

INDEX

TESTIMONY

Henry Frank, direct	3
cross	8
redirect	15
recross	15
redirect	16
Irving L. Selvage, direct	16
cross	18
recalled, direct	28
" direct	50
" cross	56
" redirect	57
" recross	57
Joseph T. Lieblich, direct	27
Samuel Von Poznak, direct	34
cross	41
Carl A. Strobel, direct	45
cross	48
redirect	48
Anna Frank, direct	63
cross	65
redirect	67
recross	67
Leo Goldberger, direct	71
cross	74
redirect	76
Henry Frank,	
Rebuttal, direct	76
Anna Frank,	
Rebuttal, direct	77
cross	78
Charles Selvage,	
Rebuttal, direct	78
cross	80
Motion for Non-Suit	67

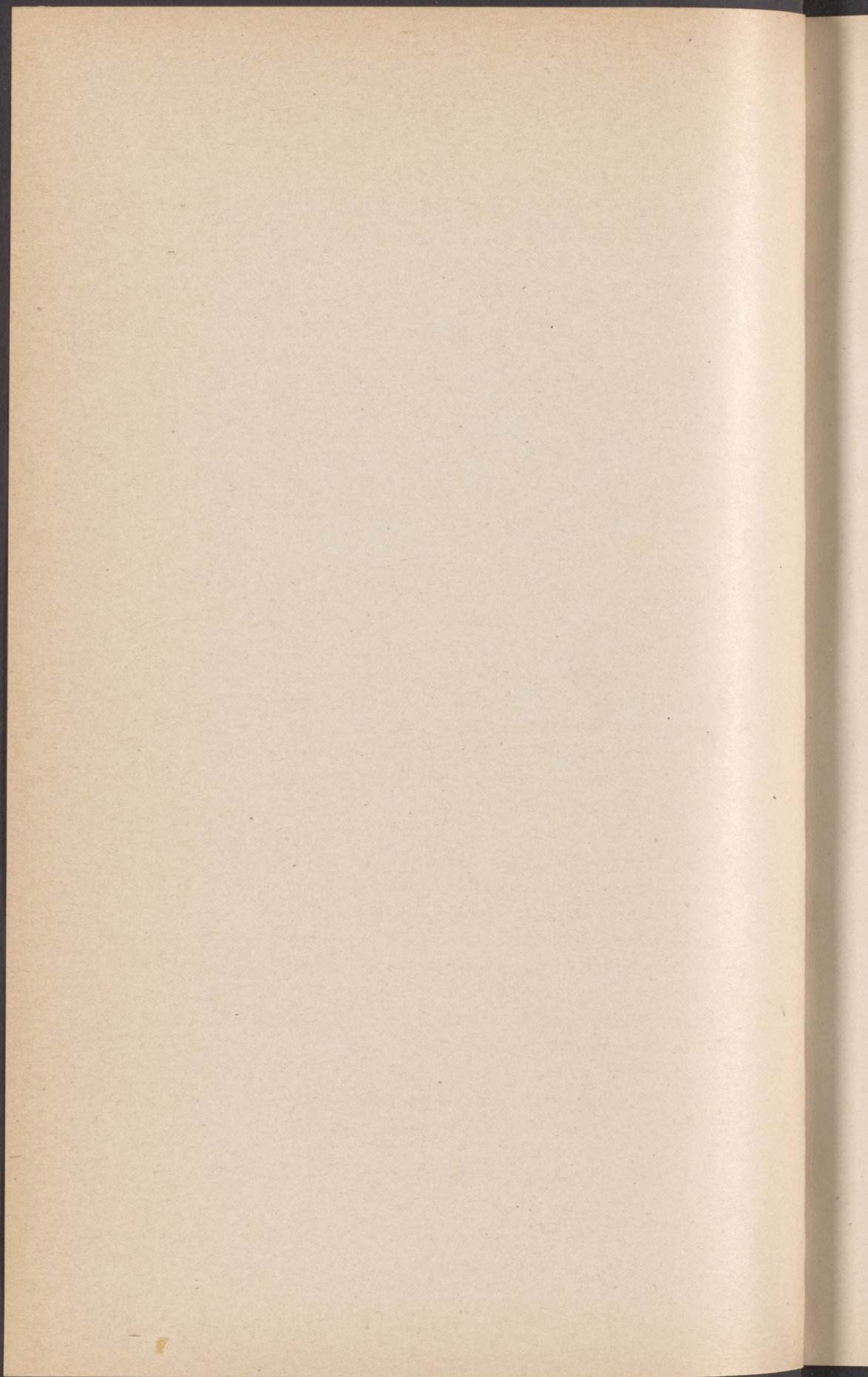
Motion for Direction of Verdict	80
Charge	81
Objections to Charge	90
Defendant's Request to Charge	91

PLEADINGS, ETC.

Assignments of Error	
(Grounds of Appeal)	1
Complaint	116
Answer	118
Reply	123
Notice of Appeal	124

EXHIBITS

	Offered	Printed
P. 1—Policy 1		24
P. 3—Letter—Lieblich to Selvage ..	28	94
P. 6—Letter—Selvage to Williams ..	30	96
P. 4—Letter—Selvage to Williams ..	54	95
P. 5—Letter—Williams to Selvage ..	54	96
P. 6A—Letter—Defendant to Plaintiff	31	97
P. 7—Proof of Loss	31	99
P. 8—Copy letter Defendant to Plaintiff	31	101
P. 9—Letter—Selvage to Lieblich ..	32	101
P. 10—Letter—Selvage to Lieblich ..	33	103
P. 11—Letter—Selvage to Lieblich ..	33	103
P. 12—Letter—Selvage to Lieblich ..	33	104
P. 13—Letter—Selvage to Lieblich ..	33	105
P. 14—Letter—Selvage to Lieblich ..	34	106
P. 15—Letter—Lieblich to Selvage ..	34	106
P. 16—Letter—Defendant to Plaintiff	43	107
P. 17—Letter—Selvage to Plaintiff	44	109
P. 18—Letter—Lieblich to Selvage ..	44	110
P. 19—Schedule of items	54	111
P. 20—Letter—Selvage to Williams	54	115



(Filed November 18, 1925)

GROUNDS ON APPEAL

Sirs:

Please take notice that the following are the grounds of appeal which defendant-appellant hereby assign and upon which they will rely:

1. The Court erred in admitting irrelevant testimony with respect to the insurance, loss and damage and condition of the building to the prejudice of the defendant.

2. The Court erred in the admission of testimony of alleged Special Agents to establish authority to bind the defendant. 10

3. The Court erred in admitting testimony of Carl Strobel, an alleged Special Agent of the defendant to prove his authority to adjust losses on behalf of defendant company.

4. The Court erred in admitting in evidence an alleged proof of loss which upon its face was defective and not in compliance with policy conditions.

5. The Court erred in admitting testimony of Irving L. Selvage with respect to loss and damage on stock, furniture and fixtures, when it was apparent in the testimony that the appraisal was not based upon the opinion of the said Irving L. Selvage, and defendant did not insure stock or building. 20

6. The Court erred in refusing to instruct witnesses on cross-examination to make responsive answers to questions propounded by defendant's counsel.

7. The Court erred in failing to grant defendant's motion for a non-suit upon the ground: 30

- (a) No notice of loss as provided by policy.
- (b) Failure to serve satisfactory proof of loss.
- (c) Failure to appraise as provided by policy.

Grounds on Appeal

(d) Failure to furnish a Magistrate certificate.

8. The Court erred in failing to direct a verdict for the defendant upon similar grounds as set forth on the motion for non-suit.

9. The Court erred in refusing to charge defendant's fifth and ninth request to charge.

10. The Court erred in charging the Jury with respect to:

(a) Carl Strobel delegating his alleged authority to Fred Williams.

(b) With respect to the entire testimony of Carl Strobel.

(c) With respect to Mr. Strobel's alleged admission as to his authority to bind the defendant.

(d) With respect to the alleged authority of Fred Williams to bind the defendant.

(e) With respect to the prejudicial statement of the Court wherein the Court said: "Without running through the correspondence, the parties went back and forth and pointed out part of the policy in piecemeal manner in a sort of a nibbling proceeding until the action was instituted."

(f) With respect to the waiver of the notice.

(g) With respect to separating the damaged from the undamaged personal property, putting it in the best possible order, etc.

(h) With respect to making a complete inventory.

(i) With respect to the authority of Fred Williams and Carl Strobel and the delegation of authority from one to the other, and its effect to bind the defendant.

Joseph T. Lieblich

Yours, etc.,

Attorney of Defendant-Appellant.

Henry Frank—direct

NEW JERSEY SUPREME COURT,
ESSEX CIRCUIT

Thursday, June 4, 1925.

Henry Frank,	}	Action at Law.
vs.		
Security Insurance Co.		

Before: Hon. Worrall F. Mountain, J., and a jury.

For the plaintiff appear Haines & Chanalís (by Michael N. Chanalís.) 10

For the defendant appears Joseph T. Lieblich.

(A jury is called and sworn.)

Mr. Chanalís opens for the plaintiff.

Mr. Lieblich opens for the defendant.

HENRY FRANK, plaintiff, sworn.

Direct Examination by Mr. Chanalís: 20

Q. You are the plaintiff in this case? A. Yes, sir.

Q. Where do you reside? A. Elizabeth, 714 East Jersey Street.

Q. Do you own that building? A. I own the building, yes, sir.

Q. How long have you owned it? A. About—now, in October it will be four years.

Q. Do you recall covering this building with a Security Insurance Company policy on July 29th, 1923, or rather the household furniture? A. Yes, sir; the household furniture. 30

Q. I show you the policy and ask you if that is the policy you received?

Henry Frank—direct

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

A. Yes, sir; that is the policy.

Q. Describe the building at 714 East Jersey Street.

Mr. Lieblich—I object to the question. We insured the contents, not the building.

The Court—I will admit it.

(Defendant's counsel prays an exception to this ruling of the court.)

(Exception noted as ground of appeal.)

Q. Describe it. A. It is a stucco building. On the first floor was a butcher shop and on the second floor I live in.

Q. How many rooms are there? A. Seven rooms on the second floor and one sleeping room was in the attic where the fire started.

Q. How many members of your family lived in that house? A. How many people in my family live in that house?

Q. Yes, A. Nine.

Q. What was contained on the third floor, that is, in the attic? What did you keep in the attic? A. We kept all our clothes, beds—in the summer time, and we had one room for the boys to sleep in.

Q. Were they all the clothes of members of your family, the winter clothes? A. The winter clothes and bedding and some furniture.

Q. In addition to that you say there was a bedroom? A. Yes, sir.

Q. Was that occupied during the night? A. Yes, sir.

Henry Frank—direct

Q. Is that in use? A. Oh, yes.

Q. When did the fire occur in these premises?

A. The fire occurred on the 1st of July, Sunday afternoon, around three o'clock.

Q. Where did the fire start? A. In the attic.

Q. Do you know how the fire started? A. No; I wasn't home.

Q. State just exactly what part of the premises were burned? A. What part.

Q. Of your home this building that was burned 10
by the fire? A. Half the side of the building, the roof was entirely burned out and through some part of the floor in the attic.

Q. What about the clothes in the attic and the furniture? A. It was all damaged, not only in the attic, but downstairs, too by water. We had on the first floor water, too.

Q. Where did the water come from? A. From the fire engines.

Q. Did the fire injure any part of the furniture 20
on the second floor, that is, in your premises, where you lived? A. Not the fire, but the water.

Q. Anything else? A. Just the water I could see, done damage on the second floor to the furniture.

Q. Did any smoke go down into the second floor?
A. That I couldn't tell you, I wasn't there.

Q. What did you do after this fire occurred? A. I reported to the insurance agent Mr. James O'Connell.

Q. Who is James O'Connell? A. Agent for the 30
Security Insurance Company.

Q. Did you obtain your insurance through him?
A. Yes, sir.

Q. When did you inform him of the fire? A. Monday morning.

Henry Frank—direct

Q. That is the day after the fire? A. The day after the fire.

Q. How did you inform him? A. I called him up on the telephone.

Q. Did you speak to him personally? A. Yes, sir.

Q. You told him that a fire had occurred in the premises? A. Yes, sir.

Q. What did he tell you?

10 Mr. Lieblich—I object to proving a telephone conversation in this way. No foundation has been laid for it.

The Court—Sustain the objection.

Q. Did you know Mr. James O'Connell? A. Yes, sure.

Q. How often have you talked to him? A. Before?

20 Q. Yes. A. Oh, I know him before; he was in business in the real estate business.

Q. You knew his voice, did you? A. Oh, yes.

Q. When you talked to him over the telephone did you recognize it as Mr. O'Connell's voice? A. Sure.

Q. What did he say to you?

30 Mr. Lieblich—I make the same objection to the admission of this telephonic conversation that no proof has been laid that would bind this defendant.

The Court—Sustain the objection.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Henry Frank—direct

Q. What else did you do after 'phoning to Mr. O'Connell? A. Well, just kept on cleaning up and the same day in the afternoon Mr. Selvage came there.

Q. Who is Mr. Selvage? A. Adjuster.

Q. Mr. Selvage is a fire adjuster? A. Mr. Selvage is a fire adjuster; yes sir, so he told me when he came there.

Q. What happened after Mr. Selvage came? A. Well, he just asked me if he could take care. 10

Mr. Lieblich—I object to any conversation on the part of Mr. Selvage if offered to bind this defendant, unless they can show that Mr. Selvage is connected with the defendant company.

Mr. Chanalis—Mr. Frank engaged Mr. Selvage as a fire adjuster.

Mr. Lieblich—I will admit that, if you say so. 20

Q. You engaged Mr. Charles Selvage to represent you to adjust the fire loss? A. Yes, sir.

Q. That occurred the day after the fire? A. Yes, sir.

Q. Did you take any steps to protect the property from further damage? A. Sure.

Q. What did you do? A. Started to clean up and get the water all out of the house so I had to make a hole in the ceiling to get all the water out and clean up as much as we could and we had the stuff lying up there just where it happened until it started to smell and we had to live in that house. 30

Q. You lived in that house, didn't you? A. Yes, sir.

Henry Frank—cross

Q. What steps did you take to separate the damaged goods from the undamaged goods? A. Whatever wasn't so much damaged we cleaned it up and used it again. Whatever was done to by fire and damaged by water we put on the side and kept it there about three or four months or longer.

Q. Have you received anything in payment of this fire loss from the insurance company?

10 Mr. Lieblich—We admit we did not pay him.

Mr. Chanalís—I would like to withdraw this witness for the time being.

Mr. Lieblich—Let me cross examine him as far as you have gone.

Cross Examination by Mr. Lieblich:

20 Q. I show you this paper and ask you if you have seen this paper? A. Yes, sir; I have seen it.

Q. What is there about that which causes you to identify it? A. What do you mean?

Q. Is there anything on there which makes you say you saw that paper before? A. My name.

Q. You signed that paper? A. Yes, sir.

Q. And swore to it? A. Yes, sir; my name is there.

Q. You swore to it before Mr. Selvage, didn't you? A. Yes, sir.

30 Q. What did you mean when you said in response to counsel's question, "I had the stuff laying there just as it happened for six or seven weeks"? A. What did I mean?

Q. Yes. A. Well, we didn't try to do anything, you know, it was waiting for the agent.

Henry Frank—cross

Q. For the insurance company? A. Waiting for Mr.—the other agent to come to look at it, but not for fire insurance.

Mr. Lieblich—I object to that and ask that it be stricken out as not responsive.

The Court—Proceed.

Q. You left it there six or seven weeks as it was after the fire, waiting for some one to come? A. 10
Yes, sir.

Q. Mr. Selvage, whom you engaged, was not representing this insurance company? A. No.

Q. When did you hire him, on a Sunday, right after the fire? A. On Monday.

Mr. Chanalis—We admit we received the letter of August 20th, 1923, from Joseph T. Lieblich to Henry Frank is marked D-2 for identification. 20

Q. I show you this paper and ask you whether or not that is your signature?

Mr. Chanalis—It is admitted we received it.

Mr. Lieblich—I offer the letter dated August 23rd, 1923, from Mr. Lieblich to Mr. Frank and ask that it be marked for identification. 30

(Same is marked D-3 for identification.)

Mr. Lieblich—I offer for identification the letter of January 15th, 1924, from Joseph T. Lieblich to Henry Frank.

Mr. Chanalis—No objection.

(Same is marked D-4 for identification.)

Henry Frank—cross

Mr. Lieblich—I call for the production of a letter January 12th, 1924, from Joseph T. Lieblich to Charles Selvage Company.

Mr. Chanalis—I have the original of that.

Mr. Lieblich—I offer it for identification.

(Same is marked D-5 for identification.)

Mr. Lieblich—I ask to have marked for identification letters dated January 16th, 1924, from Joseph T. Lieblich to Henry Frank.

10

(Same is marked D-6 for identification.)

Mr. Lieblich—Also letter dated February 6, 1924, from Joseph T. Lieblich to Charles Selvage Company.

(Same is marked D-7 for identification.)

Q. Now, then; Mr. Frank, upon the receipt of this letter, referring to the proof for identification, you wrote this (indicating)? A. My daughter wrote it for me.

20

Q. She read it to you? A. Yes, sir.

Q. You understood then what it contained, didn't you? A. Yes, sir.

Q. Your adjuster, Charles Selvage, also received a copy of it, did he not? A. Yes, sir.

Q. When you received the letter dated August 23rd, 1923, referring D-3 for identification, did you write that (indicating)? A. Yes, sir.

Q. So, you understood it? A. Yes, sir.

30

Q. Did you talk it over with your adjuster, Charles Selvage, too? A. Sure.

Q. When you received the letter dated January 15th, 1924, referring to D-4 for identification, did you write that (indicating)? A. Yes, sir.

Q. And understand it? A. Yes, sir.

Henry Frank—cross

Q. You talked it over with your adjuster, Mr. Selvage? A. Yes, sir.

Q. When you received the letter dated January 16th, 1924, referring to D-6 for identification? A. Yes, sir.

Q. Read it? A. Yes, sir.

Q. And talked it over with your adjuster? A. Yes, sir.

Q. And at the time of this fire you were not home, were you? A. No.

10

Q. What time did you get home? A. Well, I left home, I guess, around two o'clock and I went to New Brunswick in my car and as soon as I got to New Brunswick they called me up from home at my friends where I went to and told me about the fire and I turned around and went right home in as much as it takes me, an hour, to go back.

Q. So, about what time did you get to Elizabeth? A. I guess around about four o'clock or afterwards.

Q. When you came back were the firemen there? A. The firemen had gone.

20

Q. As a matter of fact the fire was confined to the attic? A. Yes, sir.

Q. There was no fire on the second floor? A. No.

Q. No fire downstairs? A. No.

Q. Just in the attic, the storeroom? A. Yes, sir.

Q. I understood you to say you had winter clothes in a part of the attic? A. Yes, sir; winter clothes.

30

Q. What did you have, do you recall? A. All kinds of winter clothes that women and men wear, heavy coats and bedding.

Henry Frank—cross

Mr. Chanalis—I object. I do not hear how that is relevant and it is not proper cross examination.

The Court—I will admit it.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

- Q. The three boys? A. The two biggest ones.
- 10 Q. You had a dresser up there, too, did you not?
A. Yes, sir.
- Q. Was there a closet in that room, too? A. A closet.
- Q. Downstairs in the bedrooms; who slept down there? A. Me and my wife in one room and the small boy.
- Q. Did you have any clothes closets in that room? A. Yes, sir.
- 20 Q. Did you have some drawers, chiffoniers, ward-
robes? A. One chiffonier. No closets; only chiffoniers.
- Q. No dressing table? A. No.
- Q. Did you have a closet in the other bedroom?
A. Yes, sir.
- Q. How many clothes closets did you have altogether on the second floor? A. Altogether on the second floor I had two chiffoniers and three clothes closets.
- 30 Q. Two chiffoniers and three clothes closets?
A. Just up in the attic in the boys room I had a clothes closet and the chiffonier, a good chiffonier.
- Q. What did you have, a dressing table with drawers in it? A. Yes, sir.
- Q. In this open attic, or whatever it was? In that attic where you say you had some stuff stored,

Henry Frank—cross

you had it hanging up on nails? A. Yes, sir; nails and a clothes line.

Q. How many clothes lines did you have? A. I don't know, I never hung them up myself.

Q. How often did you go up there? You didn't go up at all? A. I went up and looked over my stuff. I had some stuff like cans and papers and I got what stuff I needed and the woman took care of their clothing.

Q. You used that for the storage of your cans? 10
A. Yes, sir.

Q. How big were the cans? A. Some were five pounds, ten pounds or fifty pounds.

Q. You had fifty pound lard cans, too? A. Yes, sir.

Q. What kind of paper did you store them in?
A. Wrapping paper.

Q. In big rolls? A. No, ready cut that we wrapped frankfurters in.

Q. Oiled paper? A. No, ready cut paper. 20

Q. How big do they come? A. Twelve by twenty inches.

Q. Did you have much of that stored up there?
A. Paper boxes.

Q. You had paper boxes, too? A. Yes, sir.

Q. How big were they? A. Just pasteboard boxes.

Q. Did you have many of them up there? A. I had 100, 200, I couldn't tell you.

Q. You wouldn't have over 200 boxes there, would you? A. About that, I couldn't tell you just how many it was. 30

Q. About how many lard cans would you say you had up there? A. Around fifty, maybe, altogether.

Q. How much of the wrapping paper did you

Henry Frank—cross

have? A. I had maybe three hundred pounds.

Q. How big was the attic; I don't mean the room the boys slept in, I mean the other part where you had this stuff, with respect to the width of this courtroom?

Mr. Lieblich—May I inquire, your Honor, how big this courtroom is in width?

The Court—Twenty-eight feet, six inches.

10

Q. With respect to the width of this courtroom, which is twenty-eight feet six inches, how much space did you say you had in that attic excluding the room where the boys slept? A. The whole room, except the little room 10 by 12.

Q. How big was the building? Was it bigger than this space here (indicating width of court room)? A. Oh, yes. The building is—I couldn't tell you just. It is about 60 feet from East Jersey Street and around 48 feet or something on Willow Street, it is right on the corner.

Q. With respect to the courtroom the length, was it larger than this courtroom? A. I have to have a ruler to measure it.

Q. Can't you give us some idea? A. I told you the whole building. I couldn't tell you just how large it is.

Q. With respect to this courtroom would you say this attic was larger or smaller? A. I don't think it is larger.

30

Q. How big would you say it is? A. It is about that size, anyhow.

Q. How wide was it in respect to the width of the courtroom? A. I thought it is wider than this.

Q. Wider than this courtroom? A. Wider.

Henry Frank—redirect—recross

Q. In what part did you have this lard and these papers and other things stored? A. On the street side.

Q. Towards the front? A. Yes, sir.

Q. Where did you have these winter clothes?
A. They were hanging on three lines and things.

Q. You don't know just what was up there, do you? A. No.

Redirect Examination by Mr. Chanalís:

10

Q. Did your daughter also live with you? A. Yes, sir; two of them.

Q. Their clothes were in the house, too? A. Yes, sir.

Recross Examination by Mr. Lieblich:

Q. You say you had two daughters living there?
A. Yes, sir.

Q. What room did they occupy? A. They used
to sleep in the front room. 20

Q. Did you have some wardrobe in there or chiffonier for the girls to put their dresses in? A. No.

Q. Nothing at all? A. Nothing at all.

Q. Where did they go to wash and comb their hair? A. I have a bathroom.

Q. You did not have any closet? A. No.

Q. Where were the clothes belonging to the girls? A. Wherever they found room.

Q. That was not up in the attic, was it? A. 30
Well, some of the clothes that maybe they didn't wear was up in the attic.

Q. You mean some discard? A. Some they did not wear in the summer.

Henry Frank—redirect
Irving L. Selvage—direct

Redirect Examination by Mr. Chanalis:

Q. Clothes they wore in the winter time? A. Yes, sir.

Q. They were not only discards; old clothes they did not wear? A. Oh, no, it was good clothes.

Q. You did not have any old clothes at all, did you? A. I suppose like every family they had old clothes and good clothes.

10 Q. Where were the old clothes? A. I suppose they were between the two.

Q. Between what two? A. Between all the rest of them.

Q. Where? A. Up in the attic.

IRVING L. SELVAGE, sworn in behalf of the plaintiff.

20 Direct Examination by Mr. Chanalis:

Q. You are connected with Charles Selvage Company, a corporation of New Jersey, having its office in Newark? A. I am.

Q. In what capacity? A. I am secretary and treasurer of the corporation.

Q. What is the nature of the business of that company? A. Our business is to adjust losses for the assured.

30 Q. How long have you been engaged in that business? A. Ever since 1904.

Q. That is over a period of over twenty-five years? A. Yes, sir.

Q. In connection with that work what are you obliged to do? A. It is customary that we go over with the assured and help him make up his claim

Irving L. Selvage—direct

with the Insurance Company of the itemized loss, whatever it may be in a detailed manner and putting down the value with them and the loss on different items, both on contents and buildings.

Q. What experience have you had in appraising personal property at various times? A. That is all I have done and nothing else since I started in business.

Q. In connection with fire losses? A. The vast majority have been connected with fire; occasionally we are asked to make estimates on the assets of the household furniture with different assured. 10

Q. On July 2nd you were employed, were you, by Henry Frank to represent him in the adjustment of the fire loss which occurred on his premises in Elizabeth? A. It was around that time, on a Monday or Tuesday, as I recall it.

Q. Where did you meet Mr. Frank? A. Down at his place of business in Elizabeth.

Q. What did he do? A. He retained us to help him get his claim in shape and send it to the Insurance Company. I went through the furniture. 20

Q. What did he do? A. He retained us to look after his interest against the insurance company. The time in which the household furniture —

Mr. Lieblich—I object to that and move that it be stricken out as not binding on the defendant.

30

Q. Limit yourself to the fire loss covering personal property? A. I went through, partly with Mr. Frank, partly with his wife and partly with his daughter and made an inventory of the property that was damaged by the fire.

Irving L. Selvage—cross

Q. Did that occur the day you were there? A. No, a little bit that day; most of it on the day following.

Q. You say you made an inventory of all the property that was damaged by the fire? A. Yes, sir.

Q. Have you that inventory? A. I have that inventory, the original; yes, sir.

Q. The original?— A. Yes, sir.

10 Q. I show you these sheets of paper marked 1, 2, 3, 4, 5, 6, and two additional sheets of paper marked A and B with writing in pencil thereon and ask you if you can identify them? A. Yes, sir; I can. Those are my original notes made at the time.

Q. That is the inventory you made at the time? A. The first six sheets represent the inventory of the household furniture but the last two are the stock and furniture and fixtures.

20 Cross Examination by Mr. Lieblich:

Q. That paper there, was made by you. By you and with the assistance of Mr. Frank, Mrs. Frank and their daughter, and these figures here, they were figures given you by someone else? A. By the assured. By Mr. Frank, Mrs. Frank and the daughter.

