INDEX

PLEADINGS, ETC.

TESTIMONY

EXHIBITS

Rule for Judgment

MIDDLESEX COUNTY COURT OF
COMMON PLEAS
May 11, 1932
Court Met; Present Hon. Adrian Lyon, Judge.

Antole Vinik, Plaintiff, vs. Niagara Fire Insurance Company, a corporation, Defendant.	Common Pleas No. 29
and	
Antole Vinik, Plaintiff, vs. Niagara Fire Insurance Company, a corporation, Defendant.	Circuit Court No. 473

10

20

RULE FOR JUDGMENT

The Court ordered the case come on for trial and the Sheriff returned a panel of jurors for the trial thereof; the following jurors appeared and were sworn:

Henry Eberwein, Harry Conover, David R. Kipp, Mary Cortelyou, William Crenning, Frank Shanley, Fred Ayers, Charles Heafner, Joseph Dunn, William Hartman, James Jolly, Bessie Wilgus.

30

Joseph T. Lieblich,
Edmund A. Hayes
by John R. McElheaney,
Attys. for Pltff.

Arthur T. Vanderbilt
by David Stoffer,
Atty. for Deft.

Witnesses sworn: Antole Vinik, Frederick Dahmer, August Morris. (Rebuttal) Fred Dahmer, Antole Vinik, George Newton, Walter Hines.

Witnesses sworn: James Gates, Claude Penrose, Luther Henry, Louis Huttenbach, Caleb Baxter.

Motion made by Attorney David Stoffer for a directed verdict in favor of the defendant, Niagara Insurance Company. Motion denied.

The evidence being adduced and argument submitted, the jury after a charge from the Court, retired to consider their verdict in charge of Officer Peter Zurilla who was sworn to attend them; subsequently the jury returned into court, answered to their names and through their foreman declared and said they find in favor of the defendant, Niagara Fire Insurance Co., a corporation, against the plaintiff, Antole Vinik, no cause for action, and so say they all.

On motion of Arthur T. Vanderbilt, Esq., attorney of defendant it is ordered that final judgment be entered in the above styled cause in favor of the defendant and against the plaintiff.

Actually entered May 11, 1932.

COMPLAINT

Filed 1|23|32

First Count

Plaintiff, by Joseph T. Lieblich, his attorney, says:

1. That on and prior to the 21st day of January, 1931, plaintiff was the owner of the furni-

ture and building on the premises situate on Fellowship Farm, Shelton, New Jersey.

2. On the 1st day of December, 1929, defendant was and still is a corporation, being duly incorporated with power to insure risks against fire.

3. On that day, the defendant, in consideration of the sum of $28.13, paid to Harkins & Victory Company, its duly authorized agent at New Brunswick, New Jersey, did execute and deliver to Fannie Dunn its policy No. 208450, insuring property referred to in paragraph one hereof and as is more particularly set forth in defendant's policy of insurance of which plaintiff pleads profert in curia.

4. On the 21st day of January, 1931, the defendant by its agent, Harkins & Victory Company, did transfer, change and endorse the ownership in and to the policy and property insured thereunder to the plaintiff.

5. Defendant by its policy of insurance, issued in the usual form, did covenant in the manner and form prescribed by the several acts of legislature in this State, to indemnify the plaintiff for loss and damage sustained to the property by fire.

5. On the 7th day of February, 1931, while this policy of insurance was in full force and effect, the property insured in and by the said policy was damaged and destroyed by fire.

7. That the loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph three hereof, was $6063.

8. Plaintiff has complied with such covenants of the said policy of insurance as is and was requisite on his part to comply with and has demanded of the defendant the sum of $2649.99.

9. Defendant has not paid the amount of loss and damage notwithstanding the divers demands made by the plaintiff in the premises.

Plaintiff demands damages on this count the sum of $2649.99 with interest from May 1st, 1931.

Second Count

Plaintiff by Joseph T. Lieblich, his attorney, says:

1. Plaintiff repeats paragraphs one, two, three, four, five and six of the First Count as if recited herein at length.

2. That the loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph three of the First Count was $707.

3. Plaintiff has complied with such covenants of the said policy of insurance as is and was requisite on his part to comply with and has demanded of the defendant the sum of $350.

4. Defendant has not paid the amount of loss and damage notwithstanding the divers demands made by the plaintiff in the premises.

Plaintiff demands damages on this count the sum of $350. with interest from May 1st, 1931.

Joseph T. Lieblich,
Attorney of Plaintiff.

Answer

ANSWER

Filed 2|4|32

Defendant, Niagara Fire Insurance Company, says that:

First Count

1. It denies the allegations of paragraphs 1, 6, 7 and 8 of the complaint filed in the aboved stated cause.

2. It admits the allegations of paragraphs 2 and 9 of said complaint.

3. It admits the issuance of the policy mentioned in paragraphs 3, 4 and 5 of said complaint, but as to the terms and conditions thereof, begs leave to refer to said policy and to its records thereof.

4. First Separate Defense

Said policy contained among others the following terms and conditions:

> "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."

In violation of such terms, stipulations and conditions, with intent to cheat and defraud said defendant and gain an advantage over it and secure a sum of money not otherwise justly due,

said plaintiff knowingly and wilfully, falsely and fraudulently, misrepresented in writing and otherwise the amount and value of the property claimed by him to be involved in the loss, the amount of damage caused by the loss, the origin and cause of said loss, well knowing that in truth and in fact the amount of property claimed to belong to him and involved in said loss and its value, the cost of said property and the amount of damage caused by said loss was much less than the amount represented and stated by him, and well knowing that the origin and cause of the loss was otherwise than as represented and stated by him; all of which was done by said plaintiff, with intent, as aforesaid to secure the payment of a sum of money from this defendant not otherwise justly due.

By reason whereof the said policy became void and of no effect and this defendant relieved of liability thereunder.

5. Second Separate Defense

Said policy contained among others the following terms and conditions:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured."

Without any agreement being endorsed on said policy or added thereto, the hazard was increased by means within the control or knowledge of the assured,

By reason whereof said policy became null and void and of no effect and said defendant relieved of liability thereunder.

6. Third Separate Defense

Said policy contained among others the following terms and conditions:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fire works, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in weight, naptha, nitro-glycerine and other explosives * * *."

There was kept, used or allowed on the premises described in this policy gasoline and other prohibited articles (without any agreement providing otherwise being endorsed on said policy or added thereto).

By reason whereof said policy became null and void and this defendant relieved of liability thereunder.

Second Count

1. It repeats the answers made to paragraphs 1 to 6 inclusive of the First Count as answers to the corresponding paragraphs of this Count.

2. It denies the truth of the allegations in paragraphs 2 and 3 of said complaint.

3. It admits the truth of the allegations in paragraph 4 of said complaint.

4. First Separate Defense

It repeats and makes a part hereof the First Separate Defense to the First Count.

5. Second Separate Defense

It repeats and makes a part hereof the Second Separate Defense to the First Count.

6. Third Separate Defense

It repeats and makes a part hereof the Third Separate Defense to the First Count.

Arthur T. Vanderbilt,
Attorney of Defendant.

REPLY

Filed 2|16|32

Plaintiff, by way of reply to the defendant's answer says:

1. He denies each and every allegation contained in paragraphs four, five, six of the First, Second, Third Separate Defenses to each and every count, except such portions thereof as refer to extracts from the policies of insurance, and as to the same, the plaintiff refers to the said policies for certainty.

Joseph T. Lieblich,
Attorney of Plaintiff.

AMENDMENT TO ANSWER

Filed 5|14|32

Defendant further answering the complaint herein and by way of amendment to the answer heretofore filed by it says:

Amendment of Answer to First Count

7. Fourth Separate Defense

Plaintiff warranted to defendant that the insured building would be occupied exclusively for dwelling purposes. Said building was not, in fact, occupied exclusively for dwelling purposes.

Said breach of warranty as to the character and use of the insured building rendered said policy null and void and relieved this defendant of all liability thereunder.

8. Fifth Separate Defense

Said policy contained the following terms and conditions:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, 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."

A change other than by death of an insured took place in the possession of the subject of insurance, with increase of hazard (without any agreement being endorsed on said policy or added thereto).

By reason whereof said policy became null and void and this defendant relieved of liability thereunder.

9. Sixth Separate Defense

Said policy contained, among others, the following terms, conditions and stipulations:

> "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, solvent 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."

Prior to, and at the time of said fires the buildings insured by defendant's policy was also insured under the policy of London and Lancashire Fire Insurance Company in the sum of $1,500.00.

By reason whereof the liability of defendant, if any, is limited to the amount which the policies of defendant bear to the whole of the insurance covering said building.

Amendment of Answer to Second Count

7. Fourth Separate Defense

It repeats and makes a part hereof the Fourth Separate Defense to the First Count.

8. Fifth Separate Defense

It repeats and makes a part hereof the Fifth Separate Defense to the First Count.

Arthur T. Vanderbilt,
Attorney of Defendant.

NOTICE OF APPEAL

Filed 5|5|33

To: Arthur T. Vanderbilt, Esq.,
Attorney of Defendant.

Sir:

Please take notice that the plaintiff appeals from the whole and every part of the judgment

rendered in this cause to the New Jersey Supreme Court.

Dated: March 23rd, 1933.

Joseph T. Lieblich,
Attorney of Plaintiff.

Service of a copy of the within is hereby acknowledge this day of March, 1933.

Arthur T. Vanderbilt,
Attorney of Defendant.

Filed 1|23|32

COMPLAINT

First Count

Plaintiff, by Joseph T. Lieblich, his attorney, says:

1. That on and prior to the 21st day of January, 1931, plaintiff was the owner of the furniture and building on the premises situate on Fellowship Farm, Stelton, New Jersey.

2. On the 15th day of July, 1928, defendant was and still is a corporation, being duly incorporated with power to insure risks against fire.

3. On that day, the defendant, in consideration of the sum of $16.88 paid to Harkins & Victory Company, its duly authorized agent at New Brunswick, New Jersey, did execute and deliver to Mrs. Fred Dunn its policy No. 207577, insuring property referred to in paragraph one hereof and as is more particularly set forth in defendant's policy of insurance of which plaintiff pleads profert in curia.

4. On the 21st day of January, 1931, the defendant by its agent, Harkins & Victory Com-

pany did transfer, change and endorse the ownership in and to the policy and property insured thereunder to the plaintiff.

5. Defendant by its policy of insurance, issued in the usual form, did covenant in the manner and form prescribed by the several acts of legislature in this state, to indemnify the plaintiff for loss and damage sustained to the property by fire.

6. On the 7th day of February, 1931, while this policy of insurance was in full force and effect, the property insured in and by the said policy was damaged and destroyed by fire.

7. That the loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph three hereof, was $6063.

8. Plaintiff has complied with such covenants of the said policy of insurance as is and was requisite on his part to comply with and has demanded of the defendant the sum of $1500.

9. Defendant has not paid the amount of loss and damage notwithstanding the divers demands made by the plaintiff in the premises.

Plaintiff demands damages on this count the sum of $1500. with interest from May 1st, 1931.

Second Count

Plaintiff, by Joseph T. Lieblich, his attorney, says:

1. Plaintiff repeats paragraphs one, two, three, four, five, and six of the First Count as if recited herein at length.

2. That the loss and damage sustained by the destruction of the property in question, insured

under the policy described in paragraph three of the First Count was $707.

3. Plaintiff has complied with such covenants of the said policy of insurance as is and was requisite on his part to comply with and has demanded of the defendant the sum of $350.

4. Defendant has not paid the amount of loss and damage notwithstanding the divers demands made by the plaintiff in the premises.

Plaintiff demands damages on this count the sum of $350. with interest from May 1st, 1931.

Joseph T. Lieblich,
Attorney of Plaintiff.

ANSWER

Filed 2|4|32

Defendant, Niagara Fire Insurance Company, says that:

1. It denies the allegations of paragraphs 1, 6, 7 and 8 of the complaint filed in the above stated cause.

2. It admits the allegations of paragraphs 2 and 9 of said complaint.

3. It admits the issuance of the policy mentioned in paragraphs 3, 4 and 5 of said complaint, but as to the terms and conditions thereof, begs leave to refer to said policy and to its records thereof.

4. First Separate Defense

Said policy contained among others the following terms and conditions:

"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."

In violation of such terms, stipulations and conditions, with intent to cheat and defraud said defendant and gain an advantage over it and secure a sum of money not otherwise justly due, said plaintiff knowingly and wilfully, falsely and fraudulently, misrepresented in writing and otherwise the amount and value of the property claimed by him to be involved in the loss, the amount of damage caused by the loss, the origin and cause of said loss, well knowing that in truth and in fact the amount of property claimed to belong to him and involved in said loss and its value, the cost of said property and the amount of damage caused by said loss was much less than the amount represented and stated by him, and well knowing that the origin and cause of the loss was otherwise than as represented and stated by him; all of which was done by said plaintiff, with intent, as aforesaid, to secure the payment of a sum of money from this defendant not otherwise justly due.

By reason whereof the said policy became void and of no effect and this defendant relieved of liability thereunder.

5. Second Separate Defense

Said policy contained among others the following terms and conditions:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured."

Without any agreement being endorsed on said policy or added thereto, the hazard was increased by means within the control or knowledge of the assured.

By reason whereof said policy became null and void and of no effect and said defendant relieved of liability thereunder.

6. Third Separate Defense

Said policy contained among others the following terms and conditions:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * if there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fire works, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in weight, naptha, nitro-glycerine and other explosives * * *."

There was kept, used or allowed on the premises described in this policy gasoline and other prohibited articles (without any agreement providing otherwise being endorsed on said policy or added thereto).

By reason whereof said policy became null and void and this defendant relieved of liability thereunder.

Reply

Second Count

1. It repeats the answers made to paragraphs 1 to 6 inclusive of the First Count as answers to the corresponding paragraphs of this Count.

2. It denies the truth of the allegations in paragraphs 2 and 3 of said complaint.

3. It admits the truth of the allegations in paragraph 4 of said complaint.

4. First Separate Defense

It repeats and makes a part hereof the First Separate Defense to the First Count.

5. Second Separate Defense

It repeats and makes a part hereof the Second Separate Defense to the First Count.

6. Third Separate Defense

It repeats and makes a part hereof the Third Separate Defense to the First Count.

Arthur T. Vanderbilt,
Attorney of Defendant.

REPLY

Filed 2|16|32

Plaintiff, by way of reply to the defendant's answer says:

1. He denies each and every allegation contained in paragraphs four, five, six of the First, Second, Third Separate Defenses to each and every count, except such portions thereof as refer to extracts from the policies of insurance, and as to the same, the plaintiff refers to the said policies for certainty.

Joseph T. Lieblich,
Attorney of Plaintiff.

RULE

Filed 5|24|33

This matter being opened to the Court by Joseph T. Lieblich, Esq., and upon the affidavit hereto annexed and the consent of the Counsel of the defendant-Appellee hereto attached, and it appearing that the case of Anotole Vinik, plaintiff vs. Niagara Fire Ins. Co., in the Middlesex County Court of Common Pleas, was tried with the case of Anatole Vinik, plaintiff vs. Niagara Fire Ins. Co., defendant in the Middlesex County Circuit Court, and it appearing that separate notices of appeal have been filed in each of the respective causes and under the rules, the grounds of appeal must be filed with the Clerk of the Supreme Court, and upon due consideration in the premises it is on this 23rd day of May, 1933,

Ordered, that the cause of Anotole Vinik, plaintiff-appellant vs. Niagara Fire Ins. Co., Defendant-Appellee in the Middlesex County Court of Common Pleas, and the cause of Anotole Vinik, plaintiff-appellant against Niagara Fire Ins. Co., defendant-appellee in the Middlesex County Circuit Court be and the same are hereby consolidated for appeal and to be incorporated and set forth in one record.

Clarence E. Case,
Justice Supreme Court.

I hereby consent to the making and entry of the foregoing rule.

Arthur T. Vanderbilt,
Atty. for Defendant-Appellant.

Notice of Appeal and Grounds of Appeal

NOTICE OF APPEAL

Filed 5|5|33

To: Arthur T. Vanderbilt, Esq.,
Attorney of Defendant.

Sir:

Please Take Notice that the plaintiff appeals from the whole of the judgment rendered in this cause to the New Jersey Supreme Court.

Dated: March 23rd, 1933.

Joseph T. Lieblich,
Attorney of Plaintiff.

GROUNDS OF APPEAL

(2 cases)

Filed 6|2|33

To: Arthur T. Vanderbilt, Esq.,
Attorney of Appellee.

The notice of appeal from the Middlesex County Court of Common Pleas, having been filed with the Clerk of said Court on May 5, 1933, and the notice of appeal from the Middlesex County Circuit Court, having been filed with the Clerk of that Court on May 5, 1933, and both of these actions having been tried together, the appellant hereby sets forth his assignment of error and grounds of appeal upon which he will reply for a reversal of the respective judgments in the Middlesex County Court of Common Pleas and the Middlesex County Circuit Court:—

1. The Court erred in permitting an amendment to the pleadings after issue had been joined,

testimony De Bene Esse had been taken of Bertha Kruger upon the issue as raised by the pleadings, and the case moved for trial.

2. The Court erred in admitting, the answer to the following question propounded to the witness, Mr. Vinik: "Now this property was given to you about a year before the fire by your mother was it not?"

3. The Court erred in admitting, the answer to the following question propounded to the witness, Bertha Kruger: "What rent did he pay?"

4. The Court erred in admitting, the answer to the following question propounded to the witness, Bertha Kruger: "Did he appear depressed when he heard of the second fire?"

5. The Court erred in admitting, the answer to the following question propounded to the witness, Louis Huttenbach: "Now on the bases of the sketch which he gave you and the information which he gave you concerning the materials which went into the building and its construction, could you make an estimate of the replacement value of that building." "Would you do it then?" "Will you please tell us what your estimate of the replacement value is?"

6. The Court erred in directing witness Huttenbach to use a written memorandum to aid him in testifying and in refusing plaintiff an opportunity to examine the witness with respect to the necessity and lawful right to the use thereof.

7. The Court erred in admitting, the answer to the following question propounded to the witness Huttenbach: "Will you tell us Mr. Huttenbach what the cubic cost of a brick building is for example?"

8. The Court erred in making the following statement: "I know, but it is a matter of common knowledge that a brick building per cubic foot is a great deal more expensive than a frame building of this sort, and, it is almost a matter of common knowledge too that 80c a cubic foot for construction of this kind is absurd."

9. The Court erred in refusing to charge plaintiff's request to charge which is as follows: "To defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant which increased the hazard were made with knowledge to or the consent of the owner or his agent."

10. The Court erred in charging: "The policies in the suit provide as follows: This entire policy shall be void if there be kept, used or allowed on the above described premises, benzine, benzol, gasoline, naptha, or other explosives or petroleums or any of its products of greater inflamibility than kerosene oil, of the U. S. Standard." If you find that alcohol was kept, used or allowed in the premises in question, at any time prior to the fires, and if you further find that alcohol is an explosive, then your verdict must be for the defendant, of course, that means alcohol in a substantial quantity."

11. The Court erred in charging: "The policies in the suit provide as follows: This entire policy shall be void if the hazard be increased by any means therein, within the control or the knowledge of the insured. If you find that at any time after the issuance of the policy the fire hazard was increased by any means within the

control or knowledge of the plaintiff then your verdict will be for the defendant."

Yours truly, & etc.,
Joseph T. Lieblich,
Attorney of Plaintiff-Appellant.

Evidence taken before Hon. Adrian Lyon, Judge, and a Jury, on the eleventh day of May, 1932, at the Middlesex County Court House, New Brunswick, New Jersey.

(Jury sworn.)

Mr. Stoffer—If your Honor please, these defenses were prepared by Mr. Gaulkin, of our office, who has since left, and I would like to make an amendment of three separate defenses. In these separate defenses there will be no new evidence introduced in connection with the defenses, and as soon as I became aware of the situation, I called Mr. Lieblich's office, and he was in New York, but I spoke to his secretary. I also called Mr. McElheaney and told him that my breach of warranty defense would be based upon bootlegging in this building. Now, if there were any element of genuine surprise—

The Court—You object to these amendments?

Mr. Lieblich—Oh, yes, I came here prepared to try the case on the issues raised. In addition to that, I permitted Mr. McElheaney, as an accommodation to Mr. Stoffer, to examine one of their witnesses upon the issue as raised.

Mr. Stoffer—That witness had nothing to do with this question.

Mr. Lieblich—But you were limited in your examination to the issue as raised.

Mr. Stoffer—Yes.

Mr. Lieblich—Now, I have examined the testimony, and while it may be an argument, at the same time I do not think this is the proper time to make a motion of this kind, setting up a breach of the warranty.

The Court—There are three amendments here. The first is about the building being occupied exclusively for dwelling purposes.

Mr. Lieblich—He can't be heard if the policy says so. We are bound by it, and if we do not prove that it was, we are out of luck.

Mr. Stoffer—Well, if Mr. Lieblich will concede that, I won't set up the separate defense. The only point is, later he may claim we should have pleaded affirmatively the breach of warranty. Now, if it is his position that he has got to prove proper occupancy—

The Court—Is that your position?

Mr. Lieblich—My position is that I make out a prima facie case under the pleadings as raised here. If I do not, he gets a nonsuit.

The Court—Well, the point in this is that it was not occupied for dwelling purposes?

Mr. Stoffer—That is right, and the set of facts are the same as alleged in the answer drawn.

The Court—There can't seem to be any harm in allowing this amendment. I will allow the first one in evidence.

Mr. Lieblich—Your Honor will note my exception?

The Court—Yes.

Mr. Stoffer—The second one pleads increase of hazard.

Mr. Lieblich—You plead here the change of title.

Mr. Stoffer—No, no. I will say now that the purpose of the fifth separate defense in the amended answer is merely to show a change of the possession of the property by a tenant with increase of the hazard. I am not going into any title question, or anything of that sort.

The Court—Well, the effect of that merely is an increase of the hazard.

Mr. Stoffer—Yes. In other words, the policy provides against change of the possession, unless change of possession is without an increase of the hazard.

The Court—But you have already pleaded before increase of hazard.

Mr. Stoffer—Yes, that was under the strict increase of hazard clause in the policy.

The Court—What harm can there be from allowing that?

Mr. Lieblich—This defense pleads a change, other than by death of the insured, in the possession of the property, with an increase in hazard.

The Court—The only point in that is the increase in hazard.

Mr. Lieblich—Well, he is covered by the other defense. He is pleading an increase of hazard, and it is a good defense.

The Court—That is all there is to it.

Mr. Stoffer—I will bind myself on the record to that.

Mr. Lieblich—Your Honor will note my exception to the amendment?

The Court—Yes.

Mr. Stoffer—The third one merely sets up something that I thought I should state expressly in the record, and Mr. Lieblich told me he was ready to concede, namely, that there was another $1500 policy on the building, and, therefore, we are ready to pay our proportionate share.

Mr. Lieblich—Yes, I am perfectly willing that we stipulate in the record that under your Honor's instructions that you find, first, Are these insurance companies liable; second, How much is the loss and damage on the building; third, How much is the loss and damage on the furniture, and then we can apportion it among ourselves. Are you agreeable to that stipulation that Judge Lyon so charge the Jury?

Mr. Stoffer—Yes.

Mr. Lieblich—That will eliminate the defense. Then, under your Honor's instructions, apportion it, add interest, and you can do the calculation.

Mr. Stoffer—As I understand it, your Honor, we are trying the Circuit Court issue, as well?

The Court—Yes.

Mr. Stoffer—Then my amendment applies to that issue in the Circuit Court, as well.

Mr. Lieblich—I take exception in that case, also.

(Mr. Lieblich made an opening statement to the jury on behalf of the plaintiff.)

(Mr. Stoffer made an opening statement to the jury on behalf of the defendant.)

ANATOLE VINICK, the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Tolly, you are the plaintiff in this case? A. Yes.

Q. Now, you have got to speak up, so that the jury can hear what you say. A. Yes, sir.

Q. Where do you live? A. In Stelton.

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

Mr. Lieblich—I offer in evidence deed, Fannie Dunn, widow, to Anatole Vinick, single, dated November 20, 1930, recorded in the Clerk's Office, Middlesex County, on the 22nd of January, 1931, in Book 100 of Deeds, Page 316.

Mr. Stoffer—No objection.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 1.")

Mr. Lieblich—Is it admitted that the deed conforms to the policy description?

Mr. Stoffer—Well, I haven't examined it for that, but I don't suppose there is any question.

Q. Is that the deed referred to, Exhibit P-1, for your property? A. Yes, sir.

Mr. Lieblich—I offer in evidence policy number 208450, Niagara Fire Ins. Company, covering the premises of Tolly Vinick at Stelton, New Jersey, in the sum of $3000 on the frame building, and $750 household furniture.

Mr. Stoffer—No objection.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 2.")

Mr. Lieblich—I offer in evidence policy number 207577, Niagara Fire Ins. Company, covering the property of Tolly Vinick at Stelton, New Jersey, in the sum of $1500 on the frame building, and $750 household furniture.

Mr. Stoffer—No objection.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 3.")

Q. I show you this Niagara policy, Exhibit P-2, and ask you whether you paid the premium $28.13 on that policy? A. Yes, sir.

Q. I show you Exhibit P-3, policy number 207577 Niagara and ask you whether the premium $16.88 on this policy was paid? A. Yes, sir.

Q. Did anything happen to this dwelling house, Tolly? A. What was that question?

Q. Did anything happen to this dwelling house, insured in those policies, referred to in the deed, Exhibit P-1? A. Yes, sir.

Q. What, if anything,— A. It burned down.

Q. Do you know when it burned? A. In February 7, 1931.

Q. And when you say it burned down, will you tell the Court and Jury to what extent it burned down? Was it partially damaged, or wholly damaged, or what was it? A. It was practically all damaged, only a few charred walls were left.

Q. Did you have any personal property in that dwelling house? A. Yes, sir, I had furniture.

Q. All right.

Mr. Lieblich—In response to the notice to produce, I call for the production of the proof of loss under policy number 207577, Niagara Fire Insurance Company.

Mr. Stoffer—Combination proof on the Niagara policies produced.

Mr. Lieblich—I offer in evidence the proof of loss, or the combination proof of loss, on the policies numbered 208450 and 207577, Niagara Fire Insurance Company, making claim on the building of $6,063, and furniture, $707.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit P-4.")

Mr. Stoffer—As to that, your Honor, I presume the offer is merely to show compliance

with policy conditions, and the defendant is bound by nothing said in those proofs.

Q. Mr. Vinick, can you tell us from your recollection what furniture, if any, you had in the premises at the time of the destruction? A. Well, I had a whole complete house furnished. I had living room furniture,—

Q. Can you tell us the details, if any? Will Exhibit P-4 help you refresh your recollection, the proof of loss? A. I had a three-piece living room set,—

Q. You can tell us from your memory. If not, look at that paper. A. I had a three-piece living room suite,—

By Mr. Stoffer:

Q. I can't hear you, Mr. Vinick. A little louder. A. I had a three-piece living room suite,—

By Mr. Lieblich:

Q. Do you know what it cost? A. About $175.

Q. What else? A. I had a kitchen set, that is, a breakfast set, with chairs and table.

Q. Do you recall what that cost? A. I don't recall exactly.

Q. Well, will that help you in any way (handing paper)? A three-piece living room set that, you say, cost $175? A. Yes, sir.

Q. Now, what else, if anything? A. Well, I had —I had rugs in the living room and dining room.

Q. What kind of rugs? A. Well, a real nice— I don't know what you call them, what kind of rugs they are. I don't know much about them.

Q. Well, can you tell us something of the size? A. Yes, the sizes were according to the room. There was a ten by twelve, and nine by twelve.

Q. Have you any idea or any recollection as to the cost of that rug? A. Well, it cost about thirty or forty dollars a piece.

Q. Now, which did it cost, thirty or forty dollars? You have got to give this Jury a definite idea— A. Well, about $40.

Q. You say you had another rug? A. Yes.

Q. What was the size of that rug? A. A nine by twelve.

Q. And how much did that cost, do you know? A. About $35.

Q. What else, if anything, did you have there?

Mr. Stoffer—Now, just a moment. May I object on the ground the witness there is apparently reading into the record what is in his proof of loss. May I ask him whether he doesn't remember now, or whether he must refer to that paper?

By Mr. Stoffer:

Q. Mr. Tolly, don't you remember what you had in the house? A. Yes, I remember exactly.

Q. Can you tell us without using that paper, as far as you can, and, then, if you don't remember, I have no objection to your checking up. A. I had a wicker set on the front porch.

By Mr. Lieblich:

Q. How much, if anything, did that cost you? A. I think it cost $95.

Q. What else, if anything? A. The bedrooms, both—two bedrooms were furnished with bedroom beds and dressers.

Q. Yes. What did these cost you? Can you tell us? A. We paid—cost about $25.

Q. Well, how much did the bed and mattress together cost? Can you give us some idea, two beds and two mattresses? A. About $40 a piece, the bed and mattress, and I had a bookcase in the living room.

Q. A bookcase? A. Yes, sir.

Q. How much, if anything, did that cost? A. About $20.

Q. Well, suppose you look at that and see— Do you remember whether it cost $20, or more, or less? A. No, I would not say exactly what they cost. That is approximately.

Q. Suppose you look at that paper and tell us if it will help you. A. Bookcase cost $25, according to this.

Q. Well, which is correct, $20 or $25? A. $25.

Q. What else, if anything, did you have? A. I had center table and end tables.

Q. All right. Wait a minute. How much did the center table cost you? A. About $25.

Q. All right. What did the other table cost you? A. About $5 a piece. I had two of them.

Q. Oh, you had two of them? A. Yes, sir.

Q. All right. What else? A. I had these bridge lamps.

Q. How much did they cost you? How many were there? You said bridge lamps. How many were there? A. I think there were two of them.

Q. How much did they cost you, do you know? A. About $7 a piece.

Q. All right. What else? A. I had an ice box.

Q. Ice box. How much, if anything, did that cost? A. About $25.

Q. What else? A. Well, I had all kitchen utensils, pots and pans, and so forth, curtains—

Q. All right. How about the pots and pans, the kitchen utensils, what did they cost? A. I don't know what that cost. About—

Q. Well, will that proof of loss help you refresh your recollection? A. Why, about $25 worth of kitchen utensils.

Q. All right. What else? A. There was a kitchen stove, an oil stove.

Q. Yes. How much did that cost? A. I think they cost $22.

Q. All right. What else? A. And curtains for the house.

Q. Yes. How much, if anything, did they cost? A. I don't know what curtains cost. I have no idea.

Q. Well, can you tell by looking at the proof of loss? Will that refresh your recollection? A. Yes, about $20.

Q. All right. What else? A. There was a kitchen cabinet there.

Q. Yes. A. That cost about $25.

Q. Yes. What else, if anything? A. There was a smoking stand. That cost $6.

Q. Yes. Did you have any shades in the house? A. Yes, there were shades in the house.

Q. How much did they cost? A. About $25.

Q. Did you have any dressers in the bedrooms? A. Yes, I had two dressers—one dresser in one bedroom and a built in—

Q. How much did that cost? A. About $15.

Q. Did you have any pictures or ornaments in the house? A. Yes, there were pictures and ornaments, many of them.

Q. How much did they cost? A. Well, I wouldn't give any value to any personal ornaments we had. There is a sentimental value.

Q. All right. Excluding the sentimental value, how much did the other items cost you? A. About $25.

Q. How much? A. About $25.

Q. Did you have a table and five chairs? A. Yes, sir, in the kitchen.

Q. How much, if anything, did they cost? A. About $25.

Q. What was the condition of these goods and chattels that you have testified about and set forth in Exhibit P-4 at the time of their destruction by this fire? A. They were all in good condition.

Q. What is your business, trade, or occupation, Mr. Vinick? A. Carpenter and builder.

Q. How long have you been engaged in that line of work? A. About seven or eight years.

Q. I show you these papers and ask you if you can tell us what they are? A. These are the plans of the house which burned down.

Q. By whom were they prepared? A. By me.

Q. Do they accurately represent the building? A. Exactly.

Mr. Lieblich—I offer them in evidence as one exhibit. If you want to have Mr. Baxter look at them, I will go ahead for awhile.

