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JUDGMENT RECORD.

COMPLAINT.

(Filed Jan. 20, 1928.)

NEW JERSEY SUPREME COURT.

GEORGE HIGGINS, *Plaintiff*, v. FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, *Defendant*.	Judgment Record. Action at Law. On Postea. A. Moulton McNutt, Attorney.

Fidelity-Phenix Fire Insurance Company of New York, the defendant in this cause, was summoned to answer unto George Higgins, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued November 2, 1927.)

The plaintiff, George Higgins, of the Borough of Gloucester and State of New Jersey, says that:

1. On October 20th, 1925, the said defendant issued a fire insurance policy for a period of one year expiring October 20th, 1926, at twelve o'clock noon, insuring the plaintiff against loss or damage by fire to the amount of $2500.00 according to the terms

and conditions printed thereon covering certain merchandise generally, chiefly automobile accessories of every description, his own, held in trust, on consignment and sold but not removed, all contained in a certain frame and stucco dwelling being occupied as a public garage and situate on the easterly side of Broad Street, Glassboro, Gloucester County, New Jersey to which was attached a*n* Standard eighty per cent co-insurance clause.

2. The said policy was issued by Louis C. Joyce, Jr., an agent of the said company.

3. On November 21st, 1925, a fire occurred and damaged the property which the policy described.

4. The value of the property destroyed was $499.46 and the amount due to the plaintiff by reason of said loss under said policy was $290.39.

5. Attached to this complaint is a statement of the property which was destroyed together with the value thereof.

6. The plaintiff has requested the said defendant to pay plaintiff the loss sustained by him as insured by said policy but the said defendant has failed and refused to pay same and there is now due to the plaintiff from the defendant the sum of $290.39 no part of which has been paid besides interest from the twenty-first day of November, 1925.

Statement of Loss and Damage.

Merchandise	Sound Value	Loss
9 Hoods	$48.00	
24 rear fenders—touring	84.00	
16 front fenders—touring	64.00	

1 roadster back	10.00	
4 shields	9.60	
5 commercial fenders	17.50	
13 Wheels—complete	71.50	
14 wheels—truck	91.00	
7 Clincher wheels	28.00	
3 Clincher wheels—complete	18.00	
13 truck fenders	45.50	
25 rubber cells	15.00	
5 black shells	5.00	
4 rear fenders—sedan	15.00	
1 touring top	27.50	
2 roadster tops	44.00	
12 coupe rear fenders	48.00	
	641.60	641.60
List 40% (trade discount)		256.64
Net		384.96
3 cushions		19.50
5 windshields		55.00
2 nickel shells		10.00
roadster parts		30.00
		$499.46

Sound Value—$5,200.00.

Plaintiff demands two hundred ninety dollars and thirty-nine cents with interest from November 21st, 1925, as ($290.39).

A. Moulton McNutt,
Attorney for Plaintiff.

ANSWER.

(Filed Dec. 7, 1927.)

The defendant, Fidelity-Phenix Fire Insurance Company of New York, a corporation of New York, says that:

Defendant will object before, at or after the trial that the complaint discloses no cause of action.

Reserving the objection aforesaid and always subject thereto, defendant says:

First Defense.

It denies the truth of the matters contained in the complaint.

Second Defense.

The policy of insurance upon which the complaint is founded contains the following provision, viz: "No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after the full compliance by the insured with all of the foregoing requirements, nor unless commenced within twelve months next after the fire." This suit or action was not commenced within twelve months next after the fire.

Third Defense.

The policy of insurance upon which the complaint is founded contained the following provision, viz:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire." Although the time for so doing was not extended in writing by this company, the insured did not within sixty days after the fire, render to this company a statement, signed and sworn to by the insured stating the matters and things so required to be stated, nor any statement whatever.

FRENCH, RICHARDS & BRADLEY,
Attorneys for Defendant.

REPLY.

(Filed Dec. 13, 1927.)

Plaintiff in reply to the answer of the defendant in the above action says that:

It joins issue on the material allegations set forth in the answer and denies the same.

The plaintiff did not bring suit within the twelve months period because he was led to believe by the agent of the company, Louis C. Joyce, Jr., that the claim would be paid and also told that he did not need to enter suit because there was no defense to the claim and that it would be paid as soon as the matter could be taken through the proper channels. The defendant never denied liability nor disputed the amount of the claim as filed by the plaintiff but the plaintiff was assured that the matter would be settled and the money paid and that he did not need to start a suit within the time required.

As to the third defense plaintiff says that he fully complied with the conditions of the policy and furnished to Louis C. Joyce, Jr., the agent of the company, an itemized claim in writing within two days after the fire, the said claim was never disputed by said agent nor did any other representative of the company ever object to the claim in any way and further than this the statute of this State provides that the sixty day period shall not run until a demand in writing is made by the defendant upon the plaintiff for such a statement and such a demand has never been made and within sufficient time the plaintiff made inquiry of the agent of the company as to the status in the matter and was told by the

agent of the company that all of the requirements of the policy had been met and that he was not obliged to do anything further because the matter would be settled and the plaintiff would be paid.

A. MOULTON MCNUTT,
Attorney for Plaintiff.

DEFENDANT'S ANSWER TO REPLY.

(Filed Jan. 10, 1928.)

Defendant denies the second paragraph of the reply, to wit, that part of the reply interposed as an avoidance of the second defense.

Defendant denies the last paragraph of the reply.

FRENCH, RICHARDS & BRADLEY,
Attorneys for Defendant.

POSTEA.

This case was tried before Judge Frank B. Jess with a jury at the Gloucester Circuit, on June 4th, 1929.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for three hundred thirty-two dollars and forty-nine cents ($332.49).

Whereupon it is adjudged that the plaintiff, George Higgins, do recover of the said defendant, Fidelity-Phenix Fire Insurance Company of New York the sum of three hundred and thirty-

$332.49 two dollars and forty-nine cents damages
62.00 together with its costs which have been
taxed at the sum of sixty-two dollars mak-
$394.49 ing in the whole the sum of three hundred and ninety-four dollars and forty-nine cents.

Judgment signed and entered June 7, 1929.

WM. S. GUMMERE,
C. J.

I, FRED L. BLOODGOOD, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this eighteenth day of September, A. D. nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
(Seal) *Clerk.*

JUDGMENT.

NEW JERSEY SUPREME COURT.

GEORGE HIGGINS,
Plaintiff,
v.
FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK,
Defendant.

Action at Law.
On Postea.

$332.49
62.00

$394.49

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of three hundred and thirty-two dollars and forty-nine cents, besides costs to be taxed *nisi.* Entered June 7, 1929.

On motion of
A. MOULTON MCNUTT,
Attorney.

A true copy.
FRED L. BLOODGOOD,
Clerk.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

GEORGE HIGGINS, *Plaintiff,* v. FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, *Defendant.*	Action at Law. On Postea. A. Moulton McNutt, Attorney.

Judgment entered this seventh day of June, A. D. nineteen hundred and twenty-nine in favor of plaintiff and against the defendant for the sum of three hundred and thirty-two dollars and forty-nine cents damages and sixty-two dollars costs.

$332.49	
62.00	
$394.49	

WM. S. GUMMERE,
C. J.

A true copy.
FRED L. BLOODGOOD,
Clerk.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

GEORGE HIGGINS, *Plaintiff*, v. FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK, *Defendant*.	Action at Law. Notice of Appeal and Grounds.

To A. Moulton McNutt, Esq., Attorney of Plaintiff:

Sir:

Please take notice that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the trial Judge refused defendant's motion for direction of a verdict in favor of defendant.

2. Because the verdict rendered herein is against the law.

3. Because over defendant's objection plaintiff

was permitted to answer the following questions, to wit:

"Q. Then what did he tell you?

A. The same thing. He said there would not be any trouble. I would get it. I had all the confidence in the world in him.

Q. Did you know there was any limit to his authority?

A. No."

4. Because over defendant's objection the trial Court permitted the plaintiff's witnesses to testify as follows, to wit:

"Q. Did you have conversation with Mr. Higgins regarding settlement of the claim?

A. Yes.

Q. Do you recall when that was, how long after the fire?

A. There were a number of occasions.

Q. How long after the fire did you have a conversation with him relative to a settlement?

A. Shortly after we made up the schedule of loss—there are two separate schedules, one on the building of approximately $4,000, and one on the contents of $499, prorated among the various companies, six in all. Previous to arriving at these exact figures, we made a clerical error in including an awning item under merchandise, and it was necessary to make a revision, because the awning was insured as a part of the building and not as part of the merchandise. That was one occasion.

Q. Keeping in mind that you are interested in the Fidelity-Phenix Fire Insurance Company loss, what happened between you and Mr. Higgins after you had made up your loss list, and

you had gone to his place and made up the list, what happened next between you and Mr. Higgins?

A. I don't know what happened immediately next.

Q. What do you recall took place any time after you made up your list between you and Mr. Higgins?

A. From time to time Mr. Higgins inquired as to the payment of this particular claim.

Q. What did you tell him regarding his inquiry as to the payment of this claim?

A. I told him I had the matter well in hand. He was quite content to believe that, because I think he had confidence in me.

Q. That is what you told him on a number of occasions?

A. Yes.

Q. Then what happened?

A. Then what happened to him and me or the company and myself?

Q. With you and him?

A. When Mr. Higgins first reported the loss to me, I immediately visited his premises and informed him as to what was necessary to do in case of fire loss. I requested him to secure from his builder an itemized list of the damage to the building, and assisted him then and there in making up an inventory of the damaged personal property, which was merchandise. In course of time we were able to close all items except this particular one. He inquired about it from time to time. We assured him that we had the matter in hand, and we did. There finally came a time when the dispute between P. H. Mell, Fidelity-Phenix Philadelphia adjuster, who had charge of their losses, and who had

employed John G. Monrose, Philadelphia, to adjust this loss, and the man, Mr. Monrose, had never and has not yet visited the fire, the scene of the fire ——

Q. Did you tell Mr. Higgins anything about any dispute between you and Mr. Monrose?

A. Yes, sir, I told Mr. Higgins that Mr. Monrose and myself could not agree on the figures for the Fidelity-Phenix and it would be necessary to compel payment by suit.

Q. Was anything said about proof of loss prior to the time this was filed?

A. No. Mr. Higgins had filed with me the itemized account of the loss and damage and we in turn transmitted that to the company.

Q. Who suggested proof of loss be filed?

A. I did.

Q. Were you entrusted with policies of insurance in blank, authorized to issue them on the application of persons seeking insurance by the Fidelity-Phenix?

A. Yes."

5. Because the trial Court refused over the objection of the attorney for the defendant to permit the following question to be answered:

"What were the instructions which you received from the company with reference to the waiver and the suit of limitations of one year within which to bring suit?"

6. Because the trial Court charged the jury as follows:

"(a) The policy itself contains a provision requiring the proof of loss to be filed within a specified time, but the Legislature has passed an

Act which provides that 'the failure of any person, insured against loss or damage by fire in any insurance company doing business by or under the authority of the Department of Banking and Insurance of this State, to furnish proof of loss, shall not be or considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from recovery under such policy, or collection of such sum as should properly be paid under such policy, unless after said loss, sixty days' notice in writing that the said company desires said proof of loss be furnished the person so insured. The provisions of the foregoing section shall not be varied, altered, contradicted or affected by any agreement or contract, but shall remain in full force and effect, any and all provisions in any contract of insurance or other agreement to the contrary notwithstanding.' The case, being barren of any evidence that the insurer, the defendant, gave sixty days' notice in writing that the company desired said proof of loss be furnished, the Court rules that that defense fails in this case.

(b) And if the insured, the plaintiff in this suit, had no knowledge that the effort to adjust the matter had failed until more than a year after the loss, had no knowledge whatever of the difficulty that had arisen between Mr. Joyce and those who were authorized, or apparently authorized, to act for the company in the adjustment of the loss, * * * you may find that the defendant is estopped from relying upon that requirement of the policy when suit must be brought within 12 months next after the fire.

(c) And the determination of that question

will depend upon what conclusion the jury reaches with respect to the question whether, in the first place, Mr. Joyce was the agent of the plaintiff, or whether he was the agent of the defendant, the insurance company.

(d) The law of this State, as declared by the highest judicial authority of the State, is that an agent entrusted with policies in blank, and authorized to issue them upon the application of parties seeking insurance, is clearly clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent, or subsequent, and may waive notice of proof of loss, and may bind the company by his admissions in respect thereto."

7. Because the trial Court refused defendant's motion that a juror be withdrawn because of improper statements made by the attorney for the plaintiff.

Respectfully yours,
FRENCH, RICHARDS & BRADLEY,
Attorneys of Defendant.

TESTIMONY.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

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GEORGE HIGGINS,
Plaintiff,
v.
FIDELITY-PHENIX FIRE INSURANCE COMPANY,
Defendant.

Action at Law.
No. 51.

June 3 and 4, 1929. 20

JESS, J., and a jury.

APPEARANCES:

For the plaintiff, A. MOULTON MCNUTT, ESQ.

For the defendant, FRENCH, RICHARDS AND BRADLEY, ESQUIRES. (FLOYD H. BRADLEY, ESQUIRE, of counsel.) 30

Woodbury, N. J., June 3, 1929.

Mr. McNutt: It is stipulated that the copy of the insurace policy presented today is to be used in the case as a correct copy of the original; and that the amount of the loss, if any, is to be $290.39, with interest from November 21, 1925.

Mr. Bradley: I will consent just to the amount of the loss, $290.39. I think the interest should be figured from the date you submitted proof of loss, January 6, 1927.

Mr. McNutt: With interest from January 6, 1927.

(Mr. McNutt opened the case for the plaintiff to the jury.)

(Mr. Bradley opened the case for the defendant to the jury.)

GEORGE HIGGINS, sworn.

By Mr. McNutt:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Where do you reside?
A. Glassboro.
Q. In October, 1925, did you have a policy of fire insurance written?
A. Yes, sir.
Q. With the Fidelity-Phenix Fire Insurance Company?

A. Fidelity, yes.
Q. Who was the agent of the company?
A. Lewis C. Joyce, Blackwood.

Mr. McNutt: I offer in evidence the copy of the policy.

(Received and marked.)

Q. That policy was for $2,500?
A. Yes, sir.
Q. It covered automobile accessories?

Mr. Bradley: That is all admitted.

Q. Did you have a loss under the policy?
A. I had a loss the 21st November, 1925.
Q. What was the cause of the loss?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: I supposed from the opening of counsel in this case the real question to be passed upon involved the right of the agent of the company, Mr. Joyce, to waive certain provisions of the policy. It seems to me that is all there is to it. May I ask, did the witness say the policy was issued by Mr. Joyce, it came through Mr. Joyce?

Mr. Bradley: Yes.

Q. Immediately following the fire what did you do?
A. I called up Mr. Joyce and told him I had a loss over there, a fire.

Q. Then what happened?

A. He came over the next morning, Sunday morning.

Q. What did you do then?

A. Took an inventory.

Q. Who took the inventory?

A. He and I.

Q. What happened then?

A. In what way do you mean?

Q. Did you have any conversation with him then regarding ——

Mr. Bradley: Objected to. There is no authority here that shows that Mr. Joyce had any right to make any statement binding the company with reference to this fire, or any representation. His authority has not been proven. As far as we are concerned, his authority is limited to the power which appoints him in the authority here. We maintain Mr. Joyce had no right, and could not bind us, unless Mr. Joyce's authority is proven. He has no right as agent to bind us by statements, and is not the agent appointed here to make adjustments and file claims.

The Court: That brings us right to the main question in the case, and if you are right in that theory, then I suppose that we can't go any further.

Mr. Bradley: The authority should be proven, if it exists.

The Court: I think all they have to show is that he was the agent of the company, who issued the policy; that he was entrusted by the company with policies in blank to issue them to such people as de-

manded them; and then it would be a question of fact whether or not there was any waiver of any of these conditions by the agent. That is my view of the law, Mr. Bradley.

(Mr. Bradley further replied.)

The Court: I think that the very fact that he was the agent entrusted with these policies, with authority to issue them, clothed him with apparent authority to waive conditions of the contract of insurance. It has been so held by one of our Courts here, the Supreme Court, that that is sufficient.

Mr. McNutt: The policy is in evidence.

The Court: It is admitted, as I understand it, certain requirements of the policy were not complied with as far as direct notice to the company was concerned?

Mr. Bradley: Under the terms of this policy, the policy that is in evidence bears the following: "This policy is made and accepted, subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on the back hereof, which are hereby specifically referred to and made part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement, endorsed hereon, or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have

such power from which it may be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon, or attached hereto, nor shall any privilege or permission affect the terms of this policy, or be claimed by the injured unless so written or attached." This is the standard form. That goes ——

The Court: You look at 102 N. J. Law reports, 414, Chesansky against Merchants Fire Insurance Company. There it says that an agent, formally designated in writing by the insurance company, entrusted with policies in blank to be issued upon the application of persons seeking insurance, is clothed with the apparent authority to waive any condition of the policy. Whether precedent or subsequent, notwithstanding a provision of the policy that in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." That cites the case of Snyder against Insurance Company, 59 New Jersey Law, page 544, and applies it to this case. That is the decision of the Court of Errors and Appeals in the Chesansky case. The objection will be overruled.

(Exception noted for defendant.)

(Question repeated.)

Mr. Bradley: I want to take exception to all conversation with Mr. Joyce, without it being shown that Mr. Joyce had specific authority to bind us after the fire.

The Court: Overruled.

(Exception noted for defendant.)

Q. Did you have any conversation with him then regarding this list at the time that you made up the list?

A. At the time I made up my list?

Q. Yes.

A. Yes, casually, yes.

Q. Was it anything regarding the matter?

A. Yes, he was going to take care of it.

Q. Was there anybody else from this company came to see you?

A. No, I didn't see anybody.

Q. Did you hear from Mr. Joyce about this matter afterwards?

A. Did I hear from him?

Q. Yes.

A. No. I stopped there once in a while to see him, how he was getting along. He said that everything would be all right, and I need not worry about it at all.

Q. How about these other companies, who took care of them?

A. They did.

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Yes, sustained.

Q. You say you stopped there?

A. Yes, sir, frequently.

Q. You had some conversation regarding this loss?

A. Yes.

Q. Did he say anything to you about the payment of the loss?

A. Yes.

Q. What did he say?

A. He said not to worry. He said it would be paid. He was satisfied it would be paid.

Q. What reason did you have to believe that Mr. Joyce was taking care of the matter for the company?

A. I left everything with him. I got enough confidence in him. I deal with him altogether in insurance.

Q. Had he taken care of other insurance for you?

A. Yes.

Q. Had he written all your insurance?

A. Pretty much everything I got.

Q. Did you have any other conversation with him about the matter?

A. About what?

Q. About this loss?

A. Any other conversation?

Q. Yes, other than you have related?

A. No.

Q. Right after the loss he told you he would take care of it?

A. Yes, he said that.

Q. Was this loss ever paid?

A. Ever paid?

Q. Yes.

Mr. Bradley: It is admitted that this particular portion of the loss was not paid.

