INDEX

TESTIMONY.

For Plaintiff.

For Defendant.

EXHIBITS.

NOTICE OF APPEAL.

Filed February 15, 1930.

Essex County Circuit Court

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To John W. Lovell or Frederic M. P. Pearse, his attorney:

PLEASE TAKE NOTICE that the defendants, Underwriting Management Corporation, National Guaranty Fire Insurance Company, Independent Bonding & Casualty Insurance Company, appeal from the whole of the judgment entered in this cause to the Court of Errors and Appeals in the State of New Jersey.

Dated February 14, 1930.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendants.

Service of a copy of the within notice of appeal is hereby acknowledged this 14th day of February, 1930.

FREDERIC M. P. PEARSE,
Attorney of Plaintiff.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

JOHN W. LOVELL, *Plaintiff-Respondent,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO. and INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants-Appellants.*	*Action at Law.* *On Appeal from the Essex County Circuit Court.* *Grounds of Appeal.*

The defendants-appellants, assign the following grounds of appeal from the judgment of the Essex County Circuit Court, in the within cause:

1. The trial court erred in refusing to grant the defendants-appellants' motion for judgment of non-suit.

2. The trial court erred in admitting in evidence a paper containing a list of names and addresses which was marked Plaintiff's Exhibit P. 2.

3. The trial court erred in admitting in evidence that portion of the minute book of the Underwriting Management Corporation which contained the minutes of a meeting of the corporation held on June 19, 1928, which was marked Plaintiff's Exhibit P. 3.

4. The trial court erred in refusing to permit the defendants-appellants' witness, John R. Shields, on direct examination concerning the

entry of the checks marked Exhibit D. 1 on the books of the Underwriting Management Corporation, to answer the question: "How were they entered?"

5. The trial court erred in refusing to permit the defendants-appellants' witness, John R. Shields, on direct examination concerning the payment of moneys by the insurance and bonding company to the Underwriting Management Corporation under the resolution of June 19, 1928, to answer the following question: "Was anything added for liabilities to the amount of that check?"

6. The trial court erred in charging the jury as follows:

> "I say to you that if he is entitled to this claim against the Underwriting Management Corporation, then he is entitled to that against the other two companies, the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company, because they took over all the assets of the Underwriting Company and by a resolution received in evidence must be held to assume the obligations of the Underwriting Management Corporation."

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendants-Appellants.

SUMMONS.

THE STATE OF NEW JERSEY, *ss.*

To Underwriting Management Corporation, National Guaranty Fire Insurance Company, Independent Bonding & Casualty Insurance.

(SEAL)

YOU ARE SUMMONED to answer the annexed complaint of John W. Lovell, in an action at law in the Essex County Circuit Court.

And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HONORABLE NELSON Y. DUNGAN, Judge of said Essex County Circuit Court, this 15th day of January, 1929.

JOHN H. SCOTT,
Clerk.

FREDERIC M. P. PEARSE,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Complaint.*

The plaintiff, John W. Lovell, of the City of New York, County of New York, and State of New York, says that:

COUNT ONE.

1. The defendants, Underwriting Management Corporation, National Guaranty Fire Insurance Company, Independent Bonding & Casualty Insurance Company, are corporations organized and existing under the laws of the State of New Jersey with registered offices in the City of Newark, County of Essex, and State of New Jersey.

2. In the fall of the year 1924, the defendants by their agent, duly authorized the said plaintiff to sell certain stock then and there issued by and belonging to said corporations at a price and on terms fixed in such agreement, and agreed to pay to said plaintiff the sum of seventy-five cents (75¢) for each share of stock which he sold or caused to be sold.

Complaint.

3. In March, 1925, said plaintiff obtained orders for about thirty-four hundred (3400) shares, the sales to be consummated in Newark, New Jersey, as stipulated in the agreement.

4. In the latter part of the year 1926, said orders obtained through the work, labor, care, diligence, journies and attendance of the said plaintiff, as the agent of and for the said defendants, were filled to the extent of twenty-nine hundred twenty (2920) shares.

5. The defendants as a result of such sales have become indebted to the plaintiff in the sum of twenty-three hundred dollars ($2,300).

6. The plaintiff has received divers sums of money from said defendants on account of such indebtedness.

7. Defendants have refused to pay to said plaintiff the balance due him although requested to do so from time to time.

Wherefore plaintiff demands, as damages, the amount due eleven hundred dollars ($1,100) with interest from October 1, 1927.

COUNT TWO.

1. In the latter part of the year 1926, the plaintiff sold stock issued by and belonging to the said defendants, at the request of said defendants.

2. By reason of such sale, said defendants became indebted to plaintiff in a large sum of money.

3. And whereas also the said defendants, afterward, to wit, at the time of the year last aforesaid, accounted with the said plaintiff of

and concerning divers other sums of money from the said defendants to the said plaintiff before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defendants were then and there found to be in arrear and indebted to said plaintiff, in the further sum of eleven hundred dollars ($1,100) of lawful money, and being so found in arrear and indebted, the said defendants undertook and then and there faithfully promised said plaintiff to pay him the last mentioned sum of money, when the said defendants should be then and there requested.

4. Yet the said defendants, although often requested so to do, have not as yet paid the said sum of eleven hundred dollars ($1,100) above demanded, or any part thereof to the said plaintiff. But they to do this have wholly refused, and still do refuse, to the damage of the said plaintiff of eleven hundred dollars ($1,100) which said plaintiff hereby demands on this count.

COUNT THREE.

1. And whereas also the said defendants, afterwards, to wit, in the latter part of the year 1926, aforesaid, had and received a certain sum of money, to wit, the sum of eleven hundred dollars ($1,100) to and for the use of the said plaintiff and to be paid by the said defendants to the said plaintiff when they the said defendants should be thereunto afterwards requested, whereby and reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said de-

fendants the said last mentioned sum of eleven hundred dollars ($1,100).

Wherefore the said plaintiff demands the sum of eleven hundred dollars ($1,100) and interest from October 1, 1927, on this count.

COUNT FOUR.

1. And whereas also the said defendants at the time aforesaid were indebted to the said plaintiff in the sum of eleven hundred dollars ($1,100) for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, in and about the business of the said defendants, and for the said defendants and at their special instance and request, and being so indebted they the said defendants, in consideration thereof, afterwards to wit, at the time of the year last aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the last mentioned sum of money, when they should be thereunto requested.

2. The defendants have refused to pay to said plaintiff such sum, although requested to do so from time to time.

Wherefore plaintiff demands the sum of eleven hundred dollars ($1,100) and interest from October 1, 1927, as damages.

FREDERIC M. P. PEARSE,
Attorney for Plaintiff.

Complaint.

I hereby appoint and depute Daniel Demarest, Jr., to serve the within writ.

Witness my hand and seal this 16th day of January, 1929.

CONRAD DEUCHLER,
Sheriff.

ALFRED C. WALKER,
Under Sheriff.

Served the within summons and complaint January 16, 1929, personally upon John R. Shields, President of Underwriting Management, Inc., and National Guaranty Fire Insurance Co., and Independent Bonding Casualty Insurance Co., within named defendants at his principal place of business, 29 Cedar street, Newark, N. J.

CONRAD DEUCHLER,
Sheriff.

By D. DEMAREST, JR.,
Special Deputy.

ANSWER.

Filed February 1, 1929.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Answer.*

The defendants, National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company, answering the complaint of the plaintiff, say that:

ANSWER TO COUNT ONE.

1. They admit paragraph 1 insofar as it relates to these defendants.

2. They deny paragraphs 2, 3, 4, 5, 6 and 7.

ANSWER TO COUNT TWO.

1. They deny paragraphs 1, 2 and 3.

2. These defendants deny paragraph 4, insofar as it alleges that these defendants have been requested to pay any sum of money but admit that no money has yet been paid to the plaintiff on the sums of money alleged in paragraph 4, and admit that they refuse to pay any part

thereof, but deny that such refusal is without cause and to the damage of the plaintiff.

ANSWER TO COUNT THREE.

1. They deny paragraph 1.

ANSWER TO COUNT FOUR.

1. They deny paragraph 1.

2. They admit paragraph 2.

HUDSPETH & HARRIS,
Attorneys for Defendants, National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company.

DEMAND FOR BILL OF PARTICULARS.

Filed March 13, 1929.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Demand for Bill of Particulars.*

To John W. Lovell, plaintiff, or Frederic M. P. Pearse, his attorney:

PLEASE TAKE NOTICE that the defendant, Underwriting Management Corporation, demands from the plaintiff a bill of particulars concerning the following matters and things, to wit:

1. The name of the person or persons connected with this defendant who authorized the plaintiff to sell certain stock.

2. The terms of the agreement alleged in paragraph two of the complaint.

3. Was the agreement alleged in paragraph two of the complaint oral or in writing, and if in writing attach a copy thereof.

4. If oral, give a resume of the complete agreement.

Demand for Bill of Particulars.

5. Gives the names and addresses of persons from whom plaintiff obtained orders for stock as alleged in paragraph three.

6. Gives the names and addresses of the person or persons to whom orders were filled as alleged in paragraph four and the number of shares purchased by each.

7. Give a statement of the sums of money received by the plaintiff on account, including dates and amounts.

8. When and from whom did the plaintiff request payment of the alleged balance due him.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant,
Underwriting Management Corporation.

Due service of a true copy of the within demand is hereby acknowledged this 12th day of March, 1929.

FREDERIC M. P. PEARSE,
Attorney for Plaintiff.

BILL OF PARTICULARS.

Filed January 9, 1930.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO. and INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Bill of Particulars.*

To Stein, McGlynn and Hannoch, attorneys of defendant Underwriting Management Corporation or to whom it may concern:

PLEASE TAKE NOTICE that the following is the bill of particulars demanded of the plaintiff herein:

1. Robert R. Tuttle.

2. A commission of seventy-five cents (75c) a share was to be paid on all stock of the National Guaranty Fire Insurance Company, and the Independent Bonding & Casualty Insurance Company sold through the plaintiff.

3. The agreement was oral.

4. See number two.

5. The following are the names and addresses of those from whom the plaintiff obtained the following orders which were subsequently filled:

Bill of Particulars.

Alfred S. Bacon, 516 N. James St., Rome, N. Y. 200 shares National Guaranty Fire Insurance Company.

Harlon E. Bacon, 414 N. George St., Rome, N. Y. 400 shares National Guaranty Fire Insurance Company.

Dr. John M. Barton, 211 W. Thomas St., Rome, N. Y. 220 shares National Guaranty Fire Insurance Company.

Dr. John M. Barton, 211 W. Thomas St., Rome, N. Y. 200 shares Independent Bonding & Casualty Insurance Company.

Charles W. Dingman, 414 No. George St., Rome, N. Y. 400 shares National Guaranty Insurance Company.

Miss McGraw, Binghampton, N. Y. 110 shares National Guaranty Fire Insurance Company.

Harold W. Hower, 308 Elm St., N. Y. 700 shares National Guaranty Fire Insurance Company.

J. L. Prescott, Box 234, Rome, N. Y. 100 shares National Guaranty Fire Insurance Company.

Chas. M. Root, 132 Stanwix St., Rome, N. Y. 200 shares National Guaranty Fire Insurance Company.

R. G. Scott, 502 N. George St., Rome, N. Y. 100 shares Independent Bonding & Casualty Insurance Company.

George N. Smith, 101 Golden St., Rome, N. Y. 100 shares National Guaranty Fire Insurance Company.

Herbert M. Smith, The Rome Co., N. Y. 200 shares Independent Bonding & Casualty Insurance Company.

Bill of Particulars.

A. S. Weatherbee, Oneida Savings Bank, Rome, N. Y. 100 shares Independent Bonding & Casualty Insurance Company.

6. See number five.

7. On May 5, 1925 $37.50.

From November, 1926, to and including October, 1927, $100.00 per month— $1,200.00

Total $1,237.50

8. Payment of the balance due was requested of Mr. J. J. Shields by the plaintiff in July, 1928.

FREDERIC M. P. PEARSE,
Attorney for Plaintiff.

Due and timely service of the within bill of particulars is hereby acknowledged this 21st day of March, 1929.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant,
Underwriters Management Corporation.

ANSWER OF DEFENDANT, UNDERWRITING MANAGEMENT CORPORATION.

Filed March 26, 1929.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Action at Law.* *Answer of Defendant, Underwriting Management Corporation.*

The defendant, Underwriting Management Corporation, formerly a corporation of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. It denies the allegations of paragraphs one, two, three, four, five, six and seven of the first count of plaintiff's complaint.

SECOND COUNT.

1. It denies each and every allegation of paragraphs one, two, three and four of the second count of the plaintiff's complaint.

Answer of Underwriting Managemnt Corporation.

THIRD COUNT.

1. It denies each and every material allegation contained in the third count of the plaintiff's complaint.

FOURTH COUNT.

1. It denies each and every material allegation contained in the fourth count of the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

This defendant, by certificate duly filed in the Office of the Secretary of State of New Jersey on December 15, 1928, and by complying with the statutes of the State of New Jersey, in such case made and provided, and more particularly with the provisions of the act of the Legislature of the State of New Jersey, known as "An Act concerning corporations (Revision of 1898)" and the amendments thereto and supplements thereof, has been duly dissolved.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant,
Underwriting Management Corporation.

SUBSTITUTION OF ATTORNEYS.

Filed March 5, 1930.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO. and INDEPENDENT BONDING & CASUALTY INSURANCE CO., *Defendants.*	*Action at Law.* *Substitution of Attorneys.*

We hereby consent to the substitution of Stein, McGlynn & Hannoch, as attorneys for the defendants in the above-entitled cause, in our place and stead.

Dated January 16, 1930.

HUDSPETH & HARRIS.

RULE FOR JUDGMENT.

Filed January 10, 1930.

ESSEX COUNTY CIRCUIT COURT.

JOHN W. LOVELL, *Plaintiff,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO. and INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants.*	*Rule for Judgment.*

This action was tried before Judge William A. Smith with a jury in the presence of the counsel of the respective parties, at the Essex County Circuit Court, on January 9, 1930.

This cause having been heard and submitted to the jury they return their verdict as follows: In favor of the plaintiff in the sum of nine hundred and sixty-eight dollars and eighty cents ($968.80).

Whereupon it is adjudged that the plaintiff, John W. Lovell recover of the defendants, Underwriting Management Corporation, National Guaranty Fire Insurance Company, Independent Bonding & Casualty Insurance Company, the sum of nine hundred and sixty-eight dollars and eighty cents ($968.80) and his costs which are taxed at the sum of ninety-eight dollars and ninety-seven cents making in the whole the sum

Rule for Judgment.

of ten hundred sixty-seven dollars and seventy-seven cents ($1,067.77).

FREDERIC M. P. PEARSE.

On motion of

FREDERIC M. P. PEARSE,
Attorney of Plaintiff.

POSTEA.

ESSEX COUNTY CIRCUIT COURT.

48638

JOHN W. LOVELL,
Plaintiff,

vs.

UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, and INDEPENDENT BONDING & CASUALTY INSURANCE CO.,
Defendants.

Action at Law.

On verdict by a jury.

Judgment entered January 9, 1930.

Damage	$968.80
Costs	98.97
Total	$1,067.77

Frederic M. P. Pearse, attorney of plaintiff.

This action was tried before Judge William A. Smith and a jury at the Essex Circuit Court on January 9, 1930.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff John W. Lovell and against the defendants Underwriting Management Corporation, National Guaranty Fire Insurance Co., Independent Bonding & Casualty Company for the sum of nine hundred

sixty-eight dollars and eighty cents ($968.80) damage.

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of nine hundred sixty-eight dollars and eighty cents ($968.80) damage and costs which are taxed at ninety-eight dollars and ninety-seven cents making in the whole the sum of one thousand sixty-seven dollars and seventy-seven cents.

Judgment entered and signed January 9, 1930.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded January 9, 1930.
Book 109 Circuit Court Judgments, page 301.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

DO HEREBY CERTIFY that the foregoing is a true and correct copy of all the pleadings, together with the Judgment Record in the case of John W. Lovell, plaintiff *v.* Underwriting Management Corporation, National Guaranty Fire Insurance Company, Independent Bonding & Casualty Insurance Company, defendants, and the same is taken from and compared with the original records filed and entered and as the same now remains on the files of said court.

Certificate of Clerk.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this twentieth day of March, A. D. 1930.

JOHN H. SCOTT,
Clerk.

(SEAL)

TESTIMONY.

ESSEX CIRCUIT COURT.

Wednesday, January 8, 1930.

JOHN W. LOVELL, *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE COMPANY, INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY,	*Action at Law.*

Before HON. WILLIAM A. SMITH, *J.*, and a jury.

For plaintiff appears Frederic M. P. Pearse.

For defendants appear Stein, McGlynn & Hannoch (by Edward R. McGlynn).

(A jury is called and sworn.)

Mr. Pearse opens for plaintiff.

Mr. McGlynn opens for defendants.

JOHN W. LOVELL, plaintiff, sworn in his own behalf.

Direct examination by Mr. Pearse.

Q Mr. Lovell, where do you live? A 535 112th street, New York City.

Q What was your business in the years 1924, 1925 and 1926? A I was working with Mr. Tuttle. I was for a time a director and treasurer of the Underwriting Management Corporation in 1924, and I think up to May, 1925, when I had

this nervous breakdown and had to resign as treasurer and director of the management corporation.

Q During that time did you sell any stock of the Underwriting Management Corporation? A I sold the first stock of the Underwriting for $22,000 of that stock.

Q Was any of that stock sold to residents of Rome, New York? A Most of it.

Q And you were the salesman? A I was the salesman, yes.

Q As Mr. McGlynn has stated in his opening, you were at that time the treasurer of the management company? A Yes, sir.

Q Did you ever sell any of the stock of the two insurance companies: the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company?

Mr. McGlynn: That question is rather broad and calls for a conclusion. There should be more facts, as I know the arrangements.

The Court: I don't suppose it makes any difference whether he sold it or not.

(Question withdrawn.)

Q Did you have any conversation with Mr. Tuttle in the spring of 1925 with reference to the sale of the stock of the two insurance companies? A Of the National Guaranty at that time; the Independent was sold later.

Q Just tell us as briefly as you can what were the arrangements between you and Mr. Tuttle with respect to the sale of the stock of these two companies? A Mr. Tuttle, in the spring of 1925, at the time the National Guaranty Fire

Insurance Company organized, asked me if I wouldn't devote my time to the selling of the stock of that company. I told him I would. He started me in New York, starting me on a commission of ten per cent. He then proposed—

Q Just a minute. At that point you say he started you off in New York with a commission of ten per cent. Was there anything in writing given to you at that time? A Yes, he gave me a memorandum.

Q I call your attention to this memorandum and ask you if that is the memorandum to which you refer (handing paper to witness)? A It is; yes, sir.

Q That is your signature (indicating)? A It is; yes, sir.

Q Is that Mr. Tuttle's signature (indicating)? A It is, yes.

Mr. Pearse: I offer it in evidence.

Objected to on the ground that this memorandum dated March 2, 1925, says that the plaintiff is to receive a commission of ten per cent. on all stock of the National Guaranty Fire Insurance Company including all members of the International Theatrical Association—

The Court: Mark it for identification now, and if it is referred to by the subsequent arrangements it may become admissible.

(The same is marked Exhibit P. 1 for identification.)

Q The arrangements with respect to the contents of this letter did not go through, did they? A No.

John W. Lovell, direct.

Q Following that, what was the next arrangement? Tell us the conversation you had with Mr. Tuttle with respect to the sale of this stock? A Mr. Tuttle proposed that I work up Newark and I spent about a month to work it up in Newark and that was a failure. Then he asked me to go to Rome, New York, to see whether they would like to buy this stock.