Mr. Stoffer—All right.

Q. As a carpenter and builder of the standing which you have testified to, are you acquainted with the market value and cost of building materials and supplies? A. Yes, sir.

Q. Have you had occasion to build any frame buildings? A. Yes, sir.

Q. Like the building in question? A. Yes, sir.

Q. I show you this paper and ask you if you have ever seen this before? A. Yes, sir.

Q. What is it? A. That is a lumber list in detail, and figures of the sub-let contracts in the construction of this house.

Q. Do you mean that those figures which you have there represent the cost of the original construction, or the replacement? A. A replacement.

Q. And who made those figures? A. I did.

Q. Do these figures accurately represent the market value of the materials and data necessary and incidental to the reconstruction of that building? A. Yes, sir.

Q. And do those figures represent the labor incidental and necessary, the cost of the labor necessary and incidental to the reconstruction? A. Yes, sir.

Q. How much, in your opinion, is the replacement value of that building? A. About $5800 to $6000.

Q. Well, have you made the figures there? A. Yes, $6,063.

Mr. Lieblich—All right. I offer it in evidence.

Mr. Stoffer—That is objected to, the plaintiff's own figures as to reconstruction values are not admissible. He can testify about

them, but the writing can't go in evidence.

Mr. Lieblich—In the case of Teats against Hahn, your Honor,—

The Court—The objection is not to this witness's giving his testimony as to what he considers the value. The objection is to the offering of this paper, as I understand it. The objection is sustained.

Mr. Lieblich—The plans are admitted by counsel.

(The papers referred to were received in evidence and marked, "Plaintiff's Exhibit 5.")

Q. Do you know how old that building was, or rather, when it was constructed? A. About seven years old.

Q. And can you tell us what was the cost of that building for construction as compared with the $6,060 replacement value?

Mr. Stoffer—I object. May I cross examine him on that, your Honor?

The Court—Yes.

Cross Examination by Mr. Stoffer:

Q. Do you know the original cost of constructing that building seventeen years prior to the fire? A. Seven years.

Q. Do you know what it cost? A. I know approximately what it cost.

Q. What is the source of your information? A. From my mother.

Q. Did she build it? A. Yes.

Q. The entire building? A. No.

Q. Then, your information is from what your mother told you it cost her? A. Yes, sir.

Mr. Stoffer—Objected to. It is hearsay.

Mr. Lieblich—Well, I don't press that, but he is also a carpenter and builder. It can come from other ways.

The Court—He says his information came from his mother. That is clearly hearsay, of course.

Mr. Lieblich—Yes, sir, I agree with that. That is hearsay.

The Court—Now, the objection, therefore, at this time, is sustained. If he has knowledge from other sources, why, that is a different thing.

Mr. Lieblich—Well, I don't want to interrupt my adversary. When he is through, I can go ahead.

By Mr. Stoffer:

Q. How much of this building was in existence at the time when your mother expended some moneys on it seven years ago?

Mr. Lieblich—I object, if it please the Court. Under your Honor's ruling it is hearsay evidence, what information came from his mother, therefore, it is immaterial how much of the building was in existence at the time.

Mr. Stoffer—Physically, what he saw.

The Court—Now, there is no lawful testi-

mony so far from this witness before the Court as to his knowledge of the original cost of this building. The only testimony he attempted to give was that which the Court has ruled out. Proceed.

Mr. Stoffer—Go ahead. I am through.

By Mr. Lieblich:

Q. Well, you say that you are a builder? A. Yes, sir.

Q. And how many years experience? A. About seven years.

Q. You have been in this building? A. Yes, sir.

Q. The building that was destroyed, I mean. A. Yes, sir.

Q. And you know the building? A. Yes, sir.

Q. Now, can't you tell us what, in your opinion, as a builder, it would cost to build that building seven years ago? A. About $7,200.

Q. After this loss, what, if anything, did you do with respect to this insurance? A. Well, I didn't know—I went to see Mr. Dahmer. He had all the papers when the place was transferred to me.

Q. You mean, Fred Dahmer? A. Yes, sir.

Q. He is a lawyer here in New Brunswick? A. Yes, and he asked—

Mr. Stoffer—Now, I object to what he asked—

Q. You can't tell us the conversation between you and Mr. Dahmer, but tell us if you know of anything that transpired between you and the insurance

company? A. I went to Mr. Dahmer and told him—

Q. No, you can't tell the Court and Jury what you told Mr. Dahmer, or what Mr. Dahmer told you. You can only limit yourself as to any transactions between you and the insurance company. A. No, I had no transactions with the insurance company.

Q. Do you know Mr. Baxter? A. Well, I received a letter from Mr. Baxter, to come in and see him, and Mr. Huttenback.

Q. Did Mr. Baxter come to see you after the fire? A. Yes, sir.

Q. All right. How long after the fire did he come to see you? A. About two months, three months after.

Mr. Lieblich—Any question of the notice made?

Mr. Stoffer—No.

Mr. Lieblich—It is admitted that due notice was given.

Q. How much are you claiming of the Niagara Fire Insurance Company as the loss and damage on the building? A. About $6,000.

Q. Well, $6,000, or $6,060? A. $6,060— 63.

By the Court:

Q. $6,060, or $6,063? A. $6,063.

Q. How much are you claiming of the Niagara Fire Insurance Company as the loss and damage on your household furniture and personal effects? A. $707.

Q. Have you received any money from these companies, from this Niagara Fire Insurance Company? A. No, sir.

The Court—I didn't keep account of these. Do they total that?

Mr. Lieblich—There is a schedule attached to the proof of loss.

The Court—All right.

Q. Did you live in this building yourself? A. Yes, sir.

Q. When, with respect to the date of the fire? A. About a year before the fire I lived in the house.

Q. All right. At the time of the fire, who lived in the house? A. A gentleman by the name of Frank Santo.

Q. Who did he live there with? A. I believe, his wife.

Q. Well, don't you know? A. No, I could not say. I could not state exactly.

Q. Did you serve a subpoena on Frank Santo to appear here? A. I could not locate him. I tried where he was.

Q. How much of an effort did you make to locate Frank Santo? A. Well,—

Mr. Stoffer—I object. I think it is—

Mr. Lieblich—I asked him if he served him with a subpoena, and I want to know why he is not here.

The Witness—I went all around and tried to locate him, where I thought he would be, and I could not find him.

Mr. Lieblich—I see. You may take the witness.

Cross-Examination by Mr. Stoffer:

Q. Mr. Vinick, when did your mother purchase this property?

Mr. Lieblich—I object. It is immaterial.

The Court—I will admit it.

A. I don't know.

Q. Do you know how old this building was? A. About seven years old.

Q. Well, is it at that point of time, you mean, seven years before the fire? A. Yes, about six or seven years before the fire.

Q. Is it that point of time that your mother bought the property A. Yes, sir.

Q. And she put up this building? A. Yes, sir.

Q. Brand new at that time? A. Well, it was just a little of it there. It was all rebuilt, built new.

Q. What did she do by way of rebuilding it, do you know, I mean, that you know yourself of your own knowledge? A. Yes.

Q. If you don't, tell us you don't. A. Yes. She built—there was just the foundation, with a little frame, there, when she bought the property, and she built the whole house.

Q. So, you say, she put up everything above the foundation? A. Yes, sir.

By the Court:

Q. Well, what do you mean, that there was an incomplete structure on the house when she

bought it? A. Yes, sir, it was just in the form of construction.

The Court—Oh, I see.

By Mr. Stoffer:

Q. So, the other building burned down which had been on that foundation? A. There wasn't any building on the foundation.

Q. The foundation alone was there when your mother bought the property? A. Yes, and the starting of a house.

Q. Now, this property was given to you about a year before the fire by your mother, was it not?

Mr. Lieblich—I object to it as immaterial.

The Court—I admit it.

Mr. Lieblich—Exception.

A. She gave it to me when I was twenty-one.

Q. Yes, that was about a year before these fires? A. Yes.

Q. Well, it was November, 1930, according to the deed. A. Well, we were—that is right, according to the deed it is that.

Q. Your mother, at that time, moved to Philadelphia? A. Yes, sir.

Q. And did she take with her the furniture which she had in the house? A. Just her personal belongings.

Q. I asked you, furniture. A. No, sir; not the furniture.

Q. You, by reference to your proof of loss, have told us what items were of personal prop-

erty, furniture, were in the house at the time of the fire. When were you in the house last, before these fires, before February, 1931? A. New Year's Eve.

Q. I didn't hear you. A. New Year's Eve.

Q. New Year's Eve? A. Yes.

Q. The tenant at that time was Frank Santo? A. Yes, sir.

Q. And you permitted him to use the house and the furniture which was in it? A. Yes, sir.

Q. Now, you say Frank Santo was living in this house at the time of the fires? A. Yes, sir.

Q. As a matter of fact, didn't Mr. Santo move from this house several days before the first fire? A. No, sir.

Q. You lived with Mrs. Kruger during the—well, let us say, from the time your mother went to Philadelphia? A. That is right.

Q. How long before February, 1931, had Frank Santo been in this building as your tenant? A. He moved in on the 4th or 5th of January.

Q. He went in the 4th or 5th of January? A. Between sometime in that date.

By the Court:

Q. Of what year? A. Of the same year.

Q. He had only been there a month, then? A. That is all.

By Mr. Stoffer:

Q. Who was the tenant before Frank Santo? A. I just can't recollect the man's name.

Q. When did he leave the property? A. About November.

Q. And between November and January the property was not occupied? A. That is right.

Q. And when did that tenant, that is, the one before Santo, when did he take possession? A. Just after I moved out.

Q. You moved out at the time your mother left in November, 1930? A. No, not exactly then. I stayed a little while, and then left.

Q. Somewheres about the beginning of 1929? A. No, 1930 it would be. The fire was in 1931. Yes, about a year before the fire.

Q. You moved out of the building? A. Yes

Q. How soon after that did this tenant take possession? A. Oh, a short time, I don't remember exactly.

Q. Did you have a lease with him? A. No, we don't have leases.

Q. What rent did he pay?

Mr. Lieblich—I object to it as immaterial and irrelevant to this issue, what rent he paid.

The Court—It is cross-examination. Some latitude should be allowed. I admit it.

Mr. Lieblich—Exception.

A. It was $35 in the summer, and $25 in the winter.

Q. And Frank Santo paid what? A. $30 in the summer, and $25 in the winter, and he was supposed to pay that—

Q. How many times did you collect rent from Frank Santo? A. Twice.

Q. That was for the month of January, 1931? A. And February.

Q. Then, you collected twice? A. Yes.

The Court—That is what he said.

Q. Did you ever go into the building while Frank Santo was in possession? A. No, sir.

Q. Your last visit, you said, was about New Year's? A. Yes, sir.

Q. And he came in after New Year's? A. Well, he was—

Q. I beg your pardon?

Mr. Lieblich—Give him a chance to answer.

A. He had rented the house on New Year's Day, but he didn't move in until—move his personal belongings, his clothes, until about the 4th or 5th. I had given him the keys and showed him around the house, and on New Year's Day—

Q. Were you near the building at all during this period that Frank Santo occupied it? A. Well, I passed between Kruger's and the place that I worked at present there, that is quite a ways. A block away from it.

Q. How near did you go to the building? A. About a block away.

Q. No closer? A. Well, no, I don't think so.

Q. You don't know what Frank Santo was doing in the building, do you? A. He rented the building to live in.

Q. As far as you know? A. Yes.

Q. Those proofs of loss which you submitted to the defendant company are sworn to by you

on the 17th day of March, 1931, aren't they? A. Yes, sir.

Q. When did you learn of the fire on February 7? A. When I was woke up.

Q. Who awakened you? A. Boy came over to the house and knocked at the door and woke Mrs. Kruger up, and Mrs. Kruger yelled up to me, to my room, there was a fire.

Q. She yelled up to you that there was a fire? A. Yes.

Q. What did you do? A. Well, I didn't wake up just then, right away. I didn't know where the fire was, so when the commotion downstairs—they were all going to it, I got up and went out and got dressed and went to the fire.

Q. When did you get up? What hour? A. Oh, I could not tell you.

Q. What time was it, about, when Mrs. Kruger shouted up to you? A. I was asleep. I didn't have a watch with me.

Q. Well, you have no idea as to what time? A. No, sir.

Q. Now, as a matter of fact, didn't Mrs. Kruger tell you that the fire was in your house? A. I don't remember that. She told me there was—there was a fire.

Q. She awakened you? A. Yes, she woke me, that is right.

Q. And as nearly as you can remember, what did she say to you? A. Fire, and we ran.

Q. Did you dress? A. Yes, just put my pants—

Q. Right away? A. Right away.

Q. And went out of the house? A. Yes.

Q. And where did you go? A. Over to the fire.

Q. Where did you find the fire? A. Over in back of the school, and it was my house.

Q. Where was the fire centered? A. Right in the whole house. The inside was burning out.

Q. Did the fire on the 7th of February completely destroy the house? A. Well, just about. There wasn't much left. What would be there would have to come down anyway. It was all burned up.

Q. What time was it when you got up? A. Around twelve o'clock.

Q. Of midnight, a little after midnight, February 7th? A. That is it, around there.

Q. Did you go through the building after that fire? A. Yes, sir.

Q. And you saw what damage had been done? A. Yes, sir.

Q. You saw what personal property was in the house? A. Yes, sir.

Q. Did you find in the house all of the property that you set forth in the proof of loss, and which, in answer to your counsel's question, you said, burned in the fire? A. What was not there was burned, I guess. That is the only way I could see.

Q. You mean you saw the remains of the furniture? A. Yes, sir.

Q. And those things that you— A. Yes, sir.

Q. (Continuing) —have told counsel were there? Now, did you notice an electric pump in the cellar? A. Yes, sir.

Q. That was left there? A. Yes, sir.

Q. February 8th, you were asleep again? A. I guess I was.

Q. And were you awakened? A. No.

Q. Well, what happened on the morning of February 8th? A. Well, I came down to breakfast about nine o'clock, I should judge. It was on a Sunday morning, and I saw—

By Mr. Lieblich:

Q. Speak up, so that the jury can hear you. A. There were—Mr. Hines and Mrs. Kruger were there. They were talking, and Mr. Hines does not stay at the same house I do. I says, "Good morning. What are you doing here this time of the morning?" He says, "I just came over to tell you that rest of your house burned down."

By Mr. Stoffer:

Q. Now, that fire on February 8th completely destroyed the house, didn't it? A. Absolutely.

Q. Whatever had been left after the first fire was now gone? A. Yes, sir.

Q. How about the electric pump? A. That didn't seem to be there.

Q. Now, will you tell me—

Mr. Lieblich—You are not accusing the Fire Department of removing it, are you?

Mr. Stoffer—Not at all.

Q. Why did you say in this proof of loss, to which you swore, that the fire on which you were claiming damages from the defendant company

occurred on the 7th of February? A. Well, that is when it did happen.

Q. There was also a fire on the 8th, wasn't there? A. That is right.

Q. You knew that before you signed these proofs of loss? A. Yes, sir.

Q. You swore that the fire for which you were claiming damages occurred on the 7th of February, about one o'clock in the morning? A. That is right.

Q. Why didn't you mention the 8th of February? A. Well, I guess it was the same fire. I didn't mean anything. It burned down. It was a total loss.

Mr. Stoffer—I move that it be stricken out.

The Court—It is his answer to your question. I will let it stand.

Q. In other words,—I will follow that up now—you mean you see the connection between the first fire on February 7, and the second fire on February 8?

Mr. Lieblich—I object, if it please the Court. It doesn't mean he sees any connection.

The Court—This is cross-examination, and he is examining the witness.

Mr. Lieblich—He is examining him as to the date of the fire.

The Court—No, he is examining him as to why, in his proof of loss, he put down the 7th in the proof of loss, when it was

only partially destroyed at that time. I admit it.

Mr. Lieblich—Your Honor will note my exception.

The Witness—What was that question.

Mr. Stoffer—Read the question, please.

(The last question was read.)

A. No.

Q. They were two separate and independent fires on two different days, were they not? A. I don't know. They must have been.

Q. Well, then, why didn't you state in the proof of loss that the fire occurred on the 7th day of February and the 8th day of February? A. I didn't make the proof of loss up, I didn't know.

Q. Did you read the proof of loss before you swore to it? A. Yes, sir.

Q. Now, you also state in the proof of loss that the value of the building was $7,500, and that your claim against the defendant for loss and damage is $6,063. A. Yes.

Q. And you also stated in the proof of loss that at the time of the fire Frank Santo was occupying the building? A. Yes, sir.

Q. You had another policy of insurance on the building, did you not, Mr. Vinick?

Mr. Lieblich—Well, I object. It is immaterial under the stipulation that we have entered into.

Mr. Stoffer—Well, we should show the total insurance, anyway, on the record.

The Court—I admit it.

Mr. Lieblich—Well, it doesn't make any difference as far as I am concerned. That is held by the mortgagee, a $1500 policy.

Q. Another $1500 policy? A. That was held by the mortgagee.

The Court—One moment. It is already in evidence, two policies, one of $3000, and one of $1500.

Mr. Stoffer—No, in addition to those.

The Court—Oh, in addition to those. I admit it. Proceed.

The Witness—It was held by the mortgagee.

By Mr. Stoffer:

Q. I show you a copy of a letter dated May 7, 1931, and ask you if you received the original of that letter, relating to the proofs of loss? A. May 7, 1931.

Q. Did you receive that? A. Yes, sir, I think so. I think so.

Q. And after the receipt of this letter, did you send any other different proof of loss to the company?

Mr. Lieblich—I object, if it please the Court. He has not said positively that he received it. He said, "I may have received it."

Mr. Stoffer—Oh, I didn't understand that.

The Witness—I said, I think I received it.

Q. Well, now, perhaps this will refresh your recollection.

Mr. Lieblich—Well, here, we will help you out, notwithstanding your failure to give us notice to produce. We have the original letter here.

The Court—Well, it is admitted it was received. Go on.

Mr. Stoffer—I offer this.

(The paper referred to was marked, "Defendant's Exhibit 1 for identification.")

Mr. Stoffer—Will you read that last question, please?

(The last question was read as follows: "Question: And after the receipt of this letter, did you send any other different proof of loss to the company?")

A. I don't remember.

Q. You don't remember? No.

Q. Now, this schedule attached to the proof of loss sets forth the items upon which a loss of $6,063 on building is claimed, was that made up by you? A. Yes, sir.

Q. Now, you also have a schedule later on in the proof of loss, setting forth your furniture claim? A. That is right.

Q. Were those items and values fixed by you? A. Yes, sir.

Q. Now, did you buy this furniture? A. No, not all of it, some of it, small items I bought.

Q. Well, what items on this list did you personally buy? A. Well, some of the kitchen utensils.

Q. Kitchen utensils? A. Yes.

Q. Yes, what else? A. I think I bought one end table.

Q. One end table? A. Yes, and just the ornaments and stuff, just the decorations, curtains.

Q. A few of the ornaments and the other articles you received from your mother? A. Yes, sir.

Q. When you testified on direct examination on the question of your counsel, you said that these things cost so much? A. Yes, sir.

Q. You didn't mean to testify that you knew the cost from your knowledge? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Did you buy these things? A. No.

Q. Did you pay for them? A. No.

Q. How old were these articles? A. Well, not very old. A few years old, at the most.

Q. Well, did your mother buy them at the time fixed by you, which was seven years before the fire? A. No, later than that.

Q. Well, how much later? A. Well, it was not all bought at once. It was all bought at different times.

Q. In other words, your mother had been buying articles right along?

By the Court:

Q. Now, what do you mean when you say later? You mean the articles were bought later than seven years ago, or that when you got the house was later than the articles bought? Now, which do you mean? A. Well, a few years back, the articles were bought.

Q. Before you got the house? A. Yes, before I had got the house.

Q. That is what I supposed you mean't, but that was not clear.

By Mr. Stoffer:

Q. Well, now, by reference to this list, perhaps this will help you. Take the larger items there and give us an idea of about how long before the fire they were purchased. A. That living room set, I think, we bought about three years before the fire. The rugs, they were a couple of years before, I should judge.

Q. Before what? A. Before the fire.

Q. Before the fire? A. Yes, sir.

Q. All right. A. The bookcase was put in, oh, just before I left the house.

Q. That is about a year before the fire? A. Yes, sir. You just want the bigger items, or all of them?

Q. Well, the larger items.

Q. Three piece wicker set. A. The wicker set was about the same time I had—the same time I had the living room set.

Q. That is three years before the fire? A. Yes, sir. The kitchen cabinet was put in a year or so before the fire happened. I guess that is all the bigger ones. The rest were small.

Q. Well, now, I am interested in a few of the small items. Shades, you have down there $25. How many shades were there? A. I will tell you in a minute. About nineteen.

Q. Nineteen. When were they— A. Oh, a couple of years before the fire, I should judge.

Q. Now, here, you say, you have ten window

shades. Now, which is right, ten or nineteen? A. Well, the ones out on the porch don't have the shades; they had curtains.

Q. Now, curtains, you have those as a separate item haven't, you? A. Yes, sir.

Q. You have a separate charge of $25 for the curtains, or rather, value of $25 for the curtains? A. Yes, but I figured the curtains and shades all in one. How many windows I had in the house, you asked me, and that is what I told you.

By the Court:

Q. No, he didn't. He asked you how many shades you had. A. Well, shades, about ten.

By Mr. Stoffer:

Q. At $2.50 a shade, is that right? A. Yes.

Q. And the curtains, when were they bought? A. Well, it was a year or two before the fire, I should judge.

Q. And you had ten of them, at the value here of $20? A. That is right, $2.00 a set.

Q. Now, these prices that you put down on the furniture list, are they what the property had cost when purchased? A. Yes.

Q. You make no allowance for depreciation? A. No.

Q. From use? A. No.

Q. And where did you obtain the information as to the original cost of all these articles? A. Oh, just, many times I was with my people when they bought them, and that is where I got them.

Q. You remember what your mother had paid

for them two or three years before the fire? A. Yes, sir.

Q. That is how you made up this list A. Yes, sir.

By the Court:

Q. You lived in this property yourself? A. Not at the time of the fire.

Q. Awhile before the fire? A. Yes.

Q. Are you married? A. No, sir.

By Mr. Stoffer:

Q. Mr. Vinick, did you not tell Mr. Baxter—

Mr. Lieblich—Who is Mr. Baxter? The adjuster for the company?

Mr. Stoffer—Mr. Baxter has already been identified.

Mr. Lieblich—Well, I know, but are you going to admit that he is the adjuster for the company?

Mr. Stoffer—Oh, yes, of course, I will admit that.

Mr. Lieblich—All right.

Q. (Continuing) —that you had arranged with Frank Santo to pay $15 rent during the first month, and $80 the second? A. No, sir.

Q. You didn't make any such arrangement with Frank Santo? A. No, sir.

Mr. Stoffer—All right.

Redirect Examination by Mr. Lieblich:

Q. This time that you have testified to, when the fire happened, were you asleep or awake? A. When the fire happened?

Q. Yes. A. I was asleep.

Q. I see. Are you a good sleeper, a sound sleeper? A. Oh, boy.

Q. How long did you live in this house that was destroyed by fire? A. About five or six years.

Mr. Lieblich—That is all.

FRED DAHMER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Dahmer, what is your business, trade, or profession? A. A lawyer.

Q. And where do you practice law? A. In New Brunswick.

Q. Do you know Mr. Vinick, the plaintiff in this case? A. I do.

Q. Did you have anything to do with respect to this fire and the claim for damages? A. Yes.

Mr. Lieblich—I call for the production of that letter of Mr. Dahmer to Harkins & Victory Company, dated February 7, 1931.

Mr. Stoffer—Never received it and don't have it.

Mr. Lieblich—We served you notice to produce.

Q. I show you this paper, Mr. Dahmer, and ask you if you can tell us what it is? A. That is a letter that I sent to Harkins & Victory, under date of February 7, 1931, advising them, Harkins & Victory, that Anatole Vinick—

Q. It is a carbon copy, is it not? A. It is a carbon copy.

Q. Can you tell us, is that the carbon copy of the letter that you wrote? A. Yes.

Q. Did you sign the letter? A. Yes.

Q. Did you mail the letter? A. Yes.

Q. How did you mail it? By posting it in— A. No, I gave it to the mail man who calls at my office daily.

Q. Did the letter have a stamp on it? A. Yes.

Q. Did it have your return address on it? A. Yes.

Q. Did the letter ever come back to you? A. No, it didn't.

Q. Is that an exact copy of the letter you wrote? A. Yes.

Mr. Lieblich—I offer the copy in evidence.

Mr. Stoffer—May I see it?

Mr. Lieblich—(Handing paper.)

Mr. Stoffer—No objection.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 6.")

Mr. Stoffer—May I see the other letter, and you will not have to go through all that.

Mr. Lieblich—The next is a letter dated March 18, from Mr. Dahmer to the Fire Insurance Company, enclosing proofs of loss.

Mr. Stoffer—The proofs of loss are already in evidence.

Mr. Lieblich—I know that, but you raised some question about this kid not putting in the right dates.

Mr. Stoffer—No objection.

Mr. Lieblich—I offer in evidence letter dated March 18, 1931, from Mr. Dahmer to the Niagara Fire Insurance Company, enclosing two proofs of loss, Exhibit P-5, I believe it was.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 7.")

Q. I show you this proof of loss, referring to Exhibit P-4, and ask you if you have ever seen this before? A. Yes, sir; I have.

Q. What is there about it that causes you to identify it? A. I prepared it.

Q. Did I ask you how long you have been practicing law? A. Since 1923.

Q. I show you the statements herein contained, "A fire occurred on the 7th of February, 1931, at about the hour of one o'clock A.M." Can you tell us how you came to put that in in the preparation of that proof of loss?

Mr. Stoffer—I object to that on the ground that this is an attempt to vary this evidence by parole evidence. It is immaterial to the issues, immaterial under the plaintiff's prima facie case.

The Court—Well, there may be some ground for the latter part of the objection. It is quite clear what the purpose of this question is.

Mr. Lieblich—The purpose is simply this: Counsel has attempted to inject—

The Court—Yes, I understand. The latter part of the objection is to the effect that it is premature.

Mr. Lieblich—I grant that, sir. I could have saved Mr. Dahmer, here, for rebuttal. I am simply taking a short cut, so he can go back to his office.

The Court—All right. Let it go in.

Mr. Stoffer—I withdraw the objection.

A. Mr. Vinick told me that there was a fire, occurring at that particular time. For that reason, I put it in.

Q. Did he explain to you how much, if any, damage was occasioned by that fire? A. As he explained to me, it was a total destruction of the property.

Q. Now, how came you to make up that particular paper, Exhibit P-4? A. For the reason that I endeavored, from Mr. Harvey Vorme, in New York City, to obtain a proof of loss, who was the agent under the policy, at least, I saw his name on the policy, and I also endeavored to get a proof of loss—

Mr. Stoffer—I must object to that, your Honor. The paper is in evidence. It is a proof—

The Court—Yes.

Q. Did you make a request of the Niagara Fire Insurance Company to give you some blank proofs of loss?

Mr. Stoffer—I object to it as immaterial.

The Court—Oh, I will admit it.

A. Through their agent, I did, yes.

Mr. Lieblich—That is all.

Cross-Examination by Mr. Stoffer:

Q. I understand, then, that the information that is in that proof of loss is what Mr. Vinick told you A. Absolutely is.

Mr. Stoffer—That is all.

By Mr. Lieblich:

Q. And you represented him in his negotiations with the Insurance Company? A. I did.

Mr. Lieblich—That is all.

AUGUST MORRIS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Morris, what is your busines, trade, or occupation? A. Builder and carpenter.

Q. Builder what? A. Carpenter.

Q. How long have you been engaged in that line of work? A. Ten years.

Q. And during the course of your experience as a carpenter and builder, have you had occasion to build frame dwelling houses? A. I have.

Q. Have you ever seen this house of Mr. Vinick's? A. 1927, 1928, 1929, and 1930.

Q. Did you have occasion to see it more than once? A. That is, at the—during the period of time in those years?

Q. Yes. A. Yes.

Q. And as a carpenter, are you acquainted with the market value of material, supplies, labor, and other incidentals necessary to the construction of a frame building? A. Yes.

Q. I show you these papers, referring to Exhibit P-5, and ask you if you have seen those? A. I have.

Q. Do they correctly represent the Vinick house as you knew it? A. Yes.

Q. Have you, at Mr. Vinicks's request, or at anybody's request, made an estimate of the calculation of the market value or replacement cost of that building? A. I did.

Q. And what, in your opinion, is the market

value or replacement cost of that building today? A. $5,550.

Q. As you knew the building, and assuming that the building was today six or seven years old, can you tell us what, in your opinion, was the original cost of the construction of that building? A. I imagine it was about $6,500.

Q. How much, if anything, would you figure for depreciation on the building as you knew it? A. I imagine about fifteen or twenty per cent.

Q. Per cent. All right, that is all.

Mr. Lieblich—You may take the witness.

Cross-Examination by Mr. Stoffer:

Q. Will you tell us, Mr. Morris, what kind of materials this building was made of? A. Frame construction and plaster inside walls, oak floors, double flooring, and field and storm foundation.

Q. One story building? A. Yes.

Q. How many rooms? A. Five rooms and a bath; six rooms and a bath.

Q. What were the dimensions of the building? A. I imagine they were 28 by 28, with the porch extension all around.

Q. Now, as of what time did you figure the value of this building? A. When I estimated it?

Q. Yes, your estimate? A. That is the present period.

Q. As of the present time? A. Yes.

Q. Today, you mean? A. Yes.

Q. And your figure for replacement today is what, exactly? A. $5,550.

Q. $550. A. $5,550.
Q. 5,550?

The Court—Yes, that is what he said.

By the Court:

Q. How many cubic feet did you estimate? Did you estimate it? A. I haven't got the figures, that is, the detailed figures on it. I just submitted the total amount on that.

Q. Well, how much per cubic foot would you estimate a house of that character would cost? A. About eighty cents.

Q. Eighty cents a cubic foot? A. Yes.

The Court—Go on.

Q. Is that the method you employed in arriving at your figures, the cubic foot method? A. No.

Q. Are you familiar with the cubic foot method? A. Not accurate extent, and that is the reason that I go over the details and take the long route to it.

Q. So that you used, what we call, the detail method? A. Yes.

Q. You took every item that you thought went into the construction of this building? A. Yes.

Q. Did you figure anything for the foundation? A. I did.

Q. The foundation was there, wasn't it? A. I don't know.

Q. What? A. I don't know.

Q. How much did you allow for the founda-

tion? A. I don't recall. I haven't got the detailed figures.

Q. Where are they? A. Home.

Q. Now, if you assumed in making your figures that this house was seven years old, or what did you seek— A. The replacement value.

Q. The replacement value, so that your figure of $5,550 means that there would be a new building there of the same character as the building which existed prior to the fire? A. Yes.

Q. You made no allowance for depreciation? A. No.

Q. So that your opinion is that if the building was seven years old, an allowance of fifteen to twenty per cent. for depreciation would be in order? A. That is the addition of fifteen or twenty per cent. to the price I have figured to this time.

Q. What is the depreciation, Mr. Morris? A. On what?

Q. On a building? A. Well, on the figure that I submitted, there is no depreciation on there.

Q. No depreciation?

By the Court:

Q. I think the witness means, see if I understand you rightly. You mean that the $5,550 was your item after you had taken off the depreciation, is that right? A. Yes, the replacement of the building, if I had to replace the building today.

The Court—It goes beyond me.

Mr. Stoffer—Perhaps I can get at it this way.

The Court—Perhaps you can. I can't.

By Mr. Stoffer:

Q. In other words, taking the prices of lumber today, and taking the prices of labor today, to rebuild the building according to those plans, it would, in your opinion, cost $5,550? A. Yes.

Q. The result would be that you would have a new building? A. Yes.

Q. Now, then, I am asking you whether, assuming the building was only seven years old at the time it was burned, whether, when counsel for the plaintiff asked you the question about depreciation, whether you intended to say that a fair allowance for depreciation would be fifteen to twenty per cent., is that right? A. Yes.