Q. You didn't get a check for it. Did you make inquiry of Mr. Joyce why it was not there?

A. Yes.

Q. What did he tell you?

Mr. Bradley: Objected to. That seems to me

The Court: Overrule the objection.

(Exception noted for defendant.)

Q. What did he say in regard to why it was not paid?

A. What did he say?

Q. Yes. When you finally didn't get your check. You had gotten a check on the others?

Mr. Bradley: Objected to.

The Court: That is not relevant to this case.

Mr. McNutt: I will withdraw that.

Mr. Bradley: I move that a juror be withdrawn. We have endeavored in every way to ——

The Court: I won't grant that motion to withdraw a juror, because in the opening it was stated the other losses were paid. McNutt stated that there were other companies prorating the loss, and that the other companies had paid their proportion of the four hundred and some dollars loss.

The Stenographer: (Reading from his record of Mr. McNutt's opening) "There were a number of policies covering the same property, and the total loss was something like $499.46, and these companies divided up the loss, as some of you men probably understand who are familiar with insurance. Where there is more than one policy covering the same property, and there is a loss, they divide up the insurance and pay their proper share."

The Court: I will instruct the jury at this point that it doesn't make any difference what any other company did. The only question you are to decide is whether, if it comes to you, whether this company is liable in this suit, regardless of what other companies may have done. I deny the motion to withdraw a juror, and caution the jury to disregard that testimony.

Q. When you did not get your check, or get payment from the Fidelity-Phenix Fire Insurance Company, did you then again make inquiry of Mr. Joyce why you didn't get a check?

A. Yes, I made several inquiries.

Q. Then what did he tell you?

A. The same thing. He said there would not be any trouble. I would get it. I had all the confidence in the world in him.

Q. Finally did there ever come a point in the dealings with you when you were told it would not be paid by the company?

A. Would not be paid?

Q. Yes, before you entered this suit?

A. I don't think he did, no, just simply entered suit against them, that is all.

By the Court:

Q. Was he still saying that the policy would be paid?

A. Yes, he had all reason to believe that the policy would be paid, yes.

Cross-examination.

By Mr. Bradley: I would like your Honor's ruling on the fact that the cross-examination would be subject to the other objection I have already made. This is all incompetent, irrelevant and immaterial.

The Court: You have the ruling on that, Mr. Bradley.

By Mr. Bradley:

Q. How long have you known Mr. Joyce?
A. Several years.
Q. He has always looked after your insurance?
A. Yes.
Q. After this loss a man named Monrose came down to see you?
A. No.
Q. You didn't see him?
A. No.
Q. Where were you?
A. I am supposed to be around the place there, but I didn't see him.
Q. You didn't see anybody but Mr. Joyce?
A. I seen adjusters from other companies.
Q. Did you see a man by the name of Monrose?
A. I don't know him. I didn't see him.
Q. Did Mr. Joyce come with anyone else to look over the loss?
A. From your company you mean?
Q. From any company?
A. Did Mr. Joyce come with anybody else?
Q. Yes.
A. Yes, lots of them. There has been four or five there, adjusters.

Q. You don't know their names?

A. No.

Q. You don't know whether Mr. Monrose came or not?

A. I don't think anybody representing that company.

Q. You don't know whether Mr. Monrose came or not?

A. No, I don't know Mr. Monrose.

Q. And you expected Mr. Joyce was looking after this matter for you?

A. Yes, sir.

Q. Mr. Joyce has been in close touch with you since this fire?

A. Yes.

Q. He has been instrumental in bringing this suit?

A. Yes, he and I together.

Q. Did you see the authority of Mr. Joyce to transact business for the Fidelity-Phenix Fire Insurance Company, which he had in his office?

A. Did I see it?

Q. Yes.

A. No.

Q. Witness being shown what purports to be the agent's authority, in four pieces, and is asked if he ever saw that in Mr. Joyce's office?

A. I don't know as I ever seen it, no. It may have been there, too.

Mr. Bradley: I offer the agent's authority in evidence, in four pieces.

(Received and marked.)

Q. Were you at his office often?

A. Yes.

Q. Then when you stopped back to see Mr. Joyce again, he said that he was taking care of it?

A. Yes, I depended on him altogether.

Q. Did he tell you the company had refused to pay it, or were making any objection to it?

A. He did finally, yes.

Q. When was this?

A. Probably a year ago, something like that.

Q. After suit was started?

A. Before suit was started.

Q. How long before suit was started? This suit was supposed to have been started the 2nd November, 1927?

A. Just a few months before that.

Q. Would you say two or three months?

A. About that, yes.

Q. About two or three months before suit was started he told you they didn't intend to pay, didn't he?

A. I don't know whether he said that exactly, no. He said he guessed we would have to institute suit. I don't know that he said that particularly.

Q. He was representing you in this matter, wasn't he?

A. I don't see how. Sure, he was representing me, sure.

Q. He was the one that was looking after your loss?

A. Sure.

Q. Did he help you make up this inventory?

A. Yes.

Mr. Bradley: I offer in evidence the proof of loss in this case.

(Received and marked.)

Q. Are you familiar with that proof of loss?

A. Yes.

Q. That paper was prepared by Mr. Joyce, the proof of loss?

A. Yes, sir.

Q. Did you sign that proof of loss?

A. Yes, I signed this.

Q. Mr. Joyce's name is on there?

A. I seen it. Here it is. (Indicating.)

Q. Is Mr. Joyce a notary public?

A. I think he is.

Q. You swore to it before Priscilla Reid?

A. Yes, Miss Reid.

Q. Is that someone in Mr. Joyce's office?

A. Yes.

Q. That was filed or prepared about January 6, 1927?

A. Something like that. I don't know just when it was.

Q. Witness my hand at Blackwood 6th of January, 1927?

A. That is right.

Q. That is your signature, George Higgins?

A. That is right.

Q. Did Mr. Joyce ever tell you he had been careless and negligent in the handling of this?

A. I don't recall that.

Q. You left everything to Mr. Joyce?

A. Yes, indeed.

Q. And Mr. Joyce was the one who advised you to institute suit?

A. Yes, sir.

Q. You authorized Mr. Joyce to go ahead and prepare this statement, and in preparing it, he was acting for you?

A. Yes, sir.

By Mr. McNutt:

Q. Do you recall ever having read any certificate like the one shown to you, in Mr. Joyce's office, in such a way you would know what his authority was in regard to this policy?

A. No, I don't know I ever read any.

Q. Did anyone other than Mr. Joyce ever make any demands upon you, or request you to submit any writings of any kind, in regard to this loss?

A. No.

Q. Who advised you to file the proof of loss?

A. Mr. Joyce.

Q. Who advised you to do everything that was done in this matter?

A. Mr. Joyce.

Q. When the other adjusters were there, did they have any conversation with you at all?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

Mr. McNutt: I will withdraw it.

Q. Was there any other adjuster from this company who took this matter up with you at all?

A. Nobody.

Q. The only person you had any dealings with in regard to this loss was who?

A. Mr. Joyce.

Q. Did you know what his authority was in this matter?

A. Only representing them as their agent.

Q. That is all you knew?

A. That is all.

Q. Did you know there was any limit to his authority?

A. No.

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

(Exception noted for defendant.)

By Mr. Bradley:

Q. You didn't know there was any limit to his authority?

A. No.

Q. You knew he could not pay money without proof of loss, didn't you?

A. I depended on Mr. Joyce for everything.

Q. Did you know that he could not have paid you the money without proof of loss, right away paid you the money?

A. Of course, he would have to go through that, sure.

Q. You did know there was that much limit?

A. Yes.

Q. What other limits did you know?

A. I didn't know there was any, particularly.

Q. You knew he could not waive payment of your premiums, didn't you?

A. Possibly not.

Q. You knew he could not, didn't you? Didn't you know you would have to pay for the insurance you got from him?

A. I pay my premiums to him.

Q. You knew you would have to pay them?

A. Yes.

Q. You knew he could not waive that provision, didn't you?

A. Yes.

Q. What other provisions did you know he could not waive?

A. I can't call any to mind.

Q. You can't call any but these two?

A. That is all I can remember.

Q. You don't know whether Mr. Monrose was there, or not, do you?

A. I didn't see Mr. Monrose.

Q. You don't know the names of the men who were there, do you?

A. No, I didn't know their names.

LEWIS C. JOYCE, JR., sworn.

By Mr. McNutt:

Q. Where do you reside?

A. Blackwood, New Jersey.

Q. You are the Lewis C. Joyce that wrote the policy in question in this suit?

A. I am.

Q. Do you recall Mr. Higgins coming to you after the fire had occurred?

A. Yes, on several occasions, but not specifically to learn about this. It was incidental to other matters that he mentioned this. Mr. Higgins had full confidence we were capable of taking care of his interests, and he left it with us.

Q. Did he report the loss to you?

A. Yes, sir, reported it to me the morning after it occurred.

Q. What did you do?

A. I went to the premises immediately and with him assisted in making an inventory of the damaged goods.

Q. Did you have any conversation with Mr. Higgins regarding a settlement of the claim?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Exception noted for defendant.)

A. Yes.

Q. Do you recall when that was, how long after the fire?

Mr. Bradley: May I have the same general line of exceptions to these questions with regard to conversations which this man had with Mr. Higgins?

The Court: Some of them may be objectionable.

Mr. Bradley: All right. I object to this one as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Exception noted for defendant.)

A. There were a number of occasions.

Q. How long after the fire did you have a conversation with him relating to a settlement?

Mr. Bradley: Objected to, incompetent and irrel-

evant. This agent cannot bind the insurance company, because it is not proven he is our agent.

The Court: Overruled.

(Exception noted for defendant.)

A. Shortly after we made up the schedule of loss —there are two separate schedules, one on the building of approximately $4,000, and one on the contents of $499, prorated among the various companies, six in all. Previous to arriving at these exact figures, we made a clerical error in including an awning item under merchandise, and it was necessary to make a revision, because the awning was insured as a part of the building and not as part of the merchandise. That was one occasion.

Q. Keeping in mind that you are interested in the Fidelity-Phenix Fire Insurance Company loss, what happened between you and Mr. Higgins after you had made up your loss list, and you had gone to his place and made up the list, what happened next between you and Mr. Higgins?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Exception noted for defendant.)

A. I don't know what happened immediately next.

Q. Do you recall when you saw him again?

A. Not exactly, but to really explain this matter, to get the insurance explanation of it ——

Mr. Bradley: Objected to. This is not an answer.

A. I don't know what happened immediately next. I do from time to time.

Mr. Bradley: I object to this.

The Court: Reframe your question.

Q. What do you recall took place any time after you made up your list between you and Mr. Higgins?

Mr. Bradley: Objected to, as irrelevant, incompetent and immaterial, and not binding upon the defendant.

The Court: Overruled.

(Exception noted for defendant.)

(Question repeated.)

A. From time to time Mr. Higgins inquired as to the payment of this particular claim.

Q. What did you tell him regarding his inquiry as to the payment of this claim?

Mr. Bradley: The same objection.

The Court: Overrule the objection.

(Exception noted for defendant.)

A. I told him I had the matter well in hand. He was quite content to believe that, because I think he had confidence in me.

Q. That is what you told him on a number of occasions?

Mr. Bradley: The same objection.

The Court: The same ruling.

(Exception noted for defendant.)

A. Yes.
Q. Then what happened?

Mr. Bradley: The same objection.

The Court: The same ruling.

(Exception noted for defendant.)

A. Then what happened to him and me or the company and myself?
Q. With you and him?

Mr. Bradley: The same objection.

The Court: The same ruling, only we are not getting along. I am going to rule, if you will ask a general question of this witness as to what was said and done by him and Mr. Higgins, the plaintiff, with reference to the adjustment of this loss, or consideration of the loss, that he may give a general answer. I think he is entitled to explain as to what transpired between the two, as to whether or not there was any waiver, and in what conditions of the policy.

(Exception noted for defendant.)

A. When Mr. Higgins first reported the loss to me, I immediately visited his premises and informed

him as to what was necessary to do in case of fire loss. I requested him to secure from his builder an itemized list of the damage to the building, and assisted him then and there in making up an inventory of the damaged personal property, which was merchandise. In course of time we were able to close all items except this particular one. He inquired about it from time to time. We assured him that we had the matter in hand, and we did. There finally came a time when the dispute between P. H. Mell, Fidelity-Phenix Philadelphia adjuster, who had charge of their losses, and who had employed John G. Monrose, Philadelphia, to adjust this loss, and the man, Mr. Monrose, had never and has not yet visited the fire, the scene of the fire ——

Mr. Bradley: Objected to.

Witness: This is what I said to Mr. Higgins.

Mr. Bradley: Are you telling what you said to Mr. Higgins as to the reason it became necessary to start suit for the collection of the claim?

Witness: That was because of the dispute which arose between Mr. P. H. Mell, representative, and Mr. J. G. Monrose, as to the amount of the loss.

Mr. Bradley: I think it is clearly incompetent and immaterial. How can he tell about a dispute?

The Court: I think that is incompetent.

Q. Did you tell Mr. Higgins anything about any dispute between you and Mr. Monrose?

Mr. Bradley: The same objection.

The Court: The same ruling.

(Exception noted for defendant.)

A. Yes, sir, I told Mr. Higgins that Mr. Monrose and myself could not agree on the figures for the Fidelity-Phenix and it would be necessary to compel payment by suit.

Q. When was that?

A. I would have to refer to my papers to say about when that was. I should say about November, or October 1, 1927, somewhere in the fall of 1927, shortly before suit was started.

By the Court: Can you fix that date more definitely when you told him that?

Witness: I can't fix the date, except to say that it was about a fraction more than a month before suit was started.

Q. That was the first time Mr. Higgins knew that it was necessary to enter suit in the matter?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

The Court: Sustained.

Q. Did you advise Mr. Higgins to file the proof of loss in question here?

A. Yes.

Q. Was anything said about proof of loss prior to the time this was filed?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Exception noted for defendant.)

A. No, Mr. Higgins had filed with me the itemized account of the loss and damage and we in turn transmitted that to the company.

Q. What was that you sent to the company?

A. An itemized list of the loss and damage.

Q. When was that?

A. Within the week of November 21, 1925, the date of the fire.

Q. Within a week after the fire?

A. Yes.

Q. This itemized list was sent to the company?

A. Yes.

Q. By you?

A. Yes.

Q. Did you say anything at that time to Mr. Higgins about the necessity of filing proof of loss?

A. No, the question of proof of loss never came up until it was necessary to bring Mr. Monrose to some definite conclusion in the matter.

Q. Who suggested proof of loss be filed?

Mr. Bradley: The same exception.

The Court: The same ruling.

(Exception noted for defendant.)

A. I did.

Cross-examination.

By Mr. Bradley:

Q. You knew Mr. Monrose was representing the defendant here in this suit?
A. No, my notice was ——
Q. You knew it or no?
A. My advice from the company ——
Q. Can't you answer that yes or no?
A. I can't answer it yes or no without qualification.
Q. You knew Mr. Monrose was an independent adjuster in Philadelphia?
A. I know him very well.
Q. How long have you known him?
A. Probably fifteen years.
Q. You have had dealings with him, have you not?
A. Off and on.
Q. And you knew it was the custom of insurance company offices to get him as adjuster, as an independent adjuster to come and adjust the loss?
A. Some offices, except the Fidelity-Phenix, have their staff adjusters.
Q. You know Mr. Monrose does a lot of that kind of work, adjusting fire losses?
A. Yes, sir.
Q. Mr. Monrose wrote you a letter on December 11, 1925, didn't he?
A. He probably did.
Q. Have you a copy of that there?
A. Yes, sir.

Mr. Bradley: I would like to mark this for identification.

(Received and so marked.)

Q. On December 11th, 1925, you knew that Mr. Monrose represented the defendant in this matter, did you not?

A. Only from his letter, not from the company.

Q. You had no reason to doubt that his letter to you was correct, had you?

A. Yes.

Q. You knew it was correct?

A. No, I had considerable reason to doubt it.

Q. Had you had any previous dealings with Mr. Monrose?

A. Considerable.

Q. He never deceived you in a like transaction, did he?

A. He never had the opportunity.

Q. What do you mean by that?

A. You say he never deceived me in a like transaction. I say he never had the opportunity. We had no such like transaction.

Q. Mr. Monrose is a reputable public adjuster, isn't he?

A. He is what we call a cross-grained adjuster. He antagonizes his assured.

Q. What do you mean by cross-grained?

A. Monrose is the type of adjuster that can make a very disagreeable adjustment for a man who has had a loss if he happens to be in that mood, and that is what I mean by cross-grained.

Q. Anybody can do that if they happen to be in that mood, can't they?

A. He suffers from this more frequently than some of the other adjusters.

Q. You are an adjuster yourself?

A. Yes.

Q. Are you cross-grained, too?

A. Only on such occasions as this.

Q. How long before this had Mr. Monrose in-

formed you he was representing the defendant in this case?

A. That is where most of the trouble lies, with Mr. Monrose.

Q. How long before?

A. Not at all.

Q. This was the first notice you had?

A. No.

Q. What notice did you get before this?

A. Mr. Monrose's representative, Mr. Van Houten, together with myself, visited Mr. Higgins' garage shortly after the fire.

Q. For what purpose?

A. For the purpose of checking this list which had been submitted to the company.

Q. You knew then Mr. Monrose was representing the defendant here, did you not?

A. Only from his own word, but we had prior advice from the company.

Q. Did you?

A. Yes.

Q. Have you got that?

A. Yes, we have that here.

Q. Did you write a letter to the Fidelity-Phenix under date of January 8, 1927?

A. Yes.

Mr. Bradley: I would like this marked for identification.

(Received and so marked.)

Q. When was it you went with Mr. Monrose to look at this loss for the Fidelity-Phenix?

A. Mr. John G. Monrose?

Q. Yes.

A. Never.

Q. Was it his son you went with?

A. No, some young clerk from his office he sent down with Mr. Van Houten.

Q. Mr. Van Houten is with the General Adjustment Bureau. Then it was talked over then, and you knew at that time that Mr. Monrose was representing the Fidelity-Phenix?

A. Not officially, no.

Q. When did you learn it officially?

A. I haven't learned it officially yet.

Q. Did you write to Mr. Mell January 26th, 1927?

A. Yes.

Mr. McNutt: Any letters Mr. Joyce may have written to the company are immaterial, irrelevant and incompetent, because they should not bind Mr. Higgins.

The Court: Objection sustained.

Q. This is a letter from Lewis C. Joyce, Jr. That is your stationery, is it?

A. Yes.

Q. You admit that it is on your stationery, and is addressed to Mr. P. H. Mell, Staff Adjuster, 311 Walnut Street, Philadelphia, in re Grenloch policy 427, George Higgins, Glassboro, and it is an attempt by this letter to show ——

Mr. McNutt: I object to this matter going before the jury in this fashion.

