

INDEX

	Page
Affidavit of George Gold	1
Writ of Attachment	2
Complaint	3
Notice of Motion to Strike Out	6
Memorandum	9
Order Amending Complaint	10
Amended Complaint	12
Order Striking Out	16
Answer to Amended Complaint	17
Reply	19
Judgment	19
Clerk's Certificate	20
Notice of Appeal	21
Grounds of Appeal	22
Testimony	24
Motion to Non-Suit	117
Motion for Direction of Verdict	181
Charge of the Court	182
Defendant's Exceptions	192
Plaintiff's Requests to Charge	196
Defendant's Requests to Charge	196

WITNESSES FOR PLAINTIFF.

Frank B. Steinbugler:

Direct	24
Cross	34
Redirect	36, 37
Recross	37

William H. Jones:

Direct	38
Cross	52
Redirect	59

	Page
George Horton:	
Direct	62
Cross	64
Arthur P. Browning:	
Direct	68
Cross	71
T. Ivan Arnold:	
Direct	72
Cross	88
Redirect	98
Recross	99
Justino Colatarci:	
Direct	99
Cross	102
Thomas J. Arnold:	
Direct	105
Cross	111

WITNESSES FOR DEFENDANT.

Joseph M. Trask:	
Direct	118
Cross	121
Leo Schwab:	
Direct	122
Cross	125
Lawrence Marx:	
Direct	128
Cross	132
Alfred Goldberger:	
Direct	139
Cross	146
Redirect	154
Jacob W. Schwab:	
Direct	155
Cross	159
Louis Sollfrey:	
Direct	163
Cross	167

	Page
Samuel D. McCoomb:	
Direct	173
T. Ivan Arnold:	
Recalled—Direct	176

TESTIMONY IN REBUTTAL.

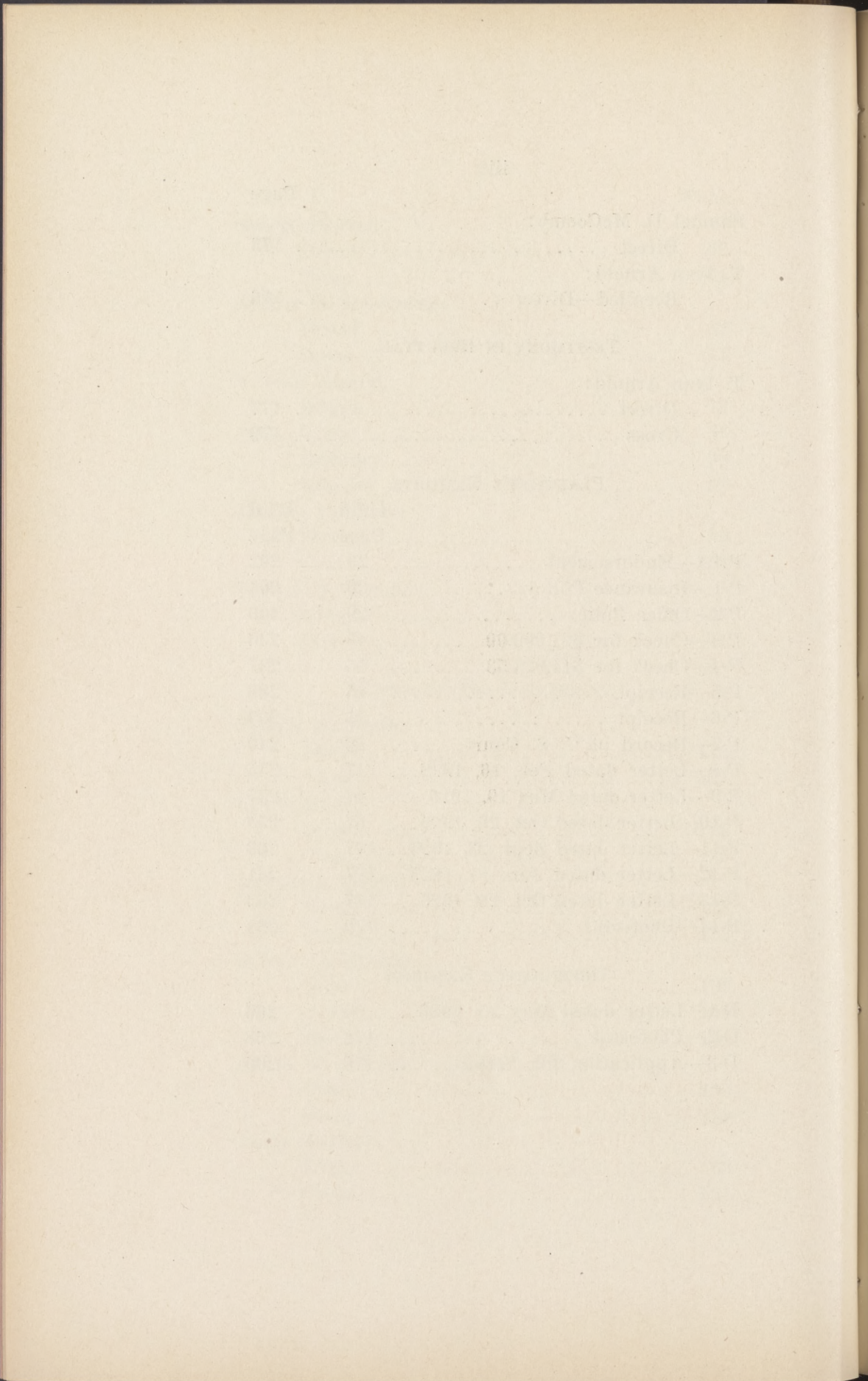
T. Ivan Arnold:	
Direct	177
Cross	179

PLAINTIFF'S EXHIBITS.

	Off'd Page	P't'd Page
P-1A—Endorsement	29	202
P-1—Insurance Policy	29	204
P-2—Office Policy	29	206
P-3—Check for \$21,000.00	45	236
P-4—Check for \$14,923.53	45	237
P-5—Receipt	45	238
P-6—Receipt	45	239
P-7—Record in U. S. Court.....	46	240
P-8—Letter dated Feb. 16, 1928...	47	255
P-9—Letter dated May 19, 1926 ...	47	257
P-10—Letter dated Oct. 29, 1929...	67	258
P-11—Letter dated Sept. 23, 1925..	177	260
P-12—Letter dated Jan. 14, 1925..	177	261
P-13—Letter dated Oct. 20, 1925...	177	263
P-14—Photostat	179	264

DEFENDANT'S EXHIBITS.

D-1—Letter dated May 25, 1926...	64	266
D-2—Photostat	172	268
D-3—Application for Permit.....	176	269



Judgment Record.

IN THE

Passaic County Circuit Court.

FIDELITY PHOENIX FIRE INSUR-
ANCE COMPANY, a corporation,

vs.

COHN-HALL-MARX COMPANY, a
corporation,

Judgment
Record.

10

The plaintiff in this cause filed the following af- 20
fidavit, viz.:

State of New Jersey, }
County of Passaic, } ss.:

George Gold, being duly sworn on his oath, de-
poses and says that he is the attorney and agent
for the Fidelity Phoenix Fire Insurance Company
and that the Cohn-Hall-Marx Company is a corpor-
ation existing under the laws of the State of New
York and is not authorized to transact business in
the State of New Jersey and that it has no office or
agent upon whom process may be served in this
State, and that it is indebted to the Fidelity Pho- 30
enix Fire Insurance Company in the sum of \$35,-
923.53, as nearly as this deponent can ascertain.

GEORGE GOLD.

Sworn and Subscribed to before me
this 25th day of July, 1928.

Olive M. Ferrer,
A Notary Public of New Jersey.

40

Writ of Attachment.

And WHEREUPON, the following Writ of Attachment issued, viz.:

Passaic County: ss.

10 *The State of New Jersey* to our
 Sheriff of our County of Passaic:
 (L.S.) GREETING: We command you, that
 you attach the rights and credits,
 moneys and effects, goods and chat-
 20 tels, lands and tenements of Cohn-Hall-Marx Com-
 pany wheresoever they may be found in your coun-
 ty, so that it be and appear before our Circuit
 Court to be holden at Paterson, in and for the
 County of Passaic on the 20th day of August,, 1928,
 to answer Fidelity Phoenix Fire Insurance Com-
 pany in an action on contract to the damage of the
 20 said Fidelity Phoenix Fire Insurance Company of
 \$35,923.53 as is said.

And in what manner you shall execute this, our writ, make appear to us at the day and place aforesaid; and have you then and there this writ.

Witness CLIFFORD L. NEWMAN, Esquire, Judge of our said Circuit Court at Paterson, aforesaid, the 27th day of July, 1928.

JOHN McCUTCHEON,
 Clerk.

30

LLOYD B. MARSH,
 Deputy.

WILLIAM B. GOURLEY,
 Attorney.

The defendant's appearance is hereby entered to the above entitled cause this 29th day of August, 1928.

40

STEIN, McGLYNN & HANNOCH,
 Attorneys for Defendant.

Complaint.

Plaintiff, Fidelity Phoenix Fire Insurance Company a corporation of the State of New York, says that:

FIRST COUNT.

1. At and during all the times hereinafter mentioned, the defendant was and still is a corporation of the State of New York, and was and still is engaged in the manufacture of cotton fabrics. 10

2. On July 29, 1925, plaintiff issued to the defendant, its open policy of insurance, insuring said defendant against loss of and damage to any of its cotton fabrics, by fire, in the sum of \$150,000., while said goods were located and stored in certain locations enumerated in a certain rider attached to said policy.

3. In and by said policy the defendant specifically and expressly warranted that the liability of the plaintiff was and should be limited to loss and damage as therein stated to the goods while located or stored in said enumerated locations. 20

4. Thereafter and under the provisions of said open policy, the defendant reported to this plaintiff that it had caused to be delivered to the Consolidated Piece Dye Works at Paterson, New Jersey, a large quantity of said cotton fabrics of the reasonable value of \$49,454.49 for the purpose of having the said Consolidated Piece Dye Works do certain printing or other work thereon at one of said enumerated locations. 30

5. Thereafter the said defendant reported that the said cotton fabrics while in the custody of said Consolidated Piece Dye Works had been damaged and partially destroyed by fire in January 1926, while stored by said Consolidated Piece Dye Works 40

Complaint.

in their warehouse which was not one of the aforesaid locations enumerated in said rider attached to said policy, and the defendant submitted documents purporting to be proofs of said loss or damage to said cotton fabrics in the sum of \$35,923.53.

10 6. At the time of the said reporting of said loss and damage to said cotton fabrics and the submission of said alleged proofs of loss, the defendant made to this plaintiff certain false and fraudulent statements, knowing the same to be false and fraudulent, and with the intent to deceive this plaintiff and to induce it to pay said alleged loss not covered by said policy, which statements were to the effect that the said Consolidated Piece Dye Works, without the knowledge or consent of this defendant and
20 in breach of its contract with this defendant, had stored said cotton fabrics in one of its warehouses which was a location not enumerated in said rider attached to said policy and that this defendant did not know that said cotton fabrics had been so stored in said location not enumerated in said rider.

30 7. This plaintiff, relying on said false and fraudulent statements of the defendant and believing therefrom that this defendant had a good and sufficient cause of action against said Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics, did on the 24th day of March, 1926, and the 1st day of May, 1926, pay to the defendant sums aggregating \$35,923.53, the total amount of its aforesaid alleged loss although it was not and knew that it was not
40 liable for said loss under said policy, in consideration of an agreement by this defendant that it would bring an action in its name for the benefit

of this plaintiff against said Consolidated Piece Dye Works and would repay said sum so paid to it from the proceeds of said action.

8. Thereafter the defendant herein did bring said action against said Consolidated Piece Dye Works, and upon the trial thereof, in which a judgment was rendered against this defendant, it was shown by the testimony of this defendant that the statements above set forth made to this plaintiff to induce it to make said payment to the defendant were in all respects false and untrue. 10

9. Upon the discovery of said falsity of said statements of this defendant to this plaintiff, and of the aforesaid fraud, this plaintiff made demand upon the defendant to repay to it the sum thus paid to it as aforesaid, but the defendant refused and still refuses to pay to this plaintiff said sum or any part thereof. 20

10. By reason of the aforesaid and of said fraudulent statements and conduct of this defendant and the fraud so perpetrated by the defendant as aforesaid upon this plaintiff, the plaintiff has sustained damage in the sum of \$35,923.53.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1 to 5 inclusive as part of this count. 30

2. On or about May 1st, 1926, the defendant received and collected from the plaintiff the sum of \$35,923.53 which said sum the defendant retains and although the plaintiff has demanded the return of said sum of money the defendant refuses to pay it over to the plaintiff.

Plaintiff demands judgment against the defendant for the sum of \$35,923.53 with interest thereon 40

Notice of Motion to Strike Out.

from the 1st day of May, 1926, together with costs of this action.

WILLIAM B. GOURLEY,
Attorney of Plaintiff.

10 **Notice of Motion to Strike Out.**

TO FIDELITY PHOENIX FIRE INSURANCE COMPANY,
or WILLIAM B. GOURLEY, its attorney.

Take Notice, that on Saturday, November 3rd, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move before such Judge of the Circuit Court as is holding motions at the Court House in the City of Paterson, in the State of New Jersey, for an order striking out the following clauses of the complaint filed by the plaintiff in the above entitled matter.

20

(a) Paragraph 7, clause reading as follows:

(1) "And believing therefrom that this defendant had a good and sufficient cause of action against said Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics."

30

Paragraph 7, clause reading as follows:

(2) "In consideration of an agreement by this defendant that it would bring an action in its name for the benefit of this plaintiff against said Consolidated Piece Dye Works and would repay said sums so paid to it from the proceeds of said action."

40

Notice of Motion to Strike Out.

(b) The entire paragraph No. 8, which reads as follows:

“Thereafter, the defendant herein did bring said action against said Consolidated Piece Dye Works, and upon the trial thereof, in which a judgment was rendered against this defendant, it was shown by the testimony of this defendant that the statements set forth above made to this plaintiff to induce it to make said payment to the defendants were in all respects false and untrue.” 10

The grounds upon which we shall urge the striking out of the above portions of the complaint are as follows:

(1) That the allegations are irrelevant and have no connection with the plaintiff's cause of action and will be prejudicial to the defendant in the trial of the case. 20

(2) Dealing with the first portion of paragraph 7, designated herein as (a-1), we shall urge that what the plaintiff believes as a result of misrepresentation is immaterial. The only material question is what loss the plaintiff sustained in consequence of any alleged misrepresentation on the part of the defendant. It will be contended that such loss is sufficiently set forth in paragraph 7 by virtue of the following sentence: 30

“Did on the 24th day of March, 1926 and the 1st day of May, 1926, pay to the defendant sums aggregating \$35,923.53, the total amount of its aforesaid alleged loss, although it was not and knew that it was not liable for said loss under said policy.” 40

Notice of Motion to Strike Out.

(3) The reason which will be urged in connection with the next portion of paragraph 7 which it is urged to have stricken out is that if the cause of action is fraud and false representation, as it very obviously is, upon reading of the complaint, there can be no question of consideration and allegation of a consideration is immaterial and should be stricken from the complaint.

(4) With reference to paragraph 8 it will be urged that the falsity of the representations on the part of the defendant have already been alleged in paragraphs 6 and 7 of the complaint. Therefore, the allegations in paragraph 8 are merely evidence which the plaintiff may or may not have the right to use to sustain proof of the falsity of the representations and that it is not good practice to allege evidence; also that the mere fact that there was a judgment for the defendant in the suit mentioned in paragraph 8 does not permit the plaintiff in this suit to introduce the record of that suit for the purpose of proving the falsity of the alleged representations on the part of the defendant, because misrepresentations alleged in the pending suit must be proven by the introduction of competent evidence to prove such facts.

Respectfully,

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant.

Dated: October 23, 1928.

Memorandum.

For Plaintiff: WILLIAM B. GOURLEY, ESQ.
 For Defendant: STEIN, MCGLYNN and
 HANNOCH, ESQS.

MEMORANDUM.

NEWMAN, J.

This is an application to strike out various portions of the complaint. The first portion for which application is made to strike out is the part of paragraph 7 which reads as follows: "and believing therefrom that this defendant had a good and sufficient cause of action against said Consolidated Piece Dye Works for breach of his contract for the care and custody of said cotton fabrics." 10

The reliance which plaintiff alleges it placed on the alleged false and fraudulent statements of the defendant are sufficient to constitute a cause of action, and its belief as above asserted is not essential to nor would it support a cause of action. It appears to be a matter which is foreign to any issue in the case, and therefore should be struck out. 20

The next application is to strike out another portion of the paragraph which reads as follows: "In consideration of an agreement by this defendant that it would bring an action in its name for the benefit of this plaintiff against said Consolidated Piece Dye Works and would repay said sums so paid to it from the proceeds of said action." 30

This phrase seems to be unconnected with and unrelated to any other part of the paragraph, and by itself presents a doubtful question as to its meaning. It seems to contain no question of fact nor to allege or support any cause of action, nor is it such a declaration as would require any answer by or denial on the part of the defendant; and for that reason like wise should be struck out. 40

Memorandum.

10 The next application to strike out is the entire paragraph 8. This alleges no cause of action, nor is it an essential link in any cause of action. The plaintiff suggests it is permitted to set out to show that it promptly demanded a return of the money which it had been led to pay the defendant by its fraudulent representations. This point is covered by the allegations of paragraph 9. Paragraph 8 sets up facts, the most of which plaintiff would not be permitted to prove on the trial, and therefore defendant ought not to be compelled to plead to it, and it should be struck out.

The result is that the three above paragraphs or portions thereof should be struck out, with costs.

20 CLIFFORD L. NEWMAN,
Judge.

Order Amending Complaint.

On application of WILLIAM B. GOURLEY, attorney for plaintiff, to amend the complaint in the above entitled cause as follows:

30 6. At the time of the said reporting of said loss and damage to said cotton fabrics and the submission of said alleged proofs of loss, the defendant made to this plaintiff certain false and fraudulent statements, knowing the same to be false and fraudulent and with the intent to deceive this plaintiff and to induce it to pay said alleged loss not covered by said policy, which statements were to the effect that the said Consolidated Piece Dye Works, without the knowledge or consent of this defendant and in breach of its

40

Order Amending Complaint.

contract with this defendant had stored said cotton fabrics in one of its warehouses which was a location not enumerated in said rider attached to said policy and that this defendant did not know that said cotton fabrics had been so stored in said location not enumerated in said rider and defendant agreed that it would bring an action in its name for benefit of this plaintiff against said Consolidated Piece Dye Works, and would repay said sums so paid to it from the proceeds of said action. 10

7. This plaintiff relying on the said false and fraudulent statements of the defendant and also upon the agreement of the defendant to bring an action against the Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics, did on the 24th day of March, 1926, and again on the 1st day of May, 1926, pay to the defendant sums of money aggregating \$35,925.53 the total amount of its aforesaid alleged loss, although it was not and knew that it was not liable for said loss under said policy. 20

8. Thereafter the plaintiff herein on or about the 20th day of April, 1927, did discover that the statements and agreements as above set forth and made to this plaintiff to induce it to make said payments to the defendant were in all respects false and untrue, particularly in that the defendant herein, contrary to its representations to the plaintiff herein well knew that the cotton fabrics in question had been stored at a warehouse 30 40

Order Amending Complaint.

other than those enumerated in the policy and the riders attached thereto, and further that the defendant herein had given its consent to the storage of said cotton fabrics at said warehouse which was not enumerated in the policy and the riders attached thereto.

10

It is on this 13th day of December, 1928, ORDERED that the plaintiff be allowed to amend its complaint as aforesaid.

CLIFFORD L. NEWMAN,
Judge.

Amended Complaint.

20 Plaintiff, Fidelity Phoenix Fire Insurance Company, a corporation of the State of New York, says that:

FIRST COUNT.

1. At and during all the times hereinafter mentioned, the defendant was and still is a corporation of the State of New York, and was and still is engaged in the manufacture of cotton fabrics.

30

2. On July 29, 1925, plaintiff issued to the defendant its open policy of insurance, insuring said defendant against loss of and damage to any of its cotton fabrics, by fire, in the sum of \$150,000, while said goods were located and stored in certain locations enumerated in a certain rider attached to said policy.

40

3. In and by the said policy the defendant specifically and expressly warranted that the liability of the plaintiff was and should be limited to loss

Amended Complaint.

and damage as therein stated to the goods while located or stored in said enumerated locations.

4. Thereafter and under the provisions of said open policy, the defendant reported to this plaintiff that it had caused to be delivered to the Consolidated Piece Dye Works at Paterson, New Jersey, a large quantity of said cotton fabrics of the reasonable value of \$49,454.49 for the purpose of having said Consolidated Piece Dye Works do certain printing or other work thereon at one of said enumerated locations. 10

5. Thereafter the said defendant reported that the said cotton fabrics while in the custody of said Consolidated Piece Dye Works had been damaged and partially destroyed by fire in January, 1926, while stored by said Consolidated Piece Dye Works in their warehouse which was not one of the afore-said locations enumerated in said rider attached to said policy and the defendant submitted documents purporting to be proofs of said loss and damage to said cotton fabrics in the sum of \$35,923.53. 20

6. At the time of the said reporting of said loss and damage to said cotton fabrics and the submission of said alleged proofs of loss, the defendant made to this plaintiff certain false and fraudulent statements, knowing the same to be false and fraudulent and with the intent to deceive this plaintiff and to induce it to pay said alleged loss not covered by said policy, which statements were to the effect that the said Consolidated Piece Dye Works, without the knowledge or consent of this defendant and in breach of its contract with this defendant had stored said cotton fabrics in one of its warehouses which was a location not enumerated in said rider attached to said policy and that 30 40

Amended Complaint.

this defendant did not know that said cotton fabrics had been so stored in said location not enumerated in said rider and defendant agreed that it would bring an action in its name for benefit of this plaintiff against said Consolidated Piece Dye Works and would repay said sums so paid to it from the proceeds of said action.

10

7. This plaintiff relying on the said false and fraudulent statements of the defendant and also upon the agreement of the defendant to bring an action against the Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics, did on the 24th day of March, 1926, and again on the 1st day of May, 1926, pay to the defendant sums of money aggregating \$35,925.53 the total amount of its aforesaid alleged loss, although it was not and knew that it was not liable for said loss under said policy.

20

8. Thereafter the plaintiff herein on or about the 20th day of April, 1927, did discover that the statements and agreements as above set forth and made to this plaintiff to induce it to make said payments to the defendant were in all respects false and untrue, particularly in that the defendant herein, contrary to its representations to the plaintiff herein, well knew that the cotton fabric in question had been stored at a warehouse other than those enumerated in the policy and the riders attached thereto, and further that the defendant herein had given its consent to the storage of said cotton fabrics at said warehouse which was not enumerated in the policy and the riders attached thereto.

30

9. Upon the discovery of said falsity of said statements of this defendant to this plaintiff, and of the aforesaid fraud, this plaintiff made demand

40

Amended Complaint.

upon the defendant to repay to it the sum thus paid to it as aforesaid, but the defendant refused and still refuses to pay to this plaintiff said sum or any part thereof.

10. By reason of the aforesaid and of said fraudulent statements and conduct of this defendant and the fraud so perpetrated by the defendant as aforesaid upon this plaintiff, the plaintiff has sustained damage in the sum of \$35,923.53. 10

SECOND COUNT.

1. Plaintiff repeats paragraphs 1 to 5 inclusive as part of this count.

2. On or about May 1st, 1926, the defendant received and collected from the plaintiff the sum of \$35,923.53 which said sum the defendant retains and although the plaintiff has demanded the return of said sum of money the defendant refuses to pay it over to the plaintiff. 20

Plaintiff demands judgment against the defendant for the sum of \$35,923.53 with interest thereon from the 1st day of May, 1926, together with costs of this action.

WILLIAM B. GOURLEY, 30
Attorney of Plaintiff.

Order Striking Out.

It appearing to the court that the notice of motion was heretofore brought on for hearing by the defendant in the above-entitled matter, for the purpose of striking out certain portions of the complaint filed by the plaintiff herein, and the court having heard the argument of the respective counsel herein and the court being satisfied that the portions of the complaint to which objection was made should be stricken from the complaint,

It is, on this 13th day of December, 1928, on motion of Stein, McGlynn & Hannoeh, attorneys of the defendant, in the presence of William B. Gourley, attorney of the plaintiff,

ORDERED that the following clauses of the complaint, to wit:

20 (1) "And believing therefrom that this defendant had a good and sufficient cause of action against said Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics."

30 (2) "In consideration of an agreement by this defendant that it would bring an action in its name for the benefit of this plaintiff against said Consolidated Piece Dye Works and would repay said sum so paid to it from the proceeds of said action."

40 (3) "Thereafter, the defendant herein did bring said action against said Consolidated Piece Dye Works, and upon the trial thereof, in which a judgment was rendered against this defendant, it was shown by the testimony of this defendant that the statements set forth above made to this plaintiff to induce it to make said payment to the de-

Answer to Amended Complaint.

defendants were in all respects false and untrue."

be stricken from and removed from the Complaint as filed herein and

It is further ORDERED that the defendant be allowed its taxed costs on this motion. 10

CLIFFORD L. NEWMAN,
Judge.

Answer to Amended Complaint.

The defendant, Cohn-Hall-Marx Company, a corporation of the State of New York, answering the amended complaint filed herein, says that: 20

FIRST COUNT.

1. It admits the facts alleged in paragraph one of said complaint.

2. It admits the facts alleged in paragraph two of said complaint.

3. It admits the facts alleged in paragraph three of said complaint.

4. It admits the facts alleged in paragraph four of said complaint. 30

5. It admits the facts alleged in paragraph five of said complaint.

6. It denies the facts alleged in paragraph six of said complaint.

7. It denies the facts alleged in paragraph seven of said complaint. 40

Answer to Amended Complaint.

8. It denies the facts alleged in paragraph eight of said complaint.

9. It denies the facts alleged in paragraph nine of said complaint.

10 10. It denies the facts alleged in paragraph ten of said complaint.

SECOND COUNT.

1. As to the allegation in paragraph 1 of the second count, defendant repeats its answers to paragraphs 1 to 5 inclusive of the first count of the complaint filed herein.

20 2. It admits that on or about May 1, 1926, plaintiff paid to the defendant the sum of \$35,923.53 and admits the plaintiff has demanded the return of said sum of money, which the defendant has refused to pay because it alleges and asserts there is no money due the plaintiff from the defendant.

FIRST AND SEPARATE DEFENSE.

Further answering the complaint filed herein, defendant says that:

30 1. Any money paid to it, the defendant, by the plaintiff, was paid in accordance with the terms of a contract of insurance as it existed between the plaintiff and the defendant on the date and/or dates of said payment or payments.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

Reply.

Plaintiff replying to the answer to the Amended complaint says that:

It denies the first and separate defense.

WILLIAM B. GOURLEY,
Attorney of Plaintiff.

10

Judgment.

This action was tried before Judge William B. Mackay, with a jury, in the presence of the Counsel of the respective parties, at the Passaic County Circuit Court, on October 15th and 16th, A. D. 1930.

The cause having been heard and submitted to the jury, they returned their verdict as follows: Forty-four Thousand Six Hundred and Twenty Dollars and Seven Cents, (\$44,620.07), in favor of the Plaintiff.

20

Whereupon, it is adjudged that the Plaintiff, Fidelity Phoenix Fire Insurance Company, a corporation, recover of the Defendant, Cohn-Hall-Marx Company, a corporation, the sum of Forty-four Thousand Six Hundred and Twenty Dollars and Seven Cents, (\$44,620.07), and its costs, which are taxed at the sum of One Hundred and Thirty-six Dollars and Twenty-one Cents, (\$136.21), making in the whole the sum of Forty-four Thousand Seven Hundred and Fifty-six Dollars and Twenty-eight Cents, (\$44,756.28).

30

Judgment entered and signed October 20th, A. D. 1930, at 9 A. M. Action No. 12308, Docket K, pages 565 &c.

W. B. MACKAY,
Judge. 40

Clerk's Certificate.

State of New Jersey,)
 County of Passaic,)^{ss.:}

10 I, Lloyd B. Marsh, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: Fidelity Phoenix Fire Insurance Company, a corporation, Plaintiff, vs. Cohn-Hall-Marx Company, a corporation, Defendant, as the same is taken from and compared with the original entry thereof in Book "B-2" of Circuit Court Judgments, for said County and now remaining of record in my office.

20 (Seal) In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Seventh day of November, A. D. Nineteen Hundred and Thirty.

LLOYD B. MARSH,
 Clerk,
 By FLOYD E. JONES,
 Deputy Clerk.

30

40

Notice of Appeal.

Filed Oct. 28, 1930.

PASSAIC COUNTY CIRCUIT COURT.

FIDELITY PHOENIX FIRE INSUR-
ANCE COMPANY, a corporation,
Plaintiff,

vs.

COHN-HALL-MARX COMPANY, a
corporation,
Defendant.

10

Action at Law.

Notice
of Appeal.

To: FIDELITY PHOENIX FIRE INSURANCE COMPANY,
a corporation, or WILLIAM B. GOURLEY, its
attorney.

20

Take Notice that the defendant in the above en-
titled matter hereby appeals from the judgment of
the Passaic County Circuit Court, from the whole
of the judgment rendered, to the New Jersey Court
of Errors and Appeals of last resort in all causes.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

30

Service of a true copy of the within Notice of
Appeal is hereby acknowledged this 25th day of
October, 1930.

W. B. GOURLEY,
Attorney for Plaintiff.

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	FIDELITY PHOENIX FIRE INSUR- ANCE COMPANY, a corporation, Plaintiff-Appellee, vs. COHN-HALL-MARX COMPANY, a corporation, Defendant-Appellant.	}	Action at Law. On Appeal. Grounds of Appeal.
----	---	---	---

20 The defendant-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment of the Passaic County Circuit Court rendered in the above entitled matter upon the following grounds, to wit:

1. The Court refused to grant the defendant's motion for a judgment of non-suit at the close of the plaintiff's case, to which ruling of the trial court defendant prayed and was allowed an exception.
- 30 2. At the close of the entire case the court refused to grant the defendant's motion for the direction of a verdict in its favor, to which ruling of the trial court defendant prayed and was granted an exception.
3. The trial court refused to charge the defendant's request to charge numbers eight, nine and ten, to which ruling of the trial court the defendant prayed and was granted an exception.
- 40 4. The trial court erroneously charged the jury

Grounds of Appeal.

as to the dates when interest began to accrue on the plaintiff's claim, to which portion of the trial court's charge defendant prayed and was granted an exception.

STEIN, McGLYNN & HANNOCH,
Attorneys for the Defendant-Appellant.

10

Due service of a true copy of the within Grounds of Appeal is hereby acknowledged this 10th day of November, 1930.

W. B. GOURLEY,
Attorney for Plaintiff.

20

30

40

Testimony.

PASSAIC COUNTY CIRCUIT COURT.

10	FIDELITY PHOENIX FIRE INSURANCE COMPANY, a corporation, Plaintiff, vs. COHN-HALL-MARX COMPANY, a corporation, Defendant.	}	At Law.
----	--	---	---------

Paterson, N. J., October 15, 1930.

Before—HON. WILLIAM M. MACKAY, Judge,
 20 and a Jury.

APPEARANCES:

For the Plaintiff: WM. B. GOURLEY, ESQ.,
 by ALBERT COMSTOCK, ESQ., and FOR-
 REST E. SINGLE, ESQ.

For the Defendant: STEIN, MCGLYNN &
 HANNOCH, ESQS., by EDWARD MC-
 GLYNN, ESQ., and ALEXANDER MAC-
 LEOD, ESQ.

30

(A jury was called and sworn and counsel
 for the respective parties opened the case to
 the jury.)

FRANK B. STEINBUGLER, sworn.

Direct-examination by Mr. Single:

40 Q. Mr. Steinbugler, what is your occupation? A.

Frank B. Steinbugler—Direct.

Agent for the Fidelity Phoenix Fire Insurance Company.

Q. Who is the Fidelity Phoenix Fire Insurance Company? A. A New York insurance company writing fire and marine insurance.

Q. Where is your office? A. 53 Beaver Street, New York.

10

Q. With what concern? In whose office? A. In the Marine Office of America.

Q. In the Marine Office of America. Who is the head of that concern? A. Mr. McCoomb, S. B. McCoomb.

Q. Just briefly tell me what the Marine Office of America is and how it functions. A. Why, it is an underwriting office for seven different insurance companies.

20

Q. Including the Fidelity Phoenix? A. Including the Fidelity Phoenix Fire Insurance Company.

Q. Now, what kind of an underwriting business—that is, what kind of insurance do they write specially? A. They write ocean, marine, and all sorts of inland marine floating policies.

Q. Just for the benefit of the jury, who can't know what you mean by inland marine, just describe what it is, what its general coverage is. A. It is a policy which covers goods of a floating nature, that may be any where in transit, in various locations beyond the control of the owner, where he couldn't cover by a specific insurance on account of the nature of the merchandise involved, being constantly moving. It is known as a floater policy under the inland marine form.

30

Q. The marine insurance primarily covers goods that are moving somewhere? A. That is right.

Q. And so this class of movement which is in-

40

Frank B. Steinbugler—Direct.

land marine, as apart from ocean, has been covered by this marine insurance? A. That is right.

Q. That is the customary way for it to be handled? A. Yes, sir.

Q. And straight fire insurance policy covers a specific location? A. That is right.

10 Q. And these policies covered movement and at specific locations? A. That is right.

Q. Is that the kind of policy that was issued in this case? A. Yes.

Q. Now, who was the assured under that policy? A. Cohn-Hall-Marx Company.

Q. Cohn-Hall-Marx Company. Do you happen to know what their business is? A. Why, they dealt in textiles, cotton textiles.

20 Q. What is their method of doing business, in so far as the goods that came under this policy is concerned? A. Why, they would buy goods in the greig, as I understand it, and have it sent to various finishers and dyers, as I understand it, to have the material finished, and we were covering under this policy the merchandise while it was in transit and also at these various locations which they mentioned to us at the time the policy was negotiated.

30 Q. I suppose the ladies will know, but the gentlemen might not know what you mean by goods in the greig. What do you mean by that? A. Well, the raw material, that is, the raw finished goods that had not been bleached, unbleached goods.

Q. Before they are stamped and colored? A. Before they are stamped and colored.

40 Q. The purpose of this policy is to cover from the time it leaves the Cohn-Hall-Marx hands in New York to the contractor who is doing the bleaching and stamping until it returns? A. That is right.

Frank B. Steinbugler—Direct.

Q. And that policy covers transportation risks while being transported and fire risks while on location? A. Yes, sir.

Q. Now, under such a policy do you set forth or do you ascertain from the assured what locations are going to be used, where the goods are going to be? A. Yes, sir.

Q. Just what is the situation there? A. Why, we ask our assured where this merchandise of theirs would be kept, at what dyers or finishers or bleacheries, so that we would know at what locations their goods would be, and also for the purpose of determining what sort of a rate would be charged, on account of the fire hazard in the particular locations mentioned. These locations were practically all what we know as mill construction and enjoyed a very low fire rate, and for that reason the policy was formed mentioning the location, so the assureds could avail themselves of the rate as indicated under the policy. 10 20

Q. Now, a mill location, you draw a distinction between houses and ordinary buildings and mills. What is that distinction? A. Why, it is fireproof construction, usually one-story concrete building with a sprinkler system installed.

Q. Now, in connection with such a policy do you allow any leeway for declaration of places? Is your assured given a certain length of time when he would be covered without notifying you of a special place? 30

Mr. McGlynn: I don't want to object for the purposes of taking up time, but it seems to me we have the policy in this particular case, the locations, and all these terms that counsel is interrogating about. Let us get it in and— 40

Frank B. Steinbugler—Direct.

10 Mr. Single: If your Honor please, I don't think it is fair to the jury to just throw this at them. Here is a man who can save a lot of time of the jury—of the jury's time—in studying what I would, if I were a juror, consider quite a complicated policy. I don't want to waste time, either, but I think this would be of benefit to the jury.

Mr. McGlynn: I will withdraw my objection, sir.

Q. Just what is the situation with regard to the necessity of the assured's advising you when there are any locations other than the locations specified?

20 A. Why, this policy provided an additional automatic coverage at another location of the same type for a stipulated amount, provided the assured, Cohn-Hall-Marx Company, notified the insurance company within thirty days after the arrival of the merchandise at this new location, some location other than the places mentioned in the schedule.

Q. That was more or less of a consideration to the assured, because it might not be informed? A. That is right.

30 Mr. McGlynn: Oh, I object to counsel's stating that. I ask to have it stricken out.

The Court: Yes.

Mr. Single: I will withdraw it.

The Court: Strike it out.

Q. Now, have you—

40 Mr. Single: Just for the purpose of the record, I would ask Cohn-Hall-Marx for the original policy.

Frank B. Steinbugler—Direct.

Mr. McGlynn: We have none. We haven't got the original policy, and have no objection to your offering the copy which has been marked before.

Mr. Single: I have not only this copy but a photostatic copy. I would like to offer them both. The photostatic copy is much more convenient for the jury. 10

Mr. McGlynn: All I care about this is my famous endorsement.

Mr. Single: I think it is there; if it is not I will see that it is. We want everything in that we can have.

Mr. McGlynn: I have no objection, if your Honor please, to marking the real copy of it in evidence and using the photostatic, because it would probably be handier to use. 20

Q. Will you just identify both these documents, for the purposes of the record (handing papers to the witness)? A. This is the company's copy of the policy.

Q. You say "company's copy" as distinguished from the original, which is given to the assured? A. That is right.

Mr. McGlynn: May I suggest that that endorsement be given the number P-1A, so referring to it we can distinguish it? 30

(Papers marked Exhibit P-1 in evidence: one paper being marked Exhibit P-1A.)

Q. This is a photostatic copy of the office policy? A. Of the office policy.

Mr. Single: I would ask to have it marked P-2. 40

Frank B. Steinbugler—Direct.

(Paper marked P-2 in evidence.)

Mr. Single: Now, I would like to just read to the jury the points that I mentioned.

Mr. McGlynn: Just refer, Mr. Single, to the clause you are reading so I will know.

10 Mr. Single: Yes, surely. (To the jury)
The policy refers, as you will note, to a great many locations, certain places in the Bronx, Massachusetts, Connecticut, and New Jersey, various locations that are listed here which are, as testified, the places to which the goods are sent for printing or dyeing or bleaching, whatever it happens to be. The policy states that it covers—this is just before the list of locations—

20 “All contained in or”—

(Mr. Single spoke inaudibly to the reporter.)

“and railroad siding adjacent or contiguous thereto, located as per schedule below, it being understood that this company’s liability at each of such locations shall be limited to the amount set forth below as applying to each location.”

30 Then it lists the places located as per schedule below. Now, at the end of the list of locations—there are sixty-three locations mentioned on here—is the clause last mentioned.”

40 “In the United States of America, located other than those mentioned above, to which the assured may from time to time send this property, it being understood and agreed that the assured will cause this company to be notified of any such new premises within

Frank B. Steinbugler—Direct.

thirty days after the arrival of their property at such new premises.”