Q. Which would mean that we would have to deduct from $5,550, fifteen to twenty per cent, for depreciation?

Mr. Lieblich—Wait a minute. Now, I object, if it please the Court. He does not mean any such thing at all.

The Court—No, no. It is a proper question.

Mr. Lieblich—No, he is testifying, he says, which means.

The Court—No, no. I must rule on the competency of the question. The question is competent. Now, then, if that is not the situation, let the witness answer, not counsel. Go on.

Mr. Lieblich—I object to the form of the question.

The Court—No.

Mr. Lieblich—Not to its competency.

The Court—I admit it. Proceed.

A. If I may answer that, if I figured replacing the building a few years ago, the price would be fifteen or twenty per cent. greater than the price that it is today.

By the Court:

Q. Well, one moment. That is, because the cost of construction seven or eight years ago was greater than it is today? A. Yes.

By Mr. Stoffer:

Q. Now, let me make myself clear as to what you mean by depreciation. Depreciation is an allowance for normal wear and tear in the use of a building? A. Yes.

Q. Now, assuming that this building, as the plaintiff has testified, was seven years old before this fire, how much would you, as a contractor and builder, allow as a deduction from the cost price for depreciation? A. Well, if you put up a new building now, you won't figure depreciation. At that time, if you put it, you allowed depreciation. If you took a $7,000, or a $6,500, then I would allow you fifteen or twenty per cent. depreciation.

Q. What I am trying to get at, Mr. Morris, is, the plaintiff in this case, if he is entitled to recover, is entitled to have a building of the same

kind as stood there at the time of the fire. Now, at that time he had a building which was used for seven years. Now, my question, and your testimony, that the replacement value now, today, would be $5,550, how much would you deduct from that in order to give the plaintiff a building of the same kind that he had before, with the same condition, the same wear and tear? A. I would not allow him anything on that if I had to replace the building.

Q. If you build a building today, and it is used for five years, in your opinion, what is the value of the building at the end of five years? A. I can't say. It may go up or down.

Q. But the intrinsic value— You recognize that there is a difference between a new building and a used building? A. Yes.

Q. Now, what would you allow, in your opinion as a carpenter and builder, what percentage would you allow per year for depreciation from normal use of a building? A. I haven't figured it out.

Q. You haven't figured it. All right. Where do you do your work? Where is your place of business? A. New Market.

Q. How long have you known Mr. Vinick? A. Maybe seven, six or seven years, since he was a little boy there.

Q. And it is at his request that you made up these figures? A. Yes.

Mr. Stoffer—That is all.

By Mr. Lieblich:

Q. Mr. Morris, this building, what was it occu-

pied as? Was it a dwelling house, a store, or what? A. A dwelling house.

Mr. Lieblich—That is all.
Mr. Lieblich—The plaintiff rests.

(The Plaintiff Rested.)

JAMES GATES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Stoffer:

Q. Mr. Gates, where do you live? A. I live at—right alongeside of Fellowship Farm School, on the Shelton-New Market Road.

Q. How long have you lived at Shelton? A. I have lived there since the spring of 1930.

Q. Please tell us the location of your house with respect to the house owned by the plaintiff, Mr. Vinick. A. It is about one hundred feet west from the Vinick house.

Q. Any houses in between the two? A. No, sir.

Q. Do you know, Mr. Gates, how long ago the house which was involved in a fire on February 7th or 8th, 1931, had been built? A. I could not be definite, but it was built during the war period, about, I should say, not later than 1918.

Q. Did you have anything to do with the building of that house? A. Well, I worked on it, I think, one or two days, on the laying of the sills of the house.

Q. And can you tell us how long before 1931, the house had been occupied by Mrs. Vinick or Mrs. Dunn? A. No, I could not tell that. It was several years after it was built that Mr. Dunn bought it from a man by the name of Cutler, who had it constructed.

Q. Do you know when Mrs. Dunn left that house and went to Philadelphia, about how long before the fire? A. I am not very definite about that, but it was some time before the fire.

Q. Did you observe Mr. Vinick living in that building? A. Yes.

Q. While Mrs. Dunn, his mother, was living there? A. Yes.

Q. And after Mrs. Dunn left, did you observe the tenants who occupied the building? A. Yes.

Q. Will you tell us, during the year 1930, how many tenants there were in the building? A. Only one, according to my recollection.

Q. So far as you know, when did that one take possession of this building? A. It was early in the spring.

Q. And how long did he stay? A. He stayed until some time in the autumn.

Q. And in 1931, did you observe any tenant take possession of the building? A. Yes.

Q. About when? A. Well, it was about the beginning of the year.

Q. And did you observe how long that tenant stayed in the building? A. Well, I know that he stayed there until just before the fire.

Q. How many days before the fire, approximately, Mr. Gates, did he leave? A. Well, I noticed his absence about five or six days before the fire.

Q. During the period during which that last tenant occupied the building, did you observe anything unusual about the use of the house by that tenant? A. Well, I came to the conclusion it was being used for—

Mr. Lieblich—I object.
The Court—Yes.

Q. Not your conclusion, what did you observe? Just tell us what you saw, by your senses, or what came to you? A. Well, I smelled—

Mr. Lieblich—If it please the Court, that would call for the operation of his mind, and I think we are limited to what he actually saw for the purpose of testifying here.

The Witness—How about hearing or smelling?

The Court—Well, when I went to school, I was taught that we had five senses, and we could get knowledge through any one of the five. Now, he started out to say he smelled.

By the Court:

Q. Now, go Mr. Witness. A. Well, I smelled a very strong odor. It was so strong that it penetrated into my own house when the windows and doors were closed, and I recognized this distillery smell with which I was familiar from the time I was a boy.

By Mr. Stoffer:

Q. Was it a pronounced odor? A. Yes, it was very strong.

Q. Now, how many times during this period, would you say, you smelled this odor? A. Well, I don't know just how many times. I may say it was practically continuous during that time.

Q. And, you say, it actually penetrated into your house which was a hundred yards from— A. A hundred feet away.

Q. A hundred feet away, excuse me. A. Yes, it did.

Q. Did you see the first fire on the morning of February 7, 1931? A. I was called up, yes, sir, after the fire had started.

Q. Did you observe the firemen fighting that fire? A. Yes.

Q. Did you go through the house after that first fire on February 7? A. No, I didn't go through the house.

Q. Were you present at the second fire early on the morning of February 8? A. Yes.

Q. What was the result of that fire? A. Well, the second fire was a total destruction.

Q. How much destruction did you observe after the first fire? A. Well, the building was badly gutted, but the shell of the building was still standing, with the exception of the roof.

By Mr. Lieblich:

Q. What? A. With the exception of the roof. There was a couple—a few timbers and part of the roof that was still intact.

By Mr. Stoffer:

Q. Did you ever see any of the personal property, the furniture in this house? A. Well, I saw it while they were living there.

Q. You mean, while Mrs. Dunn was living there? A. Yes.

Q. But after that, you don't know? A. I don't know.

Mr. Stoffer—Take the witness.

Cross-Examination by Mr. Lieblich:

Q. Did I understand you to say that you were familiar with the distillery odor? A. I don't get you. Please come up close. I don't hear so well.

Q. Oh, pardon me. Did I understand you to say that you were acquainted with the distillery odor? A. Yes, sir.

Q. Why do you say that? What makes you acquainted with that? A. Well, as a boy, I used to be around a distillery.

Q. I see. In other words, you are not a drinking man? A. Yes, sir.

Q. As a boy. May I ask how old you are now? A. Seventy-three.

Q. So that for a period of about fifty years, you have not partaken of any alcoholic beverages? A. Oh, I have.

Q. Oh, have you? All right. Well, that is what we want to find out. I want to see how good a judge you are. A. When I say I am not a drinking man, why, I am not addicted to the habit.

Q. You do occasionally take a nip? A. Yes.

Q. Do you know the difference between rye whiskey and brandy? A. Not necessarily, but I know a distillery smell.

Q. Well, what do they make in a distillery that you are acquainted with? What do they distill? A. Well, they make whiskey, at least, the one that I was around was engaged in the manufacture of whiskey.

Q. Yes. What kind of whiskey? A. I don't know whether it was rye whiskey, or corn whiskey, or Bourbon whiskey, or a mixture of both.

Q. Now, there is a difference, is there not, in the smell of mash for rye, or the mash that rye whiskey is made out of, and there is a difference between the smell of Bourbon whiskey and corn whiskey? A. There is a distinction between the smell of rye whiskey and corn whiskey, and all the different whiskeys—

Q. Now,—

The Court—Let the witness complete the answer.

A. (Continuing) —but there is very little distinction between the smell of one mash and another, so far as I remember. I know that I, as a boy, I became very well acquainted with the distillery mash smell.

Q. Well, this smell that you have testified to, this was in the middle of January? A. Yes.

Q. 1931? A. Yes, sir.

Q. And it was a smell of corn whiskey or rye whiskey, or what was it? A. I got the smell of distillery mash.

Q. And your house is west of the Vinick house? A. Yes, sir.

Q. And this tenant lived in this building during the month of January, up until February 7? A. Yes, sir, to the best of my knowledge. I think there were one or two occasions when he was away a short time during that time.

Q. You didn't go into this house at all after the first fire, did you? A. No, sir.

Q. And the first fire practically destroyed everything except the shell of the building and a few timbers on the roof? A. So far as I could see, that is all I could see, was the shell of the building.

Q. Yes, that is right, and you had never been in the building during the time that this man occupied it, had you? A. No, I was not there.

Q. And he kept his windows closed, I suppose, it being January? A. He did.

Q. Yes, and you kept the windows open in January? A. What was that?

Q. Did you keep your windows open in January and February, 1931? A. No, sir.

The Court—A distillery has a very penetrating smell, Mr. Lieblich.

Mr. Lieblich—So he said, Judge Lyon.

Q. You didn't have any argument of any kind with this Mr. Santo? A. What is that?

Q. You didn't have any argument of any kind with this Mr. Santo, the tenant? A. Oh, no, no sir.

Q. Did you talk this matter over with anyone representing the insurance company, prior to

your coming here to testify, Mr. Gates? A. I believe I did have a short conversation.

Q. A gentleman came to see you? A. With the company's attorney.

Q. Oh, Mr. Stoffer? A. Yes, sir.

Q. Before you testified? A. Yes, sir.

Mr. Lieblich—That is all.

Redirect Examination by Mr. Stoffer:

Q. Because of my interview with you, did I suggest any of the testimony that you have given today? A. No, sir.

Q. Did I do any more than ask you what you knew about this case? A. That is all.

Mr. Stoffer—That is all.

CLAUDE PENROSE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Stoffer:

Q. Chief, in February, 1931, what was your position with the New Market Fire Department? A. Fire Chief.

Q. On the morning of February 7, did you get a call to Stelton? A. Yes, a call on the 7th, at 12.30.

Q. Will you speak up, please? A. Twelve-thirty.

Q. Did you proceed to Stelton? A. Yes, sir.

Q. And what did you observe when you got

to the scene of the fire? A. Well, when we got there the flame was shooting out the roof. I put a line of hose up on the room, and a line downstairs. We checked the fire upstairs. We checked the fire—we gradually worked together. We finally put it out. At one little corner up on the roof, we had a stubborn fire there. I guess we worked about an hour. Finally, we checked it, and that was about a six foot area right straight from the cellar right up to the roof. There was a six foot diameter that it burned. The rest of the roof was o.k., and downstairs we punctured some of the ceilings, to make sure that the fire was out, into the plaster board ceilings, and, of course, we could not find no fires in any of the rooms. It was just this one area right straight up, and we was there quite awhile and made sure that everything was out. I guess we was there for about two hours, two hours and a half.

Q. Can you give us, please, the approximate area that you say was burned by this fire? A. I should say about a six foot in diameter, from the cellar to the roof.

Q. All the way up? A. Right straight up.

Q. And didn't shoot out? A. No.

Q. Laterally? A. No.

Q. Now, when you made your investigation after the fire, did you notice any furniture in the building? A. Well, it was practically no—

Mr. Lieblich—Wait a minute, Chief. He has not testified that he made any investigation after the fire.

The Court—Oh, we will assume that he did.

By the Court:

Q. What did you see after the fire? A. Well, there was practically no furniture in the house. There was a small well, I guess you would call it, a day bed, and a couple of chairs in one little room off to the right from the front door. I don't know what room you call it, whether a dining room, living room, or what, and that is practically all the furniture I seen in there, and, also, there was a mattress on this day bed, because we threw the mattress outside.

Q. Chief, did you see any of this list of articles in that house, or the remains of any such articles? A. No, I saw one day bed there, but the rest of the stuff there, I didn't take notice of it.

Q. How thorough was your examination,Chief? A. Well, after a fire, we have to go all through all the rooms to make sure that the fire is out, and I know there was nothing in our way, such as furniture.

Q. Now, before you left on the morning of February 7, did you make certain that the fire was completely out? A. Absolutely.

Q. On that occasion, on the morning of February 7, did you notice an electric pump anywhere in the building? A. Yes, in the cellar.

Q. Where was it? A. In the cellar.

Q. When was the occasion when you got a call to go to the same building? A. That was February 8, five-forty in the morning.

Q. And tell us what you observed when you got there then, Chief. A. Well, we got the alarm. We hustled out, got down there, and, well, four corners were in flame. We could not do anything. It was too far gone.

Q. Did you inspect the ruins after the fire died out? A. Well, walked around it. We could not get into it. That is one sure thing.

Q. Was that electric pump there then? A. No, it was not.

Q. Now, Chief, after the fire, the first fire, was the front door broken in? A. The first fire?

Q. The first fire.

The Court—After the first fire. You said, after the first fire?

A. Oh, after the first fire? Well, it was too far gone. I could not tell whether it had been opened, shut, or what. It was burned, all in flames.

Mr. Lieblich—What, all in flames?
(The last answer was read.)
Mr. Lieblich—Oh.

By Mr. Stoffer:

Q. Where was the entrance to the cellar? A. On the righthand side of the house, as you are going into the front entrance.

Q. What were the dimensions of this electric pump? Was it a pretty substantial pump? A. Well, it was a small water pump for house purposes.

Q. Now, after the second fire, did you look in the cellar? A. Well, I happened to go by. You could not help noticing the cellar, on account of the bright lights shining into the cellar. You could not help seeing it.

Q. Chief, between the first and second fires, was there a snowfall? A. Yes.

Q. Do you recall? A. Yes.

Q. About how many hours before the second fire, approximately, when did the snow fall? A. Well, I believe it snowed during the night of the second fire.

Q. In other words, some time before five o'clock in the morning? A. Because I looked around to see if I could see some stranger, that is to say, if I could see any tracks leading away from the house, but I could not.

Q. But you could not tell us how many hours before it snowed? A. No, I could not tell you.

Mr. Stoffer—All right. Take the witness.

Cross-Examination by Mr. Lieblich:

Q. Chief, this water pump that they are questioning you about, it was not used for pumping whiskey, was it? A. Well, I guess it is used for water, as far as I know.

Q. Yes. It was used in the house, was it not, for the purpose of getting a water supply? A. I imagine so.

Q. Did it look like anything else to you? A. No.

Q. It was a pretty cold night, Chief, when this fire happened? A. It was cold enough.

Q. It was blowing pretty good? A. No, it was not. If it was blowing, the house would not be there.

Q. It was pretty snappy, wasn't it? You will admit that? A. It was chilly. It was not zero weather. I wouldn't want to go out there in my shirt sleeves at that time of night.

Q. I suppose not. You were there about two and a half hours? A. I suppose, around that time.

Q. I guess, after the fire was out, you were glad to get away. A. Always make sure the fire was out.

Q. I am asking you if you were glad to get away? A. After the fire was out, sure we were glad to get away.

Q. After that fire was out, you were anxious to get back to get to bed? A. Yes.

Q. It was still dark, wasn't it? A. Yes, sir.

Q. Did you take a chance and go through that building, what was left of it at that hour of the morning? A. We carry—

Q. Did you, or did you not? A. We don't take no chances. No, there was nothing dangerous about that.

Q. Nothing dangerous about it at all? A. No, sir.

Q. So that you want this Jury to believe that on February 7, this fire consumed only a six inch area from the cellar to the roof.

The Court—No, six foot, he said.

A. Six foot.

By Mr. Lieblich:

Q. Six foot? A. That is right.

Q. And the fire didn't spread at all? A. No, sir.

Q. I see. Did you say that the front door was aflame?

The Court—During the second fire.

The Witness—The second fire.

The Court—During the second fire, he said, the front door was aflame, not the first.

By Mr. Lieblich:

Q. Then, I misunderstood you. A. I guess you did.

Q. Did you hear the next door neighbor testify, Mr. Gates? A. Yes, sir.

Q. That after the first fire all that was left was the shell of the roof and some rafters on the roof? Did you hear him testify to that? A. I heard him say that, but it was not after—

Q. Is that a mistake? A. Is he mistaken?

Q. Yes. A. Yes, he is mistaken.

Q. Well, did you talk to anybody about this case before you came here today to testify? A. No.

Q. Not a soul? A. Oh, that is, among the firemen, that is all.

Q. Oh, you never talked to the insurance company about it? A. No.

Q. You are sure about it? A. I didn't tell the insurance company about that. I only talked to the underwriters, that is the only people I talked to.

Q. You talked to the underwriters? A. That is right.

Q. Well, the underwriters represent the insurance company? A. Well, yes, in a way.

Q. Well, then, you did talk to somebody, didn't you? A. Yes.

Q. Who did you talk to? A. Nobody in this particular case.

Q. So you didn't tell a soul in this particular case—

The Court—No, he said he told the underwriters.

A. No, he was asking me if I ever talked about the fire to the insurance. I said, yes, some of the fires, I did talk to the underwriters, but not this particular fire.

By Mr. Lieblich:

Q. All right. If I understand you correctly, you didn't talk to a soul about what you knew about this fire? A. Just to talk among the firemen, that is all.

Q. You didn't talk to anybody on behalf of the insurance company, either lawyers, investigators, or anybody, is that right? A. No.

Mr. Lieblich—That is all.

LUTHER HENRY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Stoffer:

Q. Mr. Henry, what was your position with the New Market Fire Department? A. I was the second assistant chief.

Q. On February 7, 1931? A. I was the second assistant chief.

Q. And how long after the alarm came in that morning did you reach the scene of the fire? A. About five minutes after the fire broke I arrived.

Q. After that fire, did you go through the building? A. Yes, sir.

Q. Will you please tell us what furniture you saw in that building? A. We saw, of course, the day bed, and two or three chairs, two chairs, if I remember right.

Q. I show you a list of articles annext to proof of loss, Exhibit P-4, and ask you whether, looking at that, you saw those articles there, or the remains of such articles? A. No. There was only a day bed, two chairs, and there was a kitchen range.

Q. How thorough was your examination of this building? A. Well, I went in every room after the fire.

Q. Did you make certain that the fire was entirely out before you left? A. Yes, I always do.

Q. Was it entirely out? A. Yes, it was.

Q. When did you get a call again to the same place? A. Five-forty the next day; February 8th, at five-forty.

Q. What did you observe then? A. Well, the place was a total loss at that time, all in flames, the four walls.

Q. By the way, do you know Mrs. Kruger's place on Stelton Road there? A. I know that place.

Q. How far up, approximately, would you say that the building that was burned was from that store or house of Mrs. Kruger? A. I should say, about two thousand feet, approximately two thousand.

Q. And between the first and second fires, was there a snowfall? A. Yes.

Q. Now, the second fire was approximately within twenty-nine hours after? A. Yes, twenty-nine hours and ten minutes.

Q. After the first it had snowed? A. Yes.

Q. Do you know when the snow fell on the morning of February 8? A. No.

Q. Did you notice an electric pump in the cellar after the first fire? A. Yes, sir.

Q. Was that electric pump in the cellar after the second fire? A. No.

Mr. Stoffer—Take the witness.

Mr. Lieblich—No questions.

Mr. Stoffer—I desire now to read deposition of Mrs. Bertha Kruger, Plainfield Avenue, Stelton, taken yesterday, in the presence of counsel.

Mr. Lieblich—You better explain to the Jury what it is, and what way you took it.

Mr. Stoffer—Mrs. Kruger claimed an inability to come to court because of some

trouble with her legs, so counsel agreed to go down to Mrs. Kruger's home in Stelton and take her testimony by deposition form, rather than bring her to court.

Mr. Stoffer—It is stipulated and agreed by and between the attorneys for the respective parties that the deposition de bene esse of Mrs. Bertha Kruger should be taken at the home of said witness in Stelton, New Jersey on May 10, 1932, at 2.30 P. M. It is further stipulated that the formal signature of the transcript of the deposition by Mrs. Kruger is waived. It is also stipulated and agreed that the oath to the witness may be administered by John R. McElhaney, and the deposition may be taken by Mr. Andrew P. Haggerty.

BERTHA KRUGER, being duly sworn according to law, on her oath, saith:

Direct Examination by Mr. Stoffer:

Q. Mrs. Kruger, where do you live? A. Right here. Plainfield avenue, Stelton. No number to it; Piscataway township.

Q. How long have you known Mr. Anatole Vinick? A. I know him since he was an infant.

Q. How long has he been living with you? A. With me, now it is going to be three years.

Q. Is he still living with you? A. Yes, he is still living with us.

Q. How far from your home is the building owned by Mr. Vinick which was burned about Feb-

ruary 7 and 8, 1931? A. It is about a two minutes walk. It is right behind this public school. I suppose you seen the place.

Mr. McElhaney—The witness designating the school opposite her home.

By Mr. Stoffer:

Q. In other words you proceed here to the left as you leave your store and turn in at the first corner and walk down there about how far from the corner? A. I think it could not be more than two hundred feet in.

Q. Were you acquainted with the property there owned by Mr. Vinick? A. I have never seen it from inside, because never visiting anybody, and he was not living there while he was living with me, so of course I know the house from outside, because I am living long enough here to know every house, but I was never into it.

Q. How long have you lived in this community? A. I lived about seventeen years around here, five in this place, but we had another place.

Q. Was the house up when you first came to live in this community? A. Oh, yes, that house was up, sure. I don't know exactly when it was built, but I imagine it was quite a while up.

Q. On February 7, 1931, did you learn that there was a fire in that house? A. While we all was in bed, there was a neighbor, his name is Walter Hines, he came and woke us, telling that Tolly's house is burning; so we got up and we called for Tolly also. Tolly was getting up. We left the house and he remained in bed. My husband and I left the house and he remained in bed as we left it.

Q. As I understand it, when you learned of the fire, you went up to Mr. Vinick's room and woke him up? A. Yes.

Q. And what did you say to him? A. I said, "Tolly, your house is burning."

Q. And what did he say to you? A. He didn't answer any definite. He says, "Ah, go on." It is just like that, and he went on and slept.

Q. Now, the next day did you learn that the house was again on fire? A. Well, we heard that about nine o'clock in the morning, and it was early. Nobody came to us that night, but there was a new snow, and I said to my husband, "That's funny," and this Hines—but I had no idea; then this same Walter Hines came again, getting something for his own breakfast, and he said, "Gee, I was mad last night. It burned again towards morning rather," so while Walter sat here, Tolly got also up, and he said, "What are you doing around here?"

And he said, "I am just telling Mrs. Kruger that your house burned again."

That is why he was in the kitchen, otherwise he never comes in the kitchen. He said, "Isn't that funny?" He had been in bed, then also we all got up when he told us about five o'clock, I think, between five and six. That it had burned again about nine o'clock is the first I heard of; in fact we all heard of, that the same Walter Hines came in and let us know what happened.

Q. What time was it that you tried to wake Mr. Vinick when you heard of the first fire? A. Well, I could not tell you that definite, but it must have been around twelve o'clock.

Q. Around midnight? A. It must have been because we were all in bed, but it was not—

Q. And when you heard of the second fire, the next day, from Walter Hines, was Mr. Vinick already up? A. He just got up while we all sat there.

Q. Did you go up to Mr. Vinick's room and tell him about it? A. No, I didn't, but while we all sat there, he appeared too, he came.

Q. What did he do when he was told about the second fire? A. He never said much that way. Only he said, "That is strange; it was all out," something of that sort. He never—

Q. Did he go out to see the building? A. Not immediately because of course he had breakfast.

Q. Did he have his breakfast first? A. Well, of course, we was in the midst of breakfast, while this Walter Hines sat there; Tolly never stays around the house. He just comes in for his meals and he goes out. He goes out a good deal, but he came from upstairs just that morning that we sat here, Sunday morning. I got up myself late, that is why we had breakfast late. He didn't make an alarm of the second fire, because we didn't know anything about it, and then it must have been nine o'clock in the morning.

Q. Do you know how soon after he learned of the second fire on the morning of February 8, 1931, he went over there? A. I think around that time when he came down here for breakfast, that is when he heard of it first.

Q. What I mean— A. That is all—I mean–

Q. What I mean is, do you know of your own knowledge how soon after he heard of it that morning he went over there? A. That I don't know. I took it for granted that after he left the house after breakfast that he did go over, but I never

asked him those questions, "Where are you going," and you know he is leaving the house, and we haven't got the habit of asking the men here where are you going now, what are you doing now?

Q. Did he appear depressed when he heard of the second fire?

Mr. McElhaney—Just a minute, please. I object to that question on the ground that it calls for a conclusion on the part of this witness.

The Court—I admit it.

Mr. Lieblich—Your Honor will note an exception.

By Mr. Stoffer:

Q. All right now, you can answer. A. How would a young fellow be sort of depressed? I suppose it is not in his nature. He don't cry. Naturally he would not cry over anything. You know how—

Q. Are you sure, Mrs. Kruger, that the first information that anybody here had about the second fire was when Mr. Hines came in here about nine o'clock in the morning? A. That is when we heard it. Ah, there was that Mr. Gates, he was right at the fire again.

Q. Yes. A. Mr. Gates and Hines are the nearest neighbor. One side is Gates and one side is Hines. Those two happened to be right at the fire, but we heard later in the morning as Hines came in and got something for the breakfast, and he said, "I was mad this morning. The damn thing burned again." Just like that, "and I had to get

up. I wanted to sleep late, but I had to get up and protect my own."

Q. I would like to try to refresh your recollection as to whether it is not true that when you learned of the second fire you had to go up to wake Mr. Vinick again? A. No.

Q. And that he again remained— A. No, nothing like it. He came down here while we had— absolutely nothing to be refreshed on. I am quite sure of that.

Q. But you don't know how soon after he heard of the second fire he went there? A. To my knowledge he heard it just after I had heard it. While we were still sitting, he appeared, and he asked Walter Hines, "What are you doing here?" Just like that. He says, "I am just telling Mrs. Kruger that your house burned again." This is about all I have to report on this.

Q. Mrs. Kruger, do you know anything about an electric pump which disappeared between the first fire and the second fire from that house?

Mr. McElhaney—Just a minute. I object to that on the ground the witness has testified she was never inside of the house, and therefore would have no knowledge of anything therein.

The Court—I admit it.

Mr. Lieblich—Exception, please.

By Mr. McElhaney:

Q. All right. Now, you can answer it. A. No, I don't know. I heard that the pump was gone. I heard that.

Mr. McElhaney—Now I move that be stricken.

The Witness—I heard that, but I haven't seen it, see?

Mr. McElhaney—I move that what the witness explained be stricken.

Mr. Stoffer—I withdraw it.

Q. What had been Mr. Vinick's business during the time that he has lived with you? A. He is a carpenter and builder.

Q. And has he been working? A. Not lately.

Q. Was he working at the time? A. Well, he is working, not at his trade, I know that, but he had an uncle up here. He kept himself busy to make his ends meet. I mean he drives a truck and he picks up occasional jobs, but he did not have a worthwhile job at his own trade.

Q. Well, these two fires occurred a little more than a year ago, that is in February, 1931. Do you know whether or not Mr. Vinick was working at that time? A. He had jobs that time, sure. That is only very lately—

Q. I didn't get the last. A. It was only lately that he is not working at his trade.

Q. How long has he been working with his uncle? A. Since the Fall, because his uncle has the school route, so he drives three school buses, so there is always a job in between for him, so he put him on to drive a bus, and to drive a truck, so there is township work. Once in a while he has a job. Very recently he made a cellar for somebody, then like picking up job. It is not like having a good steady job, but who has now?

Q. Do you know any specific job that he had here in January and February, 1931?

Mr. McElhaney—Now, just a moment. I object to that as being—

A. No, I didn't keep so close a track on him. I just know things about, but I could not tell. He was building a house for Carl Meyer.

Mr. Stoffer—I withdraw the question. I withdraw the next, as well, because it is subject to the same objection.

By Mr. Stoffer:

Q. Mr. Vinick has been boarding with you since his mother went to Philadelphia in September, 1930, isn't that so, Mrs. Kruger? A. Possibly. It was around the hunting time. That would be three years.

Q. Previously he had lived with his mother in that house? A. Yes, he had lived alone for a while.

Q. You don't know anything about what furniture he had in that house? You never were in it? A. I never was in it. I could not say anything what he had or what he didn't have.

Mr. Stoffer—I believe that is all, Mr. McElhaney.

Cross Examination by Mr. McElhaney:

Q. Mrs. Kruger, you say the house was there when you came here. Do you mean it was there

when you moved to this present location about five years ago or was it there when you were at your other place seventeen years ago? A. I don't know exactly when it was built. When I was at the other place, I was away on the far end.

Q. You mean it was here when you came here? You mean it was here five years ago? A. When I came here five years ago that house was there, because I deliver groceries myself, and I saw the house outside, and I just usually know who was living, and I know all the people living in this direction for so many years. I know this Tolley when he was— about five years ago he used to pass my place down at this end, and I would say good morning, and that is how I recognize him and how I know him.

Q. Now, this Walter Hines, he is the neighbor that lives next to the house that was burned? A. On the other side of Gates. Gates is on the other side, and this burned-down house is in between.

Q. So he would be one of the first to notice the fire, wouldn't he? He didn't discover it, I guess it was Mr. Gertz. He is living just opposite the place, and he— on this road here, that is just across the field, and they noticed this flash of light in the front room where they was sleeping you know, like when you open your eyes and you see something awful light, so he went over and got this Hines out of bed when the fire looked dangerous and told him—

Q. Now, Mrs. Kruger, the night in question when you went upstairs and woke Tolly up, do you know whether he was wide awake, what you call wide awake to understand what you were saying? A. He was not at all awake. He is very hard to

get awake, but he sort of mumbled in his sleep, "Go on," like that; not exactly, I would not say he said those words, but something on that order, so I didn't bother with him.

Q. So that you don't know whether or not he understood you at the time, do you?

Mr. Stoffer—I object to that on the ground it is immaterial to the issues, and that the witness is being asked to tell what she knows about the operations of another person's mind.

The Court—I think it is competent. I admit it.

Mr. Stoffer—Exception.

By Mr. McElhaney:

Q. Now, answer it, please. A. Well, he didn't answer to me clear, and he didn't answer on the fire, that he knew it was or it was not, so I left him alone.

Q. The morning that Hines came back and reported to you that there was a second fire, Tolly was at the breakfast table you say? A. Not while he reported it.

Q. No? A. We stretched it out and sat awhile with this Hines, and then Tolly comes also down to breakfast and asking Hines, "What are you doing here so early in the morning?"

Mr. McElhaney—Yes. Well, I guess that is all.

By Mr. Stoffer:

Q. Now, Mrs. Kruger, will you please tell us exactly what you did to try to wake Mr. Vinick up when you heard of the first fire? A. I tried to wake him. What would you do?

Q. How? What did you say? What did you do? Did you shake him? A. Well, I called from downstairs first, and no answer came, and I was sort of excited. When I hear fire, I am always excited, so I went upstairs. I says, "Tolly, your house is burning," see.

Q. Well, did you touch him, shake him in an effort to wake him up? A. Well, I really don't know whether I did or didn't. I am usually very excited when I hear of the fire, so I didn't bother about that, and we left the house then.

Q. He opened his eyes, didn't he? A. Maybe he did and he closed them right away again.

Q. You don't know? A. Naturally if you wake somebody and he doesn't wake up, he does all kinds of funny things and he goes on.

