I have a cancelled policy? What will I do with it?

Q. Do you remember him ever having called upon you for turning over any policy that had been cancelled that you didn't turn over? A. When he come in with a cancelled policy to execute to me back the girl takes her policies from the safe and he takes out whatever he needs. I don't know anything about it exactly.

Q. Did Mr. Le Compte ever request from you the return of any policy which he claimed had been cancelled, that you did not turn over to him? A. No; why should I? Why should I keep a cancelled policy?

Q. Well, keep this in mind: Mr. Le Compte has said, referring to this policy, that all summer, twice a week, in the summer of 1923, he called at your hotel in Asbury Park to get back this policy for cancellation. Did he do that? A. No, sir.

Q. Where were the policies of insurance covering the Clarendon Hotel, with you or with the mortgagee, if you know? A. It was with the mortgagee, and some I had.

Q. Did you ever order the writing of any policy in the Ohio Farmers' to substitute the Pittsburgh Underwriters? A. I never did.

Q. There has been a reference made to a policy in the Provident-Washington, I think, written by Mr. Zurlin. Was that policy written to take the place of the Pittsburgh Underwriters policy? A. No, sir.

Q. How did that policy come to be written? A. Well, Mr. Meyers was a friend of my son and he always bothered me about policies; and I told my son that he could give him the policy for $5,000, and that is the way it come.

Q. Was Mr. Meyers a friend of your son's? A. He is.

Q. Did you ever have any difficulty in collecting insurance on your property in Asbury Park? A. Well, you know I didn't. I can get over a million dollars of insurance if I want it, in half an hour.

Q. I suppose you have in your experience with these hotels, you have had various policies cancelled, have you not? A. We have.

Q. And it is a fact that Mr. Le Compte has got those cancellations back? A. Sure. Why, what shall I do with them?

Q. For any refusal on your part to turn over any policy to anybody? A. Why should I refuse? What shall I do with a cancelled policy? What can I do with it, keep it for a memorandum or what?

Q. I don't know. I want to know what the fact is. A. Well, you know exactly.

Q. Would there be any reason if you have a policy cancelled to keep it? A. Why should I? I didn't know it was cancelled. If it was cancelled I would place insurance on. Did I know anything about it?

Q. Mr. Le Compte did ask you to sign a release after the fire, didn't he? A. He came with another gentleman and he told me, that man was before on the stand, he told me, "I am paying out good money for bad." He say, "If I should cancel that policy I can get $2,000 back, $2,200 more;" that is what he told me; if I will keep on with this policy I might lose it and if I have one it will take a good many years till I get that money. That is what he told me, that man, from that same line.

Q. Was that what he wanted to sign this for? A. Yes, I said I would sign it, "I don't know anything about this all."

Q. I show you Exhibit D-9, purporting to be a copy of a letter which Mr. Le Compte says he sent to you. Did you ever get the original of that letter? A. Not that I know.

Q. Well, it is addressed to you. If a letter like that had been addressed to you, you would have got it if it was sent to you, wouldn't you? A. Well, if it would be sent to me I would get it. I am getting mail three or four hundred letters a day sometimes. How can I tell? I don't know.

Q. Did you ever get any letter from Mr. Le Compte?

MR. BOARDMAN: He has answered that question. I think you had better not press him any further.

Q. Did you ever get any letter from Mr. Le Compte containing notice of cancellation of this Pittsburgh Underwriters premium? A. No, I didn't.

Q. Did you pay or cause to be paid Mr. Le Compte for the Pittsburgh Underwriters premi-

um? A. I didn't pay him for one policy, I used to pay him $500 by check, sometimes more. How can I say I pay it? He never give me a bill for one policy; he used to give me a bill for $500 or $800, and pay it.

Q. I suppose that was because he wrote several policies for you? A. Yes. He carried for me in the Clarendon in Lakewood and the , in Lakewood, a piece of property in Clifton Avenue. How can I tell? He gave me a bill.

Q. Have you paid him all you owe him for insurance? A. I don't owe him for anything except what he wrote just recently. I don't know, otherwise I don't owe him nothing.

Q. Had you paid him for all the insurance that he wrote back in 1922? A. Well, I did pay. In fact, he was owing me money at that time. He knowed what it was.

Q. What do you mean? A. Well, my wife took a note from him in the bank, the Lakewood Trust Company, $500, and when the note came due, she paid.

Q. What for? A. Because, you know, we always used to help him.

Q. You mean to loan to him? A. We helped him with a note when the note came due. She took a note from him.

Q. Was that a note given by you or your wife on a bill you owed him? A. No.

Q. You mean an accommodation for him? A. She took for the money in the bank and she paid, after the note come due, which she was obliged. The money, he was owing me money, and afterward we figured it up on some policies.

Q. He gave you credit for the amount actually due you in his insurance policies afterwards? A. Exactly.

CROSS EXAMINATION BY MR. BOARDMAN:

Q. Now let me understand about this. Mrs. Levin became accommodation endorser for Mr. Le Compte for what bank? A. Accommodation?

Q. Yes. A. Lakewood Trust Company. She took the money for him.

Q. She endorsed it? A. No, she took a note She took the money in the bank and gave it to Mr. Le Compte.

Q. When? A. It was 1922.

Q. What time? A. In the spring, before we left for Asbury.

Q. Before this policy was written in June? A. I don't know anything about the policy, but I am just telling you the way it happened in 1922.

Q. Isn't it a fact that you owed, you and your wife owed Mr. Le Compte in July $1,400 in premiums for insurance? A. Well, I don't know. Whatever we owe him we paid him, and generally we got sixty days for policies. But there never was a question brought up about money. If he needs money, I pay him and if I owe him I did owe him, and when I haven't got any money I take a note for it. I never——

Q. You don't question that he is correct when he says you owed him about $1,400 in July, 1922, for premiums? A. Possibly. If he wrote the policies how can I tell you, you know, three or four years ago?

Q. Isn't it a fact that you didn't give him anything from some time in May when you settled his accounts? A. How do I know?

Q. I am asking you. A. Well, don't ask me. I don't owe him any money and if Mr. Le Compte——

Q. Wait till you get the question. A. I know what you put.

Q. What is it? A. You asked me if I gave him any money since May, 1922, to that time.

Q. To what time? A. Till July, whatever, you want.

Q. Now I will ask you, Mr. Levin—I don't want to be rude—I ask you if you gave him anything between May, sometime in May and sometime about the 25th of July. A. I don't know.

Q. On account of the $1,400 didn't you give him about $200? A. I couldn't tell you anything. I don't know. I have to have my books with me and I could tell you. I couldn't accurately tell you.

Q. You came without your books today? A. Sure. If I would know I would know it. But ask Mr. Le Compte if I owed him any money.

Q. He said you owed him $1,400 at that time. A. But ask him today if I owe him.

Q. Now you have had a good many policies cancelled, you say? A. I don't know, if it was cancelled.

Q. You don't know whether the Pittsburgh Underwriters were cancelled or not, do you? A. How should I know?

Q. Yes, how should you? A. He didn't know himself. How should I know? I didn't know the company, I didn't know where they are, he didn't know that it was cancelled, and how should I know it was cancelled?

Q. And about the Ohio Farmers', you don't know whether that was cancelled? A. I don't know anything about that policy, never seen it. I don't know what it is.

Q. And do you remember Mr. Le Compte visiting you on July 3, 1922? A. I couldn't tell you.

Q. And he came over and said the Pittsburgh Underwriters had been cancelled and here is the Ohio Farmers'? You don't remember that at all, one way or the other? A. I beg your pardon. I couldn't tell. The 20th of July we are very busy and we are in the hotel business and I am sure that I wouldn't, if I tell you yes or no, I wouldn't tell you the truth, because I don't know.

Q. You have known Mr. Le Compte a long while? A. Oh, yes.

Q. And he is a truthful fellow? A. So far I did, so far I had all my trust in him and he insured me.

Q. He has been your agent since? A. Yes, sir.

Q. And he was your agent before? A. Yes, sir.

Q. And he was your agent for writing everything that you could write through him, you wrote through him, didn't you? A. Took away some after the fire.

Q. Yes, after the fire, but before the fire he was your agent to write insurance? A. Yes, sir.

Q. And you trusted him? A. Positively.

Q. You didn't tell him to write in this policy or that policy, but was to keep it insured? A. I didn't tell him to write in this company or that company or the other company; I never told him that.

Q. And he was to keep you insured? A. Yes.

Q. And he was your general insurance man; you were a man of big affairs and he would look after your insurance for you? A. Yes, sir.

Q. When I speak of you, you and Mrs. Levin are one? A. Yes.

Q. You signed checks and she signed checks? A. Yes, we don't deny anything, that is all.

Q. Mrs. Levin was wrong this morning or Friday when she said that he would present one bill for a policy and that would be paid? A. She didn't mean to tell that.

Q. It was a kind of running account, that is what you carried? A. How should I tell you one bill? It never happened that he just gave me a bill for that one policy. That will never happen. But he gave me a bill, sometimes it was for $1,000, $1,200, $800; sometimes we pay more, sometimes on account. I wouldn't tell you anything about pay.

Q. So there is no question about paying, no question at all? A. I paid Mr. Le Compte $65,000 insurance for premiums, and there might be a little, I just counted that he had me insured, and that was never a question about paying; it was always paid. If I couldn't pay today I would tell you. It might sometimes happen I would have been away for a week or two, and sometimes put a note in bank, but I always paid and I don't owe him anything.

Q. Now during that summer of 1922 you were living over at Asbury Park? A. Today too.

Q. And your bank was at Lakewood? A. No, Asbury Park and Lakewood.

Q. You would come over occasionally, once or twice a week? A. Not during the summer time.

Q. How often would you come over to Lakewood in the summer? A. I don't think if I was five times the whole summer. I couldn't say five times.

Q. Do you remember Miss Westhall? A. Sure, in the office.

Q. Do you remember Miss Matthews who used to be in the office? A. Yes.

Q. Do you remember her asking you about some policy of insurance that was said to have been cancelled? Do you remember anything about that? A. Well, whenever they asked me for a policy I gave it to them, and if I didn't have it we got it for him; because I have no reason to hold a policy.

Q. You would get it if you could, you would get it when you got time? A. No time, no question of time. If he wants it, I will give it to him. I have done more favors for Mr. Le Compte than getting him a cancelled policy.

Q. You don't remember Miss Matthews, now Mrs. Turner asking you about any policy that she didn't get, do you? A. I don't know.

Q. You don't know? A. No.

Q. And her telling you about the company wanting it back, because it had been cancelled? You don't recall that? A. Which one?

Q. Miss Matthews asking you about it? A. For a policy that was cancelled? If a policy was cancelled, he got it back.

Q. What do you understand to be a cancelled policy? A. Well, I understand a cancelled policy, we sometimes get a registered letter, I one and my wife one, but I know—that is cancelled, we get it and that is all I know, for I don't know.

Q. When you say it hadn't been cancelled, no policy had been cancelled, you mean you didn't get any registered letter concerning it? A. No, I didn't get no words either. I never had no words.

Q. Never had no words? A. No cancel, to cancel that policy, cancellation of that policy, cancellation of that policy.

Q. What do you mean by no words, no quarrel? A. didn't hear from him about cancelling the policy. What reason should I have to hold a cancelled policy, not give it back? Just tell me that. There might be some reason. What shall I hold that cancelled policy for six months and not give it back when you are running after me? There must be some reason why I done it. Can you explain the reason why I should do that?

Q. Yes. A. Why?

Q. You are bringing a suit on it now. A. Well, did I know six months before that I have a fire? Did I know I will have a fire there? Did I know that before? When he cancelled the policy, the 12th of July, did I know that? I didn't know it, you can be sure of that.

Q. How much do you recall about what was talked about that summer in Le Compte's office? A. I couldn't tell you, I don't know. In the summer they are very busy and we are very seldom in Lakewood.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Levin, other agents wrote insurance for you as well as Mr. Le Compte at this time? A. Yes.

Q. He didn't write all your insurance? A. Oh, no.

Q. I omitted to ask you if you were present with Mr. Stansbury and Mr. Le Compte, I think, the morning after the fire, when those two

men were giving one to the other the list of insurance covering the property. A. I was.

Q. Did you hear the talk between those two men? A. Sure. Mr. Stansbury asked him how much insurance he got and he says he got $15,500. That was Mr. Le Compte's answer, and he just took a piece of paper out from his pocket and he wrote it to Mr. Stansbury, when he told him what insurance he got, the companies he got insurance on.

Q. And did that list include the Pittsburgh Underwriters' policy, A. Yes, sir.

Q. And when did you first hear after that that the Pittsburgh Underwriters denied liabil- [illegible]. It was about four days later I hear Mr. Le Compte call me up in my home at night, and he say, "Mr. Levin, the Pittsburgh Underwriters policy was cancelled." I said "When?" He says "I don't know, but", he says, "it was cancelled." That is what it was after the fire. And then the next morning he went with me to Stansbury to tell him that, that that policy was cancelled and we was waiting, Mr. Stansbury was not in my lawyer's office, so we was waiting outside of the door. Then Mr. Stansbury came along and Mr. Le Compte told him that.

Q. Was that some days after the first talk that these two men had after the fire? A. Well, it was about four or five days after that when he talked to Mr. Stansbury.

RE-CROSS EXAMINATION BY MR. BOARDMAN:

Q. Was there an actual list? Mr. Stansbury, I understand, said there was no list given, that he just told him. A. Mr. Le Compte took out a paper, I don't know what you call it, a list or anything, he took out a paper from his pocket and he read it off to Mr. Stansbury and Mr. Stansbury writes it on a piece of paper. I don't know if you call it a list or a piece of paper or what it is.

Q. What I want to get at is, did Mr. Le Compte ever give Mr. Stansbury a list? You know what a list is, don't you? A. I know what a list is, yes. A list is what you say a memorandum; a list may be a series of things.

Q. What I mean is a list written on a piece of paper. A. Exactly; he took out a piece of paper from his pocket, Mr. Le Compte, and he gave Mr. Stansbury that list. Just Mr. Stansbury was reading, it was shortly, we didn't know anything would give trouble. If we know it maybe—but it was no trouble whatever; he just took out a list from his pocket and showed it to Mr. Stansbury to tell him what companies he got, and that policy was in it.

Q. Now, Mr. Levin, isn't this true: that Mr. Le Compte was under stress all that summer to get back this policy? Wasn't he asking you repeatedly for the policy? Didn't he tell you that they had threatened to hold him liable if he didn't get back the policy. Didn't he beg you for the policy? A. I don't know anything when he did that. If he ask for a policy I don't know what it was.. If he tell me that four years ago,

how can I tell you? But if Mr. Le Compte would ask me I would give it to him. He asked me for a policy after the fire was.

Q. Suppose the policy was up at Mr. Altschuler's house; would you have given it to him if you had it, but you didn't have it. A. Well, couldn't he write another policy and send it?

Q. Didn't you A. I?

Q. Yes, didn't you send the Provident-Washinton to Mr. Altschuler and tell him that it took the place of the Pittsburgh Underwriters? A. I say it?

Q. Yes. A. I never did.

Q. But you would act very much the way you would today, Mr. Levin; when Mr. Le Compte asked you to give him a policy you would say, "Yes, I will get it for you;" and then you would go back and you would kind of forget it, it would fly by, wouldn't it? Such things have happened in your experience? A. I don't know.

Q. All right, that is all.

MRS. ANNA LEVIN, recalled for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mrs. Levin, it is the truth that Mr. Le Compte went to your hotel in Asbury Park during the summer of 1922 about twice a week demanding that you turn over to him the Pittsburgh Underwriters policy? A. No, sir, absolutely not.

MR. BOARDMAN: Please don't lead your witness. She is an intelligent witness and she is your own client.
Well, he didn't.

Q. Did he ever ask that you return to him the Pittsburgh Underwriters policy before the fire? A. He never did, Mr. Carton.

Q. Did you ever receive any notice of its cancellation? A. Not at all.

Q. Did you make it a practice to call in the Lakewood office of Mr. Le Compte several times during the summer of 1922? A. Not except when I had to sign a paper or anything, if I sell anybody a piece of property or anything.

Q. Do you remember selling any property in the summer of 1922 and being at Mr. Le Compte's office? A. No.

Q. Did Miss Matthews or Miss Westhall ever in Mr. Le Compte's office in Lakewood request you to return this Pittsburgh Underwriters policy or any other place? A. Never. I never saw that girl, saw Miss Matthews.

Q. Did you ever see this lady before? A. No, because I don't know if I was twice in his office in the wholetime. Everybody knows we are busy in the summer; be in their office a few times.

G. WHITFIELD BROOKS, sworn for plaintiff.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Brooks, where do you live? A. Asbury Park.

Q. Will you tell us your business, please? A. Contractor and builder.

Q. And how long have you been engaged in that business? A. About twenty-five years.

Q. In Asbury Park? A. In Asbury Park.

Q. And in that way have you become acquainted with the cost of construction of buildings, hotels and so forth? A. I have.

Q. Have you in your business acted as appraiser in connection with insurance adjustment losses in Asbury Park? A. I have.

Q. In many instances? A. Yes, sir.

Q. Are you acquainted with the plaintiff here, Mr. Levin? A. I am.

Q. Were you employed in connection with the loss of the Clarendon Hotel on account of fire happening on December 2, 1922? A. I was.

Q. In what capacity? A. To appraise the loss.

Q. And who was associated with you or against you, if anyone? A. Mr. B. F. Robinson, of Newark.

Q. And Mr. Robinson is generally known as appraiser for the Adjustment Bureau, isn't he? A. Yes, sir.

Q. Did you make an inspection of this building and the loss

MR. BOARDMAN: I object. Now, your Honor, I think this has gone far enough to show where it is leading. We did not have a word in our evidence about the damage, extent of the loss. This is nothing but something that he is going to bolster up his original case with. It is not rebuttal.

MR. CARTON: Oh, no, it is rebuttal, your Honor, of Mr. Davies's statement, his attempted calculation that there wasn't any loss under this policy. I don't know what force it has, but it has suggested to me that now, in addition to what Mr. Stansbury has said, put an appraiser on to show the actual value before and after the loss, and it is to rebut any evidence that might be inferred from Mr. Davies's statement that I am doing it.

MR. BOARDMAN: Mr. Davies's statement was a mere mathematical calculation, not predicated on any one set of facts, but a hypothetical set of facts. It was not at all put in to show what the amount of loss was; it was to show that it didn't make any differenc matematically, that he put in the policy or not, just to show how much difference it made. It did not raise the question that this would seek to rebut at all. It is a mere mathematical computation.

THE COURT: Well, in view of that statement, Mr. Carton—and that is my understanding—his testimony is not rebuttal. I do not think that that statement made by Mr. Davies has any material effect upon the question as to the loss under this policy.

MR. CARTN: Well, I don't think it has your Honor. It may beout of an abundance of caution that I am doing this, but I assume that my friend will argue from Mr. Davies's testimony that these people haven't ost anything, they have been paid more than their loss amounted to.

THE COURT: Well, if he does, I should instruct the jury to disregard any such suggestions.

MR. BOARDMANS You would not preclude me from making any argument from the plaintiff's own testimony, your Honor?

THE COURT: Why, Imay be in error about this, but I cannot see what possible bearing it has. This suit is brought upon an insurance policy, and either the plaintiff is entitled to recove or not under that policy. The mere fact that if that policy had been excluded in the computation it might have had a certain effect, and its inclusion with the computation produces another effect, it seems to me does not make any difference at all.

MR. BOARDMAN: Well, that is nothing but evidence to show what the motive might be, to put in, to take a chance, and that has nothing to do with what this is addressed to.

THE COURT: Well, I am discussing it now because I think it ought to be cleared up at this stage if there is any doubt about it. It doesn't seem to me that the jury would be justified in finding any evidence against the

plaintiff from that fact. That is my view of it. That is the reason I do not regard this as being rebuttal testimony.

MR. BOARDMAN: But I do not think that fact has anything to do with the question of the physical damage to the property. It doesn't more or less, it hasn't anything to do with it. It is a mere computation of mathematics. If they are coinsurers, the sound value is in, it is against them in the loss. That is, assume $45,000, eighty per cent of that is $36,000, being a mathematical computation. Now without the Pittsburgh Underwriters, in view of the $36,000 they become co-insurers for $4,500—pure mathematics.

MR. CARTON: No trouble about that, mathmatically.

MR. BOARDMAN: It does not go to the physical condition of the property in any way. Each step is a logical step in simple arithmetic, that is all.

MR. CARTON: Are you going to claim, Mr. Boardman that there was not a loss occassioned by this fire amounting to $31,059?

MR. BOARDMAN: Yes, on your own proof, but not on Mr. Davies's mathematics.

MR. CARTON: Well, your Honor, we are going to get in difficulty on this, because from what Mr. Boardman said, and so there will be no question about this, I now ask leave of the court to reopen my case to put this witness on to show that loss. It may not be necessary at all; I don't think it is, but I think, so there will be no confusion in

the minds of any one as to the extent of this loss, I now ask leave to open my case just for the purpse of putting this witness on to show that very thing.

THE COURT: Well, I am sure that I do not quite at the moment understand just precisely what the attitude of counsel is going to be on that question, that is, in the defense.

MR. BOARDMAN: Is that an invitation for me to disclose?

THE COURT: That is an invitation. I do not wish to have the testimony to go to the jury in that confused state.

MR. BOARDMAN: No, but I might just as well say it now. Three witnesses of any importance were called by the plaintiff. Each one of those testified—Mr. Le Compte in a very off-hand way; Mr. Le Compte said he thought it was about half destroyed. Mrs. Levin, out of the mouth—led by Mr. Carton, on direct, says "You say about half destroyed?" She says "Half destroyed." Mr. Stansbury said "Oh, I estimate it was from forty to sixty per cent destroyed." Now, all three agree and the proof of loss shows a sound value, ,as I understand it—sound value is something after the depreciation is taken out. Then you take fifty per cent sound value and you have $22,500 as the sum total, the highest point that those three peope arrive at. And the assured has already collected 27,000 and is $5,000 ahead of the game. That is all in their own case. That is all their own witnesses, an dthere is no disgreement about it.

THE COURT: I think there is no question that you may not argue that to the jury. That is purely a question of fact to be determined by the jury from the evidence.

MR. BOARDMAN: That is all.

THE COURT: I don't think, Mr. Carton, that the rebuttal is necessary.

MR. CARTON: Of course, Mr. Boardman has not given a complete recital of the testimony.

THE COURT: Oh, I understand that. I think cunsel can draw their wn inferences to the jury, but it is finally for the jury to say what the evidence shows.

(The Court retired to chambers, where the following proceedings were had on motion for a direction.)

MOTION FOR DIRECTION.