Q What was said by you and by him with respect to the compensation if you sold this stock to the old stockholders in Rome? A He cut me down to seventy-five cents a share.

Q What did he say? A He said he would pay a 7½ per cent. commission on the $10 par stock at that time.

Q Was anything said by you with respect to your trip to Rome? Did you say anything with respect to that in a letter? A The letter came a little later. I went up there first to see these people interested in the management company.

By the Court.

Q These were people that you had previously sold stock to in this management company? A Yes, sir; and he wanted to see whether I could persuade them to buy stock in the fire insurance company. I saw most of them and got orders from them to the amount of $34,000 for the stock of the National Guaranty Fire Insurance Company. Perhaps I will contradict that—some of them came in later and took a few shares of the bonding company stock, but it aggregated $34,000.

By Mr. Pearse.

Q That represented the stock in the National Guaranty Fire Insurance Company, and what

was subsequently the indemnity company? A The bonding company which they took later.

Q Did you make any inducements to these people in Rome on instructions from Mr. Tuttle as to how this stock should be paid for? A Mr. Tuttle represented at that time that this preferred stock would be retired at $200.

Q That is, the preferred stock of what company? A Of the management company; that it would be retired within not over six months. He said that the profits derived would enable him to do that; that these people would not be asked to pay for the stock until they got their money from the management company.

Q As a matter of fact, do you know whether or not these subscribers that you speak of ever did receive their money in that way from the preferred stock of the management company? A Not at $200; they got it at $100 later.

Q Do you know whether or not any of these stockholders that you got subscriptions from paid and took up the subscriptions to the stock of the two insurance companies? A I do; yes, sir.

Q Did you make any request of the officers of the company to ascertain which of these stockholders had actually paid for their stock that you had obtained the subscriptions for?

Objected to on the ground that that is no way to prove payment.

The Court: He may answer yes or no.

A I did, yes.

Q Did you obtain from an officer of the company—

Mr. McGlynn: Which company?

Q Did you obtain from an officer of the Underwriting Management Corporation, and of the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company a statement of those stockholders who had paid for their stock? A Only from the secretary-treasurer of the management company.

Q Who is that? A Mr. Carpenter.

Q Is this the statement that you received (handing paper to witness)? A Yes, sir.

Mr. Pearse: I ask that it be marked for identification.

(The same is marked Exhibit P. 2 for identification.)

Q Are you acquainted with Mr. Carpenter's handwriting? A Yes, I had quite a number of letters from him.

Q Is that his handwriting (indicating)? A No, the handwriting is my own; the figures are in his handwriting.

Q The names are in your handwriting? A Yes.

Q Looking at that for the purpose of refreshing your recollection, will you tell us how many shares of the stock of the National Fire Insurance Company you sold in Rome, New York?

Objected to on the ground that the witness uses a slip of paper marked for identification which, if offered in evidence, would be excluded; on the further ground that the witness has already testified that he sold 3,400 shares and that he cannot take a statement to corroborate his previous testimony.

The Court: It may be that it will be proper for him to refer to this particular statement for his sales, but I do not think he can refer to it for the purpose of testifying as to how much the management company's representative says was sold and paid for. So far it does not appear that this is such a list that he could refer to for the purpose of refreshing his recollection.

Q Does the list on the piece of paper represent the names of the persons to whom you sold this insurance company stock? Does it or does it not?

Objected to.

The Court: As far as this question is concerned, I think he can say yes or no. He was asked whether it contains a list.

Q Does it? A Perhaps I might explain—

Q Just answer yes or no. Is that a list of the stockholders to whom you sold the stock of the two insurance companies at Rome, New York? A Yes, sir.

Q You say the names there contained are the names you wrote in your own handwriting? A Yes, sir.

Q Tell us whether or not you sent that paper to Mr. Carpenter? A Yes, sir.

Q With what request?

Objected to.

Q Was there a request for this information in writing? A Yes.

Q Have you the letter? A No.

Q What has become of the letter, do you know? A I didn't keep a copy of it; I sent it to him. He has it.

Q When was this letter sent? A About July, 1928.

Mr. Pearse: Have you such a letter?

Mr. McGlynn: I have no such letter. I have the letter of July, 1928, that Mr. Lovell wrote to Mr. Shields. I have no such letter as Mr. Lovell describes.

Mr. Pearse: No, this is one containing a request for a check-up in your books showing the persons whose names appear on this list.

Mr. McGlynn: Ask him whether it was to Mr. Carpenter personally or to the company.

Q Was the letter addressed to the company or to Mr. Carpenter personally? A To Mr. Carpenter.

Mr. McGlynn: I wouldn't have it, then.

Q You have already stated that you sold 3,400 shares of stock? A Yes, sir.

Q That is in the two companies? A Yes, sir.

Q Did you receive anything in writing from an officer of either the management company or the two insurance companies as to whether or not the stockholders to whom you had sold stock had paid for their stock?

Mr. McGlynn: The answer, of course, should be limited to yes or no.

Mr. Pearse: Yes.

A No, the people told me themselves they paid for it.

Mr. McGlynn: I ask that the last part of the answer be stricken out.

Mr. Pearse: I will consent that it be stricken out.

Q Did you not receive this paper? A I did.

Q Does that paper contain anything in the handwriting of an officer of the company from which you learned that the stock of the people to whom you sold stock had been paid for? A Yes.

Mr. McGlynn: I ask your Honor to look at that piece of paper.

The Court: As I understand it, this is a list of names and addresses prepared by the plaintiff and the figures shown were filled in and given to the plaintiff.

Mr. McGlynn: It was sent with a letter addressed to an individual and a corporation should not be bound by it.

The Court: I haven't heard yet that Mr. Carpenter was entitled to bind the company.

Mr. Pearse: He was the secretary of the company.

The Court: If he was the secretary of the company he is entitled to bind the management company.

Mr. Pearse: I offer it in evidence.

Objected to.

The Court: I will allow it in evidence as against the Underwriting Company.

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

Exception noted as ground of appeal.

(The paper referred to, previously marked Exhibit P. 2 for identification, is received in evidence and marked Exhibit P. 2.)

Q I notice in this letter you have in pencil two words: "Com. Pd." How much of this commission was paid to you originally? A These $3,000; they sent their check at that time. Mr. Smith sent his check out for $500 and this Mr. Smith sent his out for $1,000. They paid me the commissions on money they got at that time.

Q You say Mr. Smith sent his check out for $1,000. Do you mean $1,000 or $500? A Well, Mr. Smith—the Mr. Smith who sent the $1,000 was Herbert M. Smith; the one who sent the $500 was George A. Smith.

Q Which commissions were you paid? A My arrangement was that I was to be paid the money that was sent, so the money was sent in from Rome—I wasn't permitted to handle any money —and I was paid the commissions when they got it, between $300 and $400.

Q Will you tell us the names, if you can, of the stockholders on which the company paid you commissions? A The Scott brothers for 300 shares—George A. Smith—I have already testified I received $37.50; then he took later—I also got paid for the $1,000 that Herbert M. Smith sent in. I was paid, as Mr. McGlynn stated a while ago, $3.75 on the $500 George A. Smith sent in but—

Q You were paid that commission by whom? A By checks of the Underwriting Management

Corporation signed by Mr. Carpenter as treasurer. I was not the treasurer at that time.

Q Did you ever receive any commissions on the balance of these subscriptions which are contained in this Exhibit P. 2? A Only the $1,200 paid to me on account.

Q When did you leave Rome, New York? A I think it was about the 1st or 2nd of May, 1925. You are talking now of my leaving Rome at that time?

Q I am talking of when these transactions took place. A Yes, sir.

Q What was the cause of your leaving Rome?

Mr. McGlynn: What difference does it make?

(Question withdrawn.)

Q When you came home how was your health?

Objected to as immaterial.

Objection sustained.

Q Did you come back to Newark and have any further conversations with Mr. Tuttle? A Yes, sir.

Q With respect to what? A With respect to the action taken by the attorney-general of New York in Rome preventing the issuing of this stock in New York—

The Court: The reason was that he couldn't make any more sales.

Mr. Pearse: Yes, sir.

Q Was there any statement by Mr. Tuttle or the officers of that concern regarding the pay-

ment of the commissions to you by the company? A Yes, sir.

Q With whom did you have the conversation? A Mr. Tuttle.

Q How long was that after you had returned from Rome? A Immediately after my return.

Q I mean with respect to being paid your commissions? A That money that had been sent in?

Q That money that had been sent in or any other money? A I didn't get that money until some months later.

By the Court.

Q Counsel wants to know what Mr. Tuttle said about paying you after you got back? A I don't think anything in particular was said. We had a definite understanding that I was to be paid when the stock was paid for.

By Mr. Pearse.

Q Were you paid anything on account of these commissions after your return from Rome?

Objected to as leading.

Objection sustained.

Q Did you receive any further sums of money than those you have mentioned on account of your commissions? Did you receive any further sums of money from either one of these companies? A Yes.

Q What sums did you receive and whom did you receive them from? A I received a check every month from November, 1926, until the time of Mr. Tuttle's death in 1927.

John W. Lovell, direct.

Q Totaling how much? A Signed by Mr. Tuttle as president and Mr. Carpenter as secretary-treasurer.

Q How much was it? A $1,200.

Q Did you have any conversation with Mr. Tuttle or with any other officer of the company with respect to what that payment was for? A Assuredly.

Q With whom was the conversation? A With Mr. Tuttle.

Q Where did it take place? A Right in their office here in Newark; in the office of the company.

Q What is your best recollection as to what the conversation was? A I was laid up for six months, from May until November, practically unable to get about. Then I came to Newark and saw Mr. Tuttle. He had been promising right along—

By the Court.

Q Please answer the questions. What was the conversation with Mr. Tuttle with regard to what this $1,200 was for? A I didn't see Mr. Tuttle again. From the time I got back from Rome until the following November I was laid up.

By Mr. Pearse.

Q Then you came back to Newark to see him? A Yes.

Q Did you see him? A Yes.

Q Did you have any conversation with him with respect to the payment to you of commissions on the sale of this stock? A Yes.

Q Where? A In the office of the company.

John W. Lovell, direct.

Q What was it? A That he would pay me $100 a month on the $2,900 I expected to receive right along. That was the tenor of the conversation.

By the Court.

Q Was anything said about the amount of the commission? A Mr. Tuttle had agreed to give me this 7½ per cent.

By Mr. Pearse.

Q At the time when you had this conversation had it been ascertained how many of these subscribers had paid for this stock? A None of them paid at that time.

Q These payments were made subsequently, then? A That would be an explanation I would have to make. Mr. Tuttle, while I was ill, wrote to these people—

Q That is not proper. You can't testify as to what Mr. Tuttle wrote to anybody else. You have already testified that at the time when you had this conversation with Mr. Tuttle with reference to being paid something on account of these commissions that the stock had all been paid for. A I didn't know that it had been paid for.

Q Did you know how many shares had actually been taken up at that time? A No.

Q Did you know what the total number of shares would be that would be eventually paid for? A At that time?

Q Yes. A No.

By the Court.

Q Did you know what the total number of subscriptions were at that time? A Why, certainly. I brought them into the office.

John W. Lovell, direct.

By Mr. Pearse.

Q Are they the subscriptions contained in this list of names on Exhibit P. 2? A These are part of them.

Q Were there any others? A Yes.

Q Do you recall without looking at any papers how many more there were? A That were not paid for?

Q Yes. Do you remember the total number of shares you sold? A 3,400.

Q How many were taken up? A I forget how many.

Q 2,900, wasn't it? A Yes, that's correct.

Q Have you made or did you make any claim for commissions on any stock that was not paid for? A No.

Q That is, on any stock that you sold that was not paid for? A No.

Q What was the conversation with respect to this $100 a month which you received? A Simply that it was on account of these commissions that were to come to me.

Q When the stock was paid for? A When the stock was paid for.

Adjourned until tomorrow, Thursday, January 9, 1930, at ten o'clock A. M.

SECOND DAY.

Thursday, January 9, 1930.

Met pursuant to adjournment.

Present, counsel as before stated.

JOHN W. LOVELL, resumes the stand in his own behalf.

Direct examination (continued) by Mr. Pearse.

Q Did you obtain a subscription for any shares of stock in the fire insurance company from a lady by the name of Miss McGraw of Binghampton, New York?

Objected to on the ground that the defendant has not had an opportunity to ascertain whether there was such a paper.

The Court: I will allow him to answer whether there was such a subscription.

Q Did you obtain a subscription for any stock from Miss McGraw of Binghampton, New York? A Yes, sir.

By Mr. McGlynn.

Q Was the subscription in writing? A No.

By Mr. Pearse.

Q How was the subscription obtained? A I may perhaps correct that by saying that we had a correspondence. Miss McGraw was in Binghamton, New York, and I got her subscription by writing to her. She said she would take a

certain amount of the stock in the company and would forward her check to the company in Newark, which she subsequently did.

Q For how many shares was that? A 110 shares; $1,100.

Cross examination by Mr. McGlynn.

Q When did you sell the shares of stock which you said yesterday you had sold, amounting to something like 3,400 shares? A In March and April, 1925.

Q You obtained no orders after that? A Yes, I obtained the orders which I spoke of yesterday: $3,000 from Scott brothers and the others I mentioned for which I was paid.

Q And those were obtained when? A They were obtained in—well, I think it was the same month—April, 1925.

Q Your active connection with this management company ceased about when? A About the 3rd or 4th of May, 1925, as an officer of the company.

Q As I understand it, you were sick and laid up from about May, 1925, until about May, 1926? A I was laid up until the fall. I wasn't able to get out. And then I was more or less laid up until this date.

Q But you were in a position to call at the offices of this company until May, 1926? A My recollection now is that it was about November, because I think—

Q That's all right. When was it you say you had this conversation with Mr. Tuttle with respect to this $100 you testified to yesterday? A It was at that time when I called on him.

Q November, 1926? A October or November, I think.

Q What was the first payment that was made under that? A $200.

Q When was that made, do you recall? A I haven't got the exact dates.

Q They were all paid by check? A They were all paid by check.

Q I show you a check dated October 11th— A That was for $200.

Q (Continuing.) 1926: "John W. Lovell" with your indorsement on it? A Correct.

Q Was that check in that condition when you received it, when you indorsed it and when you deposited it or cashed it? A One of the checks had to be corrected. I took it for granted that was in the condition there. I can't tell which one it was.

Q Is that also one (handing paper to witness)? A Yes, the second. The April, 1928, one was given to me a few days ahead.

Q But you received it and cashed it and got the money for it? A Yes.

Mr. McGlynn: I ask that these eleven checks be marked for identification.

(The same are marked Exhibit D. 1 for identification.)

Q I understood you to say that this first check of $200, dated September 1, 1927, was in the same condition when you received it as it is now. I call your attention to a notation on the left-hand side of the check under the printed words: "In payment of" where there appear the typewritten words: "Demand loan" $200? A Correct, yes.

Q And each of the checks in the series which you identified which have been marked in evidence have on the margin on the left-hand side the same explanation? A Yes.

Q You knew that when you received the checks? A Yes.

Q When you started to sell the preferred stock of the Underwriting Management Corporation at $100 per share, that stock was sold, was it not, upon the representation, among other things, that that stock was to be retired at $200? A Yes.

Q And it was also represented that the holders of that preferred stock, when it was retired at $200, would have the right to take, subscribe or buy—whatever words you want to use—stock in the fire company at $10 per share? A No, there was no such understanding.

Q The subscribers or purchasers of that preferred stock were told, were they not, of the plan under which the fire insurance company stock was to be marketed? A The fire insurance company was not organized at that time.

Q But the subscribers or purchasers of that preferred stock were told, were they not, of the plan under which the fire insurance company stock was to be marketed? A Not at that time; later they were.

Q The plan, the idea and the purpose of selling the preferred stock in the Underwriting Management Corporation was to provide funds with which to promote and bring into being this fire insurance company, was it not? A Yes.

Q That was explained to these men, wasn't it? A Yes.

Q And it was also explained to these men that this company in which they were buying the stock was to become the owner of all stock issued

by the fire insurance company and to be the underwriter and receive a percentage of all premiums received by the fire insurance company? A Yes.

Q That was the way in which the underwriting company was to get the profits for its stockholders? A Yes.

Q Weren't they told or given any idea of how this fire insurance company stock was to be sold on the market?

Objected to on the ground that it is not proper cross examination and on the further ground that the inducements which were advanced by the plaintiff to persuade the purchasers to buy this stock are not at issue in this case.

(Argument.)

Objection overruled.

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

Exception noted as ground of appeal.

A No, they weren't, because we did not know at that time how it was to be sold.

Q I show you a letter dated August 22, 1928, consisting of four pages, signed by you. Do you recall that letter? A Yes, sir; I recall that letter that was written to you.

Q I will let you read it and I will read it aloud for the record. I call your attention to this portion of the letter—

Objected to.

The Court: I don't think you are entitled to read the letter, Mr. McGlynn. I will sustain the objection.

Mr. McGlynn: I am calling his attention to the following paragraphs—

Q Read this paragraph at the bottom of the first page to yourself? A Yes, that's correct. That was the arrangement.

Q So that on this 3,400 shares of stock which you testified to yesterday, you say you were to be paid seventy-five cents a share when the sale was finally consummated in Newark, from the moneys these gentlemen—referring to the men in Rome—were to receive from the retirement of the preferred stock they had purchased? A Not necessarily.

Q Didn't you say a moment ago that that was the arrangement? A I don't think that paragraph states that.

Q I will let you read it again. A It doesn't say that they were not to be able to remit the money independently.

Q I didn't ask you that.

Mr. McGlynn: Will you please read that question?

(The stenographer reads the question as follows: "So that on this 3,400 shares of stock which you testified to yesterday, you say you were to be paid seventy-five cents a share when the sale was finally consummated in Newark, from the moneys these gentlemen—referring to the men in Rome—were to receive from the retirement of the preferred stock they had purchased.")

Q Was that correctly quoted? A Yes, sir.

Q Was that the arrangement? A Not wholly.

Q What was the rest of it? A That Mr. Tuttle would retire the stock within six months and they were—

Q When did you get that idea? A It was always the understanding.

Q Why didn't you put that in this letter of August 22, 1928, to me?

Objected to.

Objection sustained.

Q On December 16, 1925, you had been paid by the Underwriting Management Corporation in full for all services or commissions which were due at that time, were you not? A I don't know; I might have been.

Q I show you a check dated December 16, 1925, to your order for $100, on the margin of which is stated: "In full of all claims to date." A This is the balance on commissions—

Q I didn't ask you that. Did you receive this check? A Yes.

Q Was it received in full for all claims that you had against the Underwriting Management Corporation on December 16, 1925? A Of all the moneys that had been paid in for the commissions.

Mr. McGlynn: I ask that it be marked for identification.

(The same is marked Exhibit D. 2 for identification.)

Mr. McGlynn: I ask that the letter of August 22, 1928, be marked for identification.

(The same is marked Exhibit D. 3 for identification.)

Q Do you recall the letter you wrote to Mr. Shields as president of the Underwriting Management Corporation which had a schedule annexed by you? I show you a copy and ask you if that is a copy of the letter you wrote? A Yes.

Q Do you recall that letter? A I do.

Q Is that a true copy of the schedule of the figures and so forth you had annexed? A Yes.

Mr. McGlynn: I ask that it be marked for identification.

(The same is marked Exhibit D. 4 for identification.)

Q Do you recall receiving the original of this letter with the check you just identified, December 18, 1925? A Yes, I recall that; that explains why I got the $100.

Q And that also clearly explains that that paid all of your claims to date, does it not? A Yes, as I said before, all the money that had been paid on these orders.

Mr. McGlynn: I ask that it be marked for identification.

(The same is marked Exhibit D. 5 for identification.)