Q. What did he say to you as near as you can remember it? A. I don't know exactly the words, but he said something as if it was not—something, "Go on," or something like that. Not exactly, I don't— I don't refer to the fire if it was or if it was not. I could not say he understood or he didn't. I don't know.

Q. The nearest you remember is that he said something like, "Oh, go on"? A. Something on that order. You would not exactly swear that that was his words, but it was something on that order, something that don't amount to anything very much.

LOUIS HUTTENBACH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Stoffer:

Q. Mr. Huttenbach, what is your business? A. Oh, building, estimating and appraising, and some adjusting.

Q. How long have you been in the business of building, estimating and appraising? A. Over twenty years.

Q. Did you examine the remains of the property owned by the plaintiff at Stelton, New Jersey? A. Yes.

Q. Will you tell us about it. First, tell us when you made your examination? A. February 15, 1931.

Q. And what did you find on that occasion? A. I found there was a foundation where the building burned.

Q. Did you observe anything in the rear of the premises? A. What do you mean, the foundation?

Q. I beg your pardon? What do you mean, observe anything in the rear?

Q. Well, what else did you see, if anything at all, on the occasion when you made your examination? A. I found some debris, burned, charred timbers; then, I think there was— Oh, I don't know— and it looked like to me as ~~right~~ in the back portion of the porch there.

Q. And was it after that that you met Mr. Vinick at the office of Mr. Dahmer? A. Oh, yes.

Q. About how long after that? A. In May.

Q. Now, on that occasion, did you have any conversation with Mr. Vinck wth respect to the tenant who had last occupied the building? A. Yes.

Q. And what did he say to you with respect to that tenant? A. I asked him who lived in the building, and he had told me, I think it is, an Italian fellow, an Italian, but I didn't get his name. I don't remember his name.

Q. Frank Santo. Does that recall it to you? A. No, I don't remember the name.

Q. Did you have any discussion with him as to the rent that he was receiving from Santo? A. Yes, sir.

Q. And what did he say to you? A. He told me he rented the building for the first month for $15, and, then, if he liked the place, he was going to increase it to $80 a month.

Q. Now, on that occasion, did Mr. Vinick draw a sketch for you of the building? A. Yes, sir.

Q. Do you have that sketch? A. (Handing paper.)

Mr. Stoffer—(Handing paper to Mr. Lieblich.)

By Mr. Stoffer:

Q. Was that drawn by Mr. Vinick in your presence, there? A. Yes, sir, with Mr. Baxter and Attorney Dahmer, in his office.

Mr. Stoffer—I offer the sketch.

(The paper referred to was received in evidence and marked, "Defendant's Exhibit 2.")

By Mr. Stoffer:

Q. Did Mr. Vinick, on that occasion, also give you a description of the building and the materials that were in it? A. Yes, he told me of it, and how the building was built.

Q. Will you please tell us what he told you? A. He told me there were two by eight floor beams, and, then, there were sheath and weather board and plaster board finish on the inside, and he marked out the number of windows and doors, and a flat roof, and the porch was inclosed and made little inside rooms out of it, and a bathroom on the porch.

Q. Did he tell you how old the building was? A. That I don't know.

Q. Now, on the basis of the sketch which he gave you, and the information which he gave you concerning the materials that went into the building, and its construction, did you make up an estimate of the replacement value of that building? A. Yes, sir.

Q. Did you do it then? A. Yes, sir.

Q. Will you please tell us what your estimate of the replacement value is?

Mr. Lieblich—I object on the ground that no proper foundation has been laid, nor are all the essential facts present for the purpose of the hypothetical question, such as counsel has put to the witness.

(Argument off the record.)

The Court—Well, in as much as the plaintiff gave him this information, and in as much as I presume— I don't know whether the witness has stated that— that he had told

the plaintiff that he was about to make an estimate.

Mr. Lieblich—There is no such statement here.

By the Court:

Q. Well, let me ask you. Did the plaintiff know the reason of your asking him these questions about the value? A. Yes, sir. I explained to him that we wanted to arrive at the value.

Mr. Lieblich—Well, how could he tell that, the operation of this man's mind, unless he made the disclosure?

The Court—He says he did.

Mr. Lieblich—No, he didn't say that.

The Court—He said so just now.

The witness—To arrive at the value of the building.

By Mr. Lieblich:

Q. Did you tell that to Mr. Vinick? A. Yes, sir. Mr. Baxter was sitting alongside of me.

Mr. Lieblich—Well, I still submit he didn't have sufficient information based upon the testimony in this case to enable him to intelligently make an estimate of the replacement value of that building.

The Court—I admit it.

Mr. Lieblich—Your Honor will note my exception?

The Court—Exception allowed.

By Mr. Stoffer:

Q. What is your estimate, Mr. Huttenbach, of the replacement value of this building?

Mr. Lieblich—In addition thereto, I don't think the gentleman has been properly qualified to testify.

The Court—Well, you may cross examine him on that, if you want to.

Cross Examination by Mr. Lieblich:

Q. What did you say your business was? A. Building.

Q. When did you last build a building? A. Three years ago.

Q. Where? A. Kinney and Marshall, Halsey and Marshall Street Warehouse.

Q. What kind of building was that? A. A warehouse.

Q. What kind of building? Describe it, if you will. A. Oh, for light manufacturing and storage.

Q. Oh, I see. You took the contract in your name? A. Yes, sir.

Q. And you did the work? A. Yes, sir.

Q. Isn't it a fact, that during the last three years you are doing nothing but just adjusting work for fire insurance companies? A. Last three years, yes.

Q. Prior to that time, were you in the building business yourself? A. I did that job.

Q. Isn't it a fact that the last five years you have devoted your time, exclusively, to the representation of insurance companies as an adjuster? Yes or no? A. I would not say exclusively, but the biggest part of the time, Mr. Lieblich.

Q. Yes. Well, now, let us see, this building which you say you built three years ago. How big a building was that? A. Well, I think the contract ran around thirty and some odd thousand.

Q. What was it, brick or frame? A. Brick.

Q. How many stories? A. Three and four.

Q. Three and four stories. What did you say was the contract price? A. Around thirty and some odd thousand.

Q. Do you know the cubical contents of that building? A. It was an overhauling job, Mr. Lieblich.

Q. Oh, it was an overhauling job. I see. Well, all right. Tell us the building that you built, then. A. I just can't tell you offhand.

Q. As a matter of fact, Mr. Huttenbach, have you built any buildings within the past ten years? A. No, I don't think I built a new building in the past ten years.

Q. And your time is devoted exclusively to adjusting for fire insurance companies, isn't that so, Mr. Huttenbach? A. Well, not exclusively, no, but appraising.

Q. Well, what else do you do besides earn your living as an adjuster for fire insurance companies, and as an independent adjuster? A. Well, the biggest portion of it, yes, but I do an awful lot of appraising, too.

Q. Well, appraising is in line with adjustment work? A. No, no, this has nothing to do with the insurance companies, this appraising.

Q. You mean when there is a difference between the particular adjuster for the insurance company and the policy holder, you are designated as one of the appraisers? A. No.

Q. You don't mean that? A. No. I will tell you what I mean—

Q. All right. I am not asking you that.

Mr. Lieblich—Well, I respectfully submit upon the testimony adduced, the witness is not competent to testify.

The Court—I admit his testimony. Proceed.

Mr. Lieblich—Your Honor will note my exception.

By Mr. Stoffer:

Q. May I ask you, Mr. Huttenbach, to tell the Court and Jury what this appraisal work is that you—

Mr. Lieblich—Well, I think your Honor has passed that and admitted his qualifications.

Mr. Stoffer—Well, you have left it a little up in the air. It is fair that the Jury know what his experience is, since counsel challenges it.

The Court—Go on.

Mr. Lieblich—Exception.

A. Well, the Duke estate, down in Somerville, as to the values for the buildings; then, I done all the Gould estate for the Georgian College in Lakewood. Those kind of appraisals, all kinds, apartment houses, mortgage companies.

By Mr. Stoffer:

Q. Give us your idea of the number of appraisals of that character you made in the last year? A. I have done over two hundred and sixty for one company, and I guess I have about seventy more to do.

Q. Do you keep your own price of the cost of labor and materials in the building trade? A. Oh, yes.

Q. Now, will you please tell us what your estimate of the replacement value of this building is?

By Mr. Lieblich:

Q. Are you referring to a piece of paper, Mr. Huttenbach? A. Sir?

Q. Are you referring to some paper? A. Yes.

Q. May I see it? A. This is my own.

Mr. Stoffer—Well, do you object to his referring to a paper?

Mr. Lieblich—Surely. I want to know what it is. He has a right to use it.

By Mr. Stoffer:

Q. Have you made some figures? A. I have made some figures on this, Mr. Stoffer.

Q. Do you need the paper in order to refresh your recollection?

Mr. Lieblich—I object to that.

A. I can't remember. This happened over a year ago.

The Court—I think counsel are making very technical objections in reference to this witness's testimony.

By the Court:

Q. Proceed, and give your testimony, Mr. Witness. If you need the paper to refresh your recollection, you may refer to it.

Mr. Lieblich—May I examine the witness on the use of the paper?

The Court—No.

Mr. Lieblich—I note my exception.

A. $2,603.

By Mr. Stoffer:

Q. Mr. Huttenbach, what, in your opinion, is a proper allowance for depreciation of a building from normal use, normal wear and tear? A. On a building that is occupied by the owner, kept in good repair, it would average about one per cent.; occupied by tenants, and a poor class of tenants, would average two per cent.

By the Court:

Q. A year? A. Yes, sir.

By Mr. Stoffer:

Q. Now, did you deduct the depreciation from that figure of $2,600 odd? A. Yes.

Q. So that, in your opinion, the amount of depreciation to be deducted would depend upon the age of the building? A. Yes.

Q. And the use it had been put to? A. Yes.

Q. It would vary between one and two per cent., depending upon use per year? A. Yes, sir.

Q. That foundation that you saw there, Mr. Huttenbach, will you give us the value of it, approximately? A. About $400.

Q. What? A. About $400.

Q. Well, the plaintiff's witnesses this morning testified that on a cubic foot basis this building would have a replacement cost of eighty cents a cubic foot. Is that accurate from the information that Mr. Vinick gave you as to the character and construction of this building, and the materials that went into it?

Mr. Lieblich—I object, if it please your Honor, upon the ground that there is no such testimony in this case.

The Court—There is that testimony, and if counsel had not asked the question, the Court was going to do it, because I asked the question of your witness this morning, as to what his estimate would be for this class of construction, and he said eighty cents a cubic foot.

Mr. Lieblich—I understood the witness, if my memory serves me correctly, to say that he didn't make any computation upon a cubic foot basis.

The Court—That is true, but I did ask him, if you will remember, that question as to what the cubic foot valuation of this class of construction would be, and he said

eighty cents. Now, it is competent to ask this witness what the cubic value is of this class of construction.

Mr. Lieblich—Your Honor will note my exception?

The Court—Yes.

By Mr. Stoffer:

Q. Mr. Huttenbach, what is the cubic foot value, or cost, of a building of this type? A. Now, I didn't figure this one on any cubic foot, but I would say, approximately, about eighteen cents.

Q. Eighteen cents? A. That class of construction.

Q. Will you tell us, Mr. Huttenbach, what the cubic foot cost of a brick building is, for example?

Mr. Lieblich—I object, if it please your Honor. It is immaterial and irrelevant to this issue. This is a frame building.

The Court—I know, but it is a matter of common knowledge that a brick building per cubic foot is a great deal more expensive than a frame building of this sort, and it is almost a matter of common knowledge, too, that eighty cents a cubic foot for construction of this kind is absurd.

Mr. Lieblich—May I, with all deference to your Honor, take exception to your Honor's remark as being highly prejudicial to the plaintiff in this case. The witness's testimony is for the determination of the Jury.

The Court—Yes, proceed. I will leave it to the Jury.

Mr. Stoffer—Read the question, please.
(The last question was read.)

A. A private dwelling, or apartment house?

By Mr. Stoffer:

Q. Yes. A. Around forty cents, forty, forty-two. It all depends on what you would put into the building.

Cross Examination by Mr. Lieblich:

Q. May I see the paper from which you testifield, Mr. Huttenbach? A. Mr. Lieblich, this is my paper.

Q. I want to see the paper from which you testified and gave the figures to the Court and Jury. A. These are my papers, Mr. Lieblich.

By the Court:

Q. Let him see it. A. (Handing papers.)

By Mr. Lieblich:

Q. When did you make this statement, Mr. Huttenbach? A. Prior to—after I saw Mr. Vinick and I got the number of beams and so forth in the construction.

Q. Did you say, prior? A. After.

Q. After you saw him? A. Yes, sir.

Q. And for whose benefit, or by whose instructions, did you make up this statement? A. For my—

Mr. Stoffer—I object, your Honor. It is immaterial. The witness is testifying

from figures. It does not matter who—
The Court—Well, it is cross examination. I will allow it.

A. For myself, Mr. Lieblich.

By Mr. Lieblich:

Q. In other words, you came up there of your own volition to examine Vinick and make this statement? A. No, sir, I didn't.

Q. Who sent you there? A. My company, the company that I represent.

Q. The Niagara Fire Insurance Company? A. The Niagara didn't send me there. The London Lancashire sent me there.

Q. Well, did Mr. Baxter, or didn't Mr. Baxter, of the Niagara Fire Insurance Company, ask you to make an estimate for him? A. No, sir.

Q. You are sure about that? A. Absolutely

Q. All right. Will you point out upon this sheet of paper from which you have testified, the size of this building? A. No, I have the size of them in memorandum. I have taken them from this here. I have taken them from here.

Q. For the purpose of size you referred to Exhibit D-1, is that right? A. That paper there, yes, sir.

Q. That is, for the length and breadth of the building? A. Yes, sir.

Q. All right. Now, is there anything on this paper to indicate the size of that building, Mr. Huttenbach? A. Yes, sir.

Q. There is? All right. Will you point out to us the size of the building, as indicated on Ex-

hibit D-2? A. Here it is, Mr. Lieblich (indicating).

Mr. Lieblich—The witness indicates upon this sketch twenty-one foot.

By Mr. Lieblich:

Q. What does that twenty-one feet indicate, or doesn't it indicate here, from this bedroom to this extension on the front porch? A. No, it indicates from here (indicating).

By Mr. Stoffer:

Q. Will you speak up, so that the Jury can hear you, Mr. Huttenbach. A. From this corner here.

By Mr. Lieblich:

Q. Suppose you come down here, so that the Jury may follow. A. (Witness left the stand.)

Q. Now, will you point out the full length of that building as shown here upon this sketch? A. (Indicating.)

Mr. Lieblich—Witness indicates that portion of this building on Exhibit D-2, from the bedroom to the other end of the bedroom.

The Witness—To the front. From the bedroom to the front.

By Mr. Lieblich:

Q. Didn't you just point out to the Jury, these points, indicating from one bedroom line to the

other bedroom line? A. I did point out to the Jury from bedroom to bedroom. (Witness resumed the stand.)

Q. There isn't anything upon this sketch(is there, Mr. Huttenbach, to delineate or show the full length of the building, indicating from this corner where I have marked X— A. Yes.

Q. (Continuing) to this corner where I have marked A, as to the length of that building? A. Yes, sir.

Q. Well, where is it? A. On this one. This rear does not show, but Mr. Vinick told me it was.

Q. Oh, no, I didn't ask you about what Mr. Vinick said. I am referring to this sketch that you used for the purpose of making your estimate. A. Well, here is your seven foot porch, right in front here.

By Mr. Stoffer:

Q. Pointing to what, Mr. Huttenbach? A. The front porch, right here.

Q. That is seven feet? A. Yes, sir.

By Mr. Lieblich:

Q. All right. A. That is the width of the porch.

Q. That is the width of the porch. Then you would add seven feet to twenty feet to give you the length? A. Yes.

Q. Is there anything to indicate on this end here, open porch, the length of that? A. No, sir, there is not.

Q. How did you find out the length of that? A. Mr. Vinick told me.

Q. I see. A. It was seven foot all the way around.

Q. So, in order to make up your estimate, you didn't depend upon Exhibit D-2, and this sketch to which you have referred to, alone, for the purpose of making your estimate, didn't you? A. I used the sketch of Mr. Vinick and what he told me.

Q. This figure which you have made here, is that $2,603? What does that represent? A. The rebuilding of the building.

Q. What? A. The lumber, the mason materials.

Q. How much, if anything, did you figure for labor? A. I would have to separate that because I added the materials and labor together.

Q. Oh, you figure labor and material together? A. Yes, sir.

Q. Did you figure anything for clearing up the debris? A. No.

Q. Did you figure anything for a builder's profit? A. No.

Q. Can you tell us how much of that you figured for labor, and how much for materials? A. No, I could not very well. I would have to go all over this. We never figure them like that.

Q. You have not been paid for your appraisal by the Niagara Fire Insurance Company? A. No, sir.

Q. You do not intend to submit any bill to the Niagara Fire Insurance Company? A. Not yet.

Q. In this matter? A. No.

Q. You do not intend to? A. No, sir.

Mr. Lieblich—That is all.

Redirect Examination by Mr. Stoffer:

Q. Just one question, Mr. Huttenbach. You made your figures for the London Lancashire Companies, which had a $1500 insurance policy on the same building? A. Yes.

Mr. Stoffer—That is all.

By Mr. Lieblich:

Q. Mr. Huttenbach, the London Lancashire Insurance Company are not a party defendant here, are they?

Mr. Stoffer—I object to that.

Mr. Lieblich—I think you brought it out, and I should be permitted to go in and show why.

The Court—I sustain the objection.

Mr. Lieblich—Allow me an exception. I may, with your Honor's permission, frame this one more question?

The Court—Yes.

By Mr. Lieblich:

Q. Don't answer until his Honor has ruled. Did you submit to the London Lancashire Insurance Company an estimate of the figures that you made? A. No, sir.

Q. Do you know why the London Lancashire Insurance Company are not a party defendant?

Mr. Stoffer—I object to that.

The Court—Objection sustained.

Mr. Lieblich—That is all. Exception, your Honor.

CABEL G. BAXTER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Stoffer:

Q. Mr. Baxter, you are the adjuster of the defendant, Niagara Fire Insurance Company? A. Yes, sir.

Q. Were you present on this occasion when, at Mr. Dahmer's office, Mr. Huttenbach and Mr. Vinick discussed the construction and layout of this building? A. I was.

Q. Did you hear Mr. Vinick give to Mr. Huttenbach the information concerning the details of the construction and materials? A. I did, Sir, either at that meeting, or a subsequent meeting, which was held in Newark.

Q. Now, did you see Mr. Vinick give him the sketch which is in evidence? A. Yes, sir.

Q. And on this occasion was there any discussion with Mr. Vinick, concerning the tenant who had last occupied the building? A. There was.

Q. Will you tell us what that conversation was? A. Mr. Vinick was asked what rental was being paid. He made the statement that for the first month this man was to pay $15 a month; later on he was to pay $80 a month.

Q. $80? A. $80.

Mr. Stoffer—Take the witness.

Cross Examination by Mr. Lieblich:

Q. Well, Mr. Baxter, do I understand that this conversation took place in Mr. Dahmer's office? A. Either at Mr. Dahmer's office, or a subsequent meeting at Newark.

Q. Well, what did you do? Take this kid down to Newark with Mr. Dahmer? A. Oh, yes. He was there without Mr. Dahmer.

Q. Without Mr. Dahmer? A. Oh, yes.

Q. Well, how did you have him come down? Did you invite him, or did Mr. Huttenbach invite him? A. That I don't recall.

Q. You don't recall who brought him down? A. No, sir, but I recall, however, that he was there.

Q. You knew that Mr. Dahmer was his attorney, didn't you? A. Yes, sir.

Q. And you knew that he was a comparatively young man? A. Yes, sir.

Q. And you cannot tell us whether this statement was made at Mr. Dahmer's office or in Newark? A. No, sir, I cannot.

Q. That is all. A. I think it was made in Mr. Dahmer's office. I think it was made there, but I am not quite clear about it.

Q. Well, is your recollection so clear that you want to stand on the statement having been made in Mr. Dahmer's office? A. No, I would rather have it go in that way.

Q. Tell me who was present on this occasion when you had this young man down at Newark? A. Mr. Huttenbach, Mr. Vinick, and myself.

Q. And where was this? A. In our office, in the Essex Building.

Q. In the office of the Niagara Fire Insurance Company? A. Yes, sir.

Q. What did you invite the young man down for? A. I don't know that we invited him down.

Q. You think he just came down? A. I don't recall, Sir.

Q. You will say that you didn't invite him down? A. No,. I will not say that.

Q. Will you say that Mr. Huttenbach didn't invite him down? A. That I don't know. Mr. Huttenbach may be able to enlighten you on that.

Mr. Lieblich—That is all.

Redirect Examination by Mr. Stoffer:

Q. Did you make stress, or exercise any coercion over Mr. Vinick? A. No, sir. None whatever.

Mr. Stoffer—That is all.
Mr. Stoffer—The defendant rests.
(The Defendant Rested.)

FRED DAHMER, called as a witness on behalf of the plaintiff, in rebuttal, resumed the stand and further testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Dahmer, do you recall Mr. Huttenbach, the gentleman who last testified, and Mr. Baxter, being at your office? A. Yes.

Q. Do you recall any conversation in your

presence wherein Mr. Vinick said that he rented the premises to this Santo for $15 a month for the first month, and $80 some time in the future? A. I don't recall any conversation about renting the property while these gentlemen were in my office.

Q. Well, if any such statement had been made, you would have heard it, wouldn't you? A. I surely would have.

Q. Anything the matter with your memory, Mr. Dahmer? A. Not that I know of.

Q. Did you ever know of the fact that Mr. Vinick had been invited to come to Newark, or he was going to Newark to the office of this Insurance Company? A. Well, I made the arrangement over the telephone with Mr. Baxter for Mr. Vinick to call at Mr. Baxter's office.

Q. I see. Do you know what the object of that visit was?

Mr. Stoffer—I object to that. That is going much too far.

The Court—Objection sustained.

Mr. Lieblich—All right, I won't press it. That is all.

Cross Examination by Mr. Stoffer:

Q. Now, Mr. Dahmer, were you present all the time that Mr. Huttenbach and Mr. Baxter were talking to Mr. Vinick? A. Yes.

Q. But you didn't go to Stelton with him? A. No, I didn't.

Mr. Stoffer—That is all.

ANATOLE VINICK, the plaintiff, called as a witness on his own behalf, in rebuttal, further testified as follows:

Direct Examination by Mr. Lieblich:

Q. Do you remember meeting Mr. Baxter and Mr. Huttenbach in Mr. Dahmer's office? A. Yes, sir.

Q. Did you ever say to Mr. Huttenbach, or to Mr. Baxter, that you had rented the premises to Santo for $15 the first month, and that you were to receive $80 subsequently? A. No, sir.

Q. You testified to your mother receiving this property some time in 1925. Do you remember when it was? A. No, not exactly.

Q. Well, I show you this paper— Oh, wait a minute.

Mr. Lieblich—I will offer in evidence a deed from Simund Kutner to Fannie Dunn, dated June 5, 1925, recorded in the Middlesex County Clerk's office on June 13, 1925, Book 808 on Deeds, Page 495.

Mr. Stoffer—No objection.

(The paper referred to was received in evidence and marked, "Plaintiff's Exhibit 8.")

By Mr. Lieblich:

Q. Who was the Fannie Dunn referred to in this Deed? That is, in Exhibit P-8? A . That is my mother.

Q. And that is when your mother obtained the property, June 13, 1925? A. Yes, sir.

Q. Did you hear Mr. Gates testify that your

father had purchased the property? A. No, my father died just before that.

Q. Well, did you ever know that Santo was making alcohol or whiskey or anything in those premises? A. No, sir.

Q. Do you know, as a matter of fact, whether there was alcohol or whiskey being made in those premises? A. No, never.

Q. After the fire, did you examine the premises? A. Yes, sir.

Q. Did you see any evidence of any still, or mash, or anything which would indicate barrels or cans to manufacture alcohol beverages? A. No, sir, nothing there whatsoever.

Mr. Lieblich—That is all.

Mr. Stoffer—No questions.

GEORGE NEWTON, called as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Mr. Newton, where do you live? A. New Market.

Q. During the month of February, 1931, were you in anywise connected with the Fire Department? A. I was a member of the New Market volunteer fire company.

Q. Did you attend the fire at Vinick's property on February 7, 1931? A. I did.

Q. And do you recall what kind of night it was? A. Well, not particularly, except it was

in the winter, cool, and I believe there had been some snow.

Q. Was there much wind blowing that night? A. I don't recall.

Q. Now, after the fire, did you have occasion to look at the property and see its condition? A. You mean during that evening?

Q. Yes. A. Well, I was around there all the time until we put the fire out.

Q. Well, after the fire was out, was there any part or portion of the walls standing? A. Oh, yes.

Q. Was the roof damaged or destroyed? A. Yes, it was damaged.

Q. Were the windows out? A. The windows were broken, yes, sir.

Q. Did you notice anything at all about these premises which would indicate a still? A. No.

Q. For the manufacturing of alcohol or anything like that? A. No, I didn't see anything of that sort.

Mr. Lieblich—You may take the witness.

Cross Examination by Mr. Stoffer:

Q. Do you know whether anybody was living in the house at the time of the fire?

Mr. Lieblich—I object, if your Honor please. It is immaterial. The policy distinctly gives us permission of unoccupancy.

Mr. Stoffer—Well, Mr. Lieblich has asked whether he noted the still there.

The Court—I will admit it.

Mr. Lieblich—Your Honor will note my exception.

A. I was there only at the time of the fire, so I don't know anything about occupancy.

By Mr. Stoffer:

Q. Well, did you see anything in the house which would indicate that people were then living there? A. There was some furniture.

Q. Beds made up? A. I don't recall if we seen the bed made up, no, sir.

Q. Fire in the stove? A. Well, that we could hardly tell. There was so much fire we could not go around examining that.

Q. Food in the house? A. That, either, we were not looking after.

Q. Anybody, in your presence, say that he was living there, that is was his house?

Mr. Lieblich—I object, if it please the Court.

The Court—I admit it. It is cross examination. It can't do any harm.

A. May I have that?

(The last question was read by the reporter.)

A. When you say he, who do you refer to?

By Mr. Stoffer:

Q. Did you see anything of Mr. Vinick? A. I don't recall. There were so many people there,

I don't remember whether I saw him or not. At the time, I might say, I did know whose house it was.

Q. I mean, at the time when you were fighting the fire, was he there? A. I don't know. I would not say. I don't recall having seen him.

Q. Were you also at the second fire on February 8? A. No, sir.

Mr. Stoffer—That is all.

By Mr. Lieblich:

Q. How long did it take to put out the fire, do you know? A. Well, it was a matter of two hours or more, I should say, with it.

Q. Plenty of water pumped in there? A. Yes, we used water and chemicals both.

Mr. Lieblich—That is all.
Mr. Stoffer—That is all.

WALTER HEINZ, called as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Lieblich:

Q. Walter, in February, 1931, where were you living? A. I was living next door to Tolly Vinick's house.

Q. When you say next door— A. Yes.

Q. How far away was that? A. It is about a hundred, a hundred and twenty-five feet.

Q. And how long before this fire of February

7th or 8th were you living there? A. It is two years now, the first of April.

Q. Were you living there during the month of January? A. Yes, I was.

Q. And how far, by way of comparison, from the Vinick house, is your house, compared to that of the other witness, Mr. Gates? A. I think it is about the center of it.

Q. About half way between? A. About half way between.

Q. Do you know what whiskey smells like? A. No, I don't.

Q. You don't? A. Yes, I do know how it smells.

Q. Well, you do know? A. Yes.

Q. Well, during the month of January, did you have occasion up to and including February 7, 1931, to smell a distillery smell? A. Well, I don't know how a distillery smells.

Q. You don't know how a distillery smells? A. No.

Q. Well, did you notice any peculiar smell that was not ordinary any time between January 1, 1931, and February 7 or 8, 1931? A. Well, I can't recall, because there is various smells around the neighborhood.

Q. Well, you must have a good smeller. Did you have occasion to pass this Vinick house at any time between January 1, 1931, and February 8, 1931? A. Oh, yes, I did.

Q. Did you notice anything at all to attract your attention with respect to the manufacturing of any alcoholic beverage?

Mr. Stoffer——No, no, I object to that.

Mr. Lieblich—I consent that it be stricken out.

By Mr. Lieblich:

Q. Anything to attract your attention to that particular house? A. No, I didn't.

Q. On the night of this fire, were you home? A. Well, I was coming home when—I was the one who really was—who noticed the fire.

Q. I see. Well, was it a cold night, or a windy night? A. Well, I think it was cold.

Q. Was it windy? A. Well, I am not quite sure about that.

Q. Don't you remember whether it was or not? A. No, I don't.

Q. Did you see this house after the fire? A. Well, from the outside, yes, but I have not been inside.

Q. I see. I mean, the fire of February 7. A. Yes.

Q. The first fire? A. Yes.

Q. What was left of the house after the first fire? A. Well, as far as I can recall, the four walls were standing, and part of the roof. That is all I can think of.

Mr. Lieblich—All right. You may take the witness.

Cross Examination by Mr. Stoffer:

Q. Mr. Heinz, just where was your house located with respect to the Vinick house? A. It was east to Mr. Vinick's.

Q. East? A. Yes.

Q. In other words, Mr. Gates' house— A. West west.

Q. The Vinick house was here, Mr. Gates' house was on the west? A. Yes.

Q. And you were on the east? A. Yes.

Q. And you were, approximately, how far from Vinick's house? A. About a hundred and twenty-five feet.

Q. About a hundred and twenty-five feet? A. Yes.

Q. You don't know if anybody was living in the house, do you? A. No.

Q. Are you the Walter Heinz who advised Mrs. Kruger about the first fire? A. Yes, that is right.

Q. Did you see Mr. and Mrs. Kruger come over to the house during the fire? A. I haven't seen anyone.

Q. Did you see Mr. Vinick come over there while the fire was going on? A. I can't recall.

Q. Were you there until the fire was put out? A. Yes, I was with Mr. Gates. We were watching the fire for a while.

Q. You don't recall seeing Mrs. Kruger or Mr. Vinick? A. No, I don't.

Q. Now, the second fire. What time of the morning did that occur? Do you know? A. I think it was about five o'clock.

Q. And when did you go over to tell Mrs. Kruger, or anyone, about it? A. Oh, that was the next morning, I was awakened by another neighbor, and so the wind was quite strong that night. I awakened Mr. Gates, and, of course, the

Fire Department was there already, so we watched it burn down, and Mr. Gates and myself, we made some coffee that night, and we were watching the fire so it would not spread.

Q. And, then, what time was it that you went to Mrs. Kruger's? A. I think it was about eight-thirty or nine o'clock.

Q. Was Mr. Vinick up at that time? A. No, not that I know of.

Q. Did he come down later? A. I think he came right after I came to Mr. Kruger.

Q. And did you tell him about the house having burned? A. Yes.

Q. And what did he do? A. Well, he said—I think he said he would be over right away. Something to that effect.

Q. What did he do? A. I don't know.

Q. Did he have breakfast? A. I am not quite sure.

Mr. Stoffer—That is all.

Mr. Lieblich—That is all.

Mr. Lieblich—We rest.

The Plaintiff rested.

The Court—Both sides rest.

Mr. Stoffer—The defendant moves for a direction of the verdict on the ground that under the policies which are in evidence this building and the contents were insured by the defendant while the house was occupied, exclusively, for dwelling purposes. These policies are uniform, if it please the Court, with the description, "while occupied exclusively for dwelling

purposes," is a warranty, and it is a continuing promissory warranty which is borne during the entire existence of a policy. The purpose of it is obvious. The company insures a piece of property while it is being used for a certain purpose, because while occupied for an exclusive purpose is an understanding by the insured that the building will not be used for any other purpose, such as, manufacturing the distillation of alcoholic liquors, and things of that sort.

The Court—All of these questions which you have raised are clearly jury questions. There is nothing from which the Court can say as a matter of law that a distilling operation was carried on on these premises. The only evidence with reference to that was of Mr. Gates, the neighbor, who said he smelled an odor which was similar to a distillery smell. It does not follow from that, as a matter of law, that there was a distillery on the premises.