MR. BOARDMAN: I move for the direction of a verdict in favor of the defendants on the same grounds as I moved for a nonsuit in the first instance:

1. That it appears that Mr. Le Compte, at the time he wrote the policy, was acting as agent for both parties, both for Mrs. Levin and the Pittsburgh Underwriters.

2. That the policy contains a provision requiring that if a fire occur, the inured must give notice of any loss thereby in writing to this company; that admittedly no notice in writing was given to the company.

3. That no proof of loss was filed within sixty days after the fire.

4. That proof of loss did not comply with the requirements of the policy, which required that the proof of loss shall show the actual value of each item therein, the amount of loss therein, the incumbrances thereon, all other insurance, whether valid or not, covering any of said property. This was not complied with.

5. The proofs of loss are defective in failing to show the existence of the Ohio Farmers' policy, which their own witnesses testified was in existence; and in failing to disclose the nature of the incumbrances.

6. The plaintiff appears to have sworn falsely in filing the proof of loss in respect

to the nature of the incumbrance. She had full notice of the condition of affairs and the failure to disclose the chattel mortgage is the only one that shows any moral phase. It seems to me the failure to disclose the ownership of the real estate mortgage suggests that there was a purposeful failure to disclose what kind of incumbrance it was.

7. That there is no basis for damages shown; and, secondly, that there were no damages uncompensated for.

The facts I have just referred to in respect to the proof of damages are pretty nearly complete. My friend, Mr. Carton, says that I didn't give it all. But there is scarcely a word—I have read the testimony through, and there is scarcely a word that can be really said to vary—I wouldn't say there was a word that would vary the testimony I have referred to: first, that the proof of loss shows a sound value of $45,000; that the property was half destroyed and that they have recovered $27,000.

8. For the further reason, it appears uncontradicted that the policy was cancelled by notice; that the policy was cancelled by notice accompanied by substitution.

THE COURT: My recollection of the testimony on that point is that there is direct testimony from one witness, I think Mr. Stansbury, that in his opinion, the loss amounted to so much in money.

MR BOARDMAN: Well, let me read you just what that is, your Honor. Suppose I state this.

Now, on page 7, Mr. Le Compte said, "I should imagine about half.

Mrs. Levin said: "And you say it was half burned down? A. Yes." That was on redirect.

Page 75, Mr .Stansbury mentions those figures, but I will show you just what he does say.

"Will you tell us, in your opinion, what the loss was by fire to this building that happened to the Clarendon Hotel the 21st day of December, 1922? A. In the neighborhood of forty or fifty per cent.

"Q. And how much was that?"

(Mr. Boardman continues reading testimony and argues.)

(Mr. Carton replies.)

THE COURT: Yes, I think the question will have to go to the jury. The motion to direct a verdict is denied.

(Objection noted for defendants as ground of appeal.)

Adjourned till June 30, 1926, at 10 A. M.

Charge.

Gentlemen of the Jury: As you have undoubtedly learned by this time, this is a suit on an insurance policy. When I refer hereafter in the charge to the plaintiff, I mean Anna Levin, who brings this suit. The parties defendant are the National Ben Franklin Fire Insurance Company of Pittsburgh, the Allemania Fire Insurance Company, the Republic Fire Insurance Company, and the Superior Fire Insurance Company, corporations, who, it seems, under the proofs in this case, issued the policy in suit through an association known as the Pittsburgh Underwriters. So I may hereafter refer either to the defendant corporations or to the Underwriters; and when I use the word Underwriters, you will understand that I am referring to the defendants in this suit.

It appears that the plaintiff, Mrs. Levin, was and is the owner of a property known as the Hotel Clarendon, situate in Asbury Park; that a fire partly destroyed this building. The plaintiff brings suit to recover from the defendants their proportionate share of the loss. She seeks to hold them liable under a policy of insurance alleged to have been issued by the defendants through the Pittsburgh Underwriters. This policy is for an amount not exceeding $5,000. It was one of a number of policies issued by several insurance companies on the same property. The other insurers have paid their pro rata share of the loss. That fact, however, has nothing to do with the merits of the controversy you are considering, and is a circumstance which is not to be given the slightest weight in considering the question of the defendants' liability in this case.

Charge.

The right of the plaintiff to recover against the defendants depends upon whether she has satisfied you by the greater weight of the evidence at the time of the loss by fire there was a valid, enforceable contract of insurance existing between herself and the defendant corporation. The policy relied upon by the plaintiff is dated June 27, 1922, runs for one year from its date and was issued by Ernest Le Compte, an insurance agent located at Lakewood. It is in the standard form prescribed by the law of New Jersey for fire insurance policies. It purports to cover the plaintiff's property. The fire which resulted in the partial destruction of this property occurred on December 21, 1922, a little more than six months after the issuance of the policy.

Now, the defendants resist payment of the amount claimed by the plaintiff under this policy on several grounds. One of these is that the policy was not issued by an authorized agent of the Underwriters, that is, the defendant corporations. They admit that Mr. Le Compte was their agent for the issuance of fire policies in the Lakewood district, but they claim that Asbury Park was not included within that district. An agent entrusted with policies of insurance in blank and authorized to issue them upon the applicaton of parties seeking insurance is thereby clothed with apparent power and authority to bind the company. The policy issued to the plaintiff had, according to the undisputed testimony, been entrusted to the agent Mr. Le Compte. It bore, stamped or printed upon it, the following endorsement: "E. E. Le Compte, Agent, Insur-

ance, Lakewood, N. J." There is nothing in addition to this description to apprise the plaintiff that Mr. Le Compte's agency was limited to Lakewood or that it was in any wise cicumscribed as to area. As I have said, the law is that one who entrusts another with authority to act for him is bound by whatever the agent does within the scope of his apparent power. If, therefore, the assured, the plaintiff in this case, had no notice of any territorial limitation of the agent's authority and the policy itself failed to indicate any such limitation, then the policy would be binding upon the company.

Another defense is that the premium was never received by the Underwriters. The plaintiff insists that the premium was paid to the agent Mr. Le Compte. If payment was made to the agent that would be equivalent to payment to the defendant under the circumstances of this case. Mr. Le Compte, however, denies that he ever received the premium on the policy in suit. So here you have a disputed question of fact; and if in fact the premium was not paid, then the contract of insurance was not completed so as to be binding upon the defendant.

Another ground of defense is that the insured did not comply with a condition of the policy that she should give to the insurer, that is, the defendants, immediate notice in writing after loss. What happened, according to the evidence, was that the day of the fire the assured informed the agent Le Compte that the loss had occurred. She seems to have done nothing further as to giving formal notice until the proof of loss was sent in to the defendants, something more than two months after the fire. The provision requiring immediate notice of loss is a condition precedent to the right to recover on a fire insurance policy unless the requirement be waived by the insurer or its duly authorized agent. Now was there such a waiver in this case? And that is a question which I leave to the jury to decide from the evidence. This evidence, in part, at least, is that notice was given verbally to the agent Le Compte, who had issued the policy and received the premium, according to the plaintiff's testimony, but which statement as to any receipt of premium Mr. Le Compte, you will recall, denies; and this verbal notice was given without any objection on his part as to the fact that the notice was not in writing. But you have further the testimony that when the defendants acknowledged by letter the receipt of the proof of loss, the only reason they particularly specified for denying liability was the claim that the policy had been cancelled. This might be considered as a waiver of the right to rely upon the provision of the policy requiring the plaintiff to give immediate written notice of loss, especially when taken in connection with the circumstance that the agent Le Compte, who had issued the policy, received actual notice from the insured immediately after the fire had occurred.

The defendants deny liability also on the ground that the plaintiff did not comply with the condition of the policy that proof of loss should be made within sixty days after it occurred. This defense, gentlemen, cannot prevail for the reason that the law is that if the insurer intends to insist upon compliance with this condition, he must give sixty days' notice, in writing,

to th einsured of that fact. There is no evidence that any such notice was given in this case. Therefore, the filing of the proof of loss a little more than sixty days after the fire was effective so far as that provision of the policy was concerned.

It is further insisted by the defense that a policy of the Ohio Farmers' Insurance Company was substituted for the Underwriters' policy, and that when that policy was cancelled, a policy was substituted in the Provident-Washington Insurance Company. The substitution or attempted substitution of the Ohio policy was not effective so far as the plaintiff was concerned unless it was done with the knowledge and consent of the plaintiff. Without that consent, the Ohio policy had no effect whatever upon the contract between the plaintiff and the defendants in this suit.

So far as the Provident-Washington policy is concerned, the explanation of the plaintiff is that this was additional insurance and not a substituted policy; and I do not recall any other testimony as to a contract.

It is insisted further that the plaintiff in her proof of loss swore falsely and fraudulently, that she did not truly state the amount of insurance. It is clamed that she did not state truy the nature and amount of incumbrances upon her property. This defense is available only when it appears that the assured knowingly and intentionally swore falsely or said or did that wheich is claimed to be fraudulent. Mere mistake, an honest mistake in stating facts in making out a proof of loss,

would not be sufficient to sustain the defense. You have the evidence, gentlemen, as to how the proof of loss was prepared and who prepared it, from what source the data was procured, and you would have to determine whether there was any intentional false swearing, false swearing that is intended to deceive the defendant.

But now, gentlemen, I come to what undoubtedly is the principal ground of defense in this case and the chief question that you will have to consider in arriving at your verdict; and that is the contention of the Underwriters that the policy in suit was cancelled before the loss occurred. If they have supported that claim by the greater weight of the evidence, then it will be your duty to return a verdict in their favor. The policy sued on contains a clause which reads, in substnace: "That this policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation." The policy was written by the agent Le Compte on June 27th. On July 3rd, the agent received a telegram and later a letter from the defendants' executive officer in which he was instructed peremptorily to cancel the policy. This evidence is uncontradicted. This order to Le Compte to cancel, however, was not in itself sufficient to cancel the policy. To effectuate a cancellation, it was necessary that notice of the defendants' intention to cancel should be brought home to the insured, the plaintiff, Mrs. Levin. Was this done? You have heard the testimony of Le Compte that, upon receiving the order to cancel, he wrote a new policy in the Ohio Farmers' Insurance Company which he intended as a substitute for the

Pittsburgh Underwriters' policy.; that he took this new policy to Mr. Levin and informed him that the Underwriters wanted their policy cancelled and that he had to place the insurance with another company; that he left the Ohio policy with Mr. Levin. You have heard Le Compte's further testimony that he repeatedly informed both Mr. and Mrs. Levin that he had been instructed to cancel the Underwriters' policy and that he made many requests to either or both that that policy be surrendered to him. On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters policy, and you have their testimony that either they did not assent to the substitution of the Ohio policy or that they knew nothing of such a substitution.

Now, gentlemen, I do not undertake to repeat literally what Mr. and Mrs. Levin said on that phase of the case, but state merely the sense in which I understood their testimony. You must depend upon your own recollection of their evidence and your understanding of it. But in any event, from this conflicting testimony you will have to decide whether the plaintiff was in fact notified of the cancellation of the Underwriters' policy. To decide that question you must apply the pertinent legal rule to the facts as you find them. This rule is that notice of cancellation—and I call your particular attention to this statement of law, because that is what must guide you in deciding this question—that notice of cancellation is not required to be in writing. It may be verbal or oral. No particular form of notice is required or prescribed. It is only necessary that the insurance company should positively,

distinctly, and unequivocally indicate to the assured that it is their intention that the policy should cease to be binding as such insurance upon the expiration of five days from the time when such intention was made known to the insured. And it would not matter whether this information was conveyed by the use of the words "Your policy will be cancelled in five days" or "Your policy is already cancelled." In either case, the contract would terminate at the end of five days. Nor was it essential that the defendant should secure the surrender of the policy by the plaintiff. It would make no difference whether the policy was surrendered or remained in the possession of the insured. If actual notice of cancellation was given to the plaintiff, the contract of insurance ended five days thereafter. But as I have said, gentlemen, notice, to be efficaciousto cancel the policy, must have been brought home to the plaintiff, that is, brought to her personal attention, unless you find from the evidence in this case that there was an implied authority in her husband to receive notice which would be binding upon her.

Now the evidence I here refer to includes the evidence that, although the policy was in the name of Mrs. Levin, still the husband seemed to have been generally interested in the property covered by the insurance, or at least in the business conducted therein; thetestimony of the agent Le Compte, who wrote a great deal of insurance for the plaintiff, that he received his orders for such insurance from Mr. Levin and received the checks in payment of the premiums from Mr. Levin; the testimony of Mrs. Levin that the premium checks were sometimes signed by her

and sometimes by her husband; and the mere fact that throughout her testimony she almost always used the pronoun *we,* meaning herself and her husband, apparently, in referring to or explaining any transaction with respect to the insurance matter.

Now these circumstances and facts as they appear in the evidence by no means, gentlemen, conclusively indicate that notice of cancellation of the policy given to the husband was notice to the plaintiff. The question for you to decide is whether they gave rise to the irresistable inference that there was an implied authority vested in the husband to receive such notice. Of course, if there was no such authority, any notice to Mr. Levin would not be effective to cancel the policy. The only question then would be whether actual notice of cancellation was given to the plaintiff herself, and that question woud be for you to decide on the evidence.

Now, gentlemen, if you find for the plaintiff, your verdict should be for such a sum as, under the evidence, will represent the defendants' proportionate share of the total loss. The only evidence before you is that this proportionate share was $4,251,99, as I have it. If you are satisfied that this is the total loss or the amount claimed, that is, that the total loss amounted to the sum claimed by the plaintiff, and that the plaintiff has established that claim by a preponderance of the evidence, and has likewise shown the liability of the defendants, then your verdict should be in favor of the plaintiff for the Underwriters' proportionate share of the loss sustained. If you find for the defendants in this case, your verdict should be that the plaintiff

has no cause of action. And, gentlemen, if your verdict should be for the plaintiff it should be, in my judgment, a general verdict against the defendants for one sum of money which you are to name.

I am requested by the plaintiff to charge, and do charge, as follows:

1. Defendants' contention that the policy was cancelled is an affirmative defense and the burden of proof is upon the defendants to show there was such a cancellation, if any.

2. Notice of cancellation by the company to the agent Le Compte is not sufficient to release the company, but the insurers must show that such notice was clearly brought to the attention of the plaintiff.

4. The defendants claim that their policy of insurance was cancelled. The provision concerning cancellation of the policy as appears by the policy is as follows "This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." The burden is upon the defendants to show such cancellation and it is for the jury to say from all the evidence in the case whether the policy has been cancelled in accordance with the terms therein contained.

On behalf of the defense I charge request No. 6 as follows:

6. As one person cannot act for two persons with conflicting interests, Le Compte could not act both for the defendant to waive notice of loss for the defendant and to give notice of loss to

the defendant in behalf of the plaintiff.

I charge request No. 7 as follows, with the latter part omitted:

7. If Mr. Le Compte was charged by the plaintiff as her agent to give notice of loss to the defendant, he could not waive the requirement of the policy that imediate notice be given.

15. If Mr. Le Compte, upon receipt of the telegram from the home office of defendant rewrote the insurance in the Ohio Farmers' Insurance Company, took the policy to Mr. Levin and Mr. Levin accepted it in behalf of Mrs. Levin, in substitution for the defendants' policy and in so doing he was the agent for the plaintiff, such acceptance operated to then terminate the defendants' liability, even though the five days had not run.

16. Notice to a duly authorized agent is notice to the principal; notice of cancellation, whether accompanied by the delivery of the Ohio Farmers' policy or not, given to Mr. Levin would be equivalent to notice to Mrs. Levin if he was her agent.

17. Statements in the proof of loss are admissions against the plaintiff, but cannot be used as evidence in her behalf.

The other requests are declined except as they may be covered by the charge as given by the court.

Now, gentlemen, I commit this case to your care, with the assurance that you will give it the most earnest, painstaking consideration.

PLAINTIFF'S EXCEPTIONS.

MR. CARTON: I ask an exception to that part of your Honor's charge wherein you used words to this effect: "If the premium was not paid this was not a contract of insurance with the defendants."

I claim that this is wrong because it makes no difference in this case whether the premium was paid or not, because the policy was delivered to the insured without any condition, and in such an event the defendants would have to give notice to the assured to pay the premium before they could cancel. A credit will be presumed to have been given if the policy is delivered without prepayment.

MR. BOARDMAN: I ask an exception to the refusal of the court to charge the defendants' requests as requested.

2. An exception to so much of your Honor's charge as dealt with the matter of damages in this case. My contention is that there is no basis for damages found; in the first place that Mr. Stansbury did not quaify as an expert; secondly that the only way he arrived at the figure of $31,000 that he named as the loss was in response to a question "What would forty or fifty per cent of the value mean? How much was it?" And in replying to what forty or fifty per cent of the value of the building was, he said $31,000, which in turn must mean that the building was worth about $77,000, if it was forty per cent or $61,000 if it were fifty per cent. The plaintiff is bound by her proof of loss, $45,000. But, if we are to assume that Mr. Stansbury's testimony is to be given effect, then the value of the building becomes somewhere from $62,000 to $77,000 and the plaintiff must have been a co-insurer for from $13,000 to $30,000 odd dollars, and an altogether different set of figures must be depended upon. Therefore I say that no damages were shown by legal evidence and no basis from which the jury could compute damages das estabtablished.

3. Your Honor charged "You have the denial of Levin." This was qualified by a later statement that the court did not undertake to quote literally, and if I recall the testimony, there was no denial by Levin of the delivering to him of the Ohio Farmers' policy or the giving him notice. It was only that he remembered nothing.

The defendants' requests which were not charged by the court were as follows:

1. That one who seeks to charge a corporation upon the act of an agent must show that the act was either within the scope of the agent's authority or was ratified by the corporation.

2. That the writing of this policy on property in Asbury Park was not within the authorization of Mr. Le Compte, nor was his action in writing this policy ratified by the corporation.

3. The total failure of consideration is a complete defense to the action on the policy.

4. If the jury find that no premium was ever paid on the policy in suit, the defendant must prevail in this action.

5. One person cannot act as an agent for two persons to create a contract between the two; therefore if Le Compte was acting for the Levins and the defendant, the contract cannot be sustained.

7. If Mr. Le Compte was charged by the plaintiff as her agent to give notice of loss to the defendant, he could not waive the requirement of the policy that immediate notice be given; and unless Le Compte was acting only for the defendant, the allegation of waiver in the amended complaint is not proved.

8. If the plaintiff inserted the allegations as to the Pittsburgh Underwriters' policy in the proof of loss, knowing the policy to have been cancelled, for the purpose of collecting insurance

money from the defendant, such action would be fraud and would render the policy void.

9. The failure of the plaintiff to furnish proofs of loss to the defendant within sixty days of the fire, in the situation of affairs as they then existed, defeats the plaintiff's cause of action.

10. If the plaintiff failed in her proof of loss to disclose the fact that the encumbrance upon the property was a real estate mortgage which, together with a chattel mortgage, secured the $15,000 mentioned in the proof of loss, in order to conceal the fact of the existence of the chattel mortgage and the existence of a greater moral hazard, such concealment would avoid the policy.

11. The burden is on the plaintiff to prove the performance by her of all conditions precedent of the policy, the non-performance of which are alleged in the answer; therefore if, in her proof of loss, she failed to state truly the nature and amount of the encumbrances at the time of the fire ,and did not state truly all other insurance, whther valid or not, covering the insured property, her action cannot be sustained.

12. The plaintiff has failed to prove any damages for which she has not received compensation, and is entitled to recover only nominal damages, if entitled to recover at all.

13. The plaintiff has failed to establish any basis of the computation of damages, and, if entitled to recover at all, can only recover nominal damages.

14. In order to effect a valid cancellation, the notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company positively, distinctly and unequivocally indicate to the insured that it is its intention that the policy cease to be binding as such upon the expiration of five days from the time when the intention is made known to the insured. And it does not matter whether this information is conveyed by the words "Your policy will be cancelled in five days" or "Your policy is already cancelled."

Exhibit P-1.

This exhibit is printed at length on pages 267-282.

Exhibit P-2.

To the
Pittsburgh Underwriters Insurance Company, of Pa.

By your policy of insurance No. 633176 dated June 27, 1922 issued at your agency at Lakewood, N. J. you insured Anna Levin against loss or damage by fire to the amount of Five Thousand Dollars according to the terms and conditions printed in said policy, the written portion, together with correct copy of all endorsements, assignments and transfers, being as follows, viz: Form No. 4. (Protected) (Building.) $5,000 on the four story .....roof frame building and 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 as a hotel and known as the "Clarendon Hotel" situate No. 302 Fifth Avenue, Asbury Park, New Jersey.

80% co-insurance clause attached.

Mortgagee clause attached making loss, if any, payable to Jennie Altusel, mortgagee, as her interest may appear.

* * * * * * *

For the term one year from the 27th day of June A. D., 1922, to the 27th day of June, A. D., 1923 at noon; which said policy was subsequently continued in force by Renewal No. ..... until the .... day of ..... A. D., 19.. at noon.

That in addition to the sum insured by said Policy on said property, there was other insurance made thereon to the amount of thirty-seven dollars, as particularly specified in Schedule .. hereto attached, besides which there was no other insurance thereon.

Exhibit P-2.

A fire occurred on the 21st day of December A. D., 1922 by which the building and contents insured was destroyed, or damaged, to the extent of thirty-five thousand nine hundred six 56/100 Dollars, and originated as follows: Unknown.

The actual cash value of each specific subject thus situated and insured under the aforesaid Policies at the time of loss, and the actual loss and damage by said fire to the same, and for which claim is hereby made, was as follows, viz.:

	sound value	Loss or damage on same	Insurance on same.
Building	45,000	31,039.50	36,500
Contents	10,000	4,867.06	5,500
Total sound value Total loss or Damage and Total Insurance	55,0000	35,906.56	42,000

For a more particular statement of same see Schedule .... annexed.

And the Insured claim of the ..... Insurance Company, by reason of said loss, damage and Policy of Insurance, the sum of four thousand, two hundred and fifty-one 91/100 Dollars.

The property insured belonged exclusively to Anna Levin and no other person or persons had any interest therein.

If the loss is on building, state whether Real Estate is owned in *fee simple* or held on lease.

In fee simple.

State the nature and amount of incumbrance at time of fire. —$15,000.00

Exhibit P-2.

The total value of property saved is $..... ..as per statement attached hereto marked Schedule .....

The building insured or containing said property, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: Hotel and for no other purposes whatever.

The said fire did not originate by any act, design or procurement on her part, nor on the part of any one having any interest in the property insured, or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by me; that nothing has been done by or with my privity or consent to violate the condition of the policy, or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss, or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

Witness my hand at Asbury Park, N. J. this 28th day of February, 1923.

ANNA LEVIN.