The Court: Is it for the purpose of impeaching the witness on any part of his testimony now given, showing any inconsistency?

Mr. Bradley: This is to show that he recognized Mr. Monrose in this matter, and had taken up this matter with Mr. Monrose, and Mr. Monrose ——

Mr. McNutt: I didn't bring out on direct examination anything about Mr. Monrose, any deal between Mr. ——

Mr. Bradley: He said he doesn't know it officially. This paragraph of the letter clearly indicates he did know.

The Court: I will reverse my ruling on that and overrule the objection.

(Exception noted for plaintiff.)

Q. Mr. Joyce, have you a copy of this letter you can follow along with me, January 26th, 1927?

A. Yes.

Q. You say, "I have for consideration your letter of January 25th referring to the above. My letter of January 8th was not intended as a criticism either of your company or your adjusters, and I am sorry that you seemed to think so, because we tried to clearly state that we assumed all responsibility in the matter. Our reason for communicating direct with the company was because we felt that this was our privilege, and the fact that Mr. Monrose considered the claim outlawed when we did not, made it necessary that we give the company the full statement of the facts." Further on you say if they don't pay it you will pay it from your own funds. You considered at that time Mr. Monrose represented the company, didn't you?

A. No, you don't put that clearly. Mr. Mell represented the company.

Q. You considered at that time Mr. Monrose represented the company, did you not, as adjuster in this matter?

A. Yes, we considered he did, but you asked me if we had notice of that to date.

Q. It didn't make any difference when you had official notice or not. You were dealing with him as an agent of the company?

A. I was dealing with him after dealing with Mr. Mell.

Q. You knew Mr. Mell had delegated this to Mr. Monrose?

A. The correspondence was chiefly between Mr. Monrose and myself.

Q. You knew Mr. Mell had delegated this to Mr. Monrose?

A. Yes, and I knew Monrose had not been to the loss.

Q. How did you know Mr. Monrose had not been to the loss?

A. Because the appointment that was made at my office for him and Mr. Van Houten was not attended by him, and Mr. Higgins advised that at no time had any other representative of the Fidelity-Phenix come there.

Q. You don't know of your own knowledge; you only know through Mr. Higgins?

A. I know of my own knowledge this far, there was no further attempt to negotiate with Higgins or with me except on the information which we had filed with them.

Q. You knew the question came up there about the amount of the loss, so that was one of the particular questions?

A. That was the thing that caused all the trouble.

Q. The amount of the loss?

A. Yes.

Q. The company claimed there was only a loss, and Mr. Monrose claimed there was only a loss of $164.94?

A. Without having visited the loss.

Q. You don't know he had not visited the loss of your own knowledge, do you?

A. As far as my own knowledge can possibly go, yes.

Q. You were there all the time, stayed right there at the scene of the loss from the time of the loss up to the present time, were you?

A. No.

Q. You don't know what happened when you were not there, of your own knowledge, do you?

A. I can't possibly say yes to that, but I know positively Mr. Higgins is reliable when he says that.

Q. You can't expect the Court and jury to take that, what some other man told you. Of your own knowledge you don't know whether Mr. Monrose went to that scene of the fire, or not?

A. No, but I am satisfied he didn't.

Mr. Bradley: I move the last part be stricken out.

The Court: Yes.

Q. You know Mr. Higgins says he doesn't know Mr. Monrose, don't you?

A. But surely if Mr. Monrose had been there, he would have made himself known.

Q. On January 8, 1927, you wrote a letter to the Fidelity-Phenix, referring to Mr. Monrose, did you not, where you say, "Enclosed herewith find proof, showing loss, under the above policy, in the amount of $290.39, together with National Board Report,

which proof has been long delayed, due, principally, to the fault of this office, by reason of the fact that of the number of companies on the risk, your claim was handled by John G. Monrose, three companies by the General Adjustment Bureau, and the balance of the companies by this office.'' You wrote the Fidelity-Phenix telling them at that time this claim was handled by Mr. Monrose, did you not?

A. Yes.

Q. Did you pay this loss out of your own pocket?

A. No, we advanced funds due Mr. Higgins pending settlement of this suit.

Q. You have paid him the funds?

A. We have not paid him; we advanced funds.

Q. When did you advance the funds?

Mr. McNutt: Objected to, I don't think it is material.

Mr. Bradley: I think he is the proper party to this suit. It has been clearly shown he advanced this money. It's his suit, not the defendant.

The Court: Objection sustained.

Mr. Bradley: On the further ground as to his credibility and interest in that suit. When he advanced the money is my question. If he advanced the money, it shows his interest in the suit.

Q. When did you advance that money?

A. We left him owe us that amount on open account.

Q. When did you do that first?

A. I can't tell you exactly that without referring to the book account.

Q. Was that before suit? How long before suit was started, or instituted?

A. There is always an open account with Mr. Higgins; has been for fifteen years.

Q. Ever since the fire you have allowed him that?

A. No, we always have an open account.

Q. You allowed him that, because the amount would cover the loss?

A. Yes. We didn't allow it, we left it remain open, making a distinction from the others.

Q. You didn't collect it, did you?

A. We left it open. I would collect it, if it was determined this company was not to pay.

Q. Mr. Higgins so understands it?

A. Yes.

Q. When was that arrangement made with him?

A. There was no particular arrangement at all, just an open matter.

Q. You certainly had some understanding with him about it, didn't you?

A. Simply that he shan't, pending the decision on this suit, he deprived of the use of the money to which he is entitled.

Q. On December 20th, 1926, you knew Mr. Monrose was acting for this company, did you not, when you wrote the letter of December 20th, in which you said, "I am seriously 'in dutch' with the above assured, and need your immediate help to bring this matter to a satisfactory conclusion. In re George Higgins"?

A. I have never said I knew he was acting; you said had I a notice.

Q. I didn't say anything about a notice. You did know, I don't care whether officially or not, that he was acting for the company, didn't you, by your letters and your actions? Did you write the company and ask them if Monrose was acting for them,

that he said he was, and you didn't believe him, and he was cross-grained, and so forth?

A. I wrote Mr. Monrose and talked to Mr. Mell.

Q. Asking him if he was acting for them?

A. Wrote Mr. Mell asking him if he was not handling the claim himself.

Q. Mr. Mell told you Mr. Monrose was handling it?

A. The company told me Mr. Mell.

Q. Didn't Mr. Mell tell you Mr. Monrose was handling it when you asked him if he was handling it?

A. Yes.

Q. When was that?

A. Probably a year and a half afterwards.

Q. That was before suit was started?

A. I imagine suit was not started until about two years.

Q. When you render statements, do you render them monthly, or how often, to Mr. Higgins?

A. We don't render statements to Mr. Higgins.

Q. For insurance?

A. We don't render statements to him.

Q. What do you do?

A. Simply send him bills.

Q. Do you still allow a credit on there for this account?

A. Yes.

Q. On each of the bills that are sent?

A. No, that amount is open in the account.

Q. The amount of $499.40 was the true measure of damages that the assured sustained in the fire loss?

A. Less than the true measure.

Q. It was at least this much?

Mr. McNutt: I object, I don't see how this is material. We have set the amount of damages.

(After argument.)

Mr. McNutt: All right, if he is not going into much detail.

Q. There was at least this much measure of damages.

A. Yes.

Q. $290.39 is the proportionate share of the loss this defendant should pay if there is a verdict against it?

A. Yes.

Q. Have you made any arrangement with Mr. Higgins if this loss is not paid by your company you should assume it?

A. I didn't, but I would.

Q. You did make such a statement to the company to that effect?

A. I did, very decidedly so.

Q. When was the first time you knew the company didn't intend to pay this claim?

A. Over a year after the fire.

Q. You knew there was considerable discussion in 1925 about it, didn't you?

A. Yes, the discussion was all between Mr. Monrose and myself.

Q. Mr. Monrose represented the insurance company?

A. No, Mr. Mell represented the insurance company.

Q. Who did Mr. Monrose represent?

A. Apparently, Mr. Mell.

Q. He didn't represent him individually. You

know Mr. Mell is an agent of the company, don't you?

A. Mr. Mell is not an agent of the company. He is an adjuster.

Q. An adjuster for the company?

A. Yes.

Q. And it was turned over to Monrose to settle it?

A. Yes.

Mr. McNutt: They have been over and over this several times. It is wasting a lot of time. This has been testified to two or three times.

The Court: Yes, I will rule on any objection that is made.

Q. Did you talk to Monrose on the telephone about this many times?

A. Never.

Q. You received this letter from Monrose, December 11th, 1925, which we marked D3?

A. Yes.

Q. You knew then Mr. Monrose had some interest in it, or purported to have some interest in the fire?

A. From him, yes, the information was from him.

Q. You so dealt with him?

A. We battled back and forth for about two years.

Q. Why didn't you file the proof of loss before the 6th of January, 1927?

A. It was not necessary.

Q. Why didn't you inform Mr. Higgins to institute suit within the year?

A. It was not necessary.

Q. Witness being shown D1 for identification. Is

that the authority you had from the company to affect insurance?

A. Yes.

Q. That is from this company in question, the Fidelity-Phenix?

A. All companies are just like this.

Q. You had that up in your office, didn't you?

A. This was in the cellar.

Q. Did anybody ever ask you if you had authority from the Fidelity-Phenix to write for them?

A. No.

Q. You returned that to the company in this paper, that is D1 for identification?

A. It looks very much like it.

Q. You know whether you did or not, don't you?

A. Unfortunately, I don't do the detail work in the office.

Q. You authorized someone to send it back?

A. I did, when I resigned the company.

Q. This stamp on here is January 25th, 1926. Is that about the time you returned this to the company?

A. I shouldn't imagine so.

Q. You folded it in this shape, did you?

A. No, I didn't.

Q. You had someone to do it?

A. Yes, I didn't tell them how to fold it. I said send back the commission of authority.

Q. Can you show me anywhere here that gives you any authority to adjust losses?

A. It is not on there.

Q. Can you show me on this D1 whereon you get any authority to waive any of the requirements of the policy?

A. You will find in that commission, "And such other acts as may be from time to time delegated or relegated to said agent."

Q. Have you anything in authority to show, from the company, that you were authorized to waive the conditions of this policy with reference to the bringing of suit, or to the filing of the claim within sixty days?

A. The power hereby conferred is subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its authorized representatives, and may be revoked at any time the company may so elect.

Q. What were the instructions which you received from the company with reference to the waiver of the statute of limitations of one year within which to bring suit?

Mr. McNutt: Objected to.

The Court: Sustained.

(Exception noted for defendant.)

Q. You knew before the year was up that the company was going to contest this suit, did you not?

A. No, no, indeed, they didn't make any such ——

Q. You knew there was a contest in this suit on December 11, 1925, when you wrote to Mr. Monrose, did you not?

A. That was over a year.

Q. 1925, December 11th, that is not over a year?

A. That was so then.

Q. You knew there was a controversy regarding the amount of the loss?

A. Yes, but between Mr. Monrose and me, not with the assured.

Q. Between Mr. Monrose and you, and you were the only one acting with Mr. Monrose. Mr. Monrose was not acting as representing the assured, was he?

A. He should have been, but he wasn't.
Q. He was not, was he?
A. No.
Q. You took it up with Mr. Monrose?
A. There were four other adjusters.
Q. Not four other adjusters for the Fidelity-Phenix?
A. No.
Q. Just confine yourself to this case; there was no other adjuster came in on this except Mr. Monrose and you?
A. Yes.
Q. You knew Mr. Monrose was acting on December 11th. This letter marked D4A for identification, that is your signature?
A. Yes.
Q. You wrote it?
A. Yes.

By Mr. McNutt:

Q. Were you entrusted with policies of insurance in blank, authorized to issue them on the application of persons seeking insurance by the Fidelity-Phenix?
A. Yes.

Mr. Bradley: Objected to. Here is the best evidence of his authorization. There is nothing here about policies in blank. You can't certainly prove agency by his own statement, his own admissions. Here is his authority.

The Court: Whether there was such a thing is a question for the jury to settle. He can tell whether he was entrusted with policies in blank.

(Exception noted for defendant.)

Q. Regarding these communications which you had with Mr. Monrose, Mr. Mell and other persons, if any, did Mr. Higgins know anything about that?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial. This man was acting as agent for Mr. Higgins, and it is immaterial whether Mr. Higgins knew it or not.

The Court: Objection sustained.

Q. Did you tell Mr. Higgins about the letters which you had written to various people and Mr. Monrose, which have been referred to here?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Apparently, Mr. McNutt, the plaintiff is not going to rely on the claim that Higgins was bound by anything that Joyce did with the transaction. In that case I sustain the objection.

Q. You have never actually paid Mr. Higgins any money, have you, in this matter?

A. We left an open account.

Q. You have never given him a check or money?

A. No.

Q. Do you know whether or not Mr. Higgins left this matter entirely in your hands?

A. Yes, absolutely.

Q. Did he have anybody else working on it at all?

A. Not at all.

Q. Do you know the reason he came to you was because you were an agent of the company?

Mr. Bradley: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Did you ever tell Mr. Higgins the extent of your authority from the company?
A. It would be a difficult thing to define.

Mr. Bradley: I think that calls for a yes or no answer.

A. No.

By the Court:

Q. Did I understand you to say in your testimony on cross-examination that it was more than a year after the fire that you told Mr. Higgins that the company would not pay?
A. Yes.
Q. Mr. Bradley asked you something about whether you had, had had something to do with the matter of suit, I think the question was whether you told Mr. Higgins he would have to begin suit within a year, or something of that sort?
A. No, he did not; there was no reason to.
Q. Why do you say there was no reason?
A. The dispute was a trifling one between Mr. Monrose, who is an independent adjuster, and myself, over this list of merchandise. All the other adjusters concurred in the list.
Q. That was your reason. That is why you say there was no reason?
A. There was no dispute on the claim.

By Mr. Bradley:

Q. You knew the provision of the policy you were to institute suit within a year, didn't you?

A. No.

Q. Had you ever read an insurance policy?

A. I know it by heart, word for word.

Q. You don't know of anything in there that suit must be instituted within a year?

A. Only in the case of disputed claim.

Q. Do you know line 106 "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance of the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." Do you know the policy contained such a provision?

A. Yes.

Q. Why did you say that you didn't know it was necessary to institute suit within a year?

A. Because it isn't.

Q. But the policy says it is. Do you go around telling these people they don't have to bring suit within a year?

A. No.

Q. The provision in the policy means nothing as far as time within which suit should be brought?

A. Exactly.

Q. You could bring suit ten years afterwards?

A. Under certain circumstances, yes.

Q. Under the same circumstances as in this case?

A. Yes.

Q. In other words, you would never be precluded from bringing suit?

A. I would not say. There is a statute of limitations.

Q. What is the statute? What covers this?

A. The governing factor in this case is simply that the claim had been duly filed by the assured, and the policy conditions complied with, and no denial of liability made to him.

Q. Had the claim been allowed?

A. As far as I knew, yes.

Q. As far as you know the claim was allowed. You were never advised it was allowed?

A. It was never disallowed.

Q. What did you mean in your letters to Mr. Mell and the company with reference to the claim would not be paid?

A. They didn't refuse to pay the claim.

Q. You knew they were not going to pay it?

A. No, not until shortly before suit was started.

Q. Why did you keep telling them if they didn't pay it you would pay it?

A. For the simple reason that we had a dispute on the amount between Mr. Monrose and myself.

Q. Isn't that a sufficient dispute to warrant failure to pay?

A. No.

Q. What kind of dispute is sufficient?

A. As soon as the company took an official recognition of Mr. Monrose's standing in the matter, then was time for suit. Until that time it was a personal difference between two adjusters.

Q. That is your idea of the legal situation?

A. That is my idea of the actual status of the case.

Q. It could go along for four or five years, still open?

A. Assuming the company in the meantime had not espoused the cause of one or the other.

Q. Did Mr. Monrose ever inform you that the claim would not be allowed?

A. Yes, about a year and a month afterwards, he tried to stand on the time limit.

Q. That is a year and a month?

A. Yes.

Q. A year and a month afterwards?

A. Yes.

Q. That would be in November, 1926?

A. Yes, no, December, 1926.

Q. Did you at that time tell Mr. Higgins that you would have to bring suit?

A. No, I told Mr. Higgins ——

Q. Thirteen months afterwards, you knew the company, through Mr. Monrose, claimed that the period had expired, and they would not pay the claim?

A. Yes, through Mr. Monrose.

Q. Then you didn't inform Mr. Higgins of that fact?

A. Right away, we filed proof.

Q. It was over a year before you filed proof?

A. We filed proof immediately, within thirty days after Mr. Monrose's first indication he was going to make a technical defense to the claim.

Q. You filed proof of loss after a year after the fire?

A. Yes, but within a month after Mr. Monrose indicated that he was going to avail himself of a policy defense.

Q. Then suit was not instituted until November. Did you advise Mr. Higgins he didn't have to start suit right away?

A. I don't know exactly that we did, because I didn't think it would be necessary even then.

Q. You know you didn't then, don't you?

A. No.

Q. You advised him suit was not necessary at that time?

A. I probably advised him that a certain time must elapse after proof is filed before suit can be started.

Q. You give legal information to clients, do you?

A. Yes, upon inquiry.

Q. You are the attorney in this suit?

A. No.

Q. Did you ever have a law education?

A. No.

Q. Did you take Mr. Higgins to Mr. McNutt, or refer him to Mr. McNutt?

A. Yes.

Q. When was that?

A. I don't remember exactly.

Q. Shortly before suit was brought?

A. Yes.

Q. Mr. McNutt is your attorney, is he?

A. Mr. Higgins' attorney.

Q. He is your attorney, too?

A. On occasion.

Mr. McNutt: Plaintiff rests.

THE CASE FOR THE DEFENDANT.

EUGENE SUYDAM BROKAW, sworn.

By Mr. Bradley:

Q. You are connected with the Fidelity-Phenix Fire Insurance Company?

A. Yes, sir.

Q. In what capacity?

A. I am an adjuster.

Q. I show you what purports to be authority given Mr. Lewis C. Joyce, Jr., with your company, to affect insurance, and ask you if that is Mr. Lopez' signature as secretary?

A. Yes, sir.

Q. And the signature of Mr. Evans printed on there?

A. Yes, sir.

Q. That is the regular authority given to agents?

A. Yes, sir.

Cross-examination.

Mr. McNutt: No questions.

(At this point a recess was taken until ten o'clock the following morning, June 4th, 1929, when trial of cause was resumed in the presence of counsel for the respective parties.)

Lewis C. Joyce, Jr., recalled.

By Mr. Bradley:

Q. You sent to the company a loss report?

A. Yes, sir.

Mr. Bradley: I offer it in evidence.

(Received and marked.)

Q. In the remarks at the bottom of your loss report you say, "I shall be very glad if you will authorize us to take care of this loss at once, or that

it be referred to the General Adjustment Bureau, but in either event would ask that you advise us by wire which action has been taken, as we are particularly desirous of giving this prompt attention." That is correct?