30 Q. Then, they are not your figures, you only made the inventory from what you actually saw there, these items? A. We conferred on the different items.

Q. Did you see these items? A. I saw every item before I will take a solemn oath I saw every item there.

Q. It is not necessary to become dramatic.

Irving L. Selvage—cross

By Mr. Chanalis:

Q. When was it you made this? A. That was made on Tuesday or Wednesday. I think we were engaged either on Monday or Tuesday and some of it was done on the afternoon of one day and I came back on the following day and completed it.

By Mr. Lieblich:

Q. How were you engaged, on a contingent arrangement? A. Yes, sir.

Q. What was that contingent arrangement? A. On the basis of ten per cent of the amount collected.

Q. If Mr. Frank recovered two hundred dollars you got twenty dollars, and if he recovered five hundred dollars you got fifty dollars? A. That has been our arrangement for years, we get ten percent of the loss collected.

10

20

Recess from one to two P. M.

Q. This paper, Mr. Selvage, (referring to schedule) you proceeded to make this up I understand, about three days after the fire? A. Between two and three days; yes, sir.

Q. That was your first visit? A. That was my first visit; yes sir.

Q. How much of the inventory did you make on your first visit? A. Possibly a quarter.

30

Q. Do you mean a quarter. Where did you start and where did you finish on the first day? A. As I recall I started downstairs and worked up to the attic.

Irving L. Selvage—cross

Q. On the first or second floor? A. The first floor.

Q. You do not mean where the store was? A. The store occupied the major part of the first floor, but they had apparently extended the first floor and there was some household furniture in the hallway on the first floor.

Q. Do you recall which it was? A. If I see the schedule I can.

10 Q. Yes. A. According to this there were —.

Q. Where was it you started? A. It was the first floor where I started.

Q. And how did you proceed to take the different items. For instance, what is the first item you have there? A. A door shade.

Q. You asked Mr. and Mrs. Frank how much that cost? A. I asked them how much it cost.

Q. And then you asked how much you thought it was damaged? A. We arrived at that on each item.

20 Q. As a result of the conference you had with Mr. and Mrs. Frank you fixed the item of damage? A. That's it.

Q. That applies all the way through the list you have made? A. All the way through the schedule.

Q. There is no question but what you actually saw each item? A. Not any question at all. I spent probably ten hours on making this schedule and probably as applied to the whole schedule, of course, probably of the ten, maybe five of that was devoted to household furniture.

30

Q. As the result of your examination of those premises and the investigation, did you determine to what part of the building the fire was confined to?

A. Oh, yes.

Irving L. Selvage—cross

Q. Where was that? A. The fire was confined to the upper part of the building.

Q. That is the attic room? A. The attic room. That was so badly burned it had to be—the timbers had to be all removed, but there was a heavy water damage —.

Q. I didnt ask you that? A. The fire was confined to the third floor.

Q. There was no fire on the second floor? A. No fire on the second floor; no, just smoke and water. 10

Q. You were not there at the time of the fire, were you? A. There was plenty of evidence. I just looked over the building schedule —.

Mr. Lieblich—I move to strike that out. I don't care anything about the building schedule.

Mr. Chanalis—It seems a proper answer.

The Court—I will not strike it out. 20

(Defendant's counsel prays an exception to this ruling of the court.)

(Exception noted as ground of appeal.)

The Witness—I looked over the building schedule just now and see that in the building schedule they had entire decorations through-out.

Mr. Lieblich—I move to strike that out as not binding upon the defendant and not responsive to the question asked. 30

The Court—I will strike that out.

Mr. Lieblich—I object to the other too, on the ground it is not proof of proper loss or damage. The plaintiff has to determine the figures for the loss and damage and no proper

Irving L. Selvage—cross

foundation has been laid by their testimony.

By The Court:

10 Q. I understand the prices on that schedule were not arrived at by you directly from information obtained from the wife and daughter, but you used what information they gave to you as a basis, did you? A. I used what information they gave me as a basis, plus my own experience, because in a great many cases they give me the cost of their clothing at so much money and I have to take off the depreciation of a great many items, and we never have shown depreciation had been taken off there and instead of putting in an item in there of fifty dollars it was put on as twenty-five dollars.

20 Q. Can you say this: You looked, as you have said, at all the various items in that schedule and you have appraised all those various items and the appraisal is standing opposite each item and that is your honest belief of what the article is worth? A. That is my honest belief of what the article was worth, yes, plus the damage on them, because in some cases they wanted more than enough, they were justified in doing so, and I cut it down to that extent. That is most always the case than what the contract provides.

30 Q. Do those figures represent the values of the articles as you saw them? A. As they appeared to me.

Q. The various figures that appear there, do they represent the difference between the value of the article before and after the fire? A. There are two columns on that list.

Irving L. Selvage—cross.

Q. You checked them? A. These articles here. On the first sheet of this original schedule it represents the articles that were saved and shows two columns representing the value at the time of the fire.

Mr. Lieblich—I object to that on the ground the paper will speak for itself.

The Witness—This first sheet indicates the articles or shows those items saved and shows what the value and what the loss was and further allowing —. 10

Q. You mean by the first sheet, the first column?
A. Yes, this shows what the value is and what the loss is.

Q That second column is the loss? A. Yes. The first column has the value of thirty dollars with loss thereon of twenty dollars. The next sheet also represents the articles saved. The first column indicating the value and the second column indicating the loss thereon. Then, on the third sheet where the articles were in the attic that was all a total loss. For instance, here is an article here for fifty dollars, put down the value of twenty-five dollars and showing a total loss, because up in the attic there was no value left, and the same thing applies to sheet No. 4, and the same thing applies to sheet No. 5 and sheet No. 6. 20

30

The Court—The only objection I can see to these sheets is the objection you may make, but it seems to me it would save time not to make it, and that is he can only use this sheet to refresh his recollection.

Irving L. Selvage—cross

The Witness—This was two years ago and I have made many losses since then.

By The Court:

Q. These are not totalled? A. The copy is totalled. There were several copies made.

10 The Court—Do you agree to make that objection or not.

Mr. Lieblich—I object to offering them in evidence. They are his memoranda. He can use them to refresh his recollection.

The Court—The only objection I can see is the objection to his refreshing his recollection from them, because I do not think they are evidential.

20 Mr. Chanalís—Withdraw the question. I will connect it up and bring it in as evidence and I will show that a copy of this was sent in connection with the proof of loss to the defendant corporation.

I ask to have this list marked for identification.

(Same is marked P-2 for identification.)

Q. Did you have a copy made of your schedule by your office? A. Yes, sir! we did, we had several copies made.

30 Q. Did you send any copies to the defendant company.

Mr. Lieblich—I object on the ground the question is too broad and vague to identify how he sent them and who he sent them to.

Irving L. Selvage—cross

The Court—Have you served them with a notice to produce the copies.

Mr. Chanalis—Yes.

The Court—Have they been produced?

Mr. Chanalis—I will ask for the production as soon as I identify them.

The Witness—In meeting the adjuster representing —.

Mr. Lieblich—I move that be stricken out.

The Court—Have you the copies. 10

Mr. Lieblich—No. They claim they made up some kind of a schedule and sent it to a party by the name of Williams.

The Court—Proceed.

Q. To whom did you give a copy of the schedule marked P-2 for identification? A. I gave a copy of that schedule to Mr. Fred W. Williams representing the Security Insurance Company. 20

Mr. Lieblich—I object to that and move that it be stricken out as not being binding on this defendant until such time —.

The Court—I will leave in, “I gave a copy to Mr. Fred W. Williams.”

Q. When did you give him a copy? A. When I met him on the damaged premises around the middle of July. 30

Q. Do you know what Mr. Williams was doing there? A. He was there representing the Security Insurance Company.

Mr. Lieblich—I move that that be stricken out as not being binding on this defendant.

Irving L. Selvage—cross

The Court—Strike it out.

Q. You gave a copy to Mr. Fred W. Williams?

A. I did.

Q. Did you do anything else in addition to making a schedule? A. I did. When I got home that night, or the first day I was on the premises, I called up Carl Strobel, who is special agent of the Security Insurance Company.

10

Mr. Lieblich—I move that that be stricken out as not binding on this defendant unless he can establish the authority of the office.

The Court—Strike it out. I will leave in, "I phoned Mr. Strobel."

Q. Did you know Mr. Strobel? A. I have known him for the past eighteen or twenty years.

Q. What did you say to him?

20

Mr. Lieblich—I object if it is for the purpose of binding the defendant. I object to it until they prove his authority.

The Court—Sustain the objection.

Q. Did you write to the defendant company concerning this list? A. We wrote a great many letters. In answer to that I will say yes, we wrote the defendant company in connection with this list.

30

Mr. Chanalis—I call for the production of the letter addressed to Fred W. Williams dated July 7th, 1923.

Mr. Lieblich—Here it is.

Joseph T. Lieblich—direct

Q. I ask you if that is your signature? A. That is my signature.

Mr. Chanalis—I offer this letter in evidence.

Mr. Lieblich—I object to it until such time as they can prove the authority of Mr. Williams. I produced that under a subpoena to produce it.

10

JOSEPH T. LIEBLICH, sworn in behalf of the plaintiff.

Direct Examination by Mr. Chanalis:

Q. You are the attorney for the defendant corporation? A. I was retained for the purpose of defending this suit and to investigate the claim of Frank.

Q. Do you know Fred W. Williams? A. I do.

20

Q. Has he any connection with the defendant corporation? A. No.

Q. Did he represent the defendant corporation in connection with this fire in any way? A. I cannot say from direct evidence, but I can from hearsay. I can tell you that he was retained for the purpose of investigating a claim by a special agent of this company, who is charged with authority of adjusting losses and making reports.

Q. Who was the special agent? A. I do not think I can disclose that by reason of the confidential relations existing between attorney and client.

30

Q. Do you know Mr. Strobel? A. I do.

Q. Was he connected with the defendant corporation in any way? A. Mr Strobel is special agent of the Security Insurance Company.

Irving L. Selvage—direct

Q. And by special agent, what do you mean by that? A. I don't know what his authority is, I know he is a special agent with very limited authority. What his authority is I do not know.

IRVING L. SELVAGE, recalled in behalf of the plaintiff.

10 Direct Examination by By. Chanalis:

Mr. Chanalis—I ask that the letter to Fred W. Williams be admitted.

Mr. Lieblich—I object to it on the same ground as I objected before.

The Court—I will not admit this letter.

Mr. Chanalis—I ask to have the letter marked for identification.

(Letter is marked D-5 for identification.)

20 Q. I show you a letter signed by Mr. Lieblich addressed to the Charles Selvage Company. This letter was received by you? A. Yes, sir.

Mr. Chanalis—I offer the letter in evidence.

Mr. Lieblich—I make the same objection to that letter.

The Court—Sustain the objection.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

30

(Exception noted as ground of appeal.)

Mr. Chanalis—I offer in evidence a letter dated January 12, 1924, from Joseph T. Lieblich to Charles Selvage Company.

Mr. Lieblich—No objection.

Letter marked Exhibit P-3.

Irving L. Selvage—direct

Q. Did you prepare a schedule of proof of loss?

A. I did.

Q. Did you prepare a schedule of the loss? A. I did.

Q. What did you do with it? A. I mailed one to the representative —.

Q. To whom did you mail it? A. Fred W. Williams, who met me on the—.

Q. You mailed it to Mr. Fred W. Williams? A. I mailed it to Fred W. Williams; yes, sir.

Q. Was any admission made my him —? A. May I interrupt a minute. I mailed the proof of loss to Williams, I didn't mail the schedule to Williams.

10

By Mr. Lieblich:

Q. You handed him one of the proofs of loss or mailed him one? A. Yes, sir.

By Mr. Chanalís:

Q. Did a letter accompany the proof of loss? A. I sent a letter with it; yes, sir.

Q. I show you a letter dated July 18, addressed to Fred W. Williams and ask you if that is the letter?

A. Yes, sir.

20

Mr. Chanalís—I ask to have this letter marked for identification.

(Same is marked P-4 for identification.)

30

Q. Did you receive a reply from this letter to Mr. Williams dated July 18th, 1923? A. I did.

Q. I show you a letter July 21st, 1923, and ask you if this is the letter you received in reply to your letter of July 18th? A. It is.

Irving L. Selvage—direct

Mr. Chanalis—I ask to have this letter marked for identification.

(Same is marked P-5 for identification.)

Q. Did you reply to the letter marked P-5 for identification? A. Yes, sir.

Mr. Chanalis—I call for the production of a letter dated July 24th, 1923, from the Charles Selvage Company to Fred W. Williams.

10

Mr. Lieblich—This is produced on the same ground as heretofore stated.

Q. Is this the letter you wrote? A. It is.

Mr. Chanalis—I ask to have this letter marked for identification.

(Letter is marked P-6 for identification.)

20

Q. After your reply to Mr. Fred W. Williams, marked for identification P-6, did you receive a letter from Mr. Lieblich, the attorney representing the defendant? A. Some time after that Mr. Lieblich came into the case.

Q. I show you a letter dated August 20th from Mr. Lieblich to Mr. Frank, marked D-2 for identification? A. We received the original of the copy of that.

30

Mr. Chanalis—I offer this letter in evidence.

Mr. Lieblich—No objection.

(D-2 for identification is marked Exhibit P-6.)

(Exhibit P-3 read to Jury.)

(Exhibit P-6 read to Jury.)

Irving L. Selvage—direct

Mr. Chanalis—I offer in evidence D-1 for identification which is the proof of loss.

Mr. Lieblich—No objection.

(D-1 for identification is marked Exhibit P-7.)

Mr. Chanalis—I offer in evidence letter dated July 18th, 1923, addressed to Fred W. Williams, which enclosed the proof of loss.

Mr. Lieblich—I do not object to the proof of loss for the reason that I assume it was to show compliance with the policy provision, but as far as the letter is concerned, it would not bind us and therefor I object to the admission of the letter. 10

The Court—Sustain the objection.

Mr. Chanalis—We claim exception on the ground this letter discloses this agent was appointed for the purpose of making an investigation of the loss.

The Court—Is the introduction of that letter for the purpose of showing you served proof of loss on the company? 20

Mr. Chanalis—Yes.

The Court—Sustain the objection.

Q. Did you reply to that letter? A. Yes, sir.

Q. Is this the letter you wrote in reply? A. Yes, sir.

Mr. Chanalis—I offer letter dated August 20th, 1923, from the Security Insurance Company to Frank. 30

Mr. Lieblich—No objection.

(Same is marked P-8.)

Irving L. Selvage—direct

Mr. Chanalís—I offer in evidence letter dated August 21st, 1923, from the Charles Selvage Company to Joseph T. Lieblich.

Mr. Lieblich—I object to it on the ground it is a self-serving declaration from the Selvage Company to this defendant and also argumentative and states a legal proposition not founded on the law.

The Court—I'll admit it.

10

(Defendant's counsel exception.)

(Letter dated August 21st, 1923, is marked Exhibit P-9.)

(Argument.)

The Court—The letter will be admitted because I think it is completed.

(Exhibit P-9 read to Jury.)

Mr. Lieblich—I make a further objection to that letter because it states certain allegations by the defendant.

20

Mr. Chanalís—I call for letters dated September 5th, October 5th, November 8th, and November 23rd.

Mr. Lieblich—We produce them.

Mr. Chanalís—I offer them in evidence.

Mr. Lieblich—I object to them as irrelevant because they all relate to the examination under oath and we do not raise any question as to that in this suit and they are not set forth in the pleadings are immaterial.

30

Mr. Chanalís—I think they are material on the ground I am going to urge later on about a waiver.

Mr. Lieblich—We make no defense of failure to have examination under oath.

The Court—Is that pleaded.

Irving L. Selvage—direct

Mr. Lieblich—No.

Mr. Chanalis—But I think it is relevant to show they went ahead despite the fact they did not receive the schedules and proof of loss, they nevertheless went ahead with an examination under oath and did other things. That may amount to a waiver by these conditions.

The Court—I will admit those letters.

(Defendant's counsel exception.)

(Letter dated September 5th, 1923, to Joseph T. Lieblich from the Charles Selvage Company is marked P-10.) 10

(Letter dated October 5th, 1923, to Joseph T. Lieblich from the Charles Selvage Company is marked Exhibit P-11.)

(Letter dated November 8th, 1923, to Joseph T. Lieblich from the Charles Selvage Company is marked Exhibit P-12.)

(Letter dated November 23rd, 1923, to Joseph T. Lieblich from the Charles Selvage Company is marked Exhibit P-13.) 20

(Exhibit P-10 read to Jury.)

Q. Did you receive a reply to that last letter. I show you a letter dated November 5th, 1923, addressed to Charles Selvage Company from Joseph T. Lieblich and ask you if you received that letter?

A. Yes, sir.

Mr. Chanalis—I offer the letter in evidence. 30

Mr. Lieblich—I object. This is a different case, it has nothing to do with this case.

Mr. Chanalis—Will you produce the letter dated December 7th, 1923.

Mr. Lieblich—Here it is.

Mr. Samuel Von Poznak—direct

Mr. Chanalis—I offer this letter in evidence.

Mr. Lieblich—No objection.

(Letter is marked Exhibit P-14.)

(Exhibit P-14 read to Jury.)

Mr. Chanalis—I offer in evidence letter dated December 13th, 1923, from Joseph T. Lieblich to Charles Selvage Company.

Mr. Lieblich—No objection.

(Letter is marked Exhibit P-15.)

10 Mr. Lieblich—May I break in here to put Mr. Von Poznak on the stand, and subject to my rights to make a motion for non-suit at the end of the plaintiff's case.

Mr. Chanalis—No objection.

MR. SAMUEL VON POZNAK, sworn in behalf of the defendant.

20 Direct Examination by Mr. Lieblich:

Q. What is your business, trade or occupation?

A. Auctioneer and general merchandise buyer.

Q. How long have you been in that business?

A. Thirty years.

Q. What else, if anything, do you do in the line of your work? A. I do appraising, and selling at auction for the courts.

Q. How long have you been doing appraising?

30 A. Twenty-five or thirty years.

Q. How long have you been doing selling for the courts? A. About fifteen years.

Q. Have you had occasion to appraise household furniture and wearing apparel? A. Yes.

Mr. Samuel Von Poznak—direct

Q. Articles usually found in a home? A. Yes, sir.

Q. Have you had occasion to buy and sell such articles? A. Yes, sir.

Q. How often and for what length of time or period? A. The last twenty-five or thirty years.

By Mr. Chanalis:

Q. How long have you been an auctioneer? A. 10
About thirty years.

Q. You devote most of your time to that business, don't you? A. Yes.

Q. Do you appraise the goods to be sold at these auction sales? A. Whenever they ask me to.

Q. How often does that happen? A. Not when I am selling. I have appraised goods for the past twenty years, people call me in to appraise stuff as to its value.

Q. Most of your time is spent selling goods at auctions? A. 20
Appraising is my general line of business.

Q. Isn't your general line of business auctioneer?
A. And appraising, both.

Q. When you are called upon to appraise, don't you appraise things in receivers' hands as a rule?
A. No.

Q. What other kind of goods do you appraise?
A. I appraise for people who are buying and I make reports to the government for tax purposes. 30

Q. How often have you done that? A. For the past ten or twelve years.

Mr. Samuel Von Poznak—direct

By Mr. Lieblich:

Q. Mr. Von Poznak, did you receive instructions from me to go look at some property damaged by fire in Elizabeth, New Jersey? A. Yes, sir.

Q. Do you recall when it was you went there and the length of time it took you? A. I don't recall the length of time.

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

Q. What is there about that that cause you to identify it? A. It is my appraisal.

Q. You did make an appraisal? A. Yes, sir.

Q. Look at that, for the purpose of refreshing your recollection and tell us, if you did make an appraisal and if so when and whose property and how much? A. The sound value was \$3,618.20. The actual loss and damage to the goods —.

20 By Mr. Chanalis:

Q. What is that? A. The actual value of the goods.

Mr. Chanalis—I object to that. There was nothing to connect it up.

The Court—Sustain the objection.

30 By Mr. Lieblich:

Q. Tell us what you did when you went over there? A. I went over there and looked over the goods.

Q. Where?

Mr. Samuel Von Poznak—direct

By Mr. Chanalis:

Q. When?

The Court—Identify the goods and show they were the same goods in this fire loss and if they belonged to the plaintiff in this case when this all happened they were in about the same condition they were after the fire, before he is qualified.

10

By The Court:

Q. When did you make this examination? A. The 27th day of September, 1923.

By Mr. Lieblich.

Q. Where did you make it? A. Elizabeth, New Jersey, 714 East Jersey Street.

Q. Do you know whose property that was? A. I understood it was the property of the owner of the building there who owned the butcher shop downstairs. 20

Mr. Chanalis—I object to “I understood.”

Q. Who told you he owned the butcher shop. Did you see the butcher shop downstairs? A. Yes, sir. The man in charge of the place.

Q. Do you recognize this gentleman? (Indicating Mr. Frank). A. Yes, sir. 30

Q. Who is he? A. The gentleman who took us through the house and claimed to be the owner of the goods.

Q. Do you remember his name? A. I don't remember his name.

Mr. Samuel Von Poznak—direct

Q. Mr. Frank? A. Yes.

Q. This gentleman took you around and showed you the goods? A. Yes, sir.

Q. Was anyone else with you that time? A. His wife was there with him.

Q. With him? A. Another party, another appraiser.

Q. Who was that? A. I can't recall his name now, its so long ago, I can't think of his name now.

10 Q. Do you recognize that gentleman? (Indicating Mr. Leo. Goldberger.) A. That is the gentleman, sure.

Q. Do you remember his name? A. I don't recall his name.

Q. Is that the gentleman who went with you? A. Yes, sir.

Q. (Indicating) Mr. Goldberger? A. Yes, sir.

Q. When was this? A. In 1923.

20 Q. Have you seen that gentleman since that time? A. I dont think I did.

Q. Now, Mr. Frank pointed out certain property to you? A. Yes, sir.

Q. Did you make a record of anything he showed you? A. Yes, sir; all through the house.

Q. Did you go over everything? A. Every item.

Q. Did you, after going through everything come to a conclusion or determination as to the value of that property before the fire? A. Yes, sir.

30 Q. What was that determination of the fire? A. Before the fire?

Q. Yes. A. About \$3,618.20.

Q. Did you go over those same items on which you found a value of \$3,618.20 to ascertain and de-

Mr. Samuel Von Poznak—direct

termine the amount of loss and damage suffered by Mr. Frank to that property? A. Yes, sir.

Q. How much was that? A. \$289.50.

Q. The paper which you hold in your hand, what does that represent? A. The list made by myself in my office.

Mr. Lieblich—I offer the list in evidence, made by Mr. Von Poznak.

Mr. Chanalis—I object to that on the ground the examination was too remote and there was no evidence to show that those were the things that were burned. 10

The Court—I will let both lists go in, if counsel agree to it.

Q. I show you this paper and ask you what that is? A. That is an affidavit I have sworn to as to the value of the goods and the value of the damaged goods I saw at the house. 20

Q. This is your signature on here? A. Yes, sir.

Q. And who else's signature? A. Mr. Goldberger.

Q. Did you see him sign it? A. Yes, sir.

Mr. Lieblich—I offer this paper in evidence.

Mr. Chanalis—I object.

The Court—Sustain the objection.

(Defendant's counsel claims exception to this ruling of the Court.) 30

(Exception noted as ground of appeal.)

Mr. Lieblich—I offer it as the award of these appraisers, showing the sound value of the damage as estimated by Mr. Von Poznak.

Mr. Samuel Von Poznak—direct

By The Court:

Q. Of what use was this made? Was it made of any use or did you just keep it?

By Mr. Lieblich:

Q. What did you do with this after you made it?

A. Turned it over to Mr. Lieblich.

10

The Court—What is the purpose of this?

Mr. Lieblich—For the purpose of examining the loss and damage.

(Argument.)

Mr. Lieblich—We are now interposing our defense to this action and I assume from the direct case they are proving a loss and damage amounting to two thousand dollars as their claim. Now, we are showing by this expert that the loss and damage in his opinion is \$289.50; that is the purpose of this.

20

The Court—That does not make the paper evidential. Sustain the objection.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Mr. Chanalis—I move to strike out the testimony of this witness on the ground his examination was too remote; it was on September 29th, and the fire occurred on July 1st.

30

The Court—I cannot strike that out.

Mr. Chanalis—May I have an exception.

The Court—The jury will have to take their own account of the hyatus of time between

Mr. Samuel Von Poznak—cross

the time of the fire and the time he made the examination.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Cross Examination by Mr. Chanalís:

Q. You stated you went into the premises and examined every article? A. Yes, sir, the day I was down there. 10

Q. Who was with you? A. Mr. Goldberger.

Q. Mr. Frank was there, the owner of the building? A. Yes, sir.

Q. Mrs. Frank too? A. Yes, sir.

Q. Where did you find these things? A. All through the house, from the living quarters downstairs up to the garret; the fire was in the garret, most of it.

Q. Are you sure you went into the garret and took every article and examined it? A. Everything around; yes, sir. 20

Q. As you examined it did you put down a statement of the valuation there? A. Yes, sir.

Q. You did that in your own handwriting, did you? A. Yes, sir.

Q. Have you that paper with you? A. I made a copy and had a typewritten copy made and turned that over to Mr. Lieblich.

Q. Do you remember meeting Mr. Selvage, Mr. Charles Selvage some time after this appraisal. You know Mr. Charles Selvage, dont you? A. I know him well. 30

Q. Did you make the statement to Mr. Charles Selvage that you did not go up to the garret and you did not look at the articles? A. No, sir.

Mr. Samuel Von Poznak—cross

Q. And you thought this case should be settled?

Mr. Lieblich—I object to his conclusion.
The Court—I will admit it.

Q. No, sir; I did not make that statement; it was not up to me.

Q. Did Mr. Frank go up to the garret with you?
A. Yes, sir; he went upstairs.

10 Q. Also Mrs. Frank? A. Yes, the girls was there too.

Q. They went up to the garret? A. Yes, sir.

Q. Isn't it a fact when you got to the stairs on the garret the smell was so intense you said you did not want to go up there? A. No, sir.

Q. Are you sure about that? A. Absolutely.

Q. Did you find any goods damaged on the second floor? A. Yes, sir.

Q. Were they damaged by fire? A. No, sir.

20 Q. Damaged by —? A. Water.

Q. Water? A. Yes, sir.

Q. Do you remember what proportion of the goods that were damaged were on the second floor?

A. That I can't recollect now. Some chairs, parlor furniture, piano and different items of household goods he had through the house.

Q. What was the proportion of the damage there on the second floor as compared to the damage in the garret? A. The garret had most of the fire.