Q I show you this paper, Mr. Lovell, and ask you if the typewritten part, disregarding the red markings and writings, was written by you and sent to the Underwriting Management Corporation. Do you recall writing that? A That's my signature, yes.

Q And here is a carbon copy furnished by your counsel? A Yes, sir.

Q Do you recall the date of that? A No, I do not recall the date of it.

Q Was there a letter which accompanied it? A I suppose I enclosed that in the letter; I don't know myself. He may have taken that over.

Q I show you a letter of December 11, 1925, and ask you if that is the letter which accompanied this paper you have just looked at? A Yes.

Mr. McGlynn: I ask that the letter and memorandum be marked for identification.

(The same are marked Exhibit D. 6 for identification.)

Q You say you took these orders in Rome. Were any of them in writing? A Yes, some were in writing and some were verbal.

Q How many were in writing and how many were verbal? A I reported to Mr. Tuttle at once. If I had the list I could probably tell you —the list I had yesterday that Mr. Carpenter gave me. I could tell from that, I think.

Q You can tell from that how many were in writing and how many were oral? A There were seven orders in all. Of these seven, I should say that four were in writing and three were verbal.

Q Which four were in writing? A Alfred S. Bacon; Harlon E. Bacon; I think Mr. Hower and J. L. Prescott were in writing and George A. Smith was in writing. Mr. Barton—of course I was so closely connected—I was working with Mr. John U. Barton.

Q And you didn't take any written acknowledgment from him for the subscription? A No, we didn't have a writing.

Q What kind of an order did you take from Barton? A Mr. Barton's first order was that he would take $4,800 and $200, which would make $5,000. Subsequently he sent his check for $4,220 to the company. These people I was very, very close to them and we didn't have any formal orders; that is, in writing. They were all associated together. They found the money for the stock and I got Mr. Hower and Mr. Dingman to put in their money altogether.

Q In what form were the orders which you say were in writing? A They wrote me a personal letter.

Q A personal letter? A I had talked to them about it.

Q I am not interested in that. What form were the orders in which you say you took for the National Guaranty Fire Insurance Company stock? A In the form of a letter.

Q Addressed to you? A Addressed to me.

Q What became of those letters? A Well, it isn't easy for me to answer. I had a lot of correspondence which I picked up and gave to Mr. Pearse which I felt was essential for the case. There were four letters. I had a tremendous lot of papers.

Q But there is no doubt in your mind that these four letters were not given by you to the company? A No, sir.

Q So that the National Guaranty Fire Insurance Company or the Underwriting Management Corporation never received anything in writing from any of these people whose names you have mentioned which indicated that they ordered any of its stock in March or April? A No, the insurance company didn't.

Q Did the Underwriting Management Corporation? A No, I kept them myself. I was treasurer of the company.

Q As treasurer of the company did you think it was your right to retain in your personal files agreements signed by people for stock? A I gave the names to Mr. Tuttle and he was satisfied.

Q But you were very close to Mr. Tuttle, were you not? A Not very close.

Q You and he were originally officers of the Underwriting Management Corporation, weren't you? A Yes.

Q Will you tell me why in most of your correspondence to Mr. Tuttle or Mr. Carpenter or the Underwriting Management Corporation in 1925 and 1926 you kept alluding to 4,000 shares of National Guaranty Fire Insurance Company stock being reserved for the preferred stockholders? A Yes, sir.

Q Why did you do that? A Because I had not been able to see them all and I thought that some of those might possibly subscribe for the fire insurance company stock.

Q You mean by that the men you had sold the preferred stock in the management corporation to? A The people I had not yet seen.

Q It amounted to $20,000? A $20,000, the first lot.

Q That was to be retired at $200? A Yes.

Q Which would have been $40,000, would it not? A (No answer.)

Q Twice $20,000 is $40,000? A It was to be retired at $40,000, yes.

Q And $40,000 would have been the exact purchase price of 4,000 shares at $10? A Yes.

Q That is what you kept writing about asking him if he had reserved it for the preferred

stockholders? A He had asked me to see these preferred stockholders and see whether they wouldn't subscribe for the fire insurance company stock, and I thought I could get that number; that's correct.

Q And the $34,000 worth of orders, or whatever you call them, was part of that $40,000, was it not? A Yes, part of it, certainly.

Q And so indicated by your question No. 4 in your memorandum attached to Exhibit D. 6 for identification? A Yes, sir.

Q You attended the stockholders' meeting of the Underwriting Management Corporation in June, 1928, did you not? A I did.

Q And you had also attended the annual meeting of the stockholders for 1927 and 1926, had you not? A Yes.

Q The first claim that you ever made for the commissions which are now the basis of this suit, was in the letter which you wrote to Mr. Joseph Shields under date of July 25, 1928? A Yes, sir.

Objected to as to form.

Q The letter of July 25, 1928, which you wrote to Mr. Joseph Shields and marked Exhibit D. 4 for identification in this case, was the first claim that you made to the management corporation and which is now the basis of this suit?

Objected to.

Q Was the letter of July 25, 1928, which you wrote to Mr. Shields the first claim you made to the management corporation for the commissions which are now the basis of this suit? A It was.

John W. Lovell, cross.

Q You have included in your claim here, as I understand it, one or two items for sale of bonding company stock—the Independent Bonding & Casualty Insurance Company. When did you take those orders, if at all? A The orders were taken at the same time, in April, 1925.

Q Do you know when the Independent Bonding Company was organized? A I don't know when it was organized; it was some time later, but Mr. Tuttle had explained—

Q Just a moment. You know, as a matter of fact, it was not organized in July, 1926? A I don't know the date.

Q How could you take orders for stock of a company that was not in existence?

Objected to as argumentative.

Objection sustained.

Q Were those orders written or oral?

Objected to on the ground that the witness has already testified as to all the orders.

Objection sustained.

Q You took the orders for 400 shares of Independent bonding stock in March or April, 1925, is that correct?

Objected to on the ground that the witness stated it was in April, 1925, not March or April.

Q Suppose you explain how you took the orders for bonding company stock in April, 1925, when the bonding company was not incorporated until 1926? A We talked at the time about the

Underwriting Management Corporation increasing its stock 1,500 shares to organize the bonding company, and these people could take their stock partly in the underwriting company and partly in the fire company toward the bonding company stock.

By the Court.

Q In other words, it was a proposed company that you took orders for at that time? A It was planned to incorporate the bonding company at that time, yes.

Mr. Pearse: I offer in evidence that portion of the minute book of the Underwriting Management Corporation which contains the minutes of a meeting of the corporation held on the 19th day of June, 1928, and with counsel's permission I will read into the record the portion we want.

"The secretary then read the resolution adopted by the Board of Directors which provided that a meeting of the stockholders should be called for the purpose of taking action thereon, and after considerable discussion the following resolution made by Mr. Harry M. Friend and seconded by Mr. Arthur C. Hensler was carried:

'RESOLVED, that the offer of the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company to settle the question of the cancellation of this company's contracts, be accepted.

'BE IT FURTHER RESOLVED, that the proper officers of this corporation be au-

thorized to accept from the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company sufficient cash so that with the cash now in the treasury of this corporation, A. All liabilities of this company be paid in full. B. All preferred stockholders be paid the par value of their preferred stock with accrued dividends to July 1, 1928.' ''

Counsel for defendants has admitted that the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company made the offer which is referred to in this minute of the meeting of the Underwriting Management Corporation and that they were duly authorized so to do.

Mr. McGlynn: That's correct.

Defendants' counsel objects to the introduction in evidence of the offer outlined by plaintiff's counsel on the following grounds:

1. That it does not come within the allegations set forth in paragraphs 1 and 2 of the complaint;

2. That the resolution which is being offered does not even carry with it the legal situation which counsel for plaintiff apparently intends to create by its introduction;

3. That the offer is not of such a character as would bind two other corporations to become liable for the debts of a third corporation.

Mr. Pearse: In addition to the testimony which is already in, I think there is the fact that Mr. Tuttle acted for all three of these

companies and authorized Lovell to go out and get these subscriptions from the people in Rome.

The Court: I think that is very important.

Mr. Pearse: I thought he so testified.

Mr. McGlynn: I have no objection to his being brought back.

JOHN W. LOVELL, recalled in his own behalf.

Further direct examination by Mr. Pearse.

Q Mr. Lovell, in the spring of 1925 what position did Mr. Tuttle occupy in the Underwriting Management Corporation?

Mr. McGlynn: There is no dispute about that.

The Court: It is the other two companies.

Mr. Pearse: I wanted to get it clear.

The Court: Very well.

A He was the president.

Q At the time that you went to Rome, were the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company organized? A The Independent Bonding & Casualty Insurance Company was organized later; the fire insurance company was organized under the name of the Guaranty Fire Insurance Company and had to amend it afterward to the National Guaranty Fire Insurance Company; when it changed its name I don't know.

Q The Guaranty Fire Insurance Company was organized at the time you went to Rome? A Yes, sir.

John W. Lovell, further direct.

Q What position did Mr. Tuttle occupy in that company?

Objected to on the ground that this witness cannot say.

Objection sustained.

Q Where did these conversations that you had with Mr. Tuttle take place?

Mr. McGlynn: I object. Suppose they did take place in the joint suite occupied by the three corporations?

The Court: I will allow it.

A In the office of the company.

Q What company? A The room adjoining the National company—a room away. Mr. Tuttle was the whole thing; it was in his office.

Mr. McGlynn: I ask that that be stricken out.

Mr. Pearse: I will consent that it be stricken out.

Q Answer my question. A In Mr. Tuttle's office where he was acting for all these companies.

Mr. McGlynn: I ask that the last part be stricken out.

The Court: Strike it out.

Q This was all in one office? A Yes.

Q Were all these companies there together? A There was a dozen different rooms—yes, they were all in the same place.

Colloquy.

Q Do you know what position Mr. Tuttle occupied in the National Guaranty Fire Insurance Company? A I do.

Q What was his position?

Objected to.

Objection sustained.

Q Did he ever tell you what his position was?

Objected to.

Objection sustained.

The Court: You will have to prove it by the minutes or in some other way.

Mr. Pearse: I haven't the minutes here.

Mr. McGlynn: Mr. Shields is president and he is here.

Mr. Pearse: I will rest on that resolution.

PLAINTIFF RESTS.

Mr. McGlynn: I renew my objection to the introduction of the resolution.

The Court: It does not seem to me to be an assumption of liability; it is an agreement that they will pay sufficient cash together with the cash now in the company treasury to settle the question of any cancellation of their contract, and that amount is equal to the amount of the liabilities of the company. The thing which they are obliged to do is to pay this money. The management company have to determine their liabilities; in other words, they agree to pay the company enough to pay the liabilities. They do not admit what the liabilities are; it is not an

admission of this liability. They do not assume the liabilities; they agree to pay this company as a going company enough money to meet certain things. Whether the underwriting company desires to pay that money to the people they owe is another thing. They do not agree to pay it to the people. They agree to give the underwriting company that amount.

Mr. Pearse: I think that resolution provides for the winding up of this Underwriting Management Corporation. It is a wheel within a wheel; they wind up the Underwriting Management Corporation, and as Mr. McGlynn said, agree to pay these stockholders in full.

The Court: The resolution further says: "That in the event there are any assets of this company in excess of the amount needed to retire the stock of this company, the proper officers be authorized by proper instruments in writing to convey said assets to the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company, or their nominee." That shows that this is an assumption of liability because they take all the assets. I will allow it in evidence because it shows that this is a winding up. The whole resolution will go in evidence.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P. 3.)

Motion for a non-suit.

Defendants' counsel moves that plaintiff be non-suited on the ground that he has not proved the matters set out in the complaint.

Motion denied.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. McGlynn: I offer in evidence the checks marked Exhibit D. 1 for identification.

(The same are received in evidence and marked Exhibit D. 1.)

Mr. McGlynn: I offer in evidence check of December 16th marked Exhibit D. 2 for identification.

(The same is received in evidence and marked Exhibit D. 2.)

Mr. McGlynn: I offer in evidence letter of December 18, 1925 marked Exhibit D. 3 for identification.

(The same is received in evidence and marked Exhibit D. 3.)

Mr. McGlynn: I offer in evidence Exhibits D. 4, D. 5 and D. 6 for identification.

(The same are received in evidence and marked Exhibits D. 4, D. 5 and D. 6 respectively.)

John R. Shields, direct.

JOHN R. SHIELDS, sworn in behalf of defendants.

Direct examination by Mr. McGlynn.

Q Mr. Shields, you are president of the National Guaranty Fire Insurance Company? A Yes.

Q And also connected with the Independent Bonding & Casualty Insurance Company? A Yes.

Q In what capacity? A Vice-president.

Q How long have you been connected with those two companies? A The National Guaranty Fire Insurance Company since March, 1926, and the Independent Bonding & Casualty Insurance Company since February, 1926.

Q In what capacity were you connected prior to your occupying the office of the president of the fire insurance company? A Secretary.

Q And the bonding company? A Secretary.

Q Mr. Tuttle died when? A November 13, 1927.

Q Do you know when the fire company was incorporated? A The last week of November, 1924.

Q And the bonding company? A February, 1926.

Q Were you also connected with the Underwriting Management Corporation at one time? A Yes.

Q In what capacity? A President.

Q That is, following Mr. Tuttle's death? A Yes.

Q Had you been connected in any capacity prior to that? A Yes.

Q As what? A Director.

John R. Shields, direct.

Q You examined the records of the Underwriting Management Corporation to see in what way these eleven checks, aggregating $1,200, were entered on the books of the corporation? A Yes.

Mr. McGlynn: I am referring to Exhibit D. 1.

Q How were they entered?

Objected to.

Q Have you the book here? A Yes.

Mr. Pearse: I don't object to it on that ground; I object to the entry; it is a self-serving declaration.

The Court: (After argument.) I will sustain the objection.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you have any conversation with Mr. Lovell prior to July 25, 1928? A Yes.

Q Many of them? A Several.

Q Were those conversations between you and him before or after Mr. Tuttle's death, or both? A Only after.

Q And you were acting as president of the Underwriting Management Corporation? A Yes.

Q In those conversations with you as president of the Underwriting Management Corporation did Mr. Lovell ever explain to you what his alleged claims were?

Objected to.

Objection overruled.

The Court: I think that if this witness can testify to a conversation between him and the plaintiff which is contradictory in any way to his claim against the management company, he may answer it.

Q Disregarding anything else, I am exclusively interested in any conversation Mr. Lovell had with you in which he outlined or told you the details of his claim against the Underwriting Management Corporation for commissions which are now the basis of this suit.

Objected to.

(Question withdrawn.)

Q Will you please give us your recollection of any conversation that Mr. Lovell had with you in which he explained or outlined or made a claim against the Underwriting Management Corporation for commissions for the alleged sale of stock to people in Rome, giving us, if you can, when the conversations took place? A On the 1st day of December, 1927, the then secretary-treasurer of the Underwriting Management Corporation, Frederick E. Carpenter, presented for my signature a check for $100 to the order of John W. Lovell, stating that Mr. Lovell—

By the Court.

Q Don't tell us what he said. Pursuant to the receipt of that check for your signature you had a conversation with Mr. Lovell? A Yes, sir. John W. Lovell was introduced to me on December 1, 1927, by Mr. Carpenter, secretary-

treasurer of the Underwriting Management Corporation. Mr. Carpenter presented to me a check to John W. Lovell's order for $100. I stated to him that I would interview Mr. Lovell before signing the check. At that point Mr. Carpenter introduced Mr. Lovell to me and Mr. Lovell explained that he had been receiving over a period of several months $100 monthly from the Underwriting Management Corporation in the form of a loan, later to be charged as commissions against sales to be consummated upon the retirement of the preferred stock of the Underwriting Management Corporation at $200 a share, the proceeds of that preferred stock of the Underwriting Management Corporation to be paid into the treasury of the National Guaranty Fire Insurance Company at the purchase price for fire insurance company stock at $10 a share. I told Mr. Lovell we could pay no commissions for sales that had not been made and told him no more checks for $100 a month would be signed to his order.

By Mr. McGlynn.

Q Did you find the Underwriting Management Corporation records or any subscriptions of persons Mr. Lovell has named as his customers in Rome, New York? A Yes, sir.

Q I show you these papers and ask you what they are? A The subscriptions of people named by Mr. Lovell.

Q Do those papers show any dates? A Yes.

Q What are the dates of some of them? A Alfred S. Bacon, December 28, 1926; Harlon E. Bacon, December 28, 1926; John U. Barton, July 27, 1926; C. W. Dingman, December 20, 1926;

Harold W. Hower, December 28, 1926; Harold W. Hower, July 7, 1925.

Q Are those the only records of subscriptions for stock in the National Guaranty Fire Insurance Company by the persons mentioned by Mr. Lovell? A They are.

Q Do any of those subscriptions appear to have been submitted to the company by any person other than Mr. Lovell?

Objected to.

The Court: They speak for themselves.

Mr. McGlynn: I offer the subscription contracts in evidence.

(The same are received in evidence and marked Exhibit D. 7.)

Q These subscription contracts are the only ones in the files of the company containing the same names referred to by Mr. Lovell? A They are.

The Court: Do they represent the same amount as Mr. Lovell stated?

Mr. McGlynn: No, sir; because there are some of those names for which there are no subscription contracts in the files.

Q Did the insurance company and the bonding company pay into the treasury of the Underwriting Management Corporation moneys under the resolution of June 19, 1928? A Yes.

Q How was that amount arrived at?

Objected to.

Objection overruled.

John R. Shields, cross.

A The amount of preferred stock outstanding of the Underwriting Management Corporation was determined, the amount of accrued dividends due thereon and the amount paid by certain common stockholders of the Underwriting Management Corporation for their common stock; from the sum of those items was deducted the amount in the treasury of the Underwriting Management Corporation and the difference paid in.

Q Did the Underwriting Management Corporation at that time have on its books any record of its liabilities?

Objected to.

The Court: The books would be the best evidence.

Q Was anything added for liabilities to the amount of that check?

Objected to.

Objection sustained.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Pearse.

Q The only thing you know about the subscription contracts marked Exhibit D. 7 is the fact that you found them in the files of one of these companies after you took office, is that right? A That's true of only one of the six, Mr. Pearse.

Q Which one of the six? A The one dated in July, 1925. As to the dates of the others,

I was the secretary of the National Guaranty Fire Insurance Company and had knowledge of the current transactions of that company.

Q You say that this conversation which you had with Mr. Lovell was in December, 1927? A December, 1927.

Q When he came in it was for the purpose of getting some further money which he had been receiving as he stated at the rate of $100 a month for approximately a year, is that right? A Approximately a year.

Q I mean that he came in for the purpose of getting a further sum of money? A Yes.

Q You examined these checks or were informed by Mr. Carpenter or by Mr. Lovell that advances described as demand loans had been made to him over a period of approximately a year, is that right? A Right.

Q You were the new president of the company? A Which company?

Q The Underwriting Management Corporation? A Yes.

Q After Mr. Tuttle's death? A Yes.

Q You were not willing to continue this course of paying $100 a month? A No.

Q What did you say Mr. Lovell said to you these payments were for? A They were in the form of a loan against the commissions on sales later to be consummated at the time of the retirement of the Underwriting Management Corporation preferred stock.

Q In other words, sales had been made of certain stock of the insurance companies and the inducement for the purchase of this stock made to the prospective purchasers was the fact that the preferred stock of the Underwriting Management Corporation was to be retired at $200 a

share? A I don't understand the question with relation to sales of the stock of the insurance companies.

By the Court.

Q The inducement was in sales of the stock of the management corporation? A I don't understand it.

By Mr. Pearse.