A. Yes, sir.

Q. You never received any permission from the company to adjust the loss or to act for them in that matter, did you?

A. No, I just received a circular in reply.

Mr. Bradley: I offer the circular in evidence.

(Received and marked.)

Q. Witness is shown D6 and asked if that is the circular you received?

A. Yes.

Q. "We have your notice of claim for loss under policy No. 427 issued to George Higgins. The matter has been referred to our adjuster, Mr. P. H. Mell, whose address is 311-313 Walnut Street, Philadelphia, Pa." Therefore, they notified you that Mr. Mell had charge of it?

A. Yes.

Q. Did you tell Mr. Higgins that you had no authority to adjust the loss, and that the matter had been referred to Mr. Mell?

A. No, Mr. Mell never came down on it.

Q. As I understand it, Mr. Mell or someone referred the matter to Monrose, and you had correspondence with Monrose?

A. No, Monrose, and Van Houten, the General Adjustment Bureau came to my office. We all went to Higgins' together.

Q. You did see Monrose?

A. No, not Monrose, a man from Monrose's office.

Q. Someone from his office?

A. A clerk from his office.

Q. On December 9th you wrote that letter. Have you a letter there to Mr. Monrose of December 9th?

A. Yes, sir.

Mr. Bradley: It is consented that this be used as the original, and is offered in evidence.

(Received and marked.)

Q. "Mr. John G. Monrose, Adjuster, 333 Walnut Street, Philadelphia, Pa. Dear Sir: In re: Grenloch, New Jersey Policy No. 427, George Higgins. In accordance with telephone request today from Mr. Longworth, I am enclosing to you herewith copy of statement of loss under the above, together with copy of form attached to the above policy." And in this matter you sent that letter together with the contents as disclosed by the letter to Mr. Monrose, the adjuster in this matter?

A. Yes, sir.

Q. Then it was Mr. Monrose replied by letter of December 11, 1925, which has been marked D3 for identification?

A. That is correct.

Q. What was the first reply you had to that letter, was it Monrose to you under date of December 11th?

A. I will tell you the first reply after I look.

Mr. McNutt: I have not objected to this, because I thought Mr. Bradley would soon be through, but it seems to me this is all irrelevant and immaterial,

because there is no proof here that Mr. Higgins had any knowledge of this at all and Mr. Joyce said he didn't tell Mr. Higgins anything about it. It doesn't seem to me that it is material what Joyce wrote to the company, or what the company wrote Joyce.

Mr. Bradley: Mr. Higgins said Mr. Joyce was acting for him in this matter. It has been clearly established that Mr. Joyce had no authority of the company to adjust the loss, and he knew that. This will show just what Mr. Joyce did with the company. It was my fault for not having put in the letters.

Mr. McNutt: He had these letters offered yesterday.

Mr. Bradley: I did not get them all in.

The Court: I will overrule the objection.

(Exception noted for plaintiff.)

Q. Was your next letter to Mr. Monrose December 20th, 1926?

A. What was the date of the previous letter?

Q. The previous letter you wrote or he wrote?

A. The last letter you referred to previous to this?

Q. His letter to you under date of December 11, 1925.

A. There was considerable in between.

Q. Have you any letter there you wrote to Mr. Monrose in the meantime?

A. There doesn't seem to be any correspondence with Mr. Monrose.

Q. No reply from you to Mr. Monrose up until December 20th?

A. Not to Monrose, no.

Q. Then Mr. Monrose wrote you December 24th, 1926, did he not?

A. That is correct.

Q. That was where he stated that, "Under date of December 11th, over a year ago" he wrote you in detail with reference to the matter, without ever receiving an acknowledgment or reply, and that since the time had elapsed, it was out of his power to do anything?

A. That is what he said, but apparently there was no correspondence between us.

Q. You said that none of this you told to Mr. Higgins?

A. Mr. Higgins didn't enter into the transaction with Mr. Monrose and myself.

By Mr. McNutt:

Q. Did Mr. Higgins, as far as you know, know anything about this correspondence between you and the company?

A. No.

Q. Did he ever pay you anything for acting as his adjuster or anything?

A. No.

Q. Did he ever ask you to act as adjuster for him?

A. No.

Q. When he came to you, he came to you to report the loss as an agent of the company?

A. Yes, sir.

By Mr. Bradley:

Q. You knew you were not acting for the company?

A. I decided to act for them because Monrose failed to ——

Mr. Bradley: I move that be stricken out.

Q. You knew you were not authorized by the company to act for them because they had never acceded to your demands to act, is that not so?

A. No, Mr. Monrose took the matter up with me. If that was not authority, I don't know what that would be.

Q. You considered when Mr. Monrose took the matter up with you, that gave you authority?

A. Because he failed to do so himself, it left me to do the work.

Q. You know in this Exhibit D5, which has been marked, that you asked them for authority to adjust the loss, and they replied and told you it had been referred to Mr. Mell?

A. Mr. Mell.

Q. You knew you were not the adjuster?

A. Not particularly, no, but Mr. Monrose did not act.

Q. Did you ever get any authority from the company to act for them in this matter?

A. By inference, from Mr. Monrose.

Q. Not by inference, that is a conclusion.

The Court: That is a conclusion, and perhaps a legal conclusion. If he is asked whether he ever got any expressed authority, in writing, or otherwise ——

Q. Did you ever get any expressed authority, in writing or otherwise to act for them in this matter, in which you asked to be allowed to act as adjuster, or that it be referred to the General Adjustment Bureau?

A. I don't understand the question.

Q. I don't want any conclusion drawn, or attempt to draw any legal conclusion in the matter. They never wrote you and told you that you could be the adjuster for them in this matter?

A. No, nor did they tell me Mr. Monrose would be.

Q. They told you when you wrote asking if you could be the adjuster, they told you Mr. Mell would be?

A. Yes.

Q. And no agent of the company ever told you you were to be the adjuster, or ever wrote you that you were to be the adjuster?

A. No, nor that Mr. Monrose would be.

By the Court:

Q. Did Mr. Mell ever see you in regard to it?

A. After we had this wrangling with Mr. Monrose, Mr. Mell attempted to straighten it out and to keep us both sweet, but it was a dispute between Mr. Monrose and myself over the amount of the loss.

Q. Was that the dispute?

A. Yes.

By Mr. Bradley:

Q. He told you they had Monrose, then?

A. Who, Mr. Mell?

Q. Yes.

A. No, the beginning of my knowledge of Monrose entering into it was not official at all.

Q. Was it when Monrose wrote to you?

A. No, when a man from Monrose's office came down with Mr. Van Houten.

Q. Mr. Van Houten from the General Adjustment Bureau?

A. Yes. He represented some, and I represented some.

Q. It is understood that the proof of loss is in your handwriting?

A. Yes.

Mr. Bradley: We rest. That is our case.

(Side bar.)

Mr. Bradley: If the Court please, I would like to move for the direction of a verdict for the defendant in this case, on the ground that as set forth in the second and third defense for the defendant in this case, the first one, in substance, being that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. It has been admitted that this suit or action was not commenced for over twelve months after the fire. The third defense refers to the sixty day period of filing the inventory and proof of claim. And also on the ground that the evidence discloses that Mr. Joyce was the agent in this matter for the plaintiff in the suit, and not for the defendant.

(Mr. McNutt replied.)

(After further argument.)

The Court: On the first ground on which this motion is based, I do not think that it is tenable. The statute provides that unless the insurer shall notify the insured that it wishes a proof of loss to be filed, then that requirement is waived. There is no evidence, in fact I think it is conceded in this case, there was never any demand by the insurer that the insured furnish the proof of loss. That being so, I don't think that the status that was thereby created as a result of the operation of the statute would be in any way affected by the subsequent voluntary act of the insured in filing a proof of loss. It seems to me that he has a right to rely on the statute, and that the effect of the statute cannot be destroyed by a voluntary act on his part, which, of course, can in no sense be prejudicial to the company, or change the status in any wise as it then existed at the time the proof was filed.

As to the second count on which the motion was made, namely, that the policy itself requires that a suit shall be brought within twelve months after the loss occurred, it seems to me that in considering that motion I am bound in the first place by the rule laid down by the Court of Errors and Appeals in the case which I cited yesterday, Chesansky against the Merchants Insurance Company, 102 N. J. Law 414. There it was held that an agent of an insurance company, who is entrusted with policies in blank, with authority to issue such policies to those who apply for them, is clothed with apparent authority to waive any conditions precedent or subsequent to the insurance policy. The effect of that decision, it seems to me, is that the insured has a right to rely upon the apparent authority of the agent with whom he is dealing, when that agent is

the agent of the company who issued the policy to him. In this case it appears from the evidence that the only substantial dispute, or perhaps the only dispute which led to any delay in the adjustment of this loss centered about the question of the amount of the loss. The plaintiff immediately reported the loss after the fire occurred, placed the matter in the hands of Mr. Joyce, who is an agent of the company that had issued the policy, and relied upon him and his statements that the loss would be adjusted, or whatever the evidence shows as to what he did say, that it was being taken care of. It seems to me that he had a right to rely on those statements, because of the apparent authority of the agent with whom he was dealing to make them, and that whatever was done would be binding upon the company. The fact that during this period Mr. Joyce, who was clothed with this apparent authority to represent the company, had certain negotiations with those who had been designated by the company to adjust the loss, would not in any way affect the rights of the insured to rely on Mr. Joyce as the agent of the company, particularly in view of the fact that the evidence is conclusive that he, the plaintiff, knew nothing whatever as to what was going on, or what was causing the delay in making the adjustment. The very letter of November 27th, written to Mr. Joyce by the insurance company, the defendant in this case, in reply to Joyce's letter of November 23rd (D5) in which he said, "I shall be very glad if you will authorize us to take care of this loss at once, or that it be referred to the General Adjustment Bureau, but in either event would ask you to advise us by wire which action is taken, as we are particularly desirous to give this matter prompt attention" as I see the letter of the company of November 27th, in reply to that letter from

Mr. Joyce, stated that this matter has been referred "to our adjuster, Mr. P. H. Mell, whose address is 311-313 Walnut Street, Philadelphia, Pa." also adding "Please see that the property covered by our policy not destroyed is taken care of by the assured. Impress upon the assured the fact that the conditions of the policy make it necessary for him to use every precaution to prevent loss or damage. If not already done notify us and the adjuster above named, probable amount of our loss, name of other companies on, date of meeting of adjusters, etc." that letter clearly evidences a recognition by the insurance company of the agency of Joyce, not, it is true, for the purpose of adjusting this loss, but it supports the conclusion that so far as Higgins was concerned, and so far as anything was brought to the attention of Higgins, he, Joyce, was clothed with apparent authority to waive conditions or to do whatever an agent would do within the scope of his apparent authority in the matter of adjusting the loss. So it seems to me that this is a case where the question as to the authority of the agent to bind the company, and as to whether by anything that the company or the agent did, the insured was led to believe that his loss would ultimately be paid without the necessity of bringing suit, estops now the company from claiming or relying upon that provision of the policy, that suit must be brought within twelve months or one year after the time of the loss. I think the questions raised by the evidence and under the law are questions for the jury, and will deny the motion for a directed verdict.

(Exception noted for defendant.)

THE CHARGE OF THE COURT.

JESS J.: Ladies and gentlemen of the jury: This is a suit to recover a fire loss claimed to have been sustained by the plaintiff, and the suit is brought by the plaintiff, Mr. Higgins, against the Fidelity-Phenix Fire Insurance Company of New York. The policy was for $2,500, was issued for the term of one year from the 20th October, 1925, and insured the plaintiff, Higgins, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding $2,500. The insurance covered merchandise located in the plaintiff's property in Glassboro in this county.

There is no question that a fire occurred, which caused loss or damage to the property covered by the insurance policy on which the plaintiff sues.

It has been agreed in this case between the parties that if the jury should find that the plaintiff is entitled to recover anything in this suit, he is entitled to recover the sum of $290.39, with interest. The defense, however, denies that under the facts, and under his contract of insurance, the plaintiff is entitled to any recovery whatever. The defense to this suit is based chiefly upon two grounds. One is that the plaintiff failed to comply with that provision of the policy which required that he should, within a certain time after the fire, file a proof of loss with the insurance company. It appears uncontested in this case that such proof of loss was not filed within the prescribed time, and it is claimed that, therefore, the plaintiff on that ground is estopped from any recovery in this suit. The policy itself contains a provision requiring the proof of loss to be filed within a specified time, but the Legislature has

passed an Act which provides that "the failure of any person insured against loss or damage by fire in any insurance company doing business by or under the authority of the Department of Banking and Insurance of this State to furnish proof of loss, shall not be or considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from recovery under such policy, or collection of such sum as should properly be paid under such policy, unless after said loss, sixty days' notice in writing that the said company desires said proof of loss, be furnished the person so insured. The provisions of the foregoing section shall not be varied, altered, contradicted or affected by any agreement or contract, but shall remain in full force and effect, any and all provisions in any contract of insurance or other agreement to the contrary notwithstanding."

The case, being barren of any evidence that the insurer, the defendant, gave sixty days' notice in writing that the company desired said proof of loss be furnished, the Court rules that that defense fails in this case.

The next defense is that the insured, the plaintiff in this case, did not bring suit on this policy within the time limit fixed by the contract itself, and that defense is based upon the following provision of the policy: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." That is a perfectly valid provision of the contract and is enforceable.

The question in this case is whether there are facts which the jury may find from the evidence which would warrant an assumption, or a finding, by

the jury that that provision of the contract either had been waived by the company, or whether, because of the conduct of the company, or its agent, the company is now estopped from relying upon that provision as a defense in this suit, and the determination of that question will depend upon what conclusion the jury reaches with respect to the question whether, in the first place, Mr. Joyce was the agent of the plaintiff, or whether he was the agent of the defendant, the insurance company. The evidence shows that the policy in suit was issued to Mr. Higgins, the plaintiff, by Mr. Joyce, as the agent of the defendant insurance company. There is no question, you will understand, that he was the agent of the company for the purpose of issuing the insurance policy, in question, but the defense insists he was not the agent of the company for the purpose of adjusting the loss resulting from the fire, or for the purpose of in any wise binding the company by any statement made in connection with the effort to adjust the loss, or by anything that he did in that connection.

It appears clearly that Mr. Joyce under his general authority to issue fire insurance policies for the defendant company was not the agent of the company for the purpose of adjusting any losses. It also appears, or at least there is an absence of any evidence in the case from which the jury could find that he had from the company any expressed authority in this particular case for the purpose of adjusting the loss, or negotiating for a settlement, or for waiving any conditions of the insurance contract. I say that there is no evidence of any expressed authority in Mr. Joyce thus to bind the company by any acts or statements of his. The contract of insurance itself provides, I think, in a general way that no agent shall by his acts or words or conduct

bind the company, unless his authority to do so shall be in writing. I think there is a substantial provision, or a provision substantially to that effect, in the contract. The plaintiff, however, insists that under the facts, under the law, Mr. Joyce was the agent of the defendant company in the settlement, or attempted settlement, of this loss. The law of this State, as declared by the highest judicial authority of the State, is that an agent entrusted with policies in blank, and authorized to issue them upon the application of parties seeking insurance, is clearly clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent, or subsequent, and may waive notice of proof of loss, and may bind the company by his admissions in respect thereto. The theory of the plaintiff is that the facts in this case bring Mr. Joyce within the rule of law which I have just read, namely, that he was clothed with apparent authority to bind the company in reference to any condition of the contract, antecedent or subsequent, and to bind the company by his admissions. It appears from the evidence in this case that forthwith after the loss—I think the testimony is that the morning after the fire—Mr. Higgins, the insured, reported the loss to Mr. Joyce, and I think the jury would be justified in finding from the evidence that he almost dismissed the matter from his mind, except to the extent that he on more than one occasion inquired of Mr. Joyce what progress was being made in the adjustment of the loss. His testimony, the testimony of Higgins, is that he had assurances from Joyce that he, Joyce, would take care of the matter for him, and that everything would be all right, and that he need not worry, and Mr. Joyce, as I recall the testimony, confirms this evidence, and both Mr. Joyce and Mr. Higgins concur in their testimony

that it was more than a year after the loss when Higgins was told by Joyce that the company, the defendant here, would not pay the loss.

You will understand that there is no question in this case that the suit was not brought within the limit of time provided in the contract, namely, within one year after the fire occurred. If that were a fact, standing alone without any explanation, then, of course, the plaintiff would not be entitled to recover, even though he didn't know there was any such provision in the contract. It was there, and it was a contract, and, of course, parties to a contract are bound by whatever they agree to in writing, as in this case, where they clearly comprehend all that the contract contains, or understand it. But the plaintiff insists that he was led by the conduct of Joyce, or the statements of Joyce, or both together, to believe that this claim based upon the loss under the policy would be paid ultimately. You have heard the testimony as to what was done by the parties, and what was said, what efforts were made to adjust the matter. You have heard the testimony that the principal bone of contention, as I recall it, was as to the amount of the loss.

If you find that the natural consequences of the conduct of the company, or its agent, was to induce the plaintiff to believe that it would not be necessary to bring suit on the policy, and that the delay in settlement was due to the ordinary processes in adjusting the loss, and if the insured, the plaintiff in this suit, had no knowledge that the effort to adjust the matter had failed until more than a year after the loss, and had no knowledge whatever of the difficulties that had arisen between Mr. Joyce and those who were authorized, or apparently authorized, to act for the company in the adjustment

of the loss, if Mr. Higgins had no knowledge of that condition, you may find that the defendant is estopped from relying upon that requirement of the policy that suit must be brought within twelve months next after the fire. So you see, ladies and gentlemen, the fundamental question for you to decide in this suit is whether Mr. Joyce, under the facts of the case as you find from the evidence, and under the law, was the agent of the insurance company, and if he was, whether what he did, or what he said, induced the plaintiff to believe that the loss was in process of adjustment, and would be adjusted, until the time provided in the contract within which suit must be brought, had expired; so that if by the conduct of the company, or its agent, he was lured into a sense of security, and had no intimation that in order to collect the insurance it would be necessary to institute a suit until after the time for filing the suit under the contract had expired, you might find in favor of the plaintiff. If you find that Mr. Joyce was not the agent of the plaintiff, the insured, or if you find that it has not been shown that the plaintiff was induced or led to defer any legal action until after the contract time for such action had expired, by the conduct of the company or its agent, then the plaintiff cannot recover in this suit.

As I said at the outset, it has been agreed that if your verdict is in favor of the plaintiff, damages will be assessed at the sum of $290.39, and with interest from January 6, 1927. It has been agreed that if you find for the plaintiff, and only in the event of your finding for the plaintiff, you will return a verdict for the sum of $290.39, and interest, $42.10, making the total of $332.49. I want to make it again perfectly clear that in agreeing upon this amount, the defendant is not agreeing that it is liable in this suit. The stipulation is that if you

should find in favor of the plaintiff, you may accept these figures as representing the amount of damages.