30 Q. That is, most of the goods damaged were in the garret? A. Yes, a lot of old rubbish.

Q. Did you find the goods upstairs totally or only partially damaged? A. Some were totally and some were partially.

Q. How are you able to place a value on what the

Irving L. Selvage—direct

goods were worth where there was a total loss? A. Some of the remains of some goods were still there.

Q. I mean the goods you say were a total loss?

A. Most was a total loss.

Q. You could not tell whether an article was new before it was damaged? A. There was nothing new in the garret. They were put up there for discard purposes.

Q. How could you tell that if the article was damaged by fire. You couldn't tell whether it was new or second hand? A. Yes, sir. 10

Q. Would you say they were goods that were wearable? A. I would say a lot of stuff put up there was just discarded stuff.

Q. What portion of the goods up there was discarded? A. Well, old clothing, feather beds.

Q. More than one-half? A. One hundred per cent.

Q. It was entirely goods discarded? A. Yes, sir. About fourteen pair of shoes were up there ladies and men's shoes. 20

IRVING L. SELVAGE, recalled in behalf of the plaintiff.

Direct Examination by Mr. Chanalis:

Mr. Chanalis—I ask for the production of a letter dated December 7th, 1923. 30

Mr. Lieblich—Here it is. It has been marked D-4, for identification.

Mr. Chanalis—I offer in evidence D-4 for identification.

(Same is marked Exhibit P-16.)

(Exhibit P-16 read to Jury.)

Irving L. Selvage—direct

Q. Did you reply to that letter? A. We did.

Mr. Chanalis—I ask for the production of a letter dated February 4th, 1924, from the Charles Selvage Company to Joseph T. Lieblich.

Mr. Lieblich—We produce it.

Mr. Chanalis—I offer the letter in evidence.

10 Mr. Lieblich—I object to it on the ground it is a self-serving declaration —.

The Court—I'll admit it.

(Defendant's counsel prays exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(Letter dated February 4th, 1924, is marked Exhibit P-17.)

(Exhibit P-17 read to the Jury.)

20 Mr. Chanalis—I offer in evidence letter dated February 6, 1924, from Joseph T. Lieblich to Charles Selvage Company.

Mr. Lieblich—No objection.

(Letter is marked Exhibit P-18.)

(Exhibit P-18 is read to Jury.)

Mr. Chanalis—I offer in evidence a letter from Charles Selvage Company to Joseph T. Lieblich dated February 14th, 1924, which was sent by registered mail.

30 Mr. Lieblich—I object to the offer of the letter on the ground, first of all, that it is a self-serving declaration. Second, it is framed for the purpose of alleging or defending a compliance with policy conditions. Thirdly, it purports to be made on behalf of Charles Selvage Company, adjusters, and not by Henry Frank himself and the letter is not binding

Carl A. Strobel—direct

on Henry Frank as far as policy conditions are concerned.

The Court—I have admitted a good many letters, because the contract, after the fire took place, came into operation actively, I mean by that that at that time there were duties under the contract fixed upon each party and these letters were admitted to show the conduct of the parties carrying out the contract of insurance. It seems to me this goes a little beyond that and does not help you unless you want to fill the record up. This has to do with the examination under oath. 10

(Adjourned to Monday, June 8th, 1925, at 10 o'clock A. M.

NEW JERSEY SUPREME COURT,
ESSEX CIRCUIT.

Monday, June 8, 1925. 20

(Second day. Continued pursuant to adjournment.)

(Counsel present as before stated.)

CARL A. STROBEL, sworn in behalf of the plaintiff.

Direct Examination by Mr. Chanalis: 30

Q. You are employed by the Security Insurance Company? A. I am.

Q. How long have you been in its employment?

A. Eighteen years.

Q. What are your duties?

Carl A. Strobel—direct

Mr. Lieblich—I object, if the witness is offered for the purpose of proving authority or for the purpose of binding the defendant. The declarations of the agent are not competent to establish authority.

(Argument.)

The Court—I will admit it.

(Defendant's counsel prays exception to this ruling of the Court.)

10

(Exception noted as ground of appeal.)

A. The appointment of agents, establishment of risks, payment of losses, collection of balances.

Q. Covering what territory? A. New Jersey and part of New York State.

Q. Do you know Fred W. Williams? A. I do.

Q. Who is he? A. He is an adjuster of losses.

Q. An adjuster of losses? A. Yes, sir.

20 Q. An independant adjuster of losses, or is he employed by the defendant company? A. Why he works for several companies.

Q. As an adjuster? A. Yes, sir.

Q. Did you receive any notice of the Frank fire loss in Elizabeth? A. Mr. Selvage informed me.

Q. Do you recall when? A. On July 5th, 1923.

Q. You state that Mr. Selvage notified you of the fire loss on July 5th? A. Yes, sir.

30 Q. Do you know if Mr. Fred W. Williams was retained by your company in connection with this fire loss? A. Why, I could not get to the loss on account of other work and I requested Mr. Williams to go and look at it and investigate it and endeavor to secure the measure of damage and then report to me.

Carl A. Strobel—direct

By The Court:

Q. He was to report the estimated loss to you?

A. Yes, sir.

By Mr. Chanalis:

Q. Mr. Williams was an adjuster, wasn't he? A. He is.

Q. He is an adjuster? A. Yes, sir.

10

Q. Didn't you retain Mr. Williams to adjust the loss?

Mr. Lieblich—I object until such time as they can show any authority vested in Mr. Strobel for that purpose. Admissions by Mr. Strobel are not binding on this defendant. The payment of losses is within the discretion of the company and that power cannot be delegated.

20

Q. (Question read.)

The Court—Adjust this loss?

Mr. Chanalis—Yes.

The Court—I will admit it.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

30

Q. (Question read.) A. Why, as to any other loss as an investigator to report it.

Q. What do you mean "report it?" A. They investigate the origin of the fire, the policy provisions; whether all have been complied with in securing the

Carl A. Strobel—cross—redirect

measure of these damages and then they send the papers to me and I in turn either approve or disapprove them and they are forwarded to the company. If everything is all right the loss is paid.

Q. Was he to make a recommendation as to the amount of the loss? A. Yes, sir.

Cross Examination by Mr. Lieblich:

10 Q. You say you received a notice from the Charles Selvage Company? A. Yes, sir.

Q. How was it you received it, and in what manner, method or form did you receive it? A. By telephone.

Q. What was the conversation, if any, between you and Mr. Selvage? A. He called me up one morning and told me he had a loss of Frank and I told him I knew nothing about it, I had not received any notice.

20 Q. You say you retained Mr. Williams. Just state again for what purpose. A. For the examination of the fire, the origin, how it happened, the conditions, whether the insured was covered.

Q. You mean make an investigation of all the facts? A. Oh, yes.

Q. What else? A. And securing the measure of damages and then reporting, sending his papers to me.

30 Re-Direct Examination by Mr. Chanalis:

Q. Did you state whether Mr. Williams was authorized to find out whether conditions has been complied with? A. Yes, sir; that is part of his work.

Carl A. Strobel—redirect

Mr. Chanalis—I offer in evidence list and schedule prepared by Mr. Selvage and handed to Mr. Williams.

Mr. Lieblich—I object. There was no proof of any authority vested in Mr. Williams at this time to bind this defendant. Mr. Strobel says he retained him for the purpose of investigating all the facts and circumstances surrounding the case, and the origin of the loss, whether the policies conditions were complied with, and to secure the measure of damages and then to make his report. If it is so that he could adjust losses on Mr. Strobel's say-so, that is an act that cannot be delegated.

10

(Argument.)

Mr. Leiblich—Here is a letter addressed to Williams. This letter was not even marked before. There was no proof of it, it has not been marked for identification.

20

Mr. Chanalis—No.

Mr. Lieblich—I make an objection to Exhibit P-5 for identification and this part of the sheet which purports to be a schedule, which I understand the original of that was delivered to Mr. Williams. The other two letters are called to my attention, the original of which is marked for identification. I make the same objection.

The Court—What is the purpose of this schedule.

30

Mr. Chanalis—That is part of the proof of loss. Mr. Williams came down and apparently helped out for the purpose of adjusting this loss.

Irving L. Selvage—direct

(Argument.)

The Court—If the proof of loss has been admitted, why do you want this schedule?

Mr. Chanalis—Because it's supposed to be part of the proof of loss. In other words, the proof of loss, as it is, is defective without the schedule.

10 Mr. Lieblich—Exhibit P-6, August 20th, is set forth as one of the objections to the proof of loss, as failing to attach a schedule.

The Court—This is an attempt to prove that the agent received a schedule which was supposed to be attached to it given to him before proof of loss was mailed.

20 Mr. Lieblich—This is an attempt to show they delivered the proof of loss piecemeal, sending it to a special agent with such limited powers, as Williams, which would not be binding on the company and it was not done in accordance with policy conditions.

The Court—I will admit it.

(Exception.)

Mr. Lieblich—That is a copy which is to be admitted and there is no proof offered that it is a copy.

The Court—You had better prove it.

30 IRVING L. SELVAGE, recalled in behalf of the plaintiff.

Direct Examination by Mr. Chanalis:

Q. I show you three papers attached together and with the title of "Elizabeth, Frank Loss," and

Irving L. Selvage—direct

ask you whether you can identify it A. I can identify that.

Q. State what it is? A. That is a schedule of the Frank loss, Elizabeth, New Jersey, copy of which was given to Mr. Williams when I met him on the premises.

Q. Was that schedule prepared by you? A. That schedule was prepared by me; yes, sir.

Mr. Chanalis—I offer this schedule in evidence. 10

Mr. Lieblich—May I examine him on that?

Mr. Chanalis—No objection.

By Mr. Lieblich:

Q. This paper to which counsel has called your attention is a typewritten paper consisting of three sheets, is it not? A. It is.

Q. Did you type this yourself? A. No, I did not, the stenographer in our office typed that. 20

Q. This appears to be an original copy, is it not; not a carbon copy, is it; yes or no? A. No, I should not say that is the original copy.

Q. You would not say that is the original, no, sir.

Q. You say this is a carbon copy? A. I say that is a copy of the original.

Q. I did not ask you that. I asked you if this paper I hold in my hand, marked P-19 for identification—please examine it and tell me whether or not it is a carbon copy or an original typewritten sheet? 30

A. That I cannot tell you.

Q. You can't tell me that? A. I cannot.

Q. Kindly make an examination and see whether

Irving L. Selvage—direct

or not you can after your examination? A. In answer to your question I might say we often have—.

Q. No, I want you to tell me that. Tell me whether or not that is a carbon copy or an original typewritten sheet? A. I could not tell you.

Q. Look at this paper, referring to the carbon copy of a letter dated July 18th, 1923, addressed to Fred W. Williams and compare the two and say whether or not that is a carbon copy or an original?

10 A. We haven't time —.

Q. Answer the question. A. This is a carbon copy.

Mr. Chanalis—To save the time of the jury adding up the figures, I find on the back of this sheet it has been computed and this is the original in his own handwriting, a copy of which has been handed to Mr. Selvage and I will withdraw the offer of the other paper if

20 counsel will consent to this.

Mr. Lieblich—If I wanted to consent I would not have examined.

The Court—Do not withdraw it too far. You have the right to re-examine him and you may ascertain then that the copy given to Mr. Williams was a typewritten copy were-as the one you have there is in your handwriting.

30 By The Court:

Q. How many copies were made? A. I can't recall. Sometimes we make four or five copies, one for our office, one for the adjuster and one for the assured.

Irving L. Selvage—direct

Q. Whether this is the original or carbon, are you sure a copy of that paper was given to Mr. Williams? A. I am positive of that and I can't tell whether this was an original or one of the carbon copies that was made.

Q. That doesn't make any difference. It is an exact duplicate of that? A. Yes, sir; I compared it with the stenographer.

By Mr. Lieblich:

10

Q. The letter dated July 18th, 1923, addressed to Mr. Williams, D-7 for identification, compare D-7 for identification with Exhibit P-19 for identification and tell me whether one is a carbon copy or original and which is it. A. I couldn't tell you because of the fact we have —.

Q. Now, look at those and tell me. Can you or can you not tell by examination of those two papers, which is original and which is the carbon? A. No, sir; I cannot. These —.

20

Q. That's all I want. Referring to P-19 I understood you to say you did not typewrite it? A. No, sir; I did not, but I compared it after it was typewritten.

Mr. Lieblich—I move to strike that out as not responsible.

The Court—I will not strike it out.

Mr. Lieblich—I object to the offer on the grounds heretofore stated.

30

The Court—I will admit them.

(Defendant's Counsel prays exception to this ruling of the Court.)

Irving L. Selvage—direct

(Exception noted as ground of appeal.)
 (P-19 for identification is marked Exhibit P-19.)
 (P-4 for identification is marked Exhibit P-4.)
 (P-6 for identification is marked Exhibit P-6.)
 (P-5 for identification is marked Exhibit P-5.)

10

Q. Did you write this letter? A. I wrote that letter in my own handwriting and I have often seen Mr. Williams' handwriting and I can swear that is his handwriting too.

By The Court:

Q. How did you get that letter? A. It came through the mail and I kept it.

20

Mr. Lieblich—I object to it as there is no proof of any authority of Mr. Williams to bind this defendant.

The Court—I will admit it.

(Defendant's counsel prays exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(Letter July 12, 1923, from Charles Selvage Company to Fred W. Williams is marked Exhibit P-20.)

30

By Mr. Chanalis:

Q. Now, Mr. Selvage, you examined the building, did you? A. I did.

Q. State what you found when you examined the building? A. The upper part of the building, the

Irving L. Selvage—direct

rafters of the roof were all burned; the studs were all burned, the flooring was burned, but not burned through. The second floor was thoroughly soaked with water so badly that all the ceilings had to be taken down and the rooms re-decorated. The first floor was damaged to the extent it had to be painted and smoke came down to the second —.

Mr. Lieblich—I object.

The Court—Do not tell us a conclusion. 10
You can tell us of any marks or signs you saw there.

The Witness—The building was pretty badly damaged.

Q. On Thursday you testified you examined every article. Can you state what proportion of the goods that were in the attic as compared to the goods that were in the second floor.

20

Mr. Lieblich—I object to that on the ground first that this witness has not been qualified to testify as to the loss and damage and furthermore I do not know as it comes to a question of proportion of amount or value.

The Court—I will admit the question as to quantity and as to value.

Mr. Lieblich—I object on the ground stated.

The Court—I will admit it.

(Defendant's counsel prays an exception to 30
this ruling of the Court.)

(Exception noted as ground of appeal.)

Irving L. Selvage—cross

10 A. There were only, as I recall it, possibly two or three closets, but there was very little closet room on the second floor of this building and it was necessary on account of there being so many members in the family to take in a portion of the upper floor to use for the same purpose that a great many housekeepers would use the second floor for, it was necessary to store their clothing upstairs. The clothing was, as I recall it, practically a total loss. There was considerable bedding up there and there was a room the two boys occupied that was a total loss. Then, the second floor was thoroughly wiped out with water and also smoke damaged to a slight extent and even below, the first floor, there was a damage on the first floor, as I recall, of three or four hundred dollars of stock and furniture and fixtures on the bottom floor.

Q. What proportion of it? A. I should say —.

20 Mr. Lieblich—I object. The best proof is the schedule which is in evidence.

The Court—I will admit it.

(Defendant's counsel prays exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

A. I should say about three-quarters of the claim was in the attic on account of the fact that such a large proportion consisted of clothing and bedding.

30

Cross Examination by Mr. Lieblich:

Q. Do you recall the telephone conversation with Mr. Strobel when he claims you called him up and told him about the loss? A. I do. As I recall I had three conversations with him.

Irving L. Selvage—redirect—recross

Q. Do you recall him telling you at the time you notified him that he had not received word yet from the company? A. I think the first time I talked with him he said he had not been advised yet.

Q. With respect to the schedule, referring to Exhibit P-19, these figures set out here, these are the figures which Mr. and Mrs. Frank and the girls gave you as to the value, were they not? A. In some cases they were the value, but that whole schedule is really the consumation.

10

Q. Answer the question? A. No.

Q. They are not? A. They are not.

Q. Are these figures represented on P-19, your figures? A. No, they are not.

Re-Direct Examination by Mr. Chanalís:

Q. When you state they are not your figures, what do you mean by that? A. Those figures were arrived at in consultation with the assured and were harmonized between ourselves to the claim. In some cases the assured wanted to put down figures quite a bit in excess of that on the schedule, by looking at every one could see there have been a number of cases where the sound value is put at a great deal less than what the cost is.

20

Q. Who finally determined the figures? A. I suppose in the last analysis I did.

Re-Cross Examination by Mr. Lieblich:

30

Q. So, you suppose in the last analysis you did determine those figures? A. Yes, sir.

Q. You are not sure, are you? A. In the last analysis I did, in a very great many cases.

Q. I am referring to this particular case, this

Irving L. Selvage—recross

particular list on Exhibit P-19, are those figures in the last analysis your figures, your judgment, your opinion or conclusion of the value in loss and damage, yes or no? A. In the vast majority of cases, yes.

Q. No, no, no. A. Not in every single case, no.

Mr. Lieblich—I move that the answer be stricken out and that the witness be requested and instructed to answer the question.

10 The Court—I will not strike it out. The witness is on the witness stand to tell the truth and he has a right to qualify his answer; I do not require witnesses to answer yes or no. Proceed.

Q. Referring to Exhibit P-19, are these figures designated "value and loss" in the last analysis your conclusion, opinion or judgment of the value of loss and damage in this particular case? A. In the vast majority of cases they are mine, in some cases I suppose they would be the assured's.

20

Mr. Lieblich—I submit I have a right to have an answer.

The Court—You have it. Proceed.

(Defendant's counsel prays an exception to this ruling of the Court.)

Q. Tell me if this particular case, referring to Exhibit P-19, in this case those figures designated thereon, are they your figures of your conclusion as to the value and losses? A. In the vast majority of cases they are mine; in some cases they are the assured's.

30

Irving L. Selvage—recross

Mr. Lieblich—I make the same motion.

The Witness—I can explain to you.

Q. Do you want to explain with reference to the Frank loss or some other case? A. If you want me to I will explain how this was arrived at.

Q. I want to know in this particular case, those figures designated thereon on the sheet marked P-19, I want to know whether these are your final conclusions or determinations as to the value and loss and damage thereon designated? A. The vast majority of cases are mine. 10

Q. Do you mean as to the numerous items? A. Yes, sir.

Q. Now, I understand you to say as to the greater number of items designated on P-19, the items marked "value and loss" are your conclusion on examination? A. Plus the assured's.

Q. Which is which? A. A combination of all three or four. I sat seven or eight hours making up that inventory. 20

Q. I think you are right about that.

Mr. Chanalis—I object to that remark.

Q. I think you are right. This is the collaboration between yourselves? A. Yes, and in the last analysis I put down the figures, not the assured. It met my approval when they went down there.

Q. They are your figures irrespective of any collaboration? 30

Mr. Chanalis—I object.

The Court—I'll admit it.

Irving L. Selvage—recross

A. I am trying to explain it to you.

Q. I understood you to say on Thursday that you made up the list, referring to Exhibit P-19, after you went through the premises with the two daughters and Mr. and Mrs. Frank and made up the values? A. I had some portion with those three or four people.

Q. When was it you made your final analysis or conclusion as to the loss and damage and value? A. Part on the day on which I came there and the rest
10 the following day.

Q. Have you any record showing your final conclusion, that is your own, irrespective of any collaboration? A. Have I, yes. That is my final record of the original. I can show it to you, in front of Counsellor Chanalis.

Q. Do you refer to Exhibit P-2 for identification? A. I do.

Q. Those figures delineated thereon are your final
20 conclusion, irrespective of any collaboration as to value or loss? A. They are, because —.

Q. Are they? A. Yes.

Q. I do not want any conclusion? A. Yes, sir.

Q. Did you examine each item yourself? A. I
did.

Q. You gave us the final conclusion as to the value of each item? A. I did.

Q. Is that right? A. Yes, sir.

Q. Did you examine the linoleum in the lower
30 hall? A. I did.

Q. What kind of linoleum was it? A. I don't recall.

Q. What is your best recollection? A. I have seen so many pieces and grades of linoleum since that time that I can't remember.

Irving L. Selvage—recross

Q. Is there anything about the Frank loss as to any individual item of property or chattel you do remember? A. In a general way I remember every thing, but in a specific way I do not recall anything.

Q. I understood you to say that three-quarters of the quantity were in the attic? A. Yes, sir; three-quarters of the claim.

Q. What did that consist of? A. Three-quarters of the quantity. It consisted largely of clothing and of bedding and then there was some furniture there. 10

Q. Did you examine each item of clothing? A. I did.

Q. Pick it up yourself? A. As far as possible. Some clothing was burned so it would not be any good. No, I didn't pick it up myself, the assured picked it up.

Q. The assured picked up each item and you looked at it? A. Yes, sir.

Q. You did not pick it up or examine it personally? A. Yes, I examined it personally. 20

Q. What do you mean you examined it personally, what did you do? A. By looking at it, getting within probably a foot of it and examining as well as I could.

Q. Is that all you did? Tell us everything. A. I tried to put my judgment upon it.

Q. What did you say your examinations consisted of? A. About six or eight hours down there. I can't recall exactly. I think about ten hours on the whole loss, as I recall it and I devoted six hours to the household furniture. 30

Q. What did your examination consist of with respect to the items, what did you do, how did you examine them? A. I looked at each individual item

Irving L. Selvage—recross

that was in the building on where there was a loss, household furniture.

Q. You looked at it while someone held it and you were about a half a foot apart and aside from that you did not do anything else? A. As I recall now I did not. In five or six instances I may have felt the items.

Q. Do you recall any particular item you handled? A. I do not recall handling a single item.

10 Q. These items may have been discards as Mr. Von Poznak testified? A. They may have been but I didn't think so, because there were nine members of the family.

Q. You did not examine these items personally, did you? A. Yes, I examined them, personally, every single one.

Q. What? A. Every item in the schedule I examined personally, but I did not handle every single thing personally, I did not think it was necessary.

20 Q. When you say you examined every item personally, you mean some member of the Frank family held it up and you looked at it a foot away? A. I may have stood three feet away.

Q. Do you recall any particular item of wearing apparel that you did examine up there in that attic? A. Yes, sir; I examined the coats, clothing and dresses.

Q. What kind of coats? A. I don't recall.

30 Q. Was it womens' or men's coats? A. I think men's, as I remember, men's and women's coats.

Q. Do you remember the color of the coat? A. I do not.

Q. Do you remember anything about the coat whereby you can identify it? A. I don't know as I do at this time, no.

Anna Frank—direct

Q. You do not remember anything about it? A. No.

Q. How did you proceed to fix the value? A. By starting on the ground floor and examining.

Q. I mean as to the items of clothing, these coats? A. By putting my judgment on the item as I saw it and asking the assured how long he had it.

Q. In other words you relied on what you were given by the assured? A. To some extent, yes.

Q. To what extent did you not rely? A. When the assured wanted the total loss on items without taking off depreciation, I arbitrarily depreciated it. 10

Q. Then, that is the only way you exercised your judgment which was you insisted on depreciation on every item? A. Not necessarily, no, some items were not subject to depreciation.

Q. Can you recall any particular item in that attic you fixed a value on? A. The vast majority of items I fixed the value on.

Q. I am asking you for one? A. Will you permit me to look at this list? 20

Q. I want you to recollect, I don't want you to read from a list? A. I can't recall.

Q. You are also an attorney, are you not? A. No, I am not. I just went to the New York Law School.

Q. You did not practice, you just studied? A. Yes.

30

ANNA FRANK, sworn in behalf of the plaintiff.

Direct Examination by Mr. Chanalis:

Q. You are the wife of Henry Frank, the plaintiff in this case? A. Yes, sir.

Anna Frank—direct

Q. Do you recall the fire? A. Yes, sir.

Q. State what clothes were contained, as well as you can remember, in the attic? A. I know it.

Q. State what the clothes were in a general way? A. I know it was because there was all new. I had five children and myself and my husband.

Q. What clothes did you keep up there? A. It was overcoats from me and from the children and from my husband and it was all burned.

10 Q. Were the overcoats—why were they up there at that time? A. Why, it was in the summer time and nobody can use it except in the winter time and so I put them up there. Everybody does it, I think.

Q. In addition to coats what other goods did you keep up there? A. I had my feather beds up there and my curtains and other stuff I didn't use in the summer time.

Q. Did you have any other clothes? A. I think so. Everybody keeps lots of winter clothes.

20 Q. Did you? A. Sure.

Q. To whom did the clothes belong? A. To some to the girls and some the boys and some to myself, winter clothes.

Q. Were those clothes being worn? A. Some was worn. Well, we only bought them in the winter time. They only had them one winter and put them up in the garret for the summertime.

30 Q. After the fire took place you kept the burned goods up there, did you? A. They were up there three months.

Q. What happened to some of the goods after three months, if anything? A. Some we took away and some we got there yet.

Q. You say you took away some, what do you

Anna Frank—cross

mean by that? A. It was all apart, it was nothing to use, you couldn't see what it was.

Q. You threw them away? A. We threw some away and some are there yet; come up and see it.

Q. How much of the clothes did you throw away? A. I couldn't say what I throw away.

Q. About, I mean an amount? A. I don't know, the goods, each one was fifty or sixty dollars.

Q. I mean in quantity, was it one-quarter, one-half or three-quarters? A. The clothes up there was all burned down, I couldn't use any at all. 10

Q. So, you threw it all out? A. I threw it all out, yes, and the rest is there.

Q. Did you throw more than half of the clothes out? A. More than half is away.

Q. You did that after three months? A. I did it after three months; yes, sir.

Cross-Examination by Mr. Lieblich:

Q. Do you remember when the fire was? A. I know, I guess I remember it. 20

Q. What date? A. The first of July.

Q. I understand you to say that from the first of July you kept everything up there for three months?

A. Yes, sir.

Q. Just as it was after the fire? A. No, not right after; it was after the fire. We couldn't stay without a roof on the top so we had to pack it together so the carpenter could start and it was nearly three months when the man came, I don't know who it was, I can't remember, he came after three months or maybe before and the clothes was all bundled up, what I could, and the rest were throwed away. 30

Q. That is after the man came you bundled what

Anna Frank—cross

you could? A. No, it was bundled up when the man came.

Q. So, you simply took everything while they were fixing, you pushed everything to one side? A. Yes, sir.

Q. You did not put up any lines to hang up the clothes on? A. No, we couldn't because everything was ruined.

10 Q. You did not take everything out of the attic and put it down in the yard? A. No, it was all up there.

Q. But when you told your attorney you pushed them aside, what did you mean by that? A. When the carpenter was working, on one side, we pushed the bundle to the other side.