Q Did you know how this stock of the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Company was sold in the spring of 1925 and the representations that were made to the prospective purchasers as to how it could be paid for? A What stock are you talking about? The fire insurance company, the Independent Bonding stock or the Underwriting Management stock?

Q Do you know what inducements were made to prospective purchasers of the two insurance company stock as to how that stock could be paid for in the spring of 1925? A In the spring of 1925 there was only one insurance company—

Q Will you answer my question yes or no?

The Court: I don't think he is required to.

Q Do you know what inducements were made in 1925 to the prospective purchasers of these two company stocks? A Which companies?

Q The fire and the bonding company? A There was only one company in existence in 1925.

Objected to.

Objection sustained.

Q Were you connected with the management corporation in the spring of 1925? A Yes.

Q Were you in any way connected with the fire insurance company at that time? A No.

Q You were not? A No, not in 1925.

Q In the spring of 1925? A No.

Q When did you become connected with the fire insurance company? A March, 1926.

Q What was your position in the management corporation in the spring of 1925? A As a salesman.

Q Do you know the representations that were made to prospective purchasers of the fire insurance company or the Independent Bonding Company stock with reference to how that stock should be paid for or could be paid for or would be paid for? A At what time?

Q After they had subscribed to it.

The Court: After they had subscribed?

Q At the time they subscribed; the inducement which led to these subscriptions.

Objected to on the ground that we are not concerned with the method of payment in the insurance company stocks.

Objection sustained.

Q Do you know the terms upon which the stock of the fire insurance company was sold to the subscribers in Rome in the spring of 1925? A We have no record of any sales to any subscribers in Rome in the spring of 1925.

Mr. Pearse: I submit that it can be answered yes or no.

The Court: I think his answer is no. I will let it stand.

Q Then you don't know the terms upon which that stock was sold? A I have already told you.
Q Is your answer "no"?

The Court: I think the second question is a wrong assumption. You say, "Then you don't know." He says there wasn't any sold.

Q What is the basis of your statement that none was sold at that time? A Examination of the corporation records.
Q And that is where your information comes from? A Yes, sir.
Q You never had any conversation with Mr. Lovell at that time about the sale of stock in Rome? A When?
Q In 1925? A I have testified I met him for the first time in December, 1927.
Q So you have no idea of the conversations that passed between him and Mr. Tuttle in the spring of 1925 up to that time? A I know something of them.
Q You had no conversations with Mr. Lovell, did you? You say you didn't meet him until December, 1927.

The Court: Of course, he didn't have any conversations with him, then.

Q What did you say in your answer to Mr. McGlynn with reference to the application of the commissions which Mr. Lovell was to receive when the stock was paid for? A I don't remember any such question.

Q I understood you to say in answer to Mr. McGlynn's question, and it was not very clear to me, that when these sales were consummated, whatever commissions Mr. Lovell was entitled to were to be applied to something? A I don't remember any such question or answer.

Q Will you repeat what your conversation was with Mr. Lovell at the time you met him? A A check to Mr. Lovell's order was presented to me for signature in the amount of $100, and Mr. Lovell said that in 1924 he had sold Underwriting Management Corporation preferred stock at $100 a share to certain purchasers at Rome, New York. His representation to purchasers of Underwriting Management Corporation stock at the time of their purchase at $100 a share was that the Underwriting Management Corporation preferred stock purchased at $100 would be retired at $200—double par—but that the holders of that stock would not receive cash but would return it into the treasury of the National Guaranty Fire Insurance Company for which they were to receive shares at par $10; in other words, for the stock of the Underwriting they were to receive stock of the fire insurance company; that he had been receiving in anticipation of the retirement of the management corporation stock monthly payments of $100, and that commission to be earned when the sales were made, the sales being contingent upon the retirement of the stock.

Q As a matter of fact, the stock of the Underwriting Management Corporation was not retired at $200 a share, was it? A No.

Q Therefore those stockholders never got the benefit or the opportunity which he stated they would get; that is, the opportunity to get fire

insurance company stock at $10 a share after the retirement of the management corporation stock? A They never made the purchase.

Q All they got back was the $100 a share they had paid for the management corporation stock? A With the dividends.

Q In other words, they never got the additional $100 a share? A They never bought the National Guaranty Fire Insurance stock.

Q As a matter of fact, you know from the records of the company that the two Mr. Bacons, Mr. Barton, Mr. Dingman, Mr. Hower—two subscriptions—you find in the files of the company the names of the subscribers from Rome, do you not, with the date of their subscriptions? A Yes.

Q That's the time when they learned they could not pay for their stock in the way they expected to pay for it; that they paid cash for it? A Repeat the question, please.

Q Those subscriptions were signed by them after it was discovered that they could not pay for the stock through the profits that they could get out of the retirement of the underwriting stock? A I do not know that.

By the Court.

Q As I understand your testimony, you did not know of any arrangement to retire it at $200? A Yes, I knew of the arrangement. I do not know that this man had any knowledge that the stock would be so retired. To my knowledge they believed at the time they bought the underwriting that it would be retired at $200 a share.

Joseph J. Shields, direct.

By Mr. Pearse.

Q When was it ascertained it would not be so retired? A At the time of Mr. Tuttle's death in March, 1928.

By the Court.

Q Your understanding was that these subscriptions were individual subscriptions not in consummation of any representation? A Voluntary purchases entirely.

By Mr. Pearse.

Q How do you know that? A By reason of my office as secretary of the company and knowledge of how the sales were arranged at the time.

Q Did they tell you so? A These sales were—

Q Did these subscribers tell you that? A Their correspondence showed it.

Q Is it here? A It is in the office of the company.

Q Is it here? A No, it is not here.

JOSEPH J. SHIELDS, sworn in behalf of defendant.

Direct examination by Mr. McGlynn.

Q Mr. Shields, you are a brother of John R. Shields who was just on the stand? A Yes.

Q You are also connected with the fire and bonding companies we are talking about? A Yes, sir.

Q What is your connection with the companies? A Secretary.

Q Were you at one time an officer of the management corporation? A Yes, sir; president.

Q You succeeded your brother as president? A Yes, sir.

Q Did you have any conversation with Mr. Lovell in connection with his claim for commissions? A Yes, sir; several.

Q Will you tell us what he told you was the basis of his claim for these commissions? A He said that when he sold the underwriting stock to his friends in Rome, New York, the representations made were that the stock which was sold at $100 per share of the Underwriting Management Corporation would be retired at $200 per share and that those subscribers would be given the stock of the National Guaranty Fire Insurance Company in the value of $200 per share; in other words, that National Guaranty Fire Insurance stock at $10 per share would be given on the basis of two shares for each share of Underwriting Management stock.

Q What else did he say about his claim for commissions? A Well, he claimed that by reason of the fact that the Underwriting Management Corporation stock was not retired at $200 per share the sale of the National Guaranty stock was not consummated and that he should have the commissions.

Cross examination waived.

Mr. McGlynn: I offer in evidence a certified copy of the certificate of dissolution of the Underwriting Management Corporation dated December 15, 1928.

(The same is received in evidence and marked Exhibit D. 8.)

DEFENDANTS REST.

Mr. McGlynn sums up for defendants.

Mr. Pearse sums up for plaintiff.

CHARGE TO JURY.

The Court charges the jury as follows:

SMITH, *J.:*

Members of the Jury: This suit, as you understand, is a suit for commissions brought by Mr. Lovell against the Underwriting Management Corporation and these two insurance companies for the purpose of recovering commissions on sales of stock which he says he made in these two insurance companies; that is, the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company.

The early negotiations had reference to the National Guaranty Fire Insurance Company, but it was subsequently decided to have an additional company do the bonding and casualty business, so that company was also added and there were some sales of stock in that company. The references in the agreement, I think, originally meant the National Guaranty Fire Insurance Company.

The Underwriting Management Corporation was formed for the purpose of either underwriting or promoting the fire insurance company, and Mr. Lovell, the plaintiff here, was employed by Mr. Tuttle, who was the representative of the Underwriting Management Corporation, to sell some of this stock in the Underwriting Management Corporation. The financial method was to first raise some money to put the underwriting

company on its feet so that it would start in and be able to sell the stock of the other company and be able to represent it and work for it.

Mr. Lovell did sell, I think it was, some $20,000 in stock of the Underwriting Management Corporation and the preferred stock was sold at $100 per share and I believe the common stock was given as a bonus. Mr. Tuttle authorized the representation to the purchasers, according to Mr. Lovell, that they would retire this Underwriting Management Corporation stock in six months, and when they did retire it, it would be retired at $200 instead of $100 per share and that the $200 per share would be applied to the purchase of stock in the insurance company which would be issued at $10 per share. As I understand it, he said that that would be done within six months. That was the representation Mr. Lovell says he made and was authorized to make and that was the plan that had been agreed upon and that was what he was to receive commissions on.

According to Mr. Lovell, they did not retire this management company stock, and Mr. Tuttle wanted to sell the insurance company stock. It is claimed by Mr. Lovell that after having tried to sell the stock in some other way, Mr. Tuttle sent him to Rome, New York, in the spring of 1925 to canvass the holders of the underwriting company stock and try to get them to buy insurance company stock. Mr. Lovell said he went there to obtain subscriptions and the subscriptions he obtained are stated in an exhibit in evidence called Exhibit P. 2. It is a list of names and at the side there are two columns showing the claimed number of shares sold. Three on this list, Scott brothers, 300 shares; George A.

Smith, 100 shares and Herbert M. Smith, 100 shares, Mr. Lovell says that those subscriptions he obtained and received his commissions on because they had paid in their money, so that there is now being sued for the balance of that list, which he says he is entitled to by reason of having obtained those subscriptions from those stockholders, they having finally paid for their subscriptions.

I may as well read the list of these subscriptions: Alfred S. Bacon, 200 shares in the National Guaranty Fire Insurance Company; Harlon E. Bacon, 400 shares in the National Guaranty Fire Insurance Company; Dr. John U. Barton, 220 shares in the National Guaranty Fire Insurance Company and 200 shares in the Independent Bonding and Casualty Insurance Company; Charles W. Dingman, 401 shares in the National Guaranty Fire Insurance Company; Harold W. Hower, 701 shares in the National Guaranty Fire Insurance Company; J. L. Prescott, 100 shares in the National Guaranty Fire Insurance Company; Charles M. Root, 200 shares in the National Guaranty Fire Insurance Company; R. F. Scott, 100 shares in the Independent Bonding & Casualty Insurance Company; Herbert M. Smith, 200 shares in the Independent Bonding & Casualty Insurance Company; A. S. Wetherbee, 50 shares in the National Guaranty Fire Insurance Company and 100 shares in the Independent Bonding & Casualty Insurance Company. Those aggregate 2,872 shares. Two shares are to be deducted because they are qualifying shares; Mr. Pearse had deducted that. So I make it to be $2,054. Deducting the $1,200 paid leaves $852.50 on the basis of 75 cents per share on the 2,870 shares. With interest claimed from October 1, 1927, it

would be $968.80. As I said, that figure includes interest to date. If counsel agree to that, that will eliminate the figuring from your troubles.

(Counsel so agree.)

Mr. Lovell says that he is entitled to these commissions because he made those sales of stock and he now asks judgment against not only the management company, but also against the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company. I say to you that if he is entitled to this claim against the Underwriting Management Corporation, then he is entitled to that against the other two companies, the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company, because they took over all the assets of the underwriting company and by a resolution received in evidence must be held to assume the obligations of the Underwriting Management Corporation. That constitutes the claim of the plaintiff.

The defendants in defense say that they do not dispute that there was a claim that if the stock of the management company was retired at $200 a share and converted into the stock of these insurance companies or the National Guaranty Fire Insurance Company, that then Mr. Lovell would be entitled to commissions on it. They admit that they advanced Mr. Lovell $1,200, but that it was as a loan with the understanding that it was to be applied toward the commissions on this stock if it was sold in exchange for the preferred stock which was to be retired at $200. Their claim is that that never happened; that instead of the stock being retired at $200 it was retired at $100 cash, and the stockholders got

their $100 in cash and their claim as to the management company was then disposed of. They claim, in addition, that these other subscriptions were submitted by these people as individuals regardless of their rights as stockholders of the management company; in other words, they bought this stock of the insurance company and there is no reason why Mr. Lovell should receive any commissions on the sale of that stock because he did not sell it.

You have before you the exhibits. I can't go over the details of these letters that have been introduced in evidence, but they bear on this question. You are entitled to consider all the evidence and these exhibits and these letters and determine the question of whether or not Mr. Lovell did make these independent sales or whether or not Mr. Lovell was talking about what he expected out of sales of the insurance company stock which were to be made in exchange for the retirement of the preferred stock. This, as I have said, never took place, because in 1927 the company was dissolved, the stock was retired and the stockholders got their cash for it. Of course, the insurance companies did not sell their stock to them; they gave cash for it through the retirement of the stock of the management company.

You can see that the issue is not, after all, a very complicated one. It is claimed by Mr. Lovell that he made the sales; it is claimed by the defendants that the sales that he says he made he did not make; that he was planning on getting the commission if the stockholders received their $200 a share and invested it in the stock of the company.

As I say, the issue is not so complicated and is one which I think the jury can easily determine. It depends very largely upon the credibility of the witnesses. You have the plaintiff's claim and the statements of the two Mr. Shields as to what he said and also his letter. You determine the facts in the case from all the evidence, the testimony and the exhibits, and from them decide who is entitled to your verdict in this case. The burden is upon the plaintiff. He comes into this Court and asks you for a money verdict against the defendant companies. He has to sustain his case by a fair preponderance of the evidence; that is, the evidence must weigh in his favor. If he fails in that he is not entitled to your verdict. If he proves his case by a fair preponderance of the evidence, he is entitled to your verdict; if he does not, he is not entitled to your verdict.

Defendants' counsel prays an exception to that portion of the Court's charge wherein the Court stated that if the plaintiff is entitled to a judgment against the Underwriting Management Corporation that he is entitled to a judgment against the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company.

Exception noted as ground of appeal.

Defendants' counsel prays an exception to that portion of the Court's charge wherein the Court mentioned the resolution of June 19, 1928.

Exception noted as ground of appeal.

Exhibit P. 1.

EXHIBIT P. 1.

UNDERWRITING MANAGEMENT
CORPORATION
671 Broad Street
Newark, New Jersey

March 2, 1925.

Mr. Robert R. Tuttle,
671 Broad Street,
Newark, N. J.

Dear Mr. Tuttle:

Confirming our conversation this morning, I understand I will receive a commission of ten (10%) per cent on all stock of the Guaranty Fire Insurance Company I may sell to owners and lessees of Theatres, including all Members of the International Theatrical Association, and that I will be paid a commission of two and one-half per cent (2½%) on all Premiums for Insurance, paid on business I may secure from said Lessees and owners of Theatres and Members of the International Theatrical Association, this commission of 2½% to be paid on all renewals as well as on original policies, limited to five years.

Yours very truly,

John W. Lovell

Accepted R. R. *Tutle,* Pres.

Exhibit P. 2.

EXHIBIT P. 2.

ROME STOCKHOLDERS UNDERWRITING MANAGEMENT COMPANY WHO HAVE BOUGHT STOCK OF THE NATIONAL GUARANTY FIRE INSURANCE CO. AND INDEPENDENT BONDING & CASUALTY COMPANY

Name	Number of Shares	
	National Gty. Fire	Independent Bdg. & Cas.
Frank C. Bacon, 516 N. James St..	0	0
Alfred S. Bacon, 516 N. James St..	200	0
Harlow E. Bacon, 414 S. George St..	400	0
Dr. John U. Barton, 211 N. Thomas St.	220	200
Chas. W. Dingman, 414 N. George St.	401	0
Harold W. Hower, 308 Elm St.	701	0
Chas. W. Lee	0	0
F. U. Potter, Rome Wine Co.	0	0
J. L. Prescott, Box 234	100	0
Chas. U. Root, 132 Staein St.	200	0
Scott Bros., 119 N. Washington St..	300	0
Scott, R. S., 502 N. George St.	0	100
Geo. H. Smith, 101 N. Gold St.	100	0
Herbert M. Smith, The Rome Co..	100	200
A. S. Wetherbee, Oneida Co. Sav. Bk.	50	100
F. J. DeBirschof, moved to Providence, R. I.	0	0

Exhibit P. 3.

EXHIBIT P. 3.

RESOLUTIONS ADOPTED AT SPECIAL MEETING OF THE STOCKHOLDERS OF THE UNDERWRITING MANAGEMENT CORPORATION HELD ON JUNE 19TH, 1928.

"The Secretary then read the resolution adopted by the Board of Directors which provided that a meeting of the stockholders should be called for the purpose of taking action thereon, and after considerable discussion, the following resolution made by Mr. Harry M. Friend and Seconded by Mr. Arthur C. Hensler, was carried:

RESOLVED, that the offer of the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company to settle the question of the cancellation of this company's contracts, be accepted. BE IT FURTHER

RESOLVED, that the proper officers of this corporation be authorized to accept from the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company sufficient cash so that with the cash now in the treasury of this Corporation,

(a) All liabilities of this company be paid in full.

(b) All Preferred Stockholders be paid the par value of their preferred stock with accrued dividends to July 1st, 1928.

Any preferred stockholder who holds common stock which was given as a bonus at the time of the subscription to the preferred stock, shall surrender his or her common stock with the preferred stock, for which no additional money shall be paid.

Exhibit P. 3.

(c) The holders of all common stock other than that given as bonuses with preferred stock, shall be paid the sum of $12.50 per share;

(d) Pay all expenses incurred in the dissolution of this company, such as legal expenses, advertising, etc.

BE IT FURTHER RESOLVED that upon the payment by this Corporation of the sum of money described in the preceding resolution, the proper officers of this corporation be authorized to execute and deliver to the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company a general release, releasing both of said companies from any and all liability and specifically cancelling and surrendering any and all contracts held by this Corporation.

Upon motion made by Mr. Harry M. Friend and Seconded by Mr. Arthur C. Hensler, the following resolution was adopted:

RESOLVED that the directors and officers of this Corporation be authorized and empowered to immediately dissolve this corporation and for that purpose be authorized to sign the necessary certificates and documents to carry this resolu- into effect. AND IT IS FURTHER

RESOLVED that the present directors of this Corporation shall act as liquidating trustees for the purpose of carrying out the action of the stockholders taken at this meeting. AND IT IS FURTHER

RESOLVED that upon consummation of the offer of compromise authorized herein by the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company that in the event there are any assets of this company in excess of the amount needed to retire

Exhibit D. 1.

the stock of this company, the proper officers be authorized by proper instruments in writing to convey said assets to the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company, or their nominee."

EXHIBIT D. 1.

(11 Checks)

In Payment of
Demand Loan. $100.00

UNDERWRITING
MANAGEMENT CORPORATION
Sixty Park Place No. 3924
Newark, N. J. September 1, 1927.

Pay to the Order of
John W. Lovell.....$100.00
The Sum of $100 and 00 cts .....Dollars

Underwriting Management Corporation
Robt R Tuttle
President
F. E. Carpenter
Secretary-Treasurer

To the Merchants Trust Company Newark, N. J.

No. 3660	August 8, 1927	$100.00
No. 3351	July 1, 1927	$100.00
No. 3116	June 6, 1927	$100.00
No. 2787	April 28, 1927	$100.00
No. 2619	April 4, 1927	$100.00
No. 2487	March 2, 1927	$100.00
No. 2388	February 2, 1927	$100.00
No. 2269	January 5, 1927	$100.00
No. 2051	December 1, 1926	$100.00
No. 1817	October 11, 1926	$200.00

Exhibit D. 2.

EXHIBIT D. 2.

This check is issued in full payment of items herewith, endorsement hereon, by payee or agent is acknowledgment and receipt in full thereof. No other receipt is required. If not correct return at once with explanation.