Personally appeared Anna Levin, signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said company should be advised of.

Witness my hand and official seal, this 28th day of February, 1923.

ALFRED L. STANSBURY,

Exhibit P-2.

STATE OF NEW JERSEY, } ss.:
County of Falmouth. }

I, Alfred L. Stansbury, a notary public for New Jersey, residing in Asbury Park, New Jersey, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire, or damage as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that she has by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of $4,251.99.

In Testimony Whereof, I have hereunto set my hand and official seal, this 28h day of February, 1923.

ALFRED L. STANSBURY.
Notary Public for New Jersey.

Exhibit P-2.

SCHEDULE

APPORTIONMENT OF LOSS SHOWING AMOUNT INSURED AND PAYABLE BY EACH COMPANY.

NAME OF COMPANY	Date of Expiration	See Building Under First Item Insures on Item	See Contents Under Second Item Pays on Item	Total
New Jersey Fire	7/30/24	1275.60	1500.	1275.60
Excelsior	7/26/24	3401.58	4000.	3401.58
Stuyvesant	6/27/23	4251.99	5000.	4251.99
Provident Washington	8/1/23		5000.	4251.99
Pittsburgh Underwriters	6/27/23	4251.99	5000.	4251.99
Queen Ins. Co.	11/24/23	5102.38	1500. 1327.38	7500. 6429.72
St. Paul Fire & Marine	11/24/23	4251.99	2000. 1769.84	7000. 6021.83
Glens Falls	11/24/23	2125.99	1000. 884.92	3500. 3010.91
N. Y. Underwriters Agency	11/24/23	2125.99	1000. 884.92	3500. 3010.91
				42000. 35906.56

Exhibit P-3.

February 28, 1923.

Pittsburgh Underwriters Insurance Company,
398-316 Fourth Avenue,
Pittsburgh, Pa.

Re: Policy No. 633176—Anna Levin
Clarendon Hotel, No. 302 5th Ave.
Asbury Park, N. J.

Gentlemen:

At the suggestion of the assured, whom we represent in the adjustment of this loss, we enclose proof of loss duly completed.

Respectfully yours,
MILAN ROSS AGENCY,
A. L. STANSBURY.

Exhibit P-4.

(Letterhead of Pittsburgh Underwriters.)

March 20, 1923.

Mrs. Anna Levin,
Cor. 7th St. & Madison Ave,
Lakewood, N. J.

Dear Madam:

We are in receipt of papers purporting to be Proof of Loss under policy 633176, claiming $4,251.99, by fire of December 21, 1922, and in view of the fact that you, through your husband and agent, have been notified that our policy was cancelled, we deny any liability thereunder for that and other good reasons.

We are, therefore, holding these papers at this office, subject to your order, and we will be pleased to return them to you at any time on demand.

Very truly yours,
GEO. R. DAVIES,
Mgr.

Exhibit P-5.

Pittsburgh, Pa. December 29, 1922.

Mrs. Jennie Altusel,
151 Haladay Street,
Jersey City.

Dear Madam:

We are in receipt of your letter of the 27th inst., in which you inform us that the building insured under policy No. 633176, covering the Clarendon Hotel, No. 302 Fifth Avenue, Asbury Park, N. J., was destroyed by fire on December 21.

In reply wish to state that this policy was issued June 27, 1922, was received in this office on June 29 and was ordered cancelled, with notice to our agent, Mr. E E. Le Compte, Lakewood, N. J. under date of July 3.

We have repeatedly written to Mr. Le Compte and we are now awaiting a response as to what action he has taken, if any.

Of course, if he has not followed out our instructions to order this policy cancelled, we will proceed with the adjustment of the loss.

Very truly yours,
GEORGE R. DAVIES.

Exhibit D-1.

(Letterhead of Pittsburgh Underwriters.)

July 3, 1922.

Mr. Ernest E. Le Compte,
313 Second Street,
Lakewood, N. J.

Dear Sir:

Re: Policies 633175—Abraham Friedman
" 633176—Anna Levin.

Confirmation of our telegram today is enclosed, asking for cancellation of these policies.

As is mentioned in our wire, the objection to these risks is the location, viz., Asbury Park. We retired our direct agency at this point a short while ago owing to very unprofitable experience, and of course, we cannot consider accepting any business at this resort from outside sources.

Trusting you have promptly complied with our request, and awaiting the early return of the policies, we are,

Very truly yours,
L. M. Stephens,
Assistant Mgr.

LMS/HMR

Exhibit D-3.

CERTIFICATE OF AUTHORITY.

Commission No. 8—427.

THE PITTSBURGH UNDERWRITERS.

The Allemannia Fire Insurance Co. The Humboldt Fire Insurance Co., The National-Ben Franklin Fire Insurance Co. and the Teutonia Fire Insurance Co.

All of the Cities of Pittsburgh and Alleghany, Pa.

BE IT KNOWN, That E. E. Le Compte, of Lakewood, in the County of Ocean, and State of New Jersey appointed, and by these Presents duly constituted Agent of the Pittsburgh Underwriters with full power to receive proposals, and issue policies for insurance against loss or damage by fire in Lakewood, New Jersey and vicinity, to fix rates of premiums, to receive moneys, and to renew and consent (in writing) to the transfer and assignment of, and endorsements upon Policies of Insurance, signed by the Presidents and attested by the Secretaries of the said Companies, and in all manner to attend to the business and duties of the said Agency, subject to the rules and regulations of said Companies, and to such instructions as may from time to time be given by its Officers or General Agents, and it is expressly understood that all Policies shall be null and void and of no binding effect upon these Companies if issued upon property not situated within the district in which the agent shall reside, and for which has been appointed, and all orders and instructions to cancel any risk or policy are to be strictly and promptly obeyed.

Exhibit D-3.

It is expressly understood that the Agent named in this certificate has no authority to waive any condition in any policy of these Companies, unless the same be in writing, and endorsed on the Policy.

IN TESTIMONY WHEREOF, The said the PITTSBURGH UNDERWRITERS have affixed their seals to these presents, and have caused the same to be signed by their Presidents, and attested by their Secretaries Pittsburgh, Pa., this 9th day of August 1915.

(Signatures of the Presidents and Secretaries of each of the four Companies attached thereto.)

GEO. R. DAVIES, Manager.

Exhibit D-4.

(Letterhead of Pittsburgh Underwriters.)

December 14th, 1922.

Mr. Ernest E. Le Compte,
313 Second Street,
Lakewood, N. J.

Dear Sir:

Re: 633176—Anna Levin.

We have written you about one half dozen times regarding the cancellation of this policy, to which you have paid no attention whatsoever. Special Agent Lance has also had the matter up with you, requesting that you forward the cancelled document to this office.

This matter has now been hanging fire since July 3rd, under which date we first ordered the cancellation, and we see no reason why you have not complied with our wishes.

Unless we receive the cancelled document in the very near future, we will be obliged to write direct to the assured.

Trusting that we will not be compelled to go to this extreme, we are,

Yours very truly,
GEORGE R. DAVIES.

GAH:ER

Exhibit D-5.

(Letterhead of Pittsburgh Underwriters.)

JOHN A. LANCE, *Special Agent.*

Reading, Pa., Oct. 28th, 1922.

Mr. E. E. Le Compte,
Lakewood, N. J.

Dear Sir:

Re Policy No. 633176—Anna Levin.

Under dates of July 3rd., July 31st, August 23rd. and on Oct. 27th, the home office wrote to you for this policy, which was ordered cancelled by telegraph July 3rd., and as the policy has not been received at the home office and you have not replied to any of their letters, we must insist upon immediate advices as to what has been done in the matter.

Has the policy been cancelled and if so why don't you return it or a lost policy receipt to the home office? Please bear in mind that should a loss occur under this policy you will be held personally responsible.

Kindly advise me here by return mail as to what you know about the matter and greatly oblige,

Very truly yours.
JNO A. LANCE.
Special Agent.

Exhibit D-6.

(Letterhead J. Campbell Haywood,)

Adjuster.

51 Maiden Lane, New York, Jan. 25, 1923.

Mr. Ernest E. Le Compte,
313 Second Street,
Lakewood, N. J.

Dear Mr. Le Compte:—

Thank you for sending me letter from the company to the mortgagee in the Levin matter.

What I am most anxious about is to get from you letter you were to get Mr. Levin to sign in reference to his knowledge of the cancellation of the policy. Please have him sign it and send it along as soon as you can. After I once get that it will make an entirely different situation for you in the matter.

I have had a talk with the General Adjustment Bureau about this and hope I have made them see the light. The letter I speak of will clinch matters if you can get it for me.

Very truly yours,
J. CAMPBELL HAYWOOD,
Adjuster.

JCH/JB

Exhibit D-7.

OHIO FARMERS INSURANCE COMPANY.

Le Roy, Ohio.

Policy Number 375.

Agency Lakewood, N. J. 1041.

Amount $5,000. Rate 1.67 Premium $83.50
Rate of Commission 20%
Premium Eighty-three and 50/100
Assured Anna Levin for the term of one year from the Third day of July, 1922, at noon, to the Third day of July 1923 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars.

$5,000 On the four story frame building, additions and extensions adjoining, 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 therewith occupied as a hotel and known as the "Clarendon" Hotel and situate No. 302 Fifth Avenue, Asbury Park, New Jersey.

80% co-insurance clause attached.

Mortgagee clause attached making loss, if any, payable to Jennie Altusel, mortgagee, as her interest may apear.

Stamped across the face of this report appear the word "CANCELLED" in large letters, and a smaller stamp reading "Can. 7/3/22 RP. $83.50 Flat, Aug. 1922. Attached to this exhibit the following letter:

Letter Attached to Exhibit D-7.

(Letterhead of Ohio Farmers Insurance Co.)

E. K. Schultz & Co.
General Agents Philadelphia, June 22, 1925

Mr. George R. Davies,
Pittsburgh Underwriters,
Pittsburgh, Pa.

Dear Sir.

O. F. No. 375—Anna Levin, Lakewood, N. J.

In accordance with your request we are enclosing herewith our daily report in the above policy. Cancelled policy reached us some time in August, 1922 and was returned to the Home Office of the Company. Mr. Crane states that he wrote you a few days ago stating they were unable to locate cancelled document but according to our records it had been forwarded to them. If there is anything further we can do for you, please command us.

Very truly yours,
E. K. Schultz & Co., Gen. Agts.
By E. L. Schultz.

Exhibit D-8.

This exhibit is printed at length on pages 283-284.

Exhibit D-9.

(Letterhead of
The Concordia Fire Assurance Co. of Milwaukee.)

E. E. LeCompte, Agent
Lakewood, N. J., July 12th, 1922.

Mr. M. Levin,
302 Fifth Avenue,
Asbury Park, N. J.

Dear Mr. Levin:

I have just received a letter from the Ohio Farmers Insurance Company stating that they do not want the Policy on your hotel in Asbury Park. I wrote $5,000 with them to take the place of the $5,000 I had formerly in the Pittsburgh Underwriters. Kindly return the Ohio and Pittsburgh Underwriters policies as soon as possible, as I have to return them to the Companies.

It will be necessary for you to have the $5,000 written in Asbury Park, as I canot write them here.

With kindest regards, I remain,
Very truly yours,

Exhibit D-10.

(Letterhead of
The Girard Fire and Marine Insurance Company)

ERNEST E. LE COMPTE, Agent.
313 Second Street Lakewood, N. J.
September 8th, 1922.

Mrs. Anna Levin,
Asbury Park, N. J.

Dear Madam:

I am herewith sending you copy of letter received by me from the Ohio Farmers' Insurance Company:—

"Special Agent Marsh has written you and we have wired and written you on several occasions for the cancellation and return of the following:

O.F. No. 269—Anna Levin
O.F. No. 25940—Anna Levin

policies but up to this late writing we have not received these cancelled policies. We must insist upon your giving this matter attention must insist upon giving this matter attention without further delay and letting these cancelled documents come forward immediately."

I would appreciate it greatly if you would kindly mail or bring these policies to the office at your very earliest convenience, and oblige,

Very truly yours,
E. E. LE COMPTE,

BM:EEL

Opinion Supreme Court.

(Filed May 17, 1927)

NEW JERSEY SUPREME COURT

ANNA LEVIN,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO., *et als.*
No. 34, Jany. Term, 1927.

Defendants' Rule to Show Cause.

Argued before GUMMERE, Chief Justice, and Justice Trenchard.

For the rule, Richard Boardman.

Contra, Durand, Ivins & Carton.

PER CURIAM:

This action was brought by Anna Levin against the defendants, doing business as the Pittsburgh Underwriters, on a policy of fire insurance. The trial resulted in a verdict in favor of the plaintiff. The defendants thereupon applied for and were allowed a rule to show cause why this verdict should not be set aside; all exceptions being reserved.

The first contention is that this rule should be made absolute because it appears without contradiction that the policy in suit had been cancelled some time before the loss occurred, and had, consequently, ceased to be a contract binding upon the defendants at the time of such loss. It appears from an examination of the state of the

case that when the plaintiff closed her proofs there was a motion to nonsuit submitted by the defendants. This motion was denied, and an exception to the denial was allowed. One of the grounds upon which the motion was rested was that it affirmatively appeared that the policy was cancelled prior to the occurrence of the fire, and had then ceased to be a binding contract upon the defendants. This question, consequently, is within the reservation of the rule, and, for that reason, we consider it inadvisable for this court to pass upon it.

The next ground urged for making the rule absolute is that it appeared by the greater weight of the evidence that the insured never paid the premium called for by the policy. This question was submitted to the jury, and their finding was contrary to this contention. We cannot say that such finding was so clearly against the weight of the evidence as to justify us in setting the verdict aside.

The next ground upon which counsel urges that the rule be made absolute is that the defendants' agent, Le Compte, who wrote the policy in suit, was, in fact, the agent both of the plaintiff and the defendants, and that his acts with relation to the issuing of the policy and the notice of cancellation were binding upon her. It is enough to say in disposing of this contention that it was submitted as one of the grounds upon which the motion to nonsuit was rested. This being so, for the reason already indicated, we consider it advisable to determine its soundness.

The only other ground for making the rule absolute urged on behalf of the defendants is that there was no legal proof to establish a basis for the computation of damages. But this was also made one of the grounds upon which the motion to nonsuit was rested, and, for that reason, we decline to consider it.

The rule to show cause will be discharged.

Order Discharging Rule.

(Filed May 25, 1927)

ANNA LEVIN, Plaintiff, vs. NATIONAL BEN FRANKLIN FIRE INSURANCE CO., *et als.*, Defendants.	On Defendant's Rule to Show Cause.

This cause having been duly argued at the January Term of this Court by Richard Boardman, Counsel for the defendants, for the rule; and by Durand, Ivins & Carton, Counsel for the plaintiff, in opposition thereto and the Court having considered the same and finding no error in the record or proceedings in the Court below,

It is, therefore, on this 25th day of May, in the year of our Lord, one thousand nine hundred and twenty-seven, ordered and adjudged that the

rule to show cause in this cause be and the same is hereby discharged.

Entered May 25, 1927, on motion of Durand, Ivins & Carton, Attorneys for plaintiff.

A true copy.
Edward J. Kelleher, Clerk.

Notice of Appeal.

(Filed July 2, 1927)

NEW JERSEY SUPREME COURT

ANNA LEVIN, Plaintiff, vs. NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH, ALLEMANNIA FIRE INSURANCE CO., REPUBLIC FIRE INSURANCE CO., and SUPERIOR FIRE INSURANCE CO., doing business as Pittsburgh Underwriters, Defendants.	Action at Law.

To Messrs. Durand, Ivins & Carton, Attorneys of Plaintiff:

Take notice that defendants appeal from the whole of the judgment entered in this cause to

the Court of Errors and Appeals on the following grounds:

1. The Trial Court erred in denying defendants' motion for a nonsuit.

2. The Trial Court erred in denying defendants' motion for the direction of a verdict in favor of the defendants against the plaintiff.

3. The Trial Court erred in charging the jury as follows:

> "On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters' policy."

And again:

> "You must depend upon your own recollection of their evidence and your understanding of it."

as these two statements were used in the following context:

> "On July 3rd, the agent received a telegram and later a letter from the defendants' executive officer in which he was instructed peremptorily to cancel the policy. This evidence is uncontradicted. This order to Le Compte to cancel, however, was not in itself sufficient to cancel the policy. To effectuate a cancellation, it was necessary that notice of the defendants' intention to cancel should be brought home to the insured, the plaintiff, Mrs. Levin. Was this done? You have heard the testimony

> of Le Compte that upon receiving the order to cancel, he wrote a new policy in the Ohio Farmers' Insurance Company which he intended as a substitute for the Pittsburgh Underwriters' policy; that he took this new policy to Mr. Levin and informed him that the Underwriters wanted their policy cancelled and that he had to place the insurance with another company; that he left the Ohio policy with Mr. Levin. You have heard Le Compte's further testimony that he repeatedly informed both Mr. and Mrs. Levin that he had been instructed to cancel the Underwriters' policy and that he made many requests to either or both that that policy be surrendered to him. On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters' policy, and you have their testimony that either they did not assent to the substitution of the Ohio policy or that they knew nothing of such a substitution.
>
> Now, gentlemen, I do not undertake to repeat literally what Mr. and Mrs. Levin said on that phase of the case, but state merely the sense in which I understood their testimony. You must depend upon your own recollection of their evidence and your understanding of it. But in any event, from this conflicting testimony, you will have to decide whether the plaintiff was in fact notified of the cancellation of the Underwriters' policy."

Notice of Appeal

11. (To Alfred L. Stansbury):

"Q. What did you ascertain the total insurance on the building to be?"

(To Alfred L. Stansbury):

"Q. Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st of December, 1922?"

JOHN WAHL QUEEN,
Attorney for Defendants-Appellants.

Service of the within notice is hereby acknowledged this first day of July, 1927.

DURAND, IVINS & CARTON,
Attorneys for Plaintiff.

Exhibit P-1.

No. 633176

THE PITTSBURG UNDERWRITERS' POLICY

Separate Insurance by Four Companies in One Policy.

THE ALLEMANNIA FIRE INSURANCE CO., OF PITTSBURGH, NATIONAL-BEN FRANKLIN FIRE INSURANCE CO., OF PITTSBURGH, PA., REPUBLIC FIRE INSURANCE CO., PITTSBURGH, PA., AND SUPERIOR FIRE INSURANCE CO., PITTSBURGH, PA.

Aggregate
Sum Insured $5000. Rate 1.67 Premium $83.50

In Consideration of the Stipulations herein named and of Eighty-three and 50/100 Dollars Premium, Does Insure Anna Levin for the term of One Year from the Twenty-seventh day of June 1922 at noon, to the Twenty-seventh day of June 1923 at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars, to the following described property, while located and contained as described herein and not elsewhere, to wit:

(Building), (Protected).

$5000. On the four story roof frame building, additions and extensions adjoining thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures,

Exhibit P-1

permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work, and fences connected therewith, occupied as a hotel and known as the "Clarendon Hotel" and situate #302 Fifth Ave., Asbury Park, N. J.

80% Co-Insurance clause attached.

Mortgagee clause attached making loss, if any, payable to Jennie Altusel, mortgagee, as her interest may appear.

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.

Other insurance permitted without notice until required.

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

Attached to and made a part of Policy No. 633176 of the Pittsburg Insurance Company, issued at its Lakewood, N. J. Agency.

ERNEST E. LE COMPTE Agent

Exhibit P-1

STATE OF NEW JERSEY, PERCENTAGE CO-INSURANCE CLAUSE.

"In consideration of the reduced rate of premium at which this policy is written, the Standard eighty (%) per cent. Co-insurance Clause of the State of New Jersey is attached to, and made a part of this policy." If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than 80 per cent. of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent. of the actual cash value of such property. If this policy shall be divided into two or more items, these conditions to apply to each item separately.

Attaching to and forming part of Pittsburgh Underwriters Policy No.

ERNEST E. LE COMPTE Agent.

(New Jersey Standard.)

PROVISIONS SPECIALLY APPLICABLE TO THIS COMBINATION POLICY.

This policy is made and accepted subject to the stipulation and agreement that each of the companies executing this policy, contracts severally, and not jointly, and each of said companies is liable for that proportion of loss or damage covered

by this policy, as set forth below, and not otherwise.

The Allemannia Fire Insurance Co., of Pittsburgh, severally assumes one-fourth the liability for any loss or damage under this policy.

National-Ben Franklin Fire Insurance Co., of Pittsburgh, Pa., severally assumes one-fourth the liability for any loss or damage under this policy.

Republic Fire Insurance Co., Pittsburgh, Pa., severally assumes one-fourth the liability for any loss or damage under this policy.

Superior Fire Insurance Co., Pittsburgh, Pa., severally assumes one-fourth the liability for any loss or damage under this policy.

The words "This Company" wherever they occur in this policy, shall be understood as meaning, "These Companies respectively" or "each of said Companies," as the case may require.

It is further stipulated and agreed by each of the companies executing this policy that service of process or of any proof of loss or other notice required by the said policy upon any of the companies executing the same, shall be deemed to be service upon all.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the

following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent, or other representative of this Company, shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY.—This policy is in stock corporations.

In Witness Whereof, the said THE ALLEMANNIA FIRE INSURANCE CO., NATIONAL-BEN FRANKLIN FIRE INSURANCE CO., REPUBLIC FIRE INSURANCE CO., and SUPERIOR FIRE INSURANCE CO., respectively, have caused this policy to be signed by their Presidents and attested by their Secretaries, in the CITY OF PITTSBURGH, STATE OF PENNSYLVANIA; but this policy shall not be valid until

Exhibit P-1

countersigned by the duly authorized Agent (or Agents) of these Companies at

THE ALLEMANNIA FIRE INS. CO.
OF PITTSBURGH
W. S. Weinmeyer
President.
Chas. B. Reiter,
Secretary.

NATIONAL-BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH, PA.
H. M. Schmitt,
President.
Thos. W. Hathaway,
Secretary.

REPUBLIC FIRE INSURANCE CO.,
PITTSBURGH, PA.
C. W. Gerwig,
President.

Secretary.

SUPERIOR FIRE INSURANCE CO.
PITTSBURGH, PA.
A. H. Trimble,
President.
Edw. Heer,
Secretary.
GEO. R. DAVIES,
Manager.

Countersigned at said Agency this 27th day of June 1922

ERNEST E. LE COMPTE Agent

Exhibit P-1

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, 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 the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any

matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; 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 (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy

on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by this company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more

locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the

claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

Exhibit P-1

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

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, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Exhibit P-1

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Exhibit P-1

(*Cover*)

Standard Fire Insurance Policy for use in the States of Colorado, Illinois, Indiana, Maryland, New Jersey and Utah.