Q. Did you bundle it up? A. Yes, sir; when the man came it was bundled up.

Q. What man? A. I don't know his name.

20 Q. Was it the man that testified the other day?
A. Yes, sir.

Q. Mr. Von Poznak, when he came over it was bundled up? A. Yes, sir.

Q. Did he unbundle it? A. No, he did not.

Q. When Mr. Von Poznak came didn't he go looking over everything? A. I couldn't tell you, because I was down in the kitchen and Mr. Frank went up with him and he wasn't there five minutes, so, he could not unbundle them; that is what I think.

30 Q. So, you don't know whether he did unbundle them? A. He couldn't, because they were wrapped in the bundle.

Q. You were not upstairs, were you? A. No.

Q. You did not see what he did up there? A. No.

Q. You do not know whether he did unbundle

Anna Frank—redirect—recross

them or did not? A. I know it; could he do anything in five minutes.

Q. You were not upstairs, were you? A. No.

Q. You do not know what Mr. Von Poznak did there? A. No.

Re-Direct Examination by Mr. Chanalís:

Q. What did you do on the second floor? A. The second floor was upset until, I don't know how long, until the carpenters started in working and everything, my carpets and linoleum, there are two halls to do, a hall upstairs and downstairs, was all there. 10

Q. Why did you keep them that way? A. I had to. They say I have to wait until the fire insurance company come and they never came for three months and I couldn't wait so long.

Re-Cross Examination by Mr. Lieblich:

Q. That is why you had to keep it all that way, because they told you had to keep it that way until the insurance man came? A. Sure. 20

Plaintiff rests.

Mr. Lieblich—I respectfully move for a non-suit upon the following grounds.

First, the policy of insurance in this case provides that in the event of loss, the assured shall forward to this company notice in writing. 30

Second, that before any cause of action can be maintained by an assured against this company he must comply with the policy conditions with respect to furnishing satisfac-

Motion For Non Suit

10 tory proof of loss. There isn't any proof in this case of the service of anything purporting to be a proof of loss on this defendant. There is in evidence a paper, sworn to by this assured wherein he makes a certain claim. There isn't anything connected with that paper which complies with the policy conditions and furthermore this plaintiff at his peril brought this action in view of Exhibit P-6 wherein the plaintiff had specific notice of the defects in the paper and he had failed to remedy the defects. Furthermore, the policy of the insurance company in this action provides that in the event of the disagreement on the amount of loss and damage, that there should be an appraisal and under the Wolf case 50L and supported by the Court of Errors in the Read case 83L, an appraisal is a condition precedent and there has been no
20 proof in this case of that and the demand for an appraisal is dated January 15, 1924. There is some evidence which might possibly tend to confuse your Honor and that is this: the letter which Selvage purports to have written to Mr. Williams wherein he said that if we differ we will have some appraisers appointed or have some professional appraisers appointed. That is closely after the loss when there had not been any disagreement as to
30 the amount of loss and damage yet.

Even, if your Honor were to hold that the admission of Mr. Williams is binding on this company, there is no proof that Mr. Williams had any authority to waive any of the policy conditions. Even if Williams were authorized

Motion For Non Suit

to bind this company in July with an appraisal why there has not been any disagreement and the late case in advanced volume 3, an opinion written by the Chief Justice say, "Unless there is a disagreement the appraisal is not necessary."

Furthermore, the policy provides, and I have so pleaded, that upon demand that assured furnish us with a certificate of a Magistrate. That has been held to be a condition precedent. Exhibit P-16 sets forth the demand and there has been no compliance therewith and for these reasons I urge my motion for a non-suit. 10

The Court—As to the various points advanced by counsel for the insurance company the first is that under the terms of the policy, after the fire occurred, the insured did not give immediate notice in writing to the company and that that excused the company from answering this action. The testimony, I think, as to the notice which connects or tends to connect for the purposes of this motion the defendant with notice, was as to a telephone conversation by Mr. Selvage, as agent for the plaintiff, with Mr. Stroebel. Then, he testified that he had phoned him after he wrote the defendant company. 20

The fire occurred on the first day of July, The first letter I have before me is dated July 12, and it is addressed to Mr. Williams, who the plaintiff alleges was the agent of the company for the purpose of making an appraisal. It appears from the testimony in the case that Mr. Stroebel did delegate Mr. Williams to 30

Motion For Non Suit

make the appraisal. It may be said it is a question of fact as to whether the company has waived its right in view of the fact that an investigation was made by Mr. Williams at the direction of Mr. Strobel and that subsequently from the correspondence in the case an appraisal was suggested by the plaintiff himself and that subsequently demands were made by the company for additional proof, these demands were quite specific as to what the company required, and the whole course of conduct of the defendant company after that may prove waiver, as a matter of fact, and that is a question for the jury.

10

Whether a proof of loss has been furnished is a question, perhaps, of law, and the court decides that question adversely to the defendant so far as the form of the proof is concerned. It is said there was no disagreement and that till there was a disagreement there could be no demand for an appraisal. Whether there was a disagreement, or not, it is a question of fact and may be inferred from a letter of July 18th, written by the Charles Selvage Company to Mr. Williams that there was a disagreement, because they quote in that letter an offer which is denied in another letter of Mr. Lieblich's and the most favorable interpretation of that letter is that there was a disagreement and that the plaintiff calls for his appraisal.

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30

On this motion I am entitled to consider the case in its most favorable aspect to the plaintiff, because the defendant when he makes this motion admits the truth of everything

Leo Goldberger—direct

said by the plaintiff's witnesses but denies its sufficiency in law to carry the plaintiff's case to the jury.

The fifth reason is that there was a demand for a Magistrate's certificate and it was not furnished. On that there may also be found ground that the company waived the right to make a demand for over a period of time extending from July 12th, until February of the next year. These parties were negotiating between themselves and in the course of their negotiations the defendant placed the matter in the hands of their counsel just about one month and twenty days after the fire took place and, I think, it was about that time that counsel indicated in a letter to the plaintiff what the defendant required by way of proof. He did not mention anything about a magistrates certificate. Now, when an insurance company has rights under a contract and waives them, it loses its rights. Waiver is a voluntary relinquishment of a known right. 10 20

I will decide the latter question adversely to defendant and the defendant may have an exception and I'll hear the defense.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.) 30

LEO GOLDBERGER, sworn in behalf of the defendant.

Direct Examination by Mr. Lieblich:

Mr. Chanalis—May I examine him as to

Leo Goldberger—direct

his qualifications and perhaps we can shorten the testimony?

Mr. Lieblich—Yes.

By Mr. Chanalís:

Q. What is your business? A. Insurance appraiser.

10 Q. How long have you been an insurance appraiser? A. Seven years.

Q. Appraising losses for whom? A. For anybody who may desire.

Q. Where have you had your office? A. 9 Clinton Street, Newark.

Q. How often have you appraised losses? A. Probably a dozen a week.

Q. Have you had your office at—where is your office? A. 9 Clinton Street.

20 Q. How long have you had an office there? A. Five years.

Q. Where were you two years prior? A. Perth Amboy.

Q. You were appraising losses down there too? A. Yes, sir.

Mr. Lieblich—Do you admit his qualifications?

Mr. Chanalís—Yes.

30 By Mr. Lieblich:

Q. Did you, at my request, in company with Mr. Von Poznak, go to Elizabeth to appraise the loss and damage of Henry Frank? A. I did, sir.

Leo Goldberger—direct

Q. At the time you went there tell us what you did and what Mr. Van Poznak did and how you went about it and what you found? A. Mr. Frank took us up to the garret and showed us the damaged articles he claimed. Some were strewn about the floor and there were some old springs there upright and after examining all the articles there which took a little time, we went to the second floor, that is, the floor above the butcher shop where we inventoried each one.

10

Q. Did you examine the items in the attic at all?

A. Thoroughly.

Q. Tell us what you did? A. Those packed in burlap bags we opened up and they were taken out.

Q. Who is we? A. Mr. Von Poznak and myself.

Q. What did you find there? A. In sacks, a lot of old clothing.

Q. What kind of clothing was it? A. Clothing to wear.

Q. Or did it look like something else? A. I 20 wouldn't say so.

Q. What was it? A. Of practically no value at all.

Q. What did your examination consist of. How did you proceed? A. We opened each sack and checked it over according to the schedule, one item at a time.

Q. Is that the schedule you have in your hand?

A. Yes, sir.

Q. That is a typewritten one. Made when? A. 30 Afterwards.

Q. What did the examination consist of, by that I mean, did you pick up the garments at all and handle them?

Leo Goldberger—cross

Mr. Chanalis—I object as leading.

Q. Tell us how you examined these things and what you did? A. Examined each and every piece there.

Q. Did you handle them? A. Handled them, yes, sir.

Q. When you handled them, what did you do?

Mr. Chanalis—I object.

10

The Court—I will admit it.

Q. You can tell us how you did this? A. We took each article, examined it thoroughly and grouped it as to its value.

Q. Did that take place on the third floor in the attic? A. The third floor and going through the other rooms, each room by room.

20 Q. As the result of your investigation and examination did you come to the conclusion as to the value of the damage? A. We did, sir. \$289.50.

Q. Was what? A. As the entire damage there, the sound value we figured to be three thousand six hundred and eighteen dollars and twenty cents for the entire premises.

Q. Do you recall when it was you were there with Mr. Von Poznak? A. I don't recall correctly, no.

Cross-Examination by Mr. Chanalis:

30 Q. How long were you up in the attic? A. About an hour, an hour and a half.

Q. Who was there with you? A. Mr. Von Poznak and Mr. Frank.

Q. Mr. Frank was there with you? A. Yes, sir.

Leo Goldberger—cross

Q. You opened those sacks, you say? A. Yes, sir.

Q. You stated on your direct examination you proceeded and examined each article according to schedule? A. Yes, sir.

Q. What did you mean by that, "examining each article according to schedule." A. We made up a schedule as we went along. We started in the attic and worked down to the second floor and made a schedule right along.

10

Q. You made a schedule of every article examined? A. Yes, sir.

Q. You stated you found goods up there were worthless before they were burned? A. Why, we saw there was very little of value, I might say worthless, before.

Q. Would you say there was a total loss up there? A. By no means.

Q. A number of the goods were destroyed? A. Very little.

20

Q. Very little of the goods were destroyed entirely? A. Yes, the fire was mostly on the roof.

Q. What proportion would you say was a total loss of the goods that were up there in the attic? A. I might say as far as the attic is concerned, two or three per cent.

Q. Now, of the goods in the attic what was the value, that is the sound value of those goods in relation to—without examining the schedule—what would you say from your recollection was the sound value of the goods in the attic as compared with the entire loss in value? A. Possibly about five per cent.

30

Q. You say, that the total sound value was three thousand six hundred and eighteen dollars, you ap-

Leo Goldberger—redirect

Henry Frank—direct

praised the property up to the roof to be five per cent of that, isn't that true? A. No, the entire sound value of the entire premises.

Q. You only appraised the personal property, isn't that true? A. Exactly.

Q. You appraised that in the whole premises at three thousand six hundred and eighteen dollars and twenty cents? A. Yes, sir.

10 Q. You stated the sound value of property in the attic amounted to five per cent of that, isn't that true? That is correct? A. Yes, sir.

Re-Direct Examination by Mr. Lieblich:

Q. When you say the sound value of the property was three thousand dollars you mean the entire furniture and fixtures of Mr. Frank in all his rooms including the attic? A. Yes.

20

Defendant Rests.

HENRY FRANK, recalled in his own behalf in rebuttal.

Direct Examination by Mr. Chanalis:

30 Q. When Mr. Goldberger and Mr. Von Poznak came to your property who was there? A. They came in the store and my daughter was standing there.

Q. Was your wife there? A. Not in the store, she was upstairs.

Q. Did you go up to the attic with Mr. Goldberger and Mr. Von Poznak? A. Yes, sir.

Q. When you got up there what did you do or what did they do? A. Well, I said, "Its a nice time

Anna Frank—direct

to come, after three months, to appraise. There is all the stuff all bundled up and you can examine it if you want to, but you have to put it back in place again."

Q. "What did they do?" A. "They didn't open not one bundle.

Q. "Not one single bundle?" A. "Not one single bundle tied up.

Q. "Was all the clothes tied up?" A. "Mostly the clothes were packed and tied.

Q. "How long were they up there?" A. "I don't think they were five minutes.

Q. "When you went upstairs did anyone see you?" A. "My daughter went half-way up the stairs.

Q. "Was she present when they came down?" A. "Yes, sir.

Cross Examination Waived.

220

ANNA FRANK, recalled in behalf of the plaintiff, in rebuttal.

Direct Examination by Mr. Chanalis:

Q. "Do you recall Mr. Goldberger and Mr. Von Poznak, the two gentlemen who testified here on Thursday and today, do you remember them coming to your house?" A. "Yes, sir; I do.

Q. "Do you recall about when they came?" A. "I don't know the exact date, but it was about three months after the fire.

Q. "Do you recall going upstairs with them?" A. "My father was upstairs and I went up to call my father and I was going up in the attic with them

330

Anna Frank—cross
Charles Selvage—direct

and I went upstairs and I only got half-way up and they were coming down; they were only up there a short time.

Q. Did you see them go up? A. Yes, sir.

Q. You saw them come down? A. Yes, sir.

Q. How long do you say they were up there? A. At the most it was ten minutes, at the very most. I don't think they were up there that long.

10

Cross Examination by Mr. Lieblich:

Q. You discussed the matter with Mr. Chanalis, your lawyer, before you came to testify? A. I did not.

Q. You did not discuss this matter with Mr. Chanalis before you came here to testify? A. No, I did not see Mr. Chanalis.

Q. You did not talk to him at all about this case, did you? A. No.

20

Q. You didn't know what you were going to testify to this morning? A. I knew what I was going to say.

Q. Who did you talk it over with? A. No one.

Q. You didn't talk it over with anyone? A. No.

Q. Are you sure about? A. Yes, sir.

30

CHARLES SELVAGE, sworn in behalf of the plaintiff in rebuttal.

Direct Examination by Mr. Chanalis:

Q. Where do you reside? A. Newark.

Q. What is your business? A. Insurance adjusters for the people.

Charles Selvage—direct

Q. You are associated with Charles Selvage Company? A. At present.

Q. Do you know the Mr. Von Poznak who testified in that case? A. Yes, sir.

Q. You were present at the time he was being examined, weren't you? A. Yes, sir.

Q. How long have you known Mr. Van Poznak? A. I guess I—twenty-five or thirty years.

Q. Did you have a conversation with Mr. Von Poznak concerning an appraisal he made in this case? A. We do not call it appraisals, we call it estimates. 10

Q. With regard to an estimate he made? A. Yes, sir.

Q. When did that occur and where? A. In front of our office one morning between eleven and twelve o'clock, I should think it was the latter part of November or the early part of December, 1923.

Q. State the conversation. A. I met him on the street and he said, "Say, Selvage, come here." 20
I went over and he said, "Why don't you get that loss out of the way in Elizabeth?" I said, "I don't know anything about a loss? Why don't you do something?" "Well," he said, "get it out of the way, get it out of the way." I said —.

Mr. Lieblich—I object. Any such statements by Mr. Von Poznak surely are not binding on this company.

(Argument.) 30

Q. Did Mr. Von Poznak at that time state to you that he did not examine the articles in the attic? A. He did.

Charles Selvage—cross

Q. Or that he did not go up in the attic for the reason it smelled so there? A. Oh, he didn't say that, he didn't say he didn't go in the attic. He said he was up there not over five or ten minutes, because it was so damn hot he didn't want to stay up there; those were his exact words.

Cross Examination by Mr. Lieblich:

10 Q. When was this? A. Oh, in November or December in front of 776 Broad Street, Newark.

Q. In your office? A. Oh, no; on the street.

Q. In 1923? A. Yes, it was the following November or December to July, 1923.

Q. There is no question in your mind about the date? A. Absolutely none.

Q. No question in your mind about the conversation? A. No.

20 Q. Your memory is very good? A. In that particular case; yes, sir.

Q. You talked this matter over with Mr. Chanalis, didn't you? A. Certainly we did. Why shouldn't we?

Q. I don't find fault. How did counsel know about this conversation? A. Maybe I told him or someone else, I don't know.

Q. You don't know whether you told him or not? A. I don't know as I told him first.

30

Plaintiff Rests.

Mr. Lieblich—If your Honor please, I respectfully move for the direction of verdict in favor of the defendant. May I be permitted to state my grounds and then argue each one.

Motion for Direction of Verdict

The Court—Yes.

Mr. Lieblich—First, the failure to separate the damaged and undamaged personal property and so forth as pleaded specifically by me in the second separate defense.

Second. Failure to furnish a satisfactory proof of loss as pleaded specifically in the third separate defense.

Third. Next, upon the ground of the failure to appraise the loss and damage as specifically pleaded in the fifth separate defense. 10

Fourth. Next on the ground of failure to furnish a certificate of a Magistrate as pleaded specifically in the fourth separate defense.

(Argument.)

The Court—I think the answer to the four grounds for direction of a verdict is this, that the question of a waiver is a question for the jury and in each case the waiver, it seems to me under the testimony, may be found to destroy the ground which you allege as a basis for your motion. 20

I will deny your motion. You may have an exception.

(Defendant's counsel prays an exception to this ruling of the Court.)

Mr. Lieblich sums up for the Defendant.

Mr. Chanalis sums up for the Plaintiff. 30

The Court charges the jury as follows:
Mountain, J.

On July 1, 1923, the plaintiff in this action had a policy of insurance with the Security Insurance Company, of New Haven, Connecticut. Presumably, he

Charge

had paid the premium for this policy and it insured him against fire. The policy indicates the character of the building insured. On that day he had a fire and the fire seemed to have attacked particularly the attic. In the attic at that time there was, as I understand it, a room used as a sleeping apartment for the boys and the remainder of space was utilized for storage purposes. The fire was confined to the attic, but there was damage, it is said, by water and smoke in the two floors below. On the first floor of this building the plaintiff had a butcher shop and on the second floor were six rooms and bath.

The plaintiff alleges that at the time of this fire the winter clothes and bedding belonging to his family were kept in the attic and, by the way, I think the testimony was that the family consisted of three boys, two daughters and the father and mother.

This insurance policy had been taken out through the local agent, named O'Connell, of New Brunswick, and the plaintiff says he informed the agent the day after the fire. He also did something else the day after the fire,—he retained the Selvage Company, who were insurance adjusters, to represent him and act as his agent; and Mr. Irving L. Selvage, of that Company, acted for the plaintiff. The latter testified that as soon as he was retained, which was, as I say, the day after the fire, he made an inventory of the property which was damaged. The time that passed between the date of the conflagration and that inventory, he said, was two or three days. He said he saw each item and spent about ten hours, of which five or six were devoted to an examination of the personal property. When he had completed the schedule, he alleges he gave a copy of it to a man

83
Charge

by the name of Fred W. Williams. He gave that copy to him on the premises and he wrote to the defendant company and phoned to Mr. Strobel, who subsequently took the stand.

Now, Mr. Strobel has indicated that, for certain purposes, he, representing the defendant company, delegated some of his duties to the Mr. Williams I have referred to and he has stated in his testimony that he asked Mr. Williams to make an investigation of all the facts and report on the measure of damages that he was to find if conditions had been complied with and was to make recommendations as to the amount of the loss. 10

Mr. Williams and Mr. Selvage indulged in some correspondence which will be helpful to you and this correspondence started about twelve days after the fire.

We find, of course, after the fire, as is probably the case with every fire, that it is most interesting to watch the conduct of the parties; not only the representative of the insurance company, but the assured or the representative of the assured; as indicating how they carried out the terms of the contract of insurance after the fire had taken place. 20

On July 18 we find Mr. Selvage suggesting to Mr. Williams that an appraisal be had of the property by two professional men, and we find in that letter a statement that indicates that there had been some conversation, or may indicate to you that there had been some conversation between these two men as to the terms or the value of the property destroyed and that they were not close together in their calculations. 30

Then, on July 21, Mr. Williams wrote to the Charles Selvage Company and demanded a list of the

Charge

items and the cash value of the items which have been claimed. Those were handed to Mr. Williams, if we believe Mr. Selvage's letter of July 24 and his own testimony on that point, and in this letter of July 24 Mr. Selvage requested Williams to attach this to the proof which they had. On August 20 the defendant company apparently puts this matter into the hands of their lawyer and on that day he sent a letter to the assured, setting forth what the assured had failed to do, and he specified that there was not attached a copy of all the forms and riders and endorsements and various other matters which, when you retire to the jury room, you will find specifically answered in a letter by Selvage himself to Mr. Lieblich. Without running through all this correspondence, it would seem from reading it hastily that the parties sparred back and forth without coming to any definite point, and you may find they took parts of this policy and in a piece-meal manner demanded a little now and a little then, a sort of a nibbling process as time passed along, from the date of the fire until, I presume, it was determined to bring this action.

You will find in the correspondence the demands on the one side or the other and what has generally taken place.

The plaintiff further alleges that notwithstanding what has taken place, he has had a fire and has had no insurance compensation for his losses and he alleges his losses amount to \$2,000.

The defendant, among other things by way of defense, relies upon certain parts of the policy in question. Before discussing the defendant's case, because there is some law involved in these defenses, the Court does not want the jury to be guided or

Charge

persuaded or moved or influenced by its decision on any motion, because the motions were properly made and the Court, in answer to the motions, ruled upon them. You will remember, however, that the Court dwelt upon the fact that the question of waiver, whatever that meant, was a question for the jury to determine, and so a question of fact. If a man has a right, under a contract in writing, and by some action of his it is evident he relinquishes that right in favor of the other man and voluntarily, we call that a waiver; and when a person has waived a certain part of a contract, he cannot be held to that condition. 10

Now perhaps I can make that more clear as I turn to the defense, because the question of waiver is a question of fact. As I have said two or three times, waiver is the voluntary relinquishment of a known right. One of the defenses of the defendant is that immediate notice of the loss was not given in writing to this company and that the property was not separated, the undamaged from the damaged, and put in the best possible order; that a complete inventory was not made, stating the quantity and cost of each article and the amount of the loss thereon. 20

It is for you to determine, in my opinion, whether a written notice was given or not and whether this property was not protected or separated and as to whether or not an inventory was made or whether, if these things were not done, the company, by some action of its or its agent, waived its right to insist now that it can set up particularly the things for which the plaintiff is alleged not to have done, as a defense. Then, among other matters, the policy provides if a fire occurs, the assured should, within sixty days from the date of the fire inform the company, 30

Charge

10 signing and swearing to the amount of damage to the property and the cash value, and so forth. In addition to that, it is a question for you to determine whether or not that was done. You will read these letters and see how these parties were acting, how connected one with the other; and you will recall the allegations of Mr. Selvage, that he gave a copy of the schedule to Mr. Williams, and you will recall that Mr. Williams wrote him for some information in connection with that. Then, it appears that the schedule was not attached to this proof which has been put in evidence, but that Mr. Selvage, when he gave this to Mr. Williams and in a subsequent letter, asked him if he would not attach the list of articles after their value was set forth opposite the various items.

20 The defendant says that Mr. Williams did not have any authority as an agent of this company to receive this proof of claim, no matter in what state it was—whether it was with schedules attached or not. That is a question of fact, whether, under the circumstances in this case you will find that Mr. Williams was acting within the scope of his authority in doing this and had actually had it conferred upon him by Mr. Strobel and so holding himself out in such a manner as to lead the plaintiff, under the circumstances, to recognize him as an agent; and more than that, if, in the subsequent acts of the Company it did not recognize Williams as its agent and base all this correspondence on some of his acts.

30 Then there is another defense interposed, that a magistrate's certificate was not furnished, in accordance with the terms of the contract. You understand, gentlemen, we are not trying to charge you that the terms of this contract cannot be changed,

Charge

or argue that they can be changed. The failure of the plaintiff to observe any of the terms of this contract precludes his right to recover. But in this case, as it has been developed, the Court has felt it was a question of fact for you to determine, whether some of these things the defendant insisted the plaintiff should have done had not been waived by the defendant.

It now appears, as to this magistrate's certificate: The fire took place on July 1, 1923 and I think the certificate was demanded the middle of the following January; the certificate was required not only to set up the fact the assured had honestly sustained a loss, but also the amount. 10

If the company waits as long as that after a fire and then expects the magistrate to go upon the premises, contemplating, I suppose, that the person who had the fire will keep all these things in the condition they were in directly after the fire, does not the company waive its right to do that? Should not that right, existing under the policy, be exercised more promptly? If you find the Company waived that right, you can regard that as no defense by the defendant. 20

It is said, as another defense, that in case of a disagreement as to the amount of loss, the same is to be ascertained by two competent and disinterested appraisers. That is a condition precedent to recovery. But we find in this case that, as I say, the parties sparred along throughout the period of time, which will be evident to you when you read these communications. We find in the month of July a suggestion for an appraisal was made by the plaintiff, and whether there was a disagreement at that time is a question of fact for you to determine. The 30

Charge

letter is in evidence which may or may not furnish you with grounds for that decision.. Again I say, if that is waived, it is of no avail to the defendant.

Now, if you are satisfied that the plaintiff has proved, by the greater weight of the evidence, that he is entitled to your judgment and that he has carried out the terms of this policy as I have indicated them, of course, your judgment will be for the plaintiff. He insists his loss was \$2,000.

10 The defendant strenuously and emphatically opposes the contention of the plaintiff that his loss was as much as that. The plaintiff insists that the figure is very much less than that. One Von Poznak took the witness stand and said he had gone to the premises and examined them and found that the actual property of Henry Frank amounted to \$3,618.20 and that the loss and damage amounted to \$289.50. He was accompanied at that time, according to his story, by a Mr. Goldberger, who testified
20 that \$289.50 covered the entire damage and said that when they were there the clothing was in sacks, which were checked item by item; and that much of the clothing had no value whatever. The policy sets forth the measure of damage in the first line of the second page: "The insurance company shall not be liable beyond the actual cash value at the time the loss or damage occurs, and the loss or damage shall be ascertained according to such cash value, with proper deductions for depreciation," and then further goes on, to wit: "What it would cost the assured
30 to replace the same by like quality and quantity."

I have been asked to charge, on behalf of the defendant, a number of requests, and those I read I will charge:

"1. A policy of insurance is a contract of indem-

Charge

nity and one of the utmost good faith, and if you find that the plaintiff did not act fair and honestly by making a diligent effort to produce bills, vouchers, etc., then this policy is void and you must find for the defendant." The bills and vouchers referred to, I think, were those produced, or partly produced, and perhaps you may find their lack of production accounted for before the attorney for the defendant at this hearing.

2. "Concealment is the designed intentional withholding of any fact material to the loss or damage which the insured in honesty and good faith ought to communicate; and if you find that the plaintiff did conceal any material fact and did not honestly and in good faith communicate to the defendant or its representative any information relative to the loss or damage, the property insured or the subject of insurance, then this policy is void and you must find for the defendant." 10

3. "If you believe from the evidence in this case that the plaintiff, after the fire, neglected to use reasonable precaution to protect the property from further damage, which is the language employed by the insurance policy, then the policy is void and you must find for the defendant." 20

4. "If you find, as a fact, that the plaintiff did not separate the damaged from the undamaged personal property and did not put it in the best possible order, which is the condition imposed upon him by the insurance policy, the plaintiff has not complied with the terms and conditions of this insurance policy and the same is therefore void and you must find for the defendant." 30

The fifth request I will deny.