In full settlement of all claims to date ....100.—

UNDERWRITING MANAGEMENT CORPORATION No. 820

Newark, N. J., December 16, 1925

Pay to the Order of
John W. Lovell $100.00
The sum of $100 and 00 cts .....Dollars

UNDERWRITING MANAGEMENT CORPORATION
Robert R. Tuttle
President
F. E. Carpenter
Treasurer-Secretary

To the Merchants and Manufacturers National Bank Newark, N. J.

EXHIBIT D. 3.

JOHN W. LOVELL

535 W. 112th St.,
New York City.

August 22nd, 1928

Mr. Edward R. McGlynn,
17 Academy Street,
Newark, N. J.

Dear Sir:

My reason for writing you again at this time is that on calling on Mr. J. J. Shields last Saturday in regard to my account for $952.50 against the Underwriting Management Corporation, he informed me that you had been appointed Special Counsel to wind up the affairs of that Company, and he had turned over to you my account and the several letters I had written him, and that he would take no further action unless so instructed by you.

On Monday, I called at your office and was informed that for this month and until after Labor Day you would only be at your office on Thursdays. As undoubtedly you would be very busy on these days I have thought it better to write you on the matter of the arbitration of my account rather than call on you again.

So that you may understand the situation better, and to be as brief as possible, the facts in regard to this account are as follows:

In the Fall of 1924, by arrangement with Mr. Tuttle, I obtained for him the sum of $20,000 by the sale of 200 shares of the 250 shares then to be issued of the Preferred Stock of the Underwriting Management Corporation. These sales

Exhibit D. 3.

were nearly all made to some twelve gentlemen in the city of Rome, N. Y. With this money Mr. Tuttle organized the National Guarantee Fire Insurance Company and started a campaign for the sale of its stock. I had been elected a Director and Treasurer of the Underwriting Management Corporation, but never received any salary nor even an expense account, my compensation to be entirely what commissions I might earn from the sale of the stock. He suggested my seeing the Theatre owners and others in New York City; and agreed I should be paid a commission of 10%. I spent some three months on this work, all at my own expense, and might have closed some large orders but for the injunction issued from Albany, as stated further on. Mr. Tuttle had not told me there was a New York State law forbidding the sale of the Stock of any Insurance Company previous to obtaining a License from the Insurance Commission of the State of New York, and an infraction of this law might lead to the arrest of anyone so engaged.

In March, 1925, I started negociations with the gentlemen in Rome who had bought the stock of the Underwriting Management Corporation and obtained orders from them for some 3400 shares of the stock of the National Guarantee Fire Co. on which I was to be paid 75 cents a share when the sale was finally consumated in Newark, from the monies these gentlemen were to receive from the retirement of the Preferred Stock they had purchased.

It was at this time Mr. Tuttle told me of the New York Insurance Law, but said it would not prevent me negociating for sales or taking orders, only the sales must be closed in Newark and in the event of any subscribers being then ready to

Exhibit D. 3.

pay for their stock, to have such subscribers mail their cheques directly to the Company in Newark, where Certificates would be made out and sent to them.

Believing the statement of Mr. Tuttle, and at his request, I arranged with him to again go to Rome, obtain orders in the way he suggested. Previous to my going he had written to Mr. Root, one of the Underwriting Management Stockholders there for names of people in Rome who might be interested in the Fire Insurance Company, and Mr. Root sent him a list of some seventy names.

On April 28, of that year, 1925, Mr. Tuttle wrote to all these names, a copy of which letter I enclose to you. This has an important bearing in my case, as you will notice he gives the names of ten gentlemen in Rome as Stockholders in the Fire Insurance Company, whereas, at that time he only had the orders I had given him (with the exception of one share each held by Mr. Dingman and Mr. Hower to qualify them as Directors of the Fire Insurance Company, elected through Mr. Tuttle at my request).

On arriving in Rome the day after Mr. Tuttle's letter reached there, I started an energetic canvas and obtained orders for some $5000. which I reported to Mr. Tuttle and the cheques for which were subsequently sent to Newark by the subscribers. For the first cheque for $500. sent by Mr. George H. Smith for fifty shares, Mr. Tuttle immediately sent me a cheque for $37.50, viz. 50 shares at the rate of 75 cents a share, as I had told him I was very short of funds and would need the amount to meet my hotel bill. It appeared, as I learnt after, some time before I went to Rome, Mr. Tuttle had written to a number of

Exhibit D. 3.

people in or about Utica, and one of them made enquiry of the Better Business Bureau in Utica as to the Company. The Bureau I was told wrote to Albany, and as it was found there the Company had not obtained the License as required by the New York law, this matter was turned over to the Attorney General and at the time I arrived in Rome injunction papers were being prepared. Of course, I was ignorant of all this, but on the Saturday after my arrivel in Rome, these injunction papers were served on Mr. Dingman and Mr. Hower as Directors of the Fire Insurance Company and on myself.

On the evening before, Friday, at seven o'clock I was arrested on complaint of an Agent of the Better Business Bureau, who had come over from Utica, and who said later that he knew of these injunction papers being prepared, and would reach him Saturday morning. Fortunately, Dr. Barton was at home and responded to my telephone call, and signed the necessary Bail Bond for my release. I returned to New York on that day and on Monday morning I saw Mr. Tuttle and Mr. Baldwin, and gave them the opy of the injunction papers I had received.

But the shock of this arrest caused a severe nervous breakdown that confined me to the house for over a year, and it was only in the Fall of 1926 I was able to be out. I had corresponded several times with Mr. Tuttle in regard to the orders I had taken in Rome, and received a letter from Mr. Carpenter that a sufficient number of the Founders' shares had been set aside to fill these orders.

Early in October, 1926, when the Doctor thought I was strong enough to venture the trip to Newark, I called on Mr. Tuttle, explained my

Exhibit D. 3.

position to him, the heavy expense I had been put to pay Doctor's fees and inability to earn any income, and asked him to make me advances on the commission of the 3400 shares I had taken orders and which he had stated would be filled by the end of 1926, or early in 1927. I said I could get along with $100 a month, and he agreed to pay me that amount, and did pay it to me for 12 months, $1200, from October 1926 to October, 1927. You know he died in November 1927.

While he was paying me this $100 a month and without my knowledge he wrote to all the subscribers I had taken in Rome, telling them the Founders Shares @ $10 were about exhausted, that the price was being advanced to $15, and proposing that they pay cash then for their subscriptions, and that they could positively depend on their getting their money back within three months, as their Preferred Stock would then be retired. As a further inducement he stated he would let them have the stock at what it cost the Company, $8.75 a share. The Underwriting Management Corporation of course had to pay the Insurance Company, the $8.00, and the 75 cents belonged to me as my agreed commission for obtaining the orders. All but four accepted his offer, and Mr. Tuttle received payment for 2920 shares. As I had received $37.50 and then advances of $1200, this left a balance due me of $952.50.

The reason I have not filed this claim sooner is because I only learned that these subscriptions had been paid for when I went to Rome last month, in the hope and expectation that I could get these subscribers to re-invest the amount they had received for their Preferred Stock in the new Company I am organizing.

Exhibit D. 3.

From this statement of facts I think you will see I am fairly entitled to the amount I claim. Mr. Tuttle did not make these sales. He simply did what he told me in the beginning would have to be done, closed the sales in Newark, for orders I had taken under an agreement to be paid 75 cents a share, when finally closed.

When I called on Mr. J. J. Shields, after the receipt of your letter of July 31st, he stated he was willing to have my claim arbitrated. I gladly gave my assent, and the next day appointed Mr. William H. Fleish as arbitrator on my account, and gave him a letter to Mr. Shields. On presenting this, Mr. Shields told him he was not ready to appoint an arbitrator for the company and the matter would have to go over indefinitely. I wrote Mr. Shields of my disappointment and stated I would expect him to take action within a week. Not hearing from him and so reporting to Mr. Fleisch, he, Mr. Fleisch, told me that it was customary in Newark, where parties were willing to have their claims arbitrated, to take the matter up with the Newark Chamber of Commerce who appointed Arbitration Committees especially to speedily settle all such claims. This seemed such a sensible way out, that I wrote Mr. Shields I was filing my claim with the Chamber of Commerce. It never for a moment occurred to me that he would object to this, but it appears he does, for on calling on him last Saturday, with the Submission paper, Mr. Ross Nichols, the Ass't Secretary of the Chamber of Commerce in Charge of these matters, had sent me for the signatures of both parties interested; Mr. Shields refused to sign it and as I stated in the beginning of this letter referred me to you.

Exhibit D. 3.

After reading these statements of the facts, if you feel I am fairly entitled to the amount I claim, I trust you will order its payment. If, however, you feel there are reasons why your company should not be called upon to pay it, then I hope you will agree with me that the Arbitration Committee of the Chamber of Commerce will be the best and fairest to pass upon it. The names of the proposed arbitrators are Charles Niebling, John L. Carroll, A. R. Cullimore, Stanly J. Eisner, and Walter C. Jacobs.

None of the gentlemen are known to me, not even by name, but the fact that they enjoy the confidence of the Chamber of Commerce is sufficient to have me place my case in their hands for a final decision.

If you assent to this will you instruct Mr. J. J. Shields to sign the Submission papers required by the Chamber, so a quick decision may be reached.

Yours very truly,

JOHN W. LOVELL

Of course, I am still willing to leave the matter to the arbitration of Mr. Fleisch and whoever Mr. Shields or yourself might designate to act for the Company if you would prefer this to submitting it to the Chamber of Commerce Arbitration Committee.

Exhibit D. 4.

EXHIBIT D. 4.

COPY

535 W. 112th St.,
New York, July 25, 1928.

Mr. J. J. Shields,
Pres. Underwriting Management Corp.
Newark, N. J.

Dear Mr. Shields:

When in Rome last week I found that at the time I was ill about two years ago, Mr. Tuttle had written to the gentlemen in Rome from whom I had taken orders for Stock in the National Guaranty Fire Insurance Co. stating that if they would take the Stock then, instead of waiting until their Preferred Stock was retired @ 200, he would make a concession of 1.25 a share supplying the stock at 8.75 a share which he said was allowing them the full commission the U.M.Co received, as, though he did not say so in his letters, the 75c was the amount that would have to be paid to me as commission as he had agreed, leaving 8.00 net which of course had to go to the Insurance Company.

When the orders were taken by me, I filed the names and amounts with Mr. Tuttle in Newark. (See my letter to him dated November 25, 1925, and received a letter back dated December 11, 1925, which stated

"A sufficient number of the Founders Shares have been reserved for the Rome Subscribers"

I may say that when Mr. Tuttle persuaded the Rome Subscriber to take up the Stock they had subscribed and he continued to me this sum for twelve months, so I have received $1200.00 on account which I have credited.

Exhibit D. 4.

I have added the three sales of Independent Bonding & Casualty Insurance Company stock, as these were made to three of my customers who decided to add to their holdings of this Company's Stock instead of the National Guaranty. I feel I am fairly entitled to commission on these sales as Mr. Tuttle might never have heard of them if I had not first interested them. I had received orders from Mr. R. S. Scott in the name of Scott Brothers, for 300 shares—National Guaranty; Herbert S. Smith for 100 shares; A. S. Wetherbee for 50 shares, the checks for which were mailed by their subscribers directly to Newark and I was later paid my commission sum $337.50, after my nervous break-down.

I trust you will see your way to have a check for this balance sent me $990.00. It would, of course, have been paid to me at the time the monies were received if I had known that my order had actually been filled and paid for in cash. I will be greatly obliged if I can hear from you by early mail.

Yours very truly,

(Signed) John W. Lovell

Copy

Underwriting Management Corporation
60 Park Place, Newark, N. J.

To: John W. Lovell
535 W. 112th Street, New York.

For Commission Stock Sales of the National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company completed and money paid directly to the Underwriting Management Corporation by the following:

Alfred S. Bacon, Rome, New York	—200	Shares	National Guaranty Fire Ins. Co.		2000.00
Harlow E. Bacon " "	—400	"	" " " " "		4000.00
John W. Barton " "	—220	"	" " " " "		2200.00
" " " "	—200	"	Independent Bonding & Cas. Ins. Co.		2000.00
Chas. W. Dingman " "	—400	"	National Guaranty Fire Ins. Co.		4000.00
Harold W. Hower " "	—700	"	" " " " "		7000.00
J. L. Prescott " "	—100	"	" " " " "		1000.00
Chas. M. Root " "	—200	"	" " " " "		2000.00
George H. Smith " "	—100	"	" " " " "		1000.00
					$25200.00

In addition to above—

Mr. Herbert M. Smith, Rome, New York, told me he had added to his holdings					
also R. S. Scott, " " "	200	Shares	Independent Bonding & Cas. Ins. Co.		2000.00
	100	"	" " " " "		1000.00
A. S. Wetherbee " " "	100	"	" " " " "		1000.00
					$29200.00

Commission at 7½% as agreed	$2190.00
By cash received on account	1200.00
Balance now due me	$ 990.00

Exhibit D. 5.

EXHIBIT D. 5.

December 18, 1925

Mr. John W. Lovell
629 W. 135th St.,
New York City, N. Y.

My dear Mr. Lovell:

Answering your letter of December 17th, wish to say that we have enclosed cancelled check #526—Federal Trust Company, drawn to your order in the sum of $37.50 in payment of your commission on the George H. Smith sale, proves conclusively that the rate of commission on Guaranty Fire Stock has always been 7½%.

Any arrangement you have had with Mr. Tuttle on account of sale of Guaranty Fire Stock through the International Theatrical Association, is hereby cancelled.

The following statement will prove to you that we are right in saying that the check recently sent you for $100 is in full settlement of all claims to date:

March 31, 1925—Due U. M. Corp.—		$1000.
Deduct a/c cancelled subscription—		600.
		400.
Paid a/c sub. for 9 shares Preferred $300.		
Com. paid *ccheck* #222 Federal Trust		
5 Shares at 10%)	110.	190.
4 shares at 15%)		
		210.
Apr. 30, 1925 Advance check #512—Fed. Tr.		50.
		260.

Exhibit D. 5.

Cr. Com. a/c Rome subscription..... 360.

Dec. 16—check #820 M & M..... 100.

We have also enclosed check #512—Federal Trust, drawn to your order in the sum of $50, which is the advance made you on April 30th, and referred to in the above statement. Kindly return all three of these checks to us at once.

Hope to hear soon of your complete recovery. With best wishes, we remain,

Yours very truly,

UNDERWRITING MANAGEMENT CORPORATION

FEC:CA F. E. Carpenter, Secretary

Exhibit D. 6.

EXHIBIT D. 6.

JOHN W. LOVELL
629 W. 135th Street
NEW YORK CITY
Telephone 4286 Bradhurst

MEMO:

In Re. UNDERWRITING MANAGEMENT CORPORATION

1. Amount of Commission on last sales:
   4 orders taken in Rome, May 5-9—$3800.00—380.00
   Possibly sent to office direct:
   Miss Henrietta Lewis 50.00—*No*
   Dr. George Reid 100.00—*No*
   George A Pfister 1000.00—*No*
   —Miss McGraw—*Dr*
   Bather—1000.00 or 1700.00
   Others in Rome—*No* ?

   ANSWER.
   4800@7½=$360.—

2. Were these commissions applied on my subscription for nine shares Preferred stock, and if so what is balance due, if any?

   ANSWER.
   No

3. If not, and they were applied on advances and my order cancelled, all over $210.00 plus additional loan in May of $25.00, $230.00 in all, as per your letter of March 31, is now due me in cash, and you might mail me check for the amount.

   ANSWER.
   Rome Com 360.—

Exhibit D. 6.

Bal due us with 9 sh can 210.—
4/30—Check *50.—* *260.—*

100.—

What about legal expense?

4. Have 4,000. shares of Guaranty Fire Ins. Co. stock been reserved for Preferred Stockholders, and have you my list of orders, taken last March, amounting to $34,300?

ANSWER.

Yes

5. What is probable date preferred stock will be retired, and commission $3430. be paid to me, plus additional orders I may take from those I have not yet seen, certainly $670. more.

ANSWER.

?—Com will be 7½ not 10%—if allowed—

6. Mail me certificate for six shares common stock, balance due on sales to Wilson and Peare.

John W. Lovell

ANSWER.

—Later

Exhibit D. 6.

JOHN W. LOVELL
629 W. 135th Street
New York City
Telephone 4286 Bradhurst

December 11, 1925.

Mr. Robert R. Tuttle,
20 Washington Place,
Newark, N. J.

My dear Mr. Tuttle:

It is now over two weeks since I wrote for certain information in connection with the Underwriting Management Corporation, receiving your very kind acknowledgment, dated November 27th, and saying my letter had been referred to Mr. Carpenter.

Not hearing anything for a week, I wrote a personal letter to Mr. Carpenter on December 3rd, asking him if it was at all possible to get an answer to my letter of Novmber 25th last week, or early this, as my future movements so largely depended upon it.

I have had no word yet, not even an acknowledgment of the last letter and I think, in view of the great service I rendered the Company in finding the money with which it was enabled to get started, that you will agree with me I am not being treated quite fairly in this matter.

But, besides my own personal interests, which are of the greatest importance, I feel a moral obligation to the preferred Stockholders, whose subscriptions I received on account of their confidence in me, and the representations I made to them. One of these was, that I was the Treasurer of the Company and I would be in a position to keep them informed as to the progress being made, and that the first profits would be

Exhibit D. 6.

used to retire their stock and not be diverted to any other purpose.

My long illness has prevented my doing this, and I am absolutely dependent on you to give me the information I have asked for, so I may write to these stockholders and let them know the exact status. Also if there is any doubt about your reserving the 4,000. shares of Insurance Stock for them; they should know this at once.

This Insurance Stock will undoubtedly become very valuable and if earnings will be as we expect, should be worth $100. a share or more. You have already announced in your list of Stockholders of the Insurance Company, five of these Preferred Stockholders, who will only become stockholders when Preferred stock is retired, and as these names are no doubt valuable in influencing other sales, it seems to me imperative all the orders I have taken should be filled.

It was generally understood the profit from the sale of the 100,000. shares would be sufficient to retire the preferred stock. You must know by this time, what the cost will be. Our estimate was it would not exceed $100,000. of the $200,000. commission the company receives, or ample to retire the Preferred stock of $80,000., leaving besides the $40,000. paid by the Preferred Stockholders and the profit of business since September 1st.

I appreciate what you say as to everyone, including Mr. Carpenter and yourself, being very busy getting ready to install the new system to take care of the business of the Guaranty Fire, and therefore to save the time of Mr. Carpenter and yourself, I am enclosing a memo. of the six matters on which I require information.

It will take only a few minutes of your time and Mr. Carpenter's to fill in the answers and

Exhibit D. 7.

return to me, retaining copy, and I do hope I will receive this by return mail.

As I wrote Mr. Carpenter, I hope very soon now to be able to join him in loyally supporting you in making the Guaranty Fire a great success. It will have all my time, energy and thought, as I believe so thoroughly in it and its great future.

Now, pray do not disappoint me, my dear Mr. Tuttle. Put yourself in my place and do to me as I would to you, if our positions were reversed. Give me all the assistance in your power.

Yours very sincerely,

JOHN W. LOVELL

JWL—B
Encls.

EXHIBIT D. 7.

Subscription for Founders' Shares

Guaranty Fire Insurance Company, Twenty Washington Place, Newark, N. J.

Gentlemen:—Please enter my order and subscription for 200 shares of the Founders' allotment of the non-assessable capital stock of the Guaranty Fire Insurance Company, for which I agree to pay $10 per share, $5 of which is to be applied to the capital account and $5 to the surplus account, total subscription $2000.—, and hand you herewith my check for $2000.— in full payment.