The Court will instruct you as to the law with respect to that clause.

By Mr. Single:

Q. Now, from time to time, Mr. Steinbugler, in connection with this insurance policy, were various changes or endorsements made thereon? A. To the best of my recollection. 10

Q. Now, with particular reference to the endorsement that has been referred to by my friend, P-1A, can you just tell us when this P-1A was made out?

Mr. McGlynn: The question is when it was made out, Mr. Single?

Mr. Single: Yes. 20

A. That was made out on May 13, 1926.

Q. Now, under whose orders or directions was that made out, do you know? A. Why, this endorsement was finally made as the result of an agreement—

Mr. McGlynn: I object to the answer as not responsive, if your Honor please.

The Court: No. 30

Q. Do you know the circumstances leading up to that endorsement or was that somebody else's in the Marine Office that had to do with that?

Mr. McGlynn: Just a minute. May I have a ruling on the question previous? The witness was asked—

Mr. Single: I withdrew the question.

The Court: I did rule and he didn't press it. He put another question. 40

Frank B. Steinbugler—Direct.

Mr. McGlynn: I didn't hear him withdraw it.

The Court: He put another question.

Mr. Single: I thought your Honor sustained the objection. Didn't your Honor sustain the objection?

10 The Court: You put another question.

Mr. Single: I see. Well, I will withdraw the question and put the new question.

(The last question was read by the reporter as follows:)

"Q. Do you know the circumstances leading up to that endorsement or was that somebody else's in the Marine Office that had to do with that?"

20 A. Why, the arrangement was made between our office and the assured, and inasmuch as we had advanced the loan, we were entitled to receive the premium which we would have received had we actually insured it there, the difference between the rate at the location which was mentioned in the policy and the rate prevailing at the location where the loss actually occurred, which—

30 Q. Did you have to do with that arrangement or who had to do with it for the Marine Office? A. Why, I was in the conference, the office conference, at the time the thing was brought up.

Q. Well, who had to do with the assured in that connection? A. The broker.

Q. And who dealt with the broker in your office? A. I did.

40 Q. Now, just tell me what conversation you had, who the broker was, and what the conversation was. A. You see, the broker in this particular policy was John A. Eckert and Company. After

Frank B. Steinbugler—Direct.

the—after my interview with Mr. Kaufman, who was an underwriter and who brought this matter to my attention, about the payment of the additional premium, it was suggested we speak to the broker on the policy and bring it to their attention.

Q. Now, when was that conversation with reference to the meetings held between Mr. Jones and Mr. McCoomb and the broker's office and the Cohn-Hall-Marx people? After the fire? A. Considerably later. 10

Q. Considerably later? A. Sometime—

Q. When was it with reference to the trial that took place between Cohn-Hall-Marx and the Consolidated Piece Dyeing Company in Newark? A. That I don't know.

Q. Well, that took place a year later, was it not, about? A. The trial? 20

Q. In Newark? A. Yes.

Mr. McGlynn: April, 1927.

Q. 1927. So this was practically eleven months before that trial? A. That is right.

Q. And your advice with regard to the additional premium point came from Mr. Kaufman, who is the underwriter in the Marine Office? A. Yes. 30

Q. And after that you got in touch with the broker and agreed on the endorsement? A. Yes, sir.

Q. And the rate charged then was the rate which the assured should have paid had they declared this location where the fire occurred? A. Yes, sir.

Mr. Single: That is all.

*Frank B. Steinbugler—Cross.**Cross-examination by Mr. McGlynn:*

Q. What is it that fixes your recollection now of the time of your conversation with regard to this endorsement or rider? A. What fixes my idea of the time?

10 Q. Yes. What is there now that prompts you to recall when the the conversation was with regard to this additional premium? A. Why, Mr. Single's question.

Q. Well, it was from the date of the endorsement. A. The date of the endorsement.

Q. You hae no personal recollection now whether it was discussed before that or not? A. Before this endorsement? Yes, sir, it was discussed before this endorsement.

20 Q. All right. When was it discussed for the first time? A. About a week previous to this endorsement.

Q. You remember the date of the first payment made to the defendant by the insurance company? A. No, sir.

Q. Do you know the date of the second payment? A. No, sir.

30 Q. Do you know whether this conversation—the first conversation, I am referring to—with regard to a premium was before the first payment? A. It was not.

Q. How do you know that? A. Because I know the loss was actually paid before this question was brought up.

Q. The entire loss? A. To the best of my knowledge, yes, sir.

40 Q. Well, when would you say the first conversation was had with you with regard to the charging and collecting of an additional premium? A.

Frank B. Steinbugler—Cross.

About a week prior to the issuance of the endorsement.

Q. That is May 13, is it? A. Yes, sir.

Q. This form of endorsement, P-1A, this printed blank on which typewritten information is inserted, is the same form of endorsement as used by the company with respect to all sorts of changes and conditions in connection with the policy? A. Yes, sir. 10

Q. And do I understand the practice to be in connection with this endorsement that one is sent to the assured to be attached to his policy? A. Yes, sir.

Q. One retained by the company? A. Yes, sir.

Q. Attached to its copy of the contract? A. Yes, sir.

Q. And another sent to the broker? A. Yes, sir, for his record. 20

Q. For his record? A. Yes.

Q. The premium charged on this rider, the \$850.63, was paid, was it not? A. Yes, sir.

Q. I understood you to say that that exhibit we marked P-1A, with the crumpled up list of papers, is the company's office copy?

Mr. Single: P-1.

A. The company's copy. 30

Q. The company's copy of the insurance contract? A. Yes, sir.

Q. From the date of its issuance right up to the date of its termination? A. Yes.

Q. Having annexed thereto its various riders and endorsements which indicate changes of location or premium rates, and so forth? A. Yes.

Q. Mr. Steinbugler, I call your attention to your testimony at a previous trial of this case, referring 40

Frank B. Steinbugler—Cross.

to the minutes of September 18 or 19, 1929, at the bottom of page 87. Previous to that you had been asked, back a few questions, practically the same questions you were asked here today. "Q. Now, how do you know that this came to be written"—speaking of the endorsement of May, 1926—and the latter part of your answer on page 87, "This amount represented the difference between what had been paid on the original premium of the policy and the rate at the location where the fire occurred. This memorandum was simply put through our office record as a change on this policy, but there was no endorsement on the policy. The original policy had not been affected at all. It was just simply an office record to show that a charge of that amount, of eight hundred and some add
10 dollars, was made.
20

"Q. And made, you say, because the money had been advanced? A. Because the money was to be advanced. I don't know whether it had been advanced at that time or not." A. The entire amount, I don't know.

Q. Well— A. I knew that the first payment had been made. What amount—I don't know whether the entire amount had been advanced or not.

30 Q. Has anything happened since the last trial which in any way refreshes your recollection as to when this particular conversation took place? A. Why, no.

Redirect-examination by Mr. Single:

Q. Mr. Steinbugler, just one question, if I may. How many people are in the Marine Office, about?
A. About two hundred.

40 Q. Do they have a loss department, separate

Frank B. Steinbugler—Recross.

Frank B. Steinbugler—Redirect.

from the department in which you were? A. Yes.

Q. Who is in charge of that? A. Mr. Jones.

Q. And the questions of losses come under his jurisdiction? A. Yes.

Mr. Single: That is all, thank you.

10

Recross-examination by Mr. McGlynn:

Q. Just one other question. Have you any interest in the outcome of this suit? A. Of what nature?

Q. Well, under what arrangement at that time were you writing policies for this company? A. Under a contingency contract.

Q. Under the terms of that contingency contract did the fact that the company sustained this loss affect in any way your particular income for that given year? A. Yes, sir. 20

Q. So that if the insurance company, the Fidelity Phoenix Fire Insurance Company, the plaintiff in this suit, recovers a judgment here in this suit, it would in some way benefit you personally? A. It is problematical.

Q. In the adjustment of your account with the insurance company? A. Yes, sir. 30

Mr. McGlynn: That is all.

Redirect-examination by Mr. Single:

Q. You work on what is called a contingent fee?
A. Contingent.

Q. That is, if your accounts with the company show a profit you get a share of it; if they don't, you don't? A. Yes. 40

William H. Jones—Direct.

Q. That is customary in marine insurance, is it not? A. Yes, sir.

Mr. Single: That is all, thank you.

10 WILLIAM H. JONES, sworn:

Direct-examination by Mr. Single:

Q. Mr. Jones, by whom are you employed? A. Marine Office of America.

Q. That is the company that Mr. Steinbugler has just been discussing? A. Yes.

Q. And what is your particular position with that company, Mr. Jones? A. The manager of the loss department.

20 Q. You were the manager of the loss department in 1926, at the time of this loss? A. Yes.

Q. At the Consolidated Piece Dye Works? A. Yes.

Q. Now, just tell us what knowledge you had of this loss and how that knowledge came. A. The loss was reported by a letter from the brokers, John A. Eckert and Company, reporting that a fire had occurred in Paterson, New Jersey.

30 Q. The advice was simply that a fire had occurred in Paterson? A. As I recall it, yes.

Q. And what did you do? A. I telephoned Mr. Browning, a surveyor and adjuster, to go out to Paterson to inspect the damage.

Q. And did Mr. Browning go? A. Yes.

Q. And what—then what did he do? A. He came back to New York and reported on the result of his investigation.

40 Q. What did he report?

William H. Jones—Direct.

Mr. McGlynn: Oh, I object to it, if your Honor please. His testimony is to be given here. I think that is the best evidence, not this hearsay.

Q. Well, not in detail, but generally what did he say? A. The main thing he reported about— 10

Mr. McGlynn: Just a moment. Pardon me. I can't see, if your Honor please, how he could tell us something that was said—

The Court: No.

Q. Did the information come to you, Mr. Jones, that the loss had occurred at a place 205-207 Paterson Street? A. Yes.

Q. And was that a place covered by your policy? A. No. 20

Q. Your policy did cover certain property of the Consolidated Piece Dye Works, did it? A. Certain premises?

Q. Certain premises. A. Yes.

Q. It covered property of Cohn-Hall-Marx while at certain places? A. Yes, yes.

Q. Was 205-207 Paterson Street one of those places? A. No.

Q. Had your company ever been advised by Cohn-Hall-Marx that they were storing goods at 205-207 Paterson Street? A. Not to my knowledge. 30

Q. At any time? A. No.

Q. And accordingly they had not been advised of the storage there for thirty days? A. No.

Q. Did this policy cover goods of Cohn-Hall-Marx wherever situated? A. No. It had a list of the locations where goods were insured.

Q. And was there any liability under this policy 40

William H. Jones—Direct.

for that merchandise destroyed at 205 Paterson Street? A. No.

10 Mr. McGlynn: Oh, I object to that, if your Honor please. I don't think this witness should give us an answer to that question. I don't know anything about what we may determine in this case, but it seems to me the jury in this case are the ones to determine the liability at that location, not this witness.

The Court: He has already answered it.

Mr. McGlynn: It was pretty quick. I was on my feet before the question was hardly finished.

20 Mr. Single: I will withdraw the answer and ask the Court for a ruling on the question.

The Court: Repeat the question.

(The last question was read by the reporter.)

The Court: Wouldn't that be a matter of the construction of the contract?

Mr. Single: I beg your pardon?

The Court: Wouldn't that be a matter of the construction of the contract itself?

30 Mr. Single: To be passed upon by whom, your Honor? By you? The reason why I bring it up is because my friend in opening made the flat-footed statement that this policy covered anywhere.

Mr. McGlynn: Covered what?

Mr. Single: Covered—the policy covered the loss at the time of the loss, that there was a liability under the policy for the loss itself.

40 Mr. McGlynn: By reason of the endorse-

William H. Jones—Direct.

ment, that is what I said in my opening, the same as I have always done.

The Court: By reason of P-1A.

Mr. McGlynn: Yes, the same position I have always maintained.

Mr. Single: I will reframe my question and just leave the question of liability, then, that my friend raises with regard to P-1A, and I will ask the witness if the policy before the endorsement of May 13 covered the loss. I take it that then there would be no objection on the part of my friend. 10

Mr. McGlynn: Yes, there is an objection, if your Honor please. I think that the question of the construction of documents, no matter what kind, whether admitted or not, is a matter for the Court, and not for a witness on the stand to testify to. It is purely a conclusion. 20

Mr. Single: I quite agree, but I don't see how my friend in opening can then tell what the Court's construction of the document is going to be and make a statement that the Court is going to find that the policy did cover outside of this endorsement.

The Court: I always thought in this case that this contract of insurance did not cover 205-207 Paterson Street specifically by name at all, but counsel for the defendant always contended that what caused the coverage was the fact that P-1A was attached to the policy. 30

Mr. McGlynn: Your Honor's recollection of my position is absolutely correct.

The Court: Is that correct?

Mr. McGlynn: Yes. 40

William H. Jones—Direct.

The Court: That is what I thought.

Mr. Single: I am quite agreed that the Court may pass on that point, and I don't want to ask this witness anything that will affect the P-1A situation. My question as now framed—

10

The Court: Wouldn't the statement that I have made settle your point, because I just wanted to know a minute ago what that contract meant prior to the attachment of P-1A.

Mr. Single: Perhaps it would, but I don't understand that your Honor had answered that point.

The Court: I just said that my understanding was that it did not cover the location.

20

Mr. Single: I would much rather have your understanding.

The Court: The endorsement, P-1A, covered it and made it retroactive, so I don't think we need dispute that.

Mr. Single: No, I quite agree.

The Court: I mean, I thought that is probably agreed to on all sides. Is it?

Mr. McGlynn: Yes, as far as I am concerned.

30

By Mr. Single:

Q. Mr. Jones, tell us—you say that you heard from the brokers that there had been this loss in Paterson. Now, just tell us what next you heard from the assured. What were the next steps in connection with this present situation? A. The next step was that the brokers invited us to attend a conference in their office to discuss the loss.

40

Q. Who attended that conference? A. Mr. Lawrence Marx, of Cohn-Hall-Marx; Mr. McCoomb, of

William H. Jones—Direct.

the Marine Office of America; Mr. Trask; Mr. Browning; Mr. Eckert; and myself.

Q. Mr. Trask and Mr. Eckert were the brokers?
A. Yes.

Q. Mr. Browning was the adjuster? A. Yes.

Q. You and Mr. McCoomb were from the Marine Office? A. Yes.

Q. And Mr. Lawrence Marx was one of the officers of the Cohn-Hall-Marx Company, the defendant corporation? A. Yes, the assured.

Q. The assured? A. Yes.

Q. Now, just tell us what took place at that time. A. The main discussion was the location of the fire. We pointed out to them that there was no insurance under the policy on goods over in Paterson Street and there was no liability under the policy. The next thing that happened was that Mr. Marx explained that they didn't know their goods were in Paterson Street, if they were there they had been moved without their consent. And we said in that case it appeared to us that they had a good cause of action against the Consolidated for moving their goods from a sprinkled mill to a very hazardous building in another part of the town, and we suggested that they sue the Consolidated, to which he replied that that would take a long time and that he needed the money, and wouldn't we arrange to advance him the money and he would agree to sue the Consolidated.

Q. Just tell us, as nearly as you can remember, what Mr. Marx said about the goods being at this location. A. I don't remember the exact words, but he didn't know anything about it, he said.

Q. Cohn-Hall-Marx didn't know? A. No.

Q. That the goods had been placed at 207 Paterson Street? A. Paterson Street, no.

William H. Jones—Direct.

Q. Did he say where he claimed they had been placed or understood they had been placed? A. Yes, he said he understood they were at Hazel Street and Montclair Avenue.

Q. Now, was the question of the difference in hazard of the two locations discussed? A. Yes.

10 Q. Was there a question discussed as to the amount of goods that were at 207 Paterson Street? A. No, except in so far as it came up in connection with the loss.

Q. Roughly, what values were they? A. I think about—I don't know, something over thirty thousand dollars, thirty-five thousand dollars.

Mr. McGlynn: You mean the loss or the values?

20 Mr. Single: The values. I think they are forty-nine thousand at that time.

Q. Now, any discussion with regard to how long the goods had been at 207 Paterson Street? A. No, not that I recall.

30 Q. What next transpired? A. Well, we told Mr. Marx that we would take the thing under advisement, to see if we could advance him the money, and, as I recall, about a week later we decided that we would advance the money to him as a loan on his undertaking to sue Consolidated.

Q. And what was then done? A. Well, the adjustment proceeded. The final adjustment of the loss had not been finished and we agreed to advance \$21,000 on account, leaving the balance to be determined when the adjustment was finished.

Q. And was the balance ultimately determined? A. Yes.

40 Q. And, roughly, what was the balance as you recall it? A. About \$14,900.

William H. Jones—Direct.

Q. Now, Mr. Jones, you gave them your check for those two amounts? A. Yes.

Q. And you had receipts signed, as you have described? A. Yes.

Mr. McGlynn: If you want to offer them, I have no objection.

Mr. Single: I want to offer in evidence the check for \$21,000, dated March 29, 1926. (Paper marked Exhibit P-3 in evidence.) 10

Mr. Single: Check for \$14,923.53, dated May 1, 1926.

(Paper marked Exhibit P-4 in evidence.)

Mr. Single: And loan receipts for similar amounts, one dated March 24, the same date, and the other apparently dated May 4. 20

(Papers marked Exhibits P-5 and P-6 in evidence, respectively.)

Q. Now, what did you next do in connection with the claim by Cohn-Hall-Marx against Consolidated? A. We engaged attorneys to start the action.

Q. Did you prepare a claim form or a claim letter to be sent by Cohn-Hall-Marx to the consolidated? A. Yes.

Q. An action was subsequently started? A. Yes. 30

Q. A trial eventuated in Newark? A. Yes.

Q. Now, you were not present at that trial, were you? A. No, I didn't attend the trial.

Q. But you do know the result of the trial? A. Yes.

Q. Now, just what was the result of the trial? A. The result was that the Consolidated Piece Dye Works were not held liable for the fire, and the 40

William H. Jones—Direct.

facts developed that Cohn-Hall-Marx knew that the goods were stored in Paterson Street.

10 Mr. McGlynn: Well, now, if your Honor please, it seems to me the last part of that answer should be stricken out. Mr. Jones said frankly he wasn't at the trial. I don't see how he could make that statement unless it is based upon information that he received indirectly, and therefore it is incompetent.

The Court: Strike it out.

Mr. Single: I will offer in this suit—I suppose without objection—

Mr. McGlynn: No objection.

20 Mr. Single: —the record of the complaint, defense, and rules for judgment and order thereafter, in the Federal Court at Newark.

Mr. McGlynn: May I have the date of the commencement of the suit?

Mr. Single: Yes, surely. It was filed on August 18, 1926.

Mr. McGlynn: And the trial was April, was it not? We can agree on that.

Mr. Single: The trial took place on April 20, 1927.

30 (Three papers marked Exhibit P-7 in evidence.)

Mr. Single: The order dismissing the claim was filed on October 21, 1929.

By Mr. Single:

Q. Now, Mr. Jones, after that trial did you write Cohn-Hall-Marx Company a letter of demand for repayment of the amount advanced them? A. Yes, we did.

40 Q. I show you a letter dated February 16, 1928,

William H. Jones—Direct.

and ask you if that was the letter you wrote to Cohn-Hall-Marx (handing a paper to the witness).

A. Yes.

Mr. McGlynn: What is the date, Mr. Single?

Mr. Single: February 16, 1928. I offer that letter in evidence. 10

Mr. McGlynn: No objection.

(Paper marked Exhibit P-8.)

(Mr. Single read Exhibit P-8 to the jury.)

Q. Did you get a reply to that letter, Mr. Jones?

A. I don't recall.

Q. In any event, they didn't pay you back the money? A. They didn't pay the money.

Q. And you subsequently instructed counsel to take action for the recovery of the amount thus paid? A. Yes. 20

Q. Now, did you receive from the brokers in this case a letter dated May 19, 1926, from Cohn-Hall-Marx? Did that letter come to your hands (handing a paper to the witness)? "Cohn-Hall-Marx to John A. Eckert"? A. Yes.

Mr. McGlynn: No objection.

Mr. Single: I offer the letter in evidence.

(Paper marked Exhibit P-9 in evidence.) 30

(Mr. Single read Exhibit P-9 to the jury.)

Q. Did a letter also come to you from your adjusters from Cohn-Hall-Marx, dated March 2, 1926, (handing a paper to the witness)? A. To what effect was the letter?

Mr. McGlynn: Wait just a second, Mr. Single.

Q. Now, Mr. Jones, do you know, roughly, what 40

William H. Jones—Direct.

the insurance premium was that was paid every year by Cohn-Hall-Marx under your policy?

Mr. McGlynn: What was that, Mr. Single?

Mr. Single: Does he know roughly what the insurance premium was that was paid every year under that policy?

10

Mr. McGlynn: What difference would it make, if your Honor please? I think it is immaterial. I can't see that that makes any difference in this case.

Mr. Single: All right, I will withdraw the question.

The Court: It might be material to your side, because you made a statement to the jury regarding it.

20

Mr. McGlynn: Additional premium.

The Court: No.

Mr. McGlynn: That is the only statement I made about premium.

The Court: Regarding the premium paid on the goods at one location and what the premium would be if placed at another location.

30

Mr. McGlynn: I understood the question to be on the total premium. I merely mentioned the rate; I didn't say anything about the amount paid. I understood this question was directed as to how much we paid entirely. I don't see what difference it makes.

The Court: Isn't that the rate.

40

Mr. McGlynn: What I said to the jury was what the rate at one location was. The other rate was \$1.72, but I gave them no intimation I was going to prove the total premium.

William H. Jones—Direct.

The Court: You didn't give them the total?

Mr. McGlynn: No. I will withdraw my objection.

The Court: Yes, I think it would save time.

By Mr. Single:

10

Q. Just roughly, do you know what the premium was per year under this policy? A. It is about five thousand dollars, I should think.

Q. Can you just examine the policy and tell us how the premium was divided, if you can? A. There was a three-thousand-dollar premium for the transit part of the risk and \$2,750 for the fire risk.

By Mr. McGlynn:

20

Q. \$2,750, Mr. Jones? A. \$2,750. \$1,500 for the parcel post, \$100 for consignment shipments.

Mr. McGlynn: Wait a minute. What does that total, then?

Mr. Single: \$7,300.

The Witness: \$7,300.

Mr. Single: Approximately.

By Mr. Single:

30

Q. That was the total premium for the transit, fire, parcel post, and general? A. Yes.

Q. And of that \$7,300 premium the fire premium was some \$2,700? A. Yes.

Q. And that was the fire premium applying at sixty-three named locations? A. Yes.

Q. And, as a matter of fact, at those named locations the values ranged from \$100,000 up to \$600,000, did they not?

40

William H. Jones—Direct.

Mr. McGlynn: I am satisfied with your testimony, Mr. Single.

Mr. Single: All right. It is all in the documents, anyway.

10 Q. Now, Mr. Jones, with reference to the endorsement, P-1A, just tell us what the situation was with regard to that. A. Well, I didn't handle that myself, of course.

Mr. McGlynn: Then I object, if your Honor please, to the witness telling about it.

Q. Well, do you know? A. I do know.

Q. What do you mean, you didn't handle it, Mr. Jones? A. It is handled by the underwriting department, not by the claims department. I had 20 no discussions about it.

Q. You had no discussions? A. No.

Q. Well, did you have anything to do with fixing it? A. The rate?

Q. Not the rate, necessarily, but the agreement to pay that? A. No.

Q. You had nothing to do with it? A. No.

Q. Do you know who did? A. Mr. Kaufman, of our office.

30 Q. I see. Do you know what the premium was under that, what the premium amounted to? A. About eight hundred dollars.

Q. About eight hundred dollars. And that was on a forty-nine thousand dollar basis? A. Yes.

40 Q. Now, much has been said of a loan receipt here. Just tell us in connection with marine insurance what a loan receipt is and what its basis is. A. A loan receipt is a form of receipt used in connection with the payment by an insurance company where a bailee or a third party is responsible.

William H. Jones—Direct.

It allows claims to be presented and suit brought in the name of the assured under the policy.

Q. Is a loan receipt used or would a loan receipt be used where there was no liability under the policy and the assured gave the full facts showing there was no recovery due from anyone?

Mr. McGlynn: Oh, I object to that, if your Honor please. I object to this question. That is absolutely inadmissible. We are dealing with one situation, not what might have happened in some other isolated case.

Mr. Single: Suppose I withdraw the question and reframe it. Perhaps I can do that.

Q. In this case would a loan receipt have been used had Cohn-Hall-Marx advised you that they knew that the goods were over at 205 Paterson Street? 20

Mr. McGlynn: I object, if your Honor please. We are not concerned with what might have happened under a different situation. We are concerned with what happened here. They certainly can't prove a fraudulent representation by a negative proposition of an entirely different set of facts.

The Court: I suppose what you want to show is the effect of the loan receipt; is that it? 30

Mr. Single: What I want to show is that the basis for the loan receipt was the representation that the goods were at 207 Paterson Street without the knowledge of Cohn-Hall-Marx; that the amount would not have been advanced as a loan or in any way if the insurance company had been advised; 40

William H. Jones—Direct.

10 and we claim they should have been advised that the assured knew the goods were at 205 Paterson Street. The basis for that is my friend's suggestion that we would have loaned the money even though Cohn-Hall-Marx knew the goods were there, and, of course, there is no basis for such a supposition.

Mr. McGlynn: I never made any such suggestion at any time in this case.

Mr. Single: Well, perhaps I misunderstood.

Mr. McGlynn: No.

Mr. Single: Perhaps I misunderstood you.

Mr. McGlynn: You certainly did, because I never said that.

20 Mr. Single: Well, I don't see, then, if it is a fact that it would make any difference. I don't see why the question can't be answered.

The Court: I suppose if the question is raised you will have an opportunity to answer it.

Mr. Single: Well, all right. That is all.

Cross-examination by Mr. McGlynn:

30 Q. Mr. Jones, as I understand it, you were the manager of the loss department of this Marine Office of America, which has been described to us as the operating office for these various companies including the plaintiff company in this case? A. Yes.

40 Q. This loan agreement that has been mentioned and that was used in this particular case was used for the purpose of maintaining and carrying out the plaintiff's theory of subrogation, was it not?

William H. Jones—Cross.

A. Yes. It wasn't strictly speaking, subrogation.

Q. Why wasn't it? A. It was the action to recover the money.

Q. Well, this theory of loan receipts is so common in your marine insurance that you have regular printed form of loan receipts, don't you? A. Yes. 10

Q. And it is used in marine insurance a great deal, isn't it? A. Yes.

Q. More so than any other line of insurance? A. I would say yes.

Mr. McGlynn: I don't think, if your Honor please, the jury has had one of these read to them so if you don't mind I will read one.

(Mr. McGlynn read Exhibit P-5 to the jury.) 20

Q. Now, under that loan agreement and under the arrangement which had been made at this conference attended by all these officials, the Marine Office retained a firm of Newark attorneys? A. Yes.

Q. And all of the expenses of that trial in the United States District Court, wherein Cohn-Hall-Marx was the plaintiff the Consolidated Piece Dye Works was the defendant, were paid by the Marine Office? A. Yes. 30

Q. All that Cohn-Hall-Marx did in that case was to permit the suit under this agreement to be instituted in its name and to co-operate with you in the prosecution of the suit? A. Yes.

Q. I show you a letter written by you on May 25, 1926, in which you say—addressed to Cohn-Hall-Marx—"We take this opportunity of thank- 40

William H. Jones—Cross.

ing you for your co-operation with us in the attempt to recover from the Consolidated Piece Dye Works." Is that letter signed by you, sir? A. Yes.

Mr. McGlynn: I would like to have it marked for identification.

10 (Paper marked D-1 for identification.)

Mr. Single: Put it right in evidence.

Mr. McGlynn: If it will not affect any motion that may follow, so the record is clear—I think we had better leave it marked for identification.

Q. Now, there was no agreement or guarantee by Cohn-Hall-Marx at any of these conferences or in any of these documents that they would recover
20 against the Consolidated Piece Dye Works in this litigation, was there? A. There was no guarantee?

Q. That is what I said. A. No, there was no guarantee.

Q. Now, this loan that you speak of, or these loans, the one in March and the one in May, one of \$21,000 and one of \$14,000, were reported by your Marine Office to the Fidelity Phoenix Fire Insurance Company in those two respective months
30 as payments of losses under the policy issued in this case, were they not? A. They would appear in the monthly report from our accounts department to the company.

Q. That is my question. Pardon me, let me ask you this question so we will get it clarified: This Marine Office, which is operated by the seven companies, reports to the separate companies each month the receipt of any premiums for policies the payment of any losses which the office has made
40 issued by this office for each of these companies, or

William H. Jones—Cross.

for any of these companies; am I right? A. In general, yes. I don't handle that; it is done by the accounts department. But my understanding is that they customarily make a report each month in detail, reporting the loss or premium.

Q. Isn't it a fact that these two payments of \$21,000 and \$14,000 were carried in the records and went through all the routine of the office as payments of the claim under this policy? A. I wouldn't know that. 10

Q. You wouldn't know that?

Mr. Single: I have Mr. Horton here, and he will dispose of that question.

Q. Do you recognize this letter dated April 30, 1926, as having been issued by the Marine Office to the broker, John A. Eckert and Company, in this case? A. It is one of our letters. I never saw it before, though. 20

Q. You never saw it before? A. It is sent out from the cashier's department.

Q. Do you know what it says? You recognize the fact that is the signature of the cashier's department, of somebody in charge? A. Yes.

Q. Do you notice the opening sentence of that letter, "Enclosed herewith check in full settlement of the various"— A. Yes, that is the standard form letter they use. 30

Q. A standard form letter? A. Yes.

Q. Notwithstanding the fact that they have these loan agreements? A. That is true.

Q. Isn't it true, Mr. Jones, that the only real purpose of the loan agreement is to permit the assured, in the suit against the third party, to be in a position to say it has not recovered the amount of its loss? A. Normally, yes. 40

William H. Jones—Cross.

Q. And don't you know it to be a fact that in all the records of the insurance companies where these loans are made, as made in this particular case, and don't you know that in this particular case the records show that these two payments totaling \$35,000 were issued in payment of the assured's loss on this fire on January 13, 1926? A. That may be.

Q. You know it to be a fact, don't you? A. I don't know it to be a fact. I do know that we took a loan receipt when we paid the claims.

Mr. Single: I am willing to agree that that is true.

Mr. McGlynn: All right.

Q. Oh, this endorsement that you said you knew a little something about, numbered P-1A, dated May 13, 1926, is the figure \$49,455 which appears on here the value of the merchandise which the adjuster found to be located at 205-207 Paterson Street? A. I assume so.

Q. Well, haven't you testified previously in this litigation that that was the sound value of the merchandise? A. I don't recall.

Q. You don't recall? A. No.

Q. And don't you know that this endorsement, dated May 13, marked P-1A in this case, attached to this office copy of this policy, was intended to cover the goods located at 205-207 Paterson Street? A. Well, that is a carbon copy.

Q. I didn't ask you that, sir. I asked you whether you don't know that this endorsement or rider attached to the office copy of the policy of insurance covers the goods of the defendant located at 205-207 Paterson Street? A. Well, that

William H. Jones—Cross.

simply shows the premium. I don't know that it covers it. It simply shows the premium that was charged after we paid the claim.

Q. What period of time does it cover?

Mr. Comstock: It speaks for itself.

Mr. McGlynn: Do you concede that? Everybody is asking so many questions about it, I thought I would ask one, too. 10

Q. What period of time does that cover? A. August 1, 1925, to August 1, 1926, a year.

Q. Just let me read your testimony, Mr. Jones, to refresh your recollection, perhaps, taken on the occasion of September 19, 1929, page 18, referring to the question, "Well, by virtue of the fact that the endorsement does not contain apparently all the information it should, you have now testified that the rate at the Paterson Street location was \$1.72 because there was no sprinkler and because it was much more hazardous than the Hazel Street plant, that you know?" Your answer is, "Yes." 20

"Q. You know that the rate of \$1.72 is calculated on the fire risk at Paterson Street? A. Yes.

"Q. No doubt about that, is there? A. No. No, sir.

"Q. There is no doubt, then, sir, that that endorsement covers merchandise of Cohn-Hall-Marx at Paterson Street? A. Yes, that is true. 30

"Q. Now, I ask you for what period of time does that cover? A. During the period of the policy, August 1, 1925, to August 1, 1926."

A. Well, this, as I say, is a carbon copy.

Q. Now, pardon me, sir. Having referred by reading to you the questions and answers given to you back in 1929, isn't it true that this endorse- 40

William H. Jones—Cross.

ment covers goods, merchandise of Cohn-Hall-Marx at 205-207 Paterson Street from August 1, 1925, to August 1, 1926, valued at \$49,455, at a premium rate of \$1.72? A. Yes.

Q. That is all. A. Did I understand your question correctly?

10 Q. I want you to. A. May I have the question again? I thought you were referring to the rate.

(The question was read by the reporter as follows:)

20 "Q. Having referred by reading to you the questions and answers given by you back in 1929, isn't it true that this endorsement covers goods, merchandise of Cohn-Hall-Marx at 205-207 Paterson Street, from August 1, 1925, to August 1, 1926, valued at \$49,455, at a premium rate of \$1.72?"

A. That, of course, was after the fire. That is retroactive—

Q. Listen, Mr. Jones, you should be able to answer that question for me either yes or no. A. Well, I can't very well.

30 Q. Well, then, all right. If you can't, I don't want you to. You answered it once before, though, didn't you? A. You were speaking before of the endorsement.

Q. I am only talking about the endorsement. A. It is a carbon copy of something that was never attached to the policy, as I understand it.

Q. What does that say on the upper line? A. It says endorsement.

40 Q. You know, sir, that that policy of insurance covers, with the endorsement, don't you? A. I don't know that.

William H. Jones—Cross.

Q. Why, your office copy in your office with all these endorsements on is a true copy of the contract, isn't it? A. Yes.

Q. And this is taken from your files? A. Yes.

Q. And represents a true copy of the contract of insurance between the plaintiff and the defendant? A. There are things on the office copy that are not on the original policy. 10

Q. Well, this is a regular form of printed endorsement, is it not, sir? A. Yes.

Q. Issued by your company? A. That was made up by our company.

Q. And that is the form you use for endorsements? A. Yes, it is.

Q. There are others here of the same forms, are there not? A. Yes, quite true, quite true. 20

Mr. McGlynn: That is all.

Redirect-examination by Mr. Single:

Q. You don't know whether that was ever issued by your company, do you? A. No, I don't.

Q. There has been no proof offered by anyone of such an endorsement having come to the assured in this case?

Mr. McGlynn: I object, if your Honor please. Why, it has been offered as an exhibit by the plaintiff as part of its copy of the contract. 30

The Court: As far as he knows, I will permit it.

Mr. McGlynn: Sir?

The Court: As far as he knows.

Mr. McGlynn: Oh, yes. I think, Judge, in one of the questions, this last one or the 40

William H. Jones—Redirect.

one just ahead of it, I am pretty sure he said in this case. Didn't he?

The Court: I will permit you to ask him a question in so far as he may know.

By Mr. Single:

10 Q. Do you know if that was ever issued by the company? A. No.

Q. All you know is it is a memorandum in your office copy files? A. Yes.

Q. You don't know whether the assured ever got it or whether it was ever sent out by your company? A. No.

20 Mr. McGlynn: I object, if your Honor please. I don't see it makes any difference if the assured ever got it.

Mr. Single: It is certainly not a part of the contract unless the assured got it. I mean, this is only offered as the office copy of our policy.

The Court: Well, I permitted it and he answered it, so I think that settles it.

30 Q. Now, Mr. Jones, you didn't ask any guarantee of recovery from the Consolidated Piece Dye Works by Cohn-Hall-Marx? A. No.

By Mr. McGlynn:

Q. What is that? A. No, we couldn't.

By Mr. Single:

Q. If the representations were as made by them, the recovery would have followed?

40 Mr. McGlynn: Oh, I object, if your Honor pleases. There is no such result at all. He

William H. Jones—Redirect.

don't know what the action of this jury was based upon.

Mr. Single: My friend asked whether this man asked for a guarantee.

Mr. McGlynn: No, I did not.

Mr. Single: That was the very language that he used, if I may say so. 10

Mr. McGlynn: If your Honor pleases, my question was—

Mr. Single: I would like to have the stenographer check my notes. I copied it just as my friend said it. It may be that my recollection is wrong, but I thought that my friend had asked that question specifically, and that is what brought up my question.

Mr. McGlynn: If your Honor pleases, my question was whether any representation or guarantee was made by Cohn-Hall-Marx that it guaranteed the collection of the claim against the Consolidated Piece Dye Works, and I understood him to say no, there was no such guarantee or representation. 20

Mr. Single: I will ask Mr. Jones what the representation was, then.

Mr. McGlynn: Wait. I submit, if your Honor please, that we have gone all over it on direct. This is not redirect at all. 30

Mr. Single: It certainly wasn't gone over on the direct. I didn't ask my friend anything about what guarantees Cohn-Hall-Marx were to give the Marine Office.

The Court: I will permit it.

Mr. McGlynn: I will withdraw the objection. 40

George Horton—Direct.

A. The representation was that Cohn-Hall-Marx didn't know their goods were at Paterson Street.

Q. And on that representation you were willing to take your own chances as to whether you had a right of recovery in their name from the Consolidated Piece Dye Works?

10 Mr. McGlynn: I object, if your Honor please. I don't think that is a fair question at all.

The Court: It is very leading.

Mr. Single: Well, I will withdraw the question. That is all, thank you, Mr. Jones.

20 GEORGE HORTON, sworn.

Direct-examination by Mr. Single:

Q. Mr. Horton, what is your position? A. Office manager in the Marine Office of America.

Q. Of what company? A. Marine Office of America.

Q. Under your direction does—do you have under your direction the question of reporting to the companies? A. I do.

30 Q. And can you just advise us what the system is with regard to reporting premiums and losses, as, for instance, the losses in this case, the Fidelity Phoenix Fire Insurance Company, for \$21,000 and \$14,000? A. Well, our system in regard to premiums and losses is about the same. The underwriting department and the policy issuing department O. K. the applications for policies as they are finished, and the copy, such as has been
40 in evidence here, is sent to what is known as our bordereaux department. Similarly, when our loss

George Horton—Direct.

manager, Mr. Jones, or any of the men in the loss department approve of a claim—

Mr. McGlynn: Mr. Horton, will you keep your voice up and turn this way just a little more?

A. (Continuing) Similarly, in connection with the losses, when the loss department send over a payment voucher, meaning usually thereby that the loss has been approved, we also bordereaux these losses on what is known as a bordereaux form. Now, these bordereaux forms, both of the premiums and losses, are detailed reports taken from the daily reports or from the loss vouchers. Those records are used for several purposes, bookkeeping, and also to meet the requirements of the various state departments. Equally, they are bordereauxed at the end of each month. The premiums are recapitalized, and these recapitulations under four different headings are sent to our companies. They receive no details whatsoever. The four heads are under the titles of "ocean cargo," "ocean hulls," "inland cargo," and "inland hulls," and down below is brought down the difference between the premiums, returns, reinsurances, and on the recapitulation brought down the balance between the losses we have paid and the salvages we have recovered. The difference between the premium balance and the loss balance is the amount we pay the companies—distribute to our companies. That is the detail in a few words.