6. "A certificate or policy of fire insurance is a

Objections to Charge

contract setting forth the agreement of the parties, the condition precedent and subsequent and limiting the liability of the insurance company to any loss actually sustained through the burning of the property insured."

The seventh request I will deny.

8. "In determining the credibility, weight or value of the testimony of a witness, you may take into consideration the interest of a witness in the litigation, the action and conduct, as well as the manner and form, in which the witness gave his or her testimony, and the influence under which he or she is testifying."

The ninth I will deny.

(The jury retires.)

Mr. Lieblich—I respectfully pray an exception to that part of your Honor's charge wherein your Honor charged that Strobel delegated some of his duties to Williams and what follows.

(Exception noted as ground of appeal.)

Mr. Lieblich—I respectfully pray an exception to that part of your Honor's charge wherein you Honor spoke about July 18, that Selvage suggested to Williams an appraisal.

(Exception noted as ground of appeal.)

Mr. Lieblich—I respectfully pray an exception to that part of your Honor's charge wherein your Honor said the parties sparred back and forth, a sort of a nibbling process.

(Exception noted as ground of appeal.)

Mr. Lieblich—I respectfully pray an exception to that part of your Honor's charge wherein your Honor

Defendants Request to Charge

said the question of waiver is a question of fact, etc., and that Williams was acting within the scope of his authority under the authority conferred upon him by Strobel.

(Exception noted as ground of appeal.)

Mr. Lieblich—I respectfully pray an exception to that part of your Honor's charge wherein your Honor said that the provision as to the magistrate's certificate had been waived, and so forth, and all that part with respect to the magistrate's certificate.

10

Defendant's requests to charge:

1. A policy of insurance is a contract of indemnity and one of the utmost good faith and if you find that the plaintiff did not act fair and honestly by making a diligent effort to produce bills, vouchers, etc., then this policy is void and you must find for the defendant.

Charged.

2. Concealment is the designed intentional withholding of any fact material to the loss or damage which the insured in honesty and good faith ought to communicate and if you find that the plaintiff did conceal any material fact and did not honestly and in good faith communicate to the defendant or its representative any information relative to the loss or damage, the property insured or the subject of insurance, then this policy is void and you must find for the defendant.

20

Charged.

3. If you believe from the evidence in this case that the plaintiff after the fire neglected to use reasonable precaution to protect the property from further damage, which is the language employed by

30

Defendants Request to Charge

the insurance policy, then the policy is void and you must find for the defendant.

Charged.

10 5. The plaintiff must prove by a fair preponderance of the evidence the actual market value of any property which he alleges was damaged or destroyed by fire on May 2, 1923, and the said proof of damage must be definite and precise and not mere speculation and if you are satisfied that the plaintiff
11 has proven a specific sum as his actual damage by reason of the fire and the defendant is liable under its policy, then you must find for the plaintiff in the specific sum which plaintiff has actually proven as being the amount of the loss and damage sustained.

20 6. A certificate or policy of fire insurance is a contract setting forth the agreement of the parties, the condition precedent and subsequent and limiting the liability of the Insurance Company to any loss actually sustained through the burning of the property insured.

Charged.

7. If you believe that the plaintiff in this case falsely and with intent to defraud the Company overvalued his property when he stated in the proof of loss that the value thereof was \$5,382, and the loss and damage \$2,177, then the policy is void and you must find for the defendant.

Denied.

30 8. In determining the credibility, weight or value of the testimony of a witness, you may take into consideration the interest of the witness in the litigation, the action and conduct as well as the manner and form in which the witness gave his or her testimony and the influence under which he or she is testifying.

Defendants Request to Charge

Charged.

9. I charge you, gentlemen of the jury, that the contract or policy of insurance in evidence here in this case is not the creation or creature of the defendant and if you, for any reason, feel that the language therein contained is harsh or technical, you are not to permit this prejudice to influence you against the defendant, for the policy of insurance is not their creation, they have no more to do with the form and contents of the standard fire policy than has the plaintiff. The policy of insurance is a standard fire policy of the State of New Jersey, created by an Act of the Legislature of the State of New Jersey which provides what they shall contain and sets forth all the covenants and conditions which are enumerated therein.

10

Denied.

20**30**

Exhibit P-3**EXHIBITS****EXHIBIT P-3**

Re: Henry Frank Loss

Jan. 12th, 1924.

Charles Selvage Company,
776 Broad Street,
Newark, N. J.

Gentlemen:

10 I have purposely refrained from making any comment to the first paragraph of your letter of Dec. 7th, until I had the opportunity to make my investigation in the premises.

20 I have now had occasion to take this matter up with Fred W. Williams, the person employed by the Security Insurance Company, to investigate and appraise the alleged claim of Henry Frank and to determine if there is any liability on the part of the company and if so, in what sum and make his report and in accordance with instructions given to Mr. Williams, he had made his appraisal of the loss. I did not know that he had communicated to you his determination in the premises and he is positive in his statement that he has never made any offer on the part of the company, for if he had, he was not authorized by the company to do so. It may be that he disclosed to you in confidence, by reason of the friendship which has existed between you two, what his opinion was as to loss and damage and I take
30 it that in the statement which you make in the first paragraph of your letter of Dec. 7th, you are not breaching any confidence of Mr. Williams.

As far as the company's position is concerned, I am frank to state to you that they disclaim any responsibility for any action on the part of Mr. Wil-

Exhibit P-4

liams in any alleged attempt to waive any of the terms, covenants or conditions of the policy of insurance, since he had no authority in the premises.

Very truly yours,
Joseph T. Lieblich,
Attorney

JTL:A

EXHIBIT P-4

Newark, N. J. July 18, 1923. 10

F. W. Williams, Esq.
56-58 Pine Street
New York City.

Loss under Security Pol. 21108 Henry Frank,
Assured.

Dear Sir:

Enclosed you will please find proof of loss in the above case showing a claim of \$2000., with a loss and damage of \$2177., details of which we gave you yesterday. We can probably induce the assured to make some concession on this claim, but nothing like the amount you offered yesterday. 20

If it meets with your approval, we would suggest an appraisal, by two non-professional men. You might select someone from Bamberger's, and we might select someone from Hahne & Company, or you could select someone from one furniture house, and we could select someone from another furniture house. If you desire professionals, we would suggest Messrs. Weinstock, and Gifford. 30

Kindly let us hear from you at your early convenience, and oblige

Yours very truly,
Charles Selvage Company
by Hester Selvage

ILS:A

Exhibits P-5—P-6

EXHIBIT P-5

July 21, 1923.

Charles Selvage Company,
760 Broad Street,
Newark, New Jersey.
Gentlemen:-

Re Claim Frank.

10 I am in receipt of a paper purporting to be a proof of loss under policy No. 21108 of the Security Insurance Company issued at its New Brunswick, N. J. agency and in connection therewith, beg to say for the said Security Insurance Company I hereby demand a list of the items and cash value of each item upon which claim is made. Said list to be attached to and considered a part of the paper which I above referred to as purporting to be a proof of loss.

Thanking you in advance, I am

20

Yours truly,
Fred W. Williams
Adjuster

FWW:LP

EXHIBIT P-6

Newark, N. J. July 24 1923.

F. W. Williams, Esq.
56-58 Pine Street
New York City.

30

Frank Loss, Eliabeth, N. J.

Dear Sir:

We acknowledge receipt of your favor of the 21st inst., and beg to say that we handed you personally a list of the loss, showing the cash value of each item, with loss thereon, when we met with you at the

Exhibit P-6A

damaged premises on the 17th inst., won't you kindly
attach same to the proofs sent.

Yours very truly,

Charles Selvage Company
by H. Selvage

ILS:A

EXHIBIT P-6 A

Aug. 20th, 1923

Mr. Henry Frank,
714 E. Jersey St.,
Elizabeth, N. J.

10

Dear Sir:-

I am in receipt of a paper forwarded by your ad-
justers, Charles Selvage Company, in which you
make claim against the Security Insurance Com-
pany under an alleged certificate No. 21108. You will
please take notice that this paper cannot be accepted
as a satisfactory proof of loss and we herewith point
out some of the reasons and shall be pleased to fur-
nish you other reasons on demand. 20

You have failed to attach a copy of all the forms
or riders and endorsements attached to alleged cer-
tificate; you have failed to state cause or origin of
fire; you have failed to attach thereto a schedule
and statement showing the articles damaged or de-
stroyed and the sound value and loss thereon; you
have failed to state use or occupation of the prem-
ises and for other reasons which are apparent on 30
the face of the paper and the claim is in excess of
any damage which you may have sustained. I am
holding the said paper subject to further order in
the premises.

You will please take notice that we demand that
you submit to an examination under oath and produce

Exhibit P-6A

for the purpose of said examination under oath, books of account, bills, invoices and other vouchers, before Joseph T. Lieblich, Esq., the person designated as the examiner, at the office of the said Joseph T. Lieblich, No. 116 Market Street, Newark, New Jersey.

10 You will please take further notice that in the alleged certificate it is provided as a condition that the Company therein named, viz., the Security Insurance Company, shall not be held to waive any of the conditions, provisions or proceedings on its part relative to any examination under oath, Magistrate's certificate, appraisal, and in making the demand upon you for a full compliance with all of the terms of the alleged certificate and the particular covenants enumerated, we do not intend to waive any of the terms, covenants or conditions of the alleged certificate or the full compliance by you of all of the said covenants and conditions and in pointing out to you
20 these defects and in causing you to file a satisfactory proof of loss, it is not our intention to lead you to believe that we intend to admit liability to you in the premises, nor is this letter to be taken or construed as a denial of liability nor as a waiver of any forfeiture heretofore claimed or now existing.

Very truly yours,
Security Insurance Company,
Joseph T. Lieblich
Attorney.

30 JTL:R

Duplicate to:
Charles Selvage Company,
776 Broad Street,
Newark, N. J.

Exhibit P-7

EXHIBIT P-7

From

Charles Selvage Comapny,
Insurance Adjusters for the People
Newark, New Jersey

The Security Insurance Company

By your Agent James A. O'Connell at New Brunswick, N. J., you issued to Henry Frank your policy of insurance No. 21108 from July 29, 1920, to July 29, 1923, in the sum of Two Thousand Dollars; the description of the subject of insurance (hereinafter referred to as "the property"), the amount insured on each item thereof, and all endorsements written upon or attachd or appended to said policy, being as follows:

10

\$2000. On household and kitchen furniture—as per Agent O'Connell's Form—all while contained in the brick & frame building, while occupied as store and dwelling, situate on the south side of and known as No. 146 Paterson Street, in New Brunswick, N. J.

20

Nov. 17, 1921.

This policy is hereby transferred to cover on the same property removed to two story brick and frame building occupied as store and dwelling located at No. 714 East Jersey Street, Elizabeth, N. J., all liability in former location to cease from this date. In consideration of the correct rate in new location being \$1.38 for one year, and \$3.45 for three years, an additional premium of \$10.72 is hereby charged.

30

The property, while located and contained only as described in the policy, was damaged by fire occur-

Exhibit P-7

ring on the first day of July, 1923, at 3 P.M. The origin of the fire was unknown—supposed defective wires.

The sound value of each item of the property, the amount of loss thereon, and the amount of all contracts of insurance thereon, are shown in the following schedule which relates throughout to the time of the fire.

10 Sound value 5382; Loss and damage 2177; Total insurance by this policy 2000; Claimed under this policy 2000.

Total amount claimed of this Company under above mentioned policy \$2000.

(For a detailed statement of value and loss see schedule "A" herewith, which is made a part of this statement.)

20 From the beginning of the term of the policy to the time of the fire the interest of the insured in the property was that of unconditional and sole ownership free from lien or encumbrance, except as follows: sole and unconditional, and there has been no change in the title, use, occupation, location, possession or exposures of the property, except as follows: see endorsement above.

At the time of the fire the building or buildings in said policy described were occupied by assured for store and dwelling purposes. Any other information that may be required will be furnished on demand and considered a portion of this statement.

30 Witness my hand at Elizabeth, N. J., this 17th day of July, 1923.

Harry Frank.

Personally appeared Henry Frank signer of the foregoing statement, who made solemn oath to the

Exhibits P-8—P-9

truth of the same, and that no material fact is withheld, before me, this 17th day of July, A.D., 1923.

I. Lester Selvage,
Notary Public of New Jersey.

EXHIBIT P-8

(Copy of letter marked Exhibit P-6A.)

EXHIBIT P-9

Newark, N. J., August 21, 1923.

10

Joseph T. Lieblich, Esq.,
Romaine Building,
Paterson, N. J.

Loss under Security Pol. 21108, Henry Frank, Assured. Elizabeth, New Jersey.

Dear Sir:

We acknowledge receipt of your letter to the assured, copy of which you were good enough to send us, and to which we are replying immediately. We beg to take up your objections in detail, as follows, viz.:

20

1. We have no alleged certificate in our possession, but have the actual policy, and have indicated on the proof of loss a copy of all the forms, riders and endorsements attached to the original.

2. The cause, or origin of the fire, is unknown to the assured, but his theory is that it may have originated from defective wires.

30

3. We have furnished the alleged adjuster, who theoretically represented the insurance company, with a schedule and statement showing the sound value and claim on each article, and asked that he attach that to the proof of loss furnished him. The

Exhibit P-9

statement was given him when we met him at the damaged premises on July 17th last, and a formal notice was sent him to that effect on the 24th of July, asking that he kindly attach said statement to the proof of loss sent him on July 18th.

4. Inasmuch as you have not seen the loss, we feel that you are not in a position to say that the claim is in excess of the damage existing, but if it were, and the company which you are representing, thought so, we suggested under date of the 18th ult., that an appraisal be entered into, in order to dispose of the matter.

5. The assured has stated the premises were occupied for store and dwelling purposes, which are in strict conformity with the facts.

We note that you demand an examination under oath at your office at 116 Market Street, Newark, New Jersey, which the assured will be glad to comply with if you name a definite time, which you have not done.

Insofar as your fourth paragraph is concerned, in reference to a waiver, please be advised that the assured is likewise not making any by consenting to reply to your letter.

Yours very truly,
Charles Selvage Company
By I. Lester Selvage.

ILS:A

Exhibits P-10—P-11

EXHIBIT P10

Newark, N. J., Sept. 5, 1923

Joseph T. Lieblich, Esq.,
 Counsellor-at-law,
 Romaine Building,
 Paterson, N. J.

Examination under Oath. Henry Frank Loss,
 Elizabeth, N. J.

Dear Sir:

We wrote you under date of the 24th ult., that we were willing to aid both you and the company all we possibly could without waiving the rights of our clients. 10

We now accept your date of Friday, September 14th, 1923, at 10:30 o'clock in the forenoon, to proceed with the examination under oath, in accordance with the policy conditions, but we will not consent to a postponement after the sixty days have expired from the date proof of loss was given the company. 20

Yours very truly,

Charles Selvage Company,
 by Chas. Selvage.

CS:A

EXHIBIT P-11

Joseph T. Lieblich, Esq.
 Counsellor-at-Law,
 Romaine Bldg., Paterson, N. J.

Henry Frank Loss

Elizabeth, N. J. 30

Dear Sir:

As you already have been advised that the assured could not be present to 'the examination under oath' per your demand on the date stated, we now desire to say that if you will name an early day for the as-

Exhibit P-12

sured to comply with your demand, we will do our utmost to have him present.

This letter will be mailed you registered, and a carbon copy mailed the assured to avoid needless delay.

Yours very truly,
Charles Selvage Company,
by Chas. Selvage.

CS:A

10 Registered: Return receipt requested.

EXHIBIT P-12

Newark, N. J., November 8, 1923.

Jos. T. Lieblich, Esq.
Counsellor-at-law

Romaine Bldg., Paterson, N. J.
Henry Frank Loss, Elizabeth, N. J.

Dear Sir:

20 By Registered Receipt No. 66872, we wrote you, under date of October 5th last, that Mr. Henry Frank was ready to consent to the examination under oath, in accordance with your demand of September 10, 1923. To date we have received no further information from you, and today are advised by the assured that he wishes to have the case disposed of, and if you have decided not to hold said examination, in accordance with the policy conditions, then we ask that you approve the claim as presented, so that the case may be disposed of.

30 Kindly give this letter your early attention by replying to it in the future, and oblige

Yours very truly,
Charles Selvage Company
by Chas. Selvage

CS:A

Carbon copy direct to assured.

Exhibit P-13

EXHIBIT P-13

Newark, N. J., November 23, 1923.

Joseph T. Lieblich, Esq.

Attorney and Counsellor-at-law

Romaine Bldg., Paterson, N. J.

Henry Frank Loss, Elizabeth, N. J.

Dear Sir:

Under date of the 8th inst.,—two weeks ago yesterday—we wrote you that Mr. Henry Frank was ready to proceed with the examination under oath in accordance with the policy conditions, and complying with your demand of September 10, 1923. On October 5th, 1923, we sent you a registered letter No. 66872, to that effect. 10

We now beg to advise you that unless some attention is paid to this third notification, the assured will feel as though he has a legal right to proceed in the collection of his claim, and will not accordingly.

Kindly give this letter immediate attention, that we may communicate our client, with the hope of disposing of the adjustment. 20

Yours very truly,

Charles Selvage Company

by Chas. Selvage Pres.

Attys and Adjusters for the assured.

CS:A

The writer wishes that you would advise him immediately when you will call regarding the Supreme Leather case, and also when we can receive our check on the Cecile Silk Mills loss. If you will not mail us the promised check, then kindly return the satisfaction piece which I gave you some weeks ago. 30

Yours Chas.

Exhibits P-14—P-15

EXHIBIT P-14

Newark, N. J. Dec. 7, 1923.

Joseph T. Lieblich, Esq.

136 Washington Street

Paterson. New Jersey.

Henry Frank Loss Elizabeth, N. J.

Dear Sir:

10 We thank you for your letter of the 5th inst., regarding the above case, but when we tell you that the amount computed by your appraiser, of \$289.50 is in the neighborhood of one quarter of the amount which the assured declined to accept from the representative of the insurance companies, you will readily recognize the fact that we cannot advise our client to accept any such sum.

20 Please state at once what day, hour and location, some time during the latter part of next week, it will be convenient to conduct the examination, in accordance with the policy conditions and per your demand.

Yours very truly,

Charles Selvage Company

CS:A

by Chas. Selvage, Pres.

Thank you very much for the return of the release which the writer signed, pertaining to the Cecile Silk Mills. CS.,

EXHIBIT P-15

Paterson, N. J. Dec. 13th, 1923.

30 Charles Selvage Company,

776 Broad Street,

Newark, N. J.

Dear Sir:

In reply to your favor of the 7th, would advise that the first available date which I can give you for

Exhibit P-16

the examination under oath of the above mentioned is Thursday, Dec, 27th, 1923, at 1:30 P. M., at my Newark office.

Kindly let me have your advice as to whether this date is convenient for you so that I can make my arrangements accordingly.

Very truly yours,
Joseph T. Lieblich

JTL:A

10

EXHIBIT P-16

Jan. 15th, 1924.

Mr. Henry Frank,
89 Miller St.,
Elizabeth, N. J.

Re: No. 821108—Security Insurance Company.

Dear Sir:-

You will please take notice that for the purpose of enabling us to determine the loss and damage, if any, which you claim to have sustained by reason of an alleged fire, damaging property which you allege is insured under the above captioned certificate, we demand that the same be submitted to competent and disinterested appraisers and we nominate as one of the appraisers, Leo Goldberger, 9 Clinton Street, Newark, N. J. You will please let us know the name of the appraiser which you nominate as your appraiser so that the said appraisers may together agree upon an umpire and then proceed to determine the said alleged loss and damage, if any, in accordance with the alleged claim.

20

30

I take this opportunity of calling to your attention the fact that the examination under oath under the above mentioned certificate has been adjourned to Thursday, the 17th day of January, at 1:30 P.M. You will therefore at that time produce for exam-

Exhibit P-16.

ination any and all books of account, bills, invoices, checks, etc., or certified copies thereof if extracts and copies thereof to be made.

You will please take further notice that we demand that you furnish us with a certificate of a Magistrate (not interested in the claim as a creditor or otherwise not related to you), living nearest the place of fire, stating that he has examined the circumstances and believes that you honestly sustained
 10 loss and damage in such amount as the said Magistrate shall certify.

It is further provided in the certificate above mentioned that the company shall not be held to waive any of the provisions or conditions of the said certificate or any forfeiture thereof by any act, requirement or proceeding on its part, relating to appraisal, demand for certificate of a Magistrate, examination under oath, etc., and in making the above demands, we wish it clearly understood that it is not
 20 to be construed as an admission nor a denial of liability on our part, neither do we intend to waive any of our rights existing under the said certificate, nor do we at this time waive any forfeiture heretofore incurred by you under the said certificate and the demands hereby made are for the purpose of ascertaining and determining the loss, if any, which you allege that you sustained.

Very truly yours,

Security Insurance Company,

30

by Joseph T. Lieblich, Attorney

JTL:A

Copy To:

Charles Salvage Company,

Exhibit P-17

EXHIBIT P-17

Newark, N. J., February 4, 1924.

Jos. T. Lieblich, Esq., Attorney,
Security Insurance Company,
Romaine Bldg., Paterson, N. J.

Henry Frank Loss,
Elizabeth, N. J.

Dear Sir:

Your letter of the 15th ult. to the above assured has been handed to us for reply. Permit us to call your attention to the fact that an appraisal was suggested by our assured under date of July 18, 1923, when proofs of loss were sent your adjuster, Mr. Fred W. Williams. We certainly cannot permit an appraisal at this late date, nor can we allow the assured to comply with your request that a Magistrate's Certificate be supplied as we feel you have waived your rights to both a appraisal and said certificate by this long delay. 10

Please take notice that the examination under oath which you have conducted from time to time with indefinite postponements must be completed within the next thirty days, and we respectfully ask that you now name a day and hour when that examination will be completed, as the assured is naturally anxious to have this long-standing loss disposed of. In compliance with your demand of the 16th ult., asking that bills, invoices and checks appertaining to his claim be left at the office of the Charles Selvage Company, we beg to state that he has done so insofar as he is able. 20 30

Yours very truly,

Charles Selvage Company,
by I. L. Selvage

ILS:A

Exhibit P-18

EXHIBIT P-18

Re: Henry Frank Loss,
Elizabeth, N. J.

Paterson, N. J., Feb. 6th, 1924.

Charles Selvage Company,
776 Broad Street,
Newark, N. J.

Gentlemen:

10 I have for acknowledgement your favor of the
4th, inst. In reply thereto would advise that I have
already informed you that the examination under
oath, as far as we were concerned, was completed
except that I desired the opportunity of inspecting
the bills, books and records which might be left at
your office, I shall be pleased to avail myself of the
opportunity to examine the same and make copies
and extracts thereof, although I have no right to
waive the failure to produce these books and records
upon the examination under oath in compliance
20 with the demands heretofore made upon your client,
and unless your client is ready to comply with the
terms, covenants and conditions of the alleged cer-
tificate of insurance and the demands heretofore
made upon your client, I shall have no alternative
than to advise the company to deny liability by
reason of the failure of your client to comply with
the demands heretofore made and all of the terms,
covenants and conditions of the alleged certificate.

30

Very truly yours,

Joseph T. Lieblich, Attorney

JTL:A

Exhibit P-19

EXIBIT P-19

Frank Loss

Elizabeth, N. J.

Lower Hall

	Value	Loss	
Door shade	8	3	
20 yds. linoleum	30	20	
Upper Hall			
16 yds. linoleum	24	24	
Chair, couch and wardrobe	35	4	10
Clothing in wardrobe	200	10	
Pillows, bathrobe, tablecloth	12	1	
Clothes trees and clothes	40	4	
2 pr. curtains and draperies	10	3	
Mr. and Mrs. Frank's room			
White enamel bedstead and bedding	40	6	
Brass bedstead and bedding	855	12	
Wardrobe and contents	400	10	
Dresser and contents	60	6	
Chiffonier and contents	80	8	20
Safe	20	2	
Rug	2	1	
Pictures	10	1	
Curtains and shades	10	2	
Clothing, hats and dress goods	40	10	
Mrs. Frank's Sr. room			
Bedstead and bedding	45	30	
Chiffonier and contents	40	6	
Wash stand and contents	15	3	
Table and contents	10	4	30
Contents of 2 closets	750	75	
Pictures on wall	15	3	
Curtains and shades	8	4	
Parlor			
Player piano	700	250	

Exhibit P-19

	3 piece parlor set	90	10
	3 sets of cretonne covers	20	10
	Lot of music	25	25
	Stool	5	1
	Lot of music rolls	30	5
	Contents of mantle	15	1
	Chair, table, cup	15	2
	Girl's hat	6	6
	Pictures	35	6
10	Portieres, curtains and shades	24	5
	Small rug	6	2
	Large rug	35	25
	Dining Room		
	Contents	700	75
	Kitchen		
	Contents	200	20
	Outkithcen		
	Contents	50	5
	Articles thrown out—3 rugs \$15		
20	clothing \$10	25	25
	Attic		
	Lot of Christmas tree ornaments	15	
	3 prs. trousers	12	
	Doll's clothes	2	
	Curtain and rod	1	
	Hat rack	8	
	3 feather beds	65	
	Box of winter underwear—10 suits	30	
	Girl's brown coat \$35	16	
30	Curtain stretcher	5	
	Lot of shades	10	
	Lot of soap	15	
	Chair	2	
	2 sets of furs—cost \$50	25	
	sweater—cost \$12	3	

Exhibit P-19

Velvet dress—cost \$30	155	
Girl's blouse—cost \$4	2	
Bed spread—embroidered	15	
Plush coat—cost \$50	22	
Sweater coat—cost \$15	5	
Girl's velvet suit—cost \$45	40	
Man's hunting coat—cost \$18	10	
Girl's green velour coat—beaver collar and cuffs— cost \$65	30	
Flannel shirt— cost \$1.50	1	10
4 rain coats—cost \$40	20	
2 sheepskin coats—cost \$45	35	
Smoking jacket—cost \$8	4	
Boy's Mackinaw—cost \$12	\$	
Woman's green serge dress—cost \$22	10	
Gray slip on sweater—cost \$7	4	
Mechanic's coat—cost \$5	4	
Girl's winter coat—cost \$25	20	
Bedsread—cost \$15	5	
Man's velvet overcoat—cost \$60	35	20
Gray blanket—cost \$4.50	3	
Overalls—cost \$2.50	2	
Oil stove	8	
Rocker	2	
Tub seat	3	
Doll's carriage—cost \$15	7	
Black serge skirt—cost \$15	5	
Pr. shoes—cost \$7	3	
25 yds. carpet—cost \$45	40	30
Pr. skates—cost \$2	2	
12 Pr. shoes—cost \$48	18	
Medicine Chest—cost \$10	8	
Brass rods for stairs	10	
2 blankets—cost \$10	6	
Large robe—cast \$10	\$9	

Exhibit P-19

	Large shawl—cost \$6	5
	Girl's sweater—cost \$9	2
	Portiere—cost \$6	4
	Satin covered down quilt—cost \$455	35
	Large doll	5
	Hand crocheted bed spread	90
	Bag of feathers	18
	5 pr. hand stitched curtains	50
	Bedstead, bedding, crocheted cover	22
10	Pr. overshoes—cost \$3.50	2
	Pr. skates	1
	Underwear	10
	3 masquerade suits	15
	Tool box and contents	3
	Electric outfit and tree decorations	15
	Lot of music rolls	10
	3 hats—cost \$15	8
	Lining paper	3
	Accordion—cost \$25	15
20	Boy scout blanket—cost \$6	4
	Pr. bathing slippers—cost \$1.25	1
	Pr. shoes—cost \$4	3
	Gas stove—cost \$8	5
	2 guns—cost \$75	70
	Mat	3
	1 doz. brooms	8
	Miscellaneous articles	50
	Boy's room	
	Jewelry—ring and pin	25
30	Bedstead and spring	15
	Cotton mattress	18
	2 pillows	15
	Feather bed	30
	Sheet and quilt	6
	Pillow sheets	1
	2 chairs	3

Exhibit P-20

Wardrobe	15	
Dresser	5	
Curtain and shade	2	
Linoleum	20	
Contents of dresser	30	
Large mirror	10	
Contents of wardrobe:		
Navy overcoat—cost \$18	12	
Winter overcoat—cost \$55	35	
3 suits—cost \$110	80	10
3 pr. shoes—cost \$16	10	
Winter hat—cost \$5	3	
Cleaning up		40
		<hr/>
	\$5382	\$2177

EXHIBIT P-20

Newark, N. J., July 12th, 1923.