This subscription is made upon statements of fact contained solely in the literature of the Com-

Exhibit D. 7.

pany, and for which the Company is itself responsible.

(Signature) Alfred S. Bacon
(Street and No.) 516 North James St
(City and State) Rome, N. Y.
(Date) Dec 28/26

Witness:

Letter

Make Checks Payable to the Guaranty Fire Insurance Company

Subscription for Founders' Shares

Guaranty Fire Insurance Company, Twenty Washington Place, Newark, N. J.

Gentlemen:—Please enter my order and subscription for 400 shares of the Founders' allotment of the non-assessable capital stock of the Guaranty Fire Insurance Company, for which I agree to pay $10 per share, $5 of which is to be applied to the capital account and $5 to the surplus account, total subscription $4000.—, and hand you herewith my check for $4000.— in full payment.

This subscription is made upon statements of fact contained solely in the literature of the Company, and for which the Company is itself responsible.

(Signature) Harlow E. Bacon
(Street and No.) 414 No. George St
(City and State) Rome N Y
(Date) Dec 28/26

Exhibit D. 7.

Witness:

Letter Dec 28 1926

Make Checks Payable to the Guaranty Fire Insurance Company

Subscription for Founders' Shares

Guaranty Fire Insurance Company, Twenty Washington Place, Newark, N. J.

Gentlemen:—Please enter my order and subscription for 600 shares of the Founders' allotment of the non-assessable capital stock of the Guaranty Fire Insurance Company, for which I agree to pay $10 per share, $5 of which is to be applied to the capital account and $5 to the surplus account, total subscription $6000.—, and hand you herewith my check for $6000.— in full payment.

This subscription is made upon statements of fact contained solely in the literature of the Company, and for which the Company is itself responsible.

(Signature) Harold W. Hower
(Street and No) 308 Elm St
(City and State) Rome, N. Y.
(Date) Dec 28/26

Witness:

Letter Dec 28 1926

Make Checks Payable to the Guaranty Fire Insurance Company

Exhibit D. 7.

Subscription for Founders' Shares

Guaranty Fire Insurance Company, Twenty Washington Place, Newark, N. J.

Gentlemen:—Please enter my order and subscription for 300 shares of the Founders' allotment of the non-assessable capital stock of the Guaranty Fire Insurance Company, for which I agree to pay $10 per share, $5 of which is to be applied to the capital account and $5 to the surplus account, total subscription $3000.— and hand you herewith my check for $3000.— in full payment.

This subscription is made upon statements of fact contained solely in the literature of the Company, and for which the Company is itself responsible.

(Signature) C. W. Dingman
(Street and No.) 414 No. George St
(City and State) Rome, N. Y.
(Date) Dec 20/26

Witness:

Letter Dec 22 1926

Make Checks Payable to the Guaranty Fire Insurance Company.

Exhibit D. 7.

National Guaranty Fire Insurance Company,
Newark, N. J.

GENTLEMEN:—Upon the understanding that the National Guaranty Fire Insurance Company will write such fire or rent insurance on buildings in which I am interested, as I request them to write from time to time, up to the Company's full limits, at a reduction of 25% from the tariff or schedule rates, said 25% reduction to remain in force as long as I continue to be a shareholder, I hereby subscribe for 200 shares of the non-assessable capital stock of the National Guaranty Fire Insurance Company at $10 per share, $5 of which is to be applied to the capital account and $5 to the surplus account, total subscription $2000., and hand you herewith my check for $400.—, same being 20% of total subscription, balance payable 20% a month for the next four months.

It is understood that my subscription to the stock of the National Guaranty Fire Insurance Company carries no right to vote any share or shares of stock until the amount of the subscription shall have been paid in full.

It is understood that no agreements or stipulations, other than those printed hereon, shall be binding upon the corporation, and that no agent has authority to waive, alter or modify this contract, or to make representations or statements at variance with the printed statements issued by the corporation.

Name John M. Barton
Street and No. 211 W. Thomas St.
City and State Rome N. Y.
Date July 27th 1926,

Make Checks Payable to the National Guaranty Fire Insurance Company.

Exhibit D. 7.

ORDER

GUARANTY FIRE INSURANCE CO.
671 Broad Street, Newark, N. J.

Gentlemen:

I hereby subscribe for and agree to purchase 50 shares of the Founders' allotment (limited to 100,000 shares) of the non-assessable, capital stock of the Guaranty Fire Insurance Company, for which I agree to pay $10 per share ($5 of which is to be applied to the capital account and $5 to the surplus account, less expenses of organization), a total of $500—; payable as follows: 20%, or $500.00 accompanying this subscription and the balance $.....cash as follows: fully paid. It being understood that this order and the acceptance thereof are subject to your allotment.

It is understood that no agreements or stipulations other than those printed hereon shall be binding upon the corporation, and that no agent has authority to waive, alter or modify this contract or to make representations or statements at variance with the printed statements issued by the corporation.

Issue stock in the following name:.....

(Signature) Harold W. Hower
(Address) 308 Elm St Rome N Y
(Date) July 7/25

Witness:
Mail

Salesman

Make All Checks Payable to the Guaranty Fire Insurance Company

Exhibit D. 8.

EXHIBIT D. 8.

STATE OF NEW JERSEY.

(SEAL)

DEPARTMENT OF STATE.

Certificate of Filing of Consent by Stockholders To Dissolution

To all to whom these presents may come,

Greeting:

WHEREAS, It appears to my satisfaction, by duly authenticated record of the proceedings for the voluntary dissolution thereof deposited in my office, that the UNDERWRITING MANAGEMENT CORPORATION, a corporation of this State, whose principal office is situated at No. 60 Park Place, in the City of Newark, County of Essex, State of New Jersey (John R. Shields, being the agent therein and in charge thereof, upon whom process may be served), has complied with the requirements of "An act concerning corporations (Revision of 1896)," preliminary to the issuing of this Certificate that such consent has been filed.

NOW THEREFORE, I, JOSEPH F. S. FITZPATRICK, Secretary of State of the State of New Jersey, Do Hereby Certify that the said corporation did, on the Fifteenth day of December, 1928, file in my office a duly executed and attested consent in writing to the dissolution of said corporation, executed by more than two-thirds in interest of the stockholders thereof, which said certificate and the record of the proceedings aforesaid are now on file in my said office as provided by law.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed my official seal, at Trenton, this

Exhibit D. 8.

Fifteenth day of December, A. D. one thousand nine hundred and twenty-eight.

JOSEPH F. S. FITZPATRICK,
(SEAL) Secretary of State.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOHN W. LOVELL, *Plaintiff-Respondent,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO., and INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement of Facts.

The defendants-appellants have set forth in their brief a synopsis of the pleadings and a statement of the facts of the case which are in the main correct.

However, they have omitted one or two important facts, and we deem it advisable to call them to the attention of the Court.

The plaintiff's claim is for commissions for the sale of stock of the National Guaranty Fire Insurance Co. and the Independent Bonding & Casualty Insurance Company. The plaintiff had already sold a number of shares of the preferred stock of the Underwriting Management Corporation (Rec., p. 26) to persons residing at Rome, New York.

In the spring of 1925, Mr. Tuttle, who was or subsequently became an officer of all three companies, employed the plaintiff on a 10% commission basis (Rec., p. 26, Exhibit P. 1, p. 80) to sell stock in the Fire Insurance Company.

Nothing was ever done under this agreement, but subsequently (Rec., p. 28) the plaintiff was sent by Mr. Tuttle to Rome, New York, to sell the stock in the Fire Insurance Company to the stockholders of the Underwriting Management Corporation. The plaintiff was authorized to induce the old stockholders of the Underwriting Management Corporation to purchase the stock in the fire insurance company, and bonding company, by holding out to them that the stock could be paid for out of the bonus which the stockholders would eventually receive upon the retirement of their preferred stock in the Underwriting Management Corporation (Rec., p. 29).

The plaintiff succeeded in making these sales to the extent and to the persons set forth in Exhibit P. 2 (Rec., p. 81).

It later developed that the Underwriting Management Corporation was not as successful as had been expected and the preferred stock was retired at par instead of at 200 as expected, and these stockholders from whom the plaintiff had obtained subscriptions, paid for their stock in the fire insurance company and in the bonding company with actual cash.

The plaintiff received some of his commissions (Rec., p. 34). The plaintiff was taken sick upon his return from Rome and was laid up until November, 1926, and upon his partial recovery he called upon Mr. Tuttle (Rec., p. 37). At this time few, if any, of the stockholders, who had subscribed for the stock had made any payments and as the plaintiff was in need of funds, Mr. Tuttle acting as President of the Underwriting Corporation agreed to advance him on account of his commissions the sum of $100.00 a month, the commissions of the plaintiff being estimated at

$2,900.00 (Rec., p. 38). These payments continued until Mr. Tuttle died in 1927 (Rec., p. 36), and aggregated $1,200.00, leaving the balance (Rec., p. 84), which plaintiff claims.

Subsequently, and in order that the plaintiff might ascertain which stockholders, to whom he had sold stock, had paid for their stock, he wrote to Mr. Carpenter who was the Secretary and Treasurer of the Underwriting Management Corporation, and sent him the list of stockholders to whom he had sold stock, and asked him to fill in the number of shares that had been paid for, opposite each name, and he wrote at the head of the list "Rome Stockholders Underwriting Management Corporation who have bought stock of the National Guaranty Fire Insurance Co. and Independent Bonding & Casualty Insurance Company."

This paper was returned to him by Mr. Carpenter with the information required, that is, Mr. Carpenter set opposite the names of each stockholder the amount of stock subscribed and paid for by each. Mr. Lovell, the plaintiff, thereupon demanded the balance due him after crediting what had been paid on account, which demand was refused.

For reasons of their own, in July 1928, those interested in the three companies deemed it advisable to cancel the contracts for underwriting which the two insurance companies had made with the Underwriting Management Corporation and to liquidate the Underwriting Management Corporation. As an inducement and consideration for so doing they offered to furnish sufficient funds to pay all the liabilities of the Underwriting Management Corporation, pay its preferred stockholders par (instead of $200) and

accrued dividends to July 1, 1928 and common stockholders whose stock had not been issued as a bonus, $12.50 per share and any assets remaining were to be conveyed to the two insurance companies upon the dissolution of the Underwriting Management Corporation. This offer was accepted and the Underwriting Management Corporation was dissolved (Exhibit P. 3, Rec., p. 82; Rec., p. 54).

It is well to repeat that the Underwriting Management Corporation of which Tuttle was the President and moving spirit, had the sole contract to sell the stock of the two insurance companies, and it was by virtue of this contract that the plaintiff was employed to sell the stock that he did sell.

LAW.

I.

There was no error in admitting Exhibit P. 2 in evidence.

Plaintiff testified that he was employed to sell the stock of the two insurance companies by a duly authorized officer of the Underwriting Management Corporation, which company in turn was duly authorized by the two insurance companies to negotiate the sales. The plaintiff testifies that he sold 3400 shares of stock altogether to people in Rome, New York, and that he was not to receive any commissions until the stock was paid for. "We had a definite understanding that I was to be paid when the stock was paid for" (Rec. p. 36).

He knew who had subscribed for the stock at his solicitation but he did not know how many of these subscribers had paid for their stock.

He, therefore, in effect, enquires of the proper officer (the Secretary) of the Underwriting Management Corporation to ascertain whether or not certain named subscribers to whom, as he testifies, he had sold stock, had paid for their stock, and if so, how many shares they had paid for. The request is made in writing and the reply comes, in effect, that all but four had paid and discloses the number of shares that they had bought. This exhibit, P. 2, is of the same force and effect as though the plaintiff had asked for the same information in a letter and had received a reply from the proper officer of the corporation, who knew the facts, giving the information. And we may go a step further. As the plaintiff had sold the stock and was entitled to compensation when the stock was paid for, it became the duty of the company to pay him, and a declaration by the duly authorized officer of the corporation of a relevant fact, is certainly admissible as evidence.

The authorities which the appellant cites are not relevant to the present issue. The instrument was not offered in evidence as an admission of liability but because the written statement made by Carpenter, the Secretary of the company, as to what appeared on the books of the company, was made within the scope of his authority as Secretary of the company, and hence "relative and admissible in a suit against the company growing out of the same transaction." *Hill* v. *Adams Express Co.*, 77 N. J. L. 19, at p. 27, 71 Atl. 683. See also *Agricultural Ins. Co.* v. *Potts*, 55 N. J. L. 158, at p. 162.

A declaration of this nature is just as binding upon the corporation as the books of the corporation showing the record of the facts disclosed

by the declaration. A duty rested upon the company to deal honestly with the plaintiff. No money was received by him at the time that the subscriptions were signed from which he could deduct his commissions. The defendants themselves offer in evidence (Exhibit D. 6, p. 100) a letter addressed by the plaintiff to the President of the company in which he informs the President that he is seeking certain information and that he notes (1st paragraph) that his letters of inquiry have been referred by the President to Mr. Carpenter, the Secretary. And then he goes on further to say (p 101, l. 30) "I appreciate what you say as to everyone, including Mr. Carpenter and yourself, being very busy getting ready to install the new system to take care of the business of the Guaranty Fire, and therefore, to save the time of Mr. Carpenter and myself, I am enclosing a memo. of the six matters on which I require information.

"It will take only a few minutes of your time and Mr. Carpenter's to fill in the answers and return to me, retaining copy, and I do hope I will receive this by return mail."

This exhibit (D. 6), offered by the defendants, is in itself sufficient evidence that the Secretary of the company in giving the plaintiff information was acting within the scope of his authority, and his declarations are just as binding upon the defendants as the books of the company themselves would be which contained this information.

There can be no question that the inquiry made and the reply received were made and received as, and had reference to the business of the principal and were made in pursuance and as part of such business (38 N. J. L. 13 at p. 16).

Furthermore the defendants offer no proof challenging the correctness of the information contained in the exhibit.

II.

The Court did not err in admitting in evidence Exhibit P. 3, the resolutions passed at the stockholders' meeting of the Underwriting Management Corporation.

The suit was brought against the Underwriting Management Corporation and the two insurance companies. The defendant pleaded dissolution of the Underwriting Corporation on December 15, 1928 (Rec., p. 8). The defendant admitted (Rec., p. 54) that the offer accepted by the stockholders of the Underwriting Management Corporation was made and authorized by the two insurance companies (Rec., p. 54). The purport of the offer made by the Underwriting Management Corporation and which was accepted was that the contracts between that company and the two insurance companies should be cancelled and that there should be paid by the two insurance companies into the treasury of the Underwriting Management Corporation sufficient cash so that with the cash on hand all liabilities of the company should be paid in full, the preferred stockholders would be paid back their money with accrued dividends to July 1, 1928, common stock not given as a bonus should receive $12.50 a share and that there should be funds to pay expenses of the dissolution, etc.

A further resolution was adopted providing that the board of directors of the Underwriting Management Corporation should act as liquidating trustees and that if there were any assets "in excess of the amount needed to retire the

stock of this company'' these assets should be turned over to the two insurance companies. The Court admitted these resolutions in evidence along with the admissions made by counsel (Rec., p. 54) and held as a matter of law that with the offer and acceptance there was sufficient to hold the two insurance companies liable for the debt alleged to be due the plaintiff.

Counsel in their brief state that it was necessary to prove a dissolution in accordance with the terms of the offer. As we stated above, dissolution was pleaded in the answer and was not controverted, and a certificate of dissolution was offered in evidence by the defendant (Exhibit D. 8, Rec., p. 108). The resolution (Rec., p. 83) authorized the dissolution of the company.

The contention is made that the pleadings are at variance with the proofs.

We feel that the complaint fully apprised the defendants of the nature of the claim. The bill of particulars further informed them of the nature of the claim, the amount of it, as well as the demands made which were made before the dissolution of the Underwriting Management Corporation (Rec., pp. 14 to 16). We also find the testimony of Mr. John R. Shields introduced on behalf of the defendant, showing that he was an officer of all three corporations, and that he knew of the claim of the plaintiff for commissions before the dissolution of the Underwriting Management Corporation (Rec., pp. 62, 63). Surely the proofs support all of the counts in the complaint and can be sustained even on the common counts alone, supplemented by the bill of particulars.

III.

There was no error in refusing to grant the motion for a non-suit.

We feel that the facts pointed out in the preceding paragraphs sufficiently demonstrate that the Court committed no error in refusing to non-suit the plaintiff. The plaintiff proved his contract, he proved the liability of the defendants and he proved the amount that he was entitled to under his contract.

IV.

The Court committed no error in charging the jury as set forth in Point IV of the Brief of the Defendants-Appellants.

The portion of the charge complained of is as follows:

> "I say to you that if he is entitled to this claim against the Underwriting Management Corporation, then he is entitled to that against the other two companies, the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company, because they took over all the assets of the Underwriting Management Corporation and by a resolution received in evidence must be held to assume the obligations of the Underwriting Management Corporation."

The charge appears on page 77 of the record.

The liability of a corporation for the debts of another may be either express or implied. Here were three corporations, closely interwoven and it was deemed advisable to dissolve one of them, cancel existing contracts between them, pay the debts, pay the stockholders, and if any assets remained after paying the stockholders, the two

remaining corporations to take possession of them.

This is not the effort of a judgment creditor to levy upon the assets of one corporation passing to another corporation. The proof in this case amply shows that the insurance companies, being obligated on contracts for underwriting and sale of stock which they had made with the Underwriting Management Corporation, in order to be relieved of this liability and to justify a dissolution of the Underwriting Management Corporation, and to satisfy its creditors and stockholders, made the offer set forth in the resolutions heretofore referred to and thus became liable for its debts.

Counsel argues that the cash was not to be paid to stockholders or creditors but was to be paid to the company, presumably for the benefit of the creditors and stockholders. That it was to be paid to the company for this purpose instead of directly to the creditors and stockholders would seem to be a distinction without a difference.

Whether there has been an assumption of the debts of another, of course depends upon the intention of the parties. No one disputes the fact that there was an adequate consideration for the offer made by the two insurance companies which was accepted by the Underwriting Management Corporation. A careful reading of these resolutions, containing the offer and acceptance can lead to no conclusion other than that the liabilities of the Underwriting Management Corporation were to be paid through funds to be furnished by the two insurance companies, and reading these resolutions together one must come to the inevitable conclusion that their legal

effect and their intention amount to an assumption of liability.

The agreement must be assumed to have been made for the benefit of the creditors and stockholders of the company to be dissolved; as we have said, there is ample consideration to support it and we submit that the trial court did not misconstrue its legal import.

There was no question here for the jury and the Court did not err in its instructions to the jury.

For the reasons above, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JOHN W. LOVELL, *Plaintiff-Respondent,* *vs.* UNDERWRITING MANAGEMENT CORPORATION, NATIONAL GUARANTY FIRE INSURANCE CO. and INDEPENDENT BONDING & CASUALTY INSURANCE COMPANY, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex County Circuit Court.* *Sat Below:* SMITH, *C.C.J.*

BRIEF FOR APPELLANTS.

This is an appeal from a judgment in the sum of nine hundred sixty-eight dollars eighty cents ($968.80) rendered in the Essex County Circuit Court.

Statement of Facts.

The plaintiff's claim as described in the complaint, which contained four counts, was that in the fall of 1924, the defendants (three corporations), by their agent, had authorized the plaintiff to sell certain stock then and there issued by and belonging to said corporations, at a price and on terms fixed in said agreement, and agreed to pay the plaintiff the sum of seventy-five cents ($.75) for each share of stock which he sold or caused to be sold; that in March, 1925, the plaintiff had obtained orders for about thirty-four hundred (3400) shares; that in the latter part of 1926 the orders obtained by the plaitniff as agent of the defendants, were filled to the extent of twenty-nine hundred twenty (2920)

shares; that the defendants upon the sale of said shares had become indebted to the plaintiff in the sum of twenty-three hundred dollars ($2300.00); that certain payments had been made on account so that eleven hundred dollars ($1100.00) was due the plaintiff with interest from October 1, 1927.