Expires June 27th, 1923

Property Hotel, Asbury Park

Am't $5,000. Premium $83.50
Assured.

ANNA LEVIN

No. 633176

THE PITTSBURG UNDERWRITERS' POLICY

Underwritten By The
THE ALLEMANNIA FIRE INSURANCE CO., OF PITTSBURGH, NATIONAL-BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH, PA., REPUBLIC FIRE INSURANCE CO., PITTSBURGH, PA., AND SUPERIOR FIRE INSURANCE CO., PITTSBURGH, PA.

E. E. LE COMPTE, Agent
Insurance
313 SECOND STREET
LAKEWOOD, N. J.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

EDITION OCTOBER, 1920.

Exhibit D-8

Agency

Lakewood, N. J.
E. E. LECOMPTE

Pol. No. 633176

Old No.

Exhibit D-8.

DAILY REPORT

PITTSBURG UNDERWRITERS

OF PENNSYLVANIA.

Head Office: Commonwealth Building, Pittsburgh, Pa.

Make Diagram if not on Map. Mail this Report on the Day of Transaction, and Answer all Questions on Back Hereof.

Map Location.

Vol. Sheet

Block

Street No.

M/R

REINSURANCE

Date Co. Amount Prem. Pol. No.

F/R FOR HEAD OFFICE USE ONLY.
Register Ex. D.8
Class 6/29/26 K
Survey
Approved

Amount, $5000. Rate 1.67 Premium, $83.50
Graded Commission Rate %
Eighty-three and 50/100 Dollars Premium

Exhibit D-8

Assured Anna Levin

For the Term of one year from the Twenty-seventh Day of June 1922 at noon To the Twenty-seventh Day of June 1923 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars

(Building) (protected) form

$5000. On the four story roof frame building

* * *

Occupied as a hotel and known as the "Clarendon Hotel" and situate #302 Fifth Ave. Asbury Park, N. J.
80% Co-insurance clause attached
Mortgagee clause attached making loss, if any payable to Jennie Altschul mortgagee as her interest may appear

Agent

Report Mailed

New Jersey
Court of Errors and Appeals

ANNA LEVIN,
Plaintiff-Respondent,
vs.
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. OF PITTSBURGH, ALLEMANNIA FIRE INSURANCE CO., and SUPERIOR FIRE INSURANCE CO., doing business as Pittsburg Underwriters,
Defendants-Appellants.

On Appeal from Supreme Court.

BRIEF FOR DEFENDANTS-APPELLANTS.

I.

Abstract of Case.

This is an ~~appeal~~ action brought by Anna Levin against the defendants, the Pittsburgh Underwriters, on a policy of fire insurance. There was a mortgagee clause but the mortgage debt has been paid and the mortgagee is not a party to the action. The case was tried at the Monmouth Circuit, before Judge Jess, on June 24, 1926, and

succeeding days. The plaintiff had a verdict for $4,251.99.

Judge Jess allowed a rule to show cause reserving all exceptions and objections noted for defendant as grounds of appeal. The Supreme Court refused to pass on any of the questions so reserved (p. 258) and the rule to show cause was discharged. The case is here on appeal on the exceptions and objections noted for defendants as grounds for appeal.

The property concerned in litigation is the Clarendon Hotel, at Asbury Park. It was damaged by fire on December 21, 1922.

The sound value of the property at the time of the fire, according to the proof of loss, was $45,000. The extent of the loss was not proven in the usual way. Mr. Le Compte, the agent who wrote the policy, testified on plaintiff's case, that the property was about half destroyed. Mrs. Levin testified that it was about half destroyed, and Mr. Stansbury, another insurance broker, testified that it was from forty to fifty per cent destroyed. No proof by carpenters or builders was made.

There was $31,500 of undisputed insurance on the property and the plaintiff has collected from other insurance companies about $27,000 (p. 45) —the exact figure, we believe, was $26,788.51 (p. 97) or $4,288.51 more than one-half the sound value.

The policy in suit was written by Ernest E. Le Compte, who was the agent for the Pittsburgh Underwriters, to write business in Lakewood and vicinity. He was also the agent for the insured (p. 205). The policy was written on June 27,

1922. On July 3, 1922, Le Compte received a telegram from the Pittsburgh Underwriters, telling him to cancel the policy quickly. He immediately rewrote the risk in the Ohio Farmers Insurance Company, took the new policy, the same day, from his office in Lakewood to Asbury Park and delivered it to Mr. Levin, and asked him for the return of the Pittsburgh Underwriters' policy. It seems that the Pittsburgh Underwriters' policy was at that time in the hands of the mortgagee. Mr. Levin promised to get the policy now in suit and return it to Mr. Le Compte. Some time later, the Ohio Farmers cancelled its policy and on July 12, 1922, Mr. Le Compte wrote to Mr. Levin, a letter (Exhibit "D-9") which read:

> "I have just received a letter from the Ohio Farmers Insurance Company stating that they did not want the policy on your hotel in Asbury Park. I wrote $5,000 with them to take the place of $5,000 I had formerly in the Pittsburgh Underwriters. Kindly return the Ohio and the Pittsburgh Underwriters' policies as soon as possible as I have to return them to the companies. It will be necessary for you to have the $5,000 written in Asbury Park as I cannot write them here."

The policy of the Pittsburgh Underwriters remained with Mrs. Altshul, the mortgagee, until after the fire. The policy of the Ohio Farmers apparently was returned to that company.

On August 1, 1922, the Provident & Washington Insurance Company wrote a policy of $5,000 on the property of Mrs. Levin. This was written through Paul Zurlin. This policy was in force at the time of the fire and contributed to the loss.

That Mr. Levin was agent for and *alter ego* of Mrs. Levin, is admitted. He testified (p. 206) on cross-examination:

> "Q. When I spoke of you, you and Mrs. Levin are one? A. Yes.
>
> Q. You signed checks and she signed checks? A. Yes. We don't deny anything, that is all."

The various questions involved are as follows:

The defendants claim that the policy in suit was cancelled before the fire. The question presents itself in several phases.

(a) Defendants contend that the policy was cancelled in Mr. Le Compte's office on July 3rd, when he received the notice of cancellation from the Pittsburg Underwriters and immediately re-wrote the loss in the Ohio Farmers Insurance Company.

Mr. Levin testified (p. 205) that Mr. Le Compte was the agent of the Levins; that he was to keep the property insured and that he never told Mr. Le Compte to write in this company or that company or the other company, but he was to keep the property insured.

(b) If for any reason the cancellation did not become effective in Le Compte's office, it did become effective that afternoon when, in Asbury Park, Mr. Le Compte handed the Ohio Farmers Insurance Company policy for $5000 to Mr. Levin, and told him that the Pittsburg Underwriters had cancelled their policy, and that he, Le Compte, had re-written the policy in the Ohio Farmers, and Mr. Levin accepted the Ohio Farmers policy and promised in return to get back the Pittsburg Underwriters policy, being the policy now in suit.

(c) That the cancellation in any event became effective five days after Levin was notified of the cancellation. This last point is urged only because it seems wise to cover every phase and under the express provisions of the policy, the cancellation becomes effective on five days' notice. Under our cases, however, it would seem that where another policy is substituted for the cancelled policy, the cancellation becomes effective immediately, notwithstanding the five day clause. This point of cancellation was raised both on a motion for nonsuit and on motion for directed verdict.

A second question is one which we press with diffidence and would not press at all if the facts were not proved conclusively out of the mouths of all parties concerned, that is, that Mr. Le Compte was the agent of the Pittsburg Underwriters and he was the agent of Mr. and Mrs. Levin, and that a person who is agent for both parties, cannot make a contract between them. This matter of dual agency comes up in a second form. If Le Compte could act for both parties, he was certainly agent for Mrs. Levin, to receive notice of cancellation. And this matter of the dual agency comes up a third time on the question of waiver of notice of loss after the fire. If Le Compte was agent of Mrs. Levin, to give such notice as she claims, he could hardly be the agent of the company to waive the necessity of such notice being given. These points were raised on motion for nonsuit, motion for directed verdict and request to charge.

The third question involved has to do with the proof of damages. We contended first that no damages were proved; and secondly, that there

was no legal standard set whereby the jury could estimate the amount of loss; and thirdly, that it appeared affirmatively that the plaintiff had recovered from the other insurance companies more than her loss. We have heretofore referred to the nature of the proof. The sound value as stated in the proof of loss which was evidence against the defendant was $45,000. Mr. Le Compte testified that the property was half destroyed. Mrs. Levin testified that the property was about half destroyed, and Mr. Stansbury, another insurance man, testified that he thought that it was from forty to fifty per cent destroyed. This question of damage was raised both on a motion for nonsuit and on a motion for directed verdict. In a modified form, after the court had denied the nonsuit and directed verdict, we again called the Court's attention to the matter by a request to charge the jury that plaintiff could recover, if at all, only nominal damages. In regard to the motion for nonsuit, while it is true that proof of the breach of a contract entitles a plaintiff, upon proof of the breach, to nominal damages, and therefore, no nonsuit will be allowed, but as the contract of insurance is a contract to indemnify the plaintiff, it seems obvious that before a plaintiff in an insurance case can have any judgment, he must clearly show for how much he is to be indemnified. On motion for directed verdict, of course, any possible difficulty on this point would not arise.

The fourth question involved is whether the Trial Court erred in charging the jury as follows:

> "On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters' policy."

This statement was erroneous in that Mr. Levin did not deny the visit to him of Mr. Le Compte on July 3rd, nor the conversation as recounted by Mr. Le Compte, nor did he deny the receipt of the letter "D9," in which Mr. Le Compte recounted that he had re-written the Pittsburg insurance in the Ohio Farmers, and now that the Ohio Farmers' policy was cancelled, and that both policies should be returned to him.

The Trial Judge tried to protect himself from any misstatement by using the words:

> "You must depend upon your own recollection of their evidence and *your understanding* of it."

It is submitted that a Trial Judge cannot put a false construction on testimony and then avoid error by such cautionary language as this. We understand that the jury is bound by the evidence and that they cannot find a verdict on their "understanding" of it, which is different from its plain import.

A fifth question is whether the Trial Court erred in charging the jury as follows:

> "Now, gentlemen, if you find for the plaintiff, your verdict should be for such a sum as, under the evidence, will represent the defendants' proportionate share of the total loss. The only evidence before you is that this proportionate share was $4,251.99, as I have it. If you are satisfied that this is the *total loss or the amount claimed,* that is, that the total loss amount-

ed to the sum claimed by the plaintiff, and that the plaintiff has established that claim by a preponderance of the evidence, and has likewise shown the liability of the defendants, then your verdict should be in favor of the plaintiff for the Underwriters' proportionate share of the loss sustained."

There are several objections to it. In the first place, it is hopelessly confused. In the second place, there was no legal evidence that the defendants' proportionate share of the total loss was $4,251.99. In the third place, the policy in suit (at p. 280) provides:

> "The Company shall not be liable under this policy for a greater proportion of any loss * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not."

And the policy in suit had a rider which is commonly known as the 80% clause, which provides (p. 269):

> "If at the time of the fire the whole amount of insurance on property covered by this policy shall be less than 80% of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss so damaged as the amount insured by this policy shall bear to the said 80% of the actual cash value of such property."

There was considerable evidence offered as to the effect of these two clauses upon certain sets of figures. The figure $4251.99 is taken from the

schedule annexed to the proof of loss (p. 244). The Judge charged correctly (p. 232):

> "Statements in the proof of loss are admissions against the plaintiff but cannot be used as evidence in her behalf."

The only way in which the figure $4251.99 could be the amount with which defendants would be charged, would be by the proof, by legal evidence of the precise figures mentioned in the proof of loss (p. 241):

Building	$45,000.00
Loss or damage on the same	31,039.50
Insurance on the same	36,500.00

If the sound value is changed by later proof, or if the amount of loss or damage is changed, or if the amount of insurance is changed, then an altogether different set of figures must result.

The figure $4251.99 appears in the testimony of Stansbury in a very equivocal form (p. 70):

> "Q. What was the amount of the Pittsburg Underwriter's policy? $5,000, wasn't it? A. $5,000.
>
> Q. What would be its proportion or contribution to the amount of insurance that you have referred to in the amount of the loss? A. $4,251.99."

This computation may refer from the frame of the questions to the proof of loss, and assume that the proof of loss is evidence, or it may refer back to the testimony on page 69. After repeated objections, witness was permitted to answer.

> "Q. Will you tell us in your opinion, what the loss was by fire to this building

that happened to the Clarendon Hotel the 21st day of December, 1922? A. In the neighborhood of forty or fifty per cent.

Q. And how much was that? A. Thirty-one thousand—

> Mr. Boardman: I object; I beg your pardon, that he is not an expert in real estate. Now it is getting into a different field.

A. My business is partly real estate, mortgage loans and sale of real estate; and closing title for the Milan Ross Agency. $31,039.50."

It will be noted that the question actually asked was, what was 40% or 50% of the value of the property. And the answer is $31,039.50, which would make the sound value of the property not $45,000, but between $62,079 and $77,598.75. If the sound value was $62,079, the Levins, under the 80% clause, would become co-insurers for about $13,000, and the whole computation whereby we are charged with $4,251.99 is upset. If the third sentence of the Judge's charge, mentioned above, is disregarded and only the first and second sentences are considered, his charge can be justified only in assuming that Stansbury's valuation of the property is wrong, that instead of fixing the value, he was proving legally the amount of the loss without regard to the value of the property, and then reading against the defendants the proof of loss as plenary proof that the sound value was $45,000. The verdict was for the precise figure that the Judge named.

The sixth question is the correctness of the Court's denial of nonsuit and of direction of verdict, coupled with his refusal to charge as follows:

> "If Mr. Le Compte was charged by the plaintiff as her agent to give notice of loss to the defendant, he could not waive the requirement of the policy that immediate notice be given; and unless Le Compte was acting only for the defendant, the allegation of waiver in the amended complaint is not proved."

A similar question arose on the motion for nonsuit; that is, that the plaintiffs failed to give the defendants immediate notice of loss and upon this point appearing beyond peradventure, the plaintiff applied for and obtained leave to amend her complaint alleging a waiver of notice. The amendment appears on page three of the case. The fact upon which plaintiff depended to sustain the claim of waiver was the fact that the Levins told Le Compte of the loss, whereas, Mrs. Levin, on her cross-examination on plaintiff's case, has testified:

> "Q. Did you depend upon him (Le Compte) to give notice to the insurance company? A. Naturally we depend always on him to write the policy and we have to depend upon him."

The seventh point, the Court refused to charge the jury at defendants' request, as follows:

> "If the plaintiff inserted the allegations as to the Pittsburg Underwriters' policy in the proof of loss, knowing the policy to have been cancelled, for the purpose of collecting insurance money from the defendant, such action would be fraud and would render the policy void."

The eighth point, the Court refused to charge the jury at defendants' request, as follows:

> "If the plaintiff failed in her proof of loss to disclose the fact that the encumbrance upon the property was a real estate mortgage which, together with a chattel mortgage, secured the $15,000 mentioned in the proof of loss, in order to conceal the fact of the existence of the chattel mortgage and the existence of a greater moral hazard, such concealment would void the policy."

The ninth point, the Court refused the following requests to charge (p. 236):

> "12. The plaintiff has failed to prove any damages for which she has not received compensation, and is entitled to recover only nominal damages, if entitled to recover at all.
>
> 13. The plaintiff has failed to establish any basis of the computation of damages, and, if entitled to recover at all, can only recover nominal damages."

The tenth and eleventh questions are whether the Court erred in permitting Alfred L. Stansbury to answer the following question over defendant's objection:

> "Q. What did you ascertain the total insurance on the building to be?
>
> Q. Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st of December, 1922"

II.

Grounds of Appeal.

1. The Trial Court erred in denying defendants' motion for a nonsuit (Case, pp. 90 to 92).

2. The Trial Court erred in denying defendants' motion for the direction of a verdict in favor of the defendants against the plaintiff (Case, pp. 219 to 221).

3. The Trial Court erred in charging the jury as follows:

> "On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters' policy" (Case, p. 228).

And again:

> "You must depend upon your own recollection of their evidence and your understanding of it" (Case, p. 228),

as these two statements were used in the following context (Case, pp. 227, 228):

> "On July 3rd, the agent received a telegram and later a letter from the defendants' executive officer in which he was instructed peremptorily to cancel the policy. This evidence is uncontradicted. This order to Le Compte to cancel, however, was not in itself sufficient to cancel the policy. To effectuate a cancellation, it was necessary that notice of the defendants' intention to cancel should be brought home to the insured, the plaintiff, Mrs. Levin. Was

this done? You have heard the testimony of Le Compte that upon receiving the order to cancel, he wrote a new policy in the Ohio Farmers' Insurance Company which he intended as a substitute for the Pittsburgh Underwriters' policy; that he took this new policy to Mr. Levin and informed him that the Underwriters wanted their policy cancelled and that he had to place the insurance with another company, that he left the Ohio policy with Mr. Levin. You have heard Le Compte's further testimony that he repeatedly informed both Mr. and Mrs. Levin that he had been instructed to cancel the Underwriter's policy and that he made many requests to either or both that that policy be surrendered to him. On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriter's policy, and you have their testimony that either they did not assent to the substitution of the Ohio policy or that they knew nothing of such a substitution.

Now, gentlemen, I do not undertake to repeat literally what Mr. and Mrs. Levin said on that phase of the case, but state merely the sense in which I understood their testimony. You must depend upon your own recollection of their evidence and your understanding of it. But in any event from this conflicting testimony you will have to decide whether the plaintiff was in fact notified of the cancellation of the Underwriter's policy."

4. The Trial Court erred in charging the jury as follows (Case, 230):

> "Now, gentlemen, if you find for the plaintiff, your verdict should be for such a sum as, under the evidence, will represent the defendants' proportionate share of the total loss. The only evidence before you is that this proportionate share was $4,251.99, as I have it. If you are satisfied that this amount is the total loss or the amount claimed, that is, that the total loss amounted to the sum claimed by the plaintiff, and that the plaintiff has established that claim by a preponderance of the evidence, and has likewise shown the liability of the defendants, then your verdict should be in favor of the plaintiff for the Underwriter's proportionate share of the loss sustained."

The Trial Court erred in refusing to charge each of the following propositions upon the defendants' request (Case, 225, 236):

> 5. "One person cannot act as an agent for two persons to create a contract between the two; and therefore if Le Compte was acting for the Levins and the defendant, the contract cannot be sustained."

> 6. "If Mr. Le Compte was charged by the plaintiff as her agent to give notice of loss to the defendant, he could not waive the requirement of the policy that immediate notice be given; and unless Le Compte was acting only for the defendant, the allegation of waiver in the amended complaint is not proved."

> 7. "If the plaintiff inserted the allegations as to the Pittsburg Underwriter's

policy in the proof of loss, knowing the policy to have been cancelled, for the purpose of collecting insurance money from the defendant, such action would be fraud and would render the policy void."

8. "If the plaintiff failed in her proof of loss to disclose the fact that the encumbrance upon the property was a real estate mortgage which, together with a chattel mortgage, secured the $15,000 mentioned in the proof of loss, in order to conceal the fact of the existence of the chattel mortgage and the existence of a greater moral hazard, such concealment would void the policy."

9. "The plaintiff has failed to prove any damages for which she has not received compensation, and is entitled to recover only nominal damages, if entitled to recover at all."

10. "The plaintiff has failed to establish any basis of the computation of damages, and, if entitled to recover at all, can only recover nominal damages."

The Trial Court erred in permitting the following questions to be answered:

11. (To Alfred L. Stansbury, Case, p. 65):

"Q. What did you ascertain the total insurance on the building to be?"

(To Alfred L. Stansbury, Case, pp. 67 to 69, incl.):

"Q. Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st of December, 1922?"

III.

ARGUMENT.

Point I.

Cancellation of the Policy.

It appears by uncontradicted proof that the policy in suit was cancelled by the defendant under the terms of the policy, in July, 1922, five months before the fire. The provision of the policy is as follows:

> "This policy shall be cancelled at any time at the request of the insured or by the company by giving five days' notice of such cancellation" (p. 277).

This point was urged as a ground for nonsuit (p. 91). And as a ground for a direction of a verdict in favor of the defendant (pp. 219-220).

It matters little the precise time when the cancellation became effective but there are three possible points of time at which the cancellation became effective: One, in Le Compte's office on July 3, 1922, when, upon receipt of a telegram from the home office, asking him to "cancel quickly; prohibited territory, Asbury Park," he immediately re-wrote the risk in the Ohio Farmers' Fire Insurance Company. Second, the afternoon of July 3, 1922, at the Clarendon Hotel, Asbury Park, when Mr. Le Compte told Mr. Levin that the Pittsburg Underwriters had ordered its policy cancelled, and that he had re-written the risk in the Ohio Farmers' Insurance Company and delivered the Ohio Farmers' policy to Mr. Levin, and left it with him. Third, five days after Mr.

Levin was told of the cancellation of the Pittsburg Underwriters policy. We quote the testimony somewhat in the order in which it was produced:

Ernest E. Le Compte, called as a witness for the plaintiff, testified (p. 15):

"Q. I show you Exhibit P-1, purporting to be a policy of insurance. Was this policy issued by you? A. Yes, sir.

Q. On behalf of whom? A. Anna Levin.

Q. Anna Levin did not issue the policy, did she? A. You said on behalf of whom.

Q. Well, what policy is it? A. Oh, you mean—the Pittsburg Underwriters Insurance Company.

Q. And who was the Pittsburg Underwriters? A. A company I had in my office."

The same witness, on cross-examination, speaking of the Levins (p. 22):

"Q. And you did their insurance on the Lakewood Hotel for them? A. Yes, sir.

Q. And you did what you could write on the Asbury Park? A. Yes, sir.

Q. You have other property that you write for them? A. No, that is about all, the Clarendon in Lakewood and the Clarendon in Asbury Park.

Q. Do you know whether you wrote all of Mr. Levin's policies or not? A. In Lakewood?

Q. Yes. A. I think so.

Q. And did you write all those in Asbury Park as far as you were able? A. No, sir.

Q. As far as you were able? A. I wrote as much as I could, yes.

Q. Do you recall how you came to write this policy in the Pittsburg Underwriters, who ordered it and how it was— A. Most of the policies were ordered by Mr. Levin."

Same witness, on cross-examination (p. 24), over objection:

"Q. What was the situation in reference to the Pittsburg Underwriters policy at the time of the fire? A. At the time of the fire?

Q. Yes. A. Why, the policy was cancelled, the way I understood.

Q. When was it cancelled? A. Why, it was cancelled July 3rd."

Same witness, on re-direct (p. 30):

"Q. What do you mean by your answer, 'The policy was cancelled, the way I understood'? A. I got notice from the company to cancel the policy and I immediately wrote the policy over with another company and I went to see Mr. Levin and gave him the new policy and asked him for the old policy in the Pittsburg Underwriters.