F. W. William,
56 Pine Street,
New York City. 20

Re: Frank Loss,
Elizabeth, N. J.

Dear Sir:

Adjuster Strobel of the Security has just informed us he has turned the above adjustment over to you. Will you kindly advise if you can take it up Friday or Saturday of this week as Strobel told us he would do so and we in turn promised the assured. Kindly advise and oblige, 30

Yours very truly,

C. S. Co. by J. L. Selvage,

It will be impossible to take the loss up before Tuesday. I will be at the scene of the fire Tuesday morning at 10:30 A. M.

William.

Complaint

Filed June 24, 1924

NEW JERSEY SUPREME COURT
Mercer County

Henry Frank, Plaintiff vs. Security Insurance Company of New Haven, Conn., Defendant.	}	Action at Law
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10

COMPLAINT

The Plaintiff, Henry Frank, of the City of Elizabeth, County of Union and State of New Jersey says that:-

20 1. On or about the 29th day of June, 1920 the Defendant, under its written policy of insurance, No. 21108, insured the household furniture of the said Plaintiff while located in a building occupied as a store and dwelling and situated at No. 714 East Jersey Street, in the City of Elizabeth, County of Union and State of New Jersey, from fire in the sum of Two Thousand Dollars (\$2,000.) which loss, if any, was made payable to the Plaintiff, in consideration of the Plaintiff paying a certain premium mentioned in said policy.

30 2. The Plaintiff paid the said premium to the Defendant and received the said policy of insurance.

3. On July 1, 1923, while the said agreement of insurance was in full force and effect the said household furniture was accidently destroyed by fire and

Complaint

the Plaintiff suffered a loss of Two Thousand One Hundred Seventy-seven Dollars.

4. That by reason of said fire loss there became due and payable, under the said fire insurance agreement from the Defendant to the Plaintiff, the sum of Two Thousand Dollars (\$2,000.).

5 That, although the Plaintiff has demanded of the Defendant the sum of Two Thousand Dollars (\$2,000.) pursuant to the terms of said insurance agreement by reason of said loss and although the Plaintiff has complied with all of the provisions of the said insurance agreement the Defendant has refused to pay the said amount of Two Thousand Dollars (2,000.) or any part thereof to the Plaintiff. 10

Plaintiff demands as damages the sum of Two Thousand Dollars (\$2,000.) besides lawful interest.

Haines & Chanalis

Attorneys for Plaintiff

20

To the within named Defendant:

Take notice that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits, within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you.

Haines & Chanalis

Attorneys for Plaintiff.

30

Answer

Filed July 8, 1924.

ANSWER

Defendant, a foreign corporation with its principal office in the City of New Haven, and State of Connecticut, answering the complaint by Joseph T. Lieblich, Esq., its attorney, says:-

10 1 It denies the allegations in paragraphs one, two, three, four and five of the complaint, except to admit that if the plaintiff is in possession of a certificate of insurance of this defendant, No. 21108, the defendant refers to said certificate for certainty as to the terms, covenants and conditions thereof and prays oyer thereof.

FIRST SEPERATE DEFENSE.

20 Defendant will, upon the trial of the cause, move to dismiss the complaint upon the ground that the plaintiff has not set up a cause of action as against this defendant.

SECOND SEPARATE DEFENSE.

1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides:

30 "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 from the undamaged personal property, put it in the best possible order, making a complete inventory of the same, stating the quantity and cost of each article and the amount of loss thereon."

Answer

2 That this plaintiff did not give defendant immediate notice in writing and did not protect the property from further damage, that the plaintiff did not separate the damaged from the undamaged personal property, that the plaintiff did not put the property in the best possible order that the plaintiff did not make a complete inventory but on the contrary in truth and fact, plaintiff fraudulently and intentionally endeavor to create a greater loss and damage by leaving the property in the condition in which it was after fire for the purpose of increasing the damage and defrauding the defendant and collecting a greater sum of money than alleged loss and damage resulting by fire; wherefore the alleged certificate set forth in the complaint is null and void and no recovery can be had thereunder. 10

THIRD SEPARATE DEFENSE

1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides; 20

If fire occur, the insured within sixty days after the fire shall render a statement to this company, signed and sworn to by the said insured, stating the knowledge and believe of said insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, etc." 30

"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 foregoing requirements."

Answer

2 That the plaintiff has failed to comply with the covenant recited in paragraph one hereof, wherefore the action is prematurely brought and cannot be sustained.

FOURTH SEPARATE DEFENSE.

1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides:

10 "If fire occurs, the insured shall furnish a certificate of the Magistrate 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 shall certify."

20 "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."

2 That the defendant made due demand upon the plaintiff that he comply with the covenant recited in paragraph one hereof, compliance therewith being a condition precedent to bringing this action, and that plaintiff has refused and failed to comply therewith, wherefore this action is prematurely brought and cannot be sustained.

FIFTH SEPARATE DEFENSE.

30 1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides:

"In case of disagreement as to the amount of loss, the same shall be ascertained by two

Answer

competent and disinterested appraisers, etc.”

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

2 The plaintiff has failed to comply with the covenants mentioned in paragraph one hereof, a compliance therewith being a condition precedent to the bringing of this action, wherefore the action is prematurely brought and cannot be sustained. 10

SIXTH SEPARATE DEFENSE.

1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides:

“The sum for which this company is liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss has been received by this company in accordance with the terms of this policy, including an award by appraisers.” 20

“No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity untill after full compliance by the insured with all the foregoing requirements.”

2 Defendant repeats paragraph one of the Third Separate Defense as if recited herein at length. 30

3 That the defendant gave plaintiff notice and made due demand upon the plaintiff that he personally comply with the terms and conditions of the certificate of insurance, more particularly referring to

Answer

paragraphs one and two hereof, but the plaintiff has failed to comply therewith, wherefore this action is prematurely brought and cannot be sustained.

SEVENTH SEPARATE DEFENSE.

1 The standard fire insurance policy of the State of New Jersey, such as issued by the defendant, provides:

10 "This entire policy shall be void in case of any fraud or false swearing by the assured, whether before or after the loss."

2 That after the alleged loss and damage and before the institution of this suit, the plaintiff made and delivered to the Special Agent of the defendant, not authorized on behalf of the defendant to receive the same, but for the purpose of having the said Special Agent rely upon the representations thereto and statements therein made, a certain paper
20 wherein the plaintiff falsely and fraudulently swore that the alleged insured property was of the value of \$5382 or the said damage to be in the sum of \$2177 whereas in truth and fact, as the plaintiff well knew, the alleged insured property was not of the value of \$5382 or the and damage to be in the sum of \$2177 and the statements so made by plaintiff were false and well known by plaintiff to be false and were made with intent to deceive and defraud and to induce the defendant to pay a greater sum than plaintiff had actually loss or suffered by reason of the
30 alleged fire, wherefore the alleged certificate upon which plaintiff predicates his cause of action is null and void.

Joseph T. Lieblich
Attorney of Defendant

123

Reply

Filed July 16, 1924.

REPLY

The Plaintiff, Henry Frank, replying to the answer of the Defendant, says that:

1 The Plaintiff reserves the right and will upon the trial of the cause move to strike out the answer upon the ground that the allegations set forth therein are sham and are made for the purpose of delaying the determination of this case. 10

2 The Plaintiff denies every allegation in the answer.

Haines & Chanalis

POSTEA

This case was tried before Judge Worrall A. Mountain to whom it was referred with a jury at the Essex Circuit Court on Monday, June 8th, 1925. The jury rendered a general verdict against the Defendant and in favor of the plaintiff for the sum of One Thousand Six Hundred Dollars (1,600.00).

Notice of Appeal

To:

Henry Frank, Plaintiff, and
Haines & Chanalis, Esq.,
Attorneys of Plaintiff.

Filed November 6, 1925.

NOTICE OF APPEAL

10 Sirs:

 Please take notice that the defendant, Security
Insurance Company hereby appeals from the whole
of the verdict and judgment in the above cause, to
the New Jersey Court of Errors and Appeals.

 Yours, etc.,
 Joseph T. Lieblich
 Attorneys of Defendant.

20

30

30 Pi

No. 21108

Security Insurance Company

OF NEW HAVEN, CONNECTICUT.

Amount \$ 2000. Rate 2.50 Premium \$ 50.00

In Consideration of the Stipulations herein named and of

Fifty and 00/100 Dollars Premium

Does Insure Henry Frank

for the term of Three years

from the Twenty-ninth day of July 19 20 at noon

to the Twenty-ninth day of July 19 23 at noon

against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Two Thousand Dollars,

to the following described property while located and contained as described herein, and not elsewhere,

to-wit:

Household Furniture Form (Unprotected)

in Mercantile building.

\$ 2000. On household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel and materials for same and in process of making, watches and jewelry in use, plate and plated ware, piano, stool and cover, and other musical instruments, sewing machines, printed books and music, pictures, paintings, engravings, and mirrors, and their frames (at not exceeding cost price), amateur photographic outfit, fishing tackle, firearms, billiard and pool tables, bicycles, trunks, canes and umbrellas, baby carriages, traveling equipments, garden tools and implements, fuel and family stores. Also on property of like kind as above-described belonging to assured's family, except in case such parties have insurance for their own account (guests and servants included, but with the understanding that the contribution to them in case of loss is not to be made until after satisfying loss of assured and family). All while contained in one & 3 brick & frame building while occupied as store and dwelling..... situate on the south side of and known..... as 146 Paterson St., in New Brunswick, N.J......

It is understood that this insurance shall cover door and window screens, awnings, storm doors and windows belonging to assured, while contained in above-described building or stored in outbuildings on the above-described premises.

Privilege to make additions, alterations, and repairs in the within-described premises; to remain unoccupied not exceeding three consecutive months in any one year; to use electricity, gas, and/or kerosene oil for lighting, heating, or cooking purposes; to keep not exceeding one quart of benzine or similar cleaning fluid for domestic purposes in each housekeeping apartment.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the remaining stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY.—This Policy is in a stock corporation.

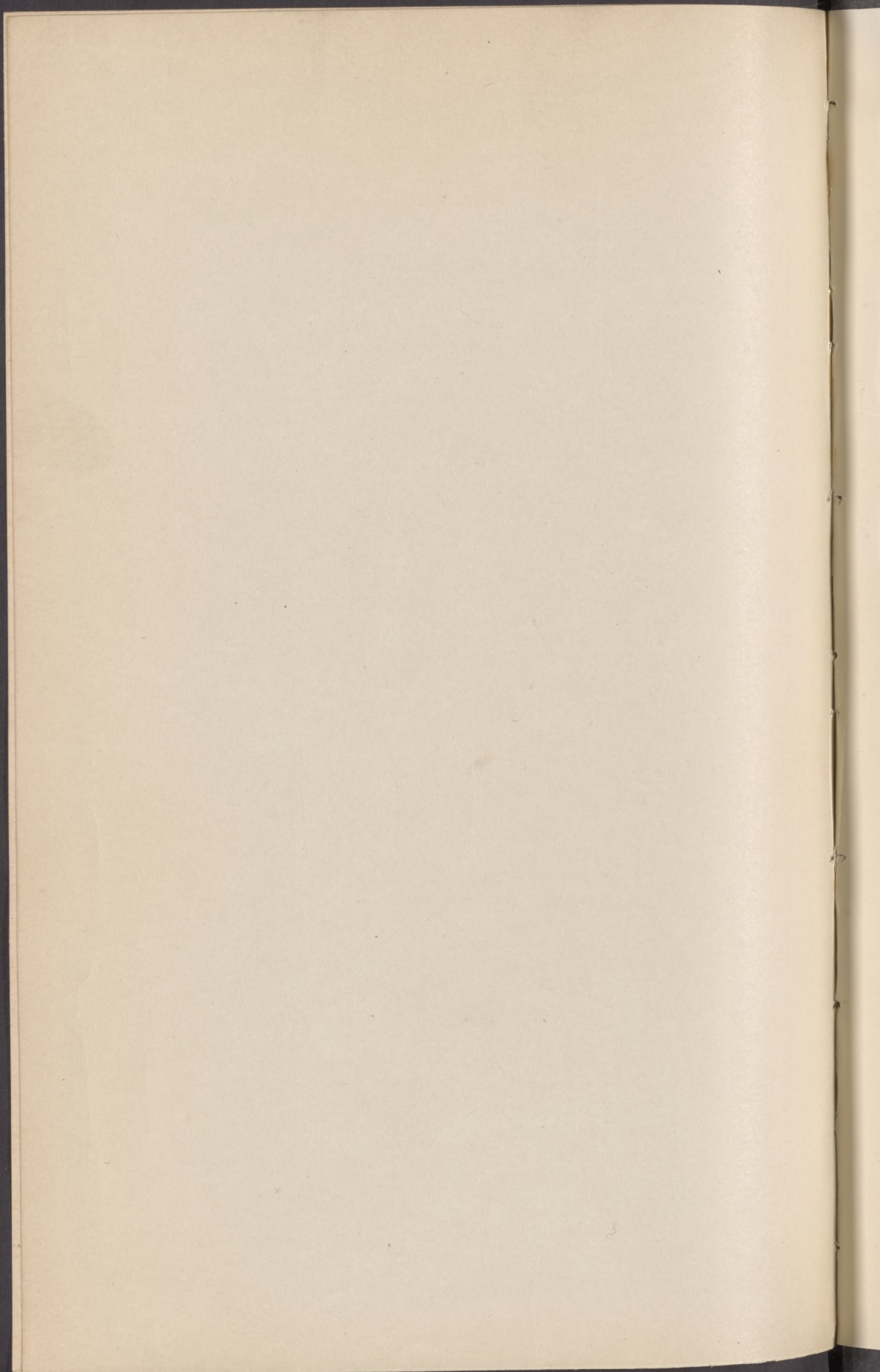
In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Manager or Agent of the Company at New Brunswick, N. J.

Victor Roth Secretary

John W. Alling President
J. J. [Signature] AGENT.

Countersigned at New Brunswick, N. J.

this 7th day of August 19 20



1 This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs,
2 and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for
3 depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same
4 with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if
5 they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined,
6 the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment,
7 estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.
8 It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value,
9 and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time
10 on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be
11 no abandonment to this company of the property described.

12 This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material
13 fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not
14 truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or
15 the subject thereof, whether before or after a loss.

16 This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the in-
17 sured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered
18 in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole
19 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
20 increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or
21 repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other
22 than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in
23 fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with
24 the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this
25 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 in-
26 terest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal
27 process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating
28 gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or
29 manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzene, benzole,
30 dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine
31 or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United
32 States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels,
33 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
34 herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for
35 ten days.

36 This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commo-
37 tion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all rea-
38 sonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring
39 premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but
40 liability for direct damage by lightning may be assumed by specific agreement hereon.

41 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
42 shall immediately cease.

43 This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities;
44 nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements,
45 jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture,
46 tools, or property held on storage or for repair; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance
47 or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise; nor
48 for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole
49 insurance on the building described.

50 If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and
51 a warranty by the insured.

52 In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this
53 company.

54 This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed
55 term, provided that an increase of hazard must be made known to this company at the time of renewal of this policy shall be void.

56 This policy shall be canceled at any time at the request of the insured, or by the ~~company~~ ^{insured} by giving ~~the~~ ^{five} days notice of
57 such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium ~~thereon~~ ^{therein}
58 actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the cus-
59 tomary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata*
60 premium.

61 If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or
62 corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the condi-
63 tions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such
64 interest as shall be written upon, attached, or appended hereto.

65 If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed,
66 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,
67 for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such
68 excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears
69 to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be
70 liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time
71 of fire, whether the same cover in new location or not.

72 If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property
73 from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order,
74 make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and,
75 within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this com-
76 pany, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire;
77 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;
78 all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip-
79 tions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property
80 since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were
81 occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or
82 machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not inter-
83 ested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has
84 examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary
85 public shall certify.

86 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property
87 herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and
88 as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies
89 thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall
90 permit extracts and copies thereof to be made.

91 In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent
92 and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent
93 and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and
94 damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine
95 the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the
96 expenses of the appraisal and umpire.

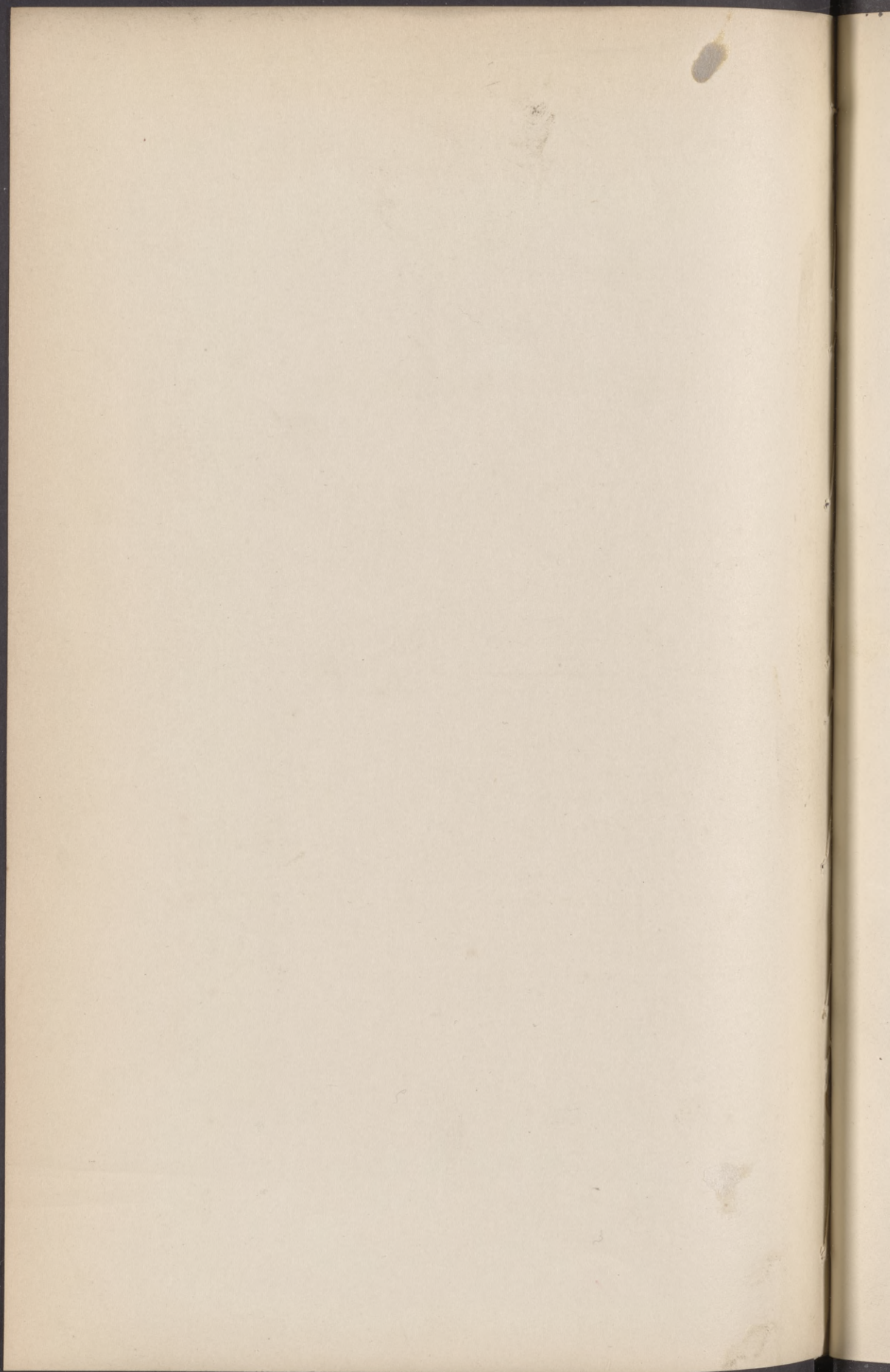
97 This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any
98 requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss
99 shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein
100 required have been received by this company, including an award by appraisers when appraisal has been required.

101 This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for
102 loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole
103 insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application
104 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
105 agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed
106 hereon.

107 If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or publi-
108 cally, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the
109 insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such
110 payment.

111 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
112 full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.
113 Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and
114 wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

115 If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization,
116 membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may
117 be written or printed upon, attached, or appended hereto.



New Jersey Court of Errors and Appeals

Henry Frank,

Plaintiff-Appellee,

vs.

Security Insurance Co.,

Defendant-Appellant.

Brief of Defendant-Appellant

FACTS

The action set forth in the complaint, (page 117) is to recover the sum of two thousand dollars from the defendant by reason of a fire of July 1st, 1923 which fire was confined to the attic of the building in the particular portion used by the plaintiff for storage of wearing apparel and similar effects which were not used during the summer. The plaintiff upon the happening of this fire or within a day or so, retained Charles Selvage of Newark to represent him in the matter and this Charles Selvage claims to have called up Special Agent Strobel to give him notice of the loss. Strobel was not authorized to bind the defendant company in any way, (page 46) and Strobel told Selvage that he had not received any notice from the company, (page 48). Subsequent thereto, an alleged proof of loss is said to have been mailed by Selvage to Mr. Williams. (Exhibit P-4.) This Williams is alleged to have been retained by Special Agent Strobel to carry out the

duties alleged to be entrusted to Strobel but there is no proof in the case of any authority vested in Strobel to do the acts alleged or is there any evidence in Strobel to delegate his authority to Williams, nor is there any evidence of authority in Williams to do the acts alleged to bind the company. The first actual knowledge of this fire which is binding upon the defendant is evidenced by the letter written by the defendant's attorney about fifty days after the fire, (Exhibit P-6a) after which defendant demanded in compliance with policy conditions:

1. That plaintiff file a satisfactory proof of loss.
2. That plaintiff submit to examination under oath.
3. That the loss and damage be determined by appraisal.
4. That plaintiff furnish a Magistrate certificate.

There has been no compliance by the plaintiff with any of these demands with the exception of the submission by the plaintiff to the examination under oath, which defense as interposed by the answer was waived upon the trial.

The defendant had the loss and damage appraised by two competent and disinterested appraisers, to wit, Mr. Van Poznak of Newark and Mr. Leo Goldberger of Perth Amboy. Mr. Van Poznak returned an award of loss and damage in the sum of \$289.50, (page 39) and Mr. Goldberger returned an award in similar sum, (page 74).

The Court refused to grant motion for non-suit by defendant at the close of the case upon the ground that the defendant had waived a compliance of the policy conditions and also refused defendant's motion for a direction of verdict upon practically similar grounds. The case went to the jury who returned a verdict in the sum of \$1600 against defendant.

POINT 1

THE COURT ERRED IN REFUSING TO CHARGE DEFENDANT'S NINTH REQUEST TO CHARGE.

This assignment of error is set forth in the Ground of Appeals as No. 9 and in substance was a request to have the Court charge the jury with respect to any prejudice or influence against a fire insurance corporation by reason of the language employed in the contract.

At the outset, may I say that I made a very careful and extensive search of the records and have asked the Court's stenographer to make a careful perusal of his original notes to ascertain if the policy of insurance upon which plaintiff predicates his cause of action was marked in evidence. I having assumed during the course of the trial that it was so marked but there is no record thereof and apparently plaintiff's counsel failed to offer the same and to have it so marked. If it had been offered, in all probability I would not have objected to the admission thereof in evidence. On taking this matter up with my adversary and his insisting that it had been offered,

I wrote thereon 'Ex. P-1' and have included the same in the record, which I feel to be an act of courtesy to which my adversary is entitled, so that if the Court's refusal to charge the Ninth Request was predicated upon the words 'policy of insurance in evidence' and the policy not having been admitted in evidence, then the keystone of plaintiff's case has fallen for they have failed to prove the contract upon which the cause of action is founded, so that it would be unfair for the Court to have refused to charge this request, while technically correct, on the ground that the policy was not in evidence. I don't think the trial Court had this in mind for I feel that the Court was acting upon the policy being in evidence. If this is a fact, on the back of the policy, which I have failed to set forth in the record and which is annexed to this brief, and the particular form prescribed by the Insurance Commissioner in compliance with the Act of 1902, is printed these words, 'Standard fire insurance policy of the States of New Jersey, Connecticut and Rhode Island', so that eliminating the point that the policy was not in evidence, the Court was under a duty to charge the jury as requested in defendant's Ninth Request to Charge and by reason of the error committed, the judgment should be set aside.