The above statements are taken from Count 1 of the complaint.

Count 2 was an allegation that in the latter part of 1926 the plaintiff sold stock issued by and belonging to the defendants at their request, and that by reason of such sale, the defendants became indebted to the plaintiff, and that the defendants had accounted with the plaintiff concerning said sum of money due the plaintiff from the defendants, and that the defendants had promised to pay the plaintiff the sum of eleven hundred dollars ($1100.00).

Count 3 was an allegation of money had and received by the defendants for the use of the plaintiff, in the sum of eleven hundred dollars ($1100.00).

Count 4 was an allegation that the defendants were indebted to the plaintiff in the sum of eleven hundred dollars ($1100.00) for work, labor, etc., performed by the plaintiff at the request of the defendants.

Plaintiff was his only witness at the trial, and his entire testimony, both direct and cross examination, will be found on pages 25 to 57 in the State of the Case.

The situation which was unfolded at the trial is briefly as follows:

In 1924 a man by the name of Tuttle organized one of the defendant corporations, the

Underwriting Management Corporation. The purposes of this corporation were two-fold; first, to raise money with which to promote and bring into operation two insurance companies, a fire insurance company and a casualty company. These two companies were later organized and are the other two defendants in the present action. Second, the Underwriting Management Corporation was to become the owner and holder of underwriting contracts, under which it was to act as the sole and exclusive agent of the insurance companies in the sale of its stock and in the writing of its insurance policies.

The method which was used to raise the initial capital of the Underwriting Management Corporation was to sell preferred stock at one hundred dollars ($100.00) per share, and apparently about ~~twenty thousand~~ two hundred (20,000) shares of this stock were sold. This stock was sold with the understanding that it would be retired, and incidentally quite promptly, at double par or two hundred dollars ($200.00) per share.

The Underwriting Management Corporation also issued common stock, all of which was issued to Mr. Tuttle in exchange for the underwriting contracts with the insurance companies, under the terms of which contracts, the Underwriting Management Corporation was to be paid a certain commission on all stock of the insurance companies sold by it, and a certain percentage of all premiums paid to the insurance companies on policies issued by them. If these contracts had been carried out successfully, a very, very handsome source of income would have been created in favor of the Underwriting Management Corporation.

It was further understood that the subscribers and holders of this preferred stock in the Under-

writing Management Corporation were to be given the opportunity to use the funds paid to them upon the retirement of this preferred stock in the purchase of stock in the Fire Insurance Company, the original issue of which was to be put out at ten dollars ($10) per share.

The plaintiff Lovell was an officer and director of the Underwriting Management Corporation and apparently sold to citizens of Rome, New York, practically the entire issue of preferred stock in the Underwriting Management Corporation. This amounted to twenty thousand dollars ($20,000.00) and the retirement value would have been forty thousand dollars ($40,000.00), so that the funds on retirement would have necessitated four thousand (4,000) shares of the Fire Insurance Company stock. This is the stock which the defendants contended Lovell had sold, if he actually sold any, and that he was not to be entitled to any commission on its sale until it had been issued and fully paid. For some reason, probably his ill health, Mr. Lovell's active connection with this corporation ceased and for quite a time he was not in direct contact with the situation.

The preferred stock of the Underwriting Management Corporation was not retired at double par, nor was it retired as soon as the promoters had originally contemplated. In the meantime, Lovell was extremely anxious that there should be reserved four thousand (4,000) shares of the National Guaranty Fire Insurance Co. stock so that it would be available for the subscribers of the preferred stock of the Underwriting Management Corporation. These four thousand shares (4,000) of stock when issued and delivered to the subscribers of the preferred stock of the Underwriting Management Corpora-

tion would have entitled Lovell to a commission of seventy-five cents ($.75) per share. Undoubtedly, in addition to this stock of the National Guaranty Fire Insurance Co., Lovell had sold a few shares of stock to persons other than the subscribers of the original issue of preferred stock of the Underwriting Management Corporation, and also sold a few shares of stock in the Independent Bonding & Casualty Insurance Company, which last-named corporation was organized subsequent to the organization of the National Guaranty Fire Insurance Co., and had been paid in full his commissions for all such sales.

Mr. Tuttle died in November, 1927, and a dispute arose as to the underwriting contracts between the insurance companies and the Underwriting Management Corporation, as a result of which negotiations were had which finally brought about the cancellation of the underwriting contracts. The consideration for the cancellation of these contracts on behalf of the Underwriting Management Corporation will be found in Exhibit P. 3, State of Case, pages 82-84. The date of this resolution was June 19, 1928.

Briefly, the two insurance companies were to pay in cash into the treasury of the Underwriting Management Corporation, a sufficient sum so that with the cash then in its treasury, it could pay its liabilities in full. Upon the performance of this contract the Underwriting Management Corporation was to be, and actually was legally dissolved. See defendants' Exhibit 8, page 108, State of Case.

In July, 1928, Lovell the plaintiff, ascertained that some of the persons to whom he had sold the preferred stock of the Underwriting Man-

agement Corporation in Rome, New York, had made direct subscription contracts with the National Guaranty Fire Insurance Co. and also with the Independent Bonding & Casualty Insurance Company. These contracts were separate and distinct from the sales alleged to have been made by Lovell and five of the subscription contracts are in the State of Case, as Exhibit D. 7, pages 102 to 107, inclusive. The dates of these contracts are especially important. One is July, 1926, and the other four are December, 1926. Lovell thereupon wrote to a Mr. Carpenter, a personal friend of his, who was secretary of the Underwriting Management Corporation, and in the letter submitted a schedule of names and addresses of all the persons who had originally bought preferred stock in the Underwriting Management Corporation, and after the names and addresses apparently, Mr. Carpenter had placed in the respective columns, the number of shares of stock in the National Guaranty Fire Insurance Co. and Independent Bonding & Casualty Insurance Company, of which some of the persons named in said Exhibit P. 2 were the owners.

At the trial, plaintiff's claim for commissions was finally rested upon the number of shares as set forth in Exhibit P. 2, (State of Case, p. 81) which shares had been issued by the two insurance companies to the various persons set forth in Exhibit P. 2.

There was absolutely no proof that any officer or agent of the National Guaranty Fire Insurance Co. or the Independent Bonding & Casualty Insurance Company had authorized Mr. Lovell to act for those companies, or had agreed to pay him any commissions for any stock sold to any of the persons to whom Lovell claimed he

had sold stock. The only theory at the trial, under which the plaintiff sought to hold the National Guaranty Fire Insurance Co. and the Independent Bonding & Casualty Insurance Company liable, was the fact that by the resolution of June 19, 1928, he contended that the two corporations just mentioned had assumed all the obligations of the Underwriting Management Corporation.

It is respectfully contended that no construction of the resolution in question can lead to this result.

The defendants seek to reverse the judgment of the Court below on four grounds which will be argued in the following order, to wit:

1. That the trial judge erred in admitting in evidence a list of names and addresses which was marked Plaintiff's Exhibit P. 2.

2. That the trial court erred in admitting in evidence that portion of the minute book of the Underwriting Management Corporation which contained the resolution of June 19, 1928, marked Plaintiff's Exhibit P. 3.

3. The trial court erred in refusing to grant the defendants' motion for a judgment of nonsuit.

4. That the trial court erred in charging the jury with respect to the liability of the National Guaranty Fire Insurance Co. and the Independent Bonding & Casualty Insurance Company.

ARGUMENT.

POINT I.

The Trial Court erred in admitting in evidence a list of names and addresses which was marked Plaintiff's Exhibit P. 2.

Exhibit P. 2 appears at page 81, State of Case, and was admitted in evidence over objection by the defendants, State of Case, page 33. The paper has a dual character and is difficult to classify due to the fact that it is made by two individuals. It consists of a list of names and addresses of persons living in Rome, New York, and to the right of the names are two columns of figures labeled respectively, Number of shares of "National Guaranty Fire" and "Independent Bdg. & Cas." Companies. The exhibit is supposed to represent the Rome Stockholders of the Underwriting Management Company who have bought stock of the National Guaranty Fire Insurance Co. and Independent Bonding & Casualty Insurance Company. It contains practically the same names and figures which are set forth in answer No. 5 of the plaintiff's Bill of Particulars (State of Case, p. 14, l. 38, to p. 16, l. 5). This exhibit is the sole evidence in the record which supports the Bill of Particulars, and upon it rest the entire facts and figures of the plaintiff's case. Hence, the question of its admissibility in evidence is of the utmost importance.

The names and addresses on the exhibit are in the handwriting of the plaintiff. State of Case, page 30, lines 27 and 28; page 31, lines 29-31. The paper was sent to a Mr. F. E. Carpenter (State of Case, p. 31, ll. 32, 33), about July, 1928, at which time Mr. Carpenter was secretary of the Underwriting Management Company (State of Case, p. 33, ll. 31-32). The paper

containing the list of names, plaintiff testified was sent together with a letter addressed to Mr. Carpenter personally, and not to the company (State of Case, p. 32, ll. 21-23). Plaintiff testified that the slip of paper was returned with the figures in the two columns inserted in pencil in the handwriting of Mr. Carpenter (State of Case, p. 30, ll. 23-26; p. 33, l. 12). It is from this piece of paper that the plaintiff says that he learned that the stock of the people to whom he says he made sales, had been paid for (State of Case, p. 33, ll. 13-18), and upon this he bases his claim for commissions and rests his entire case. The memorandum was not even read aloud by the plaintiff, and was admitted in evidence as Exhibit P. 2 over objection, to which ruling an exception was duly taken.

Due to the fact that the exhibit is in the handwriting of two individuals, the legal status of the memorandum must be discussed from several angles. The question of its admissibility into evidence is not a simple one.

In the first place the plaintiff did not attempt to read the memorandum into the record as his own testimony, since the figures on the slip of paper were not within his own knowledge and were hearsay as far as he was concerned. The exhibit did not contain facts personally known to the plaintiff, and there was not and could be no attempt to make the exhibit plaintiff's testimony either as past recollection recorded or present memory refreshed. When the attorney for the plaintiff asked the following question (State of Case, p. 30, l. 28):

> "Looking at that for the purpose of refreshing your recollection, will you tell us how many shares of the stock of the National Fire Insurance Company you sold in Rome, New York?"

it was objected to.

The Court sustained the objection, saying:

> "It may be that it will be proper for him to refer to this particular statement for his sales, but I do not think he can refer to it for the purpose of testifying as to how much the management company's representative says was sold and paid for. So far it does not appear that this is such a list that he could refer to for the purpose of refreshing his recollection."

The purpose of the introduction of the exhibit is to establish the figures allegedly inserted by F. E. Carpenter. Since it could not be said to be used to aid the memory of the witness (plaintiff), in testifying to facts within his knowledge, it is inadmissible.

See *Underwood Typewriter Co.* v. *City of Hartford* (Sup. Ct. Er. of Conn. 1923), 122 Atl. 91, 99 Conn. 329.

Similarly, if the list of names and figures was completely in the handwriting of the plaintiff, it would have been inadmissible if it was used as independent evidence to corroborate his testimony as to the amount claimed by him.

> See *Donaghey* v. *Williams* (Sup. Ct. Ark. 1916), 123 Ark. 411, 185, S. W. 778;
>
> *Hauser* v. *Leviness* (Sup. Ct. 1898), 62 N. J. L. 518, 41 Atl. 724.

For a memorandum prepared by the witness himself to be admissible as past recollection recorded, the following rule set forth by Adams, *J.*, in *Myers* v. *Weger* (E. & A. 1898), 62 N. J. L. 432, 42 Atl. 280, at page 441 of 62 Law, should be adhered to:

> "The use by a witness of his own memorandum, made at or near the time of the events recorded, is not merely to refresh the memory by reviving faint impressions, but also to supplement the memory by preserv-

> ing details that would otherwise be forgotten. In a case of the latter class the witness is able to prove the details, not by remembering the particulars that compose them, but because the circumstances under which the memorandum was made afford satisfactory assurance that at the time of the entry its contents were known by the witness to be true."

In our present case there was clearly no such showing made as to bring Exhibit P. 2 within the ruling of this case. The paper was not introduced as stating facts and figures within the plaintiff's own knowledge. Lovell did not show any facts which would make the piece of paper admissible upon any of the above theories.

If we should consider the Exhibit P. 2 as an attempt by the plaintiff to give testimony from a memorandum made by a person other than plaintiff (*i. e.* Carpenter), the testimony is patently hearsay and incompetent.

> See *Beaufort Truck Growers' Ass'n* v. *Seaboard Air Line Ry. Co.* (Sup. Ct. S. C. 1924), 128 S. C. 1, 121 S. E. 554.

Let us next look at this Exhibit P. 2 from its second angle, from the point of view of its being a memorandum or list of figures prepared by Mr. Carpenter, an officer of the defendant Underwriting Management Corporation.

It should, however, first be noted that we have no more than the bare assertion of Mr. Lovell, the plaintiff, that it was written by the secretary of the Underwriting Management Corporation. He says he knows the handwriting of Mr. Carpenter and that Exhibit P. 2 is in his handwriting. Actually, the reference is not to any writing on it, but merely to the list of figures on the right-hand side of the sheet of paper. The

date it was sent and received is not specified more definitely than in the State of the Case, page 32, line 7, "about July, 1928." There is no proper identification of the instrument either as an admission by the corporation or otherwise. Neither is Mr. Carpenter produced in court to testify.

Assuming for the sake of argument that there was absolute proof that the list of figures was in the handwriting of Mr. Carpenter, and that Mr. Carpenter was the secretary of the Underwriting Management Corporation, is the paper marked Exhibit P. 2 admissible in evidence as an admission of that company? We maintain that it is not. If it cannot be definitely classified as an admission, it is clearly inadmissible as pure hearsay.

Corporation officers are agents of their corporations and statements and declarations by agents, whether corporate or individual, can at times be admissible in evidence as admissions by their principals. The rules of law are the same as in the case of the agents of natural persons. The declarations of officers of a corporation are binding upon the corporation only when made in the course of, or in connection with, the performance of their authorized duties.

1 R. C. L. 512;

Ehremann et al. v. *Old F. G. Walker Distillery Co.*, (C. of A. of Ky. 1922) 197 Ky. 244, 246 S. W. 789.

Merely because a man is "secretary of the corporation is no legal reason to assert that he was authorized to give information or make representations which would bind the corporation and close its mouth."

See concurring opinion of Cunningham, *J.*, in *Franklin* v. *Havalena Mining Co.* (Sup. Ct. Ariz. 1916), 18 Ariz. 201, 157 Pac. 986.

The declarations are not competent evidence against the corporation unless made by the officer within the scope of his authority and while in the discharge of his duties in and about the particular transaction of which the declarations constitute a part of the *res gestae.* Thus to render the declarations or admissions of the agent evidence against or binding on the principal, they must be explanatory of some contemporaneous act within the scope of his authority, or must be made while in the execution of the agency forming a part of the *res gestae.*

See

Ehremann v. *Old F. & G. Walker Distillery Co., supra;*

Meador & Son v. *Standard Oil Co.* (Sup. Ct. Ala. 1916), 196 Ala. 365; 72 So. 34;

Southern Surety Co. v. *Nalle & Co.* (Tex. 1922), 242 S. W. 197;

Donnelly v. *Younglove Lumber Co.* (1910), 125 N. Y. Supp. 689; 140 App. Div. 846.

The same legal principles have been adhered to by the New Jersey tribunals.

The case of *Huebner* v. *Erie R. R. Co.* (E. & A. 1903), 69 N. J. L. 327; 55 Atl. 273, is one of the earlier decisions definitely following the above rules. There, a reversal was granted because the trial court improperly admitted in evidence statements made by agents of the defendant corporation. Garrison, *J.*, gives a brief summary of the earlier cases on the question at page 329:

"The question presented, therefore, is whether a principal is bound by acts or

statements of his agents with respect to matters not within the scope of their employment or committed to their agency. This question, which from time to time recurs, is an important one, and has received hitherto an uniform treatment in the reported decisions of our courts. In the early case of *Runk* v. *Ten Eyck*, 4 Zab. 756, the rule is thus laid down: 'Declarations and doings of a third person, acting in the capacity of an agent, are exempt from the general rule respecting hearsay testimony. They are admitted in evidence against the principal as the representations or acts of the principal himself whom the agent represents, while engaged in the particular transaction to which the declarations or acts refer. They must constitute a part of the *res gestae* in the course of his employment about the matter in question; they must accompany the doing of the business or making of the contract, and must be within the scope of the delegated authority.'

"This rule has since been consistently applied in our decisions, both in cases in which testimony was admitted and in those in which it was rejected. Among the more recent applications of this rule may be cited *Little* v. *Kerr*, 17 Stew. Eq. 267, in which it is said that such testimony 'while proof of the statement of a fact, is not evidence of the truth of the fact.'

"In another case—*Potts* v. *Agricultural Insurance Co.*, 26 Vroom 163, the rule laid down is that 'a statement made by a general agent of a corporation in the course of his employment as to a fact within his official knowledge *touching the status of a matter entrusted to him* is admissible in evidence on behalf of a party with whom *the corporation was dealing.*"

"In *Smith* v. *Delaware and Atlantic Telegraph and Telephone Co.*, 19 Dick. Ch. Rep. 770, the testimony of an agent was admitted when it was satisfactorily shown that it was

'made in the conduct of business entrusted to him.'

"And in *Blackman* v. *West Jersey and Seashore Railroad Co.,* 39 Vroom 1, where the testimony was rejected, the present Chief Justice said: 'It is only words which are spoken, or acts which are done by an agent in the execution of his agency which are admissible in evidence against the principal.'

"The citations suffice to show the correct rule, and to demonstrate that, if applied in the present case, it would have led to the exclusion of the testimony of Vreeland and Huebner as to all that occurred at the office of the superintendent. In legal effect, therefore, this testimony must be regarded as excised from the case."

The rule of the case of *Safner* v. *Gollin* (Sup. Ct. 1921), 96 N. J. Law 431, 115 Atl. 348, and affirmed by the Court of Errors and Appeals in 97 N. J. Law 576, 117 Atl. 927, is directly applicable to the facts of our present situation. That was a suit for personal injuries arising by reason of an automobile accident in which the plaintiff recovered a judgment below against Harry Gollin, the driver of the automobile, and the Bayonne Hardware Company. The facts which are pertinent in this discussion are thus set forth by Katzenbach, *J.,* at page 433 of 96 N. J. Law:

"The evidence of the agency of Harry Gollin to act for the Bayonne Hardware Company depends upon a conversation said to have taken place a few days after the accident between Felix Milwid, the owner of the car in which the plaintiff was riding, and Irving Gollin, treasurer of the Bayonne Hardware Company, and the owner of the Ford car which Harry Gollin was driving. Felix Milwid testified that he met Irving Gollin in a cigar store about three days after the accident and that Irving Gollin

said to him: 'I am sorry I sent that boy to deliver the glass the same day he gets the license. I don't think he drives very good. I sent that glass and such a heavy accident—such a big accident—I am sorry.' It will be observed that this statement succinctly puts into the mouth of Irving Gollin the words necessary to make Harry Gollin the agent of the Bayonne Hardware Company at the time of the occurrence of the accident. This conversation was admitted over the objection of the counsel for the Bayonne Hardware Company. If the conversation is admissible, and is to be construed as an admission of the treasurer of the Bayonne Hardware Company, binding upon that company, then the jury were warranted in finding a verdict against the company as well as against Harry Gollin. If the conversation is inadmissible, then there is no evidence in the case upon which the verdict against the Bayonne Hardware Company can be sustained."