The jury may now retire.

EXCEPTIONS.

For the defendant:

By Mr. Bradley: I would like an exception to that part of your Honor's charge wherein the Court said the provisions of the Act of 1911 would apply, which states in effect that the company must notify the assured and give him sixty days to file proof of loss, on the ground that that Act has been superseded and repealed by the Act of 1912, page 524.

I would like a further exception to that part of your Honor's charge wherein the Court said in effect that it was not necessary for the plaintiff under the circumstances of this case to file his proof of loss, and that the defendant's defense in that matter would fail and the jury were to disregard it, on the theory that we contend the plaintiff has filed a proof of loss voluntarily, which shows that he waived the provision of the policy, which we put there for his benefit, or provision of the law that he should be given sixty days' notice of the filing of the proof.

I wish to except to that portion of your Honor's charge in which the Court said in effect that if the plaintiff had no knowledge of the difficulties that had arisen between Mr. Joyce and the company with reference to this loss, that the plaintiff would be justified in relying upon the statements of Mr. Joyce in the matter for his own protection, inasmuch as the evidence clearly discloses, in our opinion that Mr. Joyce was the agent for Mr. Higgins in this matter and not the agent for the company.

I wish further to except to that portion of your Honor's charge where the Court said that if the plaintiff had no knowledge of the efforts that had failed between Mr. Joyce and the company to have this matter adjusted satisfactorily, the defendant in this case would be estopped from setting up the defense of failure of claimant to bring suit within a year.

Also to that portion of your Honor's charge wherein the Court said in effect that it was for the jury to determine whether Mr. Joyce was the agent for the plaintiff or the defendant in this case, inasmuch as by the uncontradicted evidence in this case the plaintiff had retained and had secured the services of Mr. Joyce in his behalf to submit the proof of loss and conduct the matter of the adjustment of the loss.

I desire further to except to that portion of your Honor's charge wherein the Court said in effect that the jury should presume that Mr. Joyce was clothed with apparent authority in this matter to waive the provisions of the policy, inasmuch as the policy expressly provides and states that none of the provisions of this policy is to be waived by the agent, except with an authority in writing. There is no evidence here that he had any authority from the company to make any of the waivers on which the plaintiff relies.

(Exceptions noted for defendant.)

EXHIBIT P1.
6/3/29
A. W. D.

COPY

No. 427 A Stock Corporation

FIDELITY-PHENIX FIRE INSURANCE COMPANY
OF NEW YORK
(Seal)
"America Fore"

Amount $2500.00 Rate 4.383 Premium $109.58

In Consideration of the Stipulations herein named, and of ONE HUNDRED NINE and 58/100 Dollars Premium Does Insure GEORGE HIGGINS for the term of ONE YEAR from the TWENTIETH day of OCTOBER 1925, at noon, to the TWENTIETH day of OCTOBER 1926, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding TWENTY-FIVE HUNDRED Dollars to the following described property while located and contained as described herein, and not elsewhere, to wit

$2500.00 On merchandise generally, chiefly automobile accessories of every description, his own, held in trust, on consignment, or sold but not removed.

All while contained in frame and stucco building, occupied as Public Garage, and situate on the Easterly side of Broad Street, Glassboro, Gloucester County, New Jersey.

LOUIS C. JOYCE, JR.
Insurance
Blackwood New Jersey

New Jersey Standard 80% co-insurance clause attached.

Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises; and for other insurance, without notice until required.

New Jersey Standard Lightning Clause attached. Attached to and forming part of Policy No. 427, The Fidelity-Phenix Fire Insurance Company of New York.

Agent.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at GRENLOCH, NEW JERSEY

Paul L. Haid
President

Wm. F. Dooley
Secretary

Countersigned at .....
this 16th day of September 1925

LOUIS C. JOYCE, JR.
Agent

1 This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for
2 depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if
3 they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment,
4 estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value,

and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance to a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other

than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occu-

pancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate

glass, frescoes, and decorations than that which this policy shall bear to the whole
44 insurance on the building described.
45 If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and
46 a warranty by the insured.
47 In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this
48 company.
49 This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed
50 term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.
51 This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of
52 such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been
53 actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the cus-
54 tomary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata
55 premium.
56 If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or
57 corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the condi-
58 tions hereinbefore contained shall apply in the

manner expressed in such provisions and conditions of insurance relating to such
59 interest as shall be written upon, attached, or appended hereto.
60 If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed,
61 that part of this policy in excess of its proportion of any loss and of the value of property
10 remaining in the original location, shall,
62 for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such
63 excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears
64 to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be
20 65 liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time
66 of fire, whether the same cover in new location or not.
67 If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property
68 from further damage, forthwith separate the damaged and undamaged personal property,
30 put it in the best possible order,
69 make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and,
70 within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this com-
71 pany, signed and sworn to by said insured,

stating the knowledge and belief of the insured as to the time and origin of the fire;
72 the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon;
73 all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip-
74 tions and schedules in all policies; any changes in the title, use, occupation, location, posses-
75 sion, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were
76 occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or
77 machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not inter-
78 ested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has
79 examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary
80 public shall certify.
81 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property
82 herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and,
83 as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies
84 thereof if originals be lost, at such reasonable

place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole

insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

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

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may

be written or printed upon, attached, or appended hereto.

OFFICERS

Ernest Sturm, Chairman of the Board
Paul L. Haid, President
James A. Swinnerton, Vice-President
J. R. Wilbur, Vice-President
William Quaid, Vice-President
Herbert E. Maxson, Vice-President
C. W. Pierce, Vice-President
Lamar Hill, Vice-President and Counsel

F. R. Millard
E. A. Henne
Alfred L. Merritt
O. F. Grover
Wm. F. Dooley
John W. Clarke
Wm. E. Lamm, Jr.
V. L. Gallagher
Vernon Hall
J. F. Donica
John G. Derby
Frank A. Christensen
Sumner T. Pike
} Secretaries

Charles E Swan Treasurer

Charles V. McCarthy
F. D. Hougham
Geo. F. Hayden
H. W. LaRue
} Assistant Secretaries

William H. Emes, Auditor
Bert W. Jones, Assistant Auditor

DIRECTORS

Paul Baerwald
H. McC. Bangs
Elisha P. Cronkhite
Arthur A. Fowler
Maitland F. Griggs
Paul L. Haid
Dudley Olcott
Eustis Paine
Edgar Palmer
Auguste G. Pratt
John J. Riker
Ernest Sturm
John J. Watson
Albert H. Wiggin
Willis D. Wood

Standard Fire Insurance Policy of the
States of New Jersey, Connecticut
and Rhode Island
Expires October 20, 1926
Property Merchandise
Amount $2500.00
Premium $109.58
GEORGE HIGGINS
No. 427
(Seal)
"America Fore"
FIDELITY-PHENIX FIRE
INSURANCE COMPANY
Eighty Maiden Lane, New York, N. Y.
Cash Capital $10,000,000
It is important that the written portions of all policies covering the same

property read exactly alike. If they do not they should be made uniform at once.

EXHIBIT D1.
6/3/29.
A. W. D.

FIDELITY-PHENIX
FIRE INSURANCE COMPANY
OF NEW YORK
DOES HEREBY CONSTITUTE AND APPOINT
LOUIS C. JOYCE, Jr.
of Grenloch County of Camden State of N. J.
Its Agent under the firm name of
LOUIS C. JOYCE, Jr.

to effect insurance upon property located within the Limits or in the Vicinity of said Grenloch to countersign, issue and renew Policies of Insurance when signed by the Officers of the Company and to consent in writing to assignments and transfers thereof, and to collect Premiums for transmission to the Company.

The power hereby conferred is subject to the rules and regulations of said Company and to such instructions as may from time to time be given by its authorized representatives and may be revoked at any time the Company may so elect.

IN WITNESS WHEREOF the said FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK has caused its corporate seal to be affixed, and these presents to be signed by its President, and attested by its Secretary in the City of

New York this 25th day of Sept. A. D., 1912.

Seal of
Fidelity-Phenix Fire
Insurance Company
of New York

Henry Evans
President.

Attest:
J. E. Lopez,
Secretary

EXHIBIT D2.
6/3/29
A. W. D.

PROOF OF LOSS

Policy No. 427 Amount of Policy,
Renewal No. $2500.00

Fidelity Phenix Fire Insurance Co.
Of New York City, N. Y.

(Stamped: Received Jan 20, 1927, District No. 7A.)

By Your Policy of Insurance No. 427, issued at your Grenloch N. J. Agency, dated the 20th day of October, 1925, and expiring the 20th day of October, 1926 at 12 o'clock noon, you insured George Higgins against loss or damage by fire, to the amount of Twenty Five Hundred Dollars, according to the terms and conditions printed therein; the written

portion and all endorsements, transfers and assignments being as follows: $.....

(Stamped)
Dec. 2, 1927
11:30
Loss Dept.
By .....

$2500.00 on Merchandise generally, chiefly automobile accessories of every description, his own, held in trust, on consignment, or sold but not removed.

All while contained in frame and stucco building, occupied as public garage, and situate on the Easterly side of Broad Street, Glassboro, Gloucester County, New Jersey.

LOUIS C. JOYCE, JR.
Insurance
Blackwood New Jersey.

New Jersey Standard 80% co-insurance clause attached.

Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises; and for other insurance, without notice until required.

New Jersey Standard Lightning Clause attached. Attached to and forming part of Policy No. 427, The Fidelity-Phenix Fire Insurance Company of New York.

Schedule "B" attached hereto, contains a complete list of all Policies held by me at the time of the fire, covering on property herein described. Full copies of the written portions thereof will be furnished on demand.

The property described in said policy belonged, at the time of the fire hereinafter mentioned, to

Assured and no other person or persons had any interest therein, except as mentioned below.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease √

State the nature and amount of incumbrance at time of the fire.

None

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

First floor Public Garage & auto Fourth floor .....
Second floor Sales room Fifth floor.....
Third floor..... and for no other purpose whatever.

A fire occurred on the 21st day of November, 1925, about the hour of 10.45 o'clock P. M., by which the property described by said policy and situate as therein named was destroyed or damaged, as hereinafter set forth in detail, said fire originating as follows: exposure to odd storage building situate five feet North from premises of assured.

The actual cash value of each specific subject thus situated and described by the aforesaid policy at the time of loss, and the actual loss and damage by said fire to the same, as shown by annexed schedule, and for which claim is hereby made, were as follows:

	Sound Value	Total Loss	Total Insurance	Amount named in this Policy	Claimed under this Policy
1st Item of Policy, . .	5,200 —	499 46	4300 —	2500 00	290 39
2d Item of Policy, . .					
3d Item of Policy, . .					
4th Item of Policy, . .					
5th Item of Policy, . .					
Total, ...	5,200 —	499 46	4300 —	2500 —	
Total Amount claimed of this Company under above named Policy, . . .					$290 39

(For a detailed statement of value and loss, see schedule herewith, which is made a part of this Proof of Loss.)

At the time said insurance was effected, the property described by said policy belonged to Assured, and the said fire did not originate by any act, design or procurement on the part of the assured, or this affiant, or in consequence of any fraud or evil practice done or suffered by said assured, this affiant; nothing has been done by or with the assured's or this affiant's privity or consent to violate the conditions of the policy, or render it void; no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in possession of, the said assured at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company, as to the extent of said loss, has in any manner been made.

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

It is expressly stipulated that there has been no waiver of any of the rights or defenses of this Company by the furnishing of this "Proof of Loss" blank to the assured, or making up of proofs by an adjuster, or any agent of the Company or Companies named herein, or in any other way whatever.

WITNESS my hand at Blackwood N. J., this 6th day of January, 1927

Geo. Higgins
Assured.

STATE OF New Jersey }
COUNTY OF Camden } ss.

January 6th, 1927

Personally Appeared George Higgins signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of.

Subscribed and sworn to before me, the day and date above written.

Ursula W. Read [SEAL]
Notary Public for New Jersey

SCHEDULE "A"—STATEMENT OF LOSS.
Put nothing here except what assured actually agrees to and signs. All other statements and reports should be separate from proofs.

STATEMENT of LOSS and DAMAGE
GEORGE HIGGINS
Glassboro New Jersey.

Fire—November 21st, 1925.
Premises—Easterly side of Broad Street, Glassboro, New Jersey.
Merchandise.

	Sound Value	Loss
9 Hoods	$48.00	
24 rear fenders—touring	84.00	
16 front fenders—touring	64.00	
1 roadster back	10.00	
4 shields	9.60	
5 commercial fenders	17.50	
13 Wheels—complete	71.50	
14 Wheels—truck	91.00	

7 Clincher Wheels	28.00		
3 Clincher Wheels—complete	18.00		
13 Truck fenders	45.50		
25 rubber cells	15.00		
5 black shells	5.00		
4 rear fenders—sedan	15.00		
1 touring top	27.50		
2 roadster tops	44.00		
12 coupe rear fenders	48.00		
	$641.60	$641.60	
Allowance by salvage sold to assured		256.64	
			$384.96
3 Cushions			19.50
5 Windshields	55.00		55.00
2 Nickel Shells	10.00		10.00
Roadster Parts	30.00		30.00
			$499.46

(In pencil)
95
19.50

$114.50

SOUND VALUE—$5200.00.

APPORTIONMENT.

Policy No.	Expires	Company	First Item Insures	First Item Pays	Second Item Insures	Second Item Pays
313786	10/5/26	Girard	1000.00	116.15	nil	nil
174537	6/15/26	North America	800.00	92.92	200.00	nil
427	10/20/26	Fidelity-Phenix	2500.00	290.39	nil	nil
			$4300.00	$499.46	$200.00	nil

Claim No. .....

PROOF OF LOSS.

Fidelity Phenix Fire Ins. Co.
Of New York, N. Y.

Policy No. 427
Amount of Policy, $2500.
Assured George Higgins
Agency Grenloch, N. J.
Date of Fire, Nov. 21st 1925
Proof Received, ... 19.... 10
Amount Claimed, $290.39
Amount Allowed, $.....
Less Discount, $.....
Amount Paid, $.....

(Stamped)
RECEIVED
JAN 29 1927
DOUGLAS C. TAYLOR
Loss Dept.

20

ADJUSTER'S CERTIFICATE.

This is to certify that I have carefully examined the detailed evidence of loss sustained by the insured named herein, and I hereby recommend that the sum of Four Hundred Ninety Nine 46/100 Dollars be the basis of settlement, and that the Insurance Company named herein pay the insured the sum of Two Hundred Ninety Thirty Nine 00/100 Dollars. 30

Dated January 6th, 1927.

Louis C. Joyce, Jr., Adjuster.

N. B.—ADJUSTERS should make their memoranda or notations on a separate sheet, to accompany Proofs of Loss, and not on this blank.

EXHIBIT D3.
6/3/29.
A. W. D.

Jno. G. Monrose — John G. Monrose, Jr.

Telephones { Lombard 4716 / Main 7533

JNO. G. MONROSE
ADJUSTER OF FIRE LOSSES
333 WALNUT STREET

Philadelphia, December 11th, 1925.

Louis C. Joyce, Esq.,
Blackwood, N. J.

My dear Mr. Joyce:

In re Claim: GEORGE HIGGINS
GRENLOCH, N. J. Policy #427.

Acknowledging receipt of your favor of 9th inst., enclosing copy of form and statement of claim, for which please accept thanks, kindly be advised that we have taken up the matter with Mr. Van Houten of the General Adjustment Bureau, and, assuming that you have retained a copy of this statement of loss, we beg to call your attention to the following:

The items aggregating $114.50, consisting of wind shields, shells and parts, which are conceded to be a total loss, are subject to a deduction of 40%, which makes the Sound Value and Loss under this item $68.70.

The succeeding items, which are headed, "Salvage sold Assured," and amounting to $666.60, should first be reduced by the deduction of the $25.00 for the awning, which is not a stock item but a furniture and fixture item, and when the 40% deduction is applied to that, it leaves a Sound Value

of $384.96, on which, in the opinion both of Mr. Van Houten and our representative, the loss does not exceed 25%, or $96.24, making a total Sound Value involved of $453.66, with a loss of $164.94.

No statement of total Sound Value is available, and before we can make up Proofs that will have to be obtained from the Assured, and we would appreciate it very much if you would take up the matter with him, and advise us at your convenience on what Sound Value is based the total insurance of $4300. carried on Stock.

Thanking you in advance for the attention you will give this matter, we remain, with regards,

Yours very truly,

Jno. G. Monrose

JGM-MEL

EXHIBIT D4.
6/3/29
A. W. D.

LOUIS C. JOYCE, JR.
Real Estate Investments Insurance
Blackwood, New Jersey

January 8th, 1927.

(In pencil)
Wm Williamson
(Stamped)
Dec 2 1927
11:30
RECEIVED JAN 20 1927
DISTRICT No. 7A
RECEIVED JAN 20 1927
F. A. CHRISTENSEN

Fidelity-Phenix Fire Insurance Company,
New York City.

Gentlemen:

Grenloch, New Jersey, Policy No. 427,
George Higgins, Glassboro, New Jersey.

Enclosed herewith find proof, showing loss, under the above policy, in the amount of $290.39, together with National Board Report, which proof has been long delayed, due, principally, to the fault of this office, by reason of the fact that of the number of companies on the risk, your claim was handled by John G. Monrose, three companies by the General Adjustment Bureau, and the balance of the companies by this office.

The other adjusters asked this office to secure statements of sound value, and our assured, being rather good natured, and many details in other

lines pressing us very severely, the matter was neglected until, in the early part of December, the assured lost his good nature and began pressing us for a conclusion of the matter.

At that time, I wrote the other adjusters and received the enclosed reply from Mr. Monrose.

At this late date, we were in no position to enter into any such debate with the assured, inasmuch as the delay was in no particular his fault, the responsibility certainly, while being largely with us, also being shared by your adjuster, and as a matter of protection both to yourself and to this office, I took proof, as enclosed herewith, and wish to say to you that if you are unwilling to accept the same on the basis rendered, and in view of the above explanation, kindly so advise at once, and we will pay the loss from our own funds because we cannot afford to do otherwise, nor to have the assured aggravated in view of all the circumstances.

The fire, as you will note, did not originate in the premises of the assured, but was caused by exposure to a burning building on the north, assured is highly regarded by all who are acquainted with him, and the loss is without criticism from any angle.

I trust you will see your way clear to accept proof on the basis rendered, and beg to remain

Yours truly,

Louis C. Joyce, Jr.

lcj/r

EXHIBIT D5.
6/4/29
A. W. D.

(Stamped)
RECEIVED NOV 27 1925
DISTRICT No. 7A
NOV 28 1925
LOSS DEPT.
NOV 27 1925
J. A. C.
RECEIVED NOV 27 1925
J. G. DERBY
REFERRED NOV 27 1925
LOSS DEPT.