POINT II**THE COURT ERRED IN REFUSING TO CHARGE DEFENDANT'S FIFTH REQUEST TO CHARGE.**

I requested the Court in due time to make the following charge:

"The plaintiff must prove by a fair preponderance of the evidence the actual market value of any property which he alleges was damaged or destroyed by fire on May 2, 1923, and the said proof of damage must be definite and precise and not mere speculation and if you are satisfied that the plaintiff has proven a specific sum as his actual damage by reason of the fire and the defendant is liable under its policy, then you must find for the plaintiff in the specific sum which plaintiff has actually proven as being the amount of the loss and damage sustained."

This request is absolutely within the confines of the issues and testimony in this case and within the provisions of the insurance policy upon which plaintiff is predicating his cause of action. There is no fine point of law involved therein so elementary as to require any citation on my part and it must be obvious to this Court that the failure to charge this request was prejudicial error and merits a reversal of this judgment.

POINT III.**THE COURT ERRED IN ADMITTING TESTIMONY AND EXHIBITS OF ALLEGED SPECIAL AGENTS TO PROVE THEIR AGENCY ON BEHALF OF THE DEFENDANT COMPANY.**

The law is well settled that parol testimony is not admissible by an agent for the purpose of establishing such agency, nor can agency be established to bind a principal by the mere declaration of the alleged agent.

“The declaration of the alleged agent are not competent to prove such an agency, although they are accompanied by acts purporting to be acts of the agency, but of course, such declarations and acts are competent if there is proof of former similar acts or declaration recognized or approved by the principal.”

Aetna Ins. Co. vs. North Western Iron Co., 21 Wis. 458.

Manilla Ins. Co. vs. Houghton, 154 Mass. 465.

Winchester Mfg. Co. vs. Creary, 116 U. S. 161.

Justice Garrison, speaking for our Court of Errors, says:

“The trial Court correctly ruled that there was no proof of Mortimer’s agency, and from this it followed, of necessity, that

the declarations made by him were inadmissible against the defendant.

Notably, the acts and declarations of Mortimer were inadmissible to prove his own agency."

Brounfield vs. Denton, 72 L. 238.

Strobel, a witness on behalf of the plaintiff, testified, (C. p. 26) that he was a SPECIAL AGENT and I particularly call this Court's attention to the testimony, (page 45 to 48) of Strobel and my cross-examination of Strobel (page 48, lines 10 to 30), there is not the slightest scintilla of evidence in this of any authority vested or lodged in Mr. Strobel to bind this defendant with respect to notice or otherwise; the policy of insurance providing that such notice be given to the company in writing, using the word 'company' throughout and the testimony of Mr. Strobel cannot bind this defendant.

Judge Adams, speaking for our Court of Errors, says:

"A person cannot by his own mere assertion prove that he is the agent of another."

Smith vs. Delaware, Atl. Tel. & Tel. Co., 64 Eq. 772.

It goes without saying that the plaintiff was under a duty to make out a prima facie case of agency before it could hope to bind this defendant company and our Court of Errors, speaking through Justice Garrison and Justice Swayze, have held:

"Defendant's right to have plaintiff bear the burden of proof upon the whole case is a substantial right of which the defendant should not be deprived."

Niebel vs. Winslow, 88 L. 191, 95 Atl. 995.

Hughes vs. Atl. City R. W. Co., 85 L. 212, 89 Atl. 769.

And I challenge the plaintiff to show where they have borne the burden of proof sufficient to charge the defendant with the agency of Carl Strobel for the purpose:

1. Of receiving notice of loss.
2. Of accepting or receiving proof of loss.
3. Of authority to waive any term, covenant and condition of the insurance policy.

The plaintiff alleges they dealt with one Fred W. Williams, authorized to represent the defendant. What is the proof to this effect in this case? Mr. Strobel, a witness produced by plaintiff, (page 46, line 30) says:

Q. Do you know if Mr. Fred W. Williams was retained by your company in connection with this fire loss A. Why, I could not get to the loss on account of other work and I requested Mr. Williams to go and look at it and investigate it and endeavor to secure the measure of damage and then report to me.

And acting upon this testimony of this alleged Special Agent, the Court subsequently admitted

in evidence, over my objection Exhibit P-4, P-5 and P-6. Was this action on the part of the trial Court justified in law? It may not be amiss to recall to your mind the maxim '*delegata potestas non potest delegari*' or as stated by Justice Green, speaking for our Court of Errors:

"An agent or broker whose employment involves any exercise or judgment or discretion may not transfer to another the right of power to discharge his own duty."

Ryer vs. Turkel, 75 L. 684.

Assuming for the purpose of this argument, that even if SPECIAL AGENT Strobel's authority to bind the defendant for any purpose had been proven by the plaintiff by a fair preponderance of the evidence, the Court erred in the admission of the testimony and of the exhibits because the case is absolutely devoid of any proof to the effect that the defendant, with full knowledge ratified any delegation of authority by Strobel to Williams or as Justice Trenchard, speaking for our Court of Errors, says:

"The rule that an agent cannot delegate his powers, unless the sub-agency be directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial."

Calhoon vs. Buhre, 75 L. 442.

Would this Court say that the alleged action of Williams and Strobel to bind the defendant with respect to a compliance with policy condi-

tions would be purely ministerial acts? Would the ascertainment and determination of loss and damage sustained as a result of the fire, require not only discretion but additional experience? A ministerial act does not require particular confidence in the person delegated to perform such an act but wouldn't common sense and logic dictate that it would require considerable confidence for an Insurance Company to entrust its interest for the purpose of ascertaining loss and damage in one having considerable discretion and if we assume that SPECIAL AGENT Strobel was the defendant's agent entrusted with the adjustment of the loss, this Court has held:

"An agent sent by an Insurance Company to adjust the loss has no implied power to delegate his authority to another."

Dwelling House Ins. Co. vs. Snyder, 59 L. 18.

So that it is evident that the Court erred in the admission of the testimony of Special Agent Strobel to establish authority to bind defendant and to prove his agency on behalf of defendant company and in the admission of the exhibits complained of, i.e., the correspondence between Selvage and Williams, sufficient to warrant this Court in setting aside the verdict.

POINT IV***COURT ERRED IN REFUSING TO INSTRUCT WITNESS TO MAKE RESPONSIVE ANSWERS TO QUESTIONS PROPOUNDED BY DEFENANDT'S COUNSEL.***

This point is directed to the testimony in the case beginning page 21 to 25 and 57 to 59 inclusive. The trial Court in his discretion, over my objections, had permitted Irving L. Selvage to testify as an expert as to loss and damage sustained by fire and had also admitted over objection Exhibit P-19, which was supposed to be a copy of a schedule of the quantity, items, cash value, loss or damage, which is alleged to have been delivered by this witness to Fred W. Williams, the alleged Special Agent, TO WHOM AUTHORITY IS ALLEGED HAD BEEN DELEGATED to bind the defendant by SPECIAL AGENT Strobel, and which statement is supposed to have been prepared by this witness and which statement is further supposed to represent the expert's opinion as to the value and loss and damage on the items set forth in the exhibit, and at its best, even if admissible to bind the defendant, was secondary evidence; there being no legal foundation laid for its admission.

It must be apparent to this Court that this witness Selvage was not the average witness presented for cross examination but apparently was a highly trained individual, having been in attendance at the New York Law School, (page 63) and without the aid of the Court, counsel was powerless to compel the witness to make a full,

true and responsive answer to the question propounded, especially where the trial Court had knowledge of the financial interest of this witness in the outcome of this litigation, page 19).
Extract (page 21, line 11):

Q. You were not there at the time of the fire, were you? A. There was plenty of evidence. I just looked over the building schedule.

Mr. Lieblich—I move to strike that out, etc.

Mr. Chaanalís—It seems a proper answer.

The Court—I will not strike it out.

(Defendant's counsel prays an exception to this ruling of the Court. Exception noted as ground of appeal.)

On the bottom of page 57:

Q. I am referring to this particular case, this particular list, Exhibit P-19, are those figures in the last analysis your figures, your judgment, your opinion or conclusion of the value, loss and damage, yes or no? A. In the vast majority of cases, yes.

Q. No, no, no. A. Not in every single case, no.

Mr. Lieblich—I move that the answer be stricken out and that the witness be requested and instructed to answer the question.

The Court—I will not strike it out. The witness is on the witness stand to tell the truth and he has a right to qualify his answer; I do not require witnesses to answer yes or no. Proceed.

Q. Referring to Exhibit P-19, are these figures designated 'value and loss' in the last analysis your conclusion, opinion or judgment of the value or loss and damage in this particular case? A. In the vast majority of cases they are mine, in some cases I suppose they would be the assured's.

Mr. Lieblich—I submit I have a right to have an answer.

The Court—You have it. Proceed.

(Defendant's counsel prays an exception to this ruling of the Court.) 4 to page 59.

It appears to me as heretofore set forth in this particular point, that the Court erred in failing to instruct the witness to make responsive answers to the questions which subsequently resulted in error on the part of the trial Court in admitting this schedule in evidence as Exhibit P-19. The trial Judge himself had previously stated:

“The only objection I can see is the objection to his refreshing his recollection from them, because I do not think they are evidential.” (C. p. 24, line 15.)

By reason of the error committed by the trial Judge, the plaintiff had the benefit of having the jury receive Exhibit P-19 and the figures thereon delineated which may have had more weight with

them than the parol testimony of defendant's appraisers, Mr. Van Poznak and Mr. Goldberger that the loss and damage which plaintiff had sustained was \$289.50, consequently, the error complained of by the trial Court and the failure of the Court to instruct the witness to make responsive answers when appealed to by defendant's counsel, was sufficient error to warrant a reversal of this judgment.

POINT V

COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR NON-SUIT UPON THE GROUND THAT THERE WAS NO PROOF OF NOTICE AS REQUIRED BY POLICY.

This contract, irrespective of what might be said that Insurance Companies may be semi-public institutions, is after all nothing more or less than a contract and when the parties enter into a solemn contract, particularly one which has the approval of Legislative enactment and in fact is a contract prescribed by law, the parties, I take it, are called upon to comply literally with the said contract. An examination of the contract sued upon in this case discloses the following language employed:

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

(Exhibit P-1, line 67.)

Of course, I can see where the word 'company' can be construed to mean that the written notice may be given to one properly authorized to bind the company since corporations must act through individuals as agents, but, I cannot see where a construction can be put upon this contract that a telephone call to an alleged SPECIAL AGENT can be construed to be a compliance with this covenant requiring NOTICE IN WRITING, nor any alleged conversation with a SPECIAL AGENT to whom authority has been alleged to have been delegated by another Special Agent be held to be NOTICE IN WRITING to the company.

I have heretofore cited the pronouncement of Justice Garrison in the Niebel case and Justice Swayze in the Hughes case, with respect to the burden of proof, giving the plaintiff's case the most favorable aspect it is devoid of anything establishing notice to the defendant for a period of at least fifty days, to wit, Exhibit P-62. I take it that this man Selvage has been negligent in his conduct toward his client or if he did not have sufficient knowledge of the insurance policy to properly protect the interest of his client, this Court should not be called upon to make a new or better contract for the parties:

"The judicial function of a Court of law is to enforce a contract as it is written."
Kupfersmith vs. Del. Ins. Co., 84 L. 271.

Nor should this Court read into this contract, by reason of Selvage having attempted to deal with alleged Special Agents of the defendant, the

receipt by the defendant of notice as prescribed by the contract between the parties and isn't it fair to defendant to assume that if an unauthorized person who is honest, finds or receives something which he knows does not belong to him, for him to take the particular item or what it may be, and send it or deliver it to the party to whom it belongs. Assuming then that Selvage did correspond with Williams and when Williams found that he had no authority from the defendant or Strobel, as the case may be, that the matter was brought to the attention of the defendant who then referred the matter to counsel for attention, then the first actual notice to bind the defendant is evidenced by Exhibit P-6a under date of Aug. 20th. The testimony with respect to notice is as follows:

Q. Did you do anything else in addition to making a schedule? A. I did. When I got home that night or the first day I was on the premises, I called up Carl Strobel who is SPECIAL AGENT of the Security Insurance Company.

(Record, page 26, lines 1 to 10.)

The plaintiff produced SPECIAL AGENT Strobel as their witness whose testimony is on page 48. Let us see what he says:

Q. What was the conversation, if any, between you and Mr. Selvage? A. He called me up one morning and told me he had a loss of Frank and I told him I

knew nothing about it, I had NOT RECEIVED ANY NOTICE.

(Record, page 48, lines 15 to 20.)

Consequently, unless this Court will hold that a telephone call to a Special Agent, whose authority to bind the defendant has not been proven, then there has been an absolute failure on the part of plaintiff to comply with this covenant. Justice Parker, speaking for Supreme Court, in a recent case which is not official reported, says:

“Where a policy of insurance on a motor truck provided that ‘in the event of loss or damage, the assured shall forthwith give notice thereof in writing to this company’ and it is shown without dispute that no notice of any kind was given for at least forty days and no sufficient reason appeared for any delay, the question whether such notice was ‘forthwith’ is a question for the Court.”

Macchia vs. Scottish Union Ins. Co., N. J. Adv. Report, Vol. 3, page 707. 128 A. 244.

Which opinion has been cited with approval by Justice Katzenbach, speaking for this Court in Billet vs. Penn. Ins. Co., Adv. Reports, Vol. 3, page 982; and last but not least, the contract provides for immediate notice in writing. It is admitted that no notice in writing has ever been given to this company, consequently I take it that this trial Court in his refusal to grant the motion has over-ruled the decision of this Court,

wherein Justice Katzenbach, speaking for this Court had said:

“The policy provided that the assured should give notice to the company or its authorized agent, immediate written notice of any accident causing loss covered by the policy—there was also no testimony offered that the person with whom Simon had talked was an authorized agent of the company—it was not pretended that Simon had given or was prepared to give any notice in writing to the company.”

Lehrhoff vs. Continental Ins. Co., 128 Atl. page 245. (Opinion filed Mar. 16, 1925, not officially reported.)

Consequently it is apparent where the policy provides that notice of loss shall be in writing as in this particular policy, that the burden is upon the plaintiff to comply with this covenant.

While it may be argued that this defendant did not deny liability to the present plaintiff by reason of the failure to comply with the covenant as to notice and consequently waived the same, it is to be observed that in Exhibit P-6a, page 98, the defendant expressly reserved its rights under the policy against any waiver, which on its face would adversely dispose of such an argument. For the reasons herein assigned, defendant's motion for non-suit should have been granted.

*POINT VI**COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR NON-SUIT UPON THE GROUND OF FAILURE TO FILE A SATISFACTORY PROOF OF LOSS.*

The policy (Exhibit P-1, lines 67 to 80) provides what the proof of loss shall contain and further provides, (lines 93-95):

“And the loss shall not become payable until sixty days after the NOTICE, ASCERTAINMENT, estimate and SATISFACTORY PROOF OF LOSS herein required have been received by THIS COMPANY.”

It being universally recognized that:

“A policy of insurance is a contract of indemnity and one of the utmost good faith.”

A strict construction thereof, in accordance with the doctrine enunciated by this Court in *Mick vs. Royal Ins. Co.*, 87 L. 607, and re-affirmed by Chancellor Walker in the very recent case of *Del Gudicio vs. Importers Ins. Co.*, would hold that the plaintiff must literally comply with the covenant set forth in lines 67 to 80 of Exhibit P-1. Isn't the defendant then entitled to the protection of this Court to compel a compliance with this covenant in view of their SPECIFICALLY POINTING OUT to plaintiff the defects (Ex. P-6a) in the proof of loss and giving them an opportunity to correct the same, the contract of

insurance being "A personal contract" and the defendant being entitled to a literal compliance under oath by the policy holder; so that any false statement or willful misrepresentation might have a proper legal significance as between the parties and the proof in this case being clear and conclusive that notwithstanding the receipt by plaintiff of Exhibit P-6a, yet he failed to file a new proof of loss or to correct the unsatisfactory proof of loss; and the loss not being payable until policy holder filed a satisfactory proof of loss, the Court erred in failing to grant the motion for non-suit, which error warrants a reversal of this judgment.

POINT VII

COURT ERRED IN REFUSING TO GRANT MOTION FOR NON-SUIT FOR FAILURE TO APPRAISE AS PROVIDED BY POLICY.

An examination of the record discloses:

"And the claim is in excess of any damage which you may have sustained." (Ex. P-6a).

"We thank you for your letter on the 5th inst.—but when we tell you that the amount computed by your appraiser, of \$289.50, etc." (Ex. P-14.)

"Total amount claimed of this company under above mentioned policy \$2000." (Ex. P-7).

It shows conclusively that the defendant disagreed with plaintiff as to amount of loss and damage sustained, that while the plaintiff had made a claim for \$2000, defendant stated in the letter of December 5th, 1923, that the loss and damage was in the sum of \$289.50. A disagreement having arisen between the parties (Radwanski vs. Scottish Union Ins. Co., opinion filed Supreme Court Nov. 24, 1924, not officially reported) the burden was upon the plaintiff to prove, (Niebel vs. Winslow, Supra.) a legal demand upon defendant to appraise the loss and damage, for the appraisal covenant has been held to be a condition precedent to recovery by this Court.

“A stipulation in a policy of insurance making an appraisal of the amount of the loss or damage a prerequisite to a suit upon the instrument is legal.”

Wolff vs. L. L. & G. Ins. Co. 50 L. 483.

Reed vs. Firemen's Ins. Co. 81 L. 523.

I particularly call this Court's attention to the reason of the trial Court in denying the motion, (case, page 70). I assume that the trial Court intended to predicate his refusal upon the ground of waiver, which he has correctly defined. Where is the evidence to substantiate a finding of waiver: it being defined as the voluntary relinquishment of a known right, it must of necessity be made by a duly authorized agent either actually or constructively; consequently, if any importance can attach as a matter of law to Exhibit P-4, to bind the defendant and this Court

is inclined to follow the pronouncement of Justice Parker and Justice Katzenbach, speaking for our Supreme Court, through the Chief Justice, wherein he says:

“The last ground upon the motion to non-suit was rested was that the plaintiff was barred of his right of action because of his failure to comply with a demand made upon him by the defendant for an appraisal—the contention being that the policy required compliance with such a demand when made by the insurer; but this is not the fact. The policy only provided for an appraisal. ‘In the event of disagreement as to the amount of loss,’ and there is nothing in the proofs to suggest that there was any dispute between the parties over this matter.”

Radwanski vs. Scottish Union Ins. Co.
Supra.

Then as far as Exhibit P-4 is concerned, if this Court should hold that the demand upon Williams, a Special Agent (no proof of authority) who was employed by SPECIAL AGENT Strobel (no proof of authority) was sufficient to bring home to the defendant a demand for appraisal, then on July 18th, 1923, there was no disagreement and in the language of the present Chief Justice:

“There is nothing in the proofs to suggest that there was any dispute between the parties over this matter.”

Radwanski Case Supra.

Proceeding a little further and subsequent to July 18th, it becomes apparent upon examination of Exhibits P-6a, P-7 and P-14, that along in December, a disagreement had arisen which called for the application of the doctrine enunciated by this Court in the Wolff & Reed cases, supra., and if these last cited cases are still good law, the failure of the plaintiff to prove a compliance therewith after disagreement or evidence sufficient to establish a legal waiver by defendant was sufficient to have merited the granting of the motion for which error of the trial Court, the verdict should be set aside.

POINT VIII

COURT ERRED IN REFUSING TO GRANT MOTION FOR NON-SUIT ON GROUND THAT PLAINTIFF FAILED TO FURNISH A CERTIFICATE OF A MAGISTRATE.

Almost a century has rolled by since the decision in Roumage vs. Mechanics Ins. Co., 13 L. 110, was rendered and I take it that our legislature in 1913 in redrafting and reenacting the Standard Fire policy and re-incorporating the provisions which apparently existed in the insurance policies issued at the time of the Roumage decision, to wit:

“The insured—and shall also, if required, furnish a certificate of the magistrate or Notary Public—living nearest the place of fire, etc.” (Ex. P-1, lines 77-80).

intended to give the Insurance Companies some protection since this provision will at least help to establish the general reputation of a claimant in his community and assist in the determination whether it was a designed or accidental fire.

The plaintiff has offered in evidence Exhibit P-16 and P-17, establishing conclusively that defendant made the demand for a Magistrate certificate and admitting that no certificate as contemplated by the policy provisions has been filed or furnished to defendant, a compliance with this demand for the Magistrate certificate being a condition precedent to the right to recover insurance money. (Roumage vs. Ins. Co. Supra.) There is no time limit set in the policy in which the company must make this demand, there was no question of fact involved as to whether there was or was not a compliance and the Trial Court, (page 71) undertook and determined, as a matter of law, that the defendant waived a compliance with this policy condition, for which error the judgment should be reversed.

POINT IX

COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT IN DEFENDANT'S FAVOR.

Page 81 of the record will disclose the four grounds upon which I predicated my motion; the first of which is:

- (a) FAILURE TO SEPARATE DAMAGES

ED FROM UNDAMAGED PERSONAL
PROPERTY.

Exhibit P-1 provides:

“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 from the undamaged personal property, put it in the best possible order, making a complete inventory of the same, etc.” (lines 67 to 70. — Exhibit P-1).

An examination of the record will disclose that the fire was confined to the rear portion of the attic, but there was some resulting damage by water and smoke. The plaintiff testified:

Q. “What did you mean when you said in response to counsel’s question. ‘I had the stuff laying there just as it happened for six or seven weeks’?” A. What did I mean?

Q. Yes. A. Well, we didn’t try to do anything, you know it was waiting for the agent. (bottom page 8)

Q. As a matter of fact, the fire was confined to the attic? A. Yes sir.

Q. There was no fire on the second floor? A. No.

Q. Just in the attic, the storeroom? A. Yes sir. (bottom page 11)

The plaintiff’s wife testified on direct examination:

Q. After the fire took place, you kept the burned goods up there, did you? A. They were up there three months. Q. What happened to some of the goods after three months, if anything? A. Some we took away and some we got there yet.

(Record, bottom page 64 and 66.)

An examination of this testimony must convince this Court that this plaintiff did not comply with this policy condition and did not put the PROPERTY IN THE BEST ORDER and separate the damaged from the undamaged property in order to reduce the damages resulting from the fire and upon these admissions on the part of the plaintiff, the Court erred in failing to grant defendant's motion for a directed verdict.

(b) FAILURE TO FURNISH A SATISFACTORY PROOF OF LOSS.

I re-iterate what I said in Point 6 of this brief with respect to this motion for a direction and in addition thereto, wish to call this Court's attention to the fact that the defects pointed out to the plaintiff in Exhibit P-6a, with respect to the proof of loss, were never complied with by plaintiff and we have specifically pleaded this in the Third Separate Defense so that plaintiff had notice thereof, still they did not produce Mr. Williams or subpoena him to produce the schedule of items which Selvage claims he delivered to him, so that this Court must find that Williams who was retained by Special

Agent Strobel was authorized to bind the defendant by the receipt of the schedule which in turn would be a sufficient compliance with Exhibit P-6a to help make P-7 a satisfactory proof of loss and what is the evidence directed to the respective authority.

Q. What are your duties. (objection by Mr. Lieblich, etc.) A. The appointment of agents, establishment of risks, payment of losses, collection of balances. Q. Do you know Fred W. Williams? A. I do. Q. Who is he? A. An adjuster of losses. Q. Do you know if Williams was retained by your company in connection with this fire loss? A. Why, I could not get to the loss on account of other work and I requested Williams to go and look at it and investigate it and endeavor to secure the measure of damage and then report to me. By the Court: He was to report the estimated loss to you? A. Yes sir. Q. Didn't you retain Mr. Williams to adjust the loss? (objection by Mr. Lieblich.) The Court: Adjust this loss. Mr. Chanalis: Yes. The Court: I will admit it.

(Exception noted.) Case page 45 to 47.

It is evident that this was error on the part of the Trial Court, because:

1. The testimony of Strobel was inadmissible to prove agency.
2. There is no evidence that Special Agent Strobel was authorized to adjust losses or to retain Williams.

3. If Strobel was authorized to adjust losses, he had no authority to re-delegate his authority.

4. No proof of ratification by the company with knowledge of the delegation of authority from Strobel to Williams.

The plaintiff recognizing the materiality and value of the 'schedule' and its effect in failing to attach it to the proof of loss, says:

The Court: What is the purpose of this schedule?

Mr. Chanalis: THAT IS PART OF THE PROOF OF LOSS, etc.,

The Court: If the proof of loss has been admitted, why do you want this schedule?

Mrs. Chanalis: Because its supposed to be part of the proof of loss. In other words, THE PROOF OF LOSS, AS IT IS, IS DEFECTIVE WITHOUT THE SCHEDULE.

(Record, pages 49 and 50).

In view of this admission by the plaintiff and the failure to furnish same to the defendant or a duly authorized agent after the notice of the defects in the proof of loss, (exhibit P-6a) and the errors of the trial Court in the admission of the testimony, it appears conclusively that there has been a failure of performance as contemplated by the parties and defendant should have prevailed on the motion, sufficient to warrant this Court in a reversal of the judgment below.

(c) REFUSAL TO GRANT MOTION
FOR DIRECTION BECAUSE OF THE

**FAILURE TO APPRAISE AS SET FORTH
IN THE FIFTH DEFENSE.**

In the seventh Point of this brief, I have endeavored to set forth the grounds of my motion to non-suit on this point, upon the theory that the appraisal was a condition precedent to the right of recovery and in addition thereto, in the Fifth Defense of the answer, I have specifically pleaded the failure to appraise as a defense, and I rest upon the authorities set forth in the seventh point of this brief.

**(d) REFUSAL TO GRANT MOTION
FOR DIRECTION BECAUSE OF FAILURE
TO FURNISH MAGISTRATE'S CERTIFICATE.**

This proposition was raised on the motion for non-suit in Point eight of this brief and is specifically pleaded as the Fourth Defense in my answer. It is admitted that there has been no compliance therewith, consequently, if it is not a condition precedent, the defense is conclusively established by the plaintiffs admission of failure to comply therewith and the failure to establish a waiver by a duly authorized representative of the defendant, therefore the Court erred in failing to grant motion for a direction which error warrants a reversal of this judgment.

POINT X

**THE COURT ERRED IN CHARGING THE
JURY.**

In my assignments of error, in respect to the

charge, I have set forth nine specific points of error which were greatly prejudicial to the defendant, to wit:

(a) Carl Strobel delegating his alleged authority to Fred Williams.

(b) With respect to the entire testimony of Carl Strobel.

(c) With respect to Mr. Strobel's alleged admission as to his authority to bind the defendant.

(d) With respect to the alleged authority of Fred Williams to bind the defendant.

(e) With respect to the prejudicial statement of the Court wherein the Court said: "without running through the correspondence, the parties went back and forth and pointed out part of the policy in piecemeal manner in a sort of a nibbling proceeding until the action was instituted."

(f) With respect to the waiver of the notice.

(g) With respect to separating the damaged from the undamaged personal property, putting it in the best possible order, etc.

(h) With respect to making a complete inventory.