Q. You got notice from these defendant companies to cancel this policy, did you? A. From the Pittsburg Underwriters; yes, sir. After I had notified them of the writing immediately I sent them a daily report."

Anna Levin, on direct-examination, speaking of Mr. Le Compte, testified (p. 38):

"A. Well, we always carried our insurance with him, bought some property through him.

Q. In Lakewood and Asbury Park? A. In Lakewood. Well, insurance we carried in Lakewood and Asbury Park.

Q. I show you Exhibit P-1, policy of insurance, and ask you through whom you procured that policy of insurance? A. Through Mr. Le Compte."

Mr. Alfred L. Stansbury was the third witness called. He was an insurance agent from the Milan Ross Agency. He acted as adjuster for the plaintiff and negotiated settlement with the insurance companies that settled. He testified (p. 77):

"Q. What were you employed for? What was your duty? A. I was asked by Mr. and Mrs. Levin to represent them in these losses. It had been their first fire. And we give personal service to our clients in all losses."

Page 79:

"Q. Mr. Levin didn't ask you, so you volunteered? A. He said, 'Do you think *I* need an adjuster?' I said, 'You never need an adjuster with the Milan Ross Agency. We give them that service.'

Q. Oh, yes; I see. And so you volunteered to do it for Mr. Levin? A. Yes."

And he testified finally, without objection from the plaintiff's attorney (p. 88):

"Q. How long had the Levins owned this Hotel Clarendon in Asbury Park? A. I couldn't answer that question.

Q. Well, about? How long have you been writing insurance for them? A. I

wrote the insurance the previous October to the fire.

Q. They bought it recently? A. They didn't buy the hotel through our agency.

Q. No, but they bought it recently, didn't they? A. I think they had owned it a couple of years; two or three years."

At the end of the plaintiff's case, the defendant moved for a nonsuit in the following language (p. 91):

"Mr. Boardman: I also make a motion for nonsuit on the ground that it affirmatively appears that the policy was cancelled and notice was given of its cancellation.

And further that it appears affirmatively that the policy was cancelled by the home office and the policy of the Ohio Farmers was substituted for it by Mr. Le Compte, who was the agent of the assured, for the purpose of writing insurance and procuring new insurance. That appears affirmatively.

The Court: I will deny your motion, Mr. Boardman. I think that this is a jury question."

At that point the identity of Mr. and Mrs. Levin's interest in the property had been recognized by Mr. Le Compte, by Mrs. Levin, the plaintiff, and by Mr. Stansbury, three of the four witnesses called. The remaining witness, Mr. Davies' testimony, had no bearing on these questions. At that point, too, we had the distinct statement of Mr. Le Compte that the policy in suit had been cancelled on July 3rd. Le Compte testified that

the policy had been cancelled; that he had received a telegram and that he had re-written the loss and carried the new policy to Mr. Levin, and asked for a return of the Pittsburg Underwriters' policy. Morris Levin was not called to deny this. A motion for a nonsuit, we submit, should have been granted. This testimony was elaborated on defendants' case. George R. Davies, manager for the company, testified (p. 93):

> "Q. What was done? A. On July 3rd the following telegram was sent to Mr. Ernest Le Compte, 313 Second Street, Lakewood, New Jersey, dated July 3rd, 'Cancel quickly 6330175 and 76. Asbury Park prohibited territory. (signed) Pittsburg Underwriters.' "

Mr. Le Compte, re-called for the defendants, speaking of July 3rd, testified (p. 128):

> "A. Yes, I was notified to cancel the policy quickly.
>
> Q. What did you do? A. I immediately wrote the policy over in the Ohio Farmers' Insurance Company.
>
> Q. What did you do with the Ohio Farmers' policy? A. I took it over to Asbury Park to Mr. Levin. I told him that the Pittsburg wanted their policy cancelled, and I had written this policy to take its place and I wanted him to get me the Pittsburg policy as soon as he could.
>
> Q. Did you leave the Ohio Farmers' policy with him? A. Yes, sir.
>
> Q. And what did he say? A. He said he would get it for me.
>
> Q. Do you remember just what words

> you said, what you told him then that day about the word that you had got from Pittsburgh? A. I simply told him that the Pittsburg didn't want the insurance and had ordered it cancelled and I had to write it over in another company.
>
> Q. And you told him that you got a telegram? A. I don't remember.
>
> Q. And did you leave the Ohio Farmers' with him? A. I left the policy with him; yes, sir."

And at page 129:

> "Q. What happened in reference to the Ohio Farmers'? A. I received word from the Ohio Farmers' to cancel the policy.
>
> Q. What did you do then? A. I wrote Mr. Levin a letter—
>
> Q. What was the date of your getting the word from the Ohio Farmers'? A. I think this is the letter, August 5th, but I think I received word before I got this letter. I don't remember exactly.
>
> Q. Did you then try to get back both policies? What did you do then after you got the notice of cancellation? A. I wrote Mr. Levin a letter which I have a copy of—
>
> Q. Under what date? A. July 12th.
>
> Mr. Boardman: Have you got that letter, Mr. Carton?
>
> Mr. Carton: What is that?
>
> Mr. Boardman: A letter from Mr. Le Compte to Mr. Levin, July 12, 1922.
>
> Mr. Carton: We certainly have not.

Q. Will you produce the copy of the letter which you sent?

(Witness produces paper.)

Mr. Boardman: I offer that in evidence.

(Paper marked Exhibit D-9 and read by Mr. Boardman.)

Exhibit "D-9" appears at page 256 and is as follows:

"July 12, 1922.

Dear Mr. Levin:

I have just received a letter from the Ohio Farmers Insurance Company stating that they do not want the Policy on your hotel in Asbury Park. I wrote $5,000 with them to take the place of the $5,000 I had formerly in the Pittsburgh Underwriters. Kindly return the Ohio and Pittsburgh Underwriters policies as soon as possible, as I have to return them to the Companies.

It will be necessary for you to have the $5,000 written in Asbury Park, as I cannot write them here.

With kindest regards, I remain,

Very truly yours,"

Miss Virginia Westhall, of Mr. Le Compte's office, testified (p. 176):

"A. Why, a telegram came to the office on July 3rd to cancel the policy. The telegram came from the Pittsburg Underwriters.

Q. And what was done? A. And I immediately wrote another policy in the Ohio Farmers' and Mr. Le Compte took it over that afternoon to get the Pittsburg; he was going to replace it with the Ohio Farmers."

Morris Levin was finally called to the stand, in rebuttal. He testified, on direct-examination (p. 198):

"Q. Mr. Le Compte has said that he wrote a policy for you, I think, early in July, 1922, in the Ohio Farmers and delivered it to you. Is that a fact? A. Well, I tell you, Counsellor, I couldn't recollect for any policy, what he wrote or didn't write. He wrote for me a lot of policies and how can I? Just if I say I will have to say a lie. I don't know anything if he did or not.

Q. Do you remember particularly this Ohio Farmers' policy ever having been presented to you by Mr. Le Compte? A. I couldn't tell you, because I couldn't tell no dates or days because I don't know. He presented me policies and sent it in and that is all I know.

Q. Well, maybe this will refresh your recollection. He says at the time that he delivered this policy to you, the Ohio Farmers, that he told you that the Pittsburgh

Underwriters policy had been cancelled and demanded it back from you. Is that so? A. When was that? After the fire he told me it was cancelled.

Q. Said to be early— A. Twelve days after the fire he told me it was cancelled, not before. I never knowed anything before.

Q. No, I think his conversation had relation to the early part of July, 1922. He says he went to your hotel, delivered the Ohio Farmers' and requested the return of the Pittsburg Underwriters. Did he ever do that? A. We hadn't many cancelled, you know. I wouldn't keep no policy; I wouldn't go back of—

Q. Did he do it? A. I say, I don't know. I couldn't tell you. What shall I tell you? Now tell me what can I do? Why should I have a cancelled policy? What will I do with it?

Q. Do you remember him ever having called upon you for turning over any policy that had been cancelled that you didn't turn over? A. When he come in with a cancelled policy to execute to me back the girl take her policies from the safe and he takes out whatever he needs. I don't know anything about it exactly.

Q. Did Mr. Le Compte ever request from you the return of any policy which he claimed had been cancelled, that you did not turn over to him? A. No; why should I? Why should I keep a cancelled policy?

Q. Well, keep this in mind: Mr. Le Compte has said, referring to this policy,

that all summer, twice a week, in the summer of 1923, he called at your hotel in Asbury Park to get back this policy for cancellation. Did he do that? A. No, sir.

Q. Where were the policies of insurance covering the Clarendon Hotel, with you or with the mortgagee, if you know? A. It was with the mortgagee, and some I had."

Several things about this testimony are to be noted. Mr. Levin does not deny that Le Compte called on him or that he brought the policy of the Ohio Farmers', or that he told him that the "Pittsburg wanted their policy cancelled." Nor does he deny that Le Compte ever told him "that the Pittsburg did not want the insurance and had ordered it cancelled." He simply says: "Twelve days after the fire he told me it was cancelled; not before." And at the end of his testimony, where the examiner speaks of the summer of 1923, instead of the summer of 1922, which was Mr. Le Compte's testimony, Levin answers, "No, sir." Light is thrown on what Mr. Levin meant when he gave his equivocal answer, but his testimony on cross-examination. Of course, the question is what Mr. Le Compte did, and not what Mr. Le Compte thought. Mr. Le Compte testified, on cross-examination (p. 151):

> "Q. Did you think you could not effect a cancellation of this policy unless you notified the mortgagee? A. Absolutely."

This was true as far as the mortgagee was concerned, but not true as far as owner was concerned. This, then, is what we understand Mr. Levin to mean in the early part of the following citation on his cross-examination: Le Compte

thought it was necessary to get the policy from the mortgagee, or notice to the mortgagee to effect a complete cancellation; therefore, Levin argued Le Compte could not have said the policy is completely cancelled.

Obviously he was refusing to contradict Mr. Le Compte. The examiner asks him about July 3rd, and he answers about July 20th. He is argumentative but he admits that Le Compte is truthful and trustworthy.

Page 204:

> "Q. You don't know whether the Pittsburgh Underwriters were cancelled or not, do you? A. How should I know?
>
> Q. Yes, how should you? A. He didn't know himself. How should I know? I didn't know the company, I didn't know where they are; he didn't know that it was cancelled and how should I know it was cancelled?
>
> Q. And about the Ohio Farmers', you don't know whether that was cancelled? A. I don't know anything about that policy, never seen it. I don't know what it is."

Page 205:

> "Q. And do you remember Mr. Le Compte visiting you on July 3, 1922? A. I couldn't tell you.
>
> Q. And he came over and said the Pittsburg Underwriters had been cancelled and here is the Ohio Farmers'? You don't remember that at all, one way or the other? A. I beg your pardon. I couldn't tell. The *20th* of July we are very busy and we are

> in the hotel business and I am sure that I wouldn't, if I tell you yes or no, I wouldn't tell you the truth, because I don't know.
>
> Q. You have known Mr. Le Compte a long while? A. Oh, yes.
>
> Q. And he is a truthful fellow? A. So far I did; so far I had all my trust in him and he insured me.
>
> Q. He has been your agent since? A. Yes, sir.
>
> Q. And he was your agent before? A. Yes, sir.
>
> Q. And he was your agent for writing everything that you could write through him, you wrote through him, didn't you? A. Took away some after the fire.
>
> Q. Yes, after the fire, but before the fire he was your agent to write insurance? A. Yes, sir.
>
> Q. And you trusted him? A. Positively.
>
> Q. You didn't tell him to write in this policy or that policy, but was to keep it insured? A. I didn't tell him to write in this company or that company or the other company; I never told him that.
>
> Q. And he was to keep you insured? A. Yes.
>
> Q. And he was your general insurance man; you were a man of big affairs and he would look after your insurance for you? A. Yes, sir.
>
> Q. When I speak of you, you and Mrs. Levin are one? A. Yes.
>
> Q. You signed checks and she signed checks? A. Yes, we don't deny anything, that is all."

Any argumentative or equivocal denials that Mr. Levin may have made, were qualified by his final admissions. Whatever Le Compte told him during the summer of 1922, he has forgotten, and how can he be expected to remember? He testified at page 210, on re-cross examination:

> "Q. Now, Mr. Levin, isn't this true, that Mr. Le Compte was under stress all that summer to get back this policy? Wasn't he asking you repeatedly for the policy? Didn't he tell you that they threatened to hold him liable if he didn't get back the policy? Didn't he beg you for the policy? A. I don't know anything when he did that. If he ask for a policy I don't know what it was. If he tell me that four years ago, how can I tell you? But if Mr. Le Compte would ask me, I would give it to him. He asked me for a policy after the fire was.
>
> Q. Suppose the policy was up at Mr. Altshuler's house, would you have given it to him if you had it, but you didn't have it? A. Well, couldn't he write another policy and send it?"

(a)

We respectfully submit that the policy in suit was cancelled in Mr. Le Compte's office on July 3, 1923, when he received the telegram "Cancel quickly," and re-wrote the loss in the Ohio Farmers' Insurance Company.

At that time, Mr. Le Compte's agency, as defined by Mr. Levin, was as follows (p. 205):

> "Q. You didn't tell him to write in this policy or that policy, but was to keep it insured? A. I didn't tell him to write in this company or that company or the other company; I never told him that.
>
> Q. And he was to keep you insured? A. Yes."

And his own suggestion as to what Mr. Le Compte might do, was exactly what Mr. Le Compte did do (p. 211):

> "Q. Suppose the policy was up at Mr. Altshuler's house; would you have given it to him if you had it, but you didn't have it? A. Well, couldn't he write another policy and send it?"

As we have seen, Mrs. Levin, in the very opening of her examination by her own counsel, testified (p. 38):

> "We always carried our insurance with him."

And again:

> "Q. He was your regular agent and broker? A. Yes. He brings us a policy and hands it to us."

And Mr. Le Compte himself repeatedly showed that he had no doubt of his authority to re-write the loss.

In 26 *Corpus Juris,* at page 140, the following appears:

> "If the person to whom notice of cancellation is given is the agent of insured and authorized to receive such notice, this is notice to the insured, although he may also be the agent of insurer."

In *Kerr* v. *Milwaukee Mechanics' Insurance Co.,* 117 Fed. Rep. 442, at p. 447, it is said:

> "Many cases hold that an agent of fire insurance companies, to issue their policies, may also be constituted by the insured his agent to receive the policies, and to keep and care for them, with plenary power to keep the property insured in accordance with general directions of the insured, and attend to all renewal, cancellation and replacement of insurance without consulting the assured in respect to particular policies or other details. *Hamm Realty Co.* v. *New Hampshire Fire Ins. Co.,* 80 Minn. 139, 83 N. W. 41; *Dibble* v. *Assurance Co.,* 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; *Buick* v. *Insurance Co.,* 103 Mich. 75, 61 N. W. 337. In those cases such had been the course of dealing between the insured and the agent for a term of years."

This idea seems to underlie *Ignazio* v. *Fire Ins. Co. of Philadelphia,* 98 N. J. L. 602, where the agent, Nolan, shifted the loss before the fire and delivered the policy long after. In that case, the Home Insurance Company policy was in the hands of Ignazio. A few days before the fire, after repeated notice to cancel, Nolan re-wrote the risk in the Fire Insurance Company of Philadelphia. This policy was in Nolan's possession at the time of the fire. After the fire, Ignazio came in, with his Home Insurance Company policy, to Nolan's office, to collect on it.

Speaking of this situation, the Supreme Court said (98 N. J. L. 602, at p. 605):

> "It may be gratifying to counsel to know that we have considered the cause on the merits also, and are satisfied that at the time of the fire the Home policy had been cancelled, as the complaint avers, and the Fire Association policy had been issued in its stead."

In *Orkins* v. *Standard Fire Insurance Co.,* 99 N. J. L. 114, at page 116, Chief Justice Gummere, speaking for this Court, used the following language:

> "The employment of Brownholtz was not that of a mere soliciting insurance agent. By the terms of that employment he was constituted the agent of the plaintiff, not only to take out the original policy, but thereafter to keep him insured to the extent of $1,500 in respect to the property covered by that policy. In the case of *Farrar* v. *Western Assurance Co.,* 159 Pac. Rep. 609, 611 (which was almost identical in its facts, so far as the scope of the employment was concerned), it was held that the broker, by the very terms of his employment, became clothed as the agent of the insured, with authority to accept for his principal, and act upon a notice of cancellation, and to procure for him substituted insurance in another company upon the cancellation of the original policy. To the same effect is the decision of the Supreme Court of Wisconsin in *Schauer* v. *Queen's Ins. Co.,* 88 Wis. 561, in dealing with a similar contract of employment. We approve and affirm the principle of the law of agency declared in these decisions."

(b)

If, by reason of the fact that Le Compte was the agent of both insurance companies and of the Levins, he was disqualified from substituting one policy for another, then the cancellation became effective that afternoon when Mr. Levin received and kept the Ohio Farmers' Insurance Co. policy.

Mr. Le Compte testified (p. 128):

> "Q. What did you do with the Ohio Farmers' policy? A. I took it over to Asbury Park to Mr. Levin. I told him that the Pittsburg wanted their policy cancelled and I had written this policy to take its place and I wanted him to get me the Pittsburg policy as soon as he could.
>
> Q. Did you leave the Ohio Farmers' policy with him? A. Yes, sir."

Mr. Levin testified (p. 198):

> "Q. Mr. Le Compte has said that he wrote a policy for you, I think early in July, 1922, in the Ohio Farmers', and delivered it to you. Is that a fact? A. Well, I tell you, Counsellor, I couldn't recollect for any policy, what he wrote or didn't write. He wrote for me a lot of policies and how can I? Just if I say I will have to say a lie. I don't know anything if he did or not."

That Mr. Levin was the agent of Mrs. Levin is equally clear, for Levin testified (p. 206):

> "Q. When I speak of you, you and Mrs. Levin are one? A. Yes."

And Mrs. Levin, throughout the case, recognizes the unity of the two (p. 49):

> "Q. Doesn't your husband and don't you and your husband carry a running account? A. Yes, I say, '*we.*'"

And it was Levin that ordered the insurance originally (p. 22). And it was Levin that employed Stansbury to adjust (p. 79). Notice to Mr. Levin was not constructive notice, but actual notice.

The familiar rule of agency is laid down in 19 *Cyc.*, p. 647, as follows:

> "If the person to whom notice of the cancellation is given is the agent of the insured and authorized to receive such notice, this is notice to the insured, and a general agent of the insured upon whom has been devolved the duty of attending to matters of insurance is such an authorized agent."

The notice was clearly adequate.

In the case of *Davidson* v. *German Insurance Co.*, 74 N. J. L., 487, at 491, Mr. Justice Garretson, speaking for the Court of Errors and Appeals, said:

> "The words used in the clause are: 'This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation.' The notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company posi-

formerly in the Pittsburgh Underwriters. Kindly return the Ohio and Pittsburgh Underwriters policies as soon as possible, as I have to return them to the Companies.

It will be necessary for you to have the $5,000 written in Asbury Park, as I cannot write them here.

With kindest regards, I remain,

Very truly yours,"

In reference to the letter, Mr. Levin testified as follows (p. 201):

"Q. I show you Exhibit D-9, purporting to be a copy of a letter which Mr. Le Compte says he sent to you. Did you ever get the original of that letter? A. Not that I know.

Q. Well, it is addressed to you. If a letter like that had been addressed to you, you would have got it if it was sent to you, wouldn't you? A. Well, if it would be sent to me I would get it. I am getting mail three or four hundred letters a day sometimes. How can I tell? I don't know."

Mr. Carton then asked the following question, which Mr. Levin answered (p. 201):

"Q. Did you ever get any letter from Mr. Le Compte containing notice of cancellation of this Pittsburg Underwriters *premium?* A. No, I didn't."

Levin was quick to pick up ambiguous questions. Of course, Exhibit "D-9" did not contain "Notice of cancellation of this Pittsburg Underwriters' *premium.*"

Levin's final word on this subject was (p. 210):

"Q. Now, Mr. Levin, isn't this true, that Mr. Le Compte was under stress all that summer to get back this policy? Wasn't he asking you repeatedly for the policy? Didn't he tell you that they had threatened to hold him liable if he didn't get back the policy? Didn't he beg you for the policy? A. I don't know anything when he did that. If he ask for a policy I don't know what it was. If he tell me that four years ago, how can I tell you? But if Mr. Le Compte would ask me I would give it to him. He asked me for a policy after the fire was.

Q. Suppose the policy was up at Mr. Altschuler's house, would you have given it to him if you had it, but you didn't have it? A. Well, couldn't he write another policy and send it?"

At the end of the case a motion was made for a direction of a verdict in favor of defendants, as follows (p. 219):

"I move for the direction of a verdict in favor of the defendants on the same grounds as I moved for a nonsuit in the first instance."

This included the proposition stated (p. 92) as follows:

"And further that it appears affirmatively that the policy was cancelled by the

home office and the policy of the Ohio Farmers was substituted for it by Mr. Le Compte, who was the agent of the assured for the purpose of writing insurance and procuring new insurance. That appears affirmatively."

And the eighth ground for a direction was as follows (p. 220):

> "For the further reason, it appears uncontradicted that the policy was cancelled by notice; that the policy was cancelled by notice accompanied by substitution."

We respectfully submit that the Court erred in not granting the motion for a directed verdict on these grounds.

POINT II.

It appears by the evidence of the plaintiff that Ernest E. Le Compte, in the matter of writing the policy in suit, acted as agent of the plaintiff and as agent of the defendants.

It is a general principle that one who acts, or attempts to act for parties having divergent interests, can bind neither party.

In the filed but unrecorded opinion in the case of *Jenny* v. *The Liverpool & London & Globe Ins. Co.,* Chancery Docket 38, p. 360, Vice Chancellor Stevens held:

> "The insurance in the Humboldt Company was effected by Charles Loebel, who was at the time its agent. He had also been,

> for many years, the agent of the complainant in the matter of effecting insurance on her different properties. If he is to be regarded as having acted for both parties, the contract of insurance was invalid. *Ex parte Bennett,* 10 Ves. 381; *The New York Central Ins. Co.* v. *The New York Protection Insurance Co.,* 14 N. Y. 85; *Smith & Wallace Co.* v. *Prussian Ins. Co.,* 68 N. J. L."