By allowing a tenant to increase the hazard, that is also clearly a jury question in this case.

There is no evidence here by which the Court can say, as a matter of law, the provisions of these policies were violated. The motion is denied and an exception allowed.

Mr. Stoffer—Your Honor will grant me an exception?

The Court—Yes.

Mr. Lieblich—If it please the Court, may

I move to strike out some of these defenses, unless he wants to withdraw them himself?

The Court—Well, the Court will deal with them on the charge. They are very clear, as I take it.

First, let me see if the Court agrees with counsel. First, there is the inference that this was of incendiary origin. That is an inference.

Second, that it was used otherwise than as a dwelling, which is inferred in counsel's motion for a direction of a verdict.

Third, that the occupancy was that of a tenant which increased the hazard. That is three.

Mr. Lieblich—I can't subscribe to that, because, if you Honor will permit me to call your attention to this fact: Mr. Gates did not say that that smell came from the Vinick house.

The Court—I am saying that that is a jury question. I think it is for the jury to say under the circumstances whether that is so or not. I am referring now to what I think are the issues in the case and which should go to the jury for their decision; and, then, four, whether the proof of loss contains such fraudulent statements by their estimation or otherwise, which voided the policies.

Now, those, I take it, are the four questions that the jury are to decide. Is that so?

Mr. Stoffer—The breach of warranty defense, your Honor. I don't think your Honor mentioned it.

The Court—Well, that breach of warranty is involved in that second defense, which is, that the property was used otherwise than as a dwelling. That is inferred.

Mr. Stoffer—It would be two sides, two legal questions depending upon the same set of facts.

The Court—Yes, that is what I mean.

Mr. Lieblich—Judge Lyon, I have one further question. There isn't any proof here in this case indicating anything of an incendiary origin, yet.

The Court—Well, that is not a specific charge, but I take it from the testimony that was offered, and it will be contended that that was an inference from the facts.

Mr. Stoffer—An inference from the facts, and also the proof of loss.

Mr. Lieblich—All right, go ahead.

The Court—Now, you may proceed.

(Mr. Stoffer made a closing address to the jury on behalf of the defendant.)

(Mr. Lieblich made a closing address to the jury on behalf of the plaintiff.)

CHARGE

Court's charge to the jury by Hon. Adrian Lyon, Judge of Court of Common Pleas, as follows:

Members of the Jury: This action, or rather

two actions that are being tried together as one action, is an action on two insurance policies which cover the dwelling house and the furniture owned by the plaintiff, these policies being written in the defendant company, the Niagara Fire Insurance Company.

It is claimed on the part of the plaintiff that these two policies were written by the authorized agent of the company; that the premiums were paid, and that at the time of the fire these were lawful insurance contracts in full force.

The fact is undisputed that these policies were written; that the premiums were paid, and that they were in full force at the time of the fire. It is also undisputed in the case that the property, the dwelling house and such furniture as was in it, was consumed by fire. This loss occurred on the 7th of February, 1931, and on February 8, 1931, by different, independent fires occurring on successive days about twenty-nine hours apart.

The defendant sets up in defense that the conditions which were necessary for the plaintiff to fulfill in order to hold the company liable were not complied with, and that, therefore, the company is not liable on the policies.

The defenses are several in number. First, it is claimed on the part of the defendant company that the fires were of incendiary origin, and that the plaintiff had knowledge of, or was a party to, or consented to this burning for the purpose of defrauding the insurance companies.

The testimony from which that inference would be drawn has been related to you, and is to the effect that about midnight on February 7 this fire

occurred in a peculiar manner, namely, that through the center of the house from the bottom to the top a fire broke out, about six feet in diameter, burning through from the bottom through to the roof, which was partly consumed; that the fire company was called and after a time completely extinguished the fire. You have the testimony of the firemen upon that question. That on the following night or in the early morning hours of the following night the place became afire again and in such a manner—at four corners, I think, one of the firemen described it—that when the firemen got there, the house was so far consumed that it was impossible for them to extinguish it, and the house with its contents was consumed.

The defendant has produced testimony to the effect that in the house, as described by two of the firemen, there was very little, if any, furniture left; that these two firemen went into all of the rooms of the house, and all that they found was a day bed, I think one of them described it, and a mattress, which was thrown out, and the kitchen range in the kitchen, and that there was practically no other furniture in the house.

The defendant, also, has produced in evidence certain acts of the plaintiff going to show his attitude toward the burning of his own property, drawing the inference from them that the plaintiff was concerned in its destruction. Of course, the plaintiff denies that he had any knowledge of the cause of the fire. He testified that the furniture which he had was in this house, and he has detailed it in his proof of loss and on the witness stand, and says that its value was $707.

It is for you to say under the circumstances whether or not that defense on the part of the defendant has been sustained. If it has been, of course, the plaintiff cannot recover.

Secondly, the defendant sets up that the policy is void because the property was used otherwise than as a dwelling, and as to this the testimony which has been produced is to the effect that this other occupancy was by some condition involving the manufacture of intoxicating liquor.

The testimony on that point was produced largely by the neighbor, Mr. Gates, who says he smelled the odor indicating a distillery of some sort, and, I think, by one other witness, who said that back of the house there was some indication of rye, which is, of course, material from which whiskey is manufactured.

If you should find that this property was occupied otherwise than as a dwelling, then, of course, the plaintiff cannot recover, because it is encumbent upon a person who has his property insured to be sure that when he states that the property insured shall be occupied only as a dwelling house that it is not otherwise occupied.

The defendant sets up in defense a third defense, namely, that the occupancy was one of an increased hazard, and that that increased hazard was because the plaintiff allowed the premises to be occupied and to have brought on it with that occupancy this alcohol or something of that sort, which was of an explosive nature and which was in direct violation of the provisions of the policy, and that if such an increased hazard was effected

on the premises, that then the company would not be liable.

If you should find that that is true, then, of course, the defendant is not liable, and there cannot be a verdict against the defendant.

The defendant sets up a fourth defense, namely, that in the proof of loss which the plaintiff made he materially misrepresented, that is to say, he fraudulently misrepresented, the value of the property that was consumed.

Now, of course, we all have a tendency to over estimate the value of our own property, and I suppose every one of us if we had a fire loss would be apt to give the very highest price that we think that property would bear; so that any misrepresentation of the value of property would have to be with a fraudulent intent to value it at a greatly excessive value in order to recover from the insurance policy more than that property was worth, and the defendant particularly refers to the valuation of the personal property, which was insured for $750, and which the plaintiff says was worth at the time of the fire $707.

The defendant states that there are two defenses to that, namely, that the furniture was not in the house, and if it was not in the house and was not consumed, of course, the defendant is not liable no matter how it was taken out of the house, in the first place. Secondly, that the figures which the plaintiff has given, namely, $707, are far in excess of the value of the furniture even though it was all there as the plaintiff says it was.

These are the defenses which the defendant interposes as a defense to this policy, and if you

should find that any one of these defenses is substantiated by the testimony in the case, of course, there can be no verdict against the defendant.

The first thing for you to determine will be whether or not any of these defenses prevailed and whether or not the defendant company is liable under these policies. According to the agreement of counsel, therefore, your first consideration and your first verdict will be as to whether or not the company is liable under these policies. If you determine that it is not, that ends the case.

If you determine that the company is liable, then you will proceed to determine two things: First, What was the value of the building?

The appraisal witness upon the subject of value for the plaintiff was the contractor who testified that it would cost $5,500 to reproduce this building at the present time and that it could be produced new at that sum. The building, as he testified, was a bungalow type, twenty-eight by twenty-eight, and he gave you the estimate of the reproduction cost.

The witness for the defendant upon that subject testified that the house could be reproduced for $2,300 and some odd dollars. I do not remember the amount; you will.

Now, it is somewhere between those figures that you will be justified in finding was the value of this building.

The Court made a statement during the course of the trial that it was a matter of common knowledge that eighty cents per cubic foot was high for this character of construction. You must not take that into consideration. The Court does not have

to advise you, as the Court has so many times told you, that you are to decide these cases only upon the facts of the case as they have been testified to you by the witnesses and to take nothing else; and when the Court makes a statement as to the facts and you disagree with the Court as to the facts, you are to take your memory and your consideration of the facts and not the Court's; and, likewise, the inferences which may be lawfully drawn from the facts. They are peculiarly for you and not for the Court, and you are to take such inferences from the facts as you would draw and not as the Court would draw. You are the judges of the credibility which is to be given to witnesses. That is your province exclusively, so pay no attention to what the Court said upon the subject that has just been mentioned.

The burden of proof, of course, is upon the plaintiff to prove his case by a preponderance of the evidence. That is a rule which has been so frequently stated to you that it is not necessary for the Court to enlarge upon it. Before you can give the plaintiff a verdict, you must find that the testimony in favor of the plaintiff outweighs the testimony in favor of the defendant.

Both the counsel for the plaintiff and for the defendant have asked the Court to charge several items quite at length, but I must note them.

Counsel for the plaintiff requests the Court to charge as follows, and the Court will charge you as follows:

1. An over-valuation in order to work a forfeiture must be made so plain that it cannot be accounted for upon the principle that every man

is naturally prone to put a favorable estimate upon the value of his own property.

2. Over-valuation by the insured of the property insured when made in good faith does not affect the rights of the parties, and if the company relies upon such over-valuation, it must show that they insured falsely and with the intent to defraud the company over-valued the property.

3. An innnocent though exaggerated estimate of the value will not void the policy.

4. In order to avoid a policy of insurance on the ground of fraud, it is necessary to misrepresent a material fact, and the misrepresentation must be substantially and materially untrue and must be made with fraudulent intent.

Mr. Lieblich—Number five is withdrawn.

The Court—Five is withdrawn.

(To the Jury): 6. In order to defeat a recovery, the burden rests upon the defendant to prove by a fair preponderance of the evidence that—

Mr. Lieblich—I withdraw that, because they set it up as a defense, and they didn't prove it.

The Court—Number six is withdrawn.

7. To defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant which increased the hazard were made with knowledge to or the consent of the owner or his agent.

Mr. Lieblich—Number eight is withdrawn.

The Court—One moment, Mr. Lieblich.

(To the Jury): The Court declines to charge number seven as requested.

The Court—Is number eight withdrawn?

Mr. Lieblich—Yes.

The Court—(To the Jury): 9. "As to change in title or possession," does not void policy without notice or knowledge of assured.

The Court so charges you with the additional statement that that change must be without an increase of hazard.

10. The word kept as used in the policy implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time.

Well, it would be for you to say, Members of the Jury, whether the prohibited article was on the premises for such a length of time as to increase the hazard.

The Court declines to charge as requested in number eleven.

Mr. Lieblich—Twelve is withdrawn.

The Court—(To the Jury): 13. Fraud is an affirmative defense and must be proven by the defendant insurance company since they are the ones who set this up as a defense.

Of course, fraud is never presumed; fraud must be proved by the person who alleges it.

14. False swearing must be in a matter materially affecting the risk and must be with wilful intent to defraud the insurance company.

15. Within the terms of the policy in order to establish a defense of fraud, the insurance company must show that the fraudulent statement as made was relatively and wilfully false and that the motive of the assured in making this statement was bad.

Mr. Lieblich—I withdraw sixteen.

The Court—Sixteen is withdrawn.

(To the Jury): Counsel for the defendant has asked the Court to charge as follows. I shall so charge you except with the addition of such comments as I may make:

1. Plaintiff entered into a contract of insurance with the defendant in this State. The Legislature of New Jersey has by statute prescribed a standard form of policy, and has provided also that no other or different provision, agreement, condition, or clause shall in any manner be made a part of such policy. Accordingly, the policy in this case is a contract having legislative sanction, and its true meaning must be derived from the language contained in the policy without construing clear provisions more favorable for the insured than for the company or vice versa. It is the Court's function to construe the relevant provisions, and it is encumbent upon you to apply the constructions of the policy provisions as they are given to you by the Court and not to modify them in favor of either the plaintiff or the insurance company.

Mr. Stoffer—I think your Honor has covered two.

The Court—Number two is covered.

(To the Jury): 3. Under the terms of the policies issued by defendant, plaintiff warranted that the building in question was and would be occupied exclusively as a dwelling. If you find that the building was not occupied exclusively as a dwelling prior to the fires and during the terms of it, your verdict must be for the defendant even though you find that plaintiff had no knowledge of the actual use of the building.

4. The policies in suit provide as follows: This

entire policy shall be void if there be kept, used or allowed on the above described premises benzine, benzol, gasoline, naphtha, or other explosives, and/or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard. If you find that alcohol was kept, used, or allowed on the premises in question at any time prior to the fires, and if you further find that alcohol is an explosive, then your verdict must be for the defendant.

Of course, that means alcohol in a substantial quantity.

5. The policies in suit provide as follows: This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured. If you find that at any time after the issuance of the policy in suit, the fire hazard was increased by any means within the control or knowledge of the plaintiff, then your verdict will be for the defendant.

6. The policies in suit contain the following provision: 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. If you find that plaintiff knowingly misrepresented to defendant in his proofs of loss or otherwise the value of the property claimed to be involved in the loss or the amount of damage caused by the fire or the origin

and cause of the fires, or if he knowingly misrepresented any other matters material to the insurance, your verdict must be for the defendant.

Let the officer be sworn.

Mr. Lieblich—Plaintiff excepts to that part of the Court's charge wherein the Court charged or used the following language or a portion thereof, "The fire was of incendiary origin; the fire occurred in a peculiar manner; during occupancy was by some condition used for distilling purposes; if such an increased hazard was effected by reason of alcohol upon the premises; if the furniture was not at the house; if the furniture was taken out of the house;" the Court's charge not being based upon any evidence in this case sufficient to raise a factual question for the jury.

I except to the Court's charged each and every one of the defendant's requests to charge in the language in which the requests were charged.

Mr. Stoffer—I except to that portion of your Honor's charge in which your Honor said that under the evidence of the contractors and builders the jury would be justified in finding somewhere between the two figures as to the value of the building, on the ground that the jury might see fit to take the defendant's expert's figure.

I except to your Honor's charging the plaintiff's requests to charge in the form and language in which they were charged, incorporating as they did, I believe, some faulty principles of law.

EXHIBIT P-1

	Warranty Deed
Fanny Dunn, Widow	D 11/20/30
to	A 1/19/31
Anatole Vinick	R 1/22/31
	B 1001—363
	C $1 & o. c.

Cover premises described in policies.

EXHIBIT P-2

	Warranty Deed
Sigmund Kutner	D 6/6/24
to	A 6/6/24
Fanny Dunn	R 6/13/24
	B 308—495
	C $1.00 & o. c.

Covers premises described in poilcies.

EXHIBIT P-3

Policy No. 207577 Niagara Fire Ins. Co. $2250.
Rate 75c. Prem. $16.88 insures Mrs. Fred Dunn.
$1500 on the frame building
750 on furniture etc.

$2250 in the premises described in policy No. 208450 Niagara Ex. P-2.
1/21/31 Endorsement—Anatole Vinick, owner.

Exhibit D-2

EXHIBIT D-1

Floor Plan made by Mr. Vinick, same as Ex. P--5.

EXHIBIT D-2

No. 208450

Niagara Fire Insurance Company

New York

Established 1850

Cash Capital $3,000,000.00

Amount $3750.00. Rate .75. Premium $28.13.

In Consideration of the Stipulations herein named and of twenty eight and 13/100 Dollars Premium does insure Fannie Dunn for the term of three years from the 1st day of December 1929 at noon to the 1st day of December 1932 at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Thirty seven hundred fifty dollars.

Private Dwelling, Barn and Furniture

(Unprotected)

$3000.00 on the 2 story roof building, additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work connected therewith, while occupied exclusively for dwelling purposes by not exceeding two families, situated about 1½ miles from Pennsylvania Railroad Station, known as "Fellowship Farm," Stelton, Middlesex County, New Jersey.

$750.00 on household furniture, useful and ornamental, including beds, bedding, linen, wearing apparel, plate and plated ware, printed books and music; pictures, paintings and engravings and their frames, bronzes, statuary and other works of art and objects of virtu (at not exceeding cost price); all musical and scientific instruments, radio equipment, sewing machines, mirrors, jewelry and precious stones in use, fuel and family stores and supplies, tools, toys, bicycles, guns and other sporting goods and utensils the property of the insured or any member of the family, all while contained in the above-described building.

It is understod and agreed that the 1st item of this policy also covers awnings, door and window screens, and storm doors and windows, while attached to above-described building, or in amount not to exceed $200 while stored in outbuildings upon the above-described premises.

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

Other insurance permitted without notice until required.

Exhibit D-2

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

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

Electrical Exemption Clause—If dynamos, exciters, lamps, motors, switches, radio apparatus, electric automobiles or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices, whether from artificial or natural causes, including Lightning; but if fire ensues, then this company shall be liable for its proportion of loss or damage caused by such ensuing fire, but not exceeding the sum insured and subject in all respects to the terms and conditions of this policy.

Attached to and made a part of Policy No.

208450 of the Niagara Fire Insurance Company, issued at its New Brunswick, N. J. agency.

Harkins & Victory Co., Agents.

W. F. Harkins.

Report of Endorsement

Company, Niagara Fire Ins. Co. Agency at New Brunswick, N. J. Policy No. 208450. Name of Insured, Fannie Dunne. Commencement 12-1-29. Old Rate .75. Expiration 12-1-32. New rate .75. Date of Endorsement 1-21-31. Amount of Policy $3750.00. Occupancy, Dwelling. Property Insured, Bldg. & H. H. F. Location: about 1½ miles from Pennsylvania Railroad Station, known as "Fellowship Farm", Stelton, Middlesex County, New Jersey. Construction, Fram.

The following is an exact Copy of Endorsement attached to Policy: Interest in the property insured under this policy is hereby vested in Anatole Vinik as owner instead of as heretofore, and this insurance therefore covers same property for new owner. All other conditions of policy remain unchanged.

Harkins & Victory Co., Agent.

Jas. A. Harkins, Treas.

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 provision sand 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 a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at New Brunswick, N. J.

O. E. Lane, President.

Chas. A. Lung, Secretary.

Countersigned at New Brunswick, N. J.,
this 31st day of October, 1929.

Harkins & Victory Co., Agent.
W. F. Harkins, Pres.

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 herinafter 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 or 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, phosphorous 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 accord-

ing 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 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, evidence of debt, money, notes, or securities; nor, unless liability is specifically assumed thereon, 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 con-

struction 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 the 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 of 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 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 in-

sured 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 incumberences 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 representa-

tive, 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.

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 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.

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 representative 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-4

Proof of Loss to The

Niagara Fire Insurance Company

Policy Number 208450 and 207577

Amount of Policy $6000. Expiring Dec. 1, 1932 and July 15, 1931.

By the above policies of insurance you insured Mrs. Fred Dunn also known as Fannie Dunn, (hereinafter called the assured) the written portion thereof, and all endorsements, transfers and assignments thereon being as follows: viz.

A fire occurred on the 7th day of February, 1931, at about the hour of 1 o'clock A. M. by which the property described in said policy was totally destroyed and damaged. The origin of said fire is unknown by me.

The total insurance (whether valid or not) covering said property or any part of same by the Niagara Fire Ins. Co. at the time of said fire including the above policies, was the sum of $6000.00.

The building described or containing the property described, was occupied at the time of said fire by Frank Santo.

Except as noted below the property described belonged at the time of the fire to Anatole Vinick, grantee of Mrs. Fred Dunn, and no other person or persons had any interest, lien or encumbrance thereof or thereon, except:

First mortgage of the Citizens Building and Loan Association of Newark, New Jersey in the amount of $1500.00

Since the issue of the said policy there has been no assignment or transfer or encumbrance on said

property, nor any change in the title, use, occupancy, location, possession or exposure of the same except as heretofore mentioned.

The actual cash value of the said property, at the time of the fire was the sum of $7,500.00 and the whole amount of loss and damage to and upon the same by said fire was the sum of $6063.00 or as more particularly set forth as designated "Statement of Loss" attached hereto and made a part hereof.

Assured hereby claims of this Company, under the policies referred to, the sum of $6000.00.

The said fire did not originated by any act, de-

The said fire did not originate by any act, de- these affiants nothing has been done by or with the privity or consent of the assured or these affiants, to violate the conditions of the policies or render them void; no articles are mentioned herein or in annexed schedule but such as were in the building damaged or destroyed, and belonging to and in possession of the said assured at the time of said fire; no property saved has been in any manner concealed and no attempt to deceive the said Company, as to the extent of said loss has in any manner been made.

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

Witness my hand and seal at New Brunswick, N. J., this 17th day of March, 1931.

Anatole Vinik

Exhibit P-4

State of New Jersey
County of Middlesex } ss.

Being sworn on his oath, appearing before me this day and date, above written signer of the foregoing statement, who has made solmen oath to the truth of the same, and that no material facts are withheld of which The Niagara Fire Insurance Company should be advised.

Subscribed and Sworn to before
me this 17th day of March 1931

Anatole Vinik.

Frederick H. Dahmer,
Attorney at Law of New Jersey.

Estimate: To replace Anatole Vinik's house on Fellowship Farm at Stelton, N. J. about 1½ miles from Pennsylvania Railroad Station, Township of Piscataway, Middlesex County, New Jersey.

Electric Wiring	$ 93.50
Electric Fixtures	125.00
Service	25.00
Plastering Labor	200.00
Interior Decorating	280.00
Exterior Decorating	175.00
Plumbing	450.00
Heating	400.00
Floor Scraping and finishing	40.00
Carpenter Labor	1500.00
Lumber	1594.00
Mill	658.50
Hardware	72.00
Mason Labor	300.00
Stone	150.00
Cost of house less profits	$6,063.00

Exhibit P-4

State of New Jersey
County of Middlesex } ss.

Anatole Vinik, being duly sworn according to law on his oath, deposes and says:

That he has no knowledge nor belief as to the origin of the fire. He further states that the said premises were rented by Frank Santo, and that the said house was destroyed by fire together with its contents and furniture on the 7th day of February, 1931, at about the hour of 1 o'clock.

The assured does further state that he owns the property in fee simple. Annexed hereto and made a part hereof, is a complete inventory of the damaged household goods, which were the personal property of the assured with a cash value of each item and the amount of loss thereon.

There was no other insurance on the said household furniture, except the insurance which the Niagara Fire Insurance Company, by its policy number C 196224, has on said household furniture, a copy of the schedule which is attached to this affidavit and marked Schedule "A" and there has been no change in the title, or exposure of the said property since the issuing of this policy.

Anatole Vinik.

Subscribed and Sworn to before me
this 17th day of March, 1931.

Joseph J. Messina,
Notary Public of N. J.
My Commission Expires Oct. 8, 1935.
(Seal)

Exhibit P-4

Schedule "A"

List of furniture insured by The Niagara Fire Insurance Company, by policy number 208450 and 207577 owned by Anatole Vinik.

Three piece Living room suite	$175.00
1—10x12 rug	40.00
1—9x12 "	40.00
Book case	25.00
Center table	20.00
End "	5.00
2—floor lamps	15.00
3 Piece wicker set	95.00
1—Grass rug	10.00
2—day beds and mattresses	43.00
1—Regular bed	22.00
1—Dresser	15.00
1—Kitchen Kabinet	25.00
1 table and 5 chairs	20.00
1—Ice Box	22.00
10—Window shades	25.00
10—Sets of Window Curtains	20.00
Pots, Pans and Kitchen Utensils	25.00
2—Table Lamps	12.00
1—Kitchen Stove	22.00
Pictures and Ornaments	25.00
1—Smoking Stand	6.00
Total furniture loss	$707.00

EXHIBIT P-6

Feb. 7th, 1931.

Harkins & Victory Co.,
Church Street,
City.

Loss by Anotole Vinik
Policies No. 207577 & 208450
Niagara Fire Insurance Company.

Gentlemen:

This is to advise you that my client Anotole Vinik has suffered a practical total loss by fire on the premises described in the above mentioned policies. The policies were originally taken out in the name of Fannie Dunn and Mrs. Fred Dunn.

Kindly note that the London & Lancashire Insurance Company, Ltd., has also insured said premises against fire in the sum of $1500.00.

Kindly acknowledge receipt of this letter, thanking you for the same, I am,

Very truly yours,
Fred Dahmer.

EXHIBIT P-7

March 18, 1931

Niagara Fire Insurance Co.,
95 Maiden Lane,
New York City.

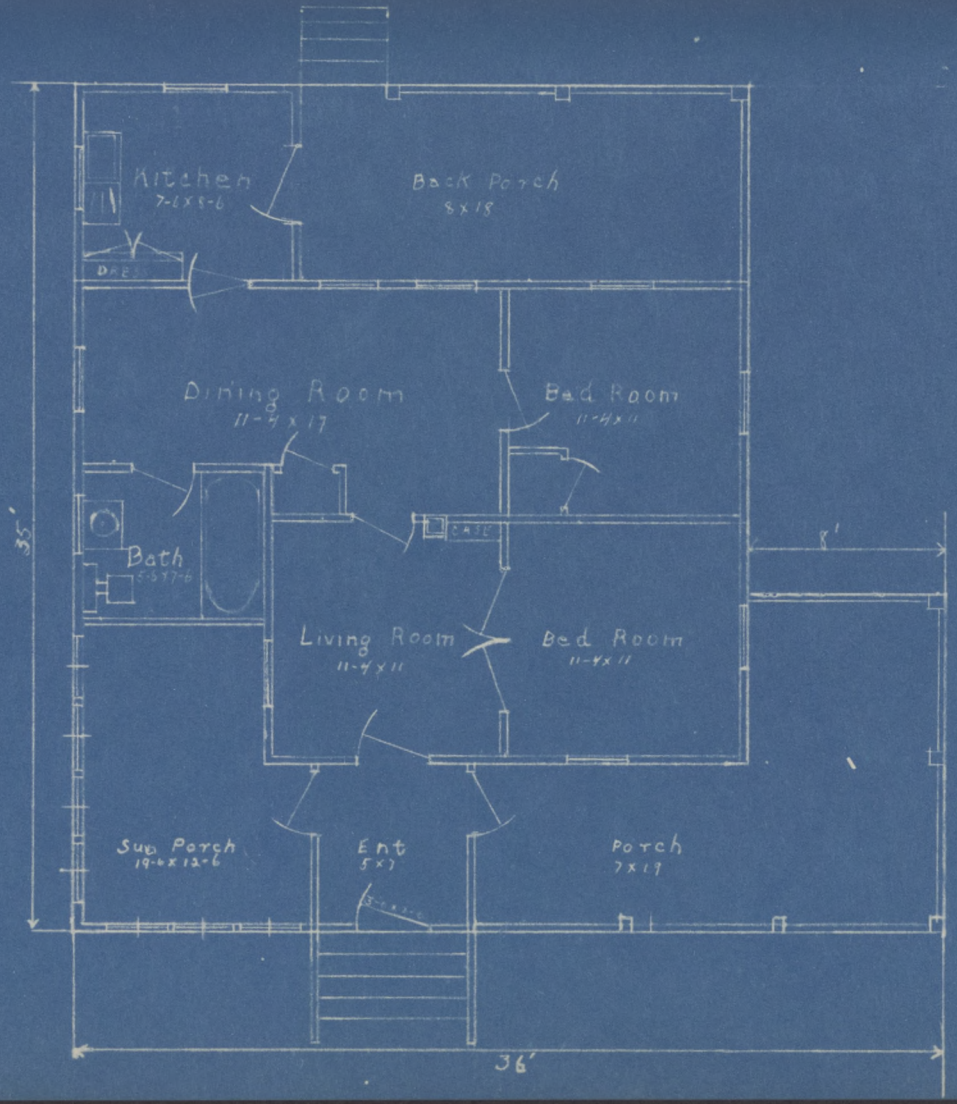
Re: Fire Loss Anotole Vinik
Policies No. 207577 - 208450.

Gentlemen:

I am enclosing herein proof of fire loss in the above entitled matter.

Trusting to receive an acknowledgement of the same and, or, any terms of settling within the very near future, I beg to remain,

Very truly yours,
Fred Dahmer.



SCALE
1/8" = 1'

P52 5/11/32

Remittitur

Filed 4/3/34

REMITTITUR

These causes, consolidated on appeal by order of the Court, having been duly argued at the October 1933 term of this Court by David Stoffer of Counsel with Arthur T. Vanderbilt, Attorney of defendant-respondent, and Joseph T. Lieblich, of Counsel with plaintiff-appellant, and the Court having inspected the records and judgments below and considered the causes assigned for error;

It is, on this 3rd day of April, 1934, on motion of Arthur T. Vanderbilt, of Counsel with defendant-respondent, Ordered and Adjudged that the judgments of the Middlesex County Circuit Court and Middlesex County Court of Common Pleas be affirmed, with costs.

It is further Ordered that the records in these causes be remitted to the Middlesex County Circuit Court and Middlesex County Court of Common Pleas, respectively, to be proceeded with in accordance with this judgment and the law and practice of these Courts.

Notice of Appeal and Grounds of Appeal

Filed 4|23|34

NOTICE OF APPEAL AND GROUNDS OF APPEAL

Please Take Notice that the plaintiff appellant, Antole Vinik, hereby appeals from the whole of the verdict and judgment in this cause and the affirmance thereof by the Supreme Court to the Court of Errors & Appeals, because the Supreme Court erred in affirming the judgment appealed from, in the Middlesex Circuit Court and Middlesex Court of Common Pleas in that:

1. The Court erred in permitting an amendment to the pleadings after issue had been joined, testimony De Bene Esse had been taken of Bertha Kruger upon the issue as raised by the pleadings, and the case moved for trial. (P. 21-25.)

2. The Court erred in admitting the answer to the following question propounded to the witness, Mr. Vinik:

> "Now this property was given to you about a year before the fire by your mother was it not?"
>
> Ans. "She gave it to me when I was 21." (P. 40, l. 15-26.)

3. The court erred in admitting, the answer to the following question propounded by the witness, Louis Huttenbach:

> "Now on the basis of the sketch which he gave you and the information which he gave you concerning the materials which went into the building and its construction, could you make an estimate of the replacement value of that building." "Would you do it then?" "Will you please tell us what your

estimate of the replacement value is?" (P. 97, l. 17-25.)

Ans. "2603.00." (P. 103.)

4. The court erred in directing witness Huttenbach to use a written memorandum to aid him in testifying and in refusing plaintiff an opportunity to examine the witness with respect to the necessity and lawful right to the use thereof. (P. 103, l. 7-15.)

5. The Court erred in admitting the answer to the following question propounded to the witness Huttenbach:

"Will you tell us Mr. Huttenbach what the cubic cost of a brick building is for example?" (P. 105, l. 17-18.)

Ans. "Around forty cents, etc." (P. 106, l. 9.)

6. The Court erred in making the following statement:

"I know, but it is a matter of common knowledge that a brick building per cubic foot is a great deal more expensive than a frame building of this sort, and, it is almost a matter of common knowledge too that 80c a cubic foot for construction of this kind is absurd." (P. 105, l. 23-28.)

7. The Court erred in charging:

"The policies in the suit provide as follows: This entire policy shall be void if there be kept, used or allowed on the above described premises, benzine, benzol, gasoline, naptha, or other explosives or petroleum or any of its products of greater inflamability than kerosene oil, of the U. S. Standard." If you find that alcohol was kept, used or al-

lowed in the premises in question, at any time prior to the fires, and if you further find that alcohol is an explosive, then your verdict must be for the defendant, of course, that means alcohol in a substantial quantity." (P. 137, l. 1-12.)

8. The Court erred in charging:

"The policies in the suit provide as follows: This entire policy shall be void if the hazard be increased by any means therein, within the control or the knowledge of the insured. If you find that at any time after the issuance of the policy the fire hazard was increased by any means within the control or knowledge of the plaintiff then your verdict will be for the defendant." (P. 137, l. 14-22.)

Respectfully yours, &c.,
JOSEPH T. LIEBLICH,
Attorney of Plaintiff-Appellant.

Service of a copy of the within is hereby acknowledged this 13th day of April, 1934.

Arthur T. Vanderbilt,
Attorney of Plaintiff-Appellee.