(i) With respect to the authority of Fred Williams and Carl Strobel and the delegation of authority from one to the other, and its effect to bind the defendant.

Part of this erroneous charge is found on page 83, lines 5 to 15, and the Court plainly says:

**SECURITY INSURANCE COMPANY OF NEW HAVEN,
COR. ELM AND CHURCH STREETS, NEW HAVEN, CONN.**

JOHN W. ALLING, PRESIDENT.
E. G. STODDARD, VICE-PRESIDENT.

VICTOR ROTH, SECRETARY.
WILLIS PARKER, ASS'T SECRETARY.

W. A. THOMSON, TREASURER.

DIRECTORS.

JOHN W. ALLING.
E. G. STODDARD.
JOHN T. MANSON.
CHAS. H. NETTLETON.

JAMES S. HEMINGWAY.
D. A. BLAKESLEE.
ELI WHITNEY.

JAMES T. MORAN.
ARNON A. ALLING.
VICTOR ROTH.
JULIUS G. DAY.

Standard Fire Insurance Policy of the States of
New Jersey, Connecticut and Rhode Island.

Expires July 29, 1923
Property Fur. 146 Paterson St.,
Amount \$2000.00
Premiums \$ 50.00
Henry Frank.

No. 21108

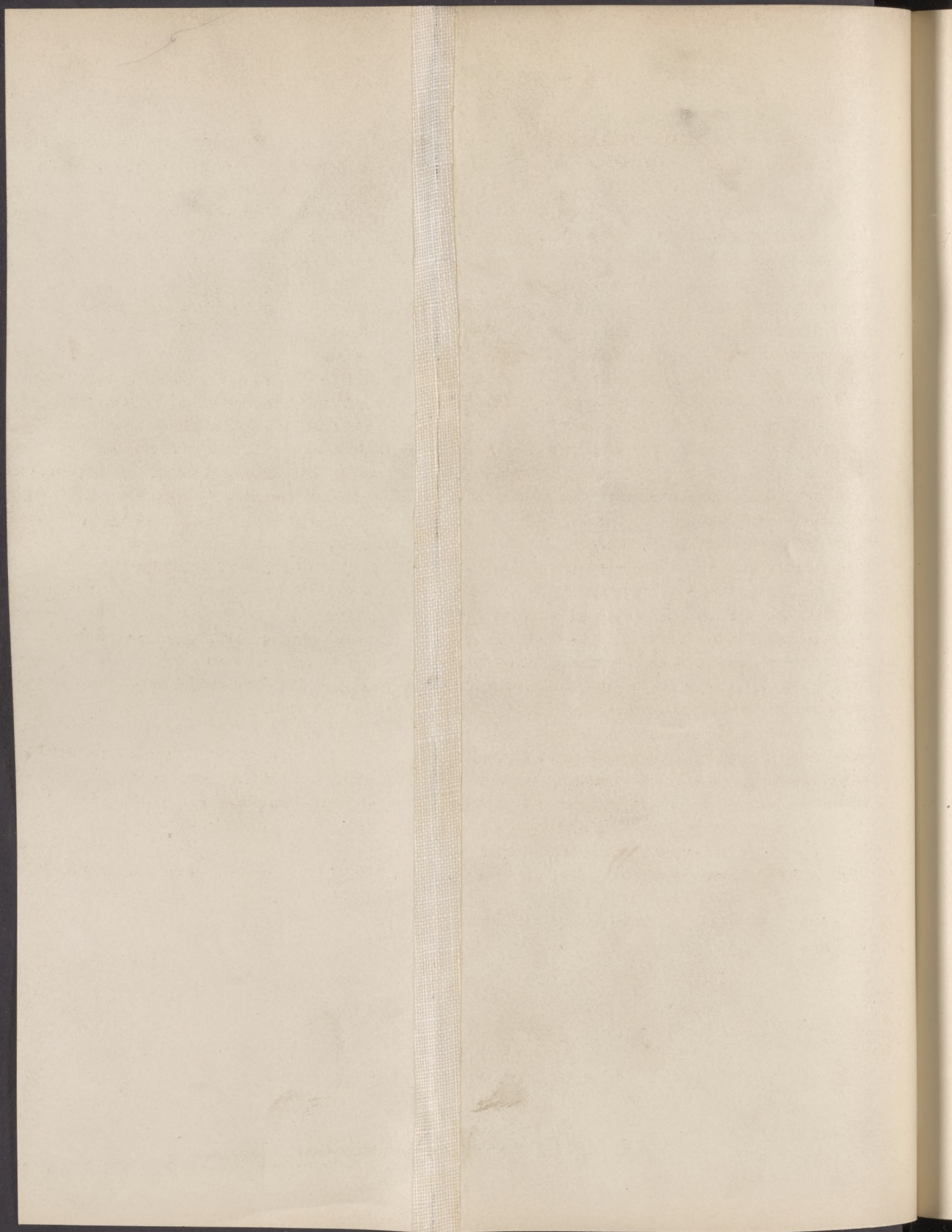
INCORPORATED 1841

**Security
Insurance Co.**

OF NEW HAVEN, CONNECTICUT.

CASH CAPITAL, \$ 1,000,000

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.



“Strobel—representing the defendant company—delegated some of his duties to Williams—etc.”

I am then forced to one of two conclusions; either the Court's interpretation of the law is correct or the authorities and my conclusion as expressed in Point three of this brief are sufficiently meritorious to warrant a reversal.

If this Court should conclude that Strobel could 'delegate some of his duties to Mr. Williams', then I assume that there was no error in the Court's charge, particularly with respect to Mr. Williams, as set forth on pages 83 and 86 of the record; but if the Court should agree with me, that the latin maxim '*delegata potestas non potest delegari*', is good law, then the charge is erroneous and prejudicial to the interest of the defendant, sufficient to warrant a reversal of this judgment.

I am inclined to believe that no particular benefit can accrue to my client by lengthening this brief and specifically arguing each of these nine assignments of error with respect to the charge, the charge being a comparatively short one, these prejudicial errors herein set forth and as raised by my exceptions can clearly be conceived by the Court except the particular error assigned in paragraph 'e'. I think these remarks were entirely uncalled for by the Court and were highly prejudicial to defendant's interest, they being a determination by the Court instead of the Court referring this matter to the Jury to determine whether or not the defendant did 'in a piecemeal manner, in a sort of nibbling proceeding' endeavor to conserve the interest and wasn't it for

the jury to determine whether or not the defendant was justified or had the right under the contract to make these demands as the condition arose in the course of the negotiations of the respective rights accruing to the respective parties.

ARGUMENT

I have endeavored in a clear and concise manner as I know how, to bring before this Court the errors complained of. It is to be understood, however, that the assignment of errors were filed prior to the delivery to us of the transcript of the testimony, etc., by the Court's stenographer, for upon the trial of the cause, I have taken numerous exceptions to the admission of evidence which I have not raised in this brief for the reason that I understand the law to be that having failed to raise these points in the assignment of errors, I am precluded from arguing them in this brief, however, if my understanding of the law be incorrect, it must become apparent to this Court upon examination of the record, that numerous objections which I have made to the admission of evidence are well founded in law and the Court erred in the admission of such evidence.

I take it that the function of this Court is to ascertain from the record if the defendant has sustained a substantial injustice by the erroneous ruling of the Court and if so, then the judgement should be reversed and for nothing holden.

Respectfully submitted,

JOSEPH T. LIEBLICH

Of Counsel with Defendant.

New Jersey Court of Errors and Appeals 10

HENRY FRANK,
Plaintiff-Appellee,

vs.

SECURITY INSURANCE Co.,
Defendant-Appellant

On Appeal From
the New Jersey
Supreme Court,
Essex County.

Brief of
Plaintiff-Appellee. 20

STATEMENT OF FACTS.

The Appellee must take issue with the Appellant in the statement of the facts as they appear in its brief.

The fire, in question, occurred on July 1st, 1923. The morning after, the Appellee notified, by telephone, one, James O'Connell, agent for the Appellant, of the fire (S. C., page 5). While the fire was confined to the attic, household goods and other personal property throughout the house, which were covered by the policy of insurance, in question, were damaged by water and smoke (S. C., pages 5, 41, 56, 111 and 112). 30

On the day after the fire Charles Selvage and Company, fire adjusters, through I. Lester Selvage, was employed by the Appellee to represent 40

him in connection with the said loss. On the evening of the same day Mr. Selvage notified, by telephone Mr. Carl Strobel, agent of the Appellant, of the said fire and proceeded, during the next few days, to prepare a written schedule and appraisal of the articles damaged or destroyed as the result of the said fire. The schedule is Exhibit P-19 (S. C., page 111).

A few days later Mr. Strobel sent Mr. Fred Williams, a fire adjuster, to the scene of the fire and on behalf of the Appellant "to examine the fire, the origin, how it happened, the conditions, whether the insured was covered, securing the measure of damages and then reporting, sending his paper to me" (S. C., pages 47-48). Mr. Selvage met Mr. Williams on that occasion and conferred with him and handed to him a copy of the schedule, which he accepted.

On July 18th, 1923, Mr. Selvage mailed to Mr. Williams a letter (Exhibit P-4, S. C., page 95) enclosing a proof of loss covering the said fire (Exhibit P-7, S. C., page 99). In the said letter an offer of settlement made by the said Williams, was rejected and an appraisal was suggested on behalf of the Appellee. On July 21, 1923, Mr. Williams replied to said letter, acknowledging receipt of said proof and demanding a schedule of the loss (Exhibit P-5, S. C., page 96). On July 24th, 1923, Mr. Selvage answered said letter, reminding Mr. Williams, that said schedule was handed to him at the scene of the fire and requesting him to attach the same to the proof (Exhibit P-6, S. C., page 96). Neither Mr. Williams nor anyone else, on behalf of the Appellant, made any reply to this letter.

Nothing further was heard from the Appellant until a month later when the Appellee received a

letter from Mr. Joseph T. Lieblich, Attorney for the Appellant, in which he demanded of the Appellee to submit to an examination under oath (Exhibit P-6a, S. C., page 97). From then on all negotiations were conducted with the Appellant through its said counsel. On the following day Mr. Selvage wrote to Mr. Lieblich consenting to said examination and requesting him to fix a date for the same (Exhibit P-9, S. C., 101). Although repeated written demands were made upon Mr. Lieblich to conduct said examination (Exhibits P-12, P-13 and P-14, S. C., pages 104, 105 and 106), said examination did not take place until January 17th, 1924 (Exhibit P-16, S. C., page 107), and was not concluded until some time thereafter.

The Appellee immediately after the fire had the premises cleaned up and the articles that were not so much damaged were repaired and used again (S. C., page 8). The articles in the attic, where most of the damage occurred, were bundled up and kept there to give the agents of the Appellant an opportunity to examine them. A period of almost three months having elapsed after the fire and no one having appeared after Mr. Williams, to examine the damaged goods, the Appellee caused to be thrown out more than half of the damaged clothes in the attic as they were a total loss (S. C., pages 64-65).

On September 27th, 1923, about three months after the said fire the Appellant sent Mr. Goldberger and Mr. Von Poznak to appraise the amount of the loss caused by the said fire and they reported it to be only Two hundred and eighty-nine Dollars and Fifty Cents (\$289.50), although the said schedule, containing the appraisal made immediately after the fire by Mr. Selvage showed

a loss of Two thousand one hundred and seventy-seven Dollars (\$2,177.00) (Exhibit P-19, S. C., pages 111, 112, 113, 114 and 115). The Appellee who was with the said Appellant's appraisers at the time they visited his said premises testified that they did not open any of the bundles in the attic when they made their appraisal, and were there only five minutes (S. C., pages 76 and 77). His daughter also testified that said appraisers were in the attic at most ten minutes (S. C., page 78).

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On January 15th, 1924, more than six months after the fire, the Appellant, through its said counsel, demanded an appraisal and Magistrate's certificate (Exhibit P-16, S. C., page 107). The Appellee did not comply with the said demands, for by reason of the great delay it had become impossible to do so (Exhibit P-17, S. C., page 109). The said Messrs. Goldberger and Von Poznak were the only witnesses offered by the Appellant and the jury rendered a verdict in favor of the Appellee and against the Appellant in the sum of One thousand and six hundred Dollars (\$1,600.00).

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Under point one in the Appellant's brief, while not relevant to the issue thereunder, there is stated that the policy of insurance, in question, was not marked in evidence and that there is no record of it having been offered. An examination of said policy discloses the marking of "Ex. P-1," made by the Court Stenographer at the time of the trial. It was offered in evidence and apparently the Court Stenographer neglected to include it in his record. That it had been offered is further evidenced by the fact that both counsel and the Court below treated the policy throughout the trial as if it had been introduced. Counsel

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for the Appellant is mistaken when he states that upon insistence of counsel of the Appellee and as a matter of courtesy on his part he included it in the record. The matter was never discussed in any way between respective counsel and the Court Stenographer stated that he informed a representative of counsel for the Appellant as to the above circumstances at the time he was preparing his State of Case. It is respectfully submitted that the courtesy referred to is feigned as an examination of the record in this case will disclose that counsel for the Appellant interposed throughout the trial almost every conceivable technical objection in an apparent effort to prevent the issue in the case being tried on its merits. The State of Case does not include the said policy of insurance and the Appellee is filing it with the Clerk of this Court. 10 20

POINT I.

The Court did not err in refusing to charge Defendant's ninth request.

There is no proof in the case that the policy of insurance in question was a standard fire insurance policy of the State of New Jersey. Even if there had been, the request to charge as worded by the Appellant would have been prejudicial to the rights of the Appellee. The contract of insurance was voluntarily entered into by the parties thereto. Furthermore, the Appellant unjustifiably assumes that the jury felt that the "language contained therein was harsh and technical" and that the jury was prejudiced thereby. 30 40

POINT II.

The Court did not err in refusing to charge Defendant's fifth request.

10 It is respectfully submitted that this request to charge had already been adequately covered by the Court below in its charge by the following:

“Now, if you are satisfied that the Plaintiff has proved, by the greater weight of the evidence, that he is entitled to your judgment and that he has carried out the terms of this policy as I have indicated them, of course, your judgment will be for the Plaintiff. He insists his loss was \$2,000.

20 The Defendant strenuously and emphatically opposes the contention of the Plaintiff that his loss was as much as that. The Plaintiff insists that the figure is very much less than that. One Von Poznak took the witness stand and said he had gone to the premises and examined them and found that the actual property of Henry Frank amounted to \$3,618.20 and that the loss and damage amounted to \$289.50. He was accompanied at that time, according to his story, by a Mr. Goldberger, who testified that \$289.50 covered the entire damage and said that when they were there the clothing was in sacks, which were checked item by item; and that much of the clothing had no value whatever. The policy sets forth the measure of damage in the first line of the second page: ‘The insurance company shall not be liable beyond the actual cash value at the time the loss or damage occurs, and the
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40 loss or damage shall be ascertained according

to such cash value, with proper deductions for depreciation,' and then further goes on, to wit: 'What it would cost the assured to replace the same by like quality and quantity.' "

POINT III.

The Court did not err in admitting the testimony and exhibits of the Appellant's agents.

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Counsel for the Appellant objected to the introduction of conversations and transactions with Mr. Fred Williams, agent of the Appellant although he was the only person who appeared on behalf of the Appellant at the scene of the fire except the said two appraisers. It was, therefore, necessary to prove his agency. This was done in three ways.

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a. By a letter dated January 12th, 1924 (Exhibit P-3, S. C., page 94) written by Joseph T. Lieblich to Charles Selvage and Company in which Mr. Williams' agency is admitted in the following words:

"I have now had occasion to take this matter up with Fred W. Williams, the person employed by the Security Insurance Company, to investigate and appraise the alleged claim of Henry Frank and to determine if there is any liability on the part of the company and if so, in what sum and make his report and in accordance with instructions given to Mr. Williams, he had made his appraisal of the loss."

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b. By the testimony of the said Joseph T. Lieblich (S. C., pages 27 and 28). In answer to the question "Did he (Fred Williams) represent the Defendant corporation in connection with the fire?" Mr. Lieblich replied "I cannot say from direct evidence but I can from hearsay. I can tell you that he was retained for the purpose of
 10 investigating a claim by a special agent of this company who is charged with authority of adjusting losses and making reports." He was then asked "Who was the special agent" and he answered "I do not think that I can disclose that by reason of the confidential relations existing between attorney and client." He then admitted that Carl Strobel was a special agent. And despite
 20 aforesaid testimony and his letter referred to above Mr. Lieblich testified (S. C., page 28) that he did not know what was Mr. Strobel's authority in the matter.

c. By Mr. Carl Strobel's testimony. He testified that he had been in the employ of the Appellant for eighteen years. That his duties were "The appointment of agents, establishment of risks, payment of losses, collection of balances for the Appellant" covering New Jersey and part of
 30 New York. And that he retained Mr. Williams to adjust the loss. He testified in part as follows:

"Q. He (Mr. Williams) was to report the estimated loss to you?

A. Yes, sir. * * *

Q. What do you mean 'report it'?

A. They investigate the origin of the fire, the policy provisions, whether all have been
 40 complied with in securing the measure of these damages and then they send the papers to me

and I in turn either approve or disapprove them and they are forwarded to the company. If everything is all right the loss is paid.

Q. Was he to make a recommendation as to the amount of the loss?

A. Yes, sir" (S. C., pages 47 and 48).

And on cross examination Mr. Strobel testified 10
in part as follows:

"Q. You say you retained Mr. Williams. Just state again for what purpose.

A. For the examination of the fire, the origin, how it happened, the conditions, whether the insured was covered.

Q. You mean make an investigation of all the facts?

A. Oh, yes. 20

Q. What else?

A. And securing the measure of damages and then reporting, sending his papers to me."

Then on re-direct examination:

"Q. Did you state whether Mr. Williams was authorized to find out whether conditions had been complied with? 30

A. Yes, sir; that is part of his work" (S. C., page 48).

Mr. Strobel also corroborated Mr. Selvage's testimony that he received the notice of the fire, in question, over the telephone (S. C., page 48).

The only purpose of proving Mr. Williams' agency was to show that the Appellant received notice of the fire, the schedule, proof of loss and a 40
demand for an appraisal from the Appellee.

It is respectfully submitted that his agency covered these powers and that this delegation of powers contained none that were discretionary as is urged by the Appellant but were purely ministerial.

10 It is further submitted that this agency was proved in the proper legal manner. Mr. Williams was not produced as a witness and there was no intention, in proving the agency, to show that he had the power to waive any of the provisions of the said contract of insurance.

It is, therefore, urged by the Appellee that the argument of the Appellant in its brief is incorrect and the cases cited are inapplicable.

POINT IV.

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The Court did not err in admitting the testimony of Mr. Selvage.

30 This question is raised in point IV of the Appellant's brief. Counsel for the Appellant quotes only from part of Mr. Selvage's testimony, and it is respectfully submitted that this is misleading. Mr. Selvage testified that he had been an appraiser for twenty-five years (S. C., pages 16 and 17). That he made a complete inventory and appraisal of the loss immediately after the fire (S. C., page 18). The following is his testimony in response to questions by the Court below:

40 "Q. I understand the prices on that schedule were not arrived at by you directly from information obtained from the wife and daughter, but you used what information they gave to you as a basis, did you?

A. I used what information they gave me as a basis, plus my own experience, because in a great many cases they give me the cost of their clothing at so much money and I have to take off the depreciation of a great many items, and we never have shown depreciation had been taken off there and instead of putting in an item in there of fifty dollars it was put on as twenty-five dollars. 10

Q. Can you say this: You looked, as you have said, at all the various items in that schedule and you have appraised all those various items and the appraisal is standing opposite each item and that is your honest belief of what the article is worth?

A. That is my honest belief of what the article was worth, yes, plus the damage on them, because in some cases they wanted more than enough, they were justified in doing so, and I cut it down to that extent. That is most always the case than what the contract provides. 20

Q. Do those figures represent the values of the articles as you saw them?

A. As they appeared to me'' (S. C., page 22).

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The schedule referred to was handed to Mr. Williams at the time he visited the fire and was admitted in evidence by the Court after Mr. Williams' agency was proven.

It is, therefore, respectfully submitted that no error was made by the Court below in the admission of Mr. Selvage's testimony as is urged by the Appellant.

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POINT V.

The Court did not err in refusing to grant Defendant's motion for a non-suit or for a direction of a verdict.

10 These questions are raised in the Appellant's brief under points V, VI, VII, VIII and IX and it is urged by the Appellee that they may be disposed of in each instance by a similar argument.

a. AS TO THE GIVING OF A WRITTEN NOTICE.

20 It is true that no written notice of the fire was given by the Appellee to the Appellant. However, actual notice was given within the time required by the contract. This was admitted by the Appellant's agent, Carl Strobel (S. C., page 48). Thereafter, pursuant to said notice the Appellant sent its agent, Fred Williams, to make an investigation of the fire. Three months later the Appellant sent two appraisers to appraise the loss. Several months thereafter the Appellant examined the Appellee under oath and negotiated with him in other ways.

30 The Court therefore correctly left to the jury to determine whether or not, by its said conduct, the Appellant had waived the said requirement (Court's Charge, S. C., page 85).

Carson vs. Jersey City Insurance Co.,
43 N. J. L., page 300.

b. AS TO THE PROOF OF LOSS.

40 It is respectfully submitted, that the examination of the proof of loss (Exhibit P-7, S. C., page

99), the schedule (P-19, S. C., page 111) and the letter, dated August 21, 1923 from Charles Selvage and Company to Mr. Lieblich (Exhibit P-7, S. C., page 99), will prove that this condition of the contract has been complied with. In discussing this point, the Appellant does not mention in its brief in what respect the said proof of loss is unsatisfactory. The charge by the Court below on this question is set forth on page 86 of the State of Case and it is submitted that the same is correct. 10

c. AS TO THE FAILURE TO APPRAISE.

A suggestion for an appraisal was made by the Appellee in July, 1923, for the reason that Mr. Williams made an offer of settlement on behalf of the Appellant which was not acceptable to the Appellee (Exhibit P-4, S. C., page 95). This suggestion was not complied with in any way. On January 15th, 1924, six and a half months after the fire, and after a large part of the damaged goods had been thrown away, the Appellant made a demand for an appraisal (Exhibit P-16, S. C., page 107). 20

The case of Radwanski vs. Scott referred to in Appellant's brief on page 22, is not in point as it merely holds that if there is no dispute as to the amount of loss, no demand for an appraisal is necessary. 30

Whether or not Mr. Williams had authority to settle the loss is also not in point for the reason that the Appellant is not being held bound on the offer which he made. The fact is, that he was the agent of the Appellant in this matter and made an offer of settlement. This offer was refused by the Appellee, who had a right under the circumstances as was verified later to believe that his claim was disputed. Mr. Williams' agency 40

was certainly broad enough to perform the ministerial act of receiving the demand for an appraisal and there was a duty then placed upon the Appellant to act in some way in compliance with the said demand instead of disregarding it.

10 The Court, therefore, correctly left to the jury the question whether or not, under the circumstances, the Appellant did not waive the right to demand an appraisal (Charge of the Court, S. C., pages 87 and 88).

d. AS TO THE MAGISTRATE'S CERTIFICATE.

20 Demand for this was not made until January 15th, 1924, more than six and a half months after the fire. It would have been impossible at that time to comply with this demand which required an affidavit of a Magistrate to the effect that he had examined the circumstances and believed that the insured had sustained a loss in a certain amount to be certified by him.

The Court, therefore, correctly left to the jury the question whether or not, under the circumstances, the Appellant waived the right to demand the said Magistrate's certificate.

30 e. AS TO THE FAILURE TO SEPARATE THE DAMAGED FROM THE UNDAMAGED PERSONAL PROPERTY.

That part of the testimony quoted by Counsel for the Appellant in support of his argument on this point is misleading. On this point Mr. Frank testified as follows:

“Q. Did you take any steps to protect the property from further damage?

40 A. Sure.

Q. What did you do?

A. Started to clean up and get the water all out of the house so I had to make a hole in the ceiling to get all the water out and clean up as much as we could and we had the stuff lying up there just where it happened until it started to smell and we had to live in that house.

Q. You lived in that house, didn't you? 10

A. Yes, sir.

Q. What steps did you take to separate the damaged goods from the undamaged goods?

A. Whatever wasn't so much damaged we cleaned it up and used it again. Whatever was done to by fire and damaged by water we put on the side and kept it there about three or four months or longer" (S. C., pages 7 and 8). 20

And Mrs. Frank testified on cross examination as follows:

"Q. I understand you to say that from the first of July you kept everything up there for three months?

A. Yes, sir.

Q. Just as it was after the fire?

A. No, not right after; it was after the fire. We couldn't stay without a roof on the top so we had to pack it together so the carpenter could start and it was nearly three months when the man came, I don't know who it was, I can't remember, he came after three months or maybe before and the clothes was all bundled up, what I could, and the rest were thrown away. 30

Q. That is after the man came you bundled what you could? 40

A. Not, it was bundled up when the man came.

Q. So, you simply took everything while they were fixing, you pushed everything to one side?

A. Yes, sir.

10 Q. You did not put up any lines to hang up the clothes on?

A. No, we couldn't because everything was ruined.

Q. You did not take everything out of the attic and put it down in the yard?

A. No, it was all up there.

Q. But when you told your attorney you pushed them aside, what did you mean by that?

20 A. When the carpenter was working, on one side, we pushed the bundle to the other side.

Q. Did you bundle it up?

A. Yes, sir; when the man came it was bundled up" (S. C., pages 65 and 66).

30 It is respectfully submitted that the above testimony shows clearly that the Appellee used reasonable procedure to preserve the property from further damage as required by the contract of insurance.

POINT VI.

The Court did not err in charging the jury.

40 This question is raised under point X. The Appellant, however, does not state any reasons why the specific statements set forth were prejudicial to the Appellant. Most of the matters re-

ferred to, however, have already been argued by the Appellee in this brief.

In his argument on page 32, Counsel for the Appellant requests this Court to consider all of the other numerous objections raised by him at the trial which he has omitted to argue in his brief. His reason for making this request is that he prepared his assignment of errors before receiving a transcript of the testimony. In connection with this latter statement we desire to call the Court's attention to the fact that while judgment in this case was entered in June, 1925, the said assignment of errors was not filed by the Appellant until November 18th, 1925. 10

It is respectfully submitted in closing that the Appellant has not sustained any of its charges of error and that the numerous cases cited by it are not in point; that the Appellant has endeavored to use the conditions set forth in the contract of insurance, not for the purpose which they were placed there, namely, for the protection of the fire insurance company, but to evade its obligation; that the testimony and exhibits referred to in this brief show that the Appellant has acted in bad faith from the very outset of the negotiations. 20

For the reasons set forth above in this brief the Appellee urges that the judgment below should be sustained. 30

Respectfully submitted,

HAINES & CHANALIS,
Of Counsel with Plaintiff. 40