The opinion then goes on to say:

"In our opinion, the purported statement made in the cigar store to Felix Milwid by Irving Gollin was inadmissible. In the case of *Ashmore* v. *Pennsylvania Steam Towing and Transportation Co.,* 38 N. J. L. 13, Chief Justice Beasley held that conversations which were entirely casual and not connected with the doing of any act within the scope of the agent's authority were not admissible in evidence, although made by a general agent in charge of the business. To make admissions receivable in evidence when made by a general agent they must not only refer to the business of the principal but they must be made in pursuance and as a part of such business. This principle has been further enunciated by our highest court in the cases of *Huebner, Administrator* v. *Erie Railroad Co.,* 69 *Id.* 327, and *Agricultural Insurance Co.* v. *Potts,* 55 *Id.* 158. Applying this test to the present

> case, it will be seen that the statement purported to have been made by Irving Gollin was one which was casually made some days after the occurrence and in no sense made in the performance of his duties as treasurer of the company. For these reasons the statement should not have been received in evidence."

Two New Jersey cases where declarations of an officer were admitted in evidence are *Halsey* v. *Lehigh Valley Railroad Co.* (Sup. Ct. 883), 45 N. J. L. 26, and *Hill* v. *Adams Express Co.* (Sup. Ct. 1908), 77 N. J. L. 19; 71 Atl. 683. In neither of these cases is there a fact situation which approaches the facts of our present case.

In the present case there is no acting within the scope of his authority by Carpenter, so as to be admissible in evidence as an admission by the Underwriting Management Corporation, nor does the letter or list of figures forming the declaration by the corporate officer fall within the rule of the cases hereinabove discussed. A letter was addressed to Mr. Carpenter *personally* (State of Case, p. 32, ll. 21-24) enclosing a list of names. A list of figures was inserted on the list of names and it was returned to the plaintiff. Neither the letter sending the list of names to Carpenter nor a copy of it is submitted by the plaintiff; neither does he offer any accompanying letter which was received from Carpenter. We have absolutely no proof nor any indication in what capacity Mr. Carpenter was acting in the correspondence. Since the letter was sent to him personally, and not to the company, the presumption is that Mr. Carpenter was throughout acting in his individual capacity and not in such manner as to bind the corporation for which he was secretary.

Carpenter was not acting within the scope of his duties as officer of the Underwriting Management Corporation at the time he sent the slip to Lovell. He was acting as an individual imparting some information to his acquaintance, John Lovell. If Lovell had desired a statement from the company he should and could have formally requested one. He did not. This notation from Carpenter should not be sufficient to fasten liability for commissions on the defendant Underwriting Management Corporation, and in turn on the other two defendant corporations.

Throughout this entire discussion, it must be remembered that it is the list of figures standing by themselves which are the alleged admission. The question should properly be considered as though the list of figures were on a separate sheet of paper.

Furthermore, the exhibit merely states that the persons named thereon are stockholders of the National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company. Under the most liberal construction there is nothing about Exhibit P. 2 to indicate anything more than that the persons named therein are stockholders to the extent set forth thereon. There is nothing to indicate any connection between these stockholders and the plaintiff.

POINT II.

The Trial Court was in error in admitting in evidence that portion of the minute book of the Underwriting Management Corporation which contained the minutes of a meeting of that corporation held on June 19, 1928, which was marked Plaintiff's Exhibit P. 3.

Exhibit P. 3 (State of Case, pp. 82-84) is an extract from the minutes of the stockholders' meeting of the Underwriting Management Co. held on June 19th, 1928. The plaintiff was one of the stockholders present at this meeting. (See State of Case, p. 51, ll. 15-18.) One of the resolutions passed read as follows:

> "Resolved, that the proper officers of this corporation be authorized to accept from the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company sufficient cash so that with the cash now in the treasury of this Corporation,
>
> (a) All liabilities of this Company be paid in full.
>
> (b) All Preferred Stockholders be paid the par value of their preferred stock with accrued dividends to July 1st, 1928.
>
> Any preferred stockholder who holds common stock which was given as a bonus at the time of the subscription to the preferred stock, shall surrender his or her common stock with the preferred stock, for which no additional money shall be paid.
>
> (c) The holders of all common stock other than that given as bonuses with preferred stock shall be paid the sum of $12.50 per share.
>
> (d) Pay all expenses incurred in the dissolution of this company, such as legal expenses, advertising, etc."

Further resolutions adopted at this meeting provided for the dissolution of the company by the directors and officers, and provided that in the event any assets remained in excess of the amounts needed to retire the stock and make the above payments, that said assets be conveyed to the National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Co., or their nominee.

This resolution was introduced into evidence for the purpose of showing the dissolution of the Underwriting Management Company and to fix responsibility for all obligations of the Underwriting Management Corporation upon the other two companies. It was not admissible in evidence for that purpose. In the first place, the resolution merely *authorized* the officers and directors of Underwriting Management Corporation to accept the offer of the other two companies. The attorney for the defendants admitted that the two companies had made such an offer to the Underwriting Management Corporation and that they were so authorized to do.

In order for the resolution to be admissible in evidence, there should have been proof of the actual dissolution of the Underwriting Management Corporation and the consummation of the transaction in accordance with the terms of the offer. The mere resolution authorizing the same is not competent evidence.

Especially important is this Exhibit P. 3 for the reason that it is the sole means of holding the defendants, National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company responsible for the claim of the plaintiff. Without this resolution there is absolutely no evidence that these two defendants "duly authorized the said plaintiff

to sell certain stock'' or that he performed services ''at the request of said defendants'' or that said defendants were in any way indebted to him. (See complaint on State of Case, pp. 5-9.) Furthermore the Independent Bonding & Casualty Insurance Company was not in existence at the time plaintiff performed the services he alleged the company is indebted to him for. (State of Case, pp. 52 and 53 to l. 15.)

Another reason the resolution should not have been permitted in evidence is that it is an endeavor to prove a different basis of liability for two of the defendant companies from that set forth in the complaint. Count one of the complaint states that all the defendants by their agent in the year *1924* duly authorized the plaintiff and entered into the alleged agreement for commissions with him. Count two bases liability upon the statement that ''in the latter part of the year 1926, the plaintiff sold stock issued by and belonging to the said defendants, at the request of said defendants.'' Counts two and three are common counts in money had and received and for work and labor performed at the special instance and request of the defendants. The minutes of the meeting marked Exhibit P. 3 is in support of none of these counts and we fail to see where it is relevant evidence in connection with any of the allegations of the complaint.

Nor does a reading of this exhibit disclose any language that will justify a construction that the two insurance companies thereunder assumed the liability of the Underwriting Management Corporation. There is absolutely no justification for the language of the trial judge (p. 58).

''The Court: The resolution further says: 'That in the event there are any assets of

> this company in excess of the amount needed to retire the stock of this company, the proper officers be authorized by proper instruments in writing to convey said assets to the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company, or their nominee.' That shows that this is an assumption of liability because they take all the assets. I will allow it in evidence because it shows that this is a winding up. The whole resolution will go in evidence."

In view of the above reasons, it is respectfully submitted that the admissions of the resolutions in evidence was improper, that it was harmful error, and is cause for the reversal of the judgment entered below.

POINT III.

The Trial Court erred in refusing to grant the defendants' motion for a judgment of non-suit.

At the close of the plaintiff's case, the attorney for the defendants moved for a non-suit on the ground that the plaintiff had not proved the matters set out in the complaint. The motion was denied and an exception was noted as a ground of appeal. (State of the Case, p. 59, ll. 1-10.)

As has already been pointed out in the statement of facts at the commencement of this brief, the plaintiff groups all three defendants together, and alleges that the defendants in the fall of the year 1924 duly authorized the plaintiff to sell certain stock for them. It further states that the orders for about thirty-four hundred (3400) shares of stock were obtained in March, 1925; that they were filled to the extent of nineteen hundred twenty (1920) shares in the latter part of the year 1926.

The second, third and fourth counts have already been described and are practically restatements of the old form of common counts. Inasmuch as the plaintiff sought recovery and rested his case upon an alleged express agreement, it is respectfully submitted that the second, third and fourth counts were not available to the plaintiff in the support of his case.

There is no dispute as to the fact that the Independent Bonding & Casualty Insurance Company was not organized until 1926, and the testimony also seems to be fairly clear that the National Guaranty Fire Insurance Co. was not fully organized at the time the plaintiff obtained the alleged orders in March, 1925.

As to the two insurance company defendants, there is absolutely no evidence showing employment of the plaintiff by these two defendants, or ratification or adoption of his acts. The only attempt made by the plaintiff to link the hiring of the plaintiff through Mr. Tuttle by these defendants is in the State of Case, pp. 55, 56 and 57. The only testimony which was admitted at that time by the Court, indicated that the three companies apparently had adjoining rooms in one suite. The mere fact that the three companies occupied the same suite of rooms was not sufficient evidence to place before the jury the question of the plaintiff's employment by the National Guaranty Fire Insurance Co. and the Independent Bonding & Casualty Insurance Company, or the question of Mr. Tuttle's agency for these two companies. A non-suit should therefore have been granted against these two companies unless the entire legal liability of the two companies was changed by the dissolution of the Underwriting Management Corporation, which

we maintain was not the case. This argument is fully gone into in Point IV of this brief.

The crux of the plaintiff's entire case is Exhibit P. 2 which is also discussed at length under Point I of this brief. If Exhibit P. 2 was not properly admitted in evidence, then the plaintiff has failed to prove the entire case as against all the three defendants. Exhibit P. 2 is the plaintiff's sole evidence as to the exact number of shares on which he claims commissions. Upon the barring of this memorandum from evidence, there can be no question as to the error in the refusal of the trial court to grant the motion to non-suit. It is upon the resolution of the Underwriting Management Corporation admitted in evidence at Exhibit P. 3 that the Court refused to grant a non-suit as against the National Guaranty Fire Insurance Co. and the Independent Bonding & Casualty Insurance Company. If the exhibit was erroneously allowed in evidence as the defendants maintain, then there was no evidence to give to the jury on the question of the liability of these two companies. The appellants further maintain that even though the resolutions remained in evidence, the construction placed upon them by the trial court was erroneous, and that these minutes of the Underwriting Management Corporation can in no way be construed as an assumption of the plaintiff's claim by the two other defendant companies. This, as has been indicated, is discussed more fully elsewhere in this brief. The plaintiff attempted to show the agency of Mr. Tuttle for all three companies, but was unsuccessful. The liability of the two insurance companies therefore, rests solely upon Exhibit P. 3. Consequently, those two defendants maintain that a judgment of non-suit should have been entered in their favor.

POINT IV.

The Trial Court erred in charging the jury as follows:

"I say to you that if he is entitled to this claim against the Underwriting Management Corporation, then he is entitled to that against the other two companies, the National Guaranty Fire Insurance Company and the Independent Bonding and Casualty Insurance Company, because they took over all the assets of the Underwriting Management Corporation and by a resolution received in evidence must be held to assume the obligations of the Underwriting Management Corporation."

The exception to this portion of the charge, which appears (State of Case, p. 77, ll. 15-25), was taken by the attorney for the defendant at p. 79, ll. 20-23. The question of the admissibility in evidence of the resolution is discussed earlier in this brief, and if it is held that the resolution was improperly admitted, then the above quoted statement in the charge of the trial court is manifestly error.

But even though the resolutions of the meeting held June 19th, 1928 were admissible, the charge of the Court below was nevertheless erroneous due to an entire misconstruction of the resolutions. A careful reading of Exhibit P. 3 will show that the offer of the Fire Insurance Company and the Bonding Company was to *pay cash to the Underwriting Management Company.* It was the Underwriting Management Corporation and neither the National Guaranty Fire Insurance Company nor the Independent Bonding & Casualty Insurance Company which was to pay all liabilities of that company in full, pay all the preferred stockholders, etc. The resolution is

not an assumption of the obligations of the Underwriting Management Corporation by the two other companies. The offer and resolution merely contain those matters as a method of stating the amount which the two companies are to pay over to the Underwriting Management Corporation. By no possible stretch of the imagination can the words of the offer of the companies be construed as providing for an assumption of the liabilities of the Underwriting Management Corporation. It states in plain language that the two companies offer to pay cash to the company about to be dissolved, which company shall meet all of its obligations; and the amount which they offer to pay is "sufficient cash so that with the cash now in the treasury" of that company, all of the Management Company's obligations can be taken care of. The true situation is correctly expressed by the trial court who, at p. 57, l. 27, says:

> "It does not seem to me to be an assumption of liability; it is an agreement that they will pay sufficient cash together with the cash now in the company treasury to settle the question of any cancellation of their contract, and that amount is equal to the amount of the liabilities of the company. The thing which they are obliged to do is to pay this money. The management company have to determine their liabilities; in other words, they agree to pay the company enough to pay the liabilities. They do not admit what the liabilities are; it is not an admission of this liability. They do not assume the liabilities; they agree to pay this company as a going company enough money to meet certain things. Whether the underwriting company desires to pay that money to the people they owe is another thing. They do not agree to pay it to the people. They agree to give the underwriting company that amount."

If the alleged obligation of the plaintiff was not included in the figures upon which the computation was made, it is either because there was no such obligation or because it was intentionally or negligently omitted by the officers and directors of the company. If there was such an obligation, judgment should be entered *solely* against the Underwriting Management Corporation, and the plaintiff can then have recourse to the liquidating directors and officers personally. These directors and officers might in turn have an action against the National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company on the ground that through mistake insufficient consideration was paid to the Underwriting Management Corporation by those companies in accordance with the terms of their offer. However, no such cause of action or right of action exists in John W. Lovell, the present plaintiff.

Mr. Lovell was one of the stockholders who was present in person at the meeting held on June 19th, 1928 (S. C., p. 51, ll. 15-18). He knew the terms of the offer made by the two daughter companies. If his claim against the Underwriting Management Corporation was a valid obligation of that company, he was charged with the duty of presenting his claim immediately (*i. e.*, before the details of the dissolution were completed) and he should have made certain that his claim was included in the list of the liabilities of the Underwriting Management Corporation. He did not do so, and the offer made by the two companies and accepted by the parent company, Underwriting Management Corporation, should not be distorted into an assumption of Lovell's claim by the National Guaranty Fire Insurance and Independent Bonding Companies.

The plaintiff will of course contend that the final ruling in regard to the resolution was the proper one. In the words of the trial court, the contention is (S. C. p. 58, ll. 20-30):

> "The resolution further says: 'That in the event there are any assets of this company in excess of the amount needed to retire the stock of this company, the proper officers be authorized by proper instruments in writing to convey said assets to the National Guaranty Fire Insurance Company and the Independent Bonding & Casualty Insurance Company, or their nominee.' That shows that this is an assumption of liability because they take all the assets."

However, such is not the law. The mere taking over of all the assets of one corporation by another corporation is not an assumption of the debts of the old corporation unless there is a special agreement to assume such debts or fraud.

It is true that Section 107 of the New Jersey Corporation Act provides that in the case of the merger or consolidation of two or more companies "* * * that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, and the respective former corporations may be deemed to continue in existence, in order to preserve the same; and all debts, liabilities and duties of either of said former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it" (L. 1896 Ch. 185, p. 311, Sec. 107; C. S., p. 1661, Sec. 107). However, there was no merger or consolidation of the Underwriting Management Corporation with the other two companies, so that the above provision of the corporation act is not applicable.

The National Guaranty Fire Insurance Company and Independent Bonding & Casualty Insurance Company had been in existence and were actively operating for several years in June, 1928. The two companies are not continuing the business of the old company, and the transfer of assets and purchase of the contracts was a cash transaction.

The possession of property is not essential to corporate existence, and the transfer, sale, or loss by a corporation of all of its property does not have the effect of terminating the corporate existence. See *Sewell* v. *East Cape May Beach Co.*, 50 N. J. Eq. 717, 25 Atl. 929; *Miller* v. *Audenried*, 67 N. J. Eq. 252, 57 Atl. 1076; *Coler* v. *Tacoma R., etc., Co.*, 65 N. J. Eq. 347, 54 Atl. 413. The sale of the assets of the Underwriting Management Corporation to the other two companies did not dissolve the Management Company.

Since there was no consolidation or merger of the companies, merely taking over all the assets of the Underwriting Management Corporation was no assumption of all of its obligations. To entitle the creditor of a corporation to a personal judgment against another corporation which purchases all the assets of the former, it must have agreed to assume the seller's debts, there must have been a consolidation of the two companies, the purchasing company must have been a mere continuation of the seller, or the transaction must have been fraudulent in fact. The foregoing rule is set forth and illustrated in the following cases:

Luedecke v. *Des Moines Cabinet Co.*, 140 Iowa 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616.

Austin v. *Tecumseh Nat'l Bank,* 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444.

Wolf v. *Shreveport Gas, E. L. & P. Co.,* 138 La. 743, 70 So. 789.

Seaboard Air Line R. Co. v. *Leader,* 115 Ga. 702, 42 S. E. 38.

Vicksburg & Y. City Tel. Co. v. *Citizens' Tel. Co.,* 79 Miss. 341, 30 So. 725.

The facts of the above typical cases will not be here discussed at length but they all follow the common law rule that to render a new corporation liable for the debts of an established corporation or firm to whose business and property it has succeeded, it must in the absence of a special agreement, appear that the transaction was fraudulent as to the creditors of the old corporation, or that the circumstances attending the creation of the new corporation and its succession to the business and property of the old corporation are of such character as to warrant a finding that it is a mere continuation of the former. The conditions to fix liability on the new corporations are not existent in our present case. There has been no fraud alleged, proved or even intimated. There is no consolidation or continuation of the business of the Underwriting Management Corporation by the other two companies.

Central Railroad Company v. *Bunn* (in Chancery 1857), 11 N. J. Eq. 336; and

Parsons Manufacturing Co. v. *Hamilton Ice Manufacturing Company* (Sup. Ct. 1909), 78 N. J. Law 309, 73 Atl. 254.

are two New Jersey cases dealing with the question of liability of a new corporation for the debts of an old corporation. Neither case bears any analogy to the facts in our present situation.

In the *Parsons Manufacturing Co.* case, *supra,* the defendant corporation took over the assets and business of an incorporated company of the same name with the prefix "The" added. Among the obligations of the old company was an unpaid promissory note given to plaintiff in final payment of the consideration for the sale of an automatic blower which defendant had taken upon the sale or transfer of assets and subsequently sold. The officers and managers of the defendant company were the same men who managed and directed the business of the old concern and caused the name of defendant corporation to be signed to the note in controversy, before the defendant company was organized and upon occasions arranged with plaintiff for an extension of time to pay the note in suit.

It was held that under the circumstances it was for the jury to conclude whether the note in question was taken over by the defendant as an obligation with the old company's assets. The liability of the defendant could there have been predicated either by novation or by ratification of its managers' acts, as well as by estoppel resulting from the taking over of the entire assets and business and the promises of its managers based thereon to pay.

In that case the defendant took over the assets of the former company for the purpose of carrying on its business. There was also no apparent change in the personnel of the concern. No such circumstances exist with the transfer of the assets of the Underwriting Management Corporation to the National Fire & Guaranty Insurance Co. and Independent Bonding & Casualty Insurance Co. and the above case has no application thereto.

The only ground or theory upon which the liability may be suggested, is that the resolutions comprising Exhibit P. 3 constitute a special and express agreement to assume the liabilties of the old company. This we maintain is absolutely contrary to the reasonable construction of words of the resolutions. And furthermore, as has heretofore been argued, it is strenuously urged that the entire Exhibit P. 3 was not properly admitted in evidence.

In conclusion, it is respectfully submitted that there were clearly error in the trial court. The defendants therefore pray that the judgment below be reversed and that final judgment be ordered for the defendants.

Respectfully submitted,

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