New Jersey Court of Errors & Appeals

No. 123, May Term 1934

Antole Vinik,
Plaintiff-Appellant,
vs.
Niagara Fire Insurance Company, a corporation,
Defendant-Appellee.

Supreme Court Opinion and Reply Brief of Plaintiff-Appellant

By direction of this Honorable Court, I am attaching hereto the opinion of the Supreme Court in view of the conclusion of this Learned Court that the opinion forms part of the record under Rule 19, the added costs being insignificant, in the hope that this short reply brief may be considered and may tend to refresh the recollection of the Learned members of the Court of the oral argument when they are in their respective "sanctum sanctorum's," I have taken the liberty of the submission.

Under point one my adversary raises the question that the grounds of appeal are improper.

You will observe that we have incorporated the notice and grounds of appeal in one, and that the same recites:

> "Because the Supreme Court erred in affirming the judgment appealed from"

and then goes on and specifies the several assignments of error which are made the respective points in the brief.

From my experience I have concluded that this Learned Court invariably applies the test whether an injustice has been done the appellant, and secondly considers forms of procedure.

This is borne out by the fact that in Sohn vs. Katz, 112 L 106, opinion filed January 1934, this Court reversed the Passaic Common Pleas and the Supreme Court, notwithstanding the fact that appellant failed to serve or file any grounds of appeal, so that if the ground of appeal in this case should not be strictly in compliance with the decisions, that the same discretions will be exercised by this Learned Court as was in Sohn vs. Katz, to the end that substantial justice may be rendered to the parties.

Upon the oral argument and in response to my point 6 my adversary attempted to argue the judicial temperament and demeanor of the Learned Trial Judge.

Surely this Learned Court will admit that even the most temperate of human beings at sometime or other may give vent to the feelings and thoughts which surge within him and which he may not always be able to fully control, and I hope this Learned Court will not overlook the psychology of the situation and the effect of the Learned Trial Court's statement upon the Jury.

I admit that it is within the discretion of the Trial Judge to comment on the evidence **in his charge to the Jury,** but the statement:

> "Eighty cents a cubic foot for construction of this kind is absurd"

coming from the Learned Trial Judge at that time and under the circumstances then existing cannot be construed as "comment of the Trial Court in his charge to the Jury."

Experience has taught us that, notwithstanding all rules of law and evidence, that Trial Judges are but human, and even a Learned Judge may sometimes, inadvertently, by emphasis, gestures or oratory, and not by the language employed, bring home to the Jury an inference or impression of his own conclusion which the Learned Trial Judge may not have intended to do, but will nevertheless sway the Jury and direct its verdict.

I am of the opinion, that the foregoing was particularly true of one of the most Honored members of our judiciary, who has now passed to the great beyond, and who was very eloquent in his charges to the Jury, and it is within the recollection of my adversary and myself that we could, with a degree of certainty, anticipate the Jury's verdict from the fact that when the Learned Jurist reached what he must have felt was the crucial point in the case, he inadvertently would take out his pocket 'kerchief,' drop it, and pause sufficiently long to afford the Jury an opportunity to properly digest that particular portion of his charge.

My adversary under point 7 relies upon the case of Goldstein vs. Northwest National Insurance Company, 4 N. J. Mis. 669 for the proposition:

> "Evidence showed the presence of a large quantity of alcohol within the meaning of the prohibited articles warranty."

I specifically direct this Court's attention to the fact that the Goldstein case came before the Supreme Court on a **rule to show cause,** and the Supreme Court concluded:

> "As we have reached the conclusion that the question as to the keeping of gasoline and alcohol upon the premises was decided by the Jury contrary to the great weight of evidence, the rules to show cause will be made absolute."

but there was no specific finding by the Supreme Court that alcohol was an explosive or that alcohol is one of the catalogued prohibited articles, and the decision of the Supreme Court can safely rest upon the finding that gasoline was kept upon the premises.

Respectfully submitted,
JOSEPH T. LIEBLICH,
Attorney of Plaintiff-Appellant.

NEW JERSEY SUPREME COURT
No. 19 October Term, 1933

OPINION

Argued October 3, 1933; decided March 23, 1934.
Reported 112 L. 461—171 Atl. 555.

On appeals from judgments of the Middlesex County Circuit Court and Middlesex Court of Common Pleas.

Before Brogan, C. J., and Justices Trenchard and Heher.

For the appellant: Joseph T. Lieblich.

For the respondent: Arthur T. Vanderbilt and David Stoffer.

The opinion of the court was delivered by Heher, J.

Respondent undertook, by two policies of insurance issued to appellant, to indemnify him against loss and damage sustained to a farm dwelling house and chattels contained therein by fire. Appellant claims that the damage to the building was in excess of $6,000., the full coverage of the two policies thereon, and that his personal property was damaged in the sum of $707. The actions were tried together, and the jury returned a verdict for defendant.

The first point urged by appellant is that the trial judge erred in permitting an amendment to the answer interposed in one of the actions, to include defenses setting up (1) breach of a warranty by plaintiff that the insured building would be occupied exclusively for dwelling purposes; (2) a change other than by death of the insured in the possession of the subject of insurance, with increase

of hazard, without an agreement to that effect being endorsed on the policy or added thereto, as provided by the terms of the policy; and (3) the existence of another policy in the sum of $1500. covering the building. This contention is without merit. Appellant's counsel consented to the amendment averring the existence of another policy. As to the others, while an exception was taken, no ground of objection was stated. Surprise was not alleged. Counsel merely stated: "I came here prepared to try the case on the issues raised." But this is manifestly not a claim of surprise. The amendment of a pleading is within the discretion of the court, and therefore not the subject of a ground of appeal, unless there is an abuse of discretion. **Allen, Inc. v. Spring Street Realty Co., 111 N. J. L. 88, 166 Atl. 199.** There was no abuse of discretion.

The third and fourth grounds of appeal have been abandoned. The second, fifth and seventh challenge rulings on evidence. The question made the basis of the second ground for reversal was clearly a proper one. Its purpose was to show that he acquired the property by gift from his mother a year before the fire. No exception was taken to the questions made the subject of the fifth and seventh grounds.

The next point made is that the trial judge erred in **directing** a witness to use a written memorandum to aid him in testifying, and in denying appellant an opportunity to examine the witness as to the necessity for its use. The witness, an expert, was asked to give an estimate of the replacement value of the insured building. We are not aware of any reason why he should not have used the

memorandum, if he found it necessary to do so. But counsel for appellant complains that he was not first allowed to examine the witness with respect to the need of it. He inquired "May I examine the witness on the use of the paper?" and the trial judge replied in the negative. Assuming, without deciding, that this was error, it does not appear that the witness actually used the memorandum to refresh his recollection. The trial judge did not direct him to use the memorandum. He merely said, "If you need the paper to refresh your recollection, you may refer to it." But it does not appear that he did refer to it. Moreover, the error, if any, was harmless. The witness was exhaustively cross-examined in reference to his estimate of the replacement value. After all, the vital question was the accuracy of his estimate, not the circumstances connected with the making of the memorandum and the necessity for its use. The memorandum was not, in any sense, conclusive on the question of value.

The next point is that there was error in an observation of the trial judge that the relative cost of brick and frame buildings was a matter of common knowledge. The ground of objection seems to be that the court, in saying that "it is almost a matter of common knowledge that eighty cents a cubic feet for construction of this kind is absurd," committed prejudicial error. If so, it was corrected in the charge. The statement was there entirely withdrawn. Moreover, there was no ruling that can be made the subject of a ground of appeal. Counsel merely excepted "to your honor's remark," adding that "the witness's testimony is for the determination of the jury;" to which the court replied, "Yes, proceed. I will leave it to the jury." This seemed to

satisfy counsel, and there the matter ended, except that the court, in his charge, withdrew the statement from the jury's consideration in a wholly satisfactory manner.

It is also insisted that there was error in the court's refusal to charge a request to the effect that defendant must "affirmatively prove that changes made by a tenant which increased the hazard were made with knowledge to or the consent of the owner or his agent." No exception was taken to the refusal to charge this request, and it is therefore not the subject of a ground of appeal.

Appellant next challenges the instruction that "if you find that at any time after the issuance of the policy in suit, the fire hazard was increased by any means within the control or knowledge of the plaintiff," the verdict should be for defendant; and also that portion of the charge wherein the court said that if the jury found "that alcohol was kept, used or allowed in the premises * * *, and if you further find that alcohol is an explosive," the verdict must be for defendant.

We find the criticism of the charge in these respects to be without merit. It is not contended that these excerpts from the charge are not technically accurate, if factually supported, but it is said there was no evidence justifying the instructions. This is not so. There was evidence tending to establish that the building was used for the manufacture of alcoholic liquors, and from this it was fairly inferable that alcohol in substantial quantities was kept upon the premises, and that it was an explosive liquid within the intendment of the policy provisions.

Judgment affirmed, with costs.

New Jersey Court of Errors & Appeals

Antole Vinik, Plaintiff-Appellant, vs. Niagara Fire Insurance Company, a Corporation, Defendant-Appellee.	On Appeal From Supreme Court

Brief of Plaintiff-Appellant

FACTS

This is an appeal from the verdict of a Jury in Middlesex County wherein two actions were tried together, by direction of the Trial Judge, to wit: Antole Vinik vs. Niagara Fire Insurance Company in Middlesex County Court of Common Pleas and another action between the same parties in Middlesex County Circuit Court and from ***the affirmance thereof*** by the Supreme Court which is ***reported in*** 112 L 462, 171 Atl. 555.

In both of these actions plaintiff sought to recover of the defendant its proportion of the loss and damage by fire on the building in the sum of $6063 and $707 on his personal property. The policies are set forth (Ex. D-2, p. 140) and (Ex. P-3, p. 139).

Plaintiff, a young man just over 23 years of age, (p. 25/23), testified to the fire and loss and damage, that at the time of the fire the ***building was used for dwelling purposes by a tenant*** (p. 38, l. 14) and at the time of the fire he was asleep (p. 44) in his usual place of abode (p. 44) at a considerable distance from the scene of the fire.

August Morris, a witness on behalf of the plaintiff, testified that the cost of replacement of the loss

was $5550. p. 61, l. 2) and that the original cost of construction was $6500 (p. 61, l. 9) and allowed 15 to 20% for depreciation (p. 61, l. 12) and in response to the Court's question, gave his estimate of value on a cubic foot basis at eighty-cents (p. 62) which resulted in the Trial Judge giving the Jury his opinion (p. 105) and which opinion was highly prejudicial to the plaintiff.

Mr. Dahmer, a lawyer in New Brunswick, testified on behalf of the plaintiff as to the compliance with policy conditions and denied a conversation which is alleged to have taken place in his office between Mr. Huttenbach, the company's appraiser, and Mr. Baxter, the company's adjuster and plaintiff (p. 115).

George A. Newton, produced on behalf of the plaintiff testified to furniture that was in the house, that it took two hours to put out the fire (p. 120, l. 16) that he lived in the locality and he at that time did not notice any odor of any kind such as was testified to by defense witness Mr. Gates (p. 69) to which I will subsequently refer.

Walter Hines, a neighbor of Vinik, testified on behalf of the plaintiff and practically corroborated George Newton's testimony (p. 121).

The defendant produced Louis Huttenbach, the company's appraiser, who testified to a loss and damage of $2603.00 on the building (p. 117).

Mr. Gates, a witness produced on behalf of the defendant, testified that he lived in Stelton since 1913, about one hundred feet south of Vinik's house, that in the beginning of the year of 1931, and just before the fire, a new tenant moved in, that about four or five days before the fire he noticed the absence of the tenant from the building, smelled the odor of "distillery" that after the fire "There was

shell of building and a few timbers of the roof intact" (p. 67-74).

Chief Penrose, of the Stelton Fire Department, testified for the defendant and stated that when he got to the fire, flames were shooting out of the roof (p. 75). After one hour the fire was checked, (p. 75) that I was on the premises about two and a half hours (p. 75) and after I investigated, there was practically no furniture in the house (p. 76, l. 7).

The case having been submitted to the jury they returned a verdict "no cause for action" (p. 2).

I specifically direct this Court's attention to the fact that the case is devoid of any evidence of a "still" or of any "alcohol" being on the premises, and that the Supreme Court has enunciated a new rule of law:

> "Alcohol,————that is was an explosive liquid within intendment of the policy provisions."
>
> In Goldstein vs. N. W. National Insurance Co., 4 New Jersey Mis. 669, the learned Supreme Court tied up "gasoline" with "alcohol" and on rule to show cause set aside the verdict, but did not go as far as did the learned Supreme Court in this case and its conclusion can readily rest upon "gasoline."

POINT 1

THE COURT ERRED IN PERMITTING AN AMENDMENT TO THE PLEADINGS AFTER ISSUE HAD BEEN JOINED, TESTIMONY DE BENE ESSE HAD BEEN TAKEN FOR BERTHA KRUGER UPON THE ISSUE AS RAISED BY THE PLEADINGS AND THE CASE MOVED FOR TRIAL. (P. 21-25)

I call this Court's attention to the fact that this case was tried before Judge Lyons on May 11, 1932 at New Brunswick. (P. 21, l. 10.)

I call this Court's attention to the fact that prior to the trial of this cause this defendant took the deposition of Bertha Kruger, one of the defendant's witnesses, at the home of Bertha Kruger, May 10, 1933. (P. 83, l. 28-40.)

I assume then that it is needless for me to argue that the deposition of Bertha Kruger was confined to the issue as raised, and that the plaintiff was limited in his cross examination of this witness to the issues as then raised by the pleadings in this case.

From an examination of the pleadings it is apparent that issue had been joined and the defense was confined to the following:

> 1. Plaintiff misrepresented the amount or the value of the property claimed by him to be involved in the loss by overstating the value thereof, the amount of damage caused by the loss by overstating the value thereof, the origin and cause of said loss by stating that he did not know what the origin and cause of the loss were, all of these statements being set forth in a written proof of loss.

2. The hazard was increased by keeping, using or allowing on the premises, gasoline and other prohibited articles as catalogued, which do not include "alcohol."

3. That the building was not occupied for dwelling purposes.

And so in this posture, the main case being reached for trial, and I having come into Court to try the case upon the issues as raised, I tried to make myself clear to the Learned Trial Judge in my argument and objection to the proposed amendments that I was not prepared to try any issue other than raised by the pleadings and limited by the Bill of Particulars, which I had prepared and which had been answered, and if the defendant insisted upon raising new matter we were entitled to prepare to meet same by service of a demand for Bill of Particulars and Interrogatories after issue was joined.

The Learned Supreme Court in its opinion 112 L. 462, says:

"As to the others while an exception was taken ***no ground of objection was stated.***"

I call this Learned Court's attention to the objection:

"The Court—You object to these amendments.

Mr. Lieblich—Oh yes. I came here prepared to try the case on the issues raised, in addition to that I permitted Mr. McElhaney, as an accommodation to Mr. Stoffer to examine one of their witnesses upon the issue as raised." (P. 21, l. 30-40.)

Thus you will observe that while I didn't use the word surprise, I cannot agree with the Supreme Court in its conclusion, when they say:

"It is manifestly not a claim of surprise."

Surely I know of no more respectful way of claiming surprise than to tell the Trial Judge that I came to Court prepared to try the case upon the issues as raised, ***and was not prepared to try the issue upon new defenses which I had not anticipated,*** and not only was my objection predicated upon the ground of surprise, but that the case had actually been opened and tried upon the issued as raised in that:

> "I permitted————————to examine one of their witnesses upon the issue as raised." (P. 21, l. 35-40.)

Mr. McElhaney was connected with the office of Edmund A. Hayes of New Brunswick who had referred the matter to me, and my adversary admitted that the examination de bene esse of his witness Bertha Kruger was limited to the issue as raised.

> "Mr. Lieblich—But you were limited in your examination to the issue as raised.
>
> Mr. Stoffer—Yes.
>
> Mr. Lieblich—Now, I have examined the testimony, and while it may be an argument, at the same time I do not think that this is the proper time to make a motion of this kind, setting up a breach of warranty." (P. 22, l. 3-15.)

Thus I feel that I made clear to the Court at least two grounds of objection to the amendments, and reserved my exceptions to the Court's ruling as will appear on page 23, lines 1 to 8, page 24, lines 1 to 10 and page 25, lines 3 and 4.

While ordinarily an amendment to pleadings may be a discretionary matter, it must be apparent to this Learned Court that this was an abuse of discretion to permit two additional defenses to be set up

to defeat a recovery, over objection, the third amendment I admitted, without affording the plaintiff an opportunity to prepare the case to meet these two additional separate and distinct defenses.

The reasoning of this Court, in the Allen case relied upon by the Supreme Court does not appear to control the facts in the case sub judice for Judge Wells said:

> "Unless — there is an abuse of discretion, ***which there does not seem to be in this case, and which we do not understand appellant to argue there was.*** Appellant's argument is that the Court misconceived the law."

Allen Inc. vs. Spring St. Rway Co., 111 L. 88, 166 Atl. 199.

My argument is predicated on the fact that not only was I surprised, as is evidenced by my colloquy with my adversary, (P. 22), but was unprepared to proceed if the amendments were allowed, and the defendant having relied upon the issue as joined, and having taken testimony, forcing us on for trial without an opportunity to prepare was an abuse of discretion.

The Learned Supreme Court admits that I have covered the point by exception.

While it may be true that under our present simplified practise "the art of pleading is a lost art", still our Practise Act of 1912 has not abrogated or changed the law applicable to pleadings to prevent surprise and to enable the parties to definitely determine the issue or issues to be tried.

> "Either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such

averments generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest."

Sec. 118 Practise Act of 1912 C. S. page 4089.

In the light of Supreme Court Rule 46 which prevents evasive denials, and as in a case of this kind where the complaint may aver the performance of conditions precedent generally:

"The answer must specially deny such allegations of fact in the complaint as defendant intends to controvert, unless he contends in good faith to controvert all the allegations; in that case he may deny them generally. It must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint, etc."

S. C. Rule 58, 1929 issue.

Justice Parker, speaking for this Learned Court, in passing upon pleadings since the passage of the Practise Act of 1912, said:

"It was argued at the trial, first, that the requirement for the production of books, papers, etc., constituted a condition precedent to recovery, and that failing its bona fide performance in full, plaintiff could not recover.

This breach, however, was not specified in the pleadings as required by the statute, and hence it was not error to overrule the particular defense. It is suggested that the pleas should be now amended to let in this defense——. Appellate Courts do not or-

dinarily, if ever, permit amendments of the record for the purpose of reversing."

Mick vs. Royal Exchange Assurance Co., 87 L. 608, 91 Atl. 103.

I cited the foregoing case as authority for the proposition, that I had a right to rely upon the issues as raised, as being the issues to be decided, and to prepare my case accordingly, and came into Court to try the issue as raised, and not any new issues without opportunity for preparation.

The record discloses that issue was joined by my filing the reply on 2|16|32, and the main case was reached for trial on 5|11|32, surely this defendant had sufficient opportunity, if they desired to amend their answer to afford plaintiff an opportunity, upon notice to contest an amendment, and if unsuccessful, have sufficient time to prepare for the trial, and not take an examination de bene esse of a witness upon the issue as raised and upon the conclusion thereof make a discovery of a desire to amend, and without notice, after the case is reached for trial, to prejudicially amend the pleadings setting up other defenses without affording the opposite party an opportunity to prepare for trial on such contemplated defenses.

I RESPECTFULLY SUBMIT THAT THE LEARNED COURT ERRED, WHICH ERROR WAS PREJUDICIAL AND SUFFICIENT TO WARRANT THIS COURT IN REVERSING THE JUDGMENT.

POINT 2

THE COURT ERRED IN ADMITTING THE ANSWER TO THE FOLLOWING QUESTION PROPOUNDED TO THE WITNESS, MR. VINIK: "NOW THIS PROPERTY WAS GIVEN TO YOU ABOUT A YEAR BEFORE THE FIRE BY YOUR MOTHER WAS IT NOT? A. SHE GAVE IT TO ME WHEN I WAS 21." (P. 40, l. 15-26)

The Supreme Court in its opinion says:

> "The question made the basis of the second ground for reversal was clearly a proper one. Its purpose was to show that he acquired the property by gift from his mother a year before the fire."

My objection thereto was predicated upon the ground that it is immaterial and the Learned Trial Court's admission thereof is harmful error.

This question taken in the light of the testimony of Mrs. Kruger, page 90, under the deposition before trial gave the jury the opportunity to conclude that since this young man was out of work, apparently without funds, he might have had a motive in the destruction of this building to collect the insurance upon the same.

From the defendant's summation before the Jury it was apparent that this question was propounded for the sole purpose of showing the jury that this young man did not invest any money in the property and consequently had nothing ***to lose*** by its destruction, but on the contrary would benefit by a verdict in his favor and was under no duty to rebuild the same.

In so far as this building was concerned the de-

fendant's liability under the policy of insurance was to be determined by:

> "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurrs, etc." Ex. D. 2, page 142, l. 26-27.)

For the purpose of establishing the foregoing, plaintiff offered the testimony of himself, by reason of his building experience and August Morris, a building contractor.

In order to recover it was essential that the plaintiff show title in himself, and for this reason the deed, Ex. p-1 was offered in evidence. (P. 139.)

Surely this deed could not be collaterally attacked, nor could parol evidence be admitted to contradict the consideration set forth in the said deed. Doesn't it, therefore, logically follow, in view of the defendant's assumption of liability, and the deed in evidence disclosing title, that it was immaterial:

A. Whether Plaintiff has purchased the property or received it as a gift.

B. The date or time of the acquisition of the property by plaintiff.

C. The deed in evidence disclosed the time when plaintiff received title.

D. The consideration was set forth in the deed, and the sole test with respect to the building issue as raised by the pleading was:

1. Did plaintiff own an estate in fee simple.
2. Was there a violation or forfeiture of the contract.
3. What was the cash value of the building before and after the loss.

Under the pleadings in this case no issue was

raised as to "title." Then how did it become material to the issue whether he received the premises by deed or gift, from whom and when?

My adversary in his brief in the Supreme Court attempted to interject an idea that the objectionable question was directed to personal property, but an examination of the record, page 40, will disclose the fallacy of that idea, and the objectionable question and the two preceding ones were all directed to the building and not to any of the personal property. So that it must be evident to this Learned Court that the purpose of the objectionable question was none other than:

> "Of showing the jury that the young man did not invest any money in the property and had nothing to lose by its destruction, but could benefit by the jury's verdict."

I RESPECTFULLY SUBMIT THAT IT WAS IMMATERIAL TO THE ISSUE AND THAT THE LEARNED COURT'S RULING AND THE ADMISSION OF THE QUESTION AND ANSWER WAS HARMFUL ERROR TO THE PLAINTIFF, SUFFICIENT TO WARRANT A REVERSAL OF THIS JUDGMENT.

POINT 3

THE COURT ERRED IN ADMITTING THE ANSWER TO THE FOLLOWING QUESTION PROPOUNDED TO THE WITNESS, LOUIS HUTTENBACH: "NOW ON THE BASIS OF THE SKETCH WHICH HE GAVE YOU AND THE INFORMATION WHICH HE GAVE YOU CONCERNING THE MATERIALS WHICH WENT INTO THE BUILDING AND ITS CONSTRUCTION, COULD YOU MAKE AN ESTIMATE OF THE REPLACEMENT VALUE OF THAT BUILDING? WOULD YOU DO IT THEN? WILL YOU PLEASE TELL US WHAT YOUR ESTIMATE OF THE REPLACEMENT VALUE IS?" (P. 97, l. 17-25) ANS. "$2603.00." (P. 103)

This point was point five in the grounds of appeal in the Supreme Court (Record P. 19) who in its opinion stated:

> "No exception was taken to the question made the subject of the fifth and seventh grounds."

I direct the attention of the Learned Court to my exception page 98, l. 37-38.

An examination of Mr. Huttenbach's testimony directed to this point (p. 96-97) will disclose, that Mr. Huttenbach did not testify to or possess any knowledge or information relative to:

A. The age of the building.
B. The electric work in this building.
C. The plumbing work in this building.
D. The heating system.
E. The mason work, material or size of chimneys, foundations, etc.

F. The roofing material.

G. The leaders, gutters, flanging on chimneys, etc.

In other words, ***Mr. Huttenbach's estimate was predicated upon the size of the building*** as described by the sketch, and ***the kind of lumber*** that went into the building and consequently ***was an estimate of the lumber and the costs thereof,*** but WAS NOT AN ESTIMATE OF THE REPLACEMENT VALUE OF THE BUILDING.

It is also apparent that Mr. Huttenbach COULD NOT give an ESTIMATE of the REPLACEMENT VALUE BECAUSE:

> Q. As a matter of fact, Mr. Huttenbach, have you built any buildings within the past ten years? A. No, I don't think I built a new building in the past ten years. (P. 100, l. 20-25.)

"The facts assumed in a hypothetical question as a basis for an opinion must have support in the evidence."

Burt vs. State, 39 L. R. H. 305.

Hurst vs. Chicago R. Co., 49 Iowa 76.

Harsch vs. Payson, 107 Ill. 365.

and the rule has been stated in the following language:

> "A question which assumes any material fact which there is no evidence to support must be excluded."
>
> Davis v. Travellers Ins. Co., 59 Kans. 74-52 Pac. 67. Burnet vs. Wilmington & Nash R. R. Co., 120 N. C. 517-26 S. E. 819.

I am conversant with the rule:

> "Counsel may assume facts as they claim them to exist; and an error in the

assumption does not make the question objectionable, ***if it is within the possible or probable range of evidence.***"

Harett vs. Garvey, 66 N. Y. 641.

Jackson vs. Burnham, 20 Colo. 532.

But this case is lacking in evidence of all of the necessary and material elements that go into the reconstruction of this building and in the absence of evidence of items specified under A, B, C, D, E, F, and G, how could any person reasonably determine the replacement value of this building?

I RESPECTFULLY SUBMIT THAT THE TRIAL COURT ERRED SUFFICIENT TO WARRANT THIS COURT IN REVERSING THE JUDGMENT.

POINT 4

THE COURT ERRED IN DIRECTING WITNESS HUTTENBACH TO USE A WRITTEN MEMORANDUM TO AID HIM IN TESTIFYING AND IN REFUSING PLAINTIFF AN OPPORTUNITY TO EXAMINE THE WITNESS WITH RESPECT TO THE NECESSITY AND LAWFUL RIGHT TO THE USE THEREOF. ***(P. 103, l. 7-15)***

An examination of the testimony of the witness Huttenbach will disclose (p. 101) that the Learned Trial Judge admitted him to testify as an expert and notwithstanding the Court's ruling he subsequently permitted additional testimony respecting the qualifications of the witness over objections and exception.

Under this point the Learned Supreme Court in its opinion says:

"The next point made is that the trial judge erred in ***directing*** a witness to use a written memorandum to aid him in testifying, and in denying appellant an opportunity to examine the witness as to the necessity for its use. The witness, an expert, was asked to give an estimate of the replacement value of the insured building. We are not aware of any reason why he should not have used the memorandum, if he found it necessary to do so. But counsel for appellant complains that he was not first allowed to examine the witness with respect to the need of it. He inquired 'May I examine the witness on the use of the paper?' and the trial judge replied in the negative. Assuming, without deciding, that this was error, ***it does not appear that he actually used the memorandum to refresh his recollection.*** The trial judge did not ***direct*** him to use the memorandum. He merely said, 'If you need the paper to refresh your recollection, you may refer to it.' But it does not appear that he did refer to it."

First may I point out that the WITNESS DID USE THE MEMORANDUM.

"Mr. Lieblich—Are you referring to some paper? A. Yes.

Q. May I see it. A. That is my own.

Mr. Stoffer—Well, do you object to his referring to a paper.

Mr. Lieblich—Surely." (P. 102, l. 15-25.)

May I next point out that the Learned Court did direct the witness to use the memorandum.

"By the Court: ***Proceed and give your testimony Mr. Witness.*** If you need your paper to refresh your recollection you may refer to it.

Mr. Lieblich—May I examine the witness on the use of the paper?

The Court—No.

Mr. Lieblich—I note my exception. (P. 103, l. 10-20.)

It is to be observed that the Learned Trial Judge did direct the witness to use the memorandum and apparently the Supreme Court overlooked and did not quote in its opinion the fore part of that instruction which reads:

"Proceed and give your testimony Mr. Witness. If you, etc."

I know of no clearer way for the Learned Trial Court to have expressed its direction to the witness than by the use of the language employed. Of course taking the fore part of the sentence from the latter it would not be a direction. But the fact remains that the entire sentence was uttered as one continuous instruction.

Maybe Mr. Hayes made a poor selection in asking me to try this case, maybe I was over zealous in conserving my client's interest and maybe it was a "technical" objection, but surely the Learned Court erred is telling the witness to use the paper over exception because:

A. The witness had not disclosed that he was lacking in recollection necessitating the use of the memo.

B. There was no evidence as to when or who made the memo.

C. The Learned Trial Court lawfully

could not arbitrarily direct the witness to use the paper to the prejudice of the plaintiff.

The Learned Supreme Court in its opinion says:

"The witness was exhaustively cross examined in reference to his estimate of the replacement value."

but I direct this Court's particular attention to the fact that ***I did not supply on cross examination,*** nor was there disclosed at any time during the course of the trial ***the items A, B, C, D, E, F, and G set forth and argued under Point 3 of this brief,*** and if the items which I have referred to under Point 3 of this brief were not included in the direct or cross examination, and are not disclosed by the testimony of the replacement value, does it not logically follow that the Supreme Court erred in its conclusion when they say:

"After all, the vital question was the accuracy of his estimate, not the circumstances connected with the making of the memorandum and the necessity for excuse. The memorandum was not in any sense conclusive on the question of value."

It appears to me needless to lengthen this brief with citations on the elementary principle involved, except to call this Court's attention to two pronouncements by Justice Parker, speaking for our Court of Errors

"Cross examination on matters either directly in issue or directly relevant to the issue is a matter of right, and its exclusion is error."

Prout vs. Bernards G. & S. Co., 77 L. 719, 73 Atl. 486.

"That a memorandum from which a witness testified was not offered in evidence was no bar to his being cross examined on it."

Goodman vs. Lehigh V. R. R. Co., 82 L. 450, 81 Atl. 848.

I RESPECTFULLY SUBMIT THAT THE REASON AND POINT ASSIGNED DISCLOSE ERROR SUFFICIENT TO WARRANT A REVERSAL OF THIS JUDGMENT.

POINT 5

In my confusion, resulting from the Court's remark (p. 105, l. 22-30) while I noted my objection:

"Mr. Lieblich—I object, if it please your Honor. It is immaterial and irrelevant to the issue. This is a frame building." (P. 105, l. 19-23.)

I failed to specifically note my exception and am apprehensive that under the rules, this Learned Court cannot pass upon this point.

POINT 6

THE COURT ERRED IN MAKING THE FOLLOWING STATEMENT: "I KNOW, BUT IT IS A MATTER OF COMMON KNOWLEDGE THAT A BRICK BUILDING PER CUBIC FOOT IS A GREAT DEAL MORE EXPENSIVE THAN A FRAME BUILDING OF THIS SORT, AND, IT IS ALMOST A MATTER OF COMMON KNOWLEDGE TOO THAT* 80c A CUBIC FOOT FOR CONSTRUCTION *OF THIS KIND* IS ABSURD." *(P. 105, l. 23-28)

Plaintiff's witness, August Morris, was asked on cross examination (p. 62, l. 12-18):

> "Q. Well, how much per cubic foot would you estimate a house of that character would cost? A. About eighty cents.
>
> Q. Eighty cents a cubic foot? A. Yes."

Defendant's witness Huttenbach was asked on direct examination (p. 105, l. 10-16):

> "Q. What is the cubic foot value or cost of a building of this type? A. Now, I didn't figure this one on any cubic foot, but I would say, approximately, about eighteen cents.
>
> Q. Eighteen cents? A. That class of construction."

At that stage of the trial an issue of fact was raised for the jury; then the question, assigned herein as error under Point 5 was asked and objected to (p. 105), whereupon the Learned Court erroneously determined this question of fact by his statement to the Jury.