LOSS REPORT

Fidelity-Phenix Fire Insurance Company of New York

Agency at Grenloch, New Jersey
November 23rd, 1925.

When loss occurs, whether large or small, fill out this blank and send it by first mail to Special Agent for your field.

Loss occurred on the 21st day of November 1925 about the hour of 10:45 o'clock P. M.
Policy No. 427 Amount of Policy $2500.00
Name of assured George Higgins
Items of policy involved both
Nearest R. R. station .....
Probable Amount of Loss to this Company Total loss approximately $600.00
Has Company been notified Yes
If fire, did it originate on assured's premises? Exposure from odd storage building, 5 feet Northerly

from premises of assured, on premises of Robert Carnell.
From what cause Fire
Loss principally by (Water, Smoke, Fire or Wind.)
If building was it occupied or vacant? yes
If known, give names of other Companies, Adjusters who will be on the loss? .....
Total Insurance on property $.....

Names of Companies and amount by each:

Insurance Co. of North America $1000.00
Girard Fire and Marine Ins. Co. $1000.00

Remarks I shall be very glad if you will authorize us to take care of this loss at once, or that it be referred to the General Adjustment Bureau, but in either event would ask that you advise us by wire which action has been taken as we are particularly desirous of giving this prompt attention.

Louis C. Joyce, Jr.
Agent.

GIVE COPY OF WRITTEN PORTION OF POLICY ON OTHER SIDE.

If special printed form send 2 copies with this notice.

(In margin)

Do not telegraph but send this to Special Agent.

(Other side)

COMPLETE COPY OF POLICY MUST BE FURNISHED SPECIAL AGENT IN EVERY INSTANCE

Policy No. 427;
Name of Assured, George Higgins;
Commencement of Risk, Oct. 20, 1925;
Term, 1 yr;
Expiration of Risk, Oct. 20, 1926;
Sum Insured, $2500.;
Rate, 4.383;
Premium, 109.58.

(Give a Full and Exact Copy of Written Portion of Policy)

Do Not Paste Form But Attach With Pin or Clip

$2500.00 on Merchandise generally, chiefly automobile accessories of every description,

New Jersey Standard 80% co-insurance clause attached.

New Jersey Standard Lightning Clause attached.

All while contained in frame and stucco building, occupied as Public Garage, and situate on the Easterly side of Broad Street, Glassboro, Gloucester County, New Jersey.

Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises; and for other insurance without notice until required.

Louis C. Joyce, Jr. Agent

(Attached)

NOTICE TO LOSS DEPARTMENT

(Stamped)

LOSS DEPT.
NOV 27 1925
J. A. C.

In addition to loss notice attached, the following other companies cover at the same location:

AMERICAN EAGLE	Pol. No..... $.....
CONTINENTAL	Pol. No..... $.....
FARMERS	Pol. No..... $.....
FIDELITY-PHENIX	Pol. No..... $.....
CONT. UNDERWRITERS	Pol. No..... $.....
PHENIX UNDERWRITERS	Pol. No..... $.....

(In pencil)
None
Examiner V. H.

(Written across face of report)
P. H. Mell, Adjr.
(335)
J. A. W.

EXHIBIT D6.
6/4/29
A. W. D.

Ernest Sturm, Chairman of the Board.
Paul L. Haid, President.
FIDELITY-PHENIX
FIRE INSURANCE COMPANY
Of New York
(Seal)
Eighty Maiden Lane, New York, N. Y.
"America Fore"

New York, Nov. 27, 1925.

Mr. Louis C. Joyce, Jr., Agents
Blackwood,
N. J.

Dear Sir:—

We have your notice of claim for loss under policy No. 427 issued to George Higgins

The matter has been referred to our adjuster, Mr. P. H. Mell, whose address is 311/313 Walnut Street, Philadelphia, Pa.

Please see that the property covered by our policy, not destroyed, is taken care of by the assured. Impress upon the assured, the fact that the conditions of the policy makes it necessary for him to use every precaution to prevent loss or damage.

If not already done notify us and the adjuster above named, probable amount of our loss, name of

other Companies on, date of meeting of adjusters, &c.

If notice of attachment or garnishment is served upon you in this or any other loss case send such notice and all accompanying papers to this office by first mail.

Yours truly,
F. R. Millard
Secretary
(In charge of Loss Dep't.)

Cash Capital
Five Million Dollars

EXHIBIT D7.
6/4/29
A. D.

December 9th, 1925.

Mr. John G. Monrose, Adjuster,
333 Walnut Street,
Philadelphia, Penna.

Dear Sir:

In re: Grenloch, New Jersey Policy No. 427
GEORGE HIGGINS

In accordance with telephone request, today, from Mr. Longworth, I am enclosing to you, herewith, copy of statement of loss, under the above, together with copy of form attached to the above policy.

Yours truly,

uwr

EXHIBIT D8.

LOUIS C. JOYCE, JR.
Real Estate Investments Insurance
Blackwood, New Jersey
December 20th, 1926.

(Stamped)
JNO. G. MONROSE
DEC 22 1926
Philadelphia, Pa.

Mr. John G. Monrose, Adjuster,
333 Walnut Street,
Philadelphia, Penna.

Dear Sir:

In re: George Higgins.

I am seriously "in dutch" with the above assured, and need your immediate help to bring this matter to a satisfactory conclusion.

Yours truly,
Louis C. Joyce, Jr.

lcj/r

(In pencil)
Get in touch with Agent.

EXHIBIT D9.

(Stamped)
RECEIVED JAN 20 1927
District No. 7A
DEC 2 1927
11:45
Loss Dept
By .....

Jno. G. Monrose — John G. Monrose, Jr.

Telephones {Lombard 4716
{Main 7533

JNO. G. MONROSE
ADJUSTER OF FIRE LOSSES
308 WALNUT STREET

Philadelphia, Dec. 24th, 1926

Louis C. Joyce Jr, Esq.
Blackwood, N. J.

Dear Sir:

In re claim: GEORGE HIGGINS
Fidelity-Phenix Pol. 427
Grenloch, N. J.

Your letter of 20th inst. in re above matter is at hand and is quite a puzzle.

Under date of December 11th, 1925, over a year ago, we wrote to you in detail in reference to this matter, without ever receiving acknowledgment or reply.

Over a year having elapsed since the date of the fire, without proof or bringing of suit, the claim is absolutely outlawed and it is out of our power to do anything in the matter.

As a matter of accomodation to you, if you have any statement in reference to the subject that you

wish to submit to the Company, we will be glad to transmit it.

Regretting that we cannot be of more use to you, we beg to remain, with compliments of the Season,

Yours very truly,

Jno. G. Monrose

JGM:L

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE HIGGINS,
Plaintiff-Respondent,
v.
FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-APPELLANT.

STATEMENT.

This appeal is taken from a judgment entered in the New Jersey Supreme Court, on June 7, 1929, upon a verdict for respondent had at the Gloucester Circuit. This action was instituted against appellant to recover a proportion of the loss sustained by respondent when certain merchandise, principally automobile accessories, insured by appellant com-

pany, were burned in a public garage in Glassboro, New Jersey, on November 21, 1925. The summons herein is dated November 2, 1927, and proof of loss was voluntarily sent to appellant by letter, dated January 8, 1927. The policy No. 427 of Fidelity-Phenix Fire Insurance Company, upon which suit is based, was the "Standard New Jersey Form" with 80% co-insurance clause attached (Exhibit P1).

By "Loss Report" dated November 23, 1925, the appellant company was notified of fire on or about November 27, 1925, on which report Louis C. Joyce, Jr., who had written the insurance in question, requested authorization from appellant to take care of the loss at once or that it be referred to General Adjustment Bureau (Exhibit D5). The appellant notified said Joyce by letter of November 27, 1925 (Exhibit D6), that it had received his notice of claim of loss under policy No. 427 issued to respondent, and the matter had been referred to P. H. Mell, of 311, 313 Walnut Street, Philadelphia. Mr. Mell employed a Mr. Monrose to adjust this loss and in pursuance of a telephone message, Mr. Joyce by letter of December 9, 1925, sent to John G. Monrose, adjuster of Fire Losses, of 333 Walnut Street, Philadelphia, a "copy of statement of loss" (Exhibit D7). To this last letter Joyce received a letter dated December 11, 1925, from said Monrose (Exhibit D3), informing him, that the statement of claim had been taken up by Mr. VanHouten of the General Adjustment Bureau and calling his attention to certain errors and corrections and requesting, that Joyce take up with the respondent the question of "Total Sound Value" as none was set forth in statement of claim and to advise him on what "Sound Value" is based the total insurance of $4300 carried on stock. Mr. Joyce did not acknowledge nor reply to said

letter (Exhibit D3), but wrote to Monrose on December 20, 1926, as follows (Exhibit D8): "In re George Higgins, I am seriously in 'dutch' with the above assured, and need your immediate help to bring this matter to a satisfactory conclusion." Monrose replied to Joyce by letter dated December 24, 1926, (Exhibit D9), that since Joyce had not acknowledged nor replied to the said letter of December 11, 1925, over a year ago and since over a year had elapsed since date of fire without proof or bringing of suit, the claim was outlawed and it was out of his power to do anything.

Under date of January 8, 1927, Mr. Joyce sent "Proof of claim" (Exhibit D5), to the appellant company which he prepared for the respondent in his own handwriting and stated that owing to other pressing business and due largely to his fault this matter had been overlooked. Among other things, Joyce stated that if the appellant "was unwilling to accept same upon the basis rendered and in view of the above explanation kindly so advise at once and we will pay the loss from our own funds * * *" Although the appellant refused to pay, Joyce did not make good his promise to pay but did advance credit on his books to respondent for amount of this loss. Two or three months before date of summons, Joyce actually advised the respondent to institute suit and took him to Joyce's own lawyer, the attorney of record for respondent herein. Joyce claims he informed the respondent, that he had the matter of adjustment well in hand and respondent, therefore, contends, that since Joyce was an agent entrusted with policies of insurance in blank, he had apparent authority to waive the provision in the policy regarding time within which suit should be instituted.

It is the contention of the appellant, however, that (a) the evidence discloses, Joyce was acting solely for the respondent in this matter and, therefore, there was not a waiver of the one year period for instituting suit, (b) the respondent having failed to file a proof of loss within sixty days after the fire, he failed to fulfill the provisions of the policy and was thereby precluded from any recovery thereon; (c) the trial Court, over objection of the defendant-appellant permitted the introduction of improper evidence on the part of the witness for the plaintiff-respondent and refused to permit questions propounded by counsel for the defendant-appellant to be answered and (d) that for further errors of the trial Court including the refusal on his part to direct a verdict for appellant, &c., the judgment should be set aside.

ARGUMENT.

I.

THE DEFENDANT'S MOTION FOR A DIRECTION OF A VERDICT IN FAVOR OF DEFENDANT SHOULD HAVE BEEN GRANTED.

A.

Because Respondent Failed to File His Proofs of Loss or to Institute Suit Within the Time Limit Provided in the Policy.

The fire loss occurred November 21, 1925 (page 19, line 16), the respondent voluntarily filed a proof

of loss January 8, 1927 (page 47, lines 32 to 35), although no request was made by the appellant for proofs nor was the time for filing same extended by the appellant. Suit was instituted November 2, 1927, almost two years after the fire. The policy (Exhibit P1) was a standard New Jersey form which provided that proofs of loss should be filed within sixty days after the fire and that suit on the policy should be instituted within one year of the fire.

The respondent seeks to cure his failure to file proofs of loss and to institute suit within the time limit set forth in the policy upon the grounds, that the requirements of the policy were waived by Mr. Joyce, the respondent's insurance agent, under the ruling of *Snyder v. Insurance Co.*, 59 N. J. L. 544, and *Cheshansky v. Merchant's Fire Insurance Co.*, 102 N. J. L. 414. Appellant contends the rulings of these cases do not apply because *in the matter of the adjusting this loss Mr. Joyce was the agent of the assured and not of the appellant and therefore the action and statement by Mr. Joyce could not constitute a waiver on the part of the appellant.*

Concerning this feature of the case, the respondent testified as follows (page 24, lines 7 to 10):

> "I left everything with him. I got enough confidence in him. I deal with him altogether in insurance."

And on the same page (line 13) in answer to the question, "Had he (*Joyce*) written all your insurance?" the respondent answered, "Pretty much everything I got," and he further testified Joyce has always looked after his insurance (page 27, lines 15-16). The respondent testified (page 28, lines 10-18) that he expected Mr. Joyce was looking after this matter for him, that he had been in close

touch with him since the fire, and that he was instrumental in bringing this suit and in response to to the question, "He was representing you in this matter, wasn't he?" respondent answered, *"Sure, he was representing me, sure"* (page 29, lines 23 to 26), and further in answer to counsel's question, "You authorized Mr. Joyce to go ahead and prepare this statement" (referring to proof of loss), "and in preparing it, he was acting for you?" the respondent answered, "Yes, sir" (page 30, lines 33-36).

Mr. Joyce testified, that "Mr. Higgins had full confidence we were capable of taking care of his interests, and he left it with us" (page 33, lines 32-35).

The fact that Mr. Joyce considered that he was acting as agent for the respondent is further substantiated by his letter, Exhibit D8, written by Mr. Joyce to Mr. Monrose, adjuster of the appellant in this matter, wherein he wrote:

"In re George Higgins

"I am seriously 'in dutch' with the above assured and need your immediate help to bring this matter to a satisfactory conclusion," and Exhibit D4, wherein he wrote,

"YOUR (meaning the appellant's) *claim was handled by John G. Monrose * * * and wish to say to you that if you are unwilling to accept the same on the basis rendered * * * we will pay the loss from our own funds."* And in furtherance of the statements in Exhibit D4, Mr. Joyce has allowed on his books credit to the respondent for the amount of this loss.

The two Exhibits D4, and 8, the manner of Joyce on the stand, his evasive answers and refusal to answer directly and frankly the questions that were

wholly within his knowledge evidenced the fact that Joyce considered he had failed in some duty which he owed to the assured. If he had considered the appellant at fault, then there would have been no feeling of obligation on his part to make good the loss, which can be explained only by a relationship of principal and agent between the respondent and Joyce.

The evidence clearly demonstrates, that both the respondent, Higgins, and Joyce considered that Joyce was acting as the agent of Higgins and not of the insurance company and also that this suit is not to indemnify the respondent for the loss in question but to indemnify Joyce for the money he agreed to pay the respondent.

There is not a scintilla of evidence in this case from which it could be properly concluded that Joyce was authorized to act for appellant in settling this loss or to waive any provisions of the policy. On the contrary, the insurance commission of Joyce (Exhibit D1) expressly negatives such an idea and also his express instructions from the insurance company in reply to his letter requesting authority to act as adjuster (Exhibit D6).

Since Joyce was acting in this matter as the agent of Mr. Higgins, then certainly no statement made by Joyce to his principal, Higgins, can be construed as a waiver on the part of the insurance company of any right which it may have reserved to itself under the policy.

B.

The Respondent Having Failed to File His Proof of Loss Within Sixty Days After the Loss in Accordance With the Provisions of the Policy, is Precluded from Recovery.

Respondent attempts to justify his failure to file proofs of loss as required by the terms of the policy upon the theory that no demand was made upon him for such proofs by the appellant pursuant to Chapter 340 of the Pamphlet Laws of 1911. Appellant maintains that this argument of the respondent is untenable because; *The provisions of Chapter* 340 *of the Pamphlet Laws of* 1911 *was not in force when this contract of insurance was entered into or the fire loss occurred.*

1. *The Act which Chapter* 340 *of the Laws of* 1911 *purports to supplement was not in existence at the time of the passage of Chapter* 340 *of the Laws of* 1911. *The statutes involved are, chronologically, as follows:*

(a) "An Act to provide for the regulation and incorporation of insurance companies, approved April 9, 1875," was a revision which, with its many supplements and amendments, was for many years the basic insurance law of this State.

(b) This Act of April 9, 1875, and the Acts supplementary thereto and amendatory thereof, were expressly repealed by P. L. 1903, Chapter 233, p. 500, entitled "An Act to repeal sundry statutes relating to insurance and insurance companies."

(c) P. L. 1911, Ch. 340, about which this phase of the controversy hinges, was enacted under the title "A Supplement to an Act entitled, 'an Act to provide for the regulation and incorporation of insurance companies' which said Act was approved April ninth, one thousand eight hundred and seventy-five."

The revision of April 9, 1875, having been expressly repealed by the P. L. of 1903, Ch. 233, it is respectfully submitted that Ch. 340, P. L. 1911, which purports to be a supplement to the Act of 1875, is invalid.

A supplement is defined by Magie, J., in *Rahway Savings Institution v. Rahway,* 53 N. J. L. 48, at p. 51, as follows:

> "The ordinary meaning of the word 'supplement' doubtless is 'a supplying by addition of what is wanting.' A glance at our legislation from the time of the adoption of the constitutional provision will show that the word has constantly been used in a sense so broad as to possibly justify a claim that it has acquired thereby a special meaning broader than the ordinary one. But for the purposes of this case it is sufficient to say, that the *ordinary meaning of the word will, under our construction of this clause, cover every species of amendatory legislation which goes to complete the legislative scheme.*"

This definition conforms to those generally accepted:

> "Something additional, something added to supply what is wanting. It is that which supplies a deficiency, adds to or completes or ex-

tends that which is already in existence without changing or modifying the original." (Words and Phrases, 2d Series, Vol. 4, p. 797.)

"A supplying by addition of that which is wanted; that which supplies a deficiency" (37 Cyc. 605).

The purpose of a supplement being to supply what is wanting in the Act which it purports to supplement, it necessarily follows that a so-called supplement to an Act which has been repealed prior to the passage of the supplement is necessarily a nullity. The action of the Legislature in entitling the Act "A supplement to an Act" shows clearly that the intent of the Legislature in passing the purported supplement was solely to add to or complete an existing piece of legislation; and if this piece of legislation had been previously repealed there is, of course, no legislative intent to have the so-called supplement take effect. In other words, by entitling the Act "A supplement," the Legislature showed its intention to have its enactment effective only as part of or an appendix to an existing Act, and the purported supplement is therefore conditioned for its existence and validity on the existence and validity of the parent Act. A supplement is but a branch of the Act supplemented. If the tree is cut down, the branch represented by the supplement, necessarily falls with it. *A fortiori,* if there is no tree in existence at the time the Legislature attempts to tie a branch to it, the branch must necessarily fall to the ground and be a nullity.

This precise point has been passed upon by the Court of Errors and Appeals in a unanimous decision in *Newark v. Mt. Pleasant Cemetery Company,* 58 N. J. L. 168, at p. 173, where Magie, J., says:

"Notwithstanding the absolute repeal in 1875 of the Act of 1851, the Legislature in 1879 passed a *supplement* to that Act, which supplement was approved March 14th, 1879, Rev. Sup., p. 80. *It recited at length the tenth section of the Act to* which it was declared to be a supplement, and then enacted *that said section should be amended so as to read:* 'that the cemetery lands and property of any association * * * formed pursuant to this Act and actually used for cemetery purposes, shall be exempt from all public taxes, rates and assessments,' &c., &c. The amendment consisted in the insertion of the words 'and actually used for cemetery purposes.'