Q. That is all, thank you, Mr. Horton.

10

20

30

40

George Horton—Cross.

Cross-examination by Mr. McGlynn:

10 Q. Now, Mr. Horton, just a moment. As I understand it, the policy is issued by this Marine Office for these seven companies, and are all issued through the Marine Office, not by the home office of the companies, but in the Marine Office? A. That is correct.

Q. And if there is any change in the insurance contract or in the form of the policy, such as a change of the location or a change of the character of the goods, or whatever it is, those endorsements are likewise issued from the Marine Office? A. That is correct.

20 Q. And the Marine Office keeps in its files an office copy of every policy of insurance issued by it? A. That is correct.

Q. Both, as you have described, for accounting purposes and also to meet the requirements of the various insurance departments of the various states in which these companies are organized? A. Yes.

30 Q. The only record that you send to the home office of these respective insurance companies is contained on these long sheets of paper which technically are called "bordereaux"? A. No. No, those bordereaux are not sent to the company, because they are details only.

Q. What goes to the company? A. A recapitulation of the totals of these bordereaux.

Q. A recapitulation which shows the amount of premiums that you have issued in any—collected in any respective month, or policies issued in any month in the name of that company? A. That is right.

40 Q. Now, any losses that you pay during the month are likewise kept on these bordereaux, on

George Horton—Cross.

a loss bordereaux; is that right? A. That is correct.

Q. Then, every once in a while, every month or so, you have an adjustment with the companies, and they even up your cash account? A. Every month.

Q. Every month. Now, in connection with this marine insurance, there is a great deal of this so-called loan agreement transaction, isn't there? A. There is. 10

Q. Now, in connection with those loan agreement cases, is the report to the company, the issuing company, any different than if the claim is paid in the regular way? A. In no way.

Q. The same way? A. The same way.

Q. And that is what was done in this case, as far as you know? A. As far as I know, yes. 20

Q. Now, in connection with an endorsement on a policy which involves an increase of the premium during the term of the policy, there has to be some sort of a record in the office of the insurance company to satisfy both the accounting end of it and the insurance departments that there was a policy or endorsement which of necessity would require that additional premium, doesn't there? A. That is right. 30

Q. And in this particular case the endorsement, P-1A, dated May 13, 1926, shows an additional premium charged by the Fidelity Phoenix to Cohn-Hall-Marx Company of \$853.63? A. That is right.

Q. Covering certain goods, with the value being given, and the additional premium at \$1.72? A. That is right.

Q. And by virtue of the statement at the bottom of the endorsement, making it retroactively effective. 40

George Horton—Cross.

tive back from August 1, 1925, to August 1, 1926?

A. That is right.

Q. Notwithstanding the fact that it is dated May 13, 1926? A. That is right.

Q. And, so far as you know, that premium was collected by the company? A. As far as I know, it was.

10

Mr. Comstock: We offered it back again.

Q. Has that premium ever been returned by the company to the assured? A. Not to my knowledge.

Mr. Comstock: We offered it to you and you wouldn't take it.

Mr. Single: It was tendered to them and they refused to take it.

Q. Do you know what date it was tendered, Mr. Horton? A. I do not.

20

Mr. McGlynn: I think before counsel makes a statement he ought to fix the date of the tender.

Mr. Single: Let us just fix the date of the tender.

By Mr. Single:

Q. Mr. Horton, what was the date of the tender?

30

Mr. McGlynn: During the second trial.

The Court: The second trial, I think, was October 31, 1929.

Mr. McGlynn: During the pendency of the second trial. I have got that letter here, I think I can give you the letter. You must have a copy.

Q. Mr. Horton, on October 21, 1929, the Marine Office tendered back that premium, do you know?

40

George Horton—Cross.

Mr. Single: You have the original?

Mr. McGlynn: I will admit it. Don't bother Mr. Horton with it. I admit that on October 29 or the day following a letter was received by us, of which this is a copy.

Mr. Single: I offer it in evidence.

(Paper marked Exhibit P-10 in evidence.) 10

Mr. Single: That is all.

Mr. Single: Does your Honor want us to start a new witness or shall we reopen tomorrow?

The Court: No. We will take a recess now until tomorrow morning at ten o'clock. Be here tomorrow morning at ten o'clock, and do not discuss the case with anyone in the meantime. When we come back here tomorrow and finish the case, and when it is all decided you can talk about it as much as you like, but until then do not discuss it with anyone. 20

(A recess was taken until Thursday, October 16, 1930, at ten o'clock A. M.) 30

Arthur P. Browning—Direct.

Paterson, N. J., October 16, 1930.

(Trial of the Cause continued).

Mr. Single: Just before we go on, if the Court please, I would like to read the last exhibit to the jury so they will have it.

10 (Mr. Single read Exhibit P-10 to the jury.)

Mr. Single: Now, if your Honor please, I will have the testimony of Mr. Browning, who has died since the case was first tried, read.

Mr. McGlynn: No objection.

The Court: Yes.

(Mr. Single read to the jury as follows:)

20 "ARTHUR P. BROWNING, sworn.

"Direct-examination by Mr. Gold:

"Q. By whom are you employed? A. By various underwriters of insurance companies.

"Q. Do you remember in January of 1926 being engaged by the Marine Office of America to come to Paterson and investigate a fire loss on Paterson Street? A. I do.

30 "Q. And did you come to Paterson? A. I did.

"Q. When? A. January 15, 1926.

"Q. That was two days after the fire? A. Two days after the fire.

"Q. Did you make an inspection of the premises? A. I did.

40 "Q. And what did you find? A. The premises at 205-207 was a one-and-a-half story building, brick on the sides with a wooden roof, and the second or half story was devoted to a business of fixing copper rollers for the Consolidated Piece Dye

Arthur P. Browning—Direct.

Works, where they cut the copper. On the ground floor was a garage supply business, where they sold supplies and different materials for automobiles. On the second floor there was a place wired off with chicken wire where they had stored voiles or this cloth that had been burned, and with it and to the left of that was a chimney going up through the roof. And I went up to where the chimney was, and apparently the fire started in the wood-work around that chimney, and I found this material all in this wire cage, like. There was a door and a hasp on it, and a lock. We examined the merchandise and found that the greater portion of it was either damaged by fire and a good portion by water. 10

“Q. And did you estimate the amount of the loss? A. We didn’t at that time. We made arrangements with the assured—Cohn-Hall-Marx and Company arranged to have the merchandise removed immediately from the premises. 20

“Q. Now, was there any sprinkler system in the premises? A. None whatever.

“Q. Subsequently did you have a meeting with Mr. Marx and some others with reference to the payment of the loss? A. I attended a meeting at John A. Eckert’s office in New York. 30

“Q. The brokers for Cohn-Hall-Marx Company? A. Yes, sir.

“Q. Who was present at that meeting? A. Mr. McComb, of the Marine Office, Mr. Jones, Mr. Marx of Cohn-Hall-Marx, Mr. Trask, and I believe that was all, with myself.

“Q. What conversation took place at that time? A. Well, the principal discussion was in respect to the fact that the merchandise hadn’t been stored at 207 Paterson Street and that the representatives 40

Arthur P. Browning—Direct.

of the Marine Office told Mr. Marx that under the terms of the policy the merchandise would not be covered by insurance at that location. There was a discussion among the various parties there as to what they would do, and finally Mr. Marx asked Mr. McComb, if he was going to deny liability and pay the loss, and Mr. McComb said he was not prepared to admit liability, neither would he deny liability at that time. He would take the matter under advisement, but if there was anything done in the way of payment it would be in the nature of a loan to Cohn-Hall-Marx, and with the idea that they could attempt recovery—and could recover, rather, from the Consolidated Piece Dye Works for having them put the merchandise in a location of which Cohn-Hall-Marx didn't know anything about at the time.

“Q. Was anything said by Mr. Marx about that?
A. Well, Mr. Marx said that his company was not familiar with the fact or did not know that this merchandise had been put at Paterson Street, and that it would be a great convenience to Cohn-Hall-Marx if the Marine Office or the Fidelity Phoenix Fire Insurance Company would advance this money to them, and they could use it at that time. And it was simply a case of bringing an action against the Consolidated Piece Dye Works, and that they would recover the money in a short while.

“Q. And was that the understanding and agreement arrived at at that conference? A. Well, the Marine Office on that date did not absolutely agree to make this loan to Cohn-Hall-Marx, but they said they would talk it over among themselves later and decide what to do.

“Q. I see. Mr. Browning, were you present at

Arthur P. Browning—Cross.

the trial in Newark? A. I was there only for a short while.

“Q. And did you testify at that trial? A. I did.

“Q. The same as you have today? A. Well, I testified more particularly in connection with the

“Q. Loss? A. With the loss and the construction of the building at 207 Paterson Street, Paterson. 10

“Mr. Gold: That is all, Mr. Browning.”

(Mr. McGlynn read the cross-examination of this witness, as follows:)

“*Cross-examination by Mr. McGlynn:*

“Q. On the occasion of your first visit to Paterson, Mr. Browning, for the purpose of inspecting the goods which had been damaged in this fire belonging to Cohn-Hall-Marx, did someone connected with the Cohn-Hall-Marx Company accompany you to Paterson? A. Yes, sir. 20

“Q. Do you recall where you went first when you came to Paterson? A. We came to Paterson—I came with Mr. Goldberger of Cohn-Hall-Marx Company. We met, I believe, at the station in Jersey City and came out on the Erie Railroad. When we arrived at Paterson, I believe, Mr. Goldberger was under the impression that Mr. Arnold, Junior, would meet us at the station, but there wasn't anybody there at the station. 30

“Q. I just asked you where you went first, Mr. Browning. A. We went—Mr. Goldberger engaged a taxicab and we went up to the Consolidated Piece Dye Works at Hazel Street.

“Q. And Montclair Avenue? A. Yes.

“Q. And who did you see up there? A. Well, 40

T. Ivan Arnold—Direct.

there was none of the officials there when we arrived. There was a young lady there.

“Q. I mean, eventually whom did you see there? A. Well, eventually Mr. Arnold, Junior came to Hazel Street.

10 “Q. And where did Mr. Arnold tell you the goods were that had been destroyed in this fire? A. He said that we would have to go to 207 Paterson Street.

“Mr. McGlynn: That is all.”

T. IVAN ARNOLD, sworn.

Direct-examination by Mr. Single:

20 Q. Mr. Arnold, where do you live? A. Hawthorne.

Q. What? A. Hawthorne.

Q. And what is your business? A. Consolidated Piece Dye Works. At the time of this coverage I was the president; I am now the treasurer.

Q. Where is their plant? A. South Paterson, Hazel Street and Montclair Avenue.

30 Q. What is their business, Mr. Arnold? A. Dyeing, printing, finishing, manipulating piece goods.

Q. How long have you been associated with that company? A. Since we started. That is just about six and a half years.

Q. And how long had you been in that business before then? A. That was my first at it.

Q. That was your first? I see. Your father and uncle were in the business before you? A. Oh, yes.

40 Q. Now, I wish you would just tell us something about your plant and your business. I want to

T. Ivan Arnold—Direct.

get the general setting with regard to your silk business before I discuss the question of the cotton business that you were doing for Cohn-Hall-Marx.
A. Yes.

Q. Just tell us briefly what your company does in connection with silks and how the business is run. A. Well, everything that we handle, all the merchandise that we handle, is in the form of piece goods, none of which belong to us. They all belong to various customers who send them to us for the purpose of having them manipulated, possibly dyed, maybe dyed and printed; there are various stages, various orders that they would give us that they want done to their goods. We carry out their orders, process the goods, and return the goods to them. 10

Q. Is your work done under patented processes? 20
A. No, no.

Q. Not special? A. No, I don't think any work

Q. Going back to 1925 and 1926, can you give us any idea of the quantity of silk that you handled at that time?

Mr. McGlynn: Now, if your Honor please, we are not particularly concerned with the quantity of the silk business that these people did. 30

The Court: What difference does it make?

Mr. Single: It is very material on this question of open stock and the method of handling the cotton business that they handled for Cohn-Hall-Marx.

The Court: Go ahead.

A. Well, you principally want to distinguish between cotton and the other goods? 40

T. Ivan Arnold—Direct.

Q. Yes, the way the business was handled. A. Oh, the other goods I would have to lump into silk goods, rayon goods, combination goods; I couldn't give you any idea of the silk only.

Q. Well, just silk or silk products, separate from your voile work that you did for Cohn-Hall-Marx.

10 A. I see. Well, we handled, say, between five hundred to a thousand pieces a day.

Q. And that is a piece of forty yards or so?

A. No, on that stuff it would run a little longer.

Q. A little longer? A. Yes, the average piece there would run about sixty.

Q. I see. Now, that was your main business, the silk end of it? A. Yes.

20 Q. Now, just tell us how the silk comes in and how it goes out of your plant. What do you do with it?

Mr. McGlynn: If your Honor please, I don't want to interrupt counsel, but it seems to me we are wasting time on all the details in connection with the silk business.

The Court: I suppose he is leading up to the question of storage.

Mr. Single: That is it. I can assure your Honor that I won't waste a second.

30 The Court: I imagine that is what the question leads up to.

A. We collected it with our own trucks; we truck it in; it goes into the receiving department where it has to be stored temporarily in the raw state while we sort it out and mark it up; then it is entered into process for whatever manipulation might be ordered on it, and as it comes out on the other end of the plant into the receiving depart-

40

T. Ivan Arnold—Direct.

ment, it is then carted off by our own trucks to the customers, who are entirely in New York.

Q. Now, do you carry any of that silk goods in storage? A. The only storage that is done on the silk goods is when it is in the raw condition. Might have to store it for a few days waiting for an order to come in the mill and put it in work, or possibly waiting for a rush in our plant. It might be stored for another day or two in the finished state when it comes into the—through all the processes into the shipping room. Also, there are 100 pieces in a lot; fifty might come through today, fifty might come through tomorrow. We save them and ship them as a complete set. 10

Q. Just assembling a lot? A. It is really not storage.

Q. Now, coming down to December, 1924, I think it was: About that time did you commence to do certain work for Cohn-Hall-Marx? A. Yes. 20

Q. Now, just tell us what the nature of that work was. A. Well, that was printing on cotton goods, on cotton voile.

Q. Just describe what you did after that, leading us up to, say, the middle of February. A. They sent the goods already dyed. They had them dyed at some bleachery. They came to us in rolls and we printed them. That was a special printing process of our own. We printed them, and the first two or three lots that they sent us we shipped out to them as we had been in the habit of shipping silk goods to our regular customers. That would take you up to about February, 1925. 30

Q. Now, then what happened? A. Then they demanded that we keep open stock for them.

Q. Now, I am sure the jury doesn't know what open stock is. I wish you would just explain it 40

T. Ivan Arnold—Direct.

to them, please. A. Well, that would mean that we take the goods in, process them with regular process, the regular work on it, and then as it came through into the shipping department, instead of being at liberty to ship them to the customer to reship them where they had to go, we would keep the goods in what they call open stock. 10 In other words, that—well, it practically amounted to a stock room for them, for their finished goods, and instead of shipping the goods to them as soon as they were finished, we would have to store them in a stock room for their account, and maybe the next day or the next week or the next month, or suppose it may have been even the next year, they might send us an order to ship so many pieces of such and such a pattern and combination, designat- 20 ing the exact goods that they wanted shipped to their customer, whoever he might be and wherever he might be.

Q. And Cohn-Hall-Marx did request you to handle their goods on open stock? A. Yes.

Q. On the open stock basis. And did you make an arrangement whereby they were to pay you for handling the goods on that basis.

Mr. McGlynn: Oh, unless it was made by 30 himself, your Honor please. My recollection is that he didn't.

Mr. Single: Well, there is no question but that arrangement was made?

The Court: Well, if he knows.

Q. Well, do you know? A. I had care of the charges that were made for it.

The Court: No, he is not asking you that. 40

T. Ivan Arnold—Direct.

A. No, but I mean I didn't make the arrangement; I merely had care of the charges made in accordance with the arrangement.

Q. Did you charge Cohn-Hall-Marx a certain amount per piece for running open stock for them?

A. Yes.

Q. What was that charge? A. A nickel.

Q. Five cents each bolt? A. Five cents for each piece. 10

Q. And what do those pieces average? A. On Cohn-Hall-Marx goods the pieces ran almost uniformly forty yards. We cut them to make forty yards to a piece.

Q. Now, tell me what you did in connection with this keeping of open stock, where you opened up a stock room and exactly what you did. A. We took floor space on Paterson Street, 207, and got that in readiness to be a stock room for them, you might say, to keep the open stock. 20

Q. Just describe what you did in getting that place in readiness. A. Well, the goods had to be kept in order. They had to be kept so that when they sent us an order to ship certain patterns and combinations we could go into the stock room and get that pattern and combination without sorting over maybe a couple of hundred pieces and looking at the little ticket on each piece and try to find it. In other words we had to. In other words, we had to stack them somehow by pattern and combination, so if we went to that pile we would get a certain pattern and combination, and we figured out the easiest way to do it, and the way that we did it, was just to build low tables or benches, you might call them. They were about as long as from here to that railing there (indicating), and I would 30 40

T. Ivan Arnold—Direct.

say about this wide, and stood about so high off the floor (indicating).

It was almost the same as piling the goods on the floor, except that we have the tables to raise them up to protect them from the dust and dirt and so forth that we naturally associate with a floor.

10 Q. How big a space did you have at Paterson Street? A. The floor down there—I can't give you the exact measurements of it. I would say it would be about maybe fifty by sixty, roughly.

Q. I see. And you had a number of these tables? A. Yes.

Q. With the different patterns on the different tables? A. Yes. We didn't always use quite all of that space for them. We had about half of it, 20 and the other half for engraving.

Q. I see. Now, what protection against burglary did you have? A. Well, just that it was securely locked up.

Q. Did you have it fenced off? A. Oh, yes. Yes.

Q. With wire fencing? A. The place—the loft was closed up. We, of course, had keys to that, I mean to the entrance, and the only other key to the 30 entrance was in the hands of our engraver. And then besides that, in order to protect it against any theft or pilfering by engraving employees, and particularly against casual employees, I mean, that might be there for a couple of weeks and gone again, we had had the goods all fenced off with a wire fence, and that was locked up.

Q. And where was the key kept? A. Oh, that was always kept at our plant.

40 Q. The ykey was always kept at the plant. And when shipments were made how were they handled?

T. Ivan Arnold—Direct.

What was done? A. Shipments were ordered by Cohn-Hall-Marx on regular forms that they used for that purpose, ordering us to ship so many pieces of such and such a description to one of their customers. That came to us in the ordinary course of business by mail, and was filled just like any other order that we would get from any of our customers. In this particular case it was filled by being turned over to the shipping clerk, who would go downtown and make the shipment. 10

Q. Now, that continued from when? A. While we did business with them in that department.

Mr. McGlynn: What?

Q. When did you first put open stock at 207?

A. The first open stock went into 207 in February, 1925. 20

Q. And what quantity of material was on open stock at 207 Paterson Street on the date of this fire, approximately, if you recall? A. It was 152,000 yards, roughly, I think. There was some odd yardage, of course, but that is round figures.

Q. What would that be, 3,000 pieces or 3,500 pieces, something like that? It would be 152,000 divided by 40? A. Yes, that is right.

Q. Whatever that would be? A. Yes. 30

Q. And the fire was when? A. January 13, 1926.

Q. Now, had you ever kept open stock at any other place than 207 Paterson Street? A. Not before then.

Q. That is, not till after the fire? A. Yes, that is what I mean.

Q. Now, did you have special orders with regard to marking packages that were sent out by Cohn-Hall-Marx? Was the material done up in any 40

T. Ivan Arnold—Direct.

special way, special brands and colors? A. Yes, we got special orders on all of that. The goods were all papered uniformly, done up in a package about so long and about so wide and about so thick, like a regular bolt of goods (indicating). And then as we got the order to ship it we were ordered
10 what tickets to put on it. There were special tickets for different customers, and special tickets of their own for different purposes.

Q. Now, did you have special cases to ship them in? A. Well, they weren't so much special. They belonged to Cohn-Hall-Marx. Cohn-Hall-Marx furnished the cases.

Q. Well, do you recall somebody from Cohn-Hall-Marx coming over and explaining how to do the shipments to you? A. Yes. They were veneer
20 cases. They came to us in a knocked-down condition. They call them shooks, you know, for the pieces of the case which had to be put up of course, four sides and the top and the bottom, put together to make a case. They were all shipped to us by Cohn-Hall-Marx. We got two different shipments of them, and when we got the first shipment we couldn't make the cases, so we sent out an S. O. S. to Cohn-Hall-Marx to tell them that we had this
30 stuff there that they had sent us, but we couldn't use it, we couldn't make head or tail of it. It didn't go together into what was our idea of a proper case, and so they sent out a man—well, I would say he would be in charge of their shipments and stock.

Mr. McGlynn: Oh, I object, if your Honor please, to the witness' characterization of what it appeared to him the man was in
40 charge of.

T. Ivan Arnold—Direct.

A. It is as near as I can describe it.

Mr. McGlynn: Well, I know, but—

Q. Was his name Link? A. His name was Link. He came from their own warehouse in Bush Terminal where he had charge of all their shipments and storage of what goods they did store.

10

Q. Was that Link or Schenck? A. Link.

Q. Did you know a man by the name of Dorman? A. Yes. He was one of their assistant secretaries.

Q. Now, tell us first what Mr. Link did, what you did with Mr. Link. A. Well, I didn't do anything with him. He showed us how to put the cases together, that is all.

Q. Where did he show you this? A. At Paterson Street.

Q. And when was that, about? A. That was very shortly after we opened up the Paterson Street place.

20

Q. That would be February or March, 1925? A. I would say still in February.

Q. Still in February? A. The end of it.

Q. Do you know Mr. Goldberger? A. Oh, surely.

Q. Tell us who he is and what you know about him. A. Well, he was the man that we did the business for. This Cohn-Hall-Marx is a pretty good sized outfit. I couldn't tell you how many departments they have, because they have got a great many and I didn't come in contact with but a very small percentage of them. Their department which they designated as Department *T* was the department that handles these Lido voiles, the department that we did the work for, and Goldberger was the manager of that department, the head of the department.

30

40

T. Ivan Arnold—Direct.

Q. And was he over here? A. On various occasions, yes.

Q. And what did he do when he came over here?
A. Well, he did a lot of things.

Q. Well, with particular reference to 207 Paterson Street. That is what I am interested in most, Mr. Arnold. A. Well, on one of his visits he saw the place.

Q. He went to 207 Paterson Street?

Mr. McGlynn: Please don't lead, Mr. Single, if you don't mind.

Mr. Single: I mean, he couldn't see it unless he went there.

A. "He saw the place," is what I said, and I will stick to that.

Q. Just tell us what he did on that occasion. A. Well, I took him down there and he just looked at it. It was all right with him. We were storing the goods. He didn't make any objection to how we were storing them. Everything was apparently ship-shape.

Q. Now, do you know a Mr. Schwab? A. Two of them. I think the one you have reference to is the treasurer of Cohn-Hall-Marx.

Q. That is right. Now, just tell us what you know about him and what occasion you had to meet him. A. Well, I met him, I don't think more than half a dozen times altogether; two of those times, at least, in Paterson.

Q. Now, tell us about those two times here. A. He came out to the plant with Goldberger—

Q. And what did you do? A. (Continuing)—on, well, I suppose one of Goldberger's regular visits. They wanted to see about their work, how it

T. Ivan Arnold—Direct.

was coming along, more or less everything connected with it. One of his visits was in connection with some colorings he wanted changed; once he wanted them a little bit faster; and he saw the place on Paterson Street on one of his visits to town here.

Q. Just tell us that occasion. A. That was the occasion when we took him down to Paterson Street primarily for dinner or lunch. We ate at Louis Inn, which is or was on Paterson Street, between Ellison and Market, near Market. 10

Q. About what number Paterson Street, do you recall? A. Well, I could only guess at it.

Q. Well, I mean just your best guess. A. I would say maybe 235 or around there. It would be a guess. Louis Inn was about four or five doors from Market Street and 207 Paterson Street, where we had the goods, was about half a dozen doors from Ellison Street. They were both in the same block. 20

Q. I see. Now, just tell us what took place on that occasion. A. I drove them down there. There were four of us in the party, myself, my father, Mr. Goldberger, and Mr. Schwab. We came into Paterson Street from the Ellison Street end, then we drove down the block towards Market Street and stopped on—well, it would be this side, the west side of Paterson Street, and as we stopped or as we were getting out of the car Mr. Goldberger pointed across the street and mentioned to Mr. Schwab that that was the building where the voiles were stored, stocked. 30

Q. Pointing to what? A. Well, approximately to 207 Paterson Street. He pointed across the street in the direction where the building was. 40

T. Ivan Arnold—Direct.

Q. Now, do you know Mr. Sollfrey? A. He was Mr. Goldberger's assistant in department *T*.

Q. And what did he have to do with the voiles that you were handling? A. He handled most of the routine. By that I mean he came out to Paterson, too, but when Mr. Goldberger came out it was something a little more important, something to do with some patterns, maybe some change he wanted made or some new pattern he wanted engraved, or the more important end of the business. When Mr. Sollfrey came out it was more for routine stuff, to check up on some shipments. He was out on some occasions and brought a gang of boys with him. We weren't shipping fast enough to get it out in time for him and he wanted to rush it along and he brought out a gang of boys to help us to speed up the work.

Q. And where did Mr. Sollfrey and these boys go? A. Well, they were at both the plant and at Paterson Street. The usual routine there was that I or someone else from our office would meet them at the station and take them where they were to go. They made shipments from open stock on Paterson Street, I know, and I can remember at least one occasion where they made lot shipments from Hazel Street. By lot shipments I mean shipments of goods as they came out of the processing, before they were put in open stock.

Q. Now, tell me at the Hazel Street plant during the year 1925 what alterations or what work was done.

Mr. McGlynn: Construction?

Mr. Single: Structural, yes.

A. We built two buildings.

Q. Yes? A. And it was hardly in 1925. It was

T. Ivan Arnold—Direct.

about in January, 1926, that we tore down one.

Q. Now, tell me in connection with the buildings that you built, when they were built. A. One was built in the spring of 1925 and one in the fall. The first one I would call our printing department; that is what we used it for. The construction of that extended from December, 1924, to June, 1925. The other building, which I would call our receiving department, the construction of that extended from September, 1925, to January, 1926. 10

Q. Now, were any of those buildings used for open stock of Cohn-Hall-Marx? A. No, no.

Q. Now, with regard to this open stock of Cohn-Hall-Marx, did this corporation have some method of keeping track of the goods you had on hand? A. Oh, yes, they had a very complete system.

Q. Did they have certain times when they took inventories? A. They took inventory twice a year. 20

Q. Just tell me how the inventory was taken. What was done? A. Well, they had special forms for that, and on most of the inventory occasions they sent men out to check with us to take the inventory. I think there was once we took it alone, but mostly they sent help to check on that.

Q. The purpose of the inventory was to find if you had the right number of bolts? A. Yes, it was to verify their office records. They kept a system there to account for every piece, when the goods were shipped to us, when they were printed, and after they were printed whether they were shipped to some customer or put into open stock, and the dates of all of those, and, of course, showing the balance of pieces in open stock. 30

Q. Now, roughly, you say there were about forty yards to a piece? A. Yes, that was their standard piece. 40

T. Ivan Arnold—Direct.

Q. And the stuff was roughly worth about thirty cents, was it? A. Well, somewhere around there. They set the price on it.

Q. So, roughly, each piece would be twelve dollars? A. Yes.

10 Q. And you had some 3,000 pieces in January, 1926, at your plant? A. In open stock.

Q. Or, roughly, \$40,000 worth of stuff? A. Somewhere around that.

Q. How would that amount have compared with the quantity you had, say, from February on?

Mr. McGlynn: I object, if your Honor please. I can't see the materiality of it.

20 Mr. Single: I want to know just roughly how much open stock they had throughout all the time.

Mr. McGlynn: Just pardon me a minute. I can't see that it makes any difference.

Mr. Single: Well, it seems to me it makes a very vital difference. Here is a corporation that takes inventories and knows where its stock is.

30 Mr. McGlynn: Oh, no, I beg your pardon. There has been nothing said by this witness about where it was, not a word.

Mr. Single: Certainly, it has been said by my witnesses.

Mr. McGlynn: Not in the inventory. He didn't say anything about where it was in the inventory.

40 Mr. Single: If your Honor please, it seems to me it is material as to the quantities that these people had. They contend they didn't know where they were. Now, it seems to me that if you had \$50,000 worth of stuff for ten or twelve months, certainly at some time

T. Ivan Arnold—Direct.

or other in those ten or twelve months you are going to find out where it is. It may be the corporation is big enough to have \$50,000 without knowing where it is, but I have my doubts.

The Court: Your theory is that it is relevant because it is a large quantity of stuff and this was a big concern and it had a certain system of doing business, but I don't see yet why you waste all this time when there is no dispute that there was a lot of stock at that time. 10

Mr. Single: I want to show that it was there for month after month.

The Court: It is even admitted that after the fire it was agreed that the loss was some \$35,000, so there must have been \$35,000 worth of stock. Why waste time with this witness simply for the purpose of drawing an inference? You can draw that inference from that admitted fact, without wasting time. 20

Mr. Single: Suppose it was just in January, this year, that the stuff was there?

The Court: If we were in the Admiralty Court without a jury I suppose it would be all right to sit all day and all night to take the testimony, but I don't see how it is material to the issue. It seems to me it is taking too much time. 30

Mr. Single: All right.

The Court: These jurors want to get through. They are a special panel.

Mr. Single: They don't want to get through any more than I do, your Honor.

That is all. 40

*T. Ivan Arnold—Cross.**Cross-examination by Mr. McGlynn:*

Q. Mr. Arnold, there is nothing in your records which in any way indicates where any of this material was located at any time it was in your possession, is there? A. No, no.

10 Q. I think you and I checked that up during your last testimony? A. Yes, I think I know what you mean.

Q. And also outside of the court-room? A. Yes, that is correct.

Q. No kind of a record, shipping record or receiving record? A. No.

Q. Or anything else that indicates where any of these goods were at any time? A. No, all our records were on Cohn-Hall-Marx forms, on their head-
20 ings.

Q. And in all those records there is no mention of specific location as differentiating Hazel Street from Paterson Street? A. No, none, because, as I say, it was all on their headings.

Q. Now, how many times did you see Mr. Schwab in Paterson? A. Twice, I believe.

Q. How many times did you see Mr. Goldberger? A. Oh, quite a little oftener than that.

30 Q. Well, how many times would you say? A. A dozen, perhaps.

Q. A dozen. How many times did you see Mr. Sollfrey? A. Also several times.

Q. As many as you saw Goldberger or more? A. About even, I guess.

Q. Now, Schwab on both occasions came to that Hazel Street plant, didn't he? A. He was at the Hazel Street plant on both occasions.

40 Q. And only one of these occasions have you any recollection of anybody pointing to a building

T. Ivan Arnold—Cross.

and saying, "That is where our voiles are stored"? Right? A. That is right.

Q. Now, what sort of cases were those that these goods were shipped in? Paper or wood? A. You mean the shooks that I referred to?

Q. The cases that you said the stuff is shipped in. I don't care anything about shooks. A. Those are the cases. It is a veneer with a heavier wooden frame around the edges. 10

Q. How big are they? A. Oh, they were all sizes, from about—well, about that size (indicating), up to great big ones.

Q. How many pieces would go in the largest size? A. The largest one held about fifty pieces, roughly.

Q. About fifty pieces? A. Yes.

Q. What was the average weight? What would be the weight of one of those pieces? A. I couldn't tell you that. 20

Q. Oh, you handled enough of them. You can give me some idea. A. I couldn't even guess.

Q. You couldn't even guess? A. No, we never had any occasion to weigh them at all.

Q. And you say that you received two shipments of these shooks, as you call them, which, as I understand it— A. Yes. 30

Q. —is the material that makes up the case? A. That is the sides and the ends, to put together for the case.

Q. Two shipments of those? A. Yes.

Q. When was the first shipment? A. The first shipment came along in February, 1925, and the next one, I guess, was a month or two later.

Q. A month or two later. How did you ship the material before you received those boxes? A. We didn't ship any out of open stock. 40

T. Ivan Arnold—Cross.

Q. Now, wait a minute. Never mind about open stock. You shipped some material. Did you ship some material before you received these cases? A. Before we received those cases we shipped material direct to Cohn-Hall-Marx, and only by our trucks, the same way that we ship any goods that we process.

10 Q. In cases or open, just open packages? A. Loose, mostly.

Q. Loose, mostly. And this place on Paterson Street that you have been describing is on the first or second floor of that building? A. It is on the second floor.

Q. The second floor? A. There are stores on the first floor underneath.

Q. No elevator in the building? A. No.

20 Q. How many staircases that you can get up-stairs? A. Well, it goes up straight, broken near the top with a little landing.

Q. One stairway? A. Yes.

Q. How wide would you say that stairway was? A. About four or five feet.

Q. Four or five feet. What would you say was the size of the largest case that you said you shipped these goods in? A. It wasn't very much less than that. It was a hard job getting them up and down.

30

Q. I see. Now, you say the space upstairs was about—what did I understand you to say, forty by sixty? A. No, a little bigger than that, I think.

Q. Fifty by sixty? A. About that.

Q. And about half of that was used for the engraving department? A. About half, right.

Q. That was fenced off by wire? A. A wire fence built to keep the two separate.

40

T. Ivan Arnold—Cross.

Q. How much of the remaining space was taken up by the tables you described? A. All of it.

Q. Sir? A. All of it.

Q. All of it. Wasn't there any space left for you to pack these pieces and put them in these boxes? A. Oh, yes, yes, I see what you mean. Naturally we had—

Q. I don't mean anything. I am trying to find out from you what was up there. A. I misunderstood you. We used the whole space, but naturally we had to leave an alleyway in between the tables so that we could get back and forth and take out pieces.

10

Q. Where would you set up these cases, these shooks? Where would you put these together? A. At the end of the building in front of the engraving machines.

20

Q. Not in the part you were using for storage? A. No.

Q. Huh? A. No.

Q. Where did you have the shooks stored? A. We had some of them down there and some of them out at Hazel Street.

Q. How did they get out at Hazel Street? A. We carted them out there.

Q. You carted them out? A. Yes.

30

Q. When did you cart them out? A. When they were shipped to us.

Q. Why did you take them out to Hazel Street if you were going to use Paterson Street as the place for the storage of the open stock? A. A question of room, Mr. McGlynn. Somebody before our day at Hazel Street had kept chicken coops there, and we put the shooks in the old chicken coop.

Q. Now we are through with the chickens, let's get back to the voile. Was there any shed at Ha-

40

T. Ivan Arnold—Cross.

zel Street that was used for the storage of this voile at any time? A. No.

Q. Sure about that? A. Yes, as I understand storage. You probably—I think I know what you refer to. It was an old shed—

10 Q. Don't let us be technical about the use of words. I don't want to use any word that confuses you. A. That is what I am going to explain.

Q. Was there any building or shed in the Hazel Street plant which at any time during the—from January 1, 1925, to January 13, 1926, was used for the purpose of accumulating any merchandise of Cohn-Hall-Marx? A. I am trying to answer your question fully, and I would say no. There was a shed there that was part of our shipping department, where part of the lots might be accumulated
20 as they came through before shipment either to a customer or shipment into open stock.

Q. You mentioned a man by the name of Link? A. Yes.

Q. How many times did you see him? A. He was out here twice, to my knowledge.

Q. Did you see him both times? A. I think I did.

Q. Sir? A. Yes.

30 Q. Where did you see him? A. I saw him at Paterson Street.

Q. Why do you hesitate? Is there any doubt about it in your mind? A. No. Because I think I also saw him once at Hazel Street. I think on one of his visits he was at both places, once he came out to show us how to make the shipments, and once he came out on inventory business.

40 Q. Now, the first time he came, I understand, was to show your men how to put these shooks together and make these cases? A. Yes.

T. Ivan Arnold—Cross.

Q. Where did he do that? A. Paterson Street.

Q. And the other time he came out was to assist in the inventory? A. Yes, he came out to take inventory the second time, and I think he was at both places then. He took open stock inventory at Paterson Street and I think he also checked up on goods in process at the plant. 10

Q. This is the first time you have ever mentioned Mr. Link's name, isn't it? A. I don't think so.

Q. You don't think so? A. I think he was mentioned.

Q. This is the fourth time you have testified about the facts connected with this transaction? A. Yes, this is the third trial like this.

Q. And one in Newark? A. Yes, that was another one.

Q. And you think you have mentioned the name Link before in your testimony? A. I don't know whether I mentioned him by name or not, but I think I mentioned someone coming out to show us how to put cases together. 20

Q. What has happened since all these other trials which now recalls to your mind the name of Link?

Mr. Single: I asked him that question.

A. I looked up some correspondence and found his name signed. 30

Q. Correspondence with whom? A. Cohn-Hall-Marx.

Q. Where is it? A. In our files.

Q. What is the date of it? A. A good many dates, covering a period of—

Q. Mentioning Link's name? A. Signed by Link.

Q. Signed by Link? A. That mentions it.

Q. What does Mr. Link look like? A. Oh, I am the world's worst at describing anyone. 40

T. Ivan Arnold—Cross.

Q. Are you the world's worst on memory, too?

A. Hardly that.

Mr. Single: That is for the jury to decide.

10 Q. If your memory is so good with respect to all the details, how is it you can't remember what Mr. Link looked like in some respects, to give us some idea whether you did see him or not? A. I hate to do it, because if I was to try to describe you tomorrow I couldn't do it.

Q. He isn't here, so you needn't feel at all backward about making any mistakes.

Mr. Single: There is a reason why he is missing.

20 The Court: Missing, is he?

Mr. McGlynn: I don't know whether he is the missing link.

A. He is not here. He was what I would call rather average.

Q. Sir? A. He was what I would call average, average sized. If I remember rightly, he wore glasses.

30 Q. Well, just let me refresh your recollection by your testimony taken at the first trial last October, referring to page 123: "Q. Did they send anyone up to help pack the goods at any time? A. Yes.

"Q. How often? A. Half a dozen times, maybe."

A. That is right.

40 Q. "Q. Do you know who they sent up? A. They sent up different ones. I think Mr. Goldberger's assistant, Mr. Sollfrey, was out once or twice—"

T. Ivan Arnold—Cross.

A. That is right.

Q. Once or twice only, now? A. In charge of a gang to help ship.

Q. "A. And the others I don't really remember their names. They were—well, I don't know. I don't think they had any particular position; I mean they just helped him." 10

A. They were mostly young fellows, boys, that had no responsible position.

Q. "Q. You mean they had no title? A. No."

A. Correct.

Q. "Q. Were they sent by Cohn-Hall-Marx to help pack the goods? A. Yes."

A. Correct.

Q. "Q. And when they arrived at the Hazel Street plant what would you do? A. Well, they came to the Hazel Street plant, I think, only once or twice. They came out on the bus and got off there and we took them down. Other times maybe they telephoned ahead of time and we would meet them downtown here and maybe they would make arrangements a day or so ahead of time. On one or two occasions they said they would be back the next day, naming some time, and we met them downtown then." 20

A. Yes. 30

Q. "Q. What would you do in the loft? A. Pack up goods for shipment.

"Q. According to their instructions? A. Oh, yes, sure."