The cold type of this record cannot disclose to the Learned Court the demeanor, the manner of delivery, the emphasis, the jestures or facial expres-

sion of the Learned Trial Judge in the delivery of this statement or the impression created upon the jury, the spectators or upon Counsel, who notwithstanding his surprise and embarrassment retained sufficient presence of mind to conserve his client's rights. (P. 105, l. 30-38.)

> "Mr. Lieblich: May I, with all deference to your Honor, take exception to your Honor's remark as being highly prejudicial to the Plaintiff in this case. ***The witness' testimony is for the determination of the Jury.***"

The Learned Supreme Court in its opinion with reference to this point says:

> "Moreover there was no ruling that can be made the subject of a ground of appeal."

I respectfully submit to this Learned Court how I could with more respect, in view of the situation, set forth my objection to the prejudicial determination by the learned trial judge than as disclosed on page 105, for surely the Learned Trial Court knew what I meant when I said:

> "Your Honor's remarks are highly prejudicial to the plaintiff in this case."

The Learned Trial Judge realized the prejudicial effect of his remark and ATTEMPTED to correct the error by subsequently charging the Jury in the following language:

> "the Court made a statement during the course of the trial that it was a matter of common knowledge that eighty cents per cubic foot was HIGH for this character of construction—and when the Court makes a statement as to the facts and you disagree with the Court as to the facts, you are to

take your memory and your consideration of the facts and not the Court's."

(Charge, bottom 132, top 133.)

This is not an accurate statement of what the Trial Court had said for IT IS TO BE OBSERVED that the Trial Judge used the language:

"Eighty cents a cubic foot for construction of this kind is ***absurd.***" (P. 105, l. 29)

In the charge the Trial Judge used the language:

"was high" (P. 132, l. 27.)

Surely there is a great distinct between "was high" and "absurd", some witnesses may be prone to exaggerate, but to be "absurd" removes from the Jury's consideration their prerogative and function to determine what weight and credibility they will give to the testimony of the witness; which under established rules in this jurisdiction is the sole function of the Jury.

I am reasonably certain that this Learned Court will admit that notwithstanding anything that the Trial Court might have said or done thereafter, the impression made by the words as uttered, the manner and form of their delivery could never be diffused or eradicated from the minds of the Jury and is reflected by the verdict returned.

The Supreme Court in its opinion says further:

"That when the Trial Court said: 'Yes, proceed. I will leave it to the Jury.' This seemed to satisfy counsel and there the matter ended."

Surely no practitioner with my experience in trial work, would do otherwise than take his exception, and while I realized that the case was gone, it would have been foolish, in my opinion, considering the feeling with which the Learned Trial Court ex-

pressed himself, to antagonize him by any further expression of dissatisfaction.

The Learned members of this Court recognize the rule that the science of psychology is interwoven with the Law and Facts in the trial of a disputed issue before a Jury, and I knew when to keep quiet.

Plaintiff under the established rule in this jurisdiction was entitled to:

A. Have all questions of fact determined by the jury.

B. Have the Jury determine what weight, effect or credibility they would give to the testimony of a witness.

C. The trial judge's statement emphasized the rule, "Falsus in uno, falsus in omnibus."

Unless I am unable to recreate the atmosphere which existed, and my ability to reason is deteriorating I cannot conceive of anything more harmful to this cause than the error complained of and assigned herein.

I RESPECTFULLY SUBMIT THAT THE ERROR ASSIGNED IS SUFFICIENT TO WARRANT THIS COURT IN REVERSING THE JUDGMENT.

POINT 7

TRIAL COURT ERRED IN CHARGING DEFENDANT'S REQUEST No. 4: "THE POLICIES IN THE SUIT PROVIDE AS FOLLOWS: THIS ENTIRE POLICY SHALL BE VOID IF THERE BE KEPT, USED OR ALLOWED ON THE ABOVE DESCRIBED PREMISES, BENZINE, BENZOL, GASOLINE, NAPTHA, OR OTHER EXPLOSIVES OR PETROLEUMS OR ANY OF ITS PRODUCTS OF GREATER INFLAMABILITY THAN KEROSENE OIL, OF THE U. S. STANDARD. IF YOU FIND THAT ALCOHOL WAS KEPT, USED OR ALLOWED IN THE PREMISES IN QUESTION, AT ANY TIME PRIOR TO THE FIRES, AND IF YOU FURTHER FIND THAT ALCOHOL IS AN EXPLOSIVE, THEN YOUR VERDICT MUST BE FOR THE DEFENDANT, OF COURSE, THAT MEANS ALCOHOL IN A SUBSTANTIAL QUANTITY." (P. 137, l. 1-12)

The Supreme Court in the concluding sentence of its opinion in this cause reported in 112 L. 466, Volume 12 Advance Reports of April 21, 1934, said:

> ***"There was evidence*** tending to establish that ***the building was used for the manufacture of alcoholic liquors,*** and from this it was fairly inferable ***that alcohol*** in substantial quantities was kept upon the premises and ***that it was an explosive liquid within the intendment of the policy provisions."***

I am apprehensive that the Learned Supreme Court, as well as the Learned Trial Judge fell into error on the facts, for the only evidence in this case

which refers to alcohol comes from the lips of Mr. Gates, wherein he refers to a "distillery smell" (p. 69, l. 29-40 and p. 72, l. 36-40).

> "Q. And it was a smell of corn whiskey or rye whiskey, or what was it? A. I GOT THE SMELL OF DISTILLERY MASH."

May I call your attention to the fact that Mr. Gates admits that he was never in the house (p. 73, l. 15-26).

I also want to point out to you that George Newton, the fireman testified, (p. 118) that there was no evidence of any alcohol manufacturing plant after the fire.

Mr. Huttenbach testified:

> "Q. Well, what else did you see, if anything at all, on the occasion when you made your examination. A. I found some debris, burned, charred timbers; then I think there was—Oh, I don't know—and it looked like to me as "rye" in the back portion of the porch there." (P. 97, l. 27-33.)
>
> (Note: I have consented to change "right" to "rye" and Mr. Huttenback made this discovery sometime after the fire.)

The Learned Trial Court commented:

> "The Court—A distillery has a very penetrating smell, Mr. Lieblich." (P. 73, l. 26-27.)

Even my adversary must admit that the foregoing testimony is not sufficient for him to have established or borne the burden of proof of ***"alcohol"*** or a "still" ***being "kept, used or allowed" on the premises,*** and that the Court erred in charging the Jury the defendant's request to charge, and that the same was harmful error.

I INVITE MY ADVERSARY TO POINT OUT ANY EVIDENCE IN THIS CASE WHICH WOULD

DISCLOSE ANY ALCOHOL UPON THE PREMISES OR A STILL IN OPERATION.

May I call this Learned Court's attention to the fact:

A. ***Alcohol is not*** catalogued in the policy as ***one of the prohibited articles.***

B. ***Alcohol is not an explosive,*** so as to come within the meaning of gasoline, naptha or other explosives, or petroleum, etc.

Since the term ***alcohol is not specifically catalogued as one of the prohibited articles,*** I know of no rule of construction which would warrant the Court in reading "alcohol" into the prohibitive articles (set forth p. 146, l. 28-40) unless the use of the words "or other explosives or petroleums" would include the term alcohol.

My adversary cannot contend that the doctrine of "noscitur a sociis" would tend to include "alcohol" in the verbage of "other explosives or petroleums", considering the grouped catalogued immediately proceding those words, to wit: benzine, benzol, gasoline, naphtha, or other explosives or petroleums, for as I shall subsequently point out, "alcohol" is not an explosive nor is it a product of petroleum.

I assume that it is needless for me to further argue the fact that the case is devoid of any evidence of a "still" upon the premises.

In some way, "alcohol" seems to have been injected into this case by way of argument and inference only, and without any proof. Let us see what is alcohol?

"Alcohol is exclusively produced by the process of fermentation."

Eureka Vinegar Co. vs. Gazette Printing Co., 35 Fed. 570.

"The strength of liquors and their intoxi-

cating powers depend upon the quantity of alcohol which they contain."

Sawyer vs. Botti, 147 Iowa, 453 LRANS 1007.

"Alcohol is a limpid colorless liquid."

Marks vs. State, 159 Alabama 11.

"Alcohol is a volatile organic body, constantly formed during the fermentation of vegetable juices containing sugar in solution."

U. S. vs. Cohn 2 Ind. T. 474 52 S. W. 38.

"Alcohol in popular language is the intoxicating principle of fermented liquor."

State vs. Fargo Bottling Works Co., 19 N. D. 396 26 LRANS 872.

"Alcohol is a limpid colorless liquid which has but one source. The fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch, which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. ***It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation,*** and the process of distillation simply serves to separate the spirit, the alcohol from the mixture whatever it may be, in which it exists."

State vs. Giersch, 98 N. C. 720 4 SE 193.

"Alcohol is a constituent of all alcoholic beverages just the same as it is of arnica, glycerine, chloroform, but it is an entirely different thing from whiskey or chloroform."

State vs. Osmers, 21 Idaho 18, 120 Pac. 165.

Let us assume for argument only, since the case is devoid of any proof that rye, corn, or other grains, or even a mash, if you will, was upon the premises. Surely, that didn't warrant the Court in charging and submitting to the Jury the proposition:

> "If you find that alcohol was kept, used, or allowed on the premises—If you find that alcohol is an explosive—that means alcohol in a substantial quantity."

or warrant the Court making this charge at the request of the defendant, without some evidence in the case, and unless my adversary can point out otherwise, I respectfully submit that the Court erred in charging the defendants request to charge in the manner and form which it did.

Mitchell vs. Potomic Ins. Co., 183 U. S. 42-46 L. Ed. 74.

The rule is well settled:

> "To defeat a recovery the burden rests upon Defendant to prove that the hazard was increased with the knowledge and consent of the insured."
>
> First Congregational Church vs. Holyoke Mutual Ins. Co., 158 Mass. 475, 33 NE 572.
>
> Paddeford vs. Providence Mutual Ins. Co., 3 R. I. 102.
>
> Nebraska Ins. Co. vs. Christenson, 29 Neb. 572.
>
> "Within a provision forfeiting a Fire Insurance Policy, if the hazard be increased by any means within the control or knowledge of the insured "control" involves some knowledge of the hadardous use of the building; and the policy is not avoided by acts of the

tenant increasing the hazard which are not within the owner's knowledge."

Royal Ex. Assurance Co. vs. Thrower, 240 Fed. 811.

"The word 'kept' as used in the policy implies the use of the premises as a place of deposit for the prohibited articles for a considerable period of time."

Williams vs. Insurance Co., 31 Maine 219.

O'Neil vs. Insurance Co., 3 N. Y. 122.

Mears vs. Insurance Co., 926 State 15.

Puttman vs. Ins. Co., 4 Fed. 753.

"The owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord."

Beech on Ins., Vol. 2, Sec. 712.

"To defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant, which increase the hazard, were made with a knowledge to or the consent of the owner."

Merril vs. Ins. Co. of N. A., 23 Fed. 245.

IS ALCOHOL AN EXPLOSIVE?

The Supreme Court, in the concluding sentence of its opinion has practically laid down a new rule of law which is without authority or sanction in any jurisdiction, that is:

"Alcohol that it was an explosive liquid within the intendment of the policy provisions."

I do not question but what alcohol is inflammable, but alcohol does not give off fumes or gas, and will not ignite unless actually contacted with fire, furthermore, where is the evidence to be submitted to the Jury for them to determine that alcohol was or was not an explosive.

I invite the members of this Court to the most simple experiment: ***Take any kind of alcohol*** and put same in a dish or saucer, and hold a flame in close proximity, and you will find that the alcohol will not ignite and the only way that the alcohol will ignite is by applying the flame or fire directly to the alcohol, and ***when it does ignite, there is no explosion,*** but it burns with a blue flame.

The word "explosion" is defined by Webster as:

> "a violent bursting or expansion, with noise, following the production of great pressure, as in the case of explosives, or a sudden release of pressure, as in the disruption of a steam boiler."

Judge Deemer speaking for the Iowa Supreme Court said:

> "The term 'explosion' may be described, in a general way, as sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. It may and does vary in degrees of intensity and in the vehemence of the report, and it is not always due to the presence of fire. Indeed, it may result from decomposition or chemical action."
>
> Vorse vs. N. J. Insurance Co., 119 Iowa 555, 93 NW 569, 60 LRA 838.
>
> "An explosion according to common understanding may be accurately enough described for practical purposes as a sudden and rapid combustion, causing violent expansion of the air and producing a report more or less loud according to the resistance offered. That it greatly varies in its degrees of violence and the effects produced are facts fully within the knowledge of all."

Transatlantic Ins. Co. vs. Dorsey, 56 MD 70, 40 AmR 403.

Doesn't it stand to reason that ***if there was any alcohol*** at all ***upon these premises,*** that someone, one of the ***firemen,*** one of the ***policemen,*** some ***neighbor, would have found a can or container*** indicative of containing alcohol, but where is the evidence to warrant the Court in stating to the Jury "that means alcohol in a substantial quantity."

If the rule enunciated by the Supreme Court that alcohol is an explosive, is to be adopted by this Court, what is to become of all insurance on our homes, considering the retention of all preparations, medicines, alcoholic beverages, liniments, etc., which we use in our ordinary everyday life which contain alcohol in a goodly quantity, and which we "kept, used, or allowed on the premises." Shall same be construed as violations of the standard fire policy? Will this Court differentiate between keeping a quart bottle of rubbing alcohol, and a quart bottle of pure grain alcohol? If "alcohol" is an explosive will it make any difference as to the kind, amount or quality?

It is true that we ordinarily refer to alcohol, when applied to the human anatomy, as a burning substance. I do not question its effect upon the human anatomy, but when it comes to reading into a contract for the purpose of defeating a recovery that "alcohol is an explosive" or that its "storage upon the premises" tends to void the policy within the construction of the covenant referred to, there I demur.

I RESPECTFULLY SUBMIT THAT FOR THE REASONS ASSIGNED, THE COURT ERRED IN CHARGING THE DEFENDANT'S

REQUEST TO CHARGE SUFFICIENT TO WARRANT A REVERSAL OF THE JUDGMENT.

POINT 8

THE COURT ERRED IN CHARGING DEFENDANT'S REQUEST No. 5: "THE POLICIES IN THE SUIT PROVIDE AS FOLLOWS: THIS ENTIRE POLICY SHALL BE VOID IF THE HAZARD BE INCREASED BY ANY MEANS THEREIN, WITHIN THE CONTROL OR THE KNOWLEDGE OF THE INSURED. IF YOU FIND THAT AT ANY TIME AFTER THE ISSUANCE OF THE POLICY THE FIRE HAZARD WAS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE PLAINTIFF THEN YOUR VERDICT WILL BE FOR THE DEFENDANT." (P. 137, l. 14-22)

What I said in Point 7 applies with equal force to this point. ***The burden of establishing the defense of increase of hazard was upon the defendant,*** who pleaded the defense, and the fact that Mr. Gates detected a "distillery odor," and the fact that Mr. Huttenbach said he found what appeared to him to be "rye" on the back porch, is not any direct evidence of an increase of hazard in substantiation of this defense, and should not be confused with any other breach of warranty or otherwise.

An examination of Mr. Gates' testimony does not disclose that he ever visited the Vinik house after he had worked on the same, nor that he saw alcohol brought in or taken out

or that he saw alcohol brought in or taken out "Within five or six days before the fire" (p. 68, l. 30-34) he said: "Well, I smelled a very strong odor" (p. 69, l. 30-34), raise any inference of fact that at any time during the life of this policy there was any alcohol or any of the prohibited articles kept upon the premises, or that the "hazard was increased" by any means within the control or knowledge of the plaintiff.

Justice Peckham speaking for the U. S. Supreme Court said:

> "The Court was asked to instruct you with reference to the theory that there was a precedent fire in the back room. ***The Court felt obliged to refuse such an instruction, because there is no testimony in the case*** that would justify the jury in reaching the conclusion that before Mr. Oliver struck that match there existed a fire in the rear portion of that cellar. ***There is no testimony and no evidence of the fact***—With relation to the denial of the request of plaintiff's counsel, the Court of appeals, in the opinion delivered by Mr. Justice Shepard, said: The instruction undertook to direct the special attention of the Jury, first, to the probable existence of an accidental fire in the rear cellar before the entry of the witness Oliver into the front one, and second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion took place in the front cellar. Neither of these inferences seems to have any reasonable foundation in the evidence."

> "A careful perusal of the evidence in the case brings us to the same conclusion. There was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar, and ***it would have been error to submit such a question to the jury for that reason.*** The request was therefore properly denied."

By parity of reasoning the Court in this case should have denied defendant's request to charge No. 5, and the charge thereof by the Court was error sufficient to warrant a reversal.

CONCLUSION

It is nothing new for my adversary to charge me with unjust criticism of the trial judge, and to avoid such a charge, I have endeavored to be as respectful as I possibly could in this brief, but to fearlessly argue the conceived errors on the part of the Trial Court, but if per chance in the writing of this brief, I may have expressed myself too boldly, I trust that my style of argument may be condoned by your Honors, for I have always endeavored and it is my intention to be most respectful to any member of the judiciary in my advocacy of a cause.

As I view this case from a meritorious standpoint, this plaintiff owned the property which was destroyed by fire, which was insured by this defendant for a satisfactory consideration, and if the testimony of August Morris ***"was absurd"*** plaintiff was at least entitled to a verdict for the admitted loss as testified to by defendant's witness Huttenbach. Unless this Court can find some evidence in this record of a "still" or of

"alcohol" being "kept, used, or allowed on the premises" or that this plaintiff by an act of omission or commission directly or indirectly was a party to the willful destruction of the property.

I respectfully submit that on the merits of this case, and predicated upon any one of the assignments of error, this plaintiff is justly entitled to a reversal of the verdict and a trial De Novo.

Respectfully submitted,

JOSEPH T. LIEBLICH,

Attorney of Appellant.

New Jersey Court of Errors and Appeals

ANATOLE VINIK, Plaintiff-Appellant, *vs.* NIAGARA FIRE INSURANCE COMPANY, a corporation, Defendant-Respondent.	On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-RESPONDENT.

Facts.

In the determination of this appeal a somewhat fuller statement of the facts is necessary than is contained in plaintiff-appellant's brief.

Plaintiff became the owner of a house in a rural district at Stelton, New Jersey, by gift from his mother a short time before the house was destroyed by separate fires on two successive days. The deed to him is dated November 20, 1930, acknowledged January 19, 1931, and recorded January 22, 1931 (Exhibit P-1, S. C., p. 139). The policies of insurance on which plaintiff sought to recover were endorsed January 21, 1931, to show his interest in the realty as well as in the contents of the building, which he claimed were also given to him by his mother when she left Stelton to live in Philadelphia (Exhibit P-3, S. C., p. 139; Exhibit D-2, S. C., p. 143, ll. 7-16).

Plaintiff did not thereafter personally occupy the house. He testified that at the beginning of January, 1931, he rented it to one Frank Santo, and that Santo occupied it until the fires on Feb-

ruary 7th and 8th, 1931 (S. C., p. 41, ll. 20-30). He testified further that the rental arrangement with Santo was $30.00 in the summer and $25.00 in the winter (S. C., p. 42, ll. 30-35). This contradicted a statement which he had made to two insurance company adjusters shortly after the fire that Santo paid him $15.00 for the first month and agreed to pay $80.00 per month thereafter if he liked the place (S. C., p. 96, ll. 16-20; p. 112, ll. 30-37).

It is clear from the testimony that the higher rental was to be paid in the event that Santo found the place suitable for the manufacture of bootleg liquor (S. C., p. 96, ll. 16-20; p. 112, ll. 30-37).

James Gates, a seventy-three year old neighbor, who occupied a house about one hundred feet to the west of plaintiff's property (S. C., p. 67, ll. 20-26), testified that the tenant Santo moved in at the beginning of the year 1931 and occupied the building until about five or six days before the fire (S. C., p. 68, ll. 27-40); that during the period of his occupancy he smelled an odor "so strong that it penetrated into my house when the windows and doors were closed, and I recognized this distillery smell with which I was familiar from the time I was a boy" (S. C., p. 69, ll. 29-35); and that this pronounced odor "was practically continuous during that time" (S. C., p. 70, ll. 5-10). On cross-examination he described it as "the smell of distillery mash" (S. C., p. 72, ll. 35-37).

Mr. Huttenbach, an adjuster for another company which had a policy on this property, testified that when he made an examination of the ruins shortly after the fires, he discovered a quantity of rye in the back portion of the porch at the rear of the house (S. C., p. 95, ll. 26-32; Court's Charge, S. C., p. 130, ll. 13-20).

Plaintiff, during this period, was living with Mrs. Bertha Kruger, who had a store and dwelling a short distance from the insured property. Plaintiff's house was right behind the Fellowship Farms School and could be reached from the Kruger store in two minutes (S. C., p. 85, ll. 3-15).

Plaintiff was a carpenter and builder. Mrs. Kruger testified that during the time he lived with her "he drives a truck and he picks up occasional jobs, but he did not have a worthwhile job at his own trade" (S. C., p. 90, ll. 18-20).

The first fire was discovered about 12:30 A. M. on February 7, 1931 (S. C., p. 74, ll. 31-33). Chief Penrose testified that when the firemen arrived the flame was shooting out of the roof; that after the fire was put out he made an examination and observed that the fire was confined to an area of about six feet in diameter straight up from the cellar to the roof, without any lateral burning; that holes were punched in some of the ceilings to make sure that the fire was out; that a thorough examination of all of the rooms of the building disclosed no furniture or other contents, except a day-bed with a mattress and a couple of chairs (S. C., p. 76, ll. 6-26).

Mrs. Kruger testified that while this fire was in progress she and her husband were awakened by a neighbor; that she went to plaintiff's room, awakened him and told him his house was burning; and that "he didn't answer any definite. He says, 'Ah, go on.' It is just like that, and he went on and slept" (S. C., p. 86, ll. 1-10).

The alarm in connection with the second fire came in at 5:40 A. M. on February 8, 1931 (S. C., p. 76, ll. 35-37). Snow had fallen during the night preceding the second fire (S. C., p. 78, ll. 10-13). When the firemen arrived, all four corners of the building were in flames and nothing could be done to save the property (S. C., p. 77, ll. 1-7).

Assistant Chief Henry corroborated the testimony of Chief Penrose (S. C., pp. 82-84).

After these fires, plaintiff submitted to defendant proofs of loss in which he swore, among other things, as follows:

(1) That there was only one fire "on the 7th day of February, 1931, at about the hour of one o'clock A. M., by which the property described in said policy was totally destroyed and damaged" (S. C., p. 153, ll. 14-18). This statement appears a second time in the proof of loss in connection with the schedule of furniture alleged to have been destroyed (S. C., p. 156, ll. 9-12). An attempt was made to show that this was merely an error of Mr. Dahmer, an attorney at law, who prepared the proofs at the request of plaintiff, but Mr. Dahmer testified that he made up the proofs of loss on the basis of the information supplied to him by his client (S. C., p. 59, ll. 20-22), and that the time of the fire as stated in the proofs of loss was fixed by Vinik (S. C., p. 58, ll. 23-25).

(2) That the origin of the fire was unknown to him (S. C., p. 153, ll. 17-18) and that he had no knowledge or belief as to the origin of the fire (S. C., p. 156, ll. 6-7).

(3) That the building was occupied by Frank Santo at the time of the fire (S. C., p. 153, ll. 24-26).

(4) That since the issuance of the policies there had been no change in the use of the property (S. C., p. 153, l. 36 to p. 154, l. 3).

(5) That "no articles are mentioned herein or in the annexed schedule, but such as were in the building damaged or destroyed and belonging to and in possession of the said assured at the time of said fire, * * * and no attempt to deceive the

said company as to the extent of said loss has in any manner been made'' (S. C., p. 154, ll. 20-27).

(6) That with reference to the building, the actual cash value at the time of the fire was $7,500.00, and the whole amount of loss and damage was $6,063.00; whereupon the assured claimed of this company alone $6,000.00 representing the full coverage on the building under its two policies (S. C., p. 154, ll. 4-14). The evidence for the defendant was that the damage to the building amounted to $2,603.00 (S. C., p. 103, ll. 7-17).

(7) That with respect to furniture, a claim of $707.00 was made, the assured alleging the presence at the time of the fire and the destruction of a long list of items set forth in a schedule annexed to the proof of loss (S. C., p. 157), whereas the firemen testified to the presence only of a day-bed, a mattress and a couple of chairs (S. C., p. 76, ll. 6-26).

The sworn proofs of loss raised (1) the issue stated in the First Separate Defense of the answer charging violation of the provision voiding the policies for misrepresentation, fraud or false swearing touching matters relating to the insurance. The evidence as to the use of the building as a distillery during Santo's tenancy bore upon the issues under the pertinent policy provisions on (2) increase of hazard (Second Separate Defense), (3) violation of the prohibited articles clause (Third Separate Defense), (4) breach of the warranty that the building would be occupied exclusively for dwelling purposes (Fourth Separate Defense) and (5) change of occupancy accompanied by increase of hazard (Fifth Separate Defense).

After a careful charge by the Trial Court supplemented by the reading of requests to charge submitted by each of the parties, the jury returned a verdict of no cause for action.

Thereafter plaintiff took an appeal to the Supreme Court, alleging as error certain rulings of the Trial Court. The Supreme Court affirmed the Trial Court and dismissed the appeal. This opinion is reported in 104 N. J. L. 462.

The sole question presented by this appeal is the propriety of the action of the Supreme Court in affirming the lower court on the record before it on that appeal. At the outset the Court's attention is directed to the grounds of appeal filed by defendant-appellant in support of this appeal. The reasons assigned are improper and will be discussed under the first point herein.

POINT I.

This appeal should be dismissed because plaintiff-appellant's grounds of appeal are improper.

This is an appeal from a judgment of the Supreme Court. This Court has repeatedly held that the only proper ground of appeal from a judgment of the Supreme Court is that "the Supreme Court erred in giving judgment for defendant-respondent instead of for the plaintiff-appellant." *Diamond Mills Paper Co.* v. *Leonard Hygiene Ice Co.,* 95 N. J. L. 540 (E. & A. 1920); *Burhans* v. *Paterson,* 99 N. J. L. 490 (E. & A. 1923).

The grounds of appeal filed by appellant obviously do not comply with this requirement. They read as follows (S. C., p. 161):

> "Please Take Notice that the plaintiff-appellant, Antole Vinik, hereby appeals from the whole of the verdict and judgment in this cause and the affirmance thereof by the Supreme Court to the Court of Errors & Appeals, because the Supreme Court erred in

affirming the judgment appealed from, in the Middlesex Circuit Court and Middlesex Court of Common Pleas in that:

1. The Court erred in permitting an amendment to the pleadings after issue had been joined, testimony De Bene Esse had been taken of Bertha Kruger upon the issue as raised by the pleadings, and the case moved for trial" (pp. 21-25).

Following this seven additional and distinct grounds are set forth but need not be quoted here as they are all of a similar nature to the first ground just referred to. These grounds are nothing more than a repetition of the grounds set forth on the appeal to the Supreme Court from the judgment entered in the Trial Court, with certain significant exceptions. An attempt has here been made to remedy a defect in the grounds assigned before the Supreme Court (S. C., pp. 18-20) where the answers to the questions complained of were not set forth as is required by the decisions of that Court. *Benson* v. *Brady,* 5 N. J. Misc. 13 (Sup. Ct. 1926); *Shedaker* v. *James,* 107 N. J. L. 400 (Sup. Ct. 1931).

But regardless of the reason for setting forth these grounds of appeal, it is clear they are improper and should not be considered. Almost identical grounds of appeal were condemned in *Diamond Mills Paper Co.* v. *Leonard Hygiene Ice Co., supra,* where this court, in dismissing the appeal, said (p. 56):

"This was an action on contract in the first judicial District Court of the county of Morris. The plaintiff had judgment and an appeal was taken to the Supreme Court where it was affirmed; whereupon the defendant appealed to this court. The plaintiff-respondent contends before us that none of the ten grounds of appeal filed in this court conform to proper procedure, and moves us to hold

> the defendant-appellant to a compliance with the method of appellate procedure laid down by this court, citing *State* v. *Verona,* 93 N. J. L. 389; *Thompson* v. *East Orange,* 94 *Id.* 106; *State of Metzler, Id.* 418. There is no ground of appeal in this court stating that the Supreme Court erred in giving judgment for the plaintiff-respondent instead of for the defendant-appellant, the only proper assignment under the cases cited. Besides, several of the grounds of appeal go to the finding or opinion of the court below, which is also bad. *McCarty* v. *West Hoboken,* 93 *Id.* 247; *Birtwistle* v. *Public Service Railway Co.,* 94 *Id.* 407."

To the same effect see *Burhans* v. *Paterson, supra.*

It is submitted that the grounds of appeal filed by appellant herein are improper and should not be considered, and this appeal should therefore be dismissed.

Should the Court, nevertheless, consider the appeal, defendant will demonstrate the invalidity of each point urged by plaintiff in the remainder of this brief.

POINT II.

The Trial Court did not err in permitting an amendment of the pleadings at the trial. The plaintiff was not prejudiced by such amendment.

Under Point 1 of his brief, plaintiff complains of the action of the Trial Court in permitting an amendment of the answer before trial. Although the law is thoroughly settled that the allowance or denial of applications to amend pleadings rests in the sound discretion of the Trial Court, plaintiff did not charge an abuse of discreion in his

assignment of error on the appeal to the Supreme Court (S. C., p. 18, ll. 36-37; p. 19, ll. 1, 2, 3). Nor is any such charge made in the grounds of appeal filed on this appeal (S. C., p. 161, ll. 15-19).

In the absence of a showing that the Trial Court committed an abuse of discreion this Court has repeatedly held that it will not reverse a Trial Court for permitting an amendment at the trial. *O'Brien* v. *Broadman,* 110 N. J. L. 211 (E. & A., 1933); *Allen* v. *Spring Street Realty Co.,* 111 N. J. L. 88 (E. & A., 1933).

Plaintiff's alleged grievance is that defendant had, with consent of plaintiff before the trial, taken the deposition of Bertha Kruger, an infirm witness. Just what that circumstance has to do with the amendment permitted at the trial is difficult to perceive. Her testimony related solely to occurrences during the time that plaintiff resided with her, and had no bearing at all on the matters set up by the amendment. The amendment allowed by the Court related to the use of the insured property, as to which Mrs. Kruger specifically testified that she knew nothing (S. C., p. 91, ll. 25-29).

At the taking of the depositions Mrs. Kruger was cross-examined by counsel for plaintiff. If any of her testimony had any bearing on the separate defense included in the amendment (which it did not) plaintiff's counsel could have objected to its immateriality under the pleadings. Since no objection was made by plaintiff's counsel in the course of the deposition, and since he cross-examined fully (S. C., pp. 91-93), it is impossible to see how plaintiff was in the least prejudiced.

Moreover, the record discloses that the Trial Court was convinced that no really new issues were introduced by the amendment. On pages 4 and 5 of plaintiff's brief are stated the issues which existed under the pleadings prior to the

amendment. When the application to amend was made to the Court before the trial, it was explained to the Court, and not denied by plaintiff's counsel, that notice of the application had been given, and that the amendment was calculated to clarify matters already set up in the answers and did not involve the introduction of new evidence (S. C., p. 21, ll. 14-30). Although plaintiff's counsel reserved his exceptions, the record discloses that he virtually agreed with the Trial Court that the amendments involved restatements of the issues already in the case, so that there was no element of surprise (S. C., p. 22, l. 13, to p. 24, l. 10):

> "The Court: There are three amendments here. The first is about the building being occupied exclusively for dwelling purposes.
>
> Mr. Lieblich: He can't be heard if the policy says so. We are bound by it, and if we do not prove that it was, we are out of luck.
>
> Mr. Stoffer: Well, if Mr. Lieblich will contend that, I won't set up the separate defense. The only point is, later he may claim we should have pleaded affirmatively the breach of warranty. Now, if it is his position that he has got to prove proper occupancy——
>
> The Court: Is that your position?
>
> Mr. Lieblich: My position is that I make out a *prima facie* case under the pleadings as raised here. If I do not, he gets a non-suit.
>
> The Court: Well, the point is this is that it was not occupied for dwelling purposes?
>
> Mr. Stoffer: That is right, and the set of facts are the same as alleged in the answer drawn.
>
> The Court: There can't seem to be any harm in allowing this amendment. I will allow the first one in evidence.
>
> Mr. Lieblich: Your Honor will note my exception?
>
> The Court: Yes.
>
> Mr. Stoffer: The second one pleads increase of hazard.
>
> Mr. Lieblich: You plead here the change of title.