And in *Smith & Wallace Co.* v. *Prussian Ins. Co.,* 68 N. J. L. 674, at p. 678, Mr. Justice Garretson, speaking for the Court of Errors and Appeals, said:

> "While it has been held that one who acts as a general agent to procure insurance cannot also act as agent for the insurer and bind the insurer by his acts, yet it is competent to inquire into the particulars of the making of each contract of insurance, and if it appears that in the contract in question the agent was not acting for the insured, but only for the insurer, the contract will be sustained; and where it appears that the agent is the duly appointed and authorized agent of the insurer, and acts as such in making the contract of the insurance, he will be regarded as the agent of the insurer only, although as to other contracts by other companies, of which he was not such authorized agent, he may be regarded as the agent of the insured."

In view of general practice and of the very nature of the inquiry, we would hardly urge this point if we could not do so out of the mouths

of those most closely concerned. In the present case, it is impossible to escape the conclusion that Le Compte did act for both parties in writing this policy.

Mr. Levin testified (p. 205):

"Q. And he is a truthful fellow? A. So far I did; I had all my trust in him and he insured me.

Q. He has been your agent since? A. Yes, sir.

Q. And he was your agent before? A. Yes, sir.

Q. And he was your agent for writing everything that you could write through him, you wrote through him, didn't you? A. Took away some after the fire.

Q. Yes, after the fire, but before the fire he was your agent to write insurance? A. Yes, sir.

Q. And you trusted him? A. Positively.

Q. You didn't tell him to write in this policy or that policy, but was to keep it insured? A. I didn't tell him to write in this company or that company or the other company; I never told him that.

Q. And he was to keep you insured? A. Yes.

Q. And he was your general insurance man; you were a fan of big affairs and he would look after your insurance for you? A. Yes, sir."

Mrs. Levin was equally explicit (p. 38):

"Q. I show you Exhibit 'P-1,' policy of insurance, and ask you through whom you

procured that policy of insurance? A. Through Mr. Le Compte."

Page 46:

"Q. Did you depend upon him to give notice to the insurance company? A. Naturally; we depend always on him to write the policy, so we have to depend on him.

Q. He was your regular agent and broker? A. Yes, and he brings a policy to us and hands it to us.

Q. And you did a large business with him, didn't you? A. Oh, yes. He carries our insurance for us—$150,000—another hotel in Lakewood."

Mr. Le Compte, called in behalf of the plaintiff, testified (p. 15):

"Q. I show you Exhibit P-1, purporting to be a policy of insurance. Was this policy issued by you? A. Yes, sir.

Q. On behalf of whom? A. Anna Levin."

It appears in this case out of the mouths of every witness examined, that Le Compte was the agent of both the insurer and the insured and therefore could bind neither.

This contention was made a ground for the motion for nonsuit (p. 90) and for a directed verdict (p. 219) and request to charge as follows (p. 235):

"One person cannot act as an agent for two persons to create a contract between the two; therefore if Le Compte was acting for the Levins and the defendant, the contract cannot be sustained."

POINTS III, V, and IX.

There was no legal proof of the amount of loss.

There were no facts proved to establish a basis for the computation of damages. There were no damages proved for which plaintiff has not been compensated, and the Court erred in the charge to the jury upon this subject.

The complaint alleges, in Paragraph 5, that the plaintiff's loss under defendant's policy was $5,000. This allegation, the answer denies.

It is the well-nigh universal method of proving a fire loss, where there has been no arbitration—and there has been none in this case—to call carpenters and contractors and prove the damages in detail. No such course was followed in this case. Three witnesses testified that the building was "about half destroyed." Stansbury said "from 40 to 50 per cent." The proof of loss, sworn to by plaintiff, which is evidence against the plaintiff, placed the sound value of the property at $45,000. If this happy-go-lucky method of proof of damage were to be allowed, the loss would be from $18,000 to $22,500. If defendants were charged with 5000/36500, the verdict should have been somewhere between $2,191.78 and $2,739.72.

Under the policy (ll. 96 to 100) and under the 80% co-insurance clause, the insurers are tied together. Every insurer is interested in every policy. The whole loss of plaintiff at a maximum estimate was $22,500. She has already collected $26,787.51 (p. 97). There is, therefore, no loss for which she has not been compensated.

The trial judge contributed to the confusion of the jury in this matter, for his charge is hopelessly inaccurate and confused in the matter. At the end of his charge, he charged, at defendants' request, correctly (p. 232):

> "Statements in the proof of loss are admissions against the plaintiff, but cannot be used as evidence in her behalf."

But before this, he had charged as follows (p. 230):

> "Now, gentlemen, if you find for the plaintiff, your verdict should be for such a sum as, under the evidence, will represent the defendants' proportionate share of the total loss. The only evidence before you is that this proportionate share was $4,251.99, as I have it. If you are satisfied that this is the total loss or the amount claimed, that is, that the total loss amounted to the sum claimed by the plaintiff, and that the plaintiff has established that claim by a preponderance of the evidence, and has likewise shown the liability of the defendants, then your verdict should be in favor of the plaintiff for the Underwriters' proportionate share of the loss sustained."

What that may mean, it is even now difficult to ascertain. As a matter of fact, he took the figure $4,251.99 from the proof of loss and thereby, as far as he could, relieved the plaintiff from the

necessity of making formal proof. The jury found a verdict for the figure named by the judge.

Mr. Le Compte testifies (p. 18):

"Q. You are an insurance man and have seen buildings burned down. Was this building half burned or was it totally burned or what was it?

Mr. Boardman: I object. An insurance man is not an expert.

Mr. Carton: I am not asking him as an expert, as a mere casual observer, whether it was a total loss or half burned down or what.

The Court: He may say what the condition was as it appeared to him.

Q. How did it appear to you? A. I should imagine about half.

Mrs. Levin testified at page 58:

Q. And you say it was half burned down? A. Yes."

Mr. Stansbury testified (p. 68) on this matter. We respectfully submit that he was not qualified as an expert. He was asked for computations. Computations that do not conform to the fact are not evidence. Testimony of any number of witnesses, that two times two make five, would not overcome the facts of the multiplication table. We quote (p. 68):

"Q. You have been an insurance man for twenty-five or twenty-six years? A. Yes, sir.

Q. How old are you? A. Forty-three.

(P. 69):

"Q. So the experience of an adjuster is the experience that he derives from the carpenter and contractors who furnish him the data; is that so? A. In some circumstances.

Q. Now, you are not a carpenter? A. No, sir.

Q. Nor a mason? A. No, sir.

Q. Nor a plumber? A. No, sir.

Q. Never been connected with any of the building trades? A. For about two years I was with the Central Railroad on construction work.

Mr. Boardman: I insist, your Honor, that he is not qualified to testify as an expert.

(Objection overruled. Objection noted for defendants as ground of appeal.)

By Mr. Carton:

(Question repeated as follows): Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st day of December, 1922? A. In the neighborhood of forty or fifty per cent.

Q. And how much was that? A. Thirty-one thousand—

Mr. Boardman: I object—I beg your pardon—that he is not an expert in real estate. Now, it is getting into a different field.

A. My business is partly real estate, mortgage loans and sale of real estate and closing title for the Milan Ross agency. $31,039.50."

(P. 70):

"Q. What was the amount of the Pittsburg Underwriters' policy? $5,000 wasn't it? A. $5,000.

Q. And what would be its proportion or contribution to the amount of insurance that you have referred to in the amount (proof) of the loss? A. $4,251.99."

The witness is asked what, in his opinion, the loss was. He replies from forty to fifty per cent. And how much was that? He rushes over an objection to say it was $31,039.50. Now, we have in evidence in the proof of loss, the considered sworn statement of the plaintiff as to what the value of the insured property was. It was $45,000 and from forty to fifty per cent of $45,000 would be from $18,000 to $22,500. So the figure he gives does not answer the question that he was asked, even though it be assumed that he was both an expert builder and an expert real estate man, for he too had approved this sound value (p. 82).

The difficulty with this proof does not stop there, however. Passing for a minute, the earlier objections, we enter a new field. Suppose that the property was from forty to fifty per cent destroyed, and that the destruction amounted to $31,039.50, let us first assume the figures most favorable to plaintiff in a monetary way, that is, that the loss was fifty per cent of the value of the

property. If, then, the damage was $31,039.50 and the value was twice that the value would be $62,079. Now, under the 80% co-insurance clause, it would be necessary for the Levins to maintain $49,663.20 of insurance to avoid becoming co-insurers. But the whole amount of the insurance carried by them at the time of the fire, including the Pittsburg policy, was only $36,500 (pp. 38, 241). Mrs. Levin, therefore—if we are to adopt Mr. Stansbury's figures—became a co-insurer to the extent of $49,663.20 less $36,500 or $13,163.20 and the liability of the defendant, if any, would be 5000/49, 663.20 of the entire loss—practically a tenth. 5000/49,663.20 of $31,039.50 would be about $3,150.

If, however, we assume that the loss was 40% of the value, the value becomes $77,598.75—80% of which sum is $62,079 and the Levins would be co-insurers for the difference between $62,079 and $36,500 or $25,579 and the liability of the defendants would be 5000/62,079, or roughly, a twelfth. A twelfth of $31,039.50 is $2,568.62.

The proofs did not justify the verdict rendered. They were in no condition to justify a verdict for any amount. Where a plaintiff proves the breach of a contract, but proves no damages, he is ordinarily entitled to nominal damages. But even that is not the case here. The contract of fire insurance is a contract of indemnity (26 C. J. 17). No breach of the contract is shown. The damages are of the essence of the action.

The facts are very likely what we have indicated, a fifty per cent loss of a $45,000 building, or about $22,500. The plaintiff has recovered nearly $27,000 through the friendly operations of

Mr. Stansbury, himself, the agent who wrote some of the insurance. The plaintiffs have already recovered more than their loss. There is no loss uncompensated.

At the close of the case, counsel for plaintiff threw into the case a suggestion of surprise on his part in this matter. The record does not bear him out in this respect. The allegation of damage in the complaint was denied in the answer. The case was begun on Tuesday, June 24, 1926. It was continued on Tuesday, June 29, 1926 (p. 154) and concluded on June 30th. On the first day of the trial, counsel for defendants stated that there was a question in the case as to the extent of the loss (p. 18). At every point he insisted that the evidence being proposed was not the legal method of proving the damage. The motion for nonsuit (p. 91) pointed out the defect in the proof.

When Mr. Stansbury was on the stand, the defendants' counsel drew from the witness the nature of the proofs ordinarily produced (p. 68):

> "Q. Now, when losses are adjusted, isn't it always, if it is a considerable loss, upon estimates made by the contractors? A. As a rule.
>
> Q. And they ordinarily go into the amount of joists and the amount of lumber required to replace, the amount of damaged plaster, bathroom—every detail, isn't it? A. Yes, sir.
>
> Q. And strictly speaking, that is what a proof of loss should contain a schedule, usually of the items of loss; isn't that so? A. Yes, sir.
>
> Q. That is the usual practice? A. Quite often."

Neither in the proof of loss furnished to defendants, nor in the proof in this action was any such evidence forthcoming. If we read between the lines, it seems obvious that Stansbury engineered some hit-or-miss adjustment with the other insurers and came into Court and tried to put through, and so far has put through, the same sort of practice. The reason why counsel did not produce better proof is in all probability that such proof was not available.

Defendant moved for a nonsuit as follows (p. 91):

> "We respectfully submit that there is no basis for damages shown; that there are no damages uncompensated for. The proof of loss, which is binding on the plaintiff, although not evidence in her behalf, states the sound value at $45,000. Mr. Le Compte, the witness called by the plaintiff testified that the building was about half destroyed. That would make the damage about $22,500 and they have received, according to the plaintiff's testimony, $27,000. Therefore, there is no damage remaining unaccounted for."

The refusal of this motion was error, we submit.

At the close of the case, we moved for a directed verdict on the following ground (p. 220):

> "That there is no basis for damages shown; and secondly, that there were no damages uncompensated for.

> The facts I have just referred to in respect to the proof of damages are pretty nearly complete. My friend, Mr. Carton, says that I didn't give it all. But there is scarcely a word that can be really said to vary—I wouldn't say there was a word that would vary the testimony I have referred to: first, that the proof of loss shows a sound value of $45,000; that the property was half destroyed and that they have recovered $27,000."

We submit the Court erred in denying this motion. The Court charged on this subject as follows (p. 230):

> "Now, gentlemen, if you find for the plaintiff, your verdict should be for such sum as, under the evidence, will represent the defendants' proportionate share of the total loss. The only evidence before you is that this proportionate share was $4,251.99, as I have it. If you are satisfied that this is the total loss or the amount claimed by the plaintiff, and that the plaintiff has established that claim by a preponderance of the evidence, and has likewise shown the liability of the defendants, then your verdict should be in favor of the plaintiff for the Underwriters' proportionate share of the loss sustained."

Counsel for defendants excepted to the charge of Court in this matter of damages in the following language (p. 234):

> "An exception to so much of your Honor's charge as dealt with the matter of damages in this case. My contention is

> that there is no basis for damages found; in the first place that Mr. Stansbury did not qualify as an expert; secondly that the only way he arrived at the figure of $31,000 that he named as the loss was in response to a question 'What would forty or fifty per cent of the value mean? How much was it?'
>
> And in replying to what forty or fifty per cent of the value of the building was, he said $31,000, which in turn must mean that the building was worth about $77,000 if it was forty per cent of $61,000 if it were fifty per cent. The plaintiff is bound by her proof of loss $45,000. But if we are to assume that Mr. Stansbury's testimony is to be given effect, then the value of the building becomes somewhere from $62,000 to $77,000 and the plaintiff must have been a co-insurer for from $13,000 to $30,000 odd dollars, and an altogether different set of figures must be depended upon. Therefore I say that no damages were shown by legal evidence and no basis from which the jury could compute damages was established."

This charge that "The only evidence before you is that this proportionate share was $4,251.99 as I have it," was peculiarly damaging and peculiarly inexcusable for no feature of the case had been more carefully argued before the Court than this, and this portion of the Court's charge conflicts with the Court's ruling throughout the trial.

At pages 18-19, Mr. LeCompte was permitted, over defendants' objection, to say that the build-

ing seemed to him about half burned down. If this was not evidence upon which the jury can estimate damages, it seems the Court must have been in error in his earlier ruling.

Again at page 39 the plaintiff tried to get the proof of the damage out of Mrs. Levin. Again at page 45, speaking of the proof of loss, which was admitted merely for the purpose of showing performance of conditions subsequent to the fire, plaintiff put in the following testimony, which the Court finds important:

> "Q. You state in your proof of loss filed with the company that its proportion under the policy amounts to $4,251.99; is that right? A. Yes.
>
> Mr. Boardman: I had no chance to object to that.
>
> Mr. Carton: She did say so. *That is nothing but a question from the paper.*
>
> Mr. Boardman: I wish the witness would be cautioned not to answer the question till I have a chance to object.
>
> The Court: *Well, the paper speaks for itself; doesn't it?*
>
> Mr. Boardman: Yes.
>
> Mr. Carton: I was just identifying the items. I think it does speak for itself, your Honor."

Yet, in his charge, the Court said (p. 232):

> "Statements in the proof of loss are admissions against the plaintiff, but cannot be used as evidence in her behalf."

And at pages 67 to 70, he permitted Mr. Stansbury to give the testimony to the effect that the property was from forty to fifty per cent destroyed. And finally, after the close of the testimony, in a colloquy counsel for the defendants summed up the evidence to the Court on this matter (p. 217):

> Mr. Boardman: "Three witnesses of any importance were called by the plaintiff. Each one of these testified—Mr. LeCompte in a very off-hand way; Mr. LeCompte said he thought it was about half destroyed. Mrs. Levin, out of the mouth—led by Mr. Carton, on direct, says, 'You say about half destroyed? She says 'Half destroyed.' Mr. Stansbury said 'Oh, I estimate it was from forty to fifty per cent destroyed.' Now, all three agree and the proof of loss shows a sound value, as I understand it—sound value is something after the depreciation is taken out. Then you take fifty per cent sound value and you have $22,500 as the sum total, the highest point that those three people arrive at. And the assured has already collected $27,000 and is $5,000 ahead of the game. That is all in their own case. That is all from their own witnesses, and there is no disagreement about it."

And the Court at page 218 answering this, said:

> The Court: "I think there is no question that you may not argue that to the jury. That is purely a question of fact to be determined by the jury from the evidence."

Counsel might argue this matter of fact but the Court nullified such argument with the statement:

> "The only evidence before you is that this proportionate share was $4,251.99 as I have it."

In other words, all these three estimates that the property was "half burned down," were not evidence at all, although they had been admitted over defendant's objections, and they are treated as overborne by the proof of loss, which the Court charged was not evidence in favor of the plaintiff.

This figure that the Court gave, was taken by the Court either directly from the proof of loss or from Mr. Stansbury's testimony (p. 70), or Mrs. Levin's testimony (p. 45) as to what the proof of loss contained.

The ratio of the loss to the sound value in the "proof of loss" was 31039.50 to 45,000, or practically three-fourths. To arrive at the figure that the Court named, it was necessary to eliminate the testimony of the three witnesses, "that the property was about half destroyed," and also to eliminate Mr. Stansbury's testimony, that forty or fifty per cent of the value of the property was $31,039.50, and to treat the "proof of loss" as plenary proof of plaintiff's loss. That this was unsound, the Trial Court recognized later in his charge.

In the first chapter of this brief, under our "Abstract of Case," we have argued this fifth point somewhat at length, in stating it. That argument, we ask the Court to reconsider here.

We respectfully submit that the Trial Court erred in its charge to the jury in this matter.

After the motion to nonsuit and for direction of a verdict were denied, defendant requested the Court to charge as follows (p. 236):

> "12. The plaintiff has failed to prove any damages for which she has not received compensation, and is entitled to recover only nominal damages, if entitled to recover at all.
>
> 13. The plaintiff has failed to establish any basis of the computation of damages, and, if entitled to recover at all, can only recover nominal damages."

As to the soundness of these requests, we are frankly in doubt. Yet, as there is law to support them, we inserted them in our requests and bring them up again here. On principle we believe that a suit on a policy of insurance is a suit, not for the breach of a contract, but to recover a loss by fire, and that, in order to escape a nonsuit, the plaintiff must prove his loss, and that the general rule that the bare breach of a contract entitles the plaintiff to recover nominal damages, does not apply. Nevertheless, in *Aetna Fire Insurance Co.* v. *Kennedy, 161 Alabama, 600; 50 Southern, 73; 135 Am. S. R. 160, quoted in foot note under 26 Corp. Jur. 519,* it was held:

> "Nominal damages only can be recovered unless plaintiff shows his interest in the property destroyed."

At 161 Ala., 605, the Court said:

> "The burden is on the plaintiff to show the value of his interest in the property

destroyed, and unless he produces evidence from which the jury can ascertain the value of his interest, he is not entitled to recover more than nominal damages. * * *

Although this evidence did not furnish sufficient data from which to ascertain the exact amount of plaintiff's interest, yet it was enough to afford an inference that plaintiff had some interest, and the Court properly refused the general charge requested by defendant."

Unless this is the rule, defendant was, we submit, entitled to a nonsuit at the end of plaintiff's case.

POINT VI.

Waiver of immediate notice of loss.

The policy provides (p. 278):

"If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company."

At the end of plaintiff's case, defendant moved for a ~~directed verdict~~ non-suit on the ground that no notice was given to the company immediately (p. 90) reciting the passage from the policy, above quoted. This was also made a ground for motion for direction of verdict at the end of the case (p. 219):

"That admittedly no notice in writing was given to the company."

Upon the motion for nonsuit being argued, the Court permitted the plaintiff, who in her com-

plaint had alleged performance of conditions precedent, to amend the complaint to allege waiver of this provision. The amendment appears at page 3. This amendment was actually made on the morning of June 29th, the second day of the trial (p. 108).

After the Court had denied both motions, of nonsuit and for directed verdict, the Court actually charged the jury on this subject as follows (pp. 224-225):

"Another ground of defense is that the insured did not comply with a condition of the policy that she should give to the insurer, that is, the defendants, immediate notice in writing after loss. What happened, according to the evidence, was that the day of the fire the assured informed the agent Le Compte that the loss had occurred. She seems to have done nothing further as to giving formal notice until the proof of loss was sent in to the defendants, something more than two months after the fire. The provision requiring immediate notice of loss is a condition precedent to the right to recover on a fire insurance policy unless the requirement be waived by the insurer or its duly authorized agent. Now, was there such a waiver in this case? And that is a question which I leave to the jury to decide from the evidence. This evidence, in part, at least, is that notice was given verbally to the agent Le Compte, who had issued the policy and received the premium, according to the plaintiff's testimony, but which statement as to any re-

ceipt of premium Mr. Le Compte, you will recall, denies; and this verbal notice was given without any objection on his part as to the fact that the notice was not in writing. But you have further the testimony that when the defendants acknowledged by letter the receipt of the proof of loss, the only reason they particularly specified for denying liability was the claim that the policy had been cancelled. This might be considered as a waiver of the right to rely upon the provision of the policy requiring the plaintiff to give immediate written notice of loss, especially when taken in connection with the circumstance that the agent Le Compte, who had issued the policy, received actual notice from the insured immediately after the fire had occurred."

It will be noted that the Trial Court finds only two bits of evidence to sustain this theory of waiver. The one is the notice to Mr. Le Compte, and the other is the letter of Mr. Davies, Exhibit "P. 4" (p. 245) which we will quote below.

In response to the request to charge, which we have quoted, the Court did charge (p. 232):

> "If Mr. Le Compte was charged by the plaintiff as her agent to give notice of loss to the defendant, he could not waive the requirement of the policy, that immediate notice be given."

In view of Mrs. Levin's testimony, this was entirely inconsistent with the earlier portion of the charge, which is quoted above, for Mrs. Levin had testified (p. 46):

> "Q. Did you depend upon him to give notice to the insurance company? A. Naturally, we depend always on him to write the policy, so we have to depend on him."

It is perfectly obvious, therefore, that she did not give notice to the company by giving notice to Le Compte, but depended upon Le Compte as her agent to give notice to the company.

This defect in the plaintiff's case, which it was sought to remedy by amendment, was not cured in the subsequent proceedings of the Court. The letter, to which the trial Judge referred, from Mr. Davies to Mr. Levin, appears at page 245 in the case (Exhibit "P. 4") and is as follows:

"March 20, 1923.

Dear Madam:

We are in receipt of papers purporting to be Proof of Loss under policy 633176, claiming $4,251.99, by fire of December 21, 1922, and in view of the fact that you, through your husband and agent, have been notified that our policy was cancelled, we deny any liability thereunder *for that and other good reasons.*

We are, therefore, holding these papers at this office, subject to your order, and we will be pleased to return them to you at any time on demand.

Very truly yours,

GEO. R. DAVIES,
Mgr."

Obviously, no waiver could be spelled out of this letter.