I think you said Hazel Street when you meant Paterson Street? A. That is right.

Q. "Q. Why was it necessary to send men to help in that fashion? A. Well, there were a few times like that that we were not making the ship- 40

T. Ivan Arnold—Cross.

ments as quick as they thought we should, so they sent their own men to speed it up a little bit.”

A. That is right.

10 Q. Well, now, there is nothing in there about anybody being sent to help you make up these boxes for the shooks, is there? A. No, there is nothing right there, but I think it was mentioned that they sent out a man to show us how to put together shooks, possibly in some other place, not in that passage. I might be wrong. It might not have been mentioned.

Q. Sir? A. I say I might be wrong and it might not have been mentioned, but I thought it was.

20 Q. How is it after testifying—this is the fourth time with regard to that situation—you now remember this man’s name, Link, and the fact that he came out to help you make up the boxes? A. I told you I got the name from some letters that he sent to us. He was in charge of their stock and shipments.

30 Q. There was nothing in the letter, sir, which refreshed your recollection that he was the man that came out to help show you how to make these boxes, was there? A. No, but I remembered the man in charge of the work after they came, and the letters gave me his name.

Q. Now, you had nothing to do with any arrangements which were made by your concern with Cohn-Hall-Marx for the use of this Paterson Street loft, did you? A. No, not to—

Q. That was done by your father? A. No, no to agree with them to arrange for it. I merely had charge of it after, of the billing and so forth.

40 Q. Getting down to this building which you say was built in the Spring of 1925 at the Hazel Street plant— A. Yes.

T. Ivan Arnold—Cross.

Q. —do you recall my showing you on the occasion of the last trial the application filed with the Building Department of the City of Paterson, dated in March, 1925? A. I do. I do.

Q. And was that the application which was filed for the building which you mention? A. That was the application filed for one of the buildings. That was the application filed for the building of the building that was built in the Fall of 1925. 10

Q. Do you recall that that application, on page 2, under question No. 8, which read, "Purpose of building," there were the words "Warehouse, storage"? A. Yes, I remember you asked me that the last time. I have answered it to a question already, that it was used for the greig room, for storage of raw goods as they came in, being put into work. 20

Q. Well, it was used for storage, then, wasn't it? Built for the purpose of using it as storage? A. That is right, for the storage of raw goods as we trucked them into our place and stored them while we sorted them out to put them into work.

Q. You mean raw goods belonging to Cohn-Hall-Marx? A. Cohn-Hall-Marx's department *T* sent us no raw goods at any time that I remember. Their goods came to us already dyed. Raw goods, as I mean it, is goods before a hand has been put to them, after they are woven. 30

Q. How long would it take you to get me those letters that you say were signed by Link? A. I guess I could get you out some of them at least pretty quick.

Q. Huh? A. I could get you out some of them, at least; I won't guarantee a complete file.

Q. I don't mean all of them. I mean— A. I 40

T. Ivan Arnold—Redirect.

can find some letters signed by him and have them here this afternoon.

Q. Good. Will you do that for me? A. Why, surely.

10 Q. Now, are there any other men that you might have overlooked in your testimony who were out there for Cohn-Hall-Marx, outside of Goldberger, Schwab, Link, and Sollfrey, and these boys that you describe? A. Those are the—Dorman was mentioned a while ago, but my dealings with him were after the fire on another question.

Q. I see. Your two concerns did business after the fire with respect to other merchandise, didn't they? A. Silk goods, but with respect to the same kind of merchandise, too.

20 Q. You still continued to do business? A. Yes, and we did business with three of their other departments at one time or another.

Mr. McGlynn: That is all, with the exception that I would like to see the letters and have the privilege of putting him back.

Mr. Single: It may be that I can make it unnecessary for my friend to do that.

Redirect-examination by Mr. Single:

30 Q. I would like to ask you—he has talked about not having said anything in four prior trials—you testified in April, 1927, with regard to this case, didn't you? A. In Newark.

40 Q. And from that record at page 151, I read you the following questions and answers: "Q. If you don't know their names, just say you don't; if you do, tell us. A. There was somebody from Cohn-Hall-Marx's storeroom or their own storeroom, I mean.

T. Ivan Arnold—Recross.

“Q. Yes? A. Their own storeroom.

“Q. Mr. Link or Mr. Dorman, do you know them?

A. I think Mr. Link was one of them.

“Q. Well, are you sure it was Mr. Link or not?

A. I wouldn't be quite sure. I know he was out a couple of times, and I think he is one of the ones that came out to show us the cases.

“Q. Do you know Dorman? A. I know him, yes.

“Q. Well, whatever their names, they were two of Cohn-Hall-Marx's men? A. Yes.”

Now, that was your testimony? A. I thought I remembered being asked about that somewhere, at some trial.

Q. And you testified in April, 1927, that Mr. Link and Mr. Dorman—you were in touch with them, two of Cohn-Hall-Marx's men? A. Yes.

Q. That is right.

10

20

Recross-examination by Mr. McGlynn:

Q. Did you read this testimony over lately? A. Not that one. I did glance over the testimony of the last trial.

Q. That doesn't obviate my request to see that correspondence with his name on.

The Court: He says he will give it to you. 30

A. Yes.

Mr. Single: That is all.

JUSTINO COLATARCI, sworn.

Direct-examination by Mr. Single:

Q. Where do you live? A. 114 Lyon Street.

Q. What did you say your business was, Mr. 40

Justino Colatarci—Direct.

Colatarci? A. Shipping clerk at the Consolidated Piece Dye Works.

Q. And were you the shipping clerk in 1924 and 1925 and 1926? A. Yes, sir.

Q. Were you familiar with certain Lido voiles of Cohn-Hall-Marx? A. Yes, sir.

10 Q. Now, just tell us what you know with regard to these voiles from February, 1925, until after the fire in January, 1926, what you had to do with them. A. Well, I got regular forms from the office that came from Cohn-Hall-Marx, to ship five pieces W. T. Grant, six Sears Roebuck, and all over the country, and the balance of the orders put in open stock.

Mr. McGlynn: What was that?

20 Mr. Single: "And the balance of the orders put in open stock."

Q. Now, tell us what you mean by open stock and where it was kept. A. Just taken down to Paterson Street.

Q. What is open stock? A. Keep there for storage till they order us.

30 Q. How is it kept? A. Kept loose on top of the tables, combination by combination, and different patterns.

Q. Now, you say Paterson Street. What number? A. I think it is 207.

Q. Now, did you ever see any men from Cohn-Hall-Marx? A. Oh, yes, different ones.

Q. Tell me what they did and what you did with them? A. This fellow on the first seat over there (indicating), he came out—

Mr. McGlynn: Sollfrey.

40

Justino Colatarci—Direct.

A. (Continuing) —with a bunch of boys.

Q. You mean Mr. Sollfrey there? A. Yes, right there. He came up and brought four or five boys to help me pack the goods up.

Q. What did you do? A. Took him down to Paterson Street.

Q. Now, do you know anything with regard to Cohn-Hall-Marx's taking inventories? A. Yes. 10

Q. Where was the inventory taken? A. In Paterson Street.

Q. Now, how often were shipments made from open stock? A. Sometime every day.

Q. You had a large volume going in and out of open stock? A. Yes.

Q. Now, was there ever any open stock kept at the Hazel Street plant? A. No, sir.

Q. Was there ever any accumulation of goods at the Hazel Street plant? A. Till we completed the orders. 20

By Mr. McGlynn:

Q. Till what? A. Till we complete an order.

Q. Till you complete? A. Yes.

By Mr. Single:

Q. Finish up a certain lot? A. Yes. 30

Q. Now, when did you first start this open stock place at Paterson Street, if you recall? A. 1925. 1925.

Q. About what month? A. February, I guess—March.

Q. February? A. Or the beginning of March.

Mr. Single: That is all.

*Justino Colatarci—Cross.**Cross-examination by Mr. McGlynn:*

Q. Mr. Colatarci, who took this inventory that you mention? A. Oh, a dozen boys from Cohn-Hall-Marx.

Q. How many times? A. A couple of times.

10 Q. Do you remember when? A. From stock?

Q. When were the inventories taken that you described? A. Near the end of the year and in the middle of the year.

Q. The middle of the year and the end of the year? A. Yes, the end of June and the end of December, like.

Q. You think those were two inventories that were taken? A. Well, yes.

20 Q. Did you help with that? A. I did not. I just took the boys down to Paterson Street and they took the inventory.

Q. You didn't stay there with them? A. I had one of my boys stay there.

Q. You didn't stay there? A. No.

Q. And you did that twice? A. Yes, sir.

Q. And how many times did you take Mr. Sollfrey to Paterson Street? A. Only once.

Q. Only once? A. Only once.

30 Q. Do you remember when that was? A. Sure, around April or May.

Q. How many times did you see him at Hazel Street? A. Oh, a couple of times.

Q. And on those occasions when he was at Hazel Street he didn't go down to Paterson Street? A. I had nothing to do with Hazel Road; he just goes to the office and talks business.

Q. He didn't come out in the plant at all? A. No, sir.

40 Q. Where did you keep this material at Hazel

Justino Colatarci—Cross.

Street when you say you were accumulating it to complete an order? A. In the shipping department.

Q. In the shipping department? A. Yes.

Q. How often would you take it from Hazel Street down to Paterson Street? A. Oh, every day, and sometime every couple of days. 10

Q. Every day? A. Yes, and every couple of days.

Q. I thought you said you accumulated it there until the end of the order? A. We used to print 50,000 yards some days.

Q. How big a place did you have down at Paterson Street? A. Oh, a great big places, take in about two lots.

Q. What? A. Take in about two lots, about 100—50 by 100, something like that. 20

Q. 150 by 100? A. 150 by 100.

Q. Did you use the whole space, 50 by 100? A. Half of it.

Q. Half of it. And how much of that space did the tables take up? A. Oh, three-quarters of the space, the full space, only we had the alleyway between and a little space at the end where we make cases and packages.

Q. How much would the heaviest packages weigh? A. You mean cases? 30

Q. Yes, the heaviest ones. A. 300 pounds.

Q. 300 pounds. There was no elevator in this building, was there? A. No.

Q. And only one stairway? A. Yes, sir.

Q. And who would do the actual packing of the goods in Paterson Street? Who did that? A. Well, when it was—ourselves. When there was a large shipment and they want it in a hurry, they used to send their boys. 40

Justino Colatarci—Cross.

Q. What would they do? A. Pack the goods up.

Q. Who would mark the cases up? A. They do.

Q. They would mark them? A. Each one would take single orders and fill them up.

Q. Who marked the outside of the cases? A. They did.

10 Q. Didn't you ever do that? A. Some I packed—my boys packed—they will do, too.

Q. There was nothing in your shipping records that showed where the goods came from? A. Where our stuff came from?

Q. Nothing in your shipping records that showed that the goods were being shipped from Hazel Street or Paterson Street? A. No, it just shows open stock.

20 Q. Open stock. And there was nothing on the outside of the case that showed where it came from? A. Cohn-Hall-Marx, Paterson.

Q. Just Cohn-Hall-Marx, Paterson. Didn't you ever see Mr. Sollfrey at Hazel Street checking up the merchandise that was up there, the finished merchandise? A. There was no finished merchandise up there to be checked up.

Q. Well, did you ever see him checking the accumulation you had up there? A. No.

30 Q. Never saw him? A. No, sir.

Q. You saw him in the plant, though? A. I did.

Q. What would you be doing? A. Well, I am in and out of the office all the time.

Q. I see. On how many occasions would you say that they sent boys out there to Paterson Street? A. Oh, half a dozen times or more.

40 Q. Well, more or less, which? A. Well, I couldn't remember three or four years ago to tell once more time or less.

Justino Colatarci—Cross.

- Q. Was it very many times or just a few times?
 A. Half a dozen times, six times, seven times.
- Q. Did you make up the first cases that were made up? A. We couldn't make them up.
- Q. Sir? A. We couldn't make them up.
- Q. You couldn't make them up? A. No, sir.
- Q. Where were the shooks? A. Some at Paterson Street and some up to Hazel Road. 10
- Q. Where did they show you how to make them up, at Hazel Street or Paterson Street? A. They came up to Hazel Street, and we couldn't make them up, and we took them down there.
- Q. They came to Hazel Street first? A. Yes.
- Q. All these men used to come to Hazel Street first? A. No, sir, we met them down by the station and took them to Paterson Street.
- Q. I see. You didn't meet them yourself, did you? A. I did, lots of times. 20
- Q. Was anybody with you? A. Myself alone.
- Q. Yourself alone? A. Yes.

Mr. McGlynn: That is all.

Mr. Single: That is all, thank you, Mr. Colatarci.

THOMAS J. ARNOLD, sworn. 30

Direct-examination by Mr. Single:

- Q. Mr. Arnold, what is your business? A. My business is printing silks, principally.
- Q. How long have you been in that business, Mr. Arnold? A. About forty-five years.
- Q. And where have you mostly been engaged in that business? A. The major portion of the time was at Hawthorne, New Jersey, a couple of miles north of here. 40

Thomas J. Arnold—Direct.

Q. Hawthorne. And what is your present connection? What do you do now? A. With the Consolidated? I am vice-president of the Consolidated Works.

Q. That is the company with the plant at Hazel Street we have just been discussing? A. Yes, yes.

10 Q. Now, in December, 1924, did you have any business connection with Cohn-Hall-Marx? If so, just tell us what was and how it arose. A. Well, our business relationship started a while before that.

Q. That is what I want you to tell me, just everything with regard to your business relationship with them. Perhaps I should confine myself to Lido voiles. A. About this time six years ago, which was in October, we received a letter from
20 Cohn-Hall-Marx asking us to have our representative call to see them. I gave the letter to our representative and he called on them, and they asked him about the printing, the multicolored printing of Lido voiles, which had never been done successfully in this country before, and they were interested in having the work done for them. We had done a few samples for a competitor of theirs, and I understood they had seen it. When they saw—
30 when our representative took them in samples when he knew what they wanted, and when they saw the samples of the work, the nature of it, they asked to see one of the principals of the concern. They wanted to open up negotiations to do work for them and they wanted to get to headquarters as quickly as possible.

Our representative reported the matter back the next day or so to the office, and I called at Cohn-Hall-Marx's store in New York on Franklin Street.
40 I talked with Mr. Goldberger and exhibited the

Thomas J. Arnold—Direct.

samples that we had done, and he was greatly interested and we talked of doing business together. And he asked the price what we could do it for. I gave him our figures, which were too high for him. However, eventually we came to an agreement what we could do the work for, and we took—I took four patterns from him to engrave.

10

It was necessary to have the patterns engraved before any work could be done. I had the patterns engraved and I agreed with him to submit his own work in about six weeks, five or six weeks, which I did. That led up to about the beginning of December, when we delivered our first samples of Lido voile to Cohn-Hall-Marx Company.

Q. Then just continue and tell us what happened. A. And, of course, even before this they talked—we talked together and they assured us that they could do a tremendous business in this class of work if we would confine the business on Lido voiles exclusively to them, which I could not do just at that time. I told them I had another party we had done some work for and I couldn't conscientiously turn them down, but in a little while we possibly could arrange so as we could finish up with the other concern, if their business was to be enough to take care of our production, which it proved to be.

20

30

We continued then to receive quite large orders from them. They even—well, they measured the amount of work they turned into us, and as the work began—when we got to processing it and shipping it out, they weren't able to receive it as fast as we could turn it out. I presume they hadn't sold it, or if they had sold it they couldn't deliver it until certain days, and it was then they brought up

40

Thomas J. Arnold—Direct.

the question of us—they actually wanted to compel us to keep open stock. They brought heavy pressure to bear on us to keep open stock for them so as we could ship—process the goods, store them away, and ship any particular pattern or any particular number whenever they would call for it.

10 I told them that was impossible and we would not do it. I had this up with Mr. Goldberger, and even he couldn't bring pressure enough to bear on me to concede to their wishes, and he brought in Mr. Schwab, and Mr. Schwab insisted that I keep open stock, and I told him it was impossible, we hadn't the room and couldn't do it and wouldn't do it.

20 We were very firm, both of us; it even came to nearly the breaking point, and Mr. Schwab tried to influence me to concede to their wishes, but I wouldn't do it, and didn't do it. Then we came to the arrangement that the only way we could do it would be to get additional space elsewhere, not at our plant. It was impossible. If we would keep open stock for them it would mean sacrificing our silk business, which was a great deal more remunerative to us than the Lido voile was.

30 Consequently, I was very firm in my determination not to process Lido voile for them if they were going to insist on us keeping open stock. I agreed with Mr. Schwab—he rather agreed with me, that we should get floor space elsewhere, and I then contended that would be an additional cost. We couldn't do that for nothing, because we had taken the work already at a very low figure. So he agreed—we agreed together that they would pay us an additional price if I would find the space elsewhere to keep their open stock, and I found
40 space elsewhere and I reported to him.

Thomas J. Arnold—Direct.

Mr. McGlynn: What was that?

(The last part of the answer was read by the reporter.)

A. (Continuing) We agreed together—we had several meetins, it wasn't all done at one time. I was in their office every day and sometimes twice a day. And we agreed that the rate it, Cohn-Hall-Marx Company, should pay five cents additional to what they were already paying us for to keep open stock for them so as they could ship from their open stock any time at all that they saw fit. 10

Q. And when did you start keeping open stock for them? A. I made that arrangement with them the latter part of January or the beginning of February, and we started to keep the open stock about the middle of February, I think. 20

Q. And you continued to keep open stock for them until at least until the fire in 1926? A. Yes, yes.

Q. That was practically eleven months later? A. Ten or eleven, yes.

Q. Now, where did you keep this open stock? A. At 205-207 Paterson Street.

Q. That was a building owned by yourself, was it? A. Jointly. 30

Mr. McGlynn: What?

Mr. Single: "Jointly."

Q. It was you and your brother? A. Yes.

Q. And what did you do? How did you prepare this building for the keeping of open stock? Just tell us briefly. A. There wasn't much preparation to it, except building a dozen tables about a foot high and about three feet wide by ten or twelve feet long, and cleaning the place up. Then, 40

Thomas J. Arnold—Direct.

when we put the open stock in there we secured it by building a wire fence around their goods.

Q. Now— A. There were other people going in and out of that room.

Q. Did you yourself ever go down to 207 Paterson Street with any of the people from Cohn-Hall-Marx? A. I never went as I recollect, no.

10

Q. Did you have occasion to go near there? A. Yes.

Q. Just tell us what that occasion was. A. On one occasion Mr. Schwab came out to the works to see our place. He wanted to see the process, the way we processed the goods. Well, now, that was rather a delicate mission. No one—we would allow no one in to where the goods were processed, and I had to tell him in a rather gentle way that we couldn't show him that, but we showed him the other parts of the works, and we went to lunch then, and I took him to lunch down on Paterson Street. Mr. Goldberger, Mr. Schwab, my son, and myself went down to lunch and we came into Paterson Street from the north side. We came in from Ellison Street. I think it was a one-way street at that time, and we stopped almost directly across from the building where their goods were stored.

20

30 And after we got out of the car Mr. Goldberger stepped out, Mr. Schwab, and myself. Mr. Goldberger turned around and he says, "There is the building where they keep the Lido voiles," and he called Mr. Schwab's attention to the fact, pointing across at the building that we owned where the Lido voiles were stored.

Q. All right. What did you receive for printing these Lido voiles, if I may ask? A. At different times different prices. I think on the aver-

40

Thomas J. Arnold—Direct.

age of about nine cents a yard, or maybe nine and a half.

Q. And you say you were paid five cents for keeping open stock? A. Five cents a bolt, not five cents a yard.

Q. Yes, that is what I mean. Were you paid that five cents a bolt from the time you first started to do business with them? A. No, sir, that was a special arrangement made at this particular time, when we began to keep the open stock for them. 10

Q. You billed the five cents a bolt and they would pay it? A. Yes, always paid their bills, yes.

Mr. Single: That is all.

Cross-examination by Mr. McGlynn:

Q. The first intimation by anybody that you would not be able to continue the business of printing these voiles because of the accumulation of stock came from you to them; isn't that true? A. I think so. 20

Q. And you told them that if you had to accumulate and store these goods you couldn't handle their business? A. Yes.

Q. They insisted that you would have to keep open stock or store the goods, whatever words you used, if you wanted to keep it; isn't that true? A. Yes. 30

Q. They insisted that you would have to do it? A. Well, of course, they could insist and I could insist.

Q. Well, you say they insisted that if you wanted to continue to print or process these goods you would have to keep the goods in storage subject to their call? A. Yes, I say— 40

Thomas J. Arnold—Cross.

Q. That didn't affect the—that didn't affect your moneys you received for processing them? That was invoiced right through whether they were shipped or whether you kept them? In other words, you didn't have to wait till the goods were shipped before you were paid for processing them?
 10 A. The moment they went into open stock they were charged.

Q. You received your money for the printing of them right away, as soon as they were finished?

A. No. In the course of time, yes, that money was paid in.

Q. I mean, the fact that a piece might lie in storage for three months— A. That wouldn't matter to us.

Q. And the five cents a bolt was charged for the
 20 storage and the extra work involved in keeping stock and shipping out under their instructions?
 A. That is correct.

Q. Is that right? A. Yes.

Q. Now, you said that you reported the fact that you had secured this place on Paterson Street. How did you report it? Orally or by writing? A. Orally.

Q. To whom? A. Mr. Schwab.

30 Q. Sure about that? A. Positively.

Q. Did you tell him where it was? A. Yes.

Q. Sure about that? A. No—I might not have given him the number of the street. I said it was in town.

Q. What? A. I said it was in town.

Q. Your Hazel Street plant was in town, too, wasn't it? A. It was in the southern section, though, another section of town.

40 Q. Now, isn't it a fact that you never informed

Thomas J. Arnold—Cross.

them specifically where this loft was? A. No, it is not a fact.

Q. Let me call your attention to some of your previous testimony on that point. A. Yes.

Q. The testimony of September, 1929, the first trial here, page 34: "Q. Now, did you inform them that you were keeping their goods in Paterson Street on one occasion or more than one occasion? A. I did not inform them. I had bargained with them to find a loft other than at Hazel Street plant." Do you remember that? A. Yes, that is quite correct. 10

Q. You never told anybody specifically the exact location of this place, did you? A. Oh, yes, they knew it.

Q. Who? A. Well, it was general knowledge. 20

Q. Never mind about general knowledge, Mr. Arnold. I want to know who you told specifically 205-207 Paterson Street is the loft in which we are storing your voiles. A. Well, Mr. Schwab and Mr. Goldberger both knew where their goods were stored.

Q. Please, Mr. Arnold, answer my question. Did you personally at any time after February, 1925, up to January, 1926, tell anybody in Cohn-Hall-Marx the exact location of these voiles? A. I never gave them the number, I don't believe, no. 30

Q. Did you give them the street? A. Yes.

Q. Who? A. They knew it.

Q. Never mind about they knew it. A. I gave Mr. Schwab and Mr. Goldberger and Mr. Sollfrey, and they all knew where it was.

Q. Never mind about they knew it. A. It was no secret.

Q. I want you to answer my question, Mr. Arnold. Now, you say you told somebody Pater- 40

Thomas J. Arnold—Cross.

son Street. Did you specifically tell anybody the location of this loft? A. Yes, I told them that we owned property there, I am positive of that, and I could prepare a room there for it. That is how we arrived at the price that they were to pay extra.

10 Q. Never mind about the price. There is no dispute that an agreement was made to pay you five cents a roll. I am not inquiring about that. I want to know—you say you went back there and reported to them that you had a loft? A. Yes.

Q. Did you tell them then where it was located? A. I believe I did.

Q. Well, now, tell us, did you or did you not? A. Well, it is a matter of business; I suppose I did.

20 Q. Have you any present recollection that you did? A. I wouldn't swear positively that I did.

Q. No, and you wouldn't swear positively that at any time after that you told anybody specifically the location of this loft? A. I didn't make any special errand to do it, but they knew it and I told them.

Q. You say you told them. Told them what?

30 A. That we had secured a loft there. We had a loft in preparation and their goods were shipped to it.

Q. Did you tell them where you had the loft?

A. Yes, I am quite sure they knew if they were told.

Q. Never mind about that "knew." Did you tell them? A. I may not personally have told them 207 Paterson Street.

Q. You know you didn't tell them. A. I did.

40 Q. Huh? A. I did, and they understood where it was.

*Thomas J. Arnold—Cross.**By the Court:*

Q. Why do you say that, Mr. Arnold? Why don't you say positively one way or the other? Now, you either know or you don't know, or you remember or you don't remember. A. I remember perfectly.

Q. What do you remember? Did you tell them Paterson Street or didn't know? A. I told them Paterson Street, there is no question about that. 10

Q. Who did you tell it to? A. Mr. Schwab and Mr. Goldberger.

Q. You told them Paterson Street? A. That we had a building on Paterson Street.

Q. Did you tell them that was the place where their goods would be stored according to your agreement? A. Yes, that was the understanding. 20

Q. No, not the understanding. Is that what you told them? Did you say that? A. I wouldn't say that, that I said your goods will be stored in 207.

Q. What language do you think you used? A. I think in a general way I said I had a building on Paterson Street and we would use that for their open stock, but to say, to swear positively that I said we were going to put them in 207 Paterson Street, I wouldn't swear to it.

Q. Didn't you tell us on one trial here, Mr. Arnold, that you first told them you would have to go out and look for a place? A. No, I would have to prepare a place. 30

Q. To prepare a place? A. Yes.

Q. The minute you knew, the second that you knew that you would have to store some of this merchandise, this property of yours and your brother's on Paterson Street came into your mind as the location for it? A. I knew I had the property that could be used for that purpose. 40

Thomas J. Arnold—Cross.

Q. It was ideal, was it not? A. No, not exactly.

Q. Did you have to put a tenant out? A. No, we didn't put a tenant out.

Q. Did you use that very space for the engraving department before them? A. We were starting in engraving somewhere about the same time.

10 Q. That is all. No, just one other question. You were president of this Consolidated Piece Dye Works at the time this transaction was negotiated?
A. No.

Q. Vice-president? A. No, I wasn't an office holder then.

Q. What was your position, then, back in 1925?
A. Well, general overseer. I owned the place.

Q. You were the principal stockholder? A.
20 Yes, I was the principal stockholder, you might put it that way.

Q. Practically the owner? A. Yes.

Q. And your company was the defendant in this first law-suit by Cohn-Hall-Marx against the Consolidated Piece Dye Works in Newark? A. Yes.

Q. Which was brought in April, 1927? A. Yes.

Q. You were represented by Mr. Gourley at that time? A. Yes, sir.

30 Mr. Single: If your Honor please, that is the plaintiff's case.

The Plaintiff Rested.

The Court: (To the Jury) I will excuse you now until one o'clock. You may go to lunch now. Come back at one o'clock, and be on time, please.

MOTION TO NON-SUIT.

Mr. McGlynn: I would like to make a motion, if your Honor please, for a non-suit, the first ground being that as the record now stands, the plaintiff, according to the testimony of its officers, discovered the apparent misrepresentation in April, 1927, upon the occasion of the trial in Newark, and that they did not demand the return of their money or start their suit until February, 1928. In my opinion, that takes away their right of action in this State. I cite the case of Champlain versus Doyle, a Court of Errors opinion in 73 Equity, page 678, and pages there following. 10

(Discussion.)

Secondly, that they did not tender back the premium to put the defendant in the position of status quo until after the first trial and just prior to the second trial in October, 1929. 20

The other ground of my motion for non-suit is this: that as this record now stands I think that the record at this time is entirely different in a great many respects than it was on the occasion of the two previous trials. As this record now stands the plaintiff has an exhibit, the contract of insurance, its copy of it, the original not being available, and as part of that contract there is a rider which has been marked P-1A, which, according to the testimony given by all the plaintiff's witnesses, clearly extended the policy of insurance to cover these goods at the Paterson Street location, and made the plaintiff company legally liable to indemnify the defendant for its loss occasioned by that fire. The terms of the contract were retroactive and made the policy extend from August, 1925, to August, 1926, on the goods which were in 30 40

Motion to Non-Suit.

that place, and therefore there was a legal liability for the plaintiff to pay the defendant and there could have been no misrepresentation. My other ground is that as a matter of law that testimony now in the case does not show any misrepresentation of a material fact, known by the defendant to be false, upon which the plaintiff relied.

(Discussion.)

The Court: No, I can't see that that is so. I can't agree with you on that. While it is true the testimony is different from the testimony in the previous case, nevertheless I think the elements of a charge of fraud are present, and I don't think as a matter of law I can take the case away from the jury by granting a non-suit, because on a motion for non-suit every inference of fact, every inference that is favorable to the plaintiff must be considered. I will deny the motion and allow you an exception.

(A recess was taken until one o'clock P. M.)

Afternoon Session.

DEFENDANT'S TESTIMONY.

JOSEPH M. TRASK, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Trask, you are a member of the firm of John A. Eckert and Company? A. I am a director of the firm, yes, sir.

Q. A director. Were you connected with that company in 1925 and 1926? A. Yes, sir.

Joseph M. Trask—Direct.

Q. And the business of your firm, as I understand it, is insurance? A. Insurance brokers.

Q. Insurance brokers. And were you present at a conference that was held sometime in January, 1926, with regard to the fire loss on Paterson Street of Cohn-Hall-Marx? A. Yes, I was at several conferences.

10

Q. Several? A. Several of them.

Q. And do you recall who was at those conferences, generally? A. Well, Mr. Eckert of our firm, Mr. McCoomb, of the Marine Office; I think Mr. Jones, of the Marine Office, possibly Mr. Jennings, of the Marine Office. There were several men there. And Mr. Marx was there.

Q. Now, did you attend the first conference? A. Yes. I don't know when the first conference was, but I was undoubtedly there.

20

Q. Was anything done at the first conference as to discussing the matter? A. Yes.

Q. Do you recall the subsequent conference about that? A. I do.

Q. And did you hear Mr. McCoomb at that conference say anything with regards to whether or not Fidelity Phoenix was going to pay this loss? A. Not at that—not in the first conference.

Q. No, the second. The second. A. I wouldn't say whether it was the second or third.

30

Q. Well, one of the conferences? A. At one of the conferences he did say he was going to pay the loss.

Q. Did he say on what ground he was going to pay the loss? A. Yes, on the broad ground that the policy was intended to cover all of Cohn-Hall-Marx's goods from the time they received them in the unfinished state until they were processed and sent to the customers.

40

Joseph M. Trask—Direct.

Q. And what did he ask Cohn-Hall-Marx to do on their part if he paid this loss? A. Just sign a loan receipt.

Q. Well, is this loan receipt that you mentioned common in this particular line of insurance or is it very rare? A. It is—no, it is very common. In fact, it is in all cases, I think.

10 Q. You mean in connection with what? A. With so-called transportation or marine losses.

Q. You mean it is common with that particular class of insurance? A. Yes, sir.

Q. And did you hear anything said at any of those conferences with regard to the payment of any additional premium by Cohn-Hall-Marx if this loss was paid? A. No, I think the first I heard that was when one of the men of the Marine Office of America, Mr. Kaufman—

20 Q. Kaufman? A. Kaufman, said to me, "As long as we are paying this claim we might just as well get an additional premium in accordance with the fire rate at that location".

Q. At the location where the fire occurred? A. The location where the fire occurred.

Q. Based upon the value of what? A. Based upon the values that were declared at that location.

30 Q. The values of the goods they were declared to have at that location? A. Yes.

Q. You say this loan agreement that you speak of is very common. Is the agreement so called a real loan or is it a mere manner that they have of working out the payment of the loss in order to preserve their rights in connection with a suit against some third party, do you know? A. Yes. I have never known it to be anything except just simply a matter of subrogation.

40

Joseph M. Trask—Cross.

Q. That is what it is used for principally? A. That is what it is used for.

Mr. McGlynn: Cross-examine.

Cross-examination by Mr. Single:

Q. Mr. Trask, in other words, they pay the loss under a loan because of the fact that they have a subrogation right in mind—recovery in mind? A. Yes. 10

Q. They always have some right that they anticipate against some party in mind when they make such an advance? A. Yes.

Q. Now, isn't it a fact that that was the right that they had in mind in this case, too? A. Presumably. They always get one of those signed. 20

Q. Well, wasn't that one of the main things that was discussed, Mr. Trask? A. Subrogation.

Q. The right against the Consolidated. A. Yes, that was discussed, subrogation.

Q. As a matter of fact, that was the main point, was it not? A. You mean for the payment of the loss?

Q. Just reading from your prior testimony, you were asked whether that was the main point in the question, the question of the right of Cohn-Hall-Marx against the Consolidated; is that your recollection of the conferences? A. Well, that was the main point in signing the loan agreement, if that is what you mean. 30

Q. And the loan agreement was signed in contemplation of affecting its recovery? A. Yes.

Q. Now, do you recall at those conferences any discussion that took place with regard to the removal, the claimed removal, of the goods from Ha- 40

Joseph M. Trask—Cross.

zel Street to 206 Paterson Street? A. Yes, sir, I do.

Q. You recall Mr. Marx or the representatives of Cohn-Hall-Marx making the statement that they didn't know the goods were at 206? A. Yes.

10 Q. Do you recall that that was—that Mr. McCooomb pointed out that at 206 the policy did not cover? A. Yes, that is what they claimed.

Q. But in Mr. Marx having said that he didn't know, Cohn-Hall-Marx didn't know, that the goods were at 205-207 Paterson Street, on that representation they were willing to go ahead and make this loan? A. That was one of the reasons, yes.

Mr. Single: That is all, thank you.

20

LEO SCHWAB, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Schwab, you are connected with the firm of John A. Eckert and Company? A. Yes, sir.

Q. Keep your voice up, Mr. Schwab? A. Yes, sir.

30 Q. And were you so connected in 1925 and 1926? A. Yes, sir.

Q. In what capacity were you connected with that firm? A. Insurance solicitor.

Q. Do I understand that you are related in some way by marriage to a member of the firm of Cohn-Hall-Marx? A. Yes, sir.

Q. Did you handle their insurance business, Cohn-Hall-Marx? A. Yes, sir.

40 Q. Did you attend any of these conferences after the fire? A. One.

Q. Subsequent to these conferences or during

Leo Schwab—Direct.

the time that they were held, did you at any time see—

Mr. Single: May I ask my friend to particularize more? He says during the conferences or subsequent. I would like to take exception to the question in that form.

Mr. McGlynn: I will withdraw it and reframe it. 10

Mr. Single: Thank you.

The Court: Is this Leo Schwab?

Mr. McGlynn: Yes.

Q. I show you Exhibit P-1A and ask you if you have ever seen a copy of that paper before. A. Yes, sir.

Q. Where did you see it? A. It was delivered to me at my office. 20

Q. Connected with John A. Eckert and Company, you mean? A. Yes.

Q. By whom was it delivered or who sent it to you? A. It was sent to me by the Marine Office of America, representing the Fidelity Phoenix Fire Insurance Company.

Q. And to what policy of insurance did it refer? A. Their floater covering all of their goods at the various finishing plants. 30

Q. And as to the endorsement here of the paper that you are looking at, did the copy that you received have a number indicating the policy to which it was to be attached? A. Yes, sir.

Q. What was the number? A. 330,521.

Mr. McGlynn: Is it conceded that is the number of the original policy?

Mr. Single: Yes, that is right.

Leo Schwab—Direct.

Q. Subsequent—withdraw that. Did you at any time on behalf of your firm bill Cohn-Hall-Marx for a premium, additional premium, on this policy? A. Yes, sir.

Q. For how much money? A. \$850.63.

10 Q. Is that the same amount that is on that endorsement? A. Yes, sir.

Q. And was that premium subsequently paid? A. Yes, sir.

Q. And in turn remitted to the Marine Office by your firm? A. Yes.

Q. Less the commissions, I assume, of course. A. Yes, sir.

20 Q. What did you do with the copy of this endorsement that you say you received? A. Forwarded it to the assured, the Cohn-Hall-Marx Company.

Q. Do you know who at that time had possession of the original policy issued to Cohn-Hall-Marx, as far as you know? A. Well, the man who attended to the insurance business was supposed to have possession of it.

30 Q. I don't mean which man in their employ. Do you know whether you had the original policy or the Cohn-Hall-Marx Company, or where it was? A. Cohn-Hall-Marx had it.

Q. I think on that endorsement Mr. Steinbugler's name appears, does it not? A. Yes, sir.

Q. What does that indicate? A. Well, Mr. Steinbugler is the general agent, soliciting agent, for the Marine Office of America who wrote this insurance, underwrote this insurance for the Fidelity Phoenix Company.

40 Q. You were the broker for Cohn-Hall-Marx and he was the underwriter for the insurance company;

Leo Schwab—Cross.

do I get that right? A. No, he is the agent for the underwriters.

Q. The agent for the underwriters? A. Yes.

Q. Did you have anything to do with the moneys which were paid by the insurance company in connection with this claim? A. No, I did not.

Q. Nothing to do with the loan agreement at all? 10
A. No.

Mr. McGlynn: That is all. Cross-examine.

Cross-examination by Mr. Single:

Q. Who was the insurance man, Mr. Schwab, for Cohn-Hall-Marx, do you recall? A. Yes, sir.

Q. What was his name, I mean the man in Cohn-Hall-Marx's organization? A. Well, they have a 20
number of clerks who look after various parts of their business. The man who looked after that part of their business, just the details of it, was a man by the name of Dorman.

Q. Was he the insurance man? Did they have someone who was the head of their insurance department, if you want to put it that way? A. Well, they don't have an insurance department. He is a clerk who looks after a great many of the 30
details of their business.

Q. Who is Mr. Durham? A. Durham? A man by the name of Durham was there at one time. He is not with them any more. He looked somewhat after the insurance business.

Q. That was the 1925 and 1926? Was the insurance under his charge then? A. Partly.

Q. Partly? Do you mean by that that he had charge of the fire and marine and somebody else had charge of the other? A. No, he had charge of 40

Leo Schwab—Cross.

the minor details of the insurance business. He was supposed to take care of the policies and so forth.

Q. I see. Now, this question of premium was all subsequent to the conversations that Mr. Trask has just told us about? A. Will you ask that again?

10 Q. I say, this question of premium that you have just testified to was all subsequent to the conversations that Mr. Trask has told us about, was it not? A. No.

Mr. McGlynn: Oh, I object, if your Honor please. I don't think this Mr. Schwab knew anything about those conversations. I asked him, and I think he said he didn't participate in them.

20 The Court: He said, "No."

Q. Just tell us when this conversation was. Can you fix the time? A. I wasn't present at any of those conversations.

Q. No, the conversation that you have just told about with Mr. Kaufman. A. I didn't say anything about a Mr. Kaufman.

30 Q. Didn't you say that someone from the Marine Office had spoke to you about the premium that you have just testified about? A. I didn't say that.