It would seem to be impossible to contend that there could be a valid amendment to a non-existent and defunct statute."

The authorities generally are to the same effect.

"A statute or entire section * * * which has been wiped out of existence by repeal is no longer the subject of further legislation by amendment" (26 *A. & E. Encyc. of Law,* 2nd Ed., p. 703).

It is therefore submitted that "An Act to provide for the regulation and incorporation of insurance companies, approved April ninth, 1875," having been previously repealed, P. L. 1911, Ch. 340, which purports to be a supplement to the Act of 1875, is a nullity.

2. *Assuming that P. L.* 1911, *Ch.* 340, *is a valid enactment, notwithstanding the force of the foregoing argument, it is, nevertheless, invalid for the additional reason that it was repealed by P. L.* 1912, *Ch.* 295, *p.* 524.

Section 77 of the General Insurance Act of 1902 (P. L. 1902, p. 407, at p. 437; 2 C. S., at p. 2862), provided for the "standard fire insurance policy of the States of New York, Pennsylvania and New Jersey." Exhibit P1, on which this suit is based, is such a standard fire insurance policy. The standard fire insurance policy as provided for by this statute contains the provision requiring the insured to file proofs within sixty days after the fire, unless such time is extended in writing by the insurance company.

The purported supplement, P. L. 1911, Ch. 340, is inconsistent with the original Act of 1902 creating the standard fire insurance policy, because the Act of 1902 requires proofs to be furnished within sixty days after the fire, unless such time is extended in writing by the company; whereas the purported supplement of 1911 expressly provides that the insured shall not be obliged to furnish proofs of loss unless the company gives sixty days' notice in writing of its desire for said proofs. Furthermore, the purported supplement of 1911 expressly provides that its provisions shall "not be varied, altered, contradicted or affected by any agreement or contract, but shall remain in full force and effect, any and all provisions in any contract of insurance or other agreement to the contrary notwithstanding." These repugnant provisions of the purported supplement unquestionably work a partial repealer of

the standard fire insurance policy form as provided by Section 77 of the General Insurance Act of 1902.

After Section 77 of the General Insurance Act of 1902 had been thus partially repealed by the purported supplement of 1911 (granting, for purposes of the argument, that the purported supplement of 1911 was a valid enactment), the Legislature, by P. L. 1912, p. 524, re-enacted Section 77 of the General Insurance Act of 1902 in an amended form. Section 77 as thus amended in 1912 reads as follows (with the new words of the section shown in italics):

> "77. The Commissioner of Banking and Insurance having, in accordance with law, prepared a printed form in blank, of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon, and form a part of such contract or policy, and filed the same in the office of the Secretary of State on or before the first day of July, one thousand eight hundred and ninety-two, similar in all respects, except as hereinafter mentioned, to the contract or policy of the fire insurance provided by law for the States of Pennsylvania and New York, such form being known and designated as the 'Standard fire insurance policy of the States of New York, Pennsylvania and New Jersey,' no fire insurance company, corporation or association, their officers or agents, *except as hereinafter provided,* shall make, issue, use or deliver for use, any fire insurance policy, or a renewal of any fire policy on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements, and conditions, with such printed form of contract or policy filed in the office of the Secretary of State as aforesaid, and no

other different provisions, agreement, condition or clause shall in any manner be made a part of said contract or policy, or be endorsed thereon or delivered therewith, except as follows, to wit:

I. The name of the company, its location and place of business, the date of its incorporation or organization, whether it is a stock or mutual company, the names of its officers, the number and date of the policy, and if it be issued through a manager or agent, the words, 'this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at * * *' may be printed on policies issued on property in this State;

II. Printed or written forms of description and specification, or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with, or a waiver of any of the provisions or conditions of the standard policy herein provided for), may be written upon or attached or appended to any policy issued on property in this State;

III. A company, corporation or association organized or incorporated under and in pursuance of the laws of this State, or elsewhere, if entitled to do business in this State, may, with the approval of the Commissioner of Banking and Insurance, if the same is not already included in the standard form filed in the office of the Secretary of State, as aforesaid, print on its policies any provision which it is by law required to insert therein, if such provision is not in conflict with the laws of this State, or of

the United States, or of the provisions of the standard form provided for herein; but said provision or provisions shall be printed apart from the other provisions, agreements or conditions of the policy, under a separate title, as follows: 'Provisions required by law to be stated in this policy;' *provided, however, any such contract or policy may be printed, written or typewritten with any size of type or of any size or shape of paper which shall have the written approval of the Commissioner of Banking and Insurance. The name, with the word 'agent' or 'agents,' and place of business of any insurance, agent or agents, either by writing, printing, stamping or otherwise, may be endorsed on the outside of the policy.*

Any policy issued contrary to the provisions of this section shall nevertheless be binding upon the company issuing the same."

P. L. 1912, Ch. 295, p. 524, above quoted, provides that the standard fire insurance policy of New Jersey shall be in the form which was filed by the Commissioner of Banking and Insurance in the office of the Secretary of State on or before July 1, 1892, and re-enacts the standard fire insurance policy in the form of Exhibit P1, on which respondent's case is based; and among the provisions of said policy are those requiring that the respondent file his proof of loss within sixty days after the fire, unless such time be extended by the company in writing. This provision of the standard fire insurance policy, as enacted by the Act of 1912, is, of course, inconsistent with the provision of the purported supplement of 1911, requiring the company to give sixty days' notice in writing to the insured if proofs of loss are

desired by the company. The provisions of the purported Supplement of 1911 are therefore necessarily repealed by the provisions of the standard fire insurance policy as enacted by the Statute of 1912, because of their obvious inconsistency.

The Legislative intent that the Amendment of 1912 should repeal the purported Supplement of 1911 is made clear by two distinct tests. In the first place, the Legislature clearly intended to make the standard fire insurance policy which was to be adopted in New Jersey uniform with that in use in the adjoining States of New York and Pennsylvania, not only with respect to the wording of those documents, but also with respect to their interpretation and enforcement. If the purported Supplement of 1911 stands in spite of the later enactment of 1912, the standard fire insurance policy of New Jersey, while seeming on its face to be uniform with that of the adjoining States of New York and Pennsylvania, would in reality be quite different from the policy in those other States, by reason of the different interpretation which would, in practice, be forced on the parties to the contract in requiring the company to give a notice of its demand for proof of loss in writing, which is nowhere provided for by the written terms of the standard fire insurance policy of New York, Pennsylvania and New Jersey.

In the second place, by the Act of 1912, the Legislature provided that no "fire insurance company, corporation or association, their officers or agents, *except as hereinafter provided,* shall make, issue, use or deliver for use any fire insurance policy or a renewal of any fire policy on property in this State, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with such printed form of contract or policy filed in the office of the

Secretary of State." If the Legislature in 1912 had intended that the terms and provisions of the purported Supplement of 1911 were to continue in effect, would they have precluded and barred every fire insurance company from stating as part of the terms of its policy or contract of insurance the true terms of such policy or contract as provided by the purported Supplement of 1911? In other words, would they have barred every fire insurance company from stating, instead of "if fire occur * * * the insured shall * * * within sixty days after the fire, unless such time is extended in writing by this company, render a statement to this company, signed and sworn to by the insured," &c., words such as these, expressing the intent of the purported Supplement of 1911, "if fire occur, the insured shall * * * if after said loss the company shall give the insured sixty days' notice that it desires proofs of loss, render a statement to this company," etc.? It is inconceivable that the Legislature would have precluded every fire insurance company from stating explicitly in a contract of insurance the actual terms which the Legislature was seeking to prescribe for the benefit of the public and of the company alike. Tested by both the desire of the Legislature to make a policy of fire insurance available in this State uniform with and paralleling the standard fire insurance policy of adjoining States and also by the exact language used by the Legislature in expressing its meaning, it is apparent that the Act of 1912, amending Section 77 of the General Insurance Act of 1902, repeals the provision of the purported Supplement of 1911 (if that supplement ever had any existence).

> "Every statute must be considered according to what appears to have been the intention of the Legislature, and even though two statutes,

relating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original Act" (*Roach v. Jersey City,* 40 N. J. L. 257, at p. 262).

"When there are two Acts on the same subject, effect must be given to both, if possible, but if they are repugnant in any of their provisions, the latter Act, *without words of repeal, operates, to the extent of the repugnancy, as a repeal of the first.* And even where two Acts are not, in express terms, repugnant, yet, if the later Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the earlier, it will operate as a repeal of the first. *United States v. Tynen,* 11 Wall. 88; *Roach v. Jersey City,* 11 Vr. 257; *Bracken v. Smith,* 12 Stew. Eq. 169. The rule last stated, Mr. Justice Van Syckel said, in *Roach v. Jersey City,* 11 Vr. 262, did not rest upon the ground of repeal by implication, 'but upon the principle that when the Legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the Act, it is apparent that the Legislature designed a complete scheme for the matter, it is a Legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions mentioned in the later Act as the only ones on that subject which shall be obligatory' "

(*Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382, at p. 385).

In *Peck v. National Liberty Ins. Co.*, 194 N. W. 973 (1923), the Supreme Court of Michigan said, concerning the effect of Legislative prescription of a form of standard policy containing the same proof of loss provision (p. 974):

> "Proof of loss was not rendered within sixty days after the fire, and no waiver or extension of time appears. Exercising power in the premises, the Legislature, by Act No. 256, Public Acts, 1917, prescribed the form of policy for fire insurance in this State. This law exacts the following agreement between the insurer and the insured: (quoting the provisions involved in the case at bar). * * *
>
> Compliance with this requirement is made a condition precedent to liability of the insurer, the law making the parties agree that:
>
> 'No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.' "

The Michigan Court also held that the action was barred despite a 1924 Act providing that no fire policy shall be declared void for breach of condition, if the insurer has not been injured or loss has not occurred by reason thereof.

In *Modern Homes, Inc., v. Atlas Assurance Co.*, 108 Atl. 869 (1919), the New Jersey Supreme Court said:

> "The standard policy requires that the in-

sured furnish proofs of loss within 60 days after the fire, and that in case of disagreement as to the amount of loss, the same shall be ascertained by appraisers, one selected by the insured and the other by the company, and an umpire selected by the appraisers. No suit or action is sustainable until full compliance by the insured with the requirements of the policy. The loss is not payable until 60 days after satisfactory proof of loss, including an award by appraisers when appraisal has been required. In the present case there was no proof of loss; and appraisal was required, but no award made. These failures to comply with the policy are fatal to the plaintiff unless excused.

As to the failure to file proof of loss, the only excuse offered is that the president of the plaintiff company, when the appraisers could not come to an agreement, 'asked a representative of the company whether they wanted him to file a proof of loss and they said no.' Who the 'representative' was, or whether he had any authority to act for the company, is not shown. Obviously, in this state of the proofs, there is legally no excuse.''

The policy provision in question is also enforced by the Chancery Court in *Niagara Fire Insurance Co. v. Fitzsimmons,* Vol. VI, N. J. Adv. Rep., page 26 (1928), Vice-Chancellor Backes said in part (p. 27):

''One of the requirements was that the insured should, within sixty days after the fire, render proof of loss.

A fire occurred. Mrs. Kylar (the insured) never made any claim for the loss nor brought

a suit within twelve months. More than sixty days having elapsed after the fire, the insurance company asserted non-liability to the insured, paid the loss to the mortgagee, and took an assignment of the mortgage * * *

The insurance company was not liable to the insured because of her failure to make proofs of loss as conditioned by the policy. * * * ''

It is respectfully submitted, therefore, that the Act of 1911 was never a valid statute; that, assuming it was a valid enactment, it was repealed by the Act of 1912, which made the standard policy of New York, Pennsylvania and New Jersey effective in New Jersey in its original form; and that the Courts of New Jersey have, since 1912, without expressing any doubts upon the subject, treated as valid and enforceable the provision of the policy requiring filing of proofs of loss within sixty days after a fire.

3. *The respondent having voluntarily filed proof of loss after the expiration of sixty days, he thereby waived the provisions of Chapter* 340 *of the Pamphlet Laws of* 1911.

Assuming, further, that Chapter 340 of the Pamphlet Laws of 1911 is a valid enactment and was not repealed by Chapter 294 of the Pamphlet Laws of 1912, by voluntarily filing proof of loss without an extension of time therefor first had from the appellant, the respondent thereby waived the benefit of the provisions of said Act, and his failure to file said proofs within the sixty-day period after fire was a breach of the condition and precluded a

recovery thereon (see Exhibit P1, page 81, at page 88, lines 70-72, of policy).

II.

THE FOLLOWING PARTS OF THE CHARGE OF THE TRIAL COURT WERE ERRONEOUS.

> "(a) The policy itself contains a provision requiring the proof of loss to be filed within a specified time, but the Legislature has passed an Act which provides that 'the failure of any person, insured against loss or damage by fire in any insurance company doing business by or under the authority of the Department of Banking and Insurance of this State, to furnish proof of loss, shall not be or considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from recovery under such policy, or collection of such sum as should properly be paid under such policy, unless after said loss, sixty days' notice in writing that the said company desires said proof of loss be furnished the person so insured. The provisions of the foregoing section shall not be varied, altered, contradicted or affected by any agreement or contract, but shall remain in full force and effect, any and all provisions in any contract of insurance or other agreement to the contrary notwithstanding.' The case, being barren of any evidence that the insurer, the defendant, gave sixty days' notice in writing that the company desired said proof of loss be furnished, the Court rules that that defense fails in this case" (page 73, line 26, to page 74, line 24).

"(b) * * * and if the insured, the plaintiff in this suit, had no knowledge that the effort to adjust the matter had failed until more than a year after the loss, had no knowledge whatever of the difficulty that had arisen between Mr. Joyce and those who were authorized, or apparently authorized, to act for the company in the adjustment of the loss, * * * you may find that the defendant is estopped from relying upon that requirement of the policy when suit must be brought within 12 months next after the fire" (page 77, line 31, to page 78, line 5).

"(c) * * * and the determination of that question will depend upon what conclusion the jury reaches with respect to the question whether, in the first place, Mr. Joyce was the agent of the plaintiff, or whether he was the agent of the defendant, the insurance company" (page 75, lines 5-10).

"(d) The law of this State, as declared by the highest judicial authority of the State, is that an agent entrusted with policies in blank, and authorized to issue them upon the application of parties seeking insurance, is clearly clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent, or subsequent, and may waive notice of proof of loss, and may bind the company by his admissions in respect thereto" (page 76, lines 7 to 16).

The appellant contends, for the reasons heretofore set forth, the above-mentioned parts of the Court's charge (Reason 6, Grounds of Appeal) were erroneous, improper and prejudicial to the rights of the appellant herein.

III.

OVER THE APPELLANT'S OBJECTION THE TRIAL COURT PERMITTED ERRONEOUS QUESTIONS TO BE ANSWERED BY RESPONDENT AND HIS WITNESS JOYCE, TO THE PREJUDICE OF THE RIGHTS OF APPELLANT.

The trial Court, over the objection of appellant, improperly permitted the respondent to answer the following (page 26, lines 15-19):

> "Q. Then what did he (Joyce) tell you?
>
> A. The same thing. He said there would not be any trouble. I would get it. I had all the confidence in the world in him." (The appellant excepted to this generally, page 22, lines 30-38.)

Appellant's attorney had entered an objection to all conversation between Joyce and respondent, upon which liability might be predicated unless it was first shown that Joyce had specific authority to bind appellant after the fire. It is submitted that the question and answer above set forth is predicated upon the theory that Joyce, in making the statement contained in the answer, was speaking as an agent of the appellant. Such a statement of Joyce was not within the scope of his agency with the appellant, for the reasons heretofore set forth, and also for the added reason, this answer was merely an expression of opinion and no waiver could be predicated thereon.

For like reasons, it was improper for the trial

Court to permit Joyce, over appellant's objection, to answer the following questions (page 36, lines 23-34):

"Q. What did you tell him regarding his inquiry as to the payment of this claim?

Mr. Bradley: The same objection.

The Court: Overrule the objection.

(Exception noted for defendant.)

A. I told him I had the matter well in hand. He was quite content to believe that, because I think he had confidence in me."

Also (page 37, line 16, to page 38):

"A. Then what happened to him and me or the company and myself?

Q. With you and him?

Mr. Bradley: The same objection.

The Court: The same ruling, only we are not getting along. I am going to rule, if you will ask a general question of this witness as to what was said and done by him and Mr. Higgins, the plaintiff, with reference to the adjustment of this loss, or consideration of the loss, that he may give a general answer. I think he is entitled to explain as to what transpired between the two, as to whether or not there was any waiver, and in what conditions of the policy.

(Exception noted for defendant.)

A. When Mr. Higgins first reported the loss to me, I immediately visited his premises and informed him as to what was necessary to do in case of fire loss. I requested him to secure from his builder an itemized list of the damage to the building, and assisted him then and there in making up an inventory of the damaged per-

sonal property, which was merchandise. In course of time we were able to close all items except this particular one. He inquired about it from time to time. We assured him that we had the matter in hand and we did. There finally came a time when the dispute between P. H. Mell, Fidelity-Phenix Philadelphia adjuster, who had charge of their losses, and who had employed John G. Monrose, Philadelphia, to adjust this loss, and the man, Mr. Monrose, had never and has not yet visited the fire, the scene of the fire ——"

Also (page 38, line 34, to page 39, line 8):

"Q. Did you tell Mr. Higgins anything about any dispute between you and Mr. Monrose?

Mr. Bradley: The same objection.

The Court: The same ruling.

(Exception noted for defendant.)

A. Yes, sir, I told Mr. Higgins that Mr. Monrose and myself could not agree on the figures for the Fidelity-Phenix and it would be necessary to compel payment by suit."

IV.

THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR A MISTRIAL.

This case involved a loss covered by several different insurance companies. A review of the testimony will disclose a repeated effort on the part of the counsel for respondent to bring to the attention of the jury, that the other insurance companies had

paid their pro rata loss. Finally counsel for respondent asked point blank (page 25, lines 9-11):

> "Q. Yes. When you finally didn't get your check. You had gotten a check on the other?"

The question was objected to before it was answered, but the damage had already been done. No amount of argument could avail this company after the jury had been thus told by opposing counsel, that these other companies had paid their respective shares—the only logical inference was that the appellant had no defense whatever. No warning on the part of the Court could keep this improper prejudicial remark from making a fair trial impossible. Counsel for respondent must have known that payment of the other losses had no possible bearing upon this case and that reference thereto was highly improper and prejudicial to a fair trial. Appellant's counsel could not refute the statement nor could he be prepared to show any reason why the other companies had paid and his client had refused. We sincerely urge that upon the trial Court's refusal to withdraw a juror and declare a mistrial, there was a clear abuse of the Court's discretion prejudicial to appellant.