Mr. Stoffer: No, no. I will say now that the purpose of the fifth separate defense in the amended answer is merely to show a change of the possession of the property by a tenant with increase of the hazard. I am not going into any title question, or anything of that sort.

The Court: Well, the effect of that merely is an increase of the hazard.

Mr. Stoffer: Yes. In other words, the policy provides against change of the possession, unless change of possession is without an increase of the hazard.

The Court: But you have already pleaded before increase of hazard.

Mr. Stoffer: Yes, that was under the strict increase of hazard clause in the policy.

The Court: What harm can there be from allowing that?

Mr. Lieblich: This defense pleads a change, other than by death of the insured, in the possession of the property, with an increase in hazard.

The Court: The only point in that is the increase in hazard.

Mr. Lieblich: Well, he is covered by the other defense. He is pleading an increase of hazard, and it is a good defense.

The Court: That is all there is to it.

Mr. Stoffer: I will bind myself on the record to that.

Mr. Lieblich: Your Honor will note my exception to the amendment?

The Court: Yes."

The third separate defense relating to the existence of another policy on the building for $1,500.00 and affecting the *pro rata* liability of respondent was covered by stipulation of counsel (S. C., p. 24, ll. 11-28).

In view of the virtual admissions of plaintiff's counsel that no really new issues were involved in the amendment, the Trial Court certainly did not abuse its discretion, and, in any event, no preju-

dice can possibly have resulted from the elaboration by counsel of the issues already in the case. *Harris* v. *Roth,* 6 Misc. 1006 (Sup. Ct. 1928).

Starting at page 5, plaintiff, in his brief, complains of the conclusion reached by the Supreme Court that plaintiff's objection to the amendments at the trial did not constitute a claim of surprise, and boldly asserts at the top of page 6 in heavy type that he had told the Trial Court that he "was not prepared to try the issue upon new defenses which I had not anticipated." Nowhere does such a statement appear in the record. It seems a little unfair to criticize the Supreme Court for failing to consider a statement which in fact was never made. The only statement made by counsel for plaintiff in objecting to the amendments was that "he had come to court prepared to try the case upon the issues as raised" (S. C., p. 21). This is the objection considered and disposed of by the Supreme Court in its opinion written by Mr. Justice Heher when he said (p. 462):

> "Appellant's counsel consented to the amendment averring the existence of another policy. As to the others, while an exception was taken, no ground of objection was stated. Surprise was not alleged. Counsel merely stated: 'I came here prepared to try the case on the issues raised.' But this is manifestly not a claim of surprise. The amendment of a pleading is within the discretion of the court, and therefore not the subject of a ground of appeal unless there is an abuse of discretion. *Allen, Inc.* v. *Spring Street Realty Co.,* 111 N. J. L. 88; 166 Atl. Rep. 199. There was no abuse of discretion here."

POINT III.

The Trial Court properly permitted the plaintiff to testify on cross-examination that he acquired the property by gift from his mother.

As pointed out under Point I of this brief, the ground for reversal set forth under Point II of plaintiff's brief should not be considered because it is not proper. Furthermore, this same ground was set forth in the reasons assigned for reversal on the appeal to the Supreme Court, except that plaintiff now, for the first time, adds the answer to the question objected to (S. C., p. 19, ll. 6, 7, 8).

This Cout will consider the ground of appeal as assigned in the court below and brought up with the record. *Burhans* v. *Paterson,* 99 N. J. L. 198 (E. & A. 1923). It is clear that this reason as assigned before the Supreme Court was improper in that it failed to set forth both the question and answer as required by the rules of that Court.

In *Benson* v. *Brady,* 5 N. J. Misc. 13; 135 Atl. 343 (Sup. Ct., 1926), the Court said, with respect to the necessity of setting forth the question and answer in a ground of appeal:

> "The alleged illegal testimony objected to —question and answer—should be embodied in the reason. This is the settled legal rule relating to the stating of a ground of appeal in a case upon appeal."

In *Shedaker* v. *James,* 107 N. J. L. 400 (Sup. Ct., 1931), the Court at page 402 repeated *verbatim* the first sentence of the foregoing quotation. The reason for this rule is obviously that the Court should be apprised on the face of the grounds of appeal of the exact issue of relevancy

and should not be obliged to search the record for the answers to the allegedly objectionable questions.

The Supreme Court, however, considered the ground and found it to be without merit, and found that the question asked was proper. Clearly this conclusion is sound and there is obviously no merit to the objection that the question, asked on cross examination, was immaterial.

Plaintiff's counsel argues that the question as to the acquisition of the property, taken together with Mrs. Kruger's testimony, "gave the jury the opportunity to conclude that since the young man was out of work, apparently without funds, he might have had a motive in the destruction of this building and be the means of acquiring cash" (Plaintiff's Brief, p. 10). We should add to these facts that plaintiff preferred to board with Mrs. Kruger rather than occupy the house; that he first rented the house in January for $15.00 (S. C., p. 96, ll. 16-17; p. 112, ll. 34-35); that even the bootlegging tenant moved out a few days before the fires (S. C., p. 68, ll. 30-28); and that a mere fire was insufficient to rouse him from his bed (S. C., p. 86, ll. 7-10).

In this case as in *Matisovsky* v. *Fidelity-Phenix Insurance Co.*, 6 Misc. 907 (Sup. Ct., 1929), the assured in his proofs of loss stated that the origin of the fire was unknown to him (S. C., p. 153, ll. 16-17). Here plaintiff went further and swore in the proofs that he had "no knowledge nor belief as to the origin of the fire" (S. C., p. 156, ll. 6-7). The Court in the *Matisovsky* case recognized the materiality of evidence that the "insureds were in financial straits before the fire" (at p. 908).

Moreover, plaintiff on direct examination was asked about the value of the building and contents at the time of the fire. Illustrative of this line of questioning and of the impression sought

to be created in the minds of the jurors are the following excerpts:

> "Q. Mr. Vinick, can you tell us from your recollection what furniture, if any, you had in the premises at the time of the destruction? A. Well, I had a whole complete house furnished. I had living room furniture——
> "Q. Do you know what it cost? A. About $175."

With reference to a wicker set, the question and answer permitted an inference that the items plaintiff was testifying about represented purchases made by him, and that the values given were based on the cost to him:

> "Q. How much, if anything, did that cost you? A. I think it cost $95."

There were many other questions of the same character:

> "What did these cost you?" (P. 30, l. 5.)
> "How much did the center table cost you?" (P. 30, ll. 26-27.)
> "What did the other table cost you?" (P. 30, l. 28.)
> "How much did they (bridge lamps) cost you, do you know?" (P. 30, ll. 36-37.)
> "Excluding the sentimental value, how much did the other items cost you?" (P. 32, ll. 9-10.)

Plaintiff answered these and similar questions by giving definite prices for the various articles. To the jury this could mean but one thing: that plaintiff himself purchased the property in question and was testifying to his actual disbursements. Furthermore, no attempt was made on his direct examination to fix the time of acquisition of the various items, a matter of importance in determining depreciation and the value of the property at the time of the fires.

The deed which had been placed in evidence (Ex. P-1, S. C., p. 139) ran from Fanny Dunn to Anotole Vinick, so that the jury at the conclusion of plaintiff's direct examination knew nothing of the relationship between grantor and grantee. Since plaintiff was asked by his counsel to fix the value of the building as well as the personalty (S. C., p. 33, ll. 30-31) the jury could logically infer that with respect to both the realty and the personalty plaintiff was testifying on the basis of actual cost to him. Still worse was the possibility of an inference, as the proofs then stood, that after acquiring the realty from an apparent stranger by deed dated November 20, 1930, but acknowledged January 19, 1931 (S. C., p. 139, ll. 5-10), plaintiff purchased new furniture for the house.

Without appealing to the latitude which a Trial Judge may permit on cross-examination to bring about a clarification of a witness' testimony, it is submitted that the question objected to was strictly material (1) to contradict plaintiff's testimony as to what various items cost him by showing that they came to him by way of gift at the same time; (2) to negative any inference that the property had been acquired new by him; (3) to contradict his testimony as to values by showing that his mother had used the property for varying periods within seven years before the fire; (4) to affect the credibility of his testimony that certain articles cost him so much, and, by showing the manner of his acquisition, to let the jury decide whether he correctly carried in his mind the cost to his mother of this property from the time he was fourteen years old, in anticipation of a gift to him on attaining his majority; (5) no bill of sale covering the furniture having been offered in evidence, it was material to ascertain how he claimed to have become the owner of this prop-

erty, an issue on which plaintiff had the burden of proof under the pleadings, the answers having denied paragraph 1 of each of the complaints (S. C., p. 2, l. 35 to p. 3, l. 4, denied p. 5, ll. 9-10; S. C., p. 11, ll. 19-23, denied p. 13, ll. 23-25); (6) it was pertinent to inquire whether his mother left him all of the property, or whether she had taken any of the contents with her when she moved to Philadelphia (S. C., p. 30, ll. 28-37).

How much property had been given to him, how much was in the house at the time of the fires, and its value were strenuously contested issues at the trial, and it is respectfully urged that the Trial Judge properly admitted the question on cross-examination as to when and how plaintiff claimed to have become the owner.

POINT IV.

The Trial Court committed no error in permitting witness Huttenbach to testify as to the value of the insured property.

Under Point 3 of his brief appellant lists a series of questions to the witness Huttenbach, which should not be considered for the reasons discussed in Point I of this brief. Furthermore, these questions were set forth in the reasons assigned for reversal in the Supreme Court without setting forth the answers thereto and are defective for the reasons discussed in Point III herein.

Moreover, the record fails to disclose exceptions to the questions incorporated in this ground of appeal. The first two questions were not even objected to (S. C., p. 97, ll. 16-23):

> "Q. Now, on the basis of the sketch which he gave you, and the information which he gave you concerning the materials that went

into the building, and its construction, did you make up an estimate of the replacement value of that building? A. Yes, sir.

Q. Did you do it then? A. Yes, sir."

The third question brought an objection that the witness did not have sufficient information to make an intelligent estimate of replacement value, and an exception was taken to the overruling of the objection (S. C., p. 98, ll. 27-36). The question was repeated, but plaintiff's counsel objected to the qualifications of the witness and the Court permitted him to cross-examine. After the Court ruled that the witness was qualified, the witness was asked (S. C., p. 102, ll. 12-14):

"Q. Now, will you please tell us what your estimate of the replacement value of this building is?"

No objection was made to this question, and no exception was noted.

Counsel for appellant in this case was also counsel for appellant in *Precipio* v. *Insurance Co. of Pa.,* 103 N. J. L. 589 (E. & A., 1927), in which the Court said at page 595:

"Therefore, it follows that when an objection is to a single question, and not to a line of questions on the same subject, the party objecting to the testimony may insist only upon the particular question objected to, and not to the line."

Moreover, since the first two questions incorporated in this ground of appeal were not even objected to, the entire ground of appeal must be dismissed even though the Court should decide that a proper objection was made, and exception noted, to the third question. It has been held that where a single ground of appeal complains of several allegedly erroneous rulings, if any one

of these is correct, the entire ground of appeal fails. *State* v. *Contarino,* 92 N. J. L. 381 (E. & A., 1918); *Coll* v. *Lehigh Valley R. R.,* 3 Misc. 869, aff'd 102 N. J. L. 713 (E. & A., 1926).

Should the Court examine into the merits of the argument despite the defects in the ground of appeal, two grievances are alleged:

(1) That the witness Huttenbach was not qualified as an expert on building values. This is raised *arguendo,* and not specifically in the ground of appeal. Moreover, the evidence discloses that the witness had been engaged for over twenty years in the business of building, estimating and appraising (S. C., p. 95, ll. 8-13). The cross-examination as to qualifications showed that the witness had done a great deal of adjusting and appraising (S. C., p. 100, ll. 26-30). His appraisals included the buildings on the Duke and Gould Estates, and during the preceding year two hundred and sixty appraisals for one mortgage company (S. C., p. 101, l. 20, to p. 102, l. 10).

In *Precipio* v. *Ins. Co. of Pa.,* 103 N. J. L. 589, at 594, the Court of Errors and Appeals reaffirmed the rule "that the question whether a witness is duly qualified to give expert testimony is a preliminary question for the Court to decide."

In a recent decision in *Holden* v. *Rolff,* 110 N. J. L. 499, 166 Atl. 201 (E. & A., 1933), the Court again said:

> "The qualification of an expert is to be determined by the trial court as a question of fact, and its conclusion will not be disturbed if there be legal evidence to support the finding."

(2) The second phase of the argument of plaintiff is that Huttenbach did not have enough information about this particular building to enable him to testify. This was also disposed of by the

Trial Court's ruling within the meaning of the authorities cited above. Moreover, the witness had testified that at a conference with plaintiff in the office of the latter's attorney, plaintiff drew for him a sketch of the building (marked in evidence as Exhibit D-2, S. C., p. 96, ll. 20-40), and furnished him with the details of the construction and materials (S. C., p. 97, ll. 3-14):

> "Q. Did Mr. Vinick, on that occasion, also give you a description of the building, and the materials that were in it? A. Yes, he told me of it, and how the building was built.
>
> "Q. Will you please tell us what he told you? A. He told me there were two by eight floor beams, and, then, there were sheath and weather board and plaster board finish on the inside, and he marked out the number of windows, and doors, and a flat roof, and the porch was inclosed and made little inside rooms out of it, and a bathroom on the porch."

The Supreme Court properly refused to consider these objections because no objection was made at the trial (Opinion of Supreme Court, 112 N. J. L. 462 at p. 462).

It is submitted, therefore, that this ground of appeal is both defective and frivolous.

POINT V.

The Trial Court properly permitted witness Huttenbach to refer to a written memorandum to refresh his recollection.

Under point 4 of his brief appellant seeks to review an act of judicial discretion in permitting the witness Huttenbach to refer to a written estimate which he made about a year before the trial. Error is charged on several grounds none of which are borne out by the record. Furthermore,

this ground is improper for the reasons set forth under Point I of this brief.

A. It is argued that the witness had not disclosed that he was lacking in recollection. How else can we interpret the witness' statement, in answer to the question whether he needed the paper, "I can't remember. This happened over a year ago" (S. C., p. 102, ll. 28-37).

B. It is next urged "There was no evidence as to when or who made the memo." The "when" was supplied in the witness' testimony concerning the conference at which plaintiff furnished him with a sketch and the details of construction and materials (S. C., p. 96, l. 29, to p. 97, l. 23, ending with "Did you do it then? A. Yes, sir."). Nor was there the slightest doubt as to "who" made the memorandum, for the witness had testified just before counsel's exception (p. 102, ll. 28-29):

> "Q. Have you made some figures? A. I have made some figures on this, Mr. Stoffer."

C. Lastly, the Trial Court's ruling that the witness could use the memorandum is called arbitrary. This criticism is especially unfair because the Court scrupulously adhered to the rule stated many years ago in *Myers* v. *Weger,* 62 N. J. L. 432 (E. & A. 1898), at 441:

> "Nor is there any substance in the objection that the witness should not have been allowed to read to the jury the above-mentioned extract. It is said that a memorandum is for mere reference, and can be used only to excite the recollection. This is too narrow a statement of the rule. So strict a limitation would make memoranda unavailable in many cases, where they are of value. The use of a witness of his own memorandum, made at or near the time of the events recorded, is not

> merely to refresh the memory by reviving faint impressions, but also to supplement the memory by preserving details that would otherwise be forgotten. In a case of the latter class, the witness is able to prove the details, not by remembering the particulars that compose them, but because the circumstances under which the memorandum was made afford satisfactory assurance that at the time of the entry its contents were known by the witness to be true. It follows that a witness, in using his own memorandum, may not merely refer to it, but may also testify from it. It may be added that the use of a memorandum rests very much in judicial discretion."

On cross-examination counsel for appellant was allowed to see the memorandum and be brought out from the witness a second time the essentials of the doctrine of past recollection recorded, which he still contends are lacking (S. C., p. 106, l. 15, to p. 107, l. 17).

It is submitted that the opinion of the Supreme Court, quoted at page 16 of appellant's brief, is sound and that the Trial Court properly permitted the witness to refer to the written memorandum.

POINT VI.

Plaintiff was not prejudiced by the statement of the Trial Court with respect to the cost per cubic foot of a frame building.

Ground number 5, having been abandoned by appellant, will not be discussed by defendant.

The sixth ground of appeal is likewise improper for the reasons urged under Point I herein.

This ground of appeal is not based on any legal ruling of the Trial Court, but on an allegedly prejudicial statement.

After plaintiff had, as an expert in his own behalf, testified that the damage to the building was $6,063.00 (S. C., p. 37, ll. 24-27), he produced August Morris as an independent expert. Morris testified to a replacement value of $5,500.00 without any allowance for depreciation (S. C., p. 63, ll. 8-14). To test the accuracy of his estimate, he was asked what in his opinion the cubic foot cost of a house of that kind was, and replied about 80 cents a cubic foot (S. C., p. 62, ll. 13-16). He was, to say the least, consistent in his exaggeration of both replacement and cubic foot value.

Huttenbach testified for defendant that the cubic foot cost of a building of this type was 18 cents (p. 105, ll. 10-15). To show how incredible Morris' testimony on this point was, Huttenbach was asked to give the cubic foot cost of a brick building, which brought the objection that a frame building was involved in this suit. This led to the remark of the Court that it was common knowledge that a brick building is more expensive, "and it is almost a matter of common knowledge, too, that eighty cents for construction of this kind is absurd." It was relevant to show that the average brick building cost only 40 to 42 cents a cubic foot (S. C., p. 106, ll. 5-11).

When counsel for appellant took exception to the Court's remark as prejudicial and involving a question for the determination of the jury, the Court said, "Yes, proceed. I will leave it to the jury" (S. C., p. 105, ll. 36-37).

In this state a Trial Judge is not a mere automaton dispensing rulings when counsel rise with objections. He has a right to comment on the evidence provided he leaves to the jury the determination of the facts and the conclusions to be drawn therefrom. *Reinfeld* v. *Laden,* 98 N. J. L. 709 (Sup. Ct., 1928); *Kneip* v. *N. Y. & L. B. R. Co.,* 102 N. J. L. 374 (E. & A., 1926).

That the Court below went further than was necessary in the charge to comply with the proviso is apparent from the following extract (S. C., p. 132, l. 32, to p. 133, l. 20), which includes omissions in the quotation on page 14 of appellant's brief:

> "The Court made a statement during the course of the trial that it was a matter of common knowledge that eighty cents per cubic foot was high for this character of construction. You must not take that into consideration. The Court does not have to advise you, as the Court has so many times told you, that you are to decide these cases only upon the facts of the case as they have been testified to you by the witnesses and to take nothing else; and when the Court makes a statement as to the facts and you disagree with the Court as to the facts, you are to take your memory and your consideration of the facts and not the Court's; and, likewise, the inferences which may be lawfully drawn from the facts. They are peculiarly for you and not for the Court, and you are to take such inferences from the facts as you would draw and not as the Court would draw. You are the judges of the credibility which is to be given to witnesses. That is your province exclusively, so pay no attention to what the Court said upon the subject that has just been mentioned."

In disposing of this contention the Supreme Court said (Opinion, p. 465):

> "The next point is that there was error in an observation of the trial judge that the relative cost of brick and frame buildings was a matter of common knowledge. The ground of objection seems to be that the court, in saying that 'it is almost a matter of common knowledge that eighty cents a cubic foot for construction of this kind is absurd,' committed prejudicial error. If so, it was cor-

rected in the charge. The statement was there entirely withdrawn. Moreover, there was no ruling that can be made the subject of a ground of appeal. Counsel merely excepted 'to your honor's remark,' adding that 'the witness' testimony is for the determination of the jury'; to which the court replied: 'Yes, proceed. I will leave it to the jury.' This seemed to satisfy counsel, and there the matter ended, except that the court, in his charge, withdrew the statement from the jury's consideration in a wholly satisfactory manner."

POINT VII.

The Trial Court committed no error in charging defendant's fourth request to charge.

This ground of appeal is defective both for the reasons discussed under Point I herein, as well as the fact there was no proper exception taken to the charge at the trial.

The only exception noted by plaintiff relative to requests to charge reads as follows (S. C., p. 138, ll. 20-23):

> "I except to the Court's charge each and every one of the defendant's requests to charge in the language in which the requests were charged."

The authorities in this state hold improper and ineffective a general exception of this character, which does not call the Trial Court's attention to the particular error complained of and does not afford the Court an opportunity to correct itself.

As far back as *Oliver* v. *Phelps,* 20 N. J. L. 179, at 182 (Sup. Ct., 1843), Hornblower, C. J., said:

> "It is not sufficient for a party to say, 'I except to the charge,' and then to assign error upon every clause and sentence in the

charge. The exceptant must point out and call the attention of the judge to the part or parts of the charge to which he excepts, and thus give him an opportunity of correcting himself, or of explaining and obviating the objections."

See also:

Petre & Hadden ads. State, 35 N. J. L. 64, 69 (Sup. Ct., 1871);

Noyes v. *State,* 41 N. J. L. 418, 429 (Sup. Ct., 1879);

Packard v. *Bergen Ry. Co.,* 54 N. J. L. 553, 556 (E. & A., 1892);

McKenna v. *Reade,* 105 N. J. L. 408, 413 (E. & A. 1928).

The Trial Court charged five requests submitted by defendant and under his general exception plaintiff complains only of the fourth request, admitting that the others were valid. The exception fails under the rule reiterated by the Court of Errors and Appeals in *Thibodeau* v. *Hamley,* 95 N. J. L. 180 (1920), at 184:

"The legal rule governing such an exception is well and vigorously stated by Chief Justice Beasley, in *Noyes* v. *State,* 41 N. J. L. 418 (p. 429), as follows: 'No rule regulating the trial of causes is more valuable or more settled than the requirement that an exception to the Judicial charge, to be legal, must be explicit. If the exception embraces several legal propositions, and any one of them be unexceptional, the objection fails. Counsel must put his finger on the erroneous proposition, and thus point the mind of the judge to it; if he challenges any part of the charge in bulk, assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being formed in such bulk is that of the party so excepting. The cases, including several of the decisions

of our own courts, are conclusive with respect to this doctrine'."

It is of no help to a Trial Judge to except to the charging of defendant's requests "in the language in which the requests were charged" (S. C., p. 138, ll. 22-23). The Court is not told whether the objection is to any legal principle or merely to verbiage.

On the merits, plaintiff's contention is not that the legal principle incorporated in the request and charged by the Court is erroneous, but rather that there was not sufficient evidence to warrant the Court in submitting this issue to the jury. To support this contention, plaintiff insists that three facts or sets of facts had to be present to justify the request as charged:

(A) That plaintiff had kept, used or allowed on the premises any of the prohibited articles referred to in the policy provision. This is erroneous in the insistence on plaintiff's participation, because the provision of the standard policy which prohibits the keeping of inflammable articles is construed as a warranty. The authorities hold that any breach of this clause will void the policy, and that, since a warranty is involved, the knowledge or ignorance of the insured as to the breach is immaterial.

Liverpool, London & Globe Ins. Co. v. *Gunther,* 116 U. S. 113, 29 L. Ed. 575 (see same case 134 U. S. 11, 33 L. Ed. 857);

Imperial Fire Ins. Co. v. *County of Coos,* 151 U. S. 452, 38 L. Ed. 231;

Leonard v. *Northwestern National Ins. Co.,* 290 Fed. 318 (Ct. of App., Dist. of Col., 1933);

Allen v. *Home Ins. Co.,* 133 Cal. 29 (1901);

Diehl v. *Adams County Mutual Ins. Co.*, 58 P. St. 443;
Matson v. *Farms Building Ins. Co.*, 73 N. Y. 310;
Swift v. *Patrons Mutual Fire Ins. Co.*, 125 Me. 255, 132 Atl. 745 (1926);
Watson v. *Firemen's Ins. Co.*, 140 Atl. 168 (Sup. Ct., N. H., 1928).

As the United States Supreme Court stated in the *Gunther* case, *supra:*

> "A violation of these prohibitions by anyone permitted by the assured to occupy the premises, is a violation by the assured himself. The company stipulates that it will not assume the risk arising from the presence of the article prohibited; and if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the company has refused to accept. In our opinion, the defendant in error was chargeable with the acts of Walker if he brought upon the insured premises, and stored in the oil room any of the prohibited articles although they were not intended to be used on the premises, but for lighting a neighboring grove. Walker was in no sense a stranger or a trespasser. With his wife, he was in the lawful occupation of the premises and, with the implied assent of the insured at least, was intrusted with the control and management of them. And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequences of Walker's acts in doing that which, if done, the company had stipulated that it would not be liable. The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another, the latter became his representative, for whom he must answer as for himself."

The same basic principle with reference to breach of warranty has been followed in this State. *Rafferty* vs. *New Brunswick Fire Ins. Co.,* 18 N. J. L. 480 (Sup. Ct., 1842); *Francis* vs. *Insurance Company,* 25 N. J. L. 78 (Sup. Ct., 1855); *Dewees* v. *Manhattan Ins. Co.,* 34 N. J. L. 244 (Sup. Ct., 1870); *Carson* v. *Jersey City Ins. Co.,* 43 N. J. L. 300 (Sup. Ct., 1881); *Buckwalter* vs. *Aetna Ins. Co.,* 6 N. J. Misc. 770.

(B) Plaintiff next argues that to justify the request to charge, the evidence should have shown that "alcohol was kept, used or allowed on the premises." Plaintiff's brief does not challenge the accuracy of the request to charge insofar as, under the "other explosives" language of the policy provision, it submits to the jury the question of whether alcohol was kept in the premises and whether it constituted an explosive. Indeed, counsel could hardly question the legal propriety of the charge on this issue under the decisions in *Goldstein* vs. *Northwestern National Ins. Co.,* 4 N. J. Misc. 669, 671 (Sup. Ct., 1926), and *Miller* v. *Union Assur. Soc. of London,* 39 F. (2d) 25 (C. C. A., 8th Cir. C., 1930).

In the *Goldstein* case this Court set aside a verdict for an assured on the ground, among others, that the evidence showed the presence of a large quantity of alcohol within the meaning of the prohibited articles warranty.

In the *Miller* case, the Court said at page 29:

> "It was further provided that said policies should become void 'if there be kept, used or allowed' on said premises gasoline or other explosives. Undeniably large quantities of gasoline and alcohol were kept and used on said premises by Armeno. Such articles were used in connection with the unlawful manufacture of alcoholic spirits. This was a violation of the contracts and warranted the appellee in declaring them void."

Plaintiff contends, however, that there was no evidence in this case that alcohol was kept, used or allowed in the insured premises. Reference has already been made several times to the testimony of the witness Gates to the almost continuous distillery smell which entered his house from the insured building, one hundred feet away. Counsel for plaintiff sees some significance in the fact that Gates did not keep his windows open (S. C., p. 73, ll. 23-24). This would merely indicate that the liquor manufacturing operations conducted in the insured premises were on a rather large scale to give off so penetrating an odor.

Additional evidence on this issue was that given by Huttenbach with reference to the quantity of rye which he observed after the fire. Certainly, there was ample evidence to warrant the Court in submitting to the jury the question of whether alcohol was kept, used or allowed in the premises.

(c) The third ingredient which plaintiff insists was lacking was evidence of "alcohol in a substantial quantity." This qualification was added to defendant's request to charge by the Trial Court (S. C., p. 137, ll. 13-14). Plaintiff could not possibly be harmed by this addition. In the light of the evidence referred to under (b) *supra,* the Court was entirely justified in leaving it to the jury to determine whether a substantial quantity of alcohol was in the insured property.

It is respectfully submitted, therefore, that plaintiff's contention that there was insufficient evidence to justify the Trial Judge in charging defendant's request is not substantiated by the record. Since the legal propriety of the request to charge is not challenged, it is necessary to show merely that upon the evidence adduced on this issue reasonable men could differ. In such a situation, the Trial Court had no alternative but to

submit the issue to the jury. This ground of appeal should be dismissed, first, because it is not properly before the Court, and secondly, because it lacks merit.

POINT VIII.

The Trial Court committed no error in charging defendant's fifth request to charge.

The argument under Point I, as well as under the preceding point as to the sufficiency of plaintiff's general exception, applies also to this ground of appeal involving the propriety of another of the defendant's requests to charge.

The argument of plaintiff on the merits discusses the weight of the evidence, rather than whether sufficient evidence of increase of hazard had been adduced to warrant the Court in submitting the issue to the jury. The testimony of Gates concerning the distillery odor which continuously came from plaintiff's building during the period of Santo's occupancy was in itself sufficient (S. C., p. 69, l. 30 to p. 70, l. 12; p. 72, ll. 15-40). Huttenbach testified to the presence of rye after the fire in the back portion of the porch (S. C., p. 95, ll. 31-32). Plaintiff could have controlled this illegal use of the premises, which certainly increased the hazard, by exercising his right as landlord to inspect the premises. Whether he knew what Santo was doing was for the jury to say in the light of the peculiar rental arrangement involving an increase from $15.00 to $80.00 if Santo liked the property, and the proximity of plaintiff's abode to the insured building.

The only issue, assuming the Court holds the general exception valid, is whether defendant's request to charge as set forth in the eighth

ground of appeal correctly stated a pertinent legal principle.

Defendant's request to charge, incorporated *verbatim* the pertinent provision of the policy and instead of an abstract and uncertain principle, it furnished the jury with the rule applicable to the evidence under the policy language.

As the Court of Errors and Appeals said in *Lenz* v. *Public Service Railway Co.*, 98 N. J. L. 849, 852):

> "So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them, and circumstances of the trial, would ordinary men and jurors understand the instructions as a whole."

Conclusion.

Appellant's brief contains unduly harsh criticism of the action of the Trial Judge, and charges that the jury was prejudiced against plaintiff and in favor of the insurance company by the Court's comments and rulings.

Going beyond our contention that the grounds of appeal involve matters within the discretion of the Trial Judge, or are not properly before the Court, we have considered the several points on their merits and have shown their lack of substance. But the final answer to this appeal is that even if the several rulings could be held erroneous, still, on the record as a whole, no prejudice can be said to have resulted to plaintiff.

The jury's verdict is sustainable on any one of the following issues not involving the legal errors alleged to have been committed by the Trial Court:

1. That plaintiff was guilty of material fraud and concealment when he swore in his proofs of loss that the property was destroyed by one fire on February 7, 1931, when, in fact, there were two fires twenty-nine hours apart.

2. On the evidence before it, the jury was entitled to find that plaintiff was guilty of fraud and false swearing when he stated in his proofs of loss that he had no knowledge or belief as to the origin of the fire.

3. That plaintiff was guilty of fraud and false swearing when he stated in his proofs that since the issuance of the policies there had been no change in the use of the property.

4. That there was a breach of warranty by the use of the property for illegal distillation of liquor, the policies containing the warranty that the building would be occupied exclusively for dwelling purposes.

5. That the policy provision with respect to increase of hazard was violated.

6. That plaintiff was guilty of fraud and false swearing in claiming loss and damage to the building of $6,063.00 (the figure attempted to be justified by a witness for plaintiff who testified to a cubic foot cost of eighty cents), when the evidence on behalf of defendant showed a total damage of $2,603.00.

7. That plaintiff was guilty of fraud and false swearing in submitting a schedule of furniture in connection with his proof of loss claiming the presence at the time of the fire, and the destruction, of a long list of items, whereas the firemen

who made a thorough examination of the entire building found only a day bed, a mattress and a couple of chairs.

It is respectfully submitted, therefore, that the appeal should be dismissed and that the judgment of the Supreme Court affirming the judgment entered upon the verdict of the jury should be affirmed.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney for and of Counsel
with Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(8432)