Q. You didn't? A. No.

40 Q. What do you know about the premium and the debit in connection with that endorsement? A. I knew that it had been opened and that I was to receive an endorsement for the amount of that premium and that I received a bill for the amount of that premium, and that I in turn was to instruct our office to charge that to Cohn-Hall-Marx.

Leo Schwab—Cross.

Q. I see. There was a prior arrangement made by whom? A. Well, that I can't tell you. I don't know. I wasn't at those conferences.

Q. I see. Well, that was my question. My question was: Had there not been prior conferences that led up to this premium charge? A. There must have been. 10

Q. There must have been? Well, there was, wasn't there? A. I suppose so. I don't know it to be a fact, because I wasn't there.

Q. Well, then, just tell me again what you do know to be a fact with regard to that premium charge. A. I know that we were—we received this endorsement at our office with a bill for the amount of this premium, and that we in turn had to charge it to Cohn-Hall-Marx.

Q. You spoke of a prior arrangement. What do you know with regard to that arrangement? Who made it? A. I don't know that. 20

Q. You don't know? A. I know it was made, but I don't know who made it.

Mr. Single: That is all, thank you.

By Mr. McGlynn:

Q. Mr. Schwab, you are not the Schwab whose name has been mentioned as being the man who came to Paterson with Mr. Goldberger, are you? 30
A. No, sir.

Lawrence Marx—Direct.

LAWRENCE MARX, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Marx, you are the president, I believe, of Cohn-Hall-Marx? A. Yes, sir.

Q. And were you the president during 1925 and 1926? A. Yes, sir.

10 Q. Did you ever know or were you ever told that any of your voile material which was being processed or something being done by the Consolidated Piece Dye Works in Paterson was at a loft at 205-207 Paterson Street, Paterson? A. Yes.

Q. I mean before the fire. A. No.

20 Q. My mistake, pardon me. Let me repeat it, so there will be no question or misunderstanding. Prior to the fire or January 13, 1926, had you ever been told or did you know that any of your goods were at Paterson Street, Paterson? A. No.

Q. Where were you under the impression that they were? A. At the plant of the Consolidated Piece Dye Works.

Q. I see. Were you ever there yourself? A. Never.

Q. Were you ever in Paterson before we tried the case the last couple of times? A. Yes, about ten years ago.

30 Q. I see. Now, do you recall the conference which was held subsequent to the fire, in New York, at the insurance broker's office, at the Marine Office? A. Yes.

Q. How many of those conferences do you recall you attended? A. I attended all of them. I think there were three.

40 Q. I see. And is your recollection the same as the other people that testified here about the people who attended those conferences, Mr. McCoomb,

Lawrence Marx—Direct.

Mr. Jones— A. Well, I don't know whether there was any testimony this morning. I wasn't in court this morning, but the testimony here of Mr. Jones is correct, as far as I remember.

Q. —Jones, Mr. McCoomb, Mr. Trask, Mr. Kaufman, of the Marine Office? A. Mr. Eckert.

Q. Mr. Eckert and yourself? A. That is right. 10

Q. Now, what happened at the first conference which was held in Mr. Eckert's office? A. Well, there wasn't very much of importance discussed at that conference, other than that it was somewhat of a surprise that the goods were at this other location, and it was decided to hold another conference in Mr. McCocombs' office, as there was a question as regards the liability of the insurance company under the policy.

Q. Did the officials of the insurance company at that first conference take any decided stand one way or the other whether they would pay it or would not pay it or just leave it open? A. No, they left it entirely open to the next discussion. 20

Q. At that conference, if I understand it correctly, you told them just as you have told us now that you never knew or were never told that any of your goods were at this Paterson Street location at the time of the fire; is that correct? A. That is correct. 30

Q. Well, now, at the second conference what did the insurance officials say, with regard to what they were going to do, I mean? A. Well, in regard to what they were going to do, Mr. McCoomb said that he wanted to be very fair in this transaction, that we had always been good customers of theirs, and he felt that under the broad terms of the policy there was a responsibility, even though the goods had been moved. He also stated that 40

Lawrence Marx—Direct.

he felt that if the goods had been moved by the Consolidated Piece Dye Works without our knowledge, that the Consolidated was liable for having moved the goods.

Q. Now, did he say that or did you say that?

A. He said that. I had no way of knowing that.

10 Q. I see. And what was his suggestion? A. Well, he said he would like to be very fair in the matter and that he would pay the claim. At the same time, he wanted to know whether if he paid the claim we would prosecute a case against the Consolidated. I asked him what that meant. He said it meant nothing, in so far as we were concerned, Cohn-Hall-Marx were concerned, but that they would do the whole job and they would only use our name, they would prepare the papers, and
20 that was what was done subsequently.

Q. Was anything said at that time about this loan agreement situation? A. I don't think so. I am not sure of that.

30 Q. Was there subsequently? A. At the last meeting they spoke about that loan receipt, at which I balked. I said I didn't think that that was the proper settlement in a case of that sort, and I was assured by Mr. McCoomb, and also by Mr. Eckert, that that was just a formal—that was the usual thing to do in marine losses, that in settling all cases or in nearly all cases, that instead of giving a regular receipt a loan receipt was delivered.

40 Q. And was anything said by anyone on behalf of the insurance company—no, strike that out. Do you recall the receipt of the first check which they paid of \$21,000 in March? A. Do I recall receiving it?

Lawrence Marx—Direct.

Q. I mean, do you recall the occasion of a conference which just preceded the delivery of that check or at the time the check was delivered? Let me ask you this: Do you recall the first payment of \$21,000? A. Yes, yes.

Q. Now, do you recall whether prior to that time or at that time anything was said about the payment of an addition premium by your company in connection with the goods which had been found at Paterson Street in this fire? A. Yes. 10

Q. What was said and by whom? A. Well, that is difficult to say. There were three or four of the insurance men in the room, and who originally suggested the idea, I don't know.

Q. But at least it was one of the officials of the insurance company? A. One of the officials of the insurance company suggested that it was only fair, in view of their attitude toward us in paying this claim, because there was a question whether there was a liability on their part or not, that in view of that fact, that we should pay the additional premium which we would have been called upon to pay had they known the goods were in that hazardous location. 20

Q. What did you say to that? A. Well, I said I thought that was perfectly fair. 30

Q. Was anything further than that said about in the event of a recovery in this proposed suit of the entire amount, whether that additional premium would likewise be refunded, or don't you recall that? A. I don't recall that.

Q. I see. Now, is it your recollection that that suggestion of a payment of an additional premium was—preceded the payment of \$21,000, or was it after? What is your recollection? A. It preceded the payment of \$21,000, that discussion. 40

Lawrence Marx—Direct.

Q. Was anything said about when it was to be paid? A. This additional premium?

Q. Yes. A. No, I don't think so. I don't think that was discussed, because in the normal course of business they would just send us bills.

10 Q. Is it your recollection that at the time the \$21,000 was paid, whether the net amount of the loss had been determined, or was it still open? A. I am not sure.

Q. You are not sure of that?

Mr. Single: I will concede that it was still open.

Q. Well, you did permit the use of your name in this proposed lawsuit, did you not, of your company's name? A. Yes, yes.

20 Q. And did you cooperate in every way you could with regard to the carrying on of that suit? A. We did everything they asked us to do.

Q. You paid no expenses at all, did you, in connection with that litigation? A. No, sir.

Q. Did you have anything to do with picking out the lawyers at all? A. No, sir.

Q. Who did, do you know? A. Who had?

30 Q. Who picked the lawyers? A. The insurance company, as far as I know.

Mr. McGlynn: Cross-examine.

Cross-examination by Mr. Single:

Q. Mr. Marx, you used the expression, "Under the broad terms of the policy." Can't I change that a little? It wasn't under the terms of the policy; it was under the theory of the policy, wasn't it? A. I am repeating, I think, the words that were

40

Lawrence Marx—Cross.

used in making the statement or the suggestion of the settlement.

Q. Didn't the underwriters tell you that under the policy there was no right on your part? A. No.

Q. Weren't you informed that the policy only covered at named locations and that that wasn't a named location? A. There was—some of the officials of the company said that and others said contrary. Mr. McCoomb took the stand that that wasn't correct. 10

Q. Well, now, the policy itself named the locations, didn't it? A. Yes.

Q. And 207 Paterson Street was not a named location? A. That is right.

Q. And the policy provided that it covered at other locations, providing notice was given within thirty days? A. Other locations of plant, but when our goods were in transit it also covered them. 20

Q. There is no question that these goods were not in transit, is there, Mr. Marx? A. There was that question, yes.

Q. They were being held in open stock, weren't they, Mr. Marx? A. There was that question brought up by the insurance company, that they might be considered as being in transit. 30

Q. But let me ask you: Were those goods in transit or were they being held in open stock? A. That is difficult to answer. I don't know. We sometimes classify goods in transit when they are in a warehouse.

Q. When your stuff is in a warehouse do you say it is in transit? A. Yes.

Q. Does that depend on how long it is there and where it is going? A. To some extent, yes. 40

Lawrence Marx—Cross.

Q. Were any of these goods that were held in open stock under orders to go anywhere? A. They were very shortly to go, yes.

Q. That is true, but were they under orders at the time to go anywhere? A. Not as far as I know.

10 Q. They were being held in open stock; that means in storage subject to order? Put it that way. A. That is true, I should think.

Q. That is what open stock means, doesn't it? A. That is correct.

Q. And there is no question but that you had not given them any notice of 207 Paterson Street within thirty days? A. Naturally, not. We didn't know it.

20 Q. I say, there is no question about that from your viewpoint? A. No.

Q. And there is no question, is there, Mr. Marx, that you advised them that you did not know the goods were at 207 Paterson Street? A. I advised them I didn't know it.

Q. You advised them you didn't know. Now, had you ever talked to Mr. Sollfrey with regard to his knowledge as to where the goods were before you made that statement? A. No.

30 Q. Had you ever talked to Mr. Link? A. No.

Q. Had you ever talked to Mr. Goldberger? A. Yes, yes.

Q. What was your conversation with him? A. Well, Mr. Goldberger said that he was very much surprised when he got to Paterson to find that the goods were not at the warehouse but were stored at this 207 Paterson Street, and I asked him—

40 Q. Had you— A. That wasn't my complete answer. I asked him whether he knew that the goods had been moved from the plant to 207 Paterson

Lawrence Marx—Cross.

Street. He said he had no knowledge to that effect.

Q. Now, had you talked to Mr. Schwab about it? Not the Mr. Schwab that was here; the other one?

A. Mr. Goldberger is the only one I spoke about it to, I believe.

Q. Now, Mr. Marx, when you stated to Mr. Mc- 10
Coomb and Mr. Jones that you didn't know, you implied that Cohn-Hall-Marx did not know, it wasn't a question of your knowledge; isn't that right?

A. That is correct.

Q. That is, your representation was that Cohn-
Hall-Marx did not know? A. That is right.

Q. Not that you didn't know personally? A.
That is right.

Q. The corporation that you are connected with 20
is a large corporation, and you are the president?

A. That is right.

Q. How many different departments do you have?

A. Did we at that time or have now?

Q. Yes, at that time, please? A. I think ten.

Q. And they were not all housed in the same
building, were they? A. Well, I know they are
not now; whether they were then, I don't know.

Q. I see. Now, Mr. Eckert that approved of this
loan agreement was your broker? A. That is 30
right.

Q. That was the Mr. Eckert that you mention-
ed? A. That is right.

Q. By the way, we have had some talk this morn-
ing about a Mr. Link. Who was he, if you know,
Mr. Marx? A. Well, at the time of the fire I think
we had some two or three hundred clerical em-
ployees. I believe, as far as my recollection serves
me, that Link had charge of our stock or a portion
of our stock at Bush Terminal Warehouses. 40

Lawrence Marx—Cross.

Q. Did you keep open stock there much the same way as you kept it up in Paterson? A. That was under our own supervision.

Q. I mean, you kept open stock? A. We kept open stock there.

10 Q. Now, tell me with regard to your accounting system, do you have audits at certain times during the year? A. Yes.

Q. How many audits do you have? A. We have—at that time, I think would be better.

Q. Yes, at that time. Thank you. A. It is really what we call two audits, mid-year and January 1.

20 Q. Mid-year and January 1. And just what do they do at those audits? What is your—what is done? A. Well, I think you had better ask me a little different question, because I will have to give you a terribly long answer.

Q. Well, do you take an inventory, check up on the goods you have on hand, wherever it is you have it? A. No.

30 Q. What do you do with regard to an inventory? A. We write to the plants with whom we do business and ask them for a memorandum of the goods that we have—that they have in their possession for our account. We also take a physical inventory of what we have in our own.

Q. And do you at times have your own auditors take inventories at outside places? A. It is possible. I doubt it. If we do, it is very rare.

Q. That wouldn't come within your purview; that is something that is not under your jurisdiction? A. No, not at all.

40 Q. Now, do you keep records of the material you have in various places? A. Yes.

Lawrence Marx—Cross.

Q. You know pretty accurately what is in the various places being processed for you? A. Yes.

Q. And you have quite accurate records of the stuff that is kept in open stock, do you? A. Yes.

Q. I show you a letter written—or who are Holmes, Browning and Wells, if you recall?

Mr. McGlynn: What is that? 10

Q. Who are Holmes, Browning and Wells? Do you recall them? A. No, I don't. If I may read this letter I may remember who it was.

Mr. McGlynn: That is Browning's firm?

Mr. Single: Yes, sure.

The Witness: I don't know, unless they may be the adjusters. It sounds like that from the tone of the letter. 20

Q. Mr. Browning, whose testimony was read, was the man who represented the insurance company? A. They were the adjusters, yes, sir.

Q. They were the adjusters for the Marine Office, for the Marine Office of America? A. You are telling me.

Q. No, I want to ask you. A. I assume that from this letter. The name don't convey anything to me at the moment. 30

Mr. Single: I offer this letter in evidence.

Mr. McGlynn: What is this? On cross-examination of my witness?

Mr. Single: Well, whatever you want.

Mr. McGlynn: Oh, I object to this, if your Honor please. It is after the fire. How can a letter of this kind be evidential?

The Court: It is not proper at this time, anyhow. 40

Lawrence Marx—Cross.

Mr. McGlynn: Sir?

The Court: It is not proper at this time.

Mr. McGlynn: I object to it even apart from that, if your Honor please. I can't see how that letter is evidential.

The Court: No, I will sustain the objection.

10

Mr. Single: May I have an exception?

By Mr. Single:

Q. Mr. Marx, you prepare from your records, or did you have prepared from your records, a statement of the stuff that was lost at Paterson Street?

A. Yes.

Q. Is this the statement that you prepared (handing a paper to the witness)?

20

Mr. McGlynn: What is this, the proof of loss?

Mr. Single: I suppose it might be so considered.

A. Yes.

Q. You made that up from your records and sent it in to the insurance company, did you? A. That is right. I think it went to the insurance company or the broker. I don't know to whom it went.

30

Q. I see. But was that prepared by you or by your office? A. That is correct.

Q. In connection with this loss? A. Correct.

Mr. Single: I offer it in evidence.

Mr. McGlynn: I object. I can't see how statements or documents made up after the fire, which must necessarily then describe these goods as being located at this address, which we all know, can be of any assistance.

40

Lawrence Marx—Cross.

The Court: Of course, you understand it is not admissible in evidence on cross-examination on the defendant's case.

Mr. Single: I think it is an admission against interest.

The Court: You understand, the New Jersey practice—I don't know, but I presume it is the same in New York—I don't know what it is in the Admiralty Court— 10

Mr. Single: I thought an admission—

The Court: All the admiralty cases I ever tried I tried in the commissioner's office before a commissioner. It used to be Commissioner George T. Somebody. You see, you are on cross-examination. You are on the defendant's case. Now, you want to put in something as an exhibit in the case as if it were on your case, whereas you are only on cross-examination. 20

Mr. Single: Then, do I have a right later to call this same witness to put this in?

The Court: No. I suppose if you feel you sufficiently prove it and it is relevant, after the defendant rests you would then offer it as part of your case.

Mr. Single: I see. All right, thank you. 30
That is all, thank you, Mr. Marx.

ALFRED GOLDBERGER, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Goldberger, were you employed by Cohn-Hall-Marx in the Fall of 1924 and during 1925?

A. Yes. 40

Alfred Goldberger—Direct.

Q. In what capacity? A. Manager of the dress goods department.

Q. Will you keep your voice up so the man over here can hear you? A. Yes.

Q. Are you with them now? A. No, sir.

10 Q. And in connection with the position that you then occupied, did you have anything to do with this material that we have been discussing here, these voiles? A. I did.

Q. And did you ever have occasion to come to Paterson in connection with that material? A. A number of times.

Q. And where did you go in Paterson when you came here with respect to this material? A. I went directly to the plant.

20 Q. Sir? A. I went directly to the plant.

Q. Where? A. At Montclair Avenue.

Q. Were you ever in a building known and described here as 205-207 Paterson Street, Paterson? A. Never have.

Q. Was that building or any portion of that building ever described or pointed out to you as being the location where the Consolidated Piece Dyeing Works were storing any of that material? A. No, sir.

30 Q. Do you recall going to lunch on one occasion on some street in Paterson, to some inn called Louis Inn with Mr. Schwab, of your firm, and the two Mr. Arnolds? A. I recall going to lunch, but I don't remember the name of the restaurant.

Q. You recall going to a restaurant? A. Yes.

Q. With the two Mr. Arnolds? A. Yes.

Q. And your treasurer, Mr. Schwab? A. He was along, too.

40 Q. Did you on that occasion, in getting out of the machine, point to a building and say to Mr.

Alfred Goldberger—Direct.

Schwab, "There is the place where our voiles are stored"? A. No, sir.

Q. When did you first learn that any of your material was not stored at the Hazel Street plant?

A. I believe it was a day or two after the fire, when Mr. Arnold came in to notify us.

Q. Are you the man who came out to Paterson with Mr. Browning, the insurance company adjuster? A. Immediately after the fire. 10

Q. When you came to Paterson with Mr. Browning, the insurance company adjuster, to inspect your company's property that had been damaged by fire, where did you go to look at it first? A. We arrived at the station and took a taxicab in the usual manner and went to the mill direct.

Q. To the Hazel Street place? A. That is the only plant I knew of. 20

Q. When you got there what were you told? A. I don't recall now which Mr. Arnold took us—I believe it was Mr. Ivan Arnold.

Q. The young man? A. He told us a fire occurred and he says he is going to take us to the plant—to the place, and when he took us out of the building I was naturally surprised, until we found that the goods were stored outside of the plant.

Q. Now, was that the first time that you knew that any of your company's property was not stored in that Hazel Street plant? A. That is the first time. 30

Q. Now, on the occasions of your visits to the Hazel Street plant prior to the fire, did you see any of your goods, any considerable quantity of your goods, there? A. I have seen goods distributed throughout the place.

Q. Did you see any of them in any particular place? A. I beg your pardon? 40

Alfred Goldberger—Direct.

Q. Did you see any quantity of them in one particular place? A. Well, I have seen them under the tables, on the tables, and later on when our business grew I saw goods in bins in a little room adjacent to the put-up room or whatever they called it, where they folded the goods.

10 Q. You saw tables, you say, at the Hazel Street plant? A. Yes.

Q. Where did you see bins at the Hazel Street plant? A. In that little room.

Q. I show you a piece of paper which looks like my drawing of the picture. I didn't do it, but it looks like what I do draw. Looking at that piece of paper, which at the bottom of it has "Hazel Street," and the top of it has "Dakota Street," and over at one side, the right-hand side as you
20 look at it, it has "Montclair Avenue"; is that a fairly good sketch of the Hazel Street plant of the Consolidated Piece Dye Works (handing a paper to the witness)? A. I wouldn't recognize any of these streets here, but this main street.

Q. Pointing to Hazel Street. A. I remember it very clearly, because this is where we always visited.

Q. You are pointing at a portion of the sketch designated— A. And the staircase right on here.

30 Q. What room did you go into there? A. Well, we just entered an office.

Q. This office? A. And from the office we went into a put-up room where they folded the goods.

Q. Your goods? A. Our goods, and other people's goods, also.

Q. And your finger is going to the right of the sketch when you say that? A. That is right. That is right.

40 Q. Now, where is this place you say you saw

Alfred Goldberger—Direct.

bins? A. In the small storage room. They have to be bins, cases on top, there is where they cut the goods.

Q. Now, do you recall when you first went out there whether this little place you have designated or pointed to as being a storage room was there when you first went there? A. I knew that it wasn't. 10

Q. You know that it wasn't? A. Yes, sir.

Q. Was it erected subsequent to the first time you went there and before the fire? A. Yes, sir.

Mr. McGlynn: I think I should have this marked in some way for identification.

(Paper marked D-2 for identification.)

Q. Now, on the occasion of any of your visits to the Hazel Street plant did you see anybody packing your goods for shipment? A. I see them accumulate them, get them ready for shipment. I didn't spend particularly a great deal of time in looking at them. 20

Q. I just wanted to know. You didn't see any goods actually packed there? A. No, I don't remember that.

Q. Did you ever see any of the loose pieces of boards which have been called shooks? Did you ever see any of those out at Hazel Street? A. Yes, yes. 30

Q. Have you any idea of the weight, Mr. Goldberger, of these—what do you call them, rolls? A. The piece.

Q. What do you call them? A. A piece or a bolt.

Q. Is that the forty-yard piece they talk about? A. Yes. 40

Alfred Goldberger—Direct.

Q. What do you think they weigh, on the average? A. Possibly three or four pounds. I don't know exactly.

Q. You don't know exactly? A. About four pounds, I should say.

By the Court:

10 Q. What do you call them? A bolt? A bolt?
A. Well, either expression is used, a piece or a bolt.

By Mr. McGlynn:

20 Q. Did Mr. Arnold, Mr. Thomas Arnold, ever have any discussions with you in New York soon after you sent material out to his mill to be worked on, regarding his ability to maintain storage of your goods as they accumulated? A. That was never discussed. I took it for granted that if Mr. Arnold entertains to do business with us he must have adequate facilities to take care of our requirements.

Q. Why do you say that? A. Well, because any other finishing plant that solicits our business knows the capacity of our company and knows that they will have to meet our requirements.

30 Q. Well, is the storage of finished material in a finishing plant common or is that unusual? A. Well—

Q. With this kind of material? A. Well, I have never done business with any plant that couldn't take care of the stock in the proper manner, and I take it for granted.

40 Q. When you say stock you mean maintaining what has been called here open stock? A. Yes, putting up and maintaining the stock and the shipping.

Alfred Goldberger—Direct.

Q. That is what open stock is, isn't it, just the storage of your material until it is called for? A. That is correct.

Q. By your orders? A. That is correct.

Q. Is that right, Mr. Goldberger? A. Yes.

Q. Well, was there a discussion with him with regard to charging something additional for the maintaining of this storage? A. That happened considerably after. 10

Q. Keep your voice up, will you? A. It happened a number of months after we started doing business.

Q. There was a discussion? A. Yes.

Q. You say considerably after you started to do business? A. Yes.

Q. As a result of that discussion I understand there is no question five cents a bolt or whatever you call it was charged for the storage and so on? A. That was agreed upon as the usual charge. 20

Q. Was there any argument between you and Mr. Arnold about the fact that he had to store these goods if he expected to do your business? A. No, he merely came in and told me that he was pressed for space.

Q. Pressed for space? A. Pressed for space, and I told him that is his look-out the same as any other plant and he should make arrangements for it, and subsequently he built his little store room that I pointed out to you on the sketch to store our merchandise. 30

Q. And your recollection of that conversation, so far as time was concerned, when would you place that? About when? A. Well, it would be merely a guess. I don't remember exactly when it was.

Q. I don't want any guesses. I would rather 40

Alfred Goldberger—Cross.

have you say you don't know than just to guess.
A. I don't remember.

Q. I don't think it will help us any; if you don't know, just say so? A. I don't remember, then.

Mr. McGlynn: All right, cross-examine.

10 *Cross-examination by Mr. Single:*

Q. How many times did you say you were at Louis Inn? A. I believe once. Once, that is all.

Q. You are sure of that, are you? A. I am positive.

Q. As a matter of fact, you were asked this question on a prior trial with regard to Louis Inn, September 19, 1929: "Q. How many lunches did you have, Mr. Goldberger, do you remember? A. With
20 Mr. Arnold?

"Q. Yes, in Paterson Street. A. Oh, several. About two or three at the most.

"Q. Do you remember when? A. When? The date, you mean?

"Q. Yes. A. Well, I know there was one—no, I don't think I do remember exactly when.

"Q. Well, two or three or four or more? A. Two, maybe, in March; some in November. I don't
30 know the dates.

"Q. How many were there, as far as you recall? A. Possibly two or three.

"Q. Two or three. And how far apart in time? A. Maybe a couple of months apart.

"Q. Always at Louis? A. No, sir.

"Q. But you remember Louis, then? A. I know now the place they pointed out as being upstairs.

"Q. Who pointed it out? A. Mr. Arnold.

40 "Q. Mr. Arnold? A. At the time of the trial in

Alfred Goldberger—Cross.

Newark I asked him which place is Louis. I didn't remember it after his testimony, and he said, 'You remember that place upstairs, you walk up one flight.' He described the place to me.

"Q. Do you remember it now? A. And then I remembered it.

"Q. How many times did you have lunch in there? A. Only once." 10

And that was your testimony at that trial, wasn't it, Mr. Goldberger, if you recall? A. Right.

Q. Now, let me ask you what your testimony, as you recall it, was at another trial. You were asked this question: "But you went to have lunch somewhere with Arnold? A. Yes.

"Q. How many times? A. I think twice to that place that he described as Louis Inn, because you described it as going upstairs; that is the only recollection I have of it." 20

Now, having heard that testimony read, what is your recollection as to how many times you were at Louis Inn with Mr. Arnold? A. Well, I have had a number of lunches with Mr. Arnold and his family and on a number of occasions, I believe, with his brother alone. We didn't always eat at the same place, and Paterson is unfamiliar to me. I don't know whether it is Louis Inn or any other place. I know I have been to some club with him, also. 30

Q. Well, what is your recollection as to how many times you were at Louis Inn? A. I think I was there once. I couldn't positively say whether it was more than once.

Q. Then, it may have been twice, as you testified before? A. It may have been, but I don't remember.

Q. Now, do you know this place 207 Paterson? 40

Alfred Goldberger—Cross.

Did you see that when you went to Louis Inn? A. No, sir.

Q. You had to pass it, didn't you? A. I don't know.

Q. You don't know? Well, you were at this place after the fire? A. Yes.

10 Q. And Louis Inn was still at Paerson Street after the fire? A. I don't know if it was.

Q. You don't know whether it was or not? A. No, I couldn't find 207 Paterson Street today no more than I could Louis Inn.

Q. No, but you were there right after the fire, at 207 Paterson Street? A. At Louis Inn?

Q. No, at 207 Paterson Street? A. Oh, yes.

20 Q. And you don't know whether that was right near Louis Inn; you wouldn't recognize it? A. No, I wouldn't.

Q. And yet it was a place where you had been twice before? A. Once or twice, I don't know.

Q. Once or twice before? A. Yes.

Q. Now, Mr. Goldberger, Mr. Arnold did tell you that he didn't want to keep open stock, didn't he? A. Yes, he did.

30 Q. And that was—when was that with respect to the time when you ceased taking goods that were shipped to Bush's Terminal? A. I couldn't fix the time exactly.

Q. Didn't your conversation come up in connection with the fact that you didn't want any more goods sent immediately after processing to Bush Terminal? A. It must have, because we have given up our Bush Terminal building entirely.

Q. And so you wanted open stock kept somewhere else? A. That is right.

40 Q. When you first made your agreement with

Alfred Goldberger—Cross.

the Consolidated it didn't contemplate open stock?

A. That is understood; it didn't have to.

Q. Well, as a matter of fact, you ran two or three months and they didn't keep open stock; the shipments were made to you immediately they were finished, weren't they? A. Well, I don't recall the time, because I don't know when we had given up our Bush Terminal building, but if we still had the Bush Terminal building then, probably goods were shipped there. 10

Q. Well, you do recall, though, that it was in connection with the keeping of open stock that the discussion was held? You wanted open stock kept over here? A. Yes.

Q. And do you recall or don't you recall the discussion as to the space that the Consolidated had to keep your stock? A. That never came under discussion. 20

Q. What was the basis for the five-cent charge? A. The basis for the five-cent charge was that it was customary in handling cotton goods. Now, Mr. Arnold's plant prior to that, I believe, had never done business with cotton goods concern. I don't know what the custom is in the silk trade. We naturally were willing to pay the charge. We figured in the beginning that inasmuch as I transacted business personally— 30

Mr. McGlynn: I can't hear you.

A. (Continuing)—inasmuch as I transacted personally the business with Mr. Arnold and made the price arrangements with him, I took it for granted, in view of the price we paid him for the merchandise, that that open stock charge would be included in the original price.

Q. And yet after this conversation regarding the 40

Alfred Goldberger—Cross.

keeping of open stock you agreed to pay five cents per bolt? A. That is correct.

Q. Was that a custom, then, if you didn't pay it to other people? A. Well, we are paying it to other people.

10 Q. Oh, you are? A. I just said it is customary in the cotton goods trade.

Q. I see. But you don't know whether it is customary or not in the silk trade? A. I didn't know, no.

Q. You don't know? A. I still don't know.

Q. Tell me, what do you mean by keeping open stock? A. Keeping open stock is accumulating merchandise that is processed and shipping it out to the customer as it is required.

20 Q. Now, can you fix the time when this building was built that you have told us about, at the plant, the Hazel Street plant? A. I should say approximately a year after we started doing business with them. About that.

Q. You mean the building where your goods were kept in open stock? A. Yes.

Q. What would that be? That would be when? December, 1926, or 1925? A. About that. A little before that, possibly.

30 Q. Well, when? A. Well, I should say in the late Fall, probably.

Q. In the late Fall? A. Yes.

Q. In other words, the first building, as you claim, that was built for open stock was in the late Fall of 1925? A. That is the only building I knew about.

Q. Yes. Up to that time they had no special place to keep their open stock? A. Yes, they did.

40 Q. Well, where was that? A. They kept it in this room that you approach from the office, be-

Alfred Goldberger—Cross.

fore you get into the room that they had built for storing our merchandise.

Q. That was the shipping room. A. I don't know whether they used it for a shipping room. I recall having seen machines in there that double and roll goods, double fold the width and roll them on boards. They have done silk goods in there, and also our goods. 10

Q. And when did you first see your stuff kept in open stock there? A. Immediately after we began doing business and made deliveries of our merchandise.

Q. Well, can you fix the time? A. No, I couldn't fix the time.

Q. Would you say February, 1925? A. I don't believe he had merchandise as early as that.

Q. Just describe what you saw, how that stock was kept there. A. There were tables there and the merchandise was kept under the tables, as well as on the tables. They were sorted in various styles and colors, to ship right from there. 20

Q. How big a space was this? A. Possibly fifty by forty; I couldn't describe it exactly.

Q. And your recollection is that that was in the same room with machinery that was used to fold merchandise? A. Fold merchandise, yes. 30

Q. In other words it was a part of— A. A putting-up room.

Q. —a plant? A. A putting-up room.

Q. What? A. A putting-up room where they put up merchandise.

Q. A putting-up room? A. Yes.

Q. And in this putting-up room they kept your open stock? A. Kept the stock, yes.

Q. And they kept it, you say, under and on tables? A. Yes. 40

Alfred Goldberger—Cross.

Q. Have any skids underneath the bottom? A. Well, I believe those tables had platforms under them already.

10 Q. They didn't keep it in cases or bins? A. I don't know whether they made the platform particularly for that purpose or whether they were there, but I know they were there on the platform.

Q. Did they keep it in cases? A. They might have had surplus goods in cases.

Q. Well, how did you see it? A. I saw everything on the tables and under the tables.

Q. Did you see anything in cases? A. No.

Q. Did you see anything in bins? A. Not that particular time.

20 Q. Well, did you see at any time? A. After they built that little store room adjacent to the room.

Q. That is in the Fall of 1925? A. That is right. There they had the goods in bins.

Q. But prior to the Fall of 1925 you saw it on tables in this what-do-you-call-it room?

Mr. McGlynn: Putting-up.

Q. In this putting-up room? A. Yes, putting-up room.

30 Q. Now, how much merchandise did you have on the average in this open stock that you have just told us about? A. It all depended upon the time of the year. I don't believe I could give you an answer—

Q. I don't think anybody can hear you. A. I haven't been connected with that company for a number of years, and I don't really remember.

40 Q. Well, you remember whether he had a hundred thousand or two hundred thousand? A. Oh,

Alfred Goldberger—Cross.

it was in excess of a hundred thousand yards, I know that fairly well.

Q. In excess of a hundred thousand? A. Yes.

Q. As a matter of fact, you had five or six or seven hundred thousand go through during the year? A. Oh, yes.

Q. More than that? A. More than that. 10

Q. So wasn't there in excess of a hundred thousand and at all times in this open stock? A. Yes.

Q. Now, just tell me what you saw at Paterson Street. How were the goods at Paterson Street kept? A. At Paterson Street they were piled very high, some on skids, some of them on the floor.

Q. No tables at Paterson Street? A. Not a table.

Q. Not a table there? A. No.

Q. And do you recall whether there was any wire netting there? A. Yes. 20

Q. There was wire netting? A. There was wire netting there.

Q. But there were no tables? A. No tables.

Q. Do you know who Mr. Link is? A. Mr. Link used to be connected with the company, I believe, was in charge of the Bush Terminal. I am not sure, because this was about the beginning of my association with Cohn-Hall-Marx Company. 30

Q. Did you have anything to do with sending him over to Paterson Street—I mean, over to Paterson? A. I wouldn't have. My assistant took care of the details in regard to shipping.

Q. It was Mr. Sollfrey who sent him over here if he was sent here? A. That is right.

Q. Now, as I understand it, Mr. Goldberger, you categorically deny that you ever pointed out 207 Paterson Street to Mr. Schwab? A. I do. 40

Alfred Goldberger—Redirect.

Q. But you admit that you were at Louis Restaurant with Mr. Schwab, Mr. Arnold, Senior, and Mr. Arnold, Junior? A. When I say it was at Louis Restaurant I take Mr. Arnold's word for it that it was Louis Restaurant.

10 Q. I see. Well, it was a restaurant upstairs, downtown somewhere? A. I don't even know if it is downtown, because I don't know the difference of uptown or downtown in Paterson.

Q. Well, I don't, either. That is all.

Redirect-examination by Mr. McGlynn:

Q. Mr. Goldberger, this information that you just gave us about Paterson Street, was all gained by your visit there after the fire? A. Yes.

20 Q. Is that correct? A. Yes.

Q. What sort of a stairway did you find when you went there after the fire? A. A very narrow wooden stairway which brought you to a little workshop with machinery in there at the head of the stairs. It was very narrow, hardly any room to move. It took about half the space. The other half was fenced off with the chicken wire, and our goods were stored in there.

30 Q. That is all. A. Naturally, we found them all wet and fire damaged.

Mr. McGlynn: That is all.

Jacob W. Schwab—Direct.

JACOB W. SCHWAB, sworn.

Direct-examination by Mr. McGlynn:

Q. Mr. Schwab, you are the other Mr. Schwab?
A. Yes.

Q. You were and still are treasurer of Cohn-Hall-Marx? A. Yes, sir.

10

Q. Will you keep your voice up so this juryman over here can hear? A. Yes, sir.

Q. Did you ever know or were you ever told prior to the fire of January 13, 1926, that any of the merchandise belonging to your firm was at 205-207 Paterson Street, Paterson? A. No, sir.

Q. Do you recall this famous luncheon that has been talked about? A. Yes, sir.

Q. Have you any recollection, or did Mr. Goldberger upon the occasion of this luncheon at some restaurant here in Paterson, attended by you two gentlemen and the two Mr. Arnolds, point out to you a place and say, "There is the place where our Lido voiles are stored"? A. No, sir, he did not.

20

Q. How many times did you come to Paterson, do you recall, between January 1, 1926—between 1925 and 1926, while this Lido voile was going on?
A. Between 1925 and 1926 I came once.

Q. And where did you go then? Which place of business of the Consolidated? A. Right to the plant of the Consolidated.

30

Q. Do you recall the layout of the buildings there? A. Yes, sir.

Q. And where did you go first, to the office or somewhere else? A. I went to the office.

Q. Did you inspect any other part of the building except that? A. Yes, we inspected the shipping department, their put-up room, and their open stock room.

40

Jacob W. Schwab—Direct.

Q. I show you this paper which I have, marked Exhibit D-2 for identification, and ask you if that generally portrays the building that you have just described, fronting on Hazel Street (handing a paper to the witness). A. Yes, sir.

10 Q. This long oblong here at the end, you say, is the place where the office was? A. Yes, sir. Yes, sir.

Q. And then, you say, you went into a room next to that? A. Yes.

Q. What do you call that? A. A put-up room.

Q. What does that mean? A. That is where they get the merchandise on rolls and fold it and paper it, label it, make it ready for shipment.

20 Q. You actually saw your merchandise going through this process you just described? A. Yes, sir.

Q. And what is this room over to the side, marked "Storage"? A. That was the room they built for open stock.

Q. Now, suppose you describe that place to the jury. What did it look like? What was it? A. That was a small room, and it had rows of cases piled up, one on top of the other, with one side knocked out.

30 Q. Yes? A. And those cases were filled with pieces.

Q. Of your merchandise? A. Of our merchandise.

Q. And when do you fix as the occasion of this visit when you say you went through these various rooms at the plant, the Hazel Street plant? A. Sometime in the Spring of 1925.

40 Q. Spring of 1925. And prior to that visit had you had any conversation with Mr.—the elder Mr. Arnold about keeping some of your stuff stored at this plant? A. Yes, sir.

Jacob W. Schwab—Direct.

Q. You yourself had had such a conversation?

A. Yes, sir.

Q. What did Mr. Arnold say about that? A. Mr. Arnold came in and said that he couldn't handle our open stock, and I told him if he wanted to do our work he would have to find means of handling it.

10

Q. What did he say? A. Well, he said he would attend to it.

Q. Now, was anything said about an additional charge for that or didn't you handle that question?

A. I don't think it was ever said to me.

Q. I see. Now, was that the occasion when you just described, when you went in this room, the putting-up room and the storage room? Is that the time you went to lunch with Mr. Arnold and his son? A. I think so, yes.

20

Q. Was either Mr. Arnold, Senior, or his son with you when you were in these various rooms, this putting-up room and the little room you described at the side? A. I don't remember.

Q. You don't remember. Now, as treasurer of your company do you ever supervise the records of the company so far as its assets and so forth are concerned? A. No, sir.

Q. Is there any record in any book or anything else belonging to your company which showed that your company had any merchandise at 205-207 Paterson Street, Paterson? A. No, sir.