We respectfully submit that the nonsuit should have been granted; that the motion for directed verdict should have been granted and that the Court erred in not charging as requested.

POINTS VII and VIII.

Defendant requested the Court to charge (p. 235).

> "If the plaintiff inserted the allegations as to the Pittsburg Underwriters' policy in the proof of loss, knowing the policy to have been cancelled, for the purpose of collecting insurance money from the defendant, such action would be fraud and would render the policy void."

(P. 236):

> "If the plaintiff failed in her proof of loss to disclose the fact that the encumbrance upon the property was a real estate mortgage which, together with a chattel mortgage, secured the $15,000 mentioned in the proof of loss, in order to conceal the fact of the existence of a greater moral hazard, such concealment would avoid the policy."

The earlier of these requests was no mere academic proposition. Running through the whole case from the defendant's opening on, there was this insistence, that the plaintiff had practically everything to gain and little to lose, by claiming under defendants' policy. If the de-

fendants' policy had not been included in the proof of loss, submitted to the other insurance companies, the plaintiff herself would, under the 80% co-insurance clause, have become a co-insurer. By including the policy, she stood to lose $317.18. By including the policy in suit in her proof of loss, she gambled to win $4,251.99. Mr. Davies' testimony at page 97 makes this clear:

> "A. The assured collected on the building which our policy originally covered, $26,787.51. Had not the Pittsburg Underwriters' policy been included, they would have been co-insurers to the extent of $4,500 and the amount of loss which would have been paid the assured would have been $27,158.69; or, in other words, she would only have been penalized $317.18 by not including our policy; and by including it they have made a claim on us for $4,251.99."

There was more of the same sort. The point of view of the Trial Court was made clear in the colloquy that appears at page 215, a part of which is as follows:

> "The Court: Why, I may be in error about this, but I cannot see what possible bearing it has. This suit is brought upon an insurance policy, and either the plaintiff is entitled to recover or not under that policy. The mere fact that if that policy had been excluded in the computation it might have had a certain effect, and its inclusion with the computation produces another effect, it seems to me does not make any difference at all.

> Mr. Boardman: Well, that is nothing but evidence to show what the motive might be, to put in, to take a chance."

When, therefore, the Court refused to charge the first of the above requests, he was, in effect, practically ruling out from the consideration of the jury, this whole phase of the case.

The subject covered was expressly pleaded in defendants' answer as the seventh defense (p. 6). What the Court did charge was as follows (pp. 226-227):

> "It is insisted further that the plaintiff in her proof of loss swore falsely and fraudulently, that she did not truly state the amount of insurance. It is claimed that she did not state truly the nature and amount of incumbrances upon her property. This defense is available only when it appears that the assured knowingly and intentionally swore falsely or said or did that which is claimed to be fraudulent. Mere mistake, an honest mistake in stating facts in making out a proof of loss, would not be sufficient to sustain the defense. You have the evidence, gentlemen, as to how the proof of loss was prepared and who prepared it, from what source the data was procured, and you would have to determine whether there was any intentional false swearing, false swearing that is intended to deceive the defendant."

This request for an express charge on this particular phase of the case was more important, in view of the fact that it was claimed by counsel

that, in the proof of loss there had been an erasure, and that the name of some other company had been written in and then erased, and the name of the Pittsburg Underwriters written over the erasure. (See Case. p. 58, and 59.) Mrs. Levin, it seemed, did not recognize the erasure but Mr. Stansbury recognized it but could not explain it (p. 81). Of course, defendant contended that the plaintiff had hesitated between attempting to charge the Ohio Farmers and the Pittsburg Underwriters, to make up the necessary amount to prevent the plaintiff becoming a co-insurer.

In respect to the second request to charge, the proof of loss (p. 211) read:

> "Q. State the nature and amount of encumbrance at the time of fire? A. $15,000."

It seems that this $15,000 was secured both by a real estate and a chattel mortgage; that while the existence of a chattel mortgage upon chattels contained in a property insured does not vitiate a mortgage simply on the real estate, the existence, however, of a chattel mortgage in such circumstances is considered as affecting the moral risk. Mr. Stansbury testified (p. 84):

> "Q. As an insurance man don't you consider the existence of a chattel mortgage a very serious matter in considering the validity of a risk? A. You mean moral?
>
> Q. Yes. A. In some instances I would.
>
> Q. And it is universally so considered, isn't it? A. Yes, I believe it is. The companies covering contents of that where a

going and saying 'That building is forty-seven per cent destroyed.' It was probably a pretty good building before it was burned. That is not evidence, but the evidence is of the contractor.

The Court: He is asked to express an opinion now as an expert. Counsel has attempted to qualify him as an expert, apart from the fact that he happened to be an adjuster, as I understand the situation.

Mr. Boardman: I don't think so.

Mr. Carton: He has gained some experience to qualify him as an expert, as an adjuster. He said independently, long before he was an adjuster, he had this experience.

CROSS-EXAMINATION by Mr. Boardman:

Q. You have been an insurance man for twenty-five or twenty-six years? A. Yes, sir.

Q. How old are you? A. Forty-three.

Q. When did you leave school? A. In the neighborhood of fourteen or fifteen, after the death of my father.

Q. And what did you do between your fourteenth and your seventeenth year? A. Made inspections for the insurance companies.

Q. At fifteen? A. At seventeen years of age I was inspector in the City of New York in the Fire Insurance Exchange.

Q. And your experience in reference to

building has been in connection with your insurance work? A. Yes.

Q. Now, when losses are adjusted, isn't it always, if it is a considerable loss, upon estimates made by contractors? A. As a rule.

Q. And they ordinarily go into the amount of joists and the amount of lumber required to replace, the amount of damages plaster, bathroom—every detail, isn't it? A. Yes, sir.

Q. And strictly speaking, that is what a proof of loss should contain a schedule, usually of the items of loss; isn't that so? That is the usual practice? A. Quite often.

Q. So the experience of an adjuster is the experience that he derives from the carpenters and the contractors who furnish him the data; is that so? A. In some circumstances.

Q. Now, you are not a carpenter? A. No, sir.

Q. Nor a mason? A. No, sir.

Q. Nor a plumber? A. No, sir.

Q. Never been connected with any of the building trades? A. For about two years I was with the Central Railroad on construction work.

Mr. Boardman: I insist, your Honor, that he is not qualified to testify as an expert.

(Objection overruled. Objection noted for defendants as ground of appeal.)

By Mr. Carton:

(Question repeated as follows): Will you tell us in your opinion what the loss was by fire to this building that happened to the Clarendon Hotel the 21st day of December, 1922? A. In the neighborhood of forty or fifty per cent.

Q. And how much was that? A. Thirty-one thousand—

> Mr. Boardman: I object—I beg your pardon—that he is not an expert in real estate. Now it is getting into a different field.

A. My business is partly real estate, mortgage loans and sale of real estate and closing title for the Milan Ross Agency. $31,039.50."

The second question was asked and objected to on the several grounds that the witness was not an expert, and that this was not the proper way in which to prove damages. The only proof to ascertain any theory of expertness on his part was that he was forty-three years old, and that he had been in the insurance business since he was seventeen. He testified that he was not a carpenter, nor a mason, nor a plumber, nor connected with any building trades except that for about two years he was with the Central Railroad on construction work.

As he went to work at fifteen, and since seventeen had been in the insurance business, these two years of construction work must have been the years when he was fifteen and sixteen. That a boy working two years for the Central Railroad

of New Jersey, at fifteen and sixteen, becomes an expert to testify as to damage to a hotel twenty-six years later, we submit is not a sound proposition of law.

We respectfully submit that the Court erred in permitting these two questions to be answered, and that such error was harmful to defendants.

October Term, 1927.

Respectfully submitted,

JOHN WAHL QUEEN,
Attorney for Defendants.

RICHARD BOARDMAN,
Of Counsel.

The Otsego Press, Cooperstown, N. Y.

New Jersey Court of Errors and Appeals

ANNA LEVIN,
Plaintiff-Respondent,
—vs.—
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. of PITTSBURGH, ALLEMANNIA FIRE INSURANCE CO., REPUBLIC FIRE INSURANCE CO., and SUPERIOR FIRE INSURANCE CO., doing business as PITTSBURG UNDERWRITERS,
Defendants-Appellants.

Action-at-Law.

ON APPEAL FROM SUPREME COURT.

Brief of Plaintiff-Respondent

DURAND, IVINS & CARTON,
Attorneys for Plaintiff-Respondent

JAMES D. CARTON,
Of Counsel.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

ANNA LEVIN,
Plaintiff-Respondent,
—vs.—
NATIONAL BEN FRANKLIN FIRE INSURANCE CO. of PITTSBURGH, ALLEMANNIA FIRE INSURANCE CO., REPUBLIC FIRE INSURANCE CO., and SUPERIOR FIRE INSURANCE CO., doing business as PITTSBURG UNDERWRITERS,
Defendants-Appellants.

Action-at-Law.

ON APPEAL FROM SUPREME COURT.

BRIEF OF PLAINTIFF-RESPONDENT.

This cause is before the Court on appeal from a verdict rendered in the Monmouth Circuit, on June 30th, 1926 in favor of the plaintiff-respondent for $4,251.99.

STATEMENT

This is an appeal from an action brought by Plaintiff-Respondent against the defendants, doing business as the Pittsburg Underwriters, on a policy of fire insurance. The policy was issued on June 27th, 1922 to the plaintiff for $5,000.00 by Ernest E. LeCompte, agent of the defendant Pittsburg Underwriters, covering the Clarendon Hotel in Asbury Park. Other insurance was procured by the plaintiff on this property making the total insurance on the property $36,500.00. On December 21st, 1922 a fire occurred, partially destroying the building. The loss estimated by Alfred L. Stansbury and by the appraisers and Mr. Kling, representing all the companies excepting Pittsburg Underwriters, was $31,039.50 (S. C.

69-82). Testimony was offered to show that the liability of the defendant companies under their policy amounted to $4,251.99 (S.C. 70).

Alfred L. Stansbury testified that he was familiar with the value of structures and the loss to them by fire and that he had experience on two or three hundred buildings involved in fire loss (S. C. 67). The Pittsburg Underwriters declined payment claiming (S. C. 245) that the policy had been cancelled.

The plaintiff testified that the policy had not been cancelled (S. C. 212) and Morris Levin, husband of the plaintiff, also testified that no mention was made as to the cancellation of the policy until after the fire (S. C. 199-200-207-208).

The agent, LeCompte, was duly appointed agent of the defendant companies and was suspended by them in September, 1922. The defendant companies were not certain that the policy had ever been cancelled and threatened on Decmber 14th, 1922 to write directly to the assured (S. C. 250). LeCompte did not write all of the insurance for the plaintiff and wrote only such insurance as was ordered by the plaintiff.

Immediately after the fire LeCompte was notified verbally by the plaintiff of the loss and a letter was sent to the defendants by Mrs. Altschuler, the mortgagee, on December 27th, 1922 to which the defendant companies replied under date of Decmber 29th, (S. C. 246).

The agent, LeCompte, was not certain that the policy was properly cancelled by him on July 3rd as he stated that he thought it was necessary to notify the mortgagee in order to effect cancellation. This he did not do. (S. C. 151).

The plaintiff and her husband denied that LeCompte had told them on July 3rd or at any other time prior to the fire that the policy was cancelled.

The defendants on March 20, 1923, acknowledged receipt of proof of loss sent by plaintiff under which

plaintiff claimed $4,251.99 and stated that in view of the fact that she had been notified through her husband and agent that the Pittsburg Underwriters policy had been cancelled that the defendants denied any liability for that and other good reasons. The only specific ground for non-payment being the alleged cancellation (S. C. 245).

POINT I.

THE QUESTION AS TO THE CANCELLATION OF THE POLICY ISSUED BY THE DEFENDANTS, WAS A QUESTION FOR THE JURY.

Under this point the defendants contend that it appears by uncontradicted proof that the policy was cancelled in July, 1922. If this were so, then, of course, there was nothing for a jury to determine on this point.

The defendants, however, are, themselves, uncertain as to this cancellation, naming no definite time when the policy was cancelled but instead giving three possible times when the alleged cancellation became effective.

Both the plaintiff and her husband denied that the policy was ever cancelled prior to the fire. According to the agent, LeCompte, the policy was not cancelled in a way which he thought was necessary to be effective. The defendant companies themselves were not satisfied as to the cancellation.

Under subdivision (a) defendants contend that the policy was cancelled on July 3rd, 1922 when the agent LeCompte received the telegram from the defendants ordering him to cancel and when he wrote a policy in the Ohio Farmers Insurance Company.

The mere fact that LeCompte received a telegram from the defendants directing him to cancel the Pittsburgh Underwriters policy certainly was not

sufficient to bind the plaintiff unless it could be shown by a preponderance of the evidence that notice to LeCompte was notice to the plaintiff. LeCompte was a soliciting insurance agent. He did not write all the policies for the plaintiff and received orders from the plaintiff or her husband for such insurance as she desired him to write.

Levin, husband of the plaintiff, the one to whom LeCompte alleges that he gave the Ohio Farmers policy, denied ever having received same (S. C. 204).

The testimony of LeCompte was that the company having ordered the cancellation of the Pittsburg Underwriters policy on July 3, 1922, he caused a new policy to be prepared and took it to Mr. Levin, husband of the plaintiff at Asbury Park, and requested the return of the Pittsburg Underwriters policy. He also testified that twice a week during the entire summer and fall of 1922 he made trips to Asbury Park for the purpose of securing a return of the policy.

LeCompte testified that the time he alleged the policy to have been cancelled was on July 3 when he said he delivered the Ohio Farmers policy to Levin.

His testimony as to the cancellation (S. C. 128) was

> "Q. What did you do with the Ohio Farmers' policy?
> A. I took it over to Asbury Park to Mr. Levin. I told him that the Pittsburg wanted their policy cancelled and I had written this policy to take its place and I wanted him to get me the Pittsburg policy as soon as he could.
> Q. Did you leave the Ohio Farmers' policy with him?
> A. Yes, sir.
> Q. And what did he say?
> A. He said he would get it for me.
> Q. Do you remember just what words you said, what you told him then—that day about the word that you had got from Pittsburgh?
> A. I simply told him that the Pittsburg didn't want the insurance and had ordered it cancelled and I had to write it over in another company.

Furthermore the agent, LeCompte, admitted (S. C. 150) that he had not given notice of cancellation in accordance with conditions of the policy. It is clear that from his testimony (S. C. 151) he had not intended to effect cancellation of the policy by any notice given Levin. He stated:

> "Q. Well you know that fact, the difference between notifying the owner and notifying the mortgagee, don't you? Did you think you couldn't effect a cancellation of this policy unless you notified the mortgagee?
> A. Absolutely.
> Q. You don't mean that, do you?
> A. Yes, I do.

So according to his own testimony he knew that a cancellation had not been effected.

It is further to be noted that LeCompte himself was not certain that he had cancelled the policy on July 3rd. He qualifies his assertion (S. C. 24) as follows in replying to a question by defendants counsel as to the situation in reference to the Pittsburg Underwriters policy at the time of the fire:

> "A. Why, the policy was cancelled, the way I understood.
> Q. When was it cancelled?
> A. Why, it was cancelled July 3rd."

The defendants laid stress on a letter dated July 12th, 1922, written by LeCompte to Mr. Levin in sup-

port of their contention that the Pittsburg Underwriters policy was cancelled. Levin denied ever having received this letter (S. C. 201).

It was significant that the agent himself had not intended this letter to act as a notice of cancellation and he testified (S. C. 149) with reference to this letter as follows:

> "Q. Wait till I ask my question. Is this what you call a notice of cancellation of the Pittsburg Underwriters policy?
> A. I didn't send that as notice of cancellation.
> Q. You didn't intend it to act as such, did you?
> A. No, sir."

This letter in addition to referring to the Pittsburg Underwriters policy also had reference to the Ohio Farmers policy which LeCompte claimed he wrote in substitution for the Pittsburg Underwriters and which he states he delivered to Levin. Levin denied the receipt of the Ohio Farmers' Policy.

The defendants also attempted to show a cancellation of the Pittsburg Underwriters by inference from the fact that subsequently Mrs. Levin placed a $5,000.00 policy in the Provident Washington Company. The testimony, showed, however, that this was additional insurance placed upon the building because of the friendship of the plaintiff's son with Myers, an insurance agent who had solicited business from the plaintiff (S. C. 56-200).

Some of the employees of the agent, LeCompte, testified that they had notified Levin and Mrs. Levin of the cancellation of the policy. It is interesting to note the language used by them. It certainly was not the positive, distinct and unequivocal language which the Court, in Davidson vs. German Insurance Co., 74 N. J. L. 487, said was necessary to indicate the

intention that the policy should cease to be binding.

These witnesses are: Virginia Westhall, an employee of LeCompte. Mrs. Pearl Bennett, housekeeper of LeCompte testified (S. C. 182). Bessie M. Turner also an employee of LeCompte testified (SC. 190).

The defendant companies themselves were not satisfied that this policy had been cancelled as is indicated by the testimony of George R. Davies, executive head of the Pittsburg Underwriters, who testified on cross examination (S. C. 99):

> "Q. Well, you say you suspended him some time in September, 1922?
> A. I think September was the first suspension.
> Q. Was the first time you ever had any trouble with him?
> A. I think it was, from memory; I wouldn't say absolutely sure.
> Q. Was that the reason that you instructed him to cancel these policies you refer to, because he didn't make remittances?
> A. Well, of course, we also had in mind that his carrying out of our instructions on this cancellation was not entirely satisfactory."

At page 109 Davies further testified:

> "Q. Mr. Davies, I think when we adjourned Friday evening we were asking you about efforts you had made to have Mr. LeCompte cancel this policy, and I think you said that on December 14th you had then determined upon some other method of effecting the cancellation of this policy; is that so?
> A. That is true."

And again (S.C. 112):

> "Q. Well, that doesn't satisfy you of the cancellation, does it?

A. No, as I said before, we continued to follow it up until December 24, 1922, showing that it was not entirely satisfactory."

The testimony of this witness shows that he was evading direct answer to counsel's questions as to whether or not this policy had ever been cancelled. This is particularly shown by his testimony on page 110. It is noticeable that this witness, the head officer of the defendant insurance companies, did not state unequivocally that this policy had ever been cancelled. His testimony clearly shows that the insurance companies did not regard this policy as having been cancelled, and because of the failure of LeCompte to effect the cancellation, on December 14th, threatened to proceed to cancel the policy in the regular way, that is by giving notice to the assured. They had taken no proceedings to do so prior to the fire which occurred about a week later, on December 21st.

This knowledge that LeCompte had not taken proper steps to cancel the policy is borne out further by the letter written by Mr. Davies under date of December 29, 1922 to Jennie Altusel (Altschuler) the mortgagee holding the mortgage on the property in question. This letter, Exhibit P5 at page 246 was in response to a letter received from Mrs. Altschuler giving notice of the fire. Mr. Davies in his letter states:

"We have repeatedly written to Mr. LeCompte and we are now awaiting a response as to what action he has taken, if any.

Of course, if he has not followed out our instructions to order this policy cancelled, we will proceed with the adjustment of the loss."

This letter was written after defendant had been notified that a fire had occurred and plainly indicates that the company had no definite information that the policy had ever been cancelled.

This position of defendants is further shown by the letters offered in evidence, particularly Exhibit D4, S. C. 250 and Exhibit D5, S. C. 251. One of these letters was written as late as December 14, only one week before the fire. In the letter of October 28, 1922 the defendants advised LeCompte that if a loss occurred he would be held responsible.

According to the books of the companies, this policy did not show cancellation. Mr. Davies testified further at page 110:

"Q. As far as your records state then on December 21, 1922, this policy was in force, was it not?

A. The cancelled policy was not in our possession.

Q. Well, you didn't have any cancelled policy, had you?

A. The policy had been ordered cancelled.

Q. Well, will you please answer my question, if that is not the fact, that, according to your books, on December 21st, this policy was in force and outstanding?

A. We did not have the cancelled policy on December 21, 1922 at the time of the fire."

There is further testimony by the witness showing evasion to answer counsel as to whether or not this policy was ever cancelled according to the records of the defendants.

The plaintiff Mrs. Levin, testified with respect to cancellation as follows (S. C. 43):

"Q. Well, was it brought home to you by Mr. LeCompte or by anyone after the fire and after these actions that you have referred to, that the defendants disclaimed liability because they cancelled the policy? Did you hear that?

A. Not for a long time.
Q. You heard of it?
A. A long time after the fire."

And again at page 212:

"Q. Mrs. Levin, it is the truth that Mr. LeCompte went to your hotel in Asbury Park during the summer of 1922 about twice a week demanding that you turn over to him the Pittsburg Underwriters policy?

A. No, sir, absolutely not."

Levin, husband of the plaintiff, to whom LeCompte is alleged to have given the Ohio Farmers policy testified with respect to the cancellation (S. C. 198):

"Q. Well, maybe this will refresh your recollection. He says at the time that he delivered this policy to you, the Ohio Farmers', that he told you that the Pittsburg Underwriters policy had been cancelled and demanded it back from you. Is that so?
A. When was that? After the fire he told me it was cancelled.
Q. Said to be early—
A. Twelve days after the fire he told me it was cancelled, not before. I never knowed anything before."

At page 199 on direct examination Levin was asked with regard to the cancelling of the policy:

"Q. Did Mr. LeCompte ever request from you the return of any policy which he claimed had been cancelled, that you did not turn over to him?

A. No; why should I? Why should I keep a cancelled policy?
Q. Well, keep this in mind: Mr. LeCompte has said, referring to this policy, that all summer, twice a week, in the summer of 1923, he called at your hotel in Asbury Park to get back this policy for cancellation. Did he do that?
A. No, sir."

Levin denied ever having ordered the Ohio Farmers policy substituted for the Pittsburg Underwriters policy (S. C. 200) and in his testimony denied ever having received the Ohio Farmers policy.

He further testified (S. C. 200) with reference to the cancellation:

"Q. Would there be any reason if you have a policy cancelled to keep it?
A. Why should I? I didn't know it was cancelled. If it was cancelled I would place insurance on. Did I know anything about it?"

On cross examination Levin testified as follows (S. C. 207):

"Q. When you say it hadn't been cancelled, no policy had been cancelled, you mean you didn't get any registered letter concerning it?
A. No, I didn't get no words either. I never had no words.
Q. Never had no words?
A. No cancel, to cancel that policy, cancellation of that policy, cancellation of that policy."

He further testified on cross examination (S. C. 210-211):

"Q. Now, Mr. Levin, isn't this true: that

Mr. LeCompte was under stress all that summer to get back this policy? Wasn't he asking you repeatedly for the policy? Didn't he tell you that they had threatened to hold him liable if he didn't get back the policy. Didn't he beg you for the policy?