V.

THE TRIAL COURT ERRONEOUSLY SUSTAINED OBJECTIONS TO A CERTAIN QUESTION PROPOUNDED TO RESPONDENT'S WITNESS ON CROSS-EXAMINATION.

When Joyce was testifying, counsel for appellant desired to bring out on cross-examination the fact

that Joyce had received instructions from the company that the failure of the assured to institute suit within one year was a complete bar and that he had never been instructed to waive the one-year period within which suit could be maintained under the provisions of the policy. To this end the following question was asked of Joyce (page 54, lines 11-20):

> "Q. What were the instructions which you received from the company with reference to the waiver of the statute of limitations of one year within which to bring suit?
>
> Mr. McNutt: Objected to.
>
> The Court: Sustained.
>
> (Exception noted for defendant.)"

It is respectfully urged that the above question was competent and relevant and that its refusal by the trial Court was erroneous and prejudicial to the interests of the appellant herein.

CONCLUSION.

For the reasons heretofore set forth, we respectfully submit that the judgment entered in the above-entitled cause was erroneous and should be reversed.

FRENCH, RICHARDS & BRADLEY,
Counsel for Appellant.

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

New Jersey Court of Errors and Appeals

GEORGE HIGGINS,
Plaintiff-Respondent,
v.
FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK,
Defendant-Appellant.

ACTION AT LAW.

APPEAL FROM SUPREME COURT.

REPLY BRIEF OF DEFENDANT-APPELLANT.

Appellant desires to call the attention of the Court to the two following inaccuracies contained in the brief of the respondent.

(a)

Respondent states on page 6 of his brief at line 7:

> "Referring to the question raised by the appellant on page 8 of brief 'B,' respondent says:
>
> 'The appellant did not raise this question at the trial and therefore cannot have same considered on appeal.' "

Respondent is here referring to Section "B" under appellant's first point, viz, that defendant's motion for a direction of a verdict in favor of defendant should have been granted. Said Section "B" of this point is:

> "The Respondent Having Failed to File His Proof of Loss Within Sixty Days After the Loss in Accordance With the Provisions of the Policy, is Precluded from Recovery."

and is subdivided into three reasons:

> 1. *The Act which Chapter* 340 *of the Laws of* 1911 *purports to supplement was not in existence at the time of the passage of Chapter* 340 *of the Laws of* 1911.
>
> 2. *Assuming that P. L.* 1911, *Ch.* 340, *is a valid enactment, notwithstanding the force of the foregoing argument, it is, nevertheless invalid for the additional reason that it was repealed by P. L.* 1912, *Ch.* 295, *p.* 524.
>
> 3. *The respondent having voluntarily filed proof of loss after the expiration of sixty days, he thereby waived the provisions of Chapter* 340 *of the Pamphlet Laws of* 1911.

While respondent's brief is not clear, apparently he refers only to reason 1 of Section "B."

The appellant respectfully refers the Court to page 69 of the State of the Case at line 18, where in a motion for a direction of a verdict in favor of the

appellant, the attorney of the appellant set forth as his reason:

> "If the Court please, I would like to move for the direction of a verdict for the defendant in this case, on the ground that as set forth in the second and third defense for the defendant in this case, the first one, in substance, being that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements. * * * The third defense refers to the sixty day period of filing the inventory and proof of claim."

The third defense set forth in appellant's answer and referred to in its reason for a direction is as follows:

> "The policy of insurance upon which the complaint is founded contained the following provision, viz.: 'If fire occur the insured * * * within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for

> what purpose any building herein described and the several parts thereof were occupied at the time of fire.' Although the time for so doing was not extended in writing by this company, the insured did not within sixty days after the fire, render to this company a statement, signed and sworn to by the insured stating the matters and things so required to be stated, nor any statement whatever."

An examination of appellant's motion for a direction of a verdict clearly shows that Section "B" of appellant's first point was raised at the trial.

It is the appellant's contention that the record need contain only the grounds for the motion and not the argument. This part of the motion for a direction was founded upon the failure of the respondent to file a proof of loss within sixty days as provided for in the policy. The respondent answered this argument that under the provisions of the Laws of 1911, he was not obliged to file a proof of loss until sixty days after appellant requested that such be filed. Appellant answered that argument as follows:

> 1. *The Act which Chapter* 340 *of the Laws of* 1911 *purports to supplement was not in existence at the time of the passage of Chapter* 340 *of the Laws of* 1911.
>
> 2. *Assuming that P. L.* 1911, *Ch.* 340, *is a valid enactment, it is, nevertheless, invalid for the reason that it was repealed by P. L.* 1912, *Ch.* 295, *p.* 525.
>
> 3. *The respondent having voluntarily filed proof of loss after the expiration of sixty days, he thereby waived the provisions of Chapter* 340 *of the Pamphlet Laws of* 1911.

Appellant submits that section "B" of his first point was properly raised at the trial and the State of the Case contains all that is required, in that it sets forth appellant's reason for a direction and that it would have been improper to have encumbered the record with the argument of counsel for and against this motion.

Appellant submits that subdivisions 2 and 3 of argument "B" of appellant's first point are also raised in appellant's objection to the charge of the trial Court (State of the Case, page 79, lines 10 to 27).

(b)

Respondent in his brief page 7 next to the last paragraph maintains:

> "The contention that the Act of 1911 was repealed by the Act of 1912 because the Act of 1912 provided for a standard form of policy, should not be considered, for the reason that there is no proof in the case as to what the form of the standard policy adopted by the Commissioner of Banking and Insurance contains."

Respondent directs the Court's attention to first paragraph of complaint (page 1 of the State of the Case, line 32), in which respondent alleges that attached to the policy of insurance upon which the suit was predicated was a *Standard eighty per cent co-insurance clause.* Exhibit P1, which was introduced by the respondent was a *Standard Fire Insurance Policy of the State of New Jersey,* Connecticut and Rhode Island (State of the Case, Exhibit P1, at page 93, lines 20 to 22).

The Standard New Jersey Fire Insurance Policy requires that the assured furnish proofs of loss within 60 days after the fire.

Modern Homes, Inc. v. Atlas Assurance Co.,
108 Atl. 869. (Not officially reported.)

The respondent having produced and introduced in evidence the policy, which on its face, was a *Standard Policy of the State of New Jersey,* how was there any duty on the part of the appellant also to introduce evidence that it was a Standard New Jersey Policy? We fail to see the logic of respondent's argument. If the policy was standard according to the New Jersey requirements, the fact that it was also standard according to the States of Connecticut and Rhode Island would not change its status in New Jersey, and the respondent having produced and introduced the evidence is bound by its entirety and cannot now claim the benefit of that part which is necessary to his recovery and deny that which might harm him.

Respectfully submitted,

FRENCH, RICHARDS &
BRADLEY,
Counsel for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE HIGGINS,
Plaintiff-Respondent,

v.

FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

BRIEF OF PLAINTIFF-RESPONDENT

Answering the first point of the argument set forth in the brief of the appellant, the respondent says:

FIRST.

It clearly appears in the case that Joyce was the duly appointed agent of the appellant company en-

trusted with the policies of insurance in blank, and was authorized to issue them upon the application of parties seeking insurance and that as such agent he issued the policy in this case. He was appointed on September 25th, 1912 (Exhibit D1), page 94. He had been the company's agent for thirteen years when the policy in question had been written (page 55, lines 21 to 24).

It was respondent's understanding that Joyce was the appellant's agent (page 31, line 31 to bottom of page), and he had no knowledge of any limitation to his authority as such agent (page 32, lines 1 to 15).

In letter to Joyce from Company (Exhibit D6), page 111, acknowledging notice of claim for loss, the company clearly confirms his agency and instructs him further.

SECOND.

It also clearly appears that the respondent knew nothing of the dealings between Joyce and the other representatives of the appellant and should not be bound by them; and during the course of the trial appellants took the stand that it was immaterial whether respondent knew it or not (page 56, lines 1 to 23).

THIRD.

The trial Court left it to the jury to say whether Joyce was the agent of the company or not (page 78, lines 7 to 21).

This Court in 1928, in the case of *Levin v. National Ben Franklin Ins. Co., et al.,* 140 Atlantic

Rep. 462, following the rule laid down in the case of *Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 678, 54 Atl. Rep. 460, held as follows:

> "Where it appears that the agent is the duly appointed and authorized agent of the insurer, and acts as such in making the contract of the insurance, he will be regarded as the agent of the insurer only, although as to other contracts by other companies, of which he was not such authorized agent, he may be regarded as the agent of the insured."

In the same case it is held that the question of agency is a jury question, as follows:

> "The next point made by appellant is that the evidence shows that LeCompte, the Lakewood agent, acted in writing the policy as the agent of both parties. This was likewise a jury question. He was the regularly accredited agent of the companies, representing their interest in his territory, and as the jury were allowed to find, ostensibly in Asbury Park; he was no more the agent of the plaintiffs in writing a policy, as the jury might say, than any other insurance man who is asked by an owner to keep him insured and to that end issued policies in companies of which he is agent."

The rule is set forth in Vol. 32 of *Corpus Juris*, page 1056, as follows:

> "Whether in a particular case or particular matter one acts as agent for the company or for insured depends upon the intention of the parties, which is to be determined from the facts and circumstances of the case, and is usually a question of fact for the jury."

And also in *Corpus Juris,* Vol. 33, page 131, as follows:

> "Except where the question becomes one to be determined by the Court by reason of the fact that there is either no evidence thereof, or the evidence is undisputed or of such a character that but one inference can reasonably be drawn therefrom, questions relating to the fact of agency for the company or for the insured, such as whether a certain agent was acting as the agent of the company or of insured, are ordinarily questions of fact for the jury. The scope and extent of the authority of an agent for the company, or of the agent for insured, are also ordinarily questions for the jury."

We also find in the case of *Dallas v. Guardian F. Ins. Co.,* 113 S. C. 492, 101 S. E. 859, the following:

> "The mere fact that, in accordance with common practice, a fire insurance agent is relied on by the insured to keep his insurance in force and in legal order does not render the fire insurance agent the representative of both the insurer and the insured."

Since the jury found that Joyce was the agent of the company they could, under the rule in *Cheshansky v. Merchant's Fire Insurance Co.,* 102 N. J. L. 417, and *Snyder v. Ins. Co.,* 59 N. J. L. 544, find that both the clause as to proof of loss and the clause as to the time within which suit must be started were waived.

The rule in these cases being as follows:

> "An agent entrusted with policies of insurance in blank and authorized to issue them upon the application of parties seeking insurance, is clearly clothed with apparent authority to bind

the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto."

In the case of *Martin v. State Ins. Co.*, 44 N. J. L. 485, it was held as follows:

"At the trial the Court charged that any words, acts, transactions or conduct on the part of the company or its authorized agents, with respect to its liability on the policy, which might reasonably be supposed to have induced the plaintiff to believe that the clause of limitation would not be insisted on by the company, would be evidence on the point of waiver. The correctness of this instruction is not questioned by the defendant. The testimony offered to show waiver was of two sorts; negotiations for settlement and demands made by the company under the policy, a fair compliance with which prevented the right of action from accruing until the six months after the fire had elapsed.

If the delay to bring suit is a result to which the company mainly contributed by holding out hopes of amicable adjustment, the company cannot be permitted to take advantage of the delay under the limitation clause of the policy. Grant v. Lexington Ins. Co., 5 Ind. 23; Mickey v. Burlington Ins. Co., 35 Iowa, 174; Black v. Winneshick Ins. Co., 31 Wis. 74; Little v. Pheonix Ins. Co., 123 Mass. 380; Peoria Ins. Co. v. Whitehall, 25 Ill. 466; Andes Ins. Co. v. Fish, 71 Ill. 620; Home Ins. Co. v. Myer, 93 Ill. 271."

In applying the principles set forth in the foregoing cases to the facts in this case the respondent

was justified in believing that Joyce was the company's agent and had the authority to and did waive the requirements of the policy regarding the filing of proofs of loss and the institution of suit, and the trial Court was correct in refusing to direct a verdict for appellant.

Referring to the question raised by the appellant on page 8 of brief "B," respondent says:

> "The appellant did not raise this question at the trial and therefore cannot have same considered on appeal."
>
> *Donahue v. Campbell,* 98 N. J. L. 755, 121 Atl. Rep. 700.

In addition to the fact that the appellant did not raise this question at the trial, it is the contention of the respondent that the Act of 1911 was in force. At the time the Act of 1911 was passed, there was in force in the State of New Jersey, the Act of 1902, which had the same title as that recited in the Act of 1911, as follows:

> "An Act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State."

This Act is found in P. L. 1902-407, and there is no doubt but what the Legislature of 1911 intended to supplement the Act of 1902.

This question came before this Court in the case of *American Surety, et als., v. Great White Spirit Co., et als.,* 58 N. J. Equity, 43 Atl. Rep. 579. In that case it was held as follows:

> "The customary addition of the date of the approval of the Act intended to be amended in such titles may be useful for reference, and

sometimes even necessary to distinguish between acts of like titles. But, if the description is otherwise complete, such added description cannot be necessary. Does the addition of words purporting to further describe the object, but which are wholly and absolutely false and inapplicable, invalidate an otherwise complete description? When, to a complete description, words are added which are partially true, or may be deemed to qualify or limit in particulars the general description, a question of intent arises. But where there is a wholly inapplicable and false description, it cannot be deemed to have been intended to limit the general description, and ought to have been rejected under the maxim, '*Falsa demonstratio non nocet.*' Griscome v. Evans, 40 N. J. Law, 402; Id. 42 N. J. Law, 579. This conclusion is in harmony with the view lately expressed in this court upon a similar question. Schmalz v. Wooley, 39 Atl. 539. The result is that the Act in question is not lacking in validity.''

The only objection made to the Act in the case just recited was that the date recited for the approval of the Act was incorrect.

The contention that the Act of 1911 was repealed by the Act of 1912 because the Act of 1912 provided for a standard form of policy, should not be considered, for the reason that there is no proof in the case as to what the form of the standard policy adopted by the Commissioner of Banking and Insurance contains.

The rule set forth in the case of *Donahue v. Campbell,* 98 N. J. Law, 755, 121 Atl. Rep. 700, should apply.

In addition to the fact that the Court on appeal should not consider matters which are not raised in the court, it is contended that when the Act of 1911 was passed there was a provision in the Act of 1902 exactly similar to that in the Act of 1912, and if the Legislature had desired to take away the right given to the insured by the Act of 1911 after they had passed said Act with a similar provision already existing in the Act of 1902 they would certainly have repealed it directly and not by inference. The rule of law set forth on pages 17 and 18 of the appellant's brief when applied to the facts in this case would certainly show that the Legislature intended that the Law of 1911 should still stand and the only apparent reason for the Legislature passing the Act of 1912 was to add the words as appears in italics on page 15 of the appellant's brief.

The case of *Modern Homes, Inc., v. Atlas Ins. Company,* page 19 of the appellant's brief, would certainly not apply to the facts in this case, where it was submitted to the jury to decide whether or not Joyce had waived the requirements to file proof of loss. The Court did not take into consideration in this case or in the case of *Niagara Fire Ins. Co. v. Fitzsimmons,* cited on page 20 of the appellant's brief, as to whether or not the Act of 1911 was repealed.

Replying to the contention of the appellant as found on page 21, paragraph 3 of its brief, would say that the respondent did not waive anything directly by Joyce filing the proof of loss when he did. The jury found that Joyce was the agent of the appellant, and certainly his act in filing the proof of loss when he did, did not waive any of the rights of the respondent. Such a waiver would only be by

implication, and there is nothing in the case which would show that he directly waived anything.

Answering the appellant's contention that the portions of the Court's charge were erroneous, as set forth on page 22 of appellant's brief, it is contended that for the reason hereinbefore set forth, the Court properly charged the jury.

Replying to the appellant's contention, as set forth on page 24 of his brief, wherein he claims that the trial Court improperly permitted the respondent to answer the question as set forth therein, would say that there is no question but what Joyce was the company's agent, and immediately after the fire the respondent telephoned Joyce to report the fire. There is nothing in the case which would indicate that he engaged Joyce as his representative to adjust the loss, but considered him the company's agent. The question as to whether or not Joyce was the agent of the company or of the insured was one for the jury, to be determined from all of the facts in the case.

It is not necessary under the case hereinbefore referred to that the fact be shown that Joyce had specific authority to bind the company. From the fact that he was the agent of the company authorized to issue policies, clothed him with apparent authority to bind the company. This applies to all of the objections set forth in appellant's brief, pages 24, 25 and 26.

Replying to the contention of the appellant, as found on pages 26 and 27 of its brief, that the trial Court should have granted appellant's motion for a mistrial, would say that the objection, that no mention should have been made of the other companies, should have been raised at the time of the opening made by counsel for the respondent, as set forth on the bottom of page 25 of the State of the Case.

In addition to that, counsel in his cross-examination specifically referred to representatives of the other companies from line 20 to the bottom of the page on page 27 of the State of the Case, which surely put him in a position where now he ought not to complain because it was in the case.

> "A refusal of the Court to withdraw a juror for improper remarks by counsel is discretionary on the part of the trial Judge, and cannot be reviewed on appeal. Smith v. Brunswick Laundry Co., 93 N. J. Law, 436, 108 A. 184; Bashaw v. Eichenberger (N. J. Err. & App.), 125 A. 130, 130 Atl. Rep. 207."

Replying to the appellant's contention that the trial of Court erroneously sustained objections to certain questions propounded to Joyce on cross-examination, as found on pages 27 and 28 of appellant's brief, would say that any private correspondence between the company and its agent would certainly not be binding on the insured. It did not appear in the case that Joyce ever communicated with the insured what was taking place between him and some other representative of the company. The question to be determined was whether Joyce was the agent of the company, and as such agent did he waive the provisions of the policy. Surely, any instructions that were given to him by another representative of the company would not be binding on the respondent, and there is no reason why the question should be answered.

In the statement made by the appellant he claims that the policy is a "standard New Jersey form," appellant's brief, page 2, line 7. The Act refers to "standard fire insurance policy of the States of New York, Pennsylvania and New Jersey," appel-

lant's brief, page 13. The policy itself, in referring as to whether or not it was a standard policy, on page 82 of the State of the Case, line 4, it refers to, "New Jersey Standard 80% Co-Insurance Clause attached," and line 11, "Standard Lightning Clause attached," and on page 93, line 20, it refers to, "Standard Fire Insurance policy of the States of New Jersey, Connecticut and Rhode Island," while the Act of 1912 refers to a policy for New York, Pennsylvania and New Jersey.

There is no proof whatsoever as to whether or not this policy in question was similar to the one prepared by the Commissioner of Banking and Insurance.

CONCLUSION.

For the reasons heretofore set forth, it is respectfully submitted that the judgment entered in the above-entitled cause be sustained.

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