30

Q. Have you made—cross that out. Since this morning have you, at my request, endeavored to locate Mr. Link? A. Yes, sir.

Q. How long is it since he has not been with your company? Approximately, I mean. A. I should say approximately four years.

40

Jacob W. Schwab—Direct.

Q. Were you able to locate him for me? A. No, sir.

Q. Now, have you any idea about the weight of this material, Mr. Schwab, of yours? A. Yes, sir.

Q. What would you say—how many yards are there in a bolt? A. They are put up in half pieces and full pieces, double folded, and they are put up in a different method for the manufacturing trade, that is, what we call the cutting-up trade, a long fold. Double fold pieces are put up in twenty-yard pieces and in thirty-five and forty yard pieces. The manufacturers' folds are put up in sixty yards, approximately.

Q. What would you say was the weight of these various folds you have just described, these twenty, thirty-five, forty, and sixty yards? A. The thirty-five and forty yard should weigh between six and seven and a half pounds.

Q. And you say the twenty half of that? A. Yes.

Q. The sixty proportionately heavier. What sort of a case is this material shipped to your customers in from the mills? A. Wooden cases.

Q. Wooden? A. Wooden cases.

Q. And what is the ordinary size of those wooden cases? A. Why, fifty pieces.

Q. Fifty pieces? A. Fifty pieces.

Q. About how big a box would that be? A. It would be about three feet high, possibly three and a half feet in length, and about three feet in depth.

Q. And a full case would weigh about how much? A. A full case packed?

Q. Yes. A. Between four hundred and four hundred and fifty pounds.

40

Mr. McGlynn: Cross-examine.

*Jacob W. Schwab—Cross.**Cross-examination by Mr. Single:*

Q. Mr. Schwab, how many times were you at Paterson? A. At the Consolidated?

Q. Yes, at the Consolidated? A. Twice.

Q. You were there twice. Now, can you tell me when that was? A. Once before we started to do work with them, which I believe was the Fall of 1924, and once after they built the open stock room. 10

Q. When was that? A. Sometime in the Spring of 1925.

Q. March, 1925, I think you testified before; is that not right? A. Well, if I testified so that is right.

Q. And you say that was after they had built the open stock room? A. Yes, sir. 20

Q. And Mr. Arnold told—you had a conversation regarding the keeping of open stock? A. Yes, sir.

Q. And Mr. Arnold told you that he had no place to keep open stock? A. Yes, sir.

Q. And you told him that he had to? A. Yes.

Q. And what did he do then? A. He said he would attend to it.

Q. Well, what did he say, as nearly as you can recollect? A. As near as I can recollect, he said he would attend to it. 30

Q. And you were out to the plant in March, 1925—it wasn't later than March, anyway, let's put it that way. A. I suppose so.

Q. And you saw your open stock, did you? A. Yes, sir.

Q. Now, just describe to us what you saw. A. I saw our pieces papered and put in bins.

Q. Did you see any pieces on tables? A. Not in the open stock room. 40

Jacob W. Schwab—Cross.

Q. Then, your recollection and Mr. Goldberger's as to what you saw is quite different, isn't it?

A. I don't know.

10 Q. You just heard him testify that the open stock that he saw was on tables, didn't you? I mean, you heard him testify to that just this minute? He just got off the stand. A. No, I heard him say that he saw in the shipping department pieces of goods on tables.

Q. Well, he said his open stock was kept on tables; I think that is what he said, wasn't it? A. That is not my recollection.

Q. And he described some under the tables and some on the tables? A. Yes, but I understood him to say that he was in the shipping department.

20 Q. Well, as a matter of fact, he said that the place that was built to keep the open stock was ready in the Fall of 1925, didn't he? A. Yes, sir.

Q. And you say that it was built and ready in March, 1925? A. Yes, sir.

Q. In other words, either he is wrong or you are wrong? A. Yes.

30 Mr. McGlynn: I object, if your Honor please. One witness can't be asked to characterize the testimony of another witness. It is a question of argument by counsel before the jury.

Mr. Single: Well, he said, "Yes."

Q. And you saw the stuff in bins and not on tables? A. I saw them in bins in the open stock room and I saw them on tables in the shipping department.

40 Q. Well, the ones in the shipping department were lots being assembled; that wasn't open stock,

Jacob W. Schwab—Cross.

was it? A. It may have been there for shipment.

Q. Well, that is what I say. They were just lots coming off? A. They might have come out of the open stock room.

Q. Well, the shipping department—you don't suggest that that was the storage place? A. No, sir.

Q. That was just the shipping department. Now, you say this place was built, where the goods were, was built between your first visit and your second visit? A. That is correct.

Q. In other words, that was built sometime between December, 1925, and March, 1925? I mean, that is a fact? A. Well, my recollection isn't clear on the second visit, the date of the second visit.

Q. Well, perhaps if I just read to you your testimony prior, it will help you out, Mr. Schwab. You were asked at page 141 of the first trial, "Well, now, as nearly as you can remember, when was that, Mr. Schwab? A. I would say in the early Spring of 1925.

"Q. The early Spring of 1925? A. Yes, sir."

And you were asked in the second trial, page 189:

"Q. Do you remember when your first visit was out there? A. Before we started to do work with them.

"Q. You mean the latter part of 1924? A. Yes.

"Q. Yes? A. Yes.

"Q. How do you fix—about what time do you fix the occasion of your second visit? About when? A. Possibly in March, 1925."

That is your recollection, isn't it? A. That is right.

Q. Did you have anything to do with insurance? A. None whatsoever.

Jacob W. Schwab—Cross.

Q. Who had to do with that in your organization? A. Mr. Dorman.

Q. Do you remember when you gave up your Bush Terminal? A. No, sir.

10 Q. Do I understand—well, just can you fix the time for me when you had this conversation with Mr. Arnold about keeping open stock? When did he first tell you about his lack of space and have that conversation with you? A. I believe it was in the early part of 1925.

Q. Was that at his plant or was that in your office? A. That was in our office.

Q. That was in your office. February, 1925, I think was the date you testified before; is that right? A. Yes, sir.

20 Q. Now, Mr. Schwab, were you ever at 207 Paterson Street after the fire? A. No, sir.

Q. Do you recall having had lunch at Louis Restaurant? A. Yes, sir.

Q. And who was with you at that time? A. Both Mr. Arnold, Senior, and Mr. Arnold, Junior, and Mr. Goldberger.

Q. You don't know where Louis Restaurant is with reference to 207 Paterson Street? A. No, sir.

30 Q. And, as I understand it, you take the same position Mr. Goldberger did, that Mr. Goldberger did not point out 207 Paterson Street to you? A. Yes, sir.

Mr. Single: That is all, thank you.

Louis Sollfrey—Direct.

LOUIS SOLLFREY, sworn.

Direct-examination by Mr. McGlynn:

Q. Were you employed by Cohn-Hall-Marx in the Fall of 1924 and the year of 1925? A. Yes.

Q. What was your position? A. As assistant to Mr. Goldberger.

10

Q. And just what did that make your duties around there? A. My duties were to take care of having merchandise shipped out on time and shipped properly, to take care of the shipment of merchandise.

Q. From where? A. From all the plants with whom we did business.

Q. And were you ever out to the Hazel Street plant of the Consolidated Piece Dye Works? A. Yes, I was out there two or three times.

20

Q. And were you ever at 205-207 Paterson Street, Paterson? A. I was never at any other place in Paterson except the Hazel Street plant.

Q. Were you ever told by anybody while you were in Paterson on any of your visiting that any of your firm's merchandise was at any other location than the Hazel Street plant? A. No, sir.

Q. Who in your company would have charge of young men or boys who might have been sent out here to Paterson to assist in shipping merchandise? A. I would have.

30

Q. And did you have occasion to send out some men on some occasions? A. I sent out—in fact, I took out men on either two or three occasions.

Q. Do you recall that you ever sent any men out when you were not with them yourself? A. No one ever went out there unless I was with them to make shipments of any merchandise.

40

Q. What was the purpose of your sending out

Louis Sollfrey—Direct.

these men? A. We had a very big demand for this merchandise and shipments were not being made quickly enough and we went out to help them make these shipments.

Q. Well, now, when you came out to help them where did you go? A. We went to Hazel Street.

10 Q. Suppose you look at this sketch marked D-2 for identification and tell us what is your recollection of the plant up there. The bottom is supposed to be Hazel Street. Where did you go in the plant when you went there? A. Here you walk up steps into the office.

Q. Wait a minute. You point to the bottom of the picture, of the sketch? A. Yes.

Q. On Hazel Street, and say that is where the office was? A. That is correct.

20 Q. You went upstairs? A. Went up two or three steps into the office.

Q. From the street, you mean? A. From the street, yes.

Q. What way next? A. Then you walk into a large finishing room in which there were tables, from which goods were shipped after having been put up and prepared in order to—preparatory for shipment. They were taken from there into a little room which had been put up, as I was told, especially for that purpose.

30 Q. Who told you? A. Ivan Arnold—to store Cohn-Hall-Marx's merchandise.

Q. This room that you speak of is the room shown on this little sketch with the word "Storage" on it? A. That is correct.

Q. Was there an opening from this putting-up room into the storage room? A. I remember walking right from this room into a room going to the storage room.

40

Louis Sollfrey—Direct.

Q. Was that storage room always there when you were there? A. The first time I went out it was there, and the last time I went out it wasn't there; I mean, when I went out sometime in 1926 after the fire.

Q. After the fire? A. Yes.

Q. You say it wasn't there then? A. It wasn't there then, and they had told me that it had been taken down since. 10

Q. When you say they, who do you mean? A. The Arnolds, Ivan Arnold.

Q. Now, in this little room that you say you got into from a door off this putting-up room— A. Yes.

Q. —what was in that room? A. Pieces of goods of Cohn-Hall-Marx. There must have been a big stock of Cohn-Hall-Marx's goods. 20

Q. How were they arranged? What were they on? A. They were in cases with the sides knocked out, in order to make bins out of them. You can't forget them—I almost broke my neck falling out of one one day.

Q. They were what you would call bins? A. They were what we would call bins.

Q. When you went out there to the Hazel Street plant with these young men, the boys of yours, to help with the shipping, who built the packing cases to put the stuff in? A. The cases were put up—these were veneer cases and they had some boys there nailing them together; that is, they could take the sides and fasten them together and the case is built up. 30

Q. You set the pieces of wood up and just nail them together? A. The sides of the cases.

Q. These cases would be there when you got there ready to put the stuff in? A. No—some of 40

Louis Sollfrey—Direct.

them were there and others were being put up by some boys that they had there to take care of the goods we were getting ready to ship.

Q. And these cases, when you did go out to Hazel Street with these young men to help ship, where did you work? A. In the room which was
10 marked "Storage".

Q. What would your young men do when they went in that room? A. Go into the room and pull out the pieces from these bins, and just take those pieces out that is specified on orders, for shipment.

Q. How big were the cases? A. Why cases containing two or three thousand yards of goods.

Q. Have you any idea as to the weight of those cases when filled? A. They must weigh around
20 350 to 450 pounds.

Q. You mean the larger ones? A. According to the size of the case, yes.

Q. Did you ever see this man who was on the stand this morning, the shipping clerk? A. I saw him two or three times in the court room here before, but never out there.

Q. You never saw him out there? A. I never saw him at the plant. Mr. Ivan Arnold always took care of us when we went out to help ship the
30 goods.

Q. Do you have any knowledge at all of any employee of your company's at any time being at 205-207 Paterson Street? A. No, sir.

Q. Did you send out a man by the name of Link to this plant? A. I didn't send anybody out there except the boys that I took out there.

Q. Did you send anybody out to show them how to put these pieces of wood together to make the case? A. No, I didn't do any such thing.
40

Louis Sollfrey—Direct.

Q. Did you ever go out there to make an inventory? A. No.

Q. Did you have anything to do in your position with reference to an inventory made up by the firm once or twice a year? A. Yes.

Q. What would you do? A. We would write to the different plants with whom we did business and ask them to take the inventory for us so that we could compare it with our records. 10

Q. Is there any record that you know of kept by your company which showed the location of any of their merchandise at Paterson Street and not at Hazel Street? A. Absolutely not.

Q. Were you at Paterson Street after the fire? A. No.

Q. Was there anybody else's goods in this little room that you call a storage room except Cohn-Hall-Marx's? A. No, sir, there were nobody else's goods in that room. 20

Q. What is your recollection about the first time you came to Paterson? Any idea when the first time was you came out here? A. It must have been in February or March when the first real shipments—when the first real merchandise was being produced.

Q. And was this room that you describe erected then, as far as you know? A. It was there when I went out, as they had told me it had just been put up within a short time. 30

Mr. McGlynn: I think that is all.

Cross-examination by Mr. Single:

Q. I am afraid I don't understand, Mr. Sollfrey, what you would do about taking inventories. 40

Louis Sollfrey—Cross.

What was the situation with regard to inventories?

A. We would write to the different plants with whom we had done business or who kept goods of ours, and ask them to give us a report as to what merchandise they had belonging to us.

10 Q. I see. You did not personally take inventories? A. No, we would not take our own inventory.

Q. Yes. And your inventories were always taken, then, just from what the plant wrote you?

A. We would make comparisons—

Q. Of course— A. We would make comparisons of their records with ours.

Q. Of course, Mr. Sollfrey, you never took an inventory of any of your goods at the Consolidated? A. No.

20 Q. You are quite positive of that? A. Not a physical inventory. We took—

Q. I mean a physical inventory. A. No.

Q. You will swear to that now? A. As far as I remember.

Q. Well, now, I don't want you to do that. I want you to remember and then swear. A. I don't remember ever having taken any inventory at Consolidated.

30 Q. You will swear that you did not, let us leave it that way. A. I say, I don't remember ever having taken an inventory.

Q. Wouldn't you remember such a thing? A. Not likely to.

Q. If you came to the Consolidated to take an inventory you wouldn't remember that? A. I don't think so.

40 Q. You mean you don't think you would remember it? A. I don't think I would remember that, no.

Louis Sollfrey—Cross.

Q. You don't think you would remember that?
A. No.

Q. So you might very well have taken an inventory and not remember it? A. It is barely possible. We took our inventories at the end of December and the end of July, so there is very little likelihood that I would have taken an inventory in March. 10

Q. I see. Now let me ask you something about your recollection about your visits. How many times do you think? A. Two or three.

Q. Two or three? A. Yes.

Q. Can you fix the time of those? A. Around February or March.

Q. And, as I understand it, you went out there and you found a building in which there was nothing but Cohn-Hall-Marx's goods? A. Nothing but Cohn-Hall-Marx's goods and cases in which to put these goods, or pieces of cases. 20

Q. They were not on tables? A. They were not on tables.

Q. They were not spread out for open stock? A. No, sir, not in this room.

Q. And you brought four or five boys along solely for the purpose of making shipments? A. Exactly. 30

Q. You didn't bring them along to make inventories? A. No.

Q. And you didn't make any? A. Not that I recall.

Q. Well, let me just ask you, what would your recollection be in April, 1927, in your testimony at the first trial? Did you have a very good recollection of things then? A. It was three years ago; I might remember some of the things. 40

Louis Sollfrey—Cross.

10 Q. Well, now, let me just read you some. I am reading from pages 86 and 87. You were asked this question: "Q. Do you know anything about the subject that was told of on Mr. Goldberger's cross-examination as to the removal of the stock by Mr. Arnold," and your answer was, "Yes, sir, Mr. Arnold came to us and told us he had no place for open stock and we told Mr. Arnold at that time that it would be very difficult for us to do business with him unless he could find such a place. Mr. Arnold went back to his plant and looked over the store rooms and found such a space right next door to his plant, joining his plant, which he told us would be available for our open stock. I have been out to his plant—in fact, we have shipped orders"—

20 "Q. When did he build that? A. He built that when this matter was taken up, and I would say it was the early part of 1925. This place has since been torn down, I understand.

"Q. Do you know that is where the Cohn-Hall-Marx goods were stored? A. I know that because I worked right in that room and shipped out goods from that room.

30 "Q. Cohn-Hall-Marx's goods? A. Cohn-Hall-Marx's goods.. In fact, I can expand upon that and say that we took inventories in that plant with the Arnolds, and that was the only plant where we took these inventories."

Now, is that a fact? A. If it is written there it must be a fact.

Q. I mean, you did testify to that? A. Well, certainly.

40 Q. Does that refresh your recollection that you took inventories? A. I don't remember it right now.

Louis Sollfrey—Cross.

Q. You did testify that you took inventories, didn't you? A. It must be so if you have it written there.

Q. Oh, well, but you have no recollection as to that? A. I can't remember now ever having taken inventories.

Q. I see. But you testified, you swore to that prior, that you took inventories at their plant? A. Presumably so, if you have it there. 10

Q. As a matter of fact, you had—what was the total yardage you had at various times from the time you started to do business until the fire? A. I can't recall that.

Q. Well, you can give us an approximate idea; that was your business. A. We may have had 100,000 yards, we may have had 200,000 yards at different times. It is according to the pressure of business at the time. 20

Q. Now, when you take inventories what do you do? What kind of a record do you keep? A. Keep a record of what the bleacheries have of our merchandise, the quantity.

Q. Have you got such a record? A. Do we have such a record?

Q. Yes. A. Certainly.

Q. Did you have such a record? A. We must have some record. 30

Q. You knew from your records what every piece of goods was you had at Arnolds', didn't you? A. That is correct.

Q. And you knew that at all times, you checked it back against your shipments, didn't you? A. That is right.

Q. And you had shipments from open stock from February at least until the fire, that is, the next January? A. That is correct. 40

Louis Sollfrey—Cross.

Q. And, as a matter of fact, in January you had some 150,000 yards, didn't you? A. Yes, I think we had more than that. We had considerably—

Q. And that was at 207 Paterson Street, wasn't it? A. It seems it was—we had more than that. We had considerably more than that. There was
10 some more shipped from the Arnold plant after that.

Q. Well, at least there were several—well, between 100,000 and 200,000 yards at Paterson Street? You saw that yourself? A. I heard since that there were.

Q. You didn't go to Paterson Street after the fire? A. I have never been there.

Mr. McGlynn: Nor before the fire, either.

20 Q. Well, I only asked you after the fire. You knew with regard to this five-cent charge, didn't you? A. Yes.

Q. Do you know when that started? A. As far as I remember, it started just as soon as we had our first large production, which compelled them to make this storage room next door in order to keep our merchandise.

30 Mr. Single: That is all.

Mr. McGlynn: I would like to offer this sketch in evidence.

(Paper previously marked D-2 for identification now becomes Exhibit D-2 in evidence.)

40 Mr. McGlynn: By stipulation, if the Court please, in May we took the testimony of Mr. McCoomb in New York, and there are some portions

Testimony of Mr. McCoomb.

of it that I would like to offer in my case, especially the cross-examination, I mean.

The Court: Took whose testimony?

Mr. McGlynn: Mr. McCoomb. His testimony has never been in the trials. He is the man that was manager of this Marine Office, and I think he was going to Europe and we took his testimony by stipulation, and the signature is waived. Now, it seems to me that I am entitled to the benefit of that testimony on my case, because, frankly, I think it is of some benefit to me. 10

The Court: Is there any objection to it?

Mr. Single: Oh, no, certainly not.

The Court: Perfectly all right?

Mr. Single: Surely.

The Court: From direct and cross-examination? 20

Mr. McGlynn: I am not interested in the direct.

Mr. Single: I don't think he can pick out pieces. If he just would show me what he wanted I would probably be willing to stipulate it.

Mr. McGlynn: I will show it to you. I have it all marked for you.

(To the jury) I have here questions and answers that Mr. Single has agreed that I can read into the record. Deposition taken of Mr. Samuel D. McCoomb, who, I believe it is admitted, was the manager of the Marine Office. 30

Mr. Single: That is right.

Mr. McGlynn: Instead of reading the whole book I am just going to read three questions and answers, to help try to get through.

"Q. Now, you say that in these conferences with Mr. Marx he stated that he was very much surprised to find that these goods of his company were not at the plant of the Consolidated, but were located 40

Testimony of Mr. McCoomb.

in this hazardous building that you have described; is that correct? A. Yes."

The next question, "Do you recall in those conferences or at one of them making a statement that because of the fact that Eckert and Company were quite a substantial customer of your office and that
 10 Cohn-Hall-Marx was rather a heavy insurer, that you were inclined to offer this solution of the difficulty? A. Well, you don't offer this solution to anybody except people whom you see are thoroughly all right and doing a good volume of business with you.

"Q. I am assuming that Cohn-Hall-Marx was willing to pay the additional rate for any additional risk. A. When any particular case like that
 20 came up it would have been the subject for some sort of an adjustment, and we probably would have worked out some solution.

"Q. So that you mean you would have covered the location upon payment of the additional premium; isn't that so? A. I don't know, and I mean circumstances would have—you are not always sure just what you will do.

"Q. Isn't that what you did hereafter? You accepted the additional premium—isn't that what
 30 you practically did afterwards? A. That would be so."

Mr. Single: Just so that the matter will be clear, I will read from the examination:

"Was there a claim presented to you under this policy for a loss by Cohn-Hall-Marx Company? Did Cohn-Hall-Marx present a claim to you? A. They sent several claims into the office. In connection especially with the claim of the Consolidated Piece Dye Works there was a loss. This particular loss was not of the Consolidated Piece Dye
 40

Testimony of Mr. McCoomb.

Works, I was satisfied, on goods for which the Consolidated Piece Dye Works were responsible.

“Just tell us about that claim and what took place that you recall. A. Well, when we first heard of the claim Mr. Jones arranged for Captain Browning to go out there and make an investigation and make a survey of the damaged goods. When he got back he came in at once and he said they were not the Consolidated Piece Dye Works, the loss was not at the Consolidated Piece Dye Works, but in some wooden building, I think they used as a garage downstairs, and that these goods were stored upstairs, and when we made an examination of the policy we found that it was at a place which our policy did not cover. Then that resulted in the insurance brokers calling a meeting in the broker’s office, John A. Eckert and Company, on the corner of John and Gold Streets, and we had a meeting in their office. Mr. Eckert was there, and Mr. Marx of Cohn-Hall-Marx, and Mr. Trask, of Mr. Eckert’s office, and I think Mr. Jones, Mr. Browning and I called from our office. 10

“Then what took place at that meeting? A. Well, Mr. Browning told us where he had found the fire had taken place, and Mr. Jones explained to them that they had no coverage in there in the location that burnt—I don’t know the number—and Mr. Marx said that he was an innocent assured, that the goods were there without his knowledge and he thought the goods were up in the sprinkler place, and the story we got was that these were supposed to be in the sprinkler place, but his production was going along so fast that Marx wasn’t able to take his goods as fast as they furnished them and these people had put them in this place 30 40

T. Ivan Arnold—Recalled—Direct.

temporarily, because goods were finished faster than Marx would take them, something of that nature.

10 “Just what else did Mr. Marx say with regard to his knowledge of the situation? A. Of course, he was greatly surprised to find he had any goods in that location.

“What did he say to you?

20 “He wanted to know if there was some way that we could help, and then we discussed—we told him very frankly that his recourse was against the Consolidated Piece Dye Works people and that if they had taken his goods that had been in the sprinkler warehouse and put them in the second floor of a warehouse with gasoline and oil down below, then we thought he had a perfectly good right of recovery against the Consolidated Piece Dye Works.”

T. IVAN ARNOLD, recalled.

Direct-examination by Mr. McGlynn:

30 Q. Mr. Arnold, I show you an application to the department of buildings at Paterson, dated March 24, 1925, and ask you if that is your signature on the last page, T. Ivan Arnold (handing a paper to the witness). A. Yes.

Q. Pres. Consolidated Piece Dye Works? A. That is right.

Mr. McGlynn: I will offer it.

(Paper marked Exhibit D-3 in evidence.)

Mr. McGlynn: That is all.

40 May I call the jury's attention to one thing so they won't have to read the whole

T. Ivan Arnold—Rebuttal—Direct.

thing? This is an application for a permit, location Hazel Street. Question No. 8 is the one I am particularly interested in. Purpose of building, warehouse class, storage.

The Witness: One of them is drying.

Mr. McGlynn: The first one is the only one I care about. 10

The Witness: One is storage and one is drying. I can't make out the middle one, either.

Mr. McGlynn: I rest.

The Defendant Rested.

 PLAINTIFF'S TESTIMONY IN REBUTTAL.

20

T. IVAN ARNOLD, recalled.

Direct-examination by Mr. Single:

Q. You were asked this morning to turn up some letters signed by Mr. Link. A. Yes.

Q. Did you turn up a few for me, or for my friend? A. Yes.

Q. Are those the letters? A. That is right. 30

Mr. Single: I offer these in evidence.

Mr. McGlynn: No objection.

Mr. Single: You have seen these letters?

Mr. McGlynn: I have, sir.

(Papers marked Exhibits P-11, P-12, and P-13, respectively, in evidence.)

Q. Have you got the plan? A. Yes.

40

T. Ivan Arnold—Rebuttal—Direct.

Mr. McGlynn: The plan of what?

The Witness: Hazel Street and Montclair Avenue.

Q. Is this the plan of your plant, Mr. Arnold?

A. Yes.

10 Q. Now, I want you— A. Up to date.

Q. —just to tell me when these various buildings were built, if you will. Well, say between December; were any changes made in the plan between December, 1924, and the middle of January, 1926? A. This part over here.

Mr. McGlynn: Hold it up for the jury to see.

20 A. This part here was all there, and this little piece in here, too. It was all there when we bought the plant in February, 1924. This part here, here, and this little piece are brick buildings; this is an old frame, an old wooden building. This piece here—no, that is the print room built between December, 1924, and June, 1925. In other words, in the Spring of 1924. This building here, another frame building, was built between September, 1925, and—
30—in other words, in the Fall of 1925. That is the building that that refers to.

Q. When was that building actually put up? A. September, 1925, to January, 1926; that is the latter half of 1925, you might as well say, or the Fall of 1925.

Q. Was there ever any open stock of Cohn-Hall-Marx in that building? A. No, no.

Q. Was there any open stock in any of those buildings in March, 1925? A. No.

40 Mr. Single: I offer it in evidence.

T. Ivan Arnold—Rebuttal—Cross.

Mr. McGlynn: Oh, yes, surely.

(Paper marked Exhibit P-14 in evidence.)

Cross-examination by Mr. McGlynn:

Q. I show you attached to the application for a building permit a paper which starts off and says, "Certificate of occupancy." A. Yes? 10

Q. Dated March 27, 1925. A. What does all that mean?

Q. To me it means that the building department issued a certificate of occupancy for a building which you were to erect under that application. Now, what occasion was there for the building department to issue to you a certificate of occupancy on March 27, if it had been built in September? 20
A. Just a minute. This is the one that I just referred to as the print room.

Q. Well, were there two buildings? A. Yes, sir, one put up in the Spring and one in the Fall of 1925.

Q. It was put up in 1925? A. They were both put up in 1925; this one in the Spring and this in the Fall. I didn't read all of this here. I see I took too much for granted, but I see there the names of the builder and so forth and so on, that it is this building here. 30

Q. Then, there was a building built in the Spring of 1925? A. Yes, sir. I just told you that, the one I referred to as what we call our print room.

Q. What is that little doo-dab down in red? What is that? A. That is the one I just said was the old woodshed.

Q. Was that—does that red mark mean a pass- 40
away from the office building building? A. Yes,

T. Ivan Arnold—Rebuttal—Cross.

here in this brick building at that time was our shipping department and there was a passageway; the whole thing would be the shipping room.

Q. And there was a door which led from this room into the shipping department? A. Yes.

10 Q. Is that right? A. Yes. I couldn't be sure whether there was a door hung here.

Q. Where? A. There was a door here at the end.

Q. And you had to tear it down? A. This one here.

Q. The insurance people made you tear it down, didn't they? A. Well, yes.

Q. That it was a little risky? A. They requested it very strenuously.

20 Mr. McGlynn: That is all.

By Mr. Single:

Q. That was a frame building, was it? A. An old frame building.

Q. Did you ever build a building to store open stock of Cohn-Hall-Marx in? A. Oh, no.

30 Q. Was this print room connected with the main plant when it was first built? A. Not when it was built. The other building, the second building, that was put up there, makes the connection. It is all connected through now.

Q. I want you to mark with an X the print room, so there will be no question about which room it was. A. That was this one here (indicating). That is the one which is marked 2-A here, and I put down at the bottom 2-A print room.

Mr. McGlynn: Anything else, Mr. Single?

Mr. Single: That is all.

*Motion for Direction of Verdict.**By Mr. McGlynn:*

Q. Mr. Arnold, just look at my sketch marked D-2; at the bottom here designates Hazel Street?

A. That is right.

Q. And I assume this building I am pointing at here is the same as this you have here? A. That is right.

10

Q. Then, the one to the right of it is the same general location as the one you have described with the red? A. That is right. This plan here is to scale. Yours isn't quite to scale. That is about the only difference.

Mr. Single: Put them both in.

Mr. McGlynn: We rest.

Both Sides Rested.

20

MOTION FOR DIRECTION OF VERDICT.

Mr. McGlynn: For the purpose of the record, may I move for a direction of a verdict on the same grounds as stated on my motion for a non-suit?

The Court: Yes, and I will deny the motion and allow you an exception.

30

(Counsel for the respective parties summed up the case to the jury.)

40

Charge of the Court.

(The Court charged the jury as follows:)

COURT'S CHARGE TO THE JURY.

MACKAY, J.

Members of the Jury:

10 This is an action brought by the Fidelity Phoenix Fire Insurance Company, as plaintiff, against the Cohn-Hall-Marx Company, as defendant.

The plaintiff claims that the defendant is, first, a corporation of the State of New Jersey engaged in the manufacture of cotton fabrics;

20 Second, that on July 29, 1925, the plaintiff issued to the defendant an open policy of insurance for \$150,000, insuring it against the loss or damage to the cotton fabrics while the goods were located or stored in certain locations enumerated in a rider attached to the policy;

Third, that the plaintiff specifically and expressly warranted that its liability should be limited to loss and damage as therein stated to the goods while located or stored in the said enumerated locations;

30 Fourth, that therefore and under the provisions of the open policy the defendant reported to the plaintiff that it had caused to be delivered to the Consolidated Piece Dye Works, of Paterson, New Jersey, a large quantity of cotton fabrics of the reasonable value of \$49,454.45 for the purpose of having certain printing or other work done thereon at the enumerated locations;

40 Fifth, that the defendant reported that the said cotton fabrics, while in the custody of the Consolidated Piece Dye Works, had been damaged or partially damaged by a fire on January 13, 1926, while stored by the Consolidated Piece Dye Works in its warehouse which was not one of the aforesaid lo-

Charge of the Court.

cations enumerated in the said rider attached to the policy, and that the defendant submitted documents purporting to be proofs of said loss and damage to the cotton fabrics, in the sum of \$35,923.53.

Now, up to that point, concerning these five allegations in the complaint, there seems to be no dispute between the parties to this action, because the answer of the defendant admits these five allegations, and you have heard during the trial of the case, as I recall it, that there has been no dispute respecting them. So that these five allegations as set forth by the plaintiff are admitted by the defendant. 10

The sixth paragraph of the complaint of the plaintiff reads as follows: "The plaintiff then alleges that at the time of the reporting of the loss and damage to the cotton fabrics and the submission of the alleged proof of loss, the defendant made certain false and fraudulent statements, knowing the same to be false and fraudulent and with the intent to deceive the plaintiff and to induce it to pay the loss not covered by the policy, which statement was to the effect that the Consolidated Piece Dye Works, without the knowledge and consent of this defendant and in breach of its contract with this defendant, had stored its said cotton fabrics in one of its warehouses, which was a location not enumerated in the riders, and the defendant agreed that it would bring an action in its name for the benefit of the plaintiff against the Consolidated Piece Dye Works, and would repay the said sum so paid to it from the proceeds of said action." 20 30

The seventh paragraph: "The plaintiff further alleges that it relied on the alleged false and fraudulent statement and also upon the agreement of 40

Charge of the Court.

the defendant to bring an action against the Consolidated Piece Dye Works for the breach of its contract for the care and custody of the cotton fabrics, and that on March 24, 1926, and on May 1, 1926, paid sums aggregating \$35,923.53, although it claims it was not and knew it was not liable for the said loss under the said policy."

10

The eighth charge or paragraph in the plaintiff's complaint is that, "The plaintiff alleges that on April 20, 1927, it discovered that the statements and agreements made to the plaintiff to induce it to make the payments to the defendant were in all respects false and untrue, particularly in that the defendant, contrary to its representations to the plaintiff, well knew that the cotton fabrics had been stored in a warehouse other than that enumerated in the policy and the riders; and, further, that the defendant had given its consent to the storage of the cotton fabrics at the warehouse which was not enumerated in the policy and rider attached thereto."

20

Now, these paragraphs that I have read, the sixth, seventh, and eighth, are specifically denied by the defendant in this case. As I told you, the first five paragraphs are admitted, but the sixth
30 seventh, and eighth are specifically denied. In fact, there have been witnesses produced by the plaintiff to prove that the defendant knew of the storing of the cotton fabrics at the Paterson Street loft prior to the time of the fire, and there have been several witnesses produced by the defendant denying that they knew about the Paterson Street
40 loft, and stating that they not only never authorized it, but also that no one in their employ had any knowledge of it or any authority in connection with it.

Charge of the Court.

Now, the plaintiff alleges in the ninth paragraph of the complaint that, "Upon the discovery of the falsity of the defendant's statements, demand was made upon the defendant to repay the sum of \$35,923.63, which has not been paid."

Now, as I said to you before, the first five paragraphs of the complaint are admitted; the sixth, seventh, and eighth, and the ninth, too, are denied. These denials were made, in the first instance, by the filing of the defendant's answer in the case, in which the defendant claims that no fraudulent statements were made and that the money paid to the defendant, as alleged by the plaintiff, was paid, first, with the understanding that it was a loan and that it was to be paid back only if the defendant was successful in its suit against the Consolidated Piece Dye Works, and not otherwise; and, second, that the alleged fraudulent statements, as I said to you before, were never made. 10 20

The defendant further contends that the plaintiff—that is, in the answer filed by the defendant—and the defendant has so contended at this trial and still contends, that the plaintiff in paying over this \$35,923.53 to the defendant, accepted a premium of \$850.53, and that by doing this the insurance policy, which is the subject-matter of this suit, became retroactive so as to be in full force and effect at the Paterson Street location from August 1, 1925, to August 1, 1926, which was the date the policy, the original policy had to run, and that therefore there was a liability in effect at the time of the fire, January 13, 1926. 30

Now, as to that defense relative to the payment of the premium, evidenced by that paper which is marked in evidence, I think, P-1A, I charge you that paper standing alone is not sufficient, because 40

Charge of the Court.

10 it is admitted that the premium was paid before the discovery of the alleged fraud set forth in the plaintiff's complaint; and, further, that its performance of the contract amounts to a waiver of fraud only when they are done with full knowledge of the fraud and all material facts, and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception, that is, if there was a deception in this case; that as a matter of law, acts which, although in performance of the contract, do not indicate any intention to waive the fraud, cannot be held to operate as a waiver, nor can these acts performed in ignorance of the fact be so held.

20 Now, let me say at this point that you are to decide the facts in this case, because, as you know, there is a dispute. You know that the plaintiff's witnesses have testified to one thing in support of the plaintiff's claim, and the defendant's witnesses have testified to the contrary, saying something different. So you must decide in this case who is telling the truth. You have the right to believe the testimony of a witness or witnesses in whole or in part, and you may disbelieve the evidence of any witness or witnesses in whole or in part, if
30 you believe the witness or witnesses is or are not telling the truth. In other words, you are the sole judges of all of the facts in this case.

40 Now, I charge you, as a matter of law, that the burden of proof in this case is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the defendant made the representations to the plaintiff, which the plaintiff claims were made and which I read to you from those paragraphs, meaning that the plaintiff should act upon them; second, that such representations were

Charge of the Court.

false and that the defendant when it made them knew them to be false; and, third, that the plaintiff, believing the said representations to be true, acted upon them and was thereby injured. That is the burden of proof that is upon the plaintiff in this case to satisfy you of by a fair preponderance of the testimony.

10

Let me give it to you again. The burden upon the plaintiff by the fair preponderance of the testimony is to prove, first, that the defendant made the representations to the plaintiff meaning that it should act upon them; second, that such representations were false and that the defendant when it made them knew them to be false; and third, that the plaintiff, believing the said representations to be true, acted upon them and was thereby injured.

If you find on that question of the burden of proof by the fair preponderance of the testimony, that the testimony is evenly balanced or that it preponderates in favor of the defendant, your verdict must be in favor of the defendant and against the plaintiff, no cause for action.

20

I might say to you at this time that the burden of proof by the fair preponderance of the testimony, which the plaintiff must bear, means by the greater and weightier evidence; it means by the more convincing testimony.

30

Now, let me say this to you: If you find as a fact from the weight of the evidence that Mr. McCoomb was representing the plaintiff as its authorized agent at the time of the first conference or the second conference or the third—whichever it was you will remember—and that he was the man who was acting in behalf of the plaintiffs in this case, and on behalf of and acting for the plaintiff, he agreed that the claim was questionable and that

40

Charge of the Court.

as a matter of business policy it should be paid as a loss, and that to put this agreement into effect the moneys were paid and a premium charged upon the understanding that the goods of the defendant at 207 Paterson Street were covered by this policy at the time of the fire, and that that was the entire agreement and understanding of the parties, and that the matter of bringing the action against the Consolidated Piece Dye Works was a secondary consideration or something that had to be done by the plaintiff solely in an endeavor to reimburse itself for the loss, then, of course, your verdict must be for the defendant and against the plaintiff, no cause of action.

If you find from all of the evidence in this case that the representation made to the plaintiff by the defendant as to its lack of knowledge of the storage of its goods at the place where they were destroyed concerned a material fact and that such representation induced the plaintiff to pay to the defendant its fire loss and that such representation was made falsely, then, of course, your verdict would be for the plaintiff.

And if you find from all of the evidence that the defendant company made a misrepresentation of a material fact to the plaintiff, knowing it to be false, and that the plaintiff was thereby induced to pay the defendant its loss, then your verdict would be for the plaintiff.

Let me charge you further: The defendant in this case, in its answer, has especially pleaded a separate defense that any money paid by the plaintiff insurance company to the defendant as a result of the fire in question was paid because of the fact that at the time of the payment plaintiff insurance company was legally bound to make

Charge of the Court.

such payment. It is alleged, and the defendant has attempted to prove, that the fire insurance policy issued by the plaintiff was modified, changed, amended, or altered by a rider or endorsement and by the payment of an additional premium thereon, so that the property of the defendant located at 205-207 Paterson Street, Paterson, New Jersey, was covered by the insurance policy in question from August 1, 1925, to August 1, 1926. 10

If you find as a fact that there was at the time of the payment of the loss a valid and existing contract of insurance between the plaintiff and the defendant, under the terms of which the plaintiff insured the defendant's goods at 205-207 Paterson Street, Paterson, and the payment of the fire loss was pursuant to and by virtue of that contract of insurance and not because of any representations made by the defendant to the plaintiff, then, in that event, your verdict should be for the defendant. 20

In this case, as I told you before, the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the defendant made certain false and fraudulent statements, meaning that the plaintiff should act upon them, knowing the same to be false and fraudulent when it made them, and with intent to deceive the plaintiff and to induce it to pay the loss not covered by the policy of insurance, and that the plaintiff, believing said representations to be true, acted upon them and was injured. 30

If you find that the plaintiff has failed to sustain any of the above described allegations by a fair preponderance of the testimony or that the evidence is evenly balanced or preponderates in 40

Charge of the Court.

favor of the defendant, then your verdict must be in favor of the defendant.