A. I don't know anything when he did that. If he ask for a policy I don't know what it was. If he tell me that four years ago, how can I tell you? But if Mr. LeCompte would ask me I would give it to him. He asked me for a policy after the fire was."

It is significant that if LeCompte had effected the cancellation on July 3rd, as alleged, or even five days later, that he would continue to make trips twice a week to Asbury Park, as he says he did, all that summer in order to secure a return of this policy.

The burden was on defendants to establish the cancellation of this policy. They clearly did not do so. In any event it was a jury question and it cannot be said that the jury was not justified in finding that the defendants had not shown cancellation.

The jury undoubtedly considered the improbability of LeCompte doing what he said he did in endeavoring to cancel this policy, particularly so when he could easily have cancelled it according to the terms of the policy if he really intended to do so.

POINT II.

ERNEST E. LeCOMPTE ACTED SOLELY AS AGENT OF THE DEFENDANTS IN THE MATTER OF WRITING THE POLICY IN SUIT.

Under Point I, defendants infer that LeCompte acted solely for the plaintiff in the writing of the policy of the Pittsburg Underwriters and under Point

2 they contend that he was acting both as the agent of the plaintiff and as the agent of the defendants.

The policy of insurance in this case offered as an exhibit by the plaintiff bears the name of "E. E. LeCompte, Agent." This policy was printed with the agents' name by the insurance company (S. C. 30, 282). The following appears as one of the riders on the policy:

"Attached to and made a part of policy No. 633176 of the Pittsburgh Insurance Co. issued at its Lakewood, N. J. Agency.

ERNEST E. LeCOMPTE Agent" (S. C. 268.)

Another rider (S. C. 269) is signed by LeCompte, agent. The policy is counter-signed (S. C. 272) as follows:

"Countersigned at said Agency this 27th day of June, 1922.

ERNEST E. LeCOMPTE, Agent"

The defendants, it is evident from the foregoing, held out LeCompte as their agent.

The witness, Davies, testified on cross examination (S. C. 98):

"Q. How long had Mr. LeCompte been your representative or agent?

A. Well, for several years; I can't recall exactly.

Q. Several years prior to 1922?

A. Several years prior to 1922.

Q. And had he written considerable insurance for you in his territory?

A. Well, it was a fair amount of business.

Q. As agent for these companies, for your company?

A. Yes.
Q. You say he is not your agent now?
A. He is not.
Q. Since what time?
A. He has not been our agent since—I think it was September, 1922, when he was suspended.
Q. When?
A. September, 1922, when he was suspended.
Q. What do you mean, suspended?
A. Requested to cease writing any further policies, cease writing, binding or renewal, any more insurance for our account."

And again Davies testified (S. C. 104):

"Q. My dear sir, this man was not your agent at that time; he had been suspended.
A. He was only suspended. He was our agent in a sense. He could not renew, bind—
Q. In what sense was he your agent?
A. He was our agent except that he could not bind or renew any more business.
Q. For every other purpose he was your agent yet?
A. He was our agent so far as he was concerned. He was only suspended."

And again (S. C. 104):

"Q. How do you get rid of an agent when you are through business with him?
A. Simply close the agency up and not renew his license at the end of the current year.
Q. Did you do that with respect to LeCompte?
A. We did. We didn't renew his license and I am not sure in New Jersey whether it is

January, February or March 1st. It is different in almost every state.
Q. When was it you didn't renew his license?
A. Well, the end of the year in which licenses were necessary for the new year, whatever month that would be; I don't know.
Q. With relation to 1921, 1922 or 1923?
A. Oh, well, that would be the fore part of the year 1923."

The defendant companies by their certificate of authority Exhibit D3 (S. C. 248) and by their letters Exhibit D4, D5, regarded LeCompte as their agent. The defendants evidently down to the date they failed to renew his license in the early part of the year 1923 considered him their agent and their letters clearly show that they did not consider he had any authority to cancel any policy on behalf of the plaintiff.

In defendants' brief, page 43, under this point, certain testimony of LeCompte is quoted which would create the inference that he was acting solely for the plaintiff (S. C. 15). An examination of the context however manifests that it was the intention of LeCompte to testify that he wrote the policy for Anna Levin at the request of her husband (S. C. 22).

As stated in Smith & Wallace Co. vs. Prussian Insurance Co. 68 N. J. L. 674, cited by defendants, at page 678:

"If it appears that in the contract in question the agent was not acting for the insured, but only for the insurer, the contract will be sustained; and where it appears that the agent is the duly-appointed and authorized agent of the insurer, and acts as such in making the contract of the insurance, he will be regarded as the agent of the insurer only, although as to

other contracts by other companies, of which he was not such authorized agent, he may be regarded as the agent of the insured."

There is nothing whatever in the testimony to indicate that LeCompte was acting as the agent of the insured with respect to this particular policy. If he were so acting he would never have made semi-weekly trips to Asbury Park in an effort to complete his alleged cancellation of the policy; he would not have written the letter of July 12th as he stated he did. LeCompte did nothing more with respect to the contract of insurance than write the same for Anna Levin.

After the loss he was not called upon by the plaintiff in the adjustment but that duty was placed in the hands of another person. If he were the agent for Mrs. Levin with respect to this particular policy LeCompte would have been the one to have looked after the interests of the assured.

The evidence clearly shows that Mrs. Levin had not made LeCompte her agent for the procuring of insurance generally but only for the insurance that she ordered. In fact Mr. LeCompte said in answer to a question (S. C. 22):

"Q. Do you recall how you came to write this policy in the Pittsburg Underwriters, who ordered it and how it was.

A. Most of the policies were ordered by Mr. Levin."

LeCompte did not write all the policies for the Levins (S. C. 22). There were several other agents who also wrote policies, for instance, the Milan-Ross Agency, Meyers, and Zurlin. LeCompte was not a broker. He was, as the evidence shows, an insurance agent representing certain companies and he wrote insurance in those companies which he represented

upon the request of his customers who wanted insurance.

This case is not at all similar to Orkin vs. Standard Fire Insurance Co. decided by the Court of Errors and Appeals, and reported in 99 N. J. L. 114. In that case the owner of the property employed a licensed broker. His employment was not that of a mere soliciting insurance agent such as LeCompte.

By the terms of employment in the Orkin case, Brownholtz became clothed as the agent of the insured. There is nothing in the present case that constitutes LeCompte as the agent for Mrs. Levin in the light of the cases cited by defendants.

"As in the case of other agents or brokers, in order that a person may act as broker or agent for an applicant for insurance, or for an insured after the policy is obtained, there must be a contract of employment express or implied, based upon a sufficient consideration. Merely permitting another to procure insurance for him does not constitute such other insured's agent." 32 Corpus Juris, page 1085.

There was nothing in LeCompte's testimony indicating that he was the agent for the insured or that he was the agent for both parties. The testimony, however, pointed clearly to the fact that he acted solely for the defendants.

Defendants contend that LeCompte was authorized to receive notice of cancellation for the assured. Their contention, however, is not borne out by the testimony or by the acts of LeCompte, or by defendants' letters to LeCompte.

In Snyder vs. Commercial Union Assur. Co., 67 N. J. L. page 7, the court said at page 10:

"It is well settled by the authorities cited at the argument that a broker who is merely em-

ployed to obtain insurance is not thereby authorized to receive notice of cancellation."

It was further held in that case that the question whether the broker had authority to accept notice of cancellation of an existing policy, to substitute for it the policy in suit and to assent to the cancellation of the old policy without consulting the plaintiff, was a question of fact and not of law.

It would therefore seem that the denial of the motions for non-suit and for the direction of a verdict in favor of the defendants on the ground argued by defendants under this point, were properly denied and left for the consideration of the jury.

Moreover Levin was the one to whom LeCompte gave his alleged notice of cancellation. No where is it contended that Mrs. Levin ever received notice excepting through her husband.

Plaintiff contends that Levin was not clothed with proper authority to accept any notice of cancellation and the question as to the agency of Levin for his wife was also a jury question.

POINTS III, V and IX.

THE AMOUNT OF LOSS AND THE DAMAGES OF THE PLAINTIFF WERE LEGALLY PROVED AND THESE PROOFS SHOW THAT PLAINTIFF HAS NOT BEEN COMPENSATED FOR HER DAMAGES.

The defendants combined the above three points, contending thereunder that there was no legal proof to establish a basis for the computation of damages; that there were no damages proved, for which plaintiff was not compensated, and that the Court erred in the charge to the jury upon this subject.

Alfred S. Stansbury, an insurance man of twenty-

five or twenty-six years standing, whose business is partly real estate, mortgage loans, and sale of real estate and closing title for the Milan Ross agency (S.C. 69) and one of the adjusters of this loss, testified that the loss by the fire of December 21st, 1922 amounted to $31,039.50. All the other companies interested in this loss contributed their proportionate share of the loss on this basis leaving a balance of $4,251.99 as the proportionate share of the defendant insurance companies. Aside from his real estate experience, he qualified as an expert (S. C. 68-69).

Stansbury testified that he had adjusted fire losses ever since he had been with the Milan Ross Agency (S. C. 66) involving insurance running up into several hundred thousand dollars and involving two or three hundred buildings where losses occurred.

The witness also testified (S. C. 67) that in his experience of adjusting losses he had become familiar with the value of structures and the loss occasioned to them by fire.

Stansbury further testified that there were actual contractors or builders called in to verify this loss; that Benjamin Robinson estimated for the other insurance companies interested and J. W. Brooks, contractor, for the plaintiff (S. C. 70).

The witness further testified under cross examination (S. C. 82):

"The amount of the loss and the value of the property was arrived at without taking into consideration the amount of the insurance. We arrived at the amount of loss, then the two contractors went at the building to get the sound value less depreciation, and they finally agreed on $45,000., and the appraisers and Mr. Kling, who represented every company except the Pittsburg Underwriters, and Mr. Kling and I finally agreed on figures, and

I on behalf of Mrs. Levin and Mr. Kling on behalf of the other underwriters, stated in that proof of loss."

The defendants attempt in their brief to argue from a hypothetical state of facts that the loss was not $31,039.50 based on the sound value of $45,000.00 for the building. Defendants err in their assertion that Stansbury stated that the loss was forty to fifty per cent. As a matter of fact he made no exact statement but said that it was in the neighborhood of forty or fifty per cent. (S. C. 69). This testimony had reference to the appearance of the building on view, and immediately afterwards the witness stated that the amount of the loss was $31,039.50 and that this sum was ascertained from a detailed examination on making the actual appraisement. Neither did LeCompte say that the percentage of loss was exactly fifty per cent. On page 19 he stated he should imagine about half.

Defendants erroneously assume that the percentages given by Stansbury and LeCompte were exact and argue from that assumption that the amount of loss, $31,039.50, therefore must be wrong. The sum of $31,039.50 is the amount stated in the proof of loss mailed to defendant companies and the proof of loss also showed the proportionate share, $4,251.99, to be borne by the Pittsburg Underwriters.

The witness, Stansbury, also testified as stated above that all the appraisers agreed upon the figures as stated in the proof of loss which figures included $4,251.99 as the proportionate share of the defendant companies.

He further testified (S. C. 70) that $4,251.99 would be the proportionate part to be paid by the defendants based on the amount of insurance in force.

Defendants did not question the validity of either the total loss of $31,039.50 or the proportionate

share to be paid by them when acknowledging the proof of loss basing their refusal to pay any insurance on the ground that the policy had been cancelled previous to the fire (S. C. 245).

Defendants had ample opportunity if they questioned the amount of loss to verify same by appraisers as provided in the policy, line 86, but no question whatever was raised by them as to the correctness of the loss in the proof filed by the plaintiff.

Plaintiff therefore submits that the loss was properly proven by the witness Stansbury and that the defendant companies waived their right to object to the amount fixed by the contractors and appraisers, by reason of their failure to state this as one of their objections for refusing to pay the amount of the policy to Mrs. Levin.

Furthermore the defendant companies did not follow the provisions of the policy (S. C. 279) as was their duty if they considered that the amount determined as the loss was excessive and by failing to do so waived their right to object.

The defendants comment in their brief (S. C. 45) that it is difficult to understand what the Court meant by the reference in its charge of $4,251.99, stating that the Court took the figures $4,251.99 from the proof of loss and thereby, as far as he could, relieved the plaintiff from the necessity of making formal proof. An examination of the testimony shows that this is not so.

The plaintiff put J. W. Brooks on the stand with the view of verifying the amount of the loss by him as one of the contractors who estimated the damage.

In the colloquy which follows (S. C. 214) between counsel for the plaintiff and defendants, the defendants' counsel said:

"We did not have a word in our evidence about the damage, extent of the loss."

and for this reason insisted that Mr. Brooks should not be heard because there was nothing to rebut.

After further discussion plaintiff then asked leave to reopen her case and offer the testimony of Mr. Brooks. This the trial court did not deem necessary by reason of the fact that defendants sole contention as to the damage to the burned building was based on the testimony of plaintiff's witnesses, that the loss was in the neighborhood of certain percentages, &c.

It is to be noted however, that plaintiff proved conclusively by one of her witnesses that the total loss in exact figures amounted to $31,039.50 and the defendants proportionate share of this loss on the total insurance in force was $4,251.99.

We have already given the testimony of the witness Stansbury showing how the total loss was reached by appraisers and contractors. The witness, Stansbury, himself, was an expert in the matter of appraisement from his long experience in estimating fire losses, and helped to make the appraisement in this loss.

That there was $36,500.00 insurance in force on the property at the time of the fire is unquestioned if it is assumed that the $5,000.00 policy issued by the defendants was in force as contended by the plaintiff. If this were so the sum of $4,251.99 is the proportionate share of the loss to be paid by defendants based on the sound value of the building.

If defendants did not believe that the sum of $31,039.50 was the correct amount of the loss or that the sum of $4,251.99 did not correctly represent their proportionate share of the loss, it would seem that the statement of the plaintiff and her two witnesses would have been contradicted at the trial. Not one word was offered to disprove the testimony of the plaintiff's witnesses.

That the loss did aggregate the sum claimed by the plaintiff was not contradicted and the jury was

justified in finding that amount due plaintiff.

It is true that defendants' witness, Davies, sought to question this statement of plaintiff as to the amount of loss, but not by any direct evidence, and counsel stated at the trial that the witness Davies's statement (S. C. 214)

> "Was a mere mathematical calculation, not predicated on any one set of facts."

This evidently must have been so as this witness, so far as the evidence disclosed, had never seen the burned building and consequently was in no position to testify as to the value or to the loss occasioned by the fire.

The only sums before the Court were the $31,039.50 testified by plaintiff's witness as the amount of damages to the building and the sum of $4,251.99 testified by Stansbury to be the proportionate share of the defendant companies.

Defendants infer from reading between the lines that Stansbury (Brief p. 51) engineered some hit-or-miss adjustment with the other insurers and came into Court and tried to put through, and so far has put through, the same sort of practice.

It seems idle to assume that the other insurance companies after being represented by contractors and appraisers, would allow anyone to compel them to contribute a sum clearly in excess of their proportionate share of the damage.

Plaintiff respectfully submits that there was a proper basis for damages, that the amount of loss was legally proved and that the defendants are indebted to the plaintiff in the sum of $4,251.99, the amount shown in the proof of loss.

Plaintiff further submits that there were no other figures which the Court could submit to the jury as a basis for damages other than the amounts furnished by the testimony of plaintiff's witnesses.

The charge of the Court on this point (S. C. 230) was proper and accurate. The question of damages was clearly left to the discretion of the jury and they were informed it was their right and duty to decide for themselves the disputed question according as the weight of the testimony appeared to them. As stated in State vs. Hummer, decided by the Court of Errors and Appeals, 73 N. J. L. 714:

> "It is the right and duty of a judge to comment upon the evidence, and in cases where he thinks it required for the promotion of justice to give his views upon the weight of it, provided he leaves it to the jury to decide upon their own view of it."

The entire charge inclusive of that quoted by the defendants under the above Points shows that the Court avowedly stated only its recollection of the testimony to which it referred and such statement even if not entirely accurate, was no ground for reversal so long as the right and duty of the jury to rely upon their own recollection and to decide for themselves all disputed questions of fact was also pointed out in the charge.

Graff vs. Louis Sterns Sons, 135 At. 335.

POINT IV.

THERE WERE NO ERRORS BY THE COURT IN THE CHARGE TO THE JURY.

Under the abstract of the case defendants argue at page 6 and 7 that the Court erred in charging the jury as follows:

> "On the other hand, you have the denial of the Levins that they were notified of the cancellation of the Underwriters' policy."

The defendants, however, do not set up this contention under any point in their argument.

In view of the fact, however, that they have commented upon it in the abstract of the case plaintiff deems it advisable to reply briefly to this contention as well as to the further contention of the defendants that the Court erred in the following part of the charge:

> "You must depend upon your own recollection of their evidence and your understanding of it." (S. C. 228).

Plaintiff submits that an examination of the excerpts of the testimony of the plaintiff and her husband, quoted under Point 1 of this brief, are amply sufficient to show that the Levins denied receiving notification of the cancellation of defendants' policy.

Plaintiff further wishes to again cite the case of Graff vs. Louis Sterns & Sons, 135 Atl. 335. Even if this part of the charge were inaccurate, which was not the case, that does not constitute a ground for reversal so long as the right and duty of the jury to rely upon their own recollection of the testimony was pointed out in the charge by the Court.

POINT VI.

IMMEDIATE NOTICE OF THE LOSS WAS GIVEN THE DEFENDANTS AND DEFENDANTS, MOREOVER, BY THEIR ACTS, WAIVED IMMEDIATE NOTICE.

The testimony shows that LeCompte was notified of the loss immediately after the fire and he testified he was present and saw the damaged property. As

previously stated in this brief, LeCompte was held out by the defendant companies as their agent. The Court properly brought to the attention of the jury the question as to whether or not there was a waiver by the defendants or their duly authorized agent.

The verbal notice to LeCompte given immediately after the fire was given without any objection on his part as to the fact that the notice was not in writing.

Furthermore, on December 27th, 1922, six days after the fire, the mortgagee, Mrs. Altschuler, notified the company in writing of the loss. (S. C. 246).

Plaintiff further submits that upon receipt of the proof of loss the defendant companies acknowledged same and disclaimed liability on the specific ground that the policy had been cancelled (S. C. 245). The question as to whether or not the fact that the defendants only specified one particular reason for the denial of any liability, could be considered as a waiver, was also left to the jury for its determination (S. C. 225).

As these were solely factual questions there was no error on the part of the Court in referring these matters to the determination of the jury.

Francis v. Insurance Co. 25 N J L 78; Rosenberg v. Maryland Casualty Co. 130 A 726
State Ins. Co. v. Maackens 33 N J L 564;

POINTS VII. and VIII.

NO ERROR WAS MADE BY THE COURT IN REFUSING TO CHARGE REQUESTS NOS. EIGHT and TEN.

The defendants allege under Points 7 and 8 that the Court erred in refusing to charge request No. 8 (S. C. 235) which is as follows:

> "If the plaintiff inserted the allegations as to the Pittsburg Underwriters' policy in the proof of loss, knowing the policy to have been cancelled, for the purpose of collecting insurance money from the defendant, such action would be fraud and would render the policy void."

There was no affirmative evidence offered that the plaintiff had inserted in her proof of loss any allegations for the purpose of collecting insurance money from the defendants knowing the policy to have been cancelled. On the contrary the question of cancellation was bitterly contested.

Moreover, this request was properly covered by the Court in its charge as was request No. 10 to which the defendants take exception for failure to charge in the exact words of counsel. Request No. 10 was as follows: (S. C. 236).

> "If the plaintiff failed in her proof of loss to disclose the fact that the encumbrance upon the property was a real estate mortgage which together with a chattel mortgage, secured the $15,000.00 mentioned in the proof of loss, in order to conceal the fact of the existance of the chattel mortgage and the existence of a greater moral hazard, such concealment would avoid the policy."

The Court's charge covering the two requests above quoted is as follows (S. C. 226):

> "It is insisted further that the plaintiff in her proof of loss swore falsely and fraudulently, that she did not truly state the amount of insurance. It is claimed that she did not state truly the nature and amount of incumbrances upon her property. This defense is available only when it appears that the assured knowingly and intentionally swore falsely or said or did that which is claimed to be fraudulent. Mere mistake, an honest mistake in

stating facts in making out a proof of loss, would not be sufficient to sustain the defense."

Plaintiff submits that the above is a proper expression of the law upon the point covered. It was not necessary for the Court to charge the jury in the exact language requested by counsel.

"The right to have the law stated in the language of counsel has been so often denied in our courts that citation of authority is unnecessary." Hammel vs. VanSickle, 128 Atl. Rep. 247.

POINTS X. and XI.

THE TRIAL COURT DID NOT ERR IN PERMITTING QUESTIONS TO BE ANSWERED BY THE WITNESS STANSBURY.

The defendants allege that the Court erred in permitting Alfred L. Stansbury to reply to the following question (S. C. 65):

"Q. What did you ascertain the total insurance on the building to be?"

As stated under Points 3, 5 and 9, Stansbury has had considerable experience as an adjuster and Insurance expert.

Plaintiff has commented on Mr. Stansbury's qualification previously in this brief and a repetition on that point is not necessary.

Defendants also cite as ground of error the fact that the Court permitted the following question to be answered:

"Q. Will you tell us in your opinion what the loss was by fire to this building, that happened to the Clarendon Hotel the 21st of December, 1922? (S. C. 67-69).

It is to be noted that the counsel for the defendants did not cross examine Stansbury as to his qualification when the first question above quoted was asked.

In the twenty-five or twenty-six years that Stansbury has been in the insurance, real estate and allied businesses his experience in adjusting fire losses and in estimating damages has been considerable, as his testimony shows.

Defendants had the opportunity, if they desired to rebut the testimony of plaintiff's witness, both to show that the insurance on the building was not $36,500.00 and to further show that the loss by fire to the building was not the amount stated by the witness Stansbury. This they did not choose to do.

Plaintiff submits that the testimony of the witness Stansbury was proper and that he was qualified to testify as to the amount of loss and as to the amount of insurance as he ascertained same to be, particularly so as to the insurance when the defendant's own agent, LeCompte, told him immediately after the fire that he held $15,500.00 insurance included in which was the Pittsburg Underwriters policy. The $15,500 insurance given to him by defendants' agent together with other insurance that Stansbury knew was on the property, brought the total amount of $36,500.00, which was the amount he testified that he had ascertained to be on the Clarendon.

It is respectfully submitted that the judgment of the plaintiff should be affirmed.

DURAND, IVINS & CARTON,
Attorneys for Plaintiff-Respondent
JAMES D. CARTON,
Of Counsel.

10

20

30

40