10 Plaintiff's allegations in its complaint, which it has attempted to prove at the trial, are that the figures and fraudulent statements alleged to have been made by the defendant to the plaintiff, were to the effect that the Consolidated Piece Dye Works, without the knowledge and consent of the defendant, had stored the fabrics in question in one of the warehouses of the Consolidated Piece Dye Works, which was a location not covered by the insurance policy, and that the defendant agreed that it would bring an action in its name for the benefit of the plaintiff against the Consolidated Piece Dye Works and would repay the money paid to it by the plaintiff from the proceeds of said action.

20 If you find that the plaintiff has failed to sustain these allegations by the fair preponderance of the testimony, your verdict should be for the defendant.

30 If you find as a fact that the defendant paid the plaintiff insurance company additional premium so that the policy of fire insurance by such payment covered the goods in question at the Paterson Street location, and that the plaintiff accepted the payment of the additional premium because of the representations made to it by the defendant, and that the defendant had no knowledge of the fact that its merchandise was stored by the Consolidated Piece Dye Works at the Paterson Street location, but that the plaintiff insurance company paid the amount of the loss either because of the fact that its policy of insurance had been changed so as to insure the defendant's goods at the Paterson Street location, or because the plaintiff

40

Charge of the Court.

thought that the defendant had a good cause of action against the Consolidated Piece Dye Works, either for a breach of contract or because the Consolidated Piece Dye Works stored the defendant's property at a location other than one which had been agreed upon between the parties, then your verdict should be for the defendant.

10

In order to find a verdict in this case in favor of the plaintiff you must find by a fair preponderance of the testimony that when the plaintiff paid the defendant the sum of \$35,923.53, representing the loss occasioned by the fire which occurred on January 13, 1926, solely and exclusively because of the representations made by the defendant to the plaintiff, that the defendant did not know that this property was stored by the Consolidated Piece Dye Works at the Paterson Street location, and also that the defendant knew that the representations thus made were false when made, and also that the defendant made the representations to the plaintiff meaning that the plaintiff should act upon them, and also that the plaintiff, believing these representations to be true, acted upon them and was thereby injured.

20

Fraud is never presumed. It must always be proven. The burden of proof is always upon the party charging fraud.

30

Now, if you find from all of the evidence that is before you in this case that the plaintiff has sustained the burden of proof by the fair preponderance of the testimony, in the manner that I have indicated your verdict should be for the plaintiff and against the defendant in the sum of \$35,923.53, with interest on \$21,000 from March 24, 1926, and interest on \$14,923.53 from May 1, 1926, less the sum of \$850.53, which was Exhibit P-1A, and less

40

Charge of the Court.

interest on that sum of \$850.53, which should be deducted.

10 If, on the other hand, you find that the plaintiff has not sustained the burden of proof by the fair preponderance of the testimony or that, as I said before, it is evenly balanced, your verdict must be in favor of the defendant and against the plaintiff, no cause of action.

Now, as I said before, you are the sole judges of all of the facts in this case. You determine who is telling the truth. It is your duty to find out where the truth lies. Both stories cannot be true; there is a conflict in the evidence.

20 Now, take the case, give it your very careful and thorough consideration and attention, and if you find for the plaintiff, as I said, your verdict must be \$35,923.53, with interest on \$21,000 from March 24, 1926, and interest on \$14,923.53 from May 1, 1926, less the deduction of \$850.53 and interest on that deduction.

Now, render a verdict that will do justice to the parties that are before you and that will square with the evidence as you have it.

Let the jury retire.

30 (The jury retired to consider of their verdict.)

 DEFENDANT'S EXCEPTIONS.

Mr. McGlynn: May I have an exception to the Court's refusal to charge requests number 8, 9, and 10?

40 And an exception to the Judge's charge on the question of the interest, where a charge of interest

Defendant's Exceptions.

should be paid from March 24 and one from May 1, 1926, because it is my contention that the interest, if any, should be calculated from the date when the money should have been returned, not when it was paid.

(No exceptions on behalf of the plaintiff.) 10

(The following proceedings were had in open court 6:40 o'clock P. M., in the presence of the Court, Mr. Comstock, and Mr. McGlynn:)

Mr. McGlynn: The facts in connection with the jury's first return of a verdict should be noted on the record.

The Court: Tell me what happened.

The Clerk of the Court: The jury returned into the court-room after they had knocked on the door and told the constable they had agreed upon a verdict. I ordered the jury returned to the court-room and I polled the jury and asked whether they had agreed upon a verdict—"Who shall say for you? Madam Forelady, how do you find?" 20

She says, "We find for the plaintiff," and I waited, expecting her to read off something in connection with that. There was silence, and then two or three members of the jury on my left, which I was unable to determine who they were, of course, said, "She couldn't remember the figures; she don't know the figures; there was a good many figures." Those were their words. I sent them back in their room— 30

The Court: And then sent for me?

The Clerk: Yes, sir, and I sent for you.

The Court: And I got here in response to your call. 40

Colloquy.

The Clerk: That was 5:40 they knocked on the door.

10 The Court: Just as the jury were retiring counsel for the plaintiff wanted to give the jury certain figures of what their verdict could be, and the counsel for the defendant thought perhaps it might influence the jury to send them in at that time, but both counsel—that is, counsel for the both sides—agreed that if there was a verdict for the plaintiff it could be molded by the Court.

20 Mr. McGlynn: Just to state my recollection of it, if your Honor please, my recollection was that we agreed if the jury asked for figures that the figures were to be submitted. I said if there was any mistake in the figure when the jury rendered a verdict it could be molded by the Court. They did not come in and say, "We find a verdict for the plaintiff for the full amount." There is some thought in my mind that perhaps the second knock on the door should be inquired into before anything was said to them about the amount of the figure, just to make sure.

The Court: Oh, yes, certainly, I will do that. They have knocked on the door.

30 Mr. Comstock: We have agreed that that is the figure.

The Court: Bring the jury in.

(The jury returned into the court-room.)

The Court: Have you agreed upon a verdict, members of the jury?

The forelady: In favor of the plaintiff.

The Court: Is that all?

A Juror: My name is Cook.

The Court: Do you speak for the jury?

40 Juror Cook: If they would like to have me.

The Court: Is that the wish of the jury? Stand

Colloquy.

up, those who are agreeable to having Mr. Cook speak for you.

(All twelve jurors arose.)

Juror Cook: We find for the plaintiff in the sum of \$35,923.53, with interest on \$21,000 since March 24, 1926, and on \$14,923.53 with interest since May 1, 1926, less \$850.63 with interest since May 1, 1926. If those figures, Judge, and dates are not quite right, why, they are subject to correction. 10

The Court: I see. All right. Just tell me whether that is your verdict. Is that the verdict of all of the jurors? Just raise your hands if that is the verdict of all of the jurors.

(All twelve jurors raised their hands.)

The Court: All right, take the verdict. Now, I understand it is agreed by counsel for the plaintiff and for the defendant that the correct figure under the jury's verdict is \$44,620.07; is that correct? 20

Mr. McGlynn: That is right.

Mr. Comstock: Yes, sir.

The Court: So I understand you find in favor of the plaintiff for the sum of \$44,620.07; is that correct?

The Jurors: Correct.

The Court: And so say you all. 30

You may now be excused from further service with the thanks of the Court. I appreciate your service very much, and I am sorry we had the little difficulty, but it is perfectly all right.

PLAINTIFF'S REQUESTS TO CHARGE.

"(1) The plaintiff was not obligated under its policy issued to the defendant to pay any money to the defendant for the loss sustained by reason of a fire at a location not enumerated in the policy, and if it paid the defendant for its loss, because of
10 the defendant company, then your verdict will be for the plaintiff.

"(2) If you find from all of the evidence that the representation made to the plaintiff by the defendant as to its lack of knowledge of the storage of its goods at the place where they were destroyed concerned a material fact and that such representation induced the plaintiff to pay to the defendant its fire loss and that such representation
20 was made falsely, then your verdict will be for the plaintiff.

"(3) If you find from all of the evidence that the defendant company made a representation of a material fact to the plaintiff, knowing it to be false, and that the plaintiff was thereby induced to pay the defendant its loss, then your verdict will be for the plaintiff.

"(4) Under the evidence produced in this case
30 the defendant at the time of the fire had no valid claim under its policy of insurance against the plaintiff and could not collect anything from them."

DEFENDANT'S REQUESTS TO CHARGE.

"(1) The defendant in this case, in its answer, has especially pleaded a separate defense that any
40 money paid by the plaintiff insurance company to

Defendant's Requests to Charge.

the defendant as a result of the fire in question was paid because of the fact that at the time of the payment, plaintiff insurance company was legally bound to make such payment. It is alleged, and the defendant has attempted to prove, that the fire insurance policy issued by the plaintiff company was modified, changed, amended or altered by a rider or endorsement and by the payment of an additional premium thereon so that the property of the defendant located at #205-207 Paterson Street, Paterson, N. J. was covered by the insurance policy in question, from August 1st, 1925 to August 1st, 1926. 10

“(2) If you find, as a fact, that there was at the time of the payment of the loss, a valid and existing contract of insurance between the plaintiff and the defendant, under the terms of which the plaintiff insured the defendant's goods at #205-207 Paterson Street, Paterson, and the payment of the fire loss was pursuant to and by virtue of that contract of insurance and not because of any representations made by the defendant to the plaintiff, then, in that event, your verdict should be for the defendant. 20

“(3) In this case, the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony, that the defendant made certain false and fraudulent statements, meaning that plaintiff should act upon them, knowing the same to be false and fraudulent when it made them, and with intent to deceive plaintiff and to induce it to pay a loss not covered by the policy of insurance; and that plaintiff, believing said representations to be true, acted upon them and was injured. If you find that the plaintiff has failed to 30 40

Defendant's Requests to Charge.

sustain any of the above described allegations by a fair preponderance of the evidence, or that the evidence is evenly balanced or preponderates in favor of the defendant, then your verdict should be for the defendant.

10 “(4) Plaintiff’s allegations in its complaint, which it has attempted to prove at the trial, were that the figures and fraudulent statements alleged to have been made by the defendant to the plaintiff were to the effect that the Consolidated Piece Dye Works, without the knowledge and consent of the defendant, and in breach of its contract with the defendant, had stored the fabrics in question in one of the warehouses of the Consolidated Piece Dye Works, which was a location not covered by
20 the insurance policy and that the defendant agreed that it would bring an action in its name for the benefit of the plaintiff against the Consolidated Piece Dye Works and would repay the money paid to it by the plaintiff from the proceeds of said action. If you find that plaintiff has failed to sustain these allegations by a fair preponderance of testimony, your verdict should be for the defendant.

30 “(5) If you find as a fact that the defendant paid the plaintiff insurance company additional premium so that the policy of fire insurance by such payment covered the goods in question at the Paterson Street location, and that the plaintiff accepted the payment of the additional premium because of the representations made to it by the defendant, that the defendant had no knowledge of the fact that its merchandise was stored by the
40 Consolidated Piece Dye Works at the Paterson location but that the plaintiff insurance company

Defendant's Requests to Charge.

paid the amount of the loss either because of the fact that its policy of insurance had been changed so as to insure the defendant's goods at the Paterson location, or, because the plaintiff thought that the defendant had a good cause of action against the Consolidated Piece Dye Works either for a breach of contract or because the Consolidated Piece Dye Works stored the defendant's property at a location other than one which had been agreed upon between the parties, then your verdict should be for the defendant. 10

“(6) In order to find a verdict in this case in favor of the plaintiff, you must by a fair preponderance of the evidence find that when plaintiff paid the defendant the sum of \$35,923.53, representing the loss occasioned by the fire which occurred on January 13, 1926, solely and exclusively because of the representations made by the defendant to the plaintiff, that the defendant did not know that its property was stored by the Consolidated Piece Dye Works at the Paterson location and also that the defendant knew that the representations thus made were false when made and also that the defendant made the representations to the plaintiff, meaning that the plaintiff should act upon them and also that the plaintiff, believing these representations to be true, acted upon them and was thereby injured. 20 30

“(7) Fraud is never presumed. It must always be proved. The burden of proof is always upon the party charging fraud.

“(9) It is the duty of the Court as a matter of law to construe any documents, agreements or contracts which in any way affect the issues of the 40

Defendant's Requests to Charge.

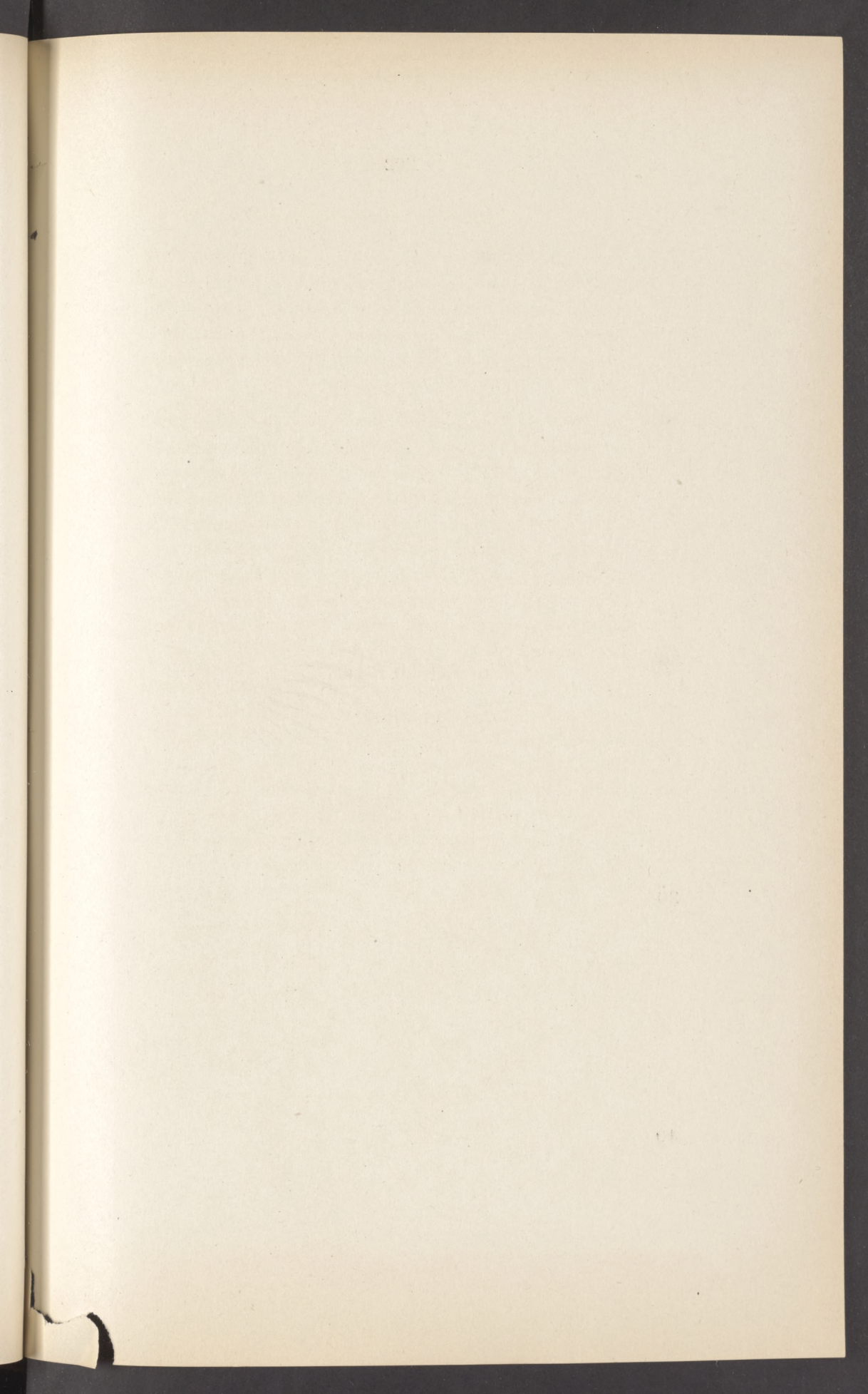
case. The rider of May 13th, 1926, which by its terms was made a part of the policy of insurance issued by the plaintiff to the defendant insured the property of the defendant located at 205-207 Paterson Street from August 1st, 1925 to August 1st, 1926.

10 “(9) If the plaintiff accepted the additional premiums and issued therefor the endorsement of May 13th, 1926, because of any false representations by the defendant it was the duty of the plaintiff within a reasonable time after it discovered the falsity of the representations which induced it to accept the premium to offer to return the premium and rescind the endorsement before it commenced any action for damages alleged to have been caused
20 by the defendant's false representations.

“ (10) If the representations alleged to have been made by the defendant were not material representations and by material representations is meant such representations as would affect as a matter of law the question of whether or not the defendant in this case had or did not have a good cause of action against the Consolidated Piece Dye Works.

30

40



10

20

Exhibit P-1a.

(Photostat)

30

40

OFFICE

ENDORSEMENT.

OFFICE.

New York,

May 13th,

1925.

P.I.A. 6-8-10
4/15/30

COHN-HALL-MARX COMPANY.

An additional premium at the rate of 1.72 is hereby charged on \$49,455.00.

\$49,455.00 @ 1.72%. - ADD'L PREMIUM. - \$850.63

CLASSIFICATION	
STATE	34. INLAND.
AGENCY	31.
ACCOUNT	27.
STATISTICS	A-9528.
REINS.	XXXXXXXXXXXXXX

NOT CARRIED

...er terms and conditions remaining unchanged.

...nd forming part of Policy No. **T-330521.**

... of the **FIDELITY-PHENIX FIRE INS. CO.**

August 1, 1925, to August 1, 1926.

HOME OFFICE

OF

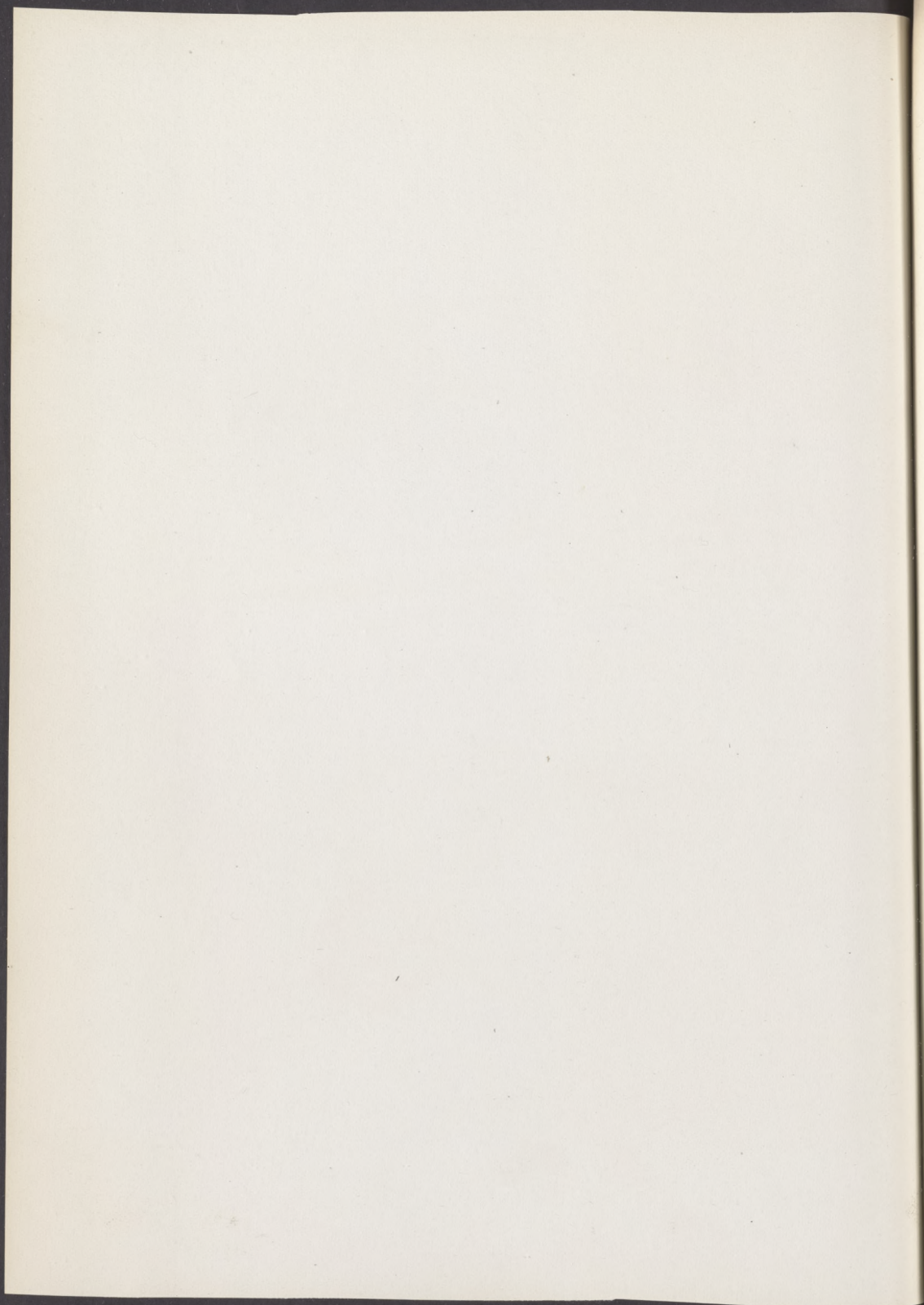
AMERICA

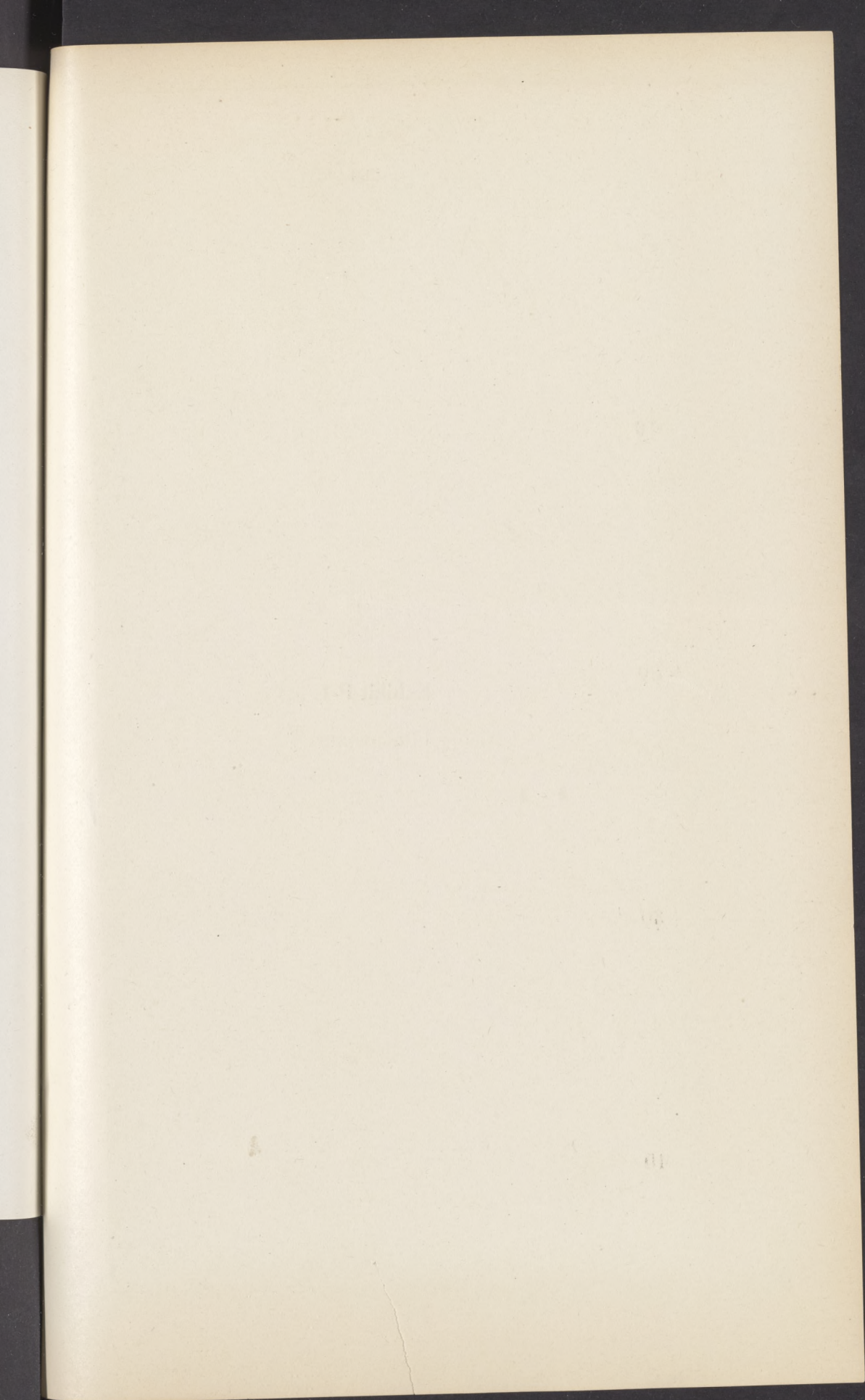
F. B. SPRINGGLER,
COM. 20%.

New York, N.Y.

By _____

Agent





10

20

Exhibit P-1.

(Photostat)

30

40

SEE CORRESPONDENCE IN FOLDER
 Fed. Ins. # 330662

Fidelity-Phoenix Fire Insurance Company

of New York

BY THIS POLICY OF INSURANCE

RECORDED

COHN-HALL-MARX COMPANY ON ACCOUNT OF WHOM IT MAY CONCERN

In case of loss, to be paid in funds current in the United States to ASSURED OR ORDER

Do make Insurance and cause THEMSELVES to be insured, lost or not lost
 At and from AUGUST 1st, 1925 NOON NEW YORK STANDARD TIME
 To AUGUST 1st, 1926 NOON NEW YORK STANDARD TIME
 On AS PER FORM ATTACHED
 On board the good AS PER FORM ATTACHED

Warranted in accordance with the form attached hereto.

TRANSIT FORM

F.B. STEINBUGLER

LIMIT
 AS PER FORM

#9 Continental Clns Co Excess of \$430,000 - Entry # 20957
 PREM.
 Transit \$3000.00 flat
 Fire " 2750.00 Deposit
 Parcel Post - \$1500.00 Deposit
 Consignment - \$100.00 flat
 TOTAL PREM. - \$7350.00

Bellman Brook Bleachery
 Greenwich Bleachery
 Robertson Bleachery, Dyers
 Bush Terminal

overing fire location risk only

ant Reim
 300,000 -
 200,000 -
 200,000 -
 100,000 -
 100,000 -
 100,000 -
 100,000 -

624630-1/26
 24915-4/26
 24916-2/26
 24917-3/26
 24918-5/26
 24919-3/26

624621-4/26
 24622-1/23/26
 24623-3/16/26
 24624-3/5/26
 24625-9/11/25
 24626-2/8/26
 24627-11/2/26
 24628-9/2/26

623750-11/25
 23822-3/26
 23943-3/4/26
 23944-3/26
 24021-3/4/26
 24022-11/1/26
 24023-4/25/26
 23496-2/11/26
 23643-2/24/26

622735-10/5/25
 22973-11/18/25
 23371-1/25
 23372/3-1/26
 23374-4/8/26
 23375-10/8/25
 23376-8/1/25
 23409-2/26
 22990-11/14/26
 22991-10/2/25
 23720-10/25
 23721-1/26
 23722-12/14/25
 23745-3/26
 23749-3/18/26

622124-1/26
 Claim \$25,000 -
 626042-7/16/26
 Loss C22118 - Va
 622378-11/1/26
 622379-10/12/26
 622157 - Har
 622382-1/26
 622405-10/12/26
 622614-11/14/26
 622849-12/12/26

State	34	Agency	31
Account	27		
Statistical	A-9528		
Bkge	0%	Carded	

In Witness Whereof, the President of the said FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK hath hereunto subscribed his name, and caused the same to be attested by its Secretary, but this policy shall not be valid until countersigned by a duly authorized manager or agent of the Company at New York, N. Y.

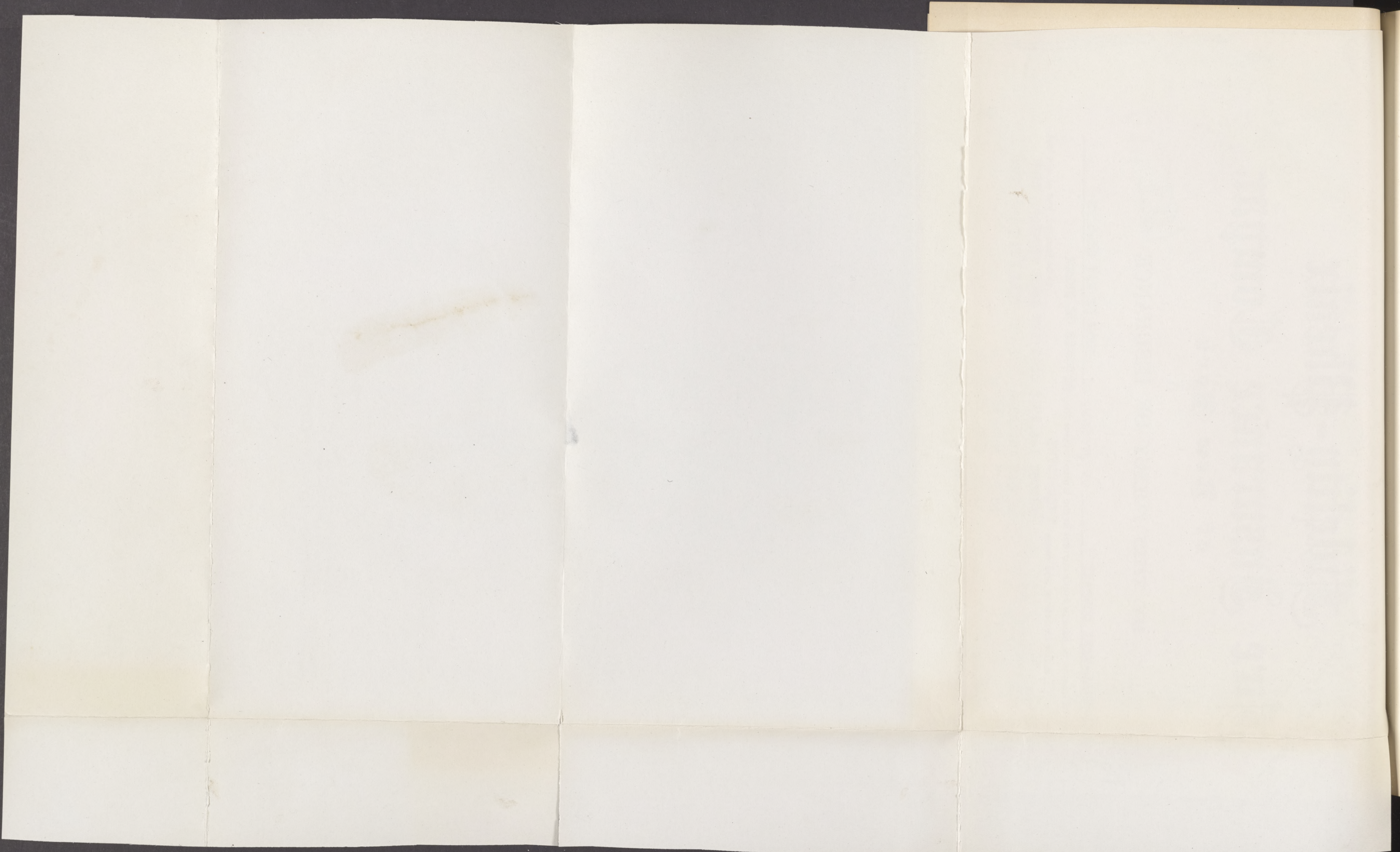
Sidney R. Kennedy
 Secretary

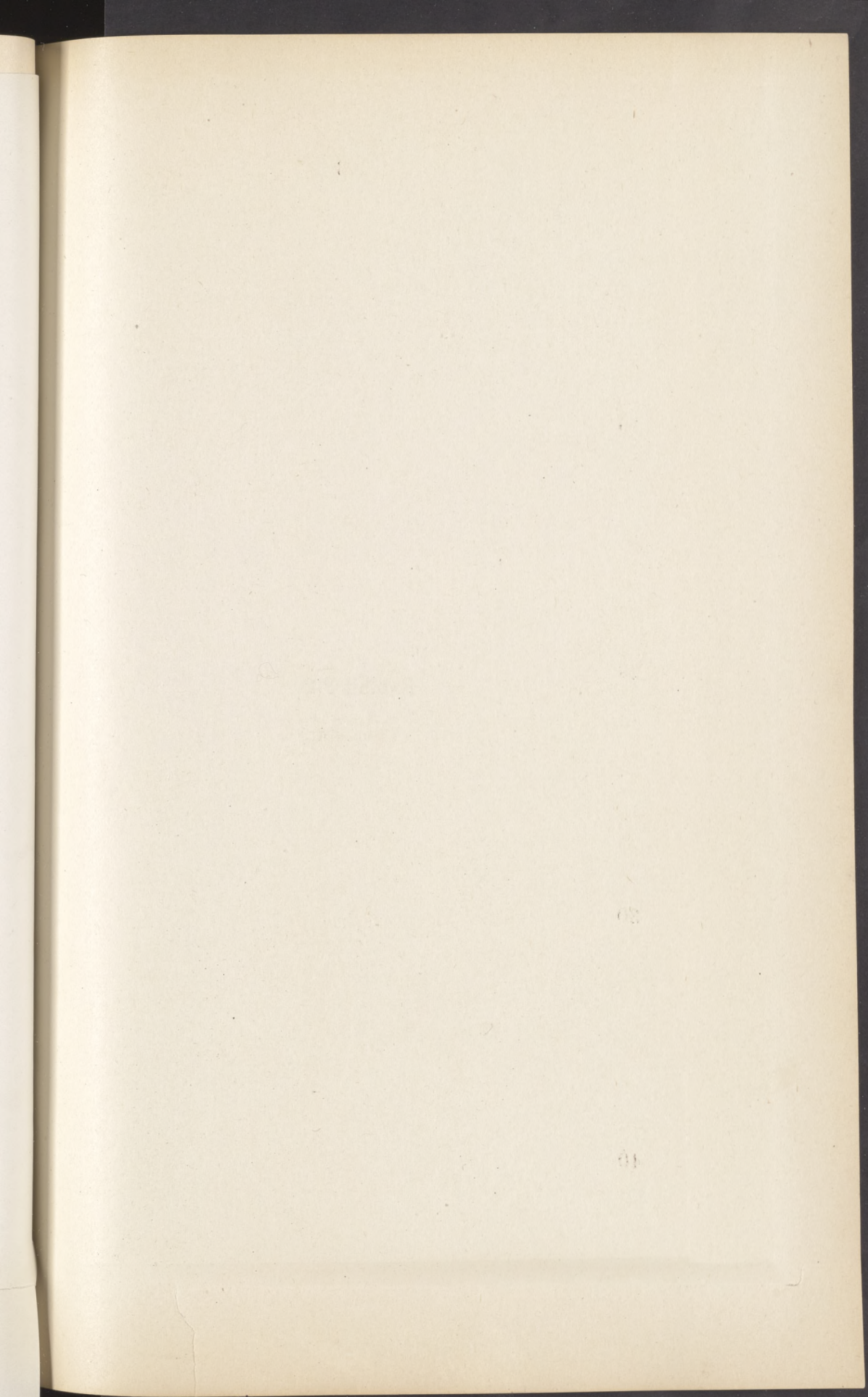
C.R. Street
 President

Countersigned at NEW YORK, N.Y. this 29th day of JULY 1925

MARINE OFFICE
 OF
 AMERICA

By _____





10

20

Exhibit P-2.

(Photostat)

30

40

TRANSIT

In Consideration of THREE THOUSAND & 00/100 Dollars 1.

Does insure COHN-HALL-MARX COMPANY 2.

as the firm now is or may hereafter be constituted, for themselves or for parties for whom they are agents, or for account of whom it may 3

concern (loss, if any, payable to the insured or order), to the amount of AS PER FORM ATTACHED Dollars 4

At and from the 1st day of AUGUST 1925, at noon, 5

Until the 1st day of AUGUST 1926, at noon, 6

on all kinds of lawful goods and merchandise, including packages, consisting principally of AS PER FORM 7

8

9

10

It is the intent of this insurance to fully indemnify the assured from any and all losses, damages and expenses up to the amount hereby insured, caused 11
by the risks and perils insured against, ~~but no claim for particular average shall be paid unless amounting to Five per cent on each shipping package~~ 12

This Policy does not cover risks by mail unless otherwise specifically stated herein. 13

This Policy does not cover export shipments unless specifically provided for herein. 14

This Policy does not cover or attach on imported goods until the risks assumed by the Marine Policies shall have ceased. 15

This Company shall not be liable for loss of accounts, bills, currency, deeds, evidences of debt, money, notes or securities. 16

Warrant by the assured that this Company shall be free from all claim for loss, damage or expense arising from or caused by theft, robbery, 17
civil commotion, strike, riot, war or detention, from the consequences of the hostile act of any Government or people, person or persons, or of any 18
State or Territory, or of any person or persons thereof or from the consequences of the car or cars having been seized by any Government, State 19
or Territory, or of the people thereof, or by any person or persons claiming to represent such Government, State or Territory, nor be subject to claim 20
for loss or damage to goods by wet or dampness, or by being spotted, discolored, mouldy, rusted, frosted, rotted, soured, steamed or changed in flavor, 21
nor for leakage or breakage, except the same is the direct result of a peril insured against. 22

This insurance warranted to be in all cases null and void to the extent of any insurance by any carrier or bailee which would attach and cover 23
said property if this policy had not been issued, and to be null and void as concerns loss or damage by fire to said property while on docks, wharves, piers, 24
bulkheads, landing sheds, depots, stations or platforms, awaiting shipment and/or after arrival, to the extent of any insurance against loss or damage by 25
fire, directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case 26
any agreement be made or accepted by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case 27
of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the act of this insurance, 28
then and in that event this Company shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by 29
perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailees and/or other insurers of prop- 30
erty lost or damaged, but also shall be chargeable with the direct pecuniary consequences to the assured temporarily arising from delay in collection from 31
said carrier and/or bailees and/or other insurers, and the advancing for this purpose only on funds to the assured for his protection pending such delay shall 32
in no case be considered as affecting the question of the final liability of this Company, and as soon as collection is made from the carrier and/or bailees 33
and/or other insurers, the title of the assured to hold the sum so advanced by this Company shall discontinue, and a portion thereof equal to the sum collected 34
from the carrier and/or bailees and/or other insurers, shall be repaid to this Company, but in case of final failure to collect from the carrier and/or bailees 35
and/or other insurers, a portion of the sum advanced by this Company, equal to the sum short collected from the carrier and/or bailees and/or other insur- 36
ers may be retained and applied in settlement of the actual liability of this Company thereby established (provided always the loss shall constitute in other 37
respects a claim under this insurance). In the event of loss or damage this policy shall be null and void to the extent of any payment made by any carrier 38
or bailees or other insurers whether liable or not. 39

If at the happening of any casualty the insured has any other insurance identical with or similar to the terms of this policy, whether prior or 40
subsequent in date, or simultaneous with this insurance, then this Company shall not be liable under this policy for a greater proportion of any loss than 41
the property insured hereunder than the amount hereby insured shall bear to the whole insurance effected, whether valid or not. 42

And in the event of loss, damage, detriment or hurt to the merchandise insured hereunder, the assured warrant to use all lawful and proper efforts 43
for the safeguard and recovery of the property without prejudice to this insurance and this Company will contribute to the just and reasonable charges 44
thereof in such proportion as the sum named in this policy bears to the whole value of the property of the assured directly involved in the disaster. 45

It is a condition of this policy that in the event of loss the assured agrees to pay the insurers additional premium or premiums at the rate of P. P. R. 46
per cent per annum on the amount of such loss or losses, and this policy is thereby reinstated and in force to the full amount, such reinstatement of 47
reinstatements to take effect immediately upon the occurrence of such loss or losses, and the charge or charges therefor to be then due. 48

It is also agreed that no suit or action of any kind against this Company for the recovery of any claim under or by virtue of this policy shall be 49
sustainable in any Court of Law or Chancery, unless such action or suit shall be commenced within the term of twelve months next after the loss shall 50
occur and in case any suit or action shall be commenced against this Company after the expiration of the twelve months next after the loss shall have 51
occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any law, 52
ruling or statute of limitation to the contrary notwithstanding. 53

All claims hereunder shall be settled in accordance with the usages and Customs of the port of New York unless otherwise 54
provided for herein, and all adjusted claims shall be due and payable thirty days after presentation and acceptance of proofs of interest and loss at 55
the office of this Company. 56

And it shall be the duty of the assured or of the agents, factors or consignees of the assured, to separate, in case of loss the sound from the 57
damaged goods, and in case of failure to agree to have the damaged packages appraised by two disinterested parties, one of whom shall be chosen by this 58
Company, and this Company shall bear its proportion of such expenses as may be reasonably be incurred in ascertaining such damage. 59

It is also agreed that the assured, in claiming and accepting payment for any loss, damage, average or expense under this policy, thereby and by 60
that acts assigns and transfers to this Company all right to claims for such loss, damage, average or expense against any person or persons, vessel, town 61
or corporation or any Government, shall prosecute therefore at the charge and for the account of this Company, if requested; the sum recovered to 62
inure the benefit of this Company, however, to the extent only of the amount of the loss, damage, average or expense, and the attendant expenses of 63
recovery paid and incurred by this Company, and any act of the assured waiving or transferring or tending to defeat or decrease any such claim 64
against any person or persons, vessel, town or corporation, or any Government, shall be a cancellation of the liability of this Company for or on account 65
of the loss, damage, average or expense claimed, and all sums paid and incurred by this Company on account of said loss, damage, average or expense 66
or for the recovery of the same shall be a lien upon the property hereby insured, and recoverable against the assured. 67

And it is mutually agreed that the acts of either party or their agents in securing, preserving or recovering the property insured shall not be 68
considered or held to be either a waiver or acceptance of an abandonment. 69

This policy can be cancelled at any time at the request of the assured or by the Company by giving ~~five days~~ notice in writing of such cancellation. 70
If this policy shall be cancelled as hereinbefore provided, the premiums having been actually paid, the unearned portion shall be returned on surrender of 71
the policy or last renewal, this Company retaining the customary short rate, except that when this policy is cancelled by the Company by giving notice, it 72
shall retain only the pro-rata premium. 73

It is agreed that should the premium on this policy be not paid within sixty (60) days from date of attaching the policy will be null and void during 74
the time the premium is past due and unpaid. 75

And it is also agreed that no assignment or transfer hereof shall in any case relieve the assured of the property hereby insured from any or all the 76
conditions expressed in this policy, and that this policy shall be void in case of its being assigned or transferred without the consent of this Company. 77

If any broker or person other than the assured have procured this policy or any renewal thereof, or any endorsement thereon, he shall be deemed 78
the agent of the assured and not of this Company in any transaction relating to this insurance. 79

Other insurance permitted without notice until required. 80

MARINE OFFICE
OF
AMERICA

It is understood and agreed that this Company or its Agents shall be permitted to examine the books, accounts and records of the Assured for the purpose of tabulating and verifying all shipments covered by this policy.

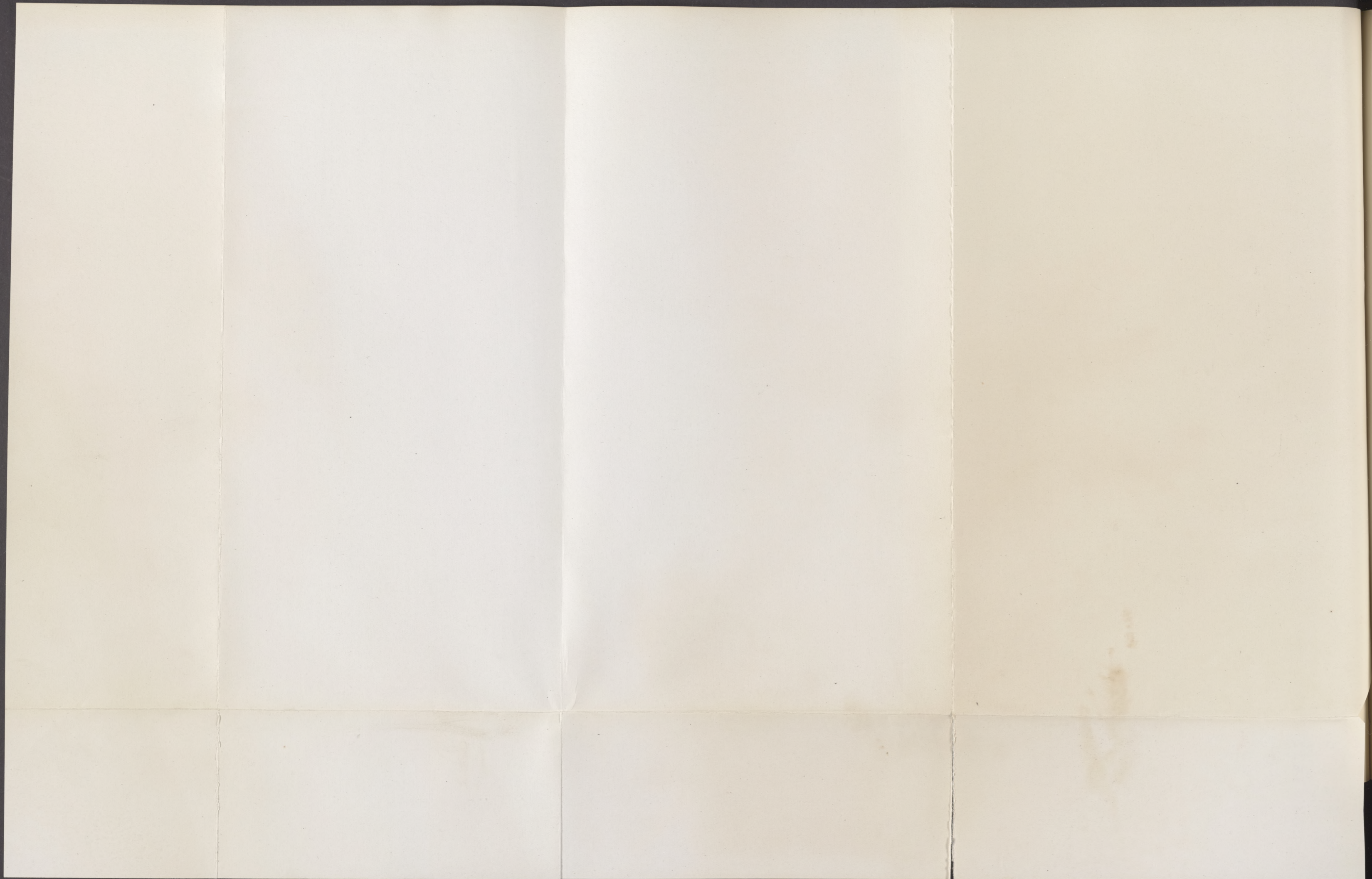
J. J. MacCord
Manager

By.....

The assured warrants to report any loss under this policy immediately to the Marine Office of America, 53 Beaver Street, New York, or to

In case of loss or injury to any part of a machine, consulting when necessary, the Marine Office of America, 53 Beaver Street, New York, or to the insured, the value of the part lost or damaged.

It is agreed that there shall be no return premium if interest insured be 1. This not insured against hereunder.



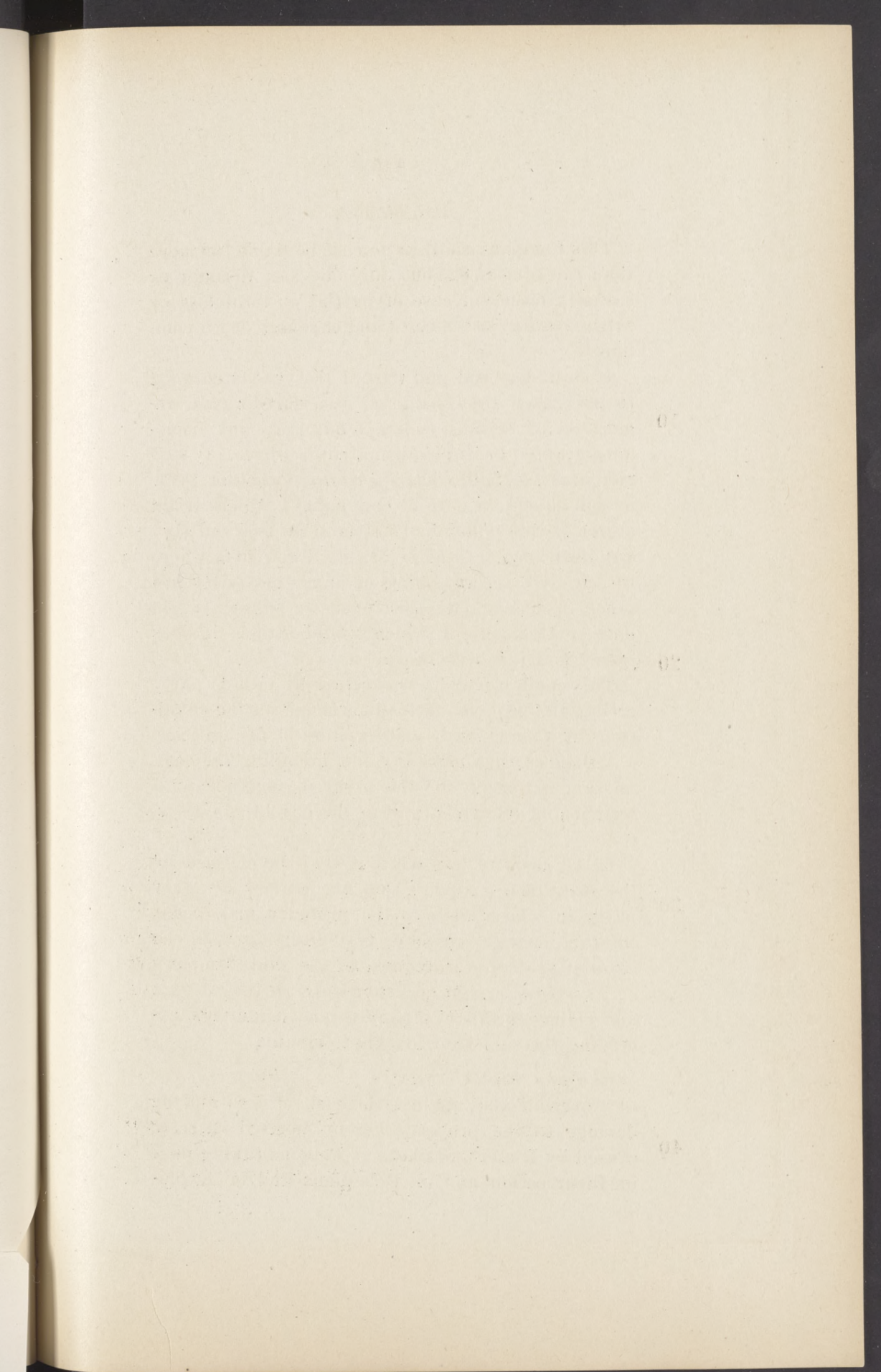


Exhibit P-2.

This Company shall in no case be liable for more than the sum of \$25,000. any one loss, disaster or casualty either in case of partial or total loss or salvage or any other costs and expenses or all combined.

10 It is understood and agreed that goods shipped to purchaser are considered at assured's risk, regardless of selling contract but that any insurance granted herein shall not cover where any carrier or other bailee has insurance (whether prior or subsequent in date to this policy) which would attach if this policy had not been issued, and that any insurance granted herein shall not cover where the assured, the consignee or any other party has other insurance (whether prior or subsequent in date to this policy) which would attach if this
20 policy had not been issued.

This policy may be cancelled by either party giving fifteen days' notice in writing on the conditions customary with underwriters of fire policies.

Valued at cash market value, including the commission or profits of the assured, together with freight and other charges on the day of the disaster.

30 In all cases of loss when it shall be claimed by the insurance company that the carrier or other party in whose custody the property may be at the time of such loss is or may be liable, then the assured shall at the request of the said Company or its agents, assign and subrogate all their rights and claims to this Company to an amount not exceeding the sum paid by this Company.

Strike and Riot Clause:

40 "Covering also against the risk of loss and/or damage to the property hereby insured directly caused by Rioters, Strikers or Persons taking part in Insurrection and/or Rebellions and/or Explo-

Exhibit P-2.

sion of any nature other than Boiler Explosion. No claim to attach hereto for delay, deterioration and/or loss of market, or for confiscation or destruction by the Government of the Country in which the property is situate. Only to pay hereon if not recoverable under any other existing policy of insurance."

Any and all clauses and conditions in the printed portion of this Policy and customs of underwriters in conflict with the terms of this special form are waived and declared null and void.

To attach to and forming part of Policy #

10

For managers.

Aug. 1/25.

For and in consideration of a deposit premium of \$2750.00 paid annually in advance, this policy is hereby extended to cover against all loss or damage by fire, lightning, sprinkler leakage, cyclone, tornado and/or windstorm to any and all property of every description, owned by the assured or held in trust or on commission, or on consignment, or sold but not delivered or removed or held on joint account with others or held on storage or for repairs, including the cost of labor and materials expended thereon (except as hereinafter provided), also the property of others for which the assured may be or may hold themselves liable in case of loss or damage.

20

30

All contained in and/or on the buildings, additions and extensions thereto and elsewhere in yards, premises and railroad sidings adjacent or contiguous thereto, located as per schedule below, it being understood that this company's liability at each of such locations shall be limited to the amount set forth below as applying to each location:

40

Exhibit P-2.

LOCATIONS

No.	Name and Location	Amount
	1. Advance Pc. Dye Wks., 2151 Pros-	
	1. Advance Pc. Dye Wks., 2151 Pros-	
	pect Ave. Bronx, NY	\$100,000.
	2. Acme Finishing Co., Pawtucket, R. I.	250,000.
10	3. Apponoug Co., Apponoug, R. I.	100,000.
	4. Arnold Print Works, North Adams,	
	Mass.	350,000.
	5. Aspinock Co., Jewett City, Conn.	150,000.
	6. Bellman Brook Bly., Fairview, N. J.	700,000.
	7. Bradford Dyeing Assn., Bradford,	
	R. I.	100,000.
	8. Jos. Bancroft & Sons Co. Wilming-	
	ton, Del.	100,000.
20	9. Barrett, Palmer & Heal, Englewood,	
	N. J.	100,000.
	10. Clifton Pc. Dye Works, 120 Burhan	
	St., Paterson, N. J.	100,000.
	11. Cochrane Pc. Dye Works, Malden,	
	Mass.	100,000.
	12. Crystal Springs Bleach & Dye.,	
	Thwaites, Mass.	100,000.
	13. Consolidated Pc. Dye Works,	
	Hazel St. & Montclair Ave. Pater-	
30	son, N. J.	150,000.
	14. Dedham Finishing Co., Dedham,	
	Mass.	100,000.
	15. Dutchess Bleachery, Inc., Wappinger	
	Falls, N. Y.	250,000.
	16. Easton Finishing Co., Easton, Pa.	150,000.
	17. Eddystone Mfg. Co., Eddystone, Pa.	150,000.
	18. Fall River Bleachery, Fall River,	
	Mass.,	100,000.
40	19. Farwell Bleachery, Lawrence, Mass.	100,000.

Exhibit P-2.

No.	Name & Location	Amount
20.	Finco Dye & Emb. Co. Leonard & Scholes St. Bklyn, NY	100,000.
21.	Gates Finishing Co., Medford, Mass.	150,000.
22.	Glenlyon Print Works, Phillipsdale, R. I.	100,000.
23.	Glenlyon Dye Works, Saylesville, R. I.	100,000. 10
24.	Greenwich Bleachery, E. Greenwich, R. I.	600,000.
25.	K. M. Gilmore, Somerville, Mass.	100,000.
26.	Greenville Finishing Co., Greenville, R. I.	100,000.
27.	Hampton Co., Easthampton, Mass.	200,000.
28.	Imperial Ptg. & Fin. Co., Bellefon, R. I.	100,000.
29.	Jewett City Textile & Novelty Mfg. Co., Jewett City, Conn.	100,000. 20
30.	Lyons Pc. Dye Works, 5th Ave. & Blvd. Paterson, N. J.	100,000.
31.	Lewiston Bleachery, Lewiston, Maine	300,000.
32.	Lowell Bleachery, Lowell, Mass.	100,000.
33.	Mansfield Bleachery, Mansfield, Mass.	200,000.
34.	Manchester Pt. Works, Norwich, Conn.	100,000. 30
35.	Mt. Hope Finishing Co., North Dighton, Mass.	100,000.
36.	Millbank Bleachery, Lodi, N. J.,	100,000.
37.	North Carolina Fin. Co., Salisbury, N. C.	100,000.
38.	New Bedford & Agawam Fin. Co., E. Wareham, Mass.	100,000.
39.	Oneida Bleachery, New York Mill, N. Y.	100,000. 40

Exhibit P-2.

	40.	Onyx Print Works, 74-80 George St. Paterson, N. J.	200,000.
	41.	Passaic Print Works, Passaic, N. J.	100,000.
	42.	Providence Dyeing Bleach. & Calen- dering Co., Providence, R. I.	100,000.
	43.	Robertson Bly. & Dye Wks., New Milford, Conn.	500,000.
10	44.	Rockland Fin. Co. Inc. West Haver- straw, N. Y.	100,000.
	45.	Standard Bleachery Co., Carlton Hill, N. J.	100,000.
	46.	Southern Bleachery, Greenville, S. C.	100,000.
	47.	Sussex Print Wks. Newton, N. J.	100,000.
	48.	Thames Dye. & Bleach. Co., Niantic, Conn.	100,000.
	49.	U. S. Finishing Co., Providence, R. I.	100,000.
20	50.	U. S. Finishing Co., Pawtucket, R. I.	200,000.
	51.	Union Bleachery, Greenville, S. C.	100,000.
	52.	Waldrich Bleachery, Delawanna, N. J.	100,000.
	53.	United Piece Dye Works, Lodi, N. J.	100,000.
	54.	U. S. Finishing Co., Sterling, Conn.	100,000.
	55.	Queen Dyeing Co., Providence, R. I.	100,000.
	56.	Cold Spring Bleachery, Yardley, Pa.	100,000.
30	57.	Reliance Textile Co., Covington, Ky.	100,000.
	58.	Bush Terminal, Brooklyn, N. Y.	500,000.
	59.	Weidmann Silk Dyeing Co., Pater- son, N. J.	100,000.
	60.	Superior Piece Dye Works, 371 Bor- den Ave., L. I. City	100,000.
	61.	Luxor Piece Dye Works, 15 First Ave., Paterson, N. J.	100,000.
	62.	Tamarack Warehouse, Pawtucket, R. I.	100,000.
40	63.	Ninigert Warehouse, Pawtucket, R. I.	100,000.

Exhibit P-2.

\$100,000. At each of any new premises in the United States of America located other than those mentioned above to which the assured may from time to time send this property; it being understood and agreed that the assured will cause this Company to be notified of any such new premises within thirty (30) 10 days after the arrival of their property at such new premises.

Sprinkler Leakage: Wherever in this policy the term (Sprinkler Leakage) occurs, it shall be held to mean leakage, discharge, or precipitation of water from the 'Automatic Sprinkler System' or any apparatus which is a part of same, resulting in loss or damage to the property described herein including all damage caused by the precipitation or collapse of any such apparatus, but not 20 caused directly or indirectly by fire, lightning, cyclone-tornado or windstorm whether the 'Sprinkler Leakage' originates in the portion of the premises occupied by the assured's property or not; including 'sprinkler leakage' caused by freezing.

It is understood and agreed that this insurance shall not be liable for loss from 'sprinkler leakage' at any location, for more than twenty-five percent 30 (25%) of the amount of fire insurance, applying at such location.

Cyclone, Tornado and/or Windstorm: It is understood and agreed that this insurance shall not be liable for loss from 'cyclone, tornado and/or windstorm' at any location for more than ten percent (10%) of the amount of fire insurance applying at such location.

The assured agrees to report the total aggregate 40

Exhibit P-2.

values of all property insured hereunder as of the first day of each month, such report to be delivered to this Company not later than the 20th of each month and the value shown by such monthly statement shall be considered to be the amount at risk under this policy for the previous month. The premium for this insurance shall be computed on a pro-rata basis at a rate of eleven cents per Hundred Dollars, (11c. per \$100.) per annum. If, upon expiration of this policy, the total pro-rata premium shall exceed the deposit premium of \$2750.00 then the assured agrees to pay this Company the difference between the total earned premium and the deposit premium. If, however, the total earned premium should be less than the deposit premium of \$2750.00 then this Company hereby agrees to refund the difference between the total earned premium and the said deposit premium.

This policy, nor any part thereof, will not be invalidated or prejudiced by reason of any contract with any railroad company and/or other corporation releasing such railroad or corporation from liability.

This policy does not cover property otherwise specifically insured.

30 This policy shall not contribute with, or claim contribution with, any insurance carried by any interest in or on whose premises the property hereby insured is located.

40 It is understood and agreed that the value of the materials used and the labor which may have been expended upon property which is in process shall not be covered by this policy except when the work upon such property shall have been completed and the property boxed or invoiced, or ready for packing, then the values of the materials used and the

Exhibit P-2.

labor expended shall be computed as part of the value of the property and shall thereafter be covered by this contract of insurance.

In the event of loss or damage it is understood and agreed that the basis of adjustment shall be the assured's selling price. However, in arriving at the values on unfinished or grey goods, the basis of adjustment shall be the selling price of the finished goods, less the value of the materials which would have been used and of the labor which would have been expended upon them in the process of finishing. 10

It is understood that loss by fire covered by this special agreement shall attach and cover as if written subject to the standard fire policy of the State of New York, and it is further agreed that any clauses in the printed conditions of this policy, which are inconsistent with this special agreement, are hereby waived and considered null and void. 20

Privileged to work at all hours, including Sundays and holidays; to make alterations, repairs and additions and this policy to cover therein; for other insurance; for present and other occupancies and communications: to cease operations; to do such work and to keep and use such materials as are usual in the business where the property is located; to use illuminating and other gases, and/or oil and/or electricity for lighting, heating, cooking, power and other purposes; and to keep on hand such materials, supplies and stock in trade on any of the premises as are considered necessary for conducting the business or operations; anything in the body of this policy to the contrary notwithstanding; privileged for premises to be or become unoccupied, or vacant, as occasion may require. 30

Whenever mention is made in this policy of any 40

Exhibit P-2.

hour of the day or night, the same shall be understood to refer to the Standard Time at the respective place or places where the property insured is located.

It is understood and agreed that the existence of a chattel mortgage will not invalidate this insurance.

10

The two following clauses apply to that portion of this special agreement covering fire insurance:

New York Standard 90% Average Clause with 5% (\$10,000.) special Inventory clause.

New York Standard Lightning Clause.

Loss, if any, to be paid to the assured in New York City Exchange.

20

This policy shall not be voided by failure to comply with any of these terms and conditions in any premises over which the assured has no control.

Attached to and forming part of Policy No. _____
_____ of the _____ Insurance Co.

John A. Eckert & Co.
90 John St.
N.Y.C.

30

In consideration of a deposit premium of \$1500 this policy is extended to cover the safe arrival of all lawful goods contained in each package shipped by the assured by Registered or Unregistered mail and by Ordinary Parcel Post, whether Government insured or not, from the time the said property passes into the hands of the Post Office for transmission, until arrival at the address stated upon the assured's itemized record of shipments, within the limits of Continental United States,

40

Exhibit P-2.

Dominion of Canada and both United States and Canadian Alaska.

This policy covers loss or damage to package and/or packages and/or contents, or any part thereof, from any cause whatsoever, occurring while the package is actually in the custody of any Post Office Department, within the limits described above. 10

This Company's liability is hereby limited to not exceeding One Hundred and Fifty Dollars (\$150) on any one package shipped by Ordinary Parcel Post or Unregistered mail and not exceeding Two Hundred and Fifty Dollars (\$250) on any one package shipped by Registered Mail or Government Insured Parcel Post.

It is hereby understood and agreed that this policy covers shipments made by others for the account of Cohn-Hall-Marx Co. It is also understood and agreed that the assured will keep a separate account of such shipments and will make a separate report each month to this company of any and all such shipments. 20

Warranted by the insured that each package shipped by Government Insured Parcel Post, valued at One Hundred Dollars (\$100) or less, will be insured for at least fifty percent (50%) of the actual value and that each package valued in excess of One Hundred Dollars (\$100) will be insured with the Government for at least Fifty Dollars (\$50). 30

This policy does not insure against loss or damage to accounts, bills, currency, deed, evidences of debt, money, notes or securities.

The assured hereby agrees to keep a true and accurate record of all shipments made and shall report the total aggregate shipments to the com. 40

Exhibit P-2.

pany each month and the premium on this policy shall be computed on each monthly report at a rate of twenty-two and one-half cents ($22\frac{1}{2}c.$) for each One Hundred Dollars (100) of shipments. As soon as the total premiums so figured exceed the deposit premium of \$1500.00 then any and/or all
10 excess premiums shall be due and payable to this company on each monthly report thereafter until the expiration of this policy.

In consideration of the above adjustment clause, this company agrees to reimburse the assured for any portion of the deposit premium paid by the assured which shall be in excess of the actual amount earned by this company, by computing the premium at twenty-two and one-half cents ($22\frac{1}{2}c.$)
20 on the total aggregate amount of annual shipments.

The portion of this policy insuring Parcel Post shipments may be canceled at any time by either the assured or by this company by giving fifteen (15) days notice in writing of such cancellation, provided, however that such cancellation shall not effect any risks then pending. If this policy shall be canceled, the deposit premium having actually been paid, the balance of the deposit premium not
30 yet earned by the company shall be returned to the assured.

In the event of loss the assured agrees to file a tracer with the Postal authorities.

The Company agrees that payment for loss or damage will be made within thirty (30) days after the filing of proof of loss by the assured and that such payment will include necessary notary fees.

Upon making payment for any property lost or
40

Exhibit P-2.

damaged under this policy, this insurance company shall be subrogated to all rights of the assured for any amount or amounts recoverable from the Postal authorities.

Attached to and forming part of Policy No. _____ of the _____ Insurance Company. 10

John A. Eckert & Co., #90 John Street,
New York, N. Y.

For and in consideration of a deposit premium of \$2750.00 paid annually in advance, this policy is hereby extended to cover against all loss or damage by fire, lightning, sprinkler leakage, cyclone, tornado and/or windstorm to any and all property of every description, owned by the assured or held in trust or on commission, or on consignment, or sold but not delivered or removed, or held on joint account with others, or held on storage or for repairs, including the cost of labor and materials expended therein (except as hereinafter provided) also the property of others for which the assured may be or may hold themselves liable in case of loss or damage. 20

All contained in and/or on the buildings, additions and extensions thereto and elsewhere in yards, premises and railroad sidings adjacent or contiguous thereto, located as per schedule below, it being understood that this Companys' liability at each of such locations shall be limited to the amount set forth below as applying to each location. 30

40

Exhibit P-2.

LOCATIONS

No.	Name and Location	Amount
	1. Advance Pc. Dye Wks., 2151 Prospect Ave. Bronx, NY	\$100,000.
	2. Acme Finishing Co., Pawtucket, R. I.	250,000.
	3. Apponoug Co., Apponoug, R. I.	100,000.
10	4. Arnold Print Works, North Adams, Mass.	350,000.
	5. Aspinock Co., Jewett City, Conn.	150,000.
	6. Bellman Brook Bly., Fairview, N. J.	700,000.
	7. Bradford Dyeing Assn., Bradford, R. I.	100,000.
	8. Jos. Bancroft & Sons Co. Wilmington, Del.	100,000.
	9. Barrett, Palmer & Heal, Englewood, N. J.	100,000.
20	10. Clifton Pc. Dye Works, 120 Burhan St., Paterson, N. J.	100,000.
	11. Cochrane Pc. Dye Works, Malden, Mass.	100,000.
	12. Crystal Springs Bleach & Dye., Thwaites, Mass.	100,000.
	13. Consolidated Pc. Dye Works, Hazel St. & Montclair Ave. Paterson, N. J.	150,000.
30	14. Dedham Finishing Co., Dedham, Mass.	100,000.
	15. Dutchess Bleachery, Inc., Wappinger Falls, N. Y.	250,000.
	16. Easton Finishing Co., Easton, Pa.	150,000.
	17. Eddystone Mfg. Co., Eddystone, Pa.	150,000.
	18. Fall River Bleachery, Fall River, Mass.,	100,000.
	19. Farwell Bleachery, Lawrence, Mass.	100,000.

Exhibit P-2.

No.	Name & Location	Amount	
20.	Finco Dye & Emb. Co. Leonard & Scholes St. Bklyn, NY	100,000.	
21.	Gates Finishing Co., Medford, Mass.	150,000.	
22.	Glenlyon Print Works, Phillipsdale, R. I.	100,000.	
23.	Glenlyon Dye Works, Saylesville, R. I.	100,000.	10
24.	Greenwich Bleachery, E. Greenwich, R. I.	600,000.	
25.	K. M. Gilmore, Somerville, Mass.	100,000.	
26.	Greenville Finishing Co., Greenville, R. I.	100,000.	
27.	Hampton Co., Easthampton, Mass.	200,000.	
28.	Imperial Ptg. & Fin. Co., Bellefont, R. I.	100,000.	
29.	Jewett City Textile & Novelty Mfg. Co., Jewett City, Conn.	100,000.	20
30.	Lyons Pc. Dye Works, 5th Ave. & Blvd. Paterson, N. J.	100,000.	
31.	Lewiston Bleachery, Lewiston, Maine	300,000.	
32.	Lowell Bleachery, Lowell, Mass.	100,000.	
33.	Mansfield Bleachery, Mansfield, Mass.	200,000.	
34.	Manchester Pt. Works, Norwich, Conn.	100,000.	30
35.	Mt. Hope Finishing Co., North Dighton, Mass.	100,000.	
36.	Millbank Bleachery, Lodi, N. J.,	100,000.	
37.	North Carolina Fin. Co., Salisbury, N. C.	100,000.	
38.	New Bedford & Agawam Fin. Co., E. Wareham, Mass.	100,000.	
39.	Oneida Bleachery, New York Mill, N. Y.	100,000.	40

Exhibit P-2.

	40.	Onyx Print Works, 74-80 George St. Paterson, N. J.	200,000.
	41.	Passaic Print Works, Passaic, N. J.	100,000.
	42.	Providence Dyeing Bleach. & Calen- dering Co., Providence, R. I.	100,000.
	43.	Robertson Bly. & Dye Wks., New Milford, Conn.	500,000.
10	44.	Rockland Fin. Co. Inc. West Haver- straw, N. Y.	100,000.
	45.	Standard Bleachery Co., Carlton Hill, N. J.	100,000.
	46.	Southern Bleachery, Greenville, S. C.	100,000.
	47.	Sussex Print Wks. Newton, N. J.	100,000.
	48.	Thames Dye. & Bleach. Co., Niantic, Conn.	100,000.
	49.	U. S. Finishing Co., Providence, R. I.	100,000.
20	50.	U. S. Finishing Co., Pawtucket, R. I.	200,000.
	51.	Union Bleachery, Greenville, S. C.	100,000.
	52.	Waldrich Bleachery, Delawanna, N. J.	100,000.
	53.	United Piece Dye Works, Lodi, N. J.	100,000.
	54.	U. S. Finishing Co., Sterling, Conn.	100,000.
	55.	Queen Dyeing Co., Providence, R. I.	100,000.
	56.	Cold Spring Bleachery, Yardley, Pa.	100,000.
30	57.	Reliance Textile Co., Covington, Ky.	100,000.
	58.	Bush Terminal, Brooklyn, N. Y.	500,000.
	59.	Weidmann Silk Dyeing Co., Pater- son, N. J.	100,000.
	60.	Superior Piece Dye Works, 371 Bor- den Ave., L. I. City	100,000.
	61.	Luxor Piece Dye Works, 15 First Ave., Paterson, N. J.	100,000.
	62.	Tamarack Warehouse, Pawtucket, R. I.	100,000.
40	63.	Ninigert Warehouse, Pawtucket, R. I.	100,000.

Exhibit P-2.

\$100,000. At each of any new premises in the United States of America located other than those mentioned above to which the assured may from time to time send this property; it being understood and agreed that the assured will cause this Company to be notified of any such new premises within thirty (30) days after the arrival of their property at such new premises. 10

Sprinkler Leakage: Wherever in this policy the term (Sprinkler Leakage) occurs, it shall be held to mean leakage, discharge or precipitation of water from the 'Automatic Sprinkler System' or any apparatus which is a part of same, resulting in loss or damage to the property described herein including all damage caused by the precipitation or collapse of any such apparatus, but not caused directly or indirectly by fire, lightning, cyclones tornado, or windstorm whether the 'Sprinkler Leakage' originates in the portion of the premises occupied by the assured's property or not, including 'sprinkler leakage' caused by freezing. 20

It is understood and agreed that this insurance shall not be liable for loss from 'Sprinkler Leakage' at any location for more than Twenty Five percent (25%) of the amount of fire insurance, applying at such location. 30

Cyclone, Tornado and/or Windstorm: It is understood and agreed that this insurance shall not be liable for loss from 'cyclone, tornado and/or windstorm' at any location for more than ten percent (10%) of the amount of fire insurance applying at such location.

The assured agrees to report the total aggregate values of all property insured hereunder as of the 40

Exhibit P-2.

first day of each month, such report to be delivered to this Company not later than the 20th of each month and the value shown by such monthly statement shall be considered to be the amount at risk under this policy for the previous month. The premium for this insurance shall be computed on a
10 pro rata basis at a rate of eleven cents per Hundred Dollars (11c. per \$100) per annum. If, upon expiration of this policy the total pro rata premium shall exceed the deposit premium of \$2750.00, then the assured agrees to pay this Company the difference between the total earned premium and the deposit premium. If, however, the total earned premium should be less than the deposit premium of \$2750.00, then this Company hereby agrees to refund the difference between the total earned
20 premium and the said deposit premium.

This policy, nor any part thereof, will not be invalidated or prejudiced by reason of any contract with any railroad company and/or other corporation releasing such railroad or corporation from liability.

This policy does not cover property otherwise specifically insured.

30 This policy shall not contribute with, or claim contribution with, any insurance carried by any interest in or on whose premises the property hereby insured is located.

40 It is understood and agreed that the value of the materials used and the labor which may have been expended upon property which is in process shall not be covered by this policy except when the work upon such property shall have been completed and the property boxed or invoiced, or ready for packing, then the values of the materials used and the labor expended shall be computed as part

Exhibit P-2.

of the value of the property and shall thereafter be covered by this contract of insurance.

In the event of loss or damage it is understood and agreed that the basis of adjustment shall be the assured's selling price. However, in arriving at the values on unfinished or grey goods, the basis of adjustment shall be the selling price of the finished goods, less the value of the materials which would have been used and of the labor which would have been expended upon them in the process of finishing.

10

It is understood that loss by fire covered by this special agreement shall attach and cover as if written subject to the standard fire policy of the State of New York, and it is further agreed that any clauses in the printed conditions of this policy, which are inconsistent with this special agreement, are hereby waived and considered null and void.

20

Privileged to work at all hours, including Sundays and holidays; to make alterations, repairs and additions and this policy to cover therein; for other insurance; for present and other occupancies and communications; to cease operations; to do such work and to keep and use such materials as are usual in the business where the property is located; to use illuminating and other gases and/or oil and/or electricity for lighting, heating, cooking, power and other purposes; and to keep on hand such materials, supplies and stock in trade on any of the premises as are considered necessary for conducting the business or operations; anything in the body of this policy to the contrary notwithstanding, privileged for premises to be or become unoccupied, or vacant, as occasion may require.

30

Whenever mention is made in this policy of any

40

Exhibit P-2.

hour of the day or night the same shall be understood to refer to the Standard Time at the respective place or places where the property insured is located.

It is understood and agreed that the existence of a chattel mortgage will not invalidate this insurance.

10

The two following clauses apply to that portion of this special agreement covering fire insurance:

New York Standard 90% Average Clause with 5% (\$10,000) Special Inventory Clause.

New York Standard Lightning Clause.

Loss, if any, to be paid to the assured in New York City Exchange.

This policy shall not be voided by failure to comply with any of these terms and conditions in any premises over which the assured has no control.

20

Attached to and forming part of Policy No. 330521 of the Fidelity-Phenix Fire Insurance Company.

In consideration of a deposit premium of \$1500.00 this policy is extended to cover the safe arrival of all lawful goods contained in each package shipped by the assured by Registered or Unregistered mail and by Ordinary Parcel Post, whether Government insured or not, from the time the said property passes into the hands of the Post Office for transmission, until arrival at the address stated upon the assured's itemized record of shipments, within the limits of Continental United States, Dominion of Canada and both United States and Canadian Alaska.

30

This policy covers loss or damage to package and/or packages and/or contents, or any part thereof, from any cause whatsoever, occurring while the package is actually in the custody of any Post

40

Exhibit P-2.

Office Department, within the limits described above.

This Company's liability is hereby limited to not exceeding One Hundred and Fifty Dollars (\$150) on any one package shipped by Ordinary Parcel Post or Unregistered mail and not exceeding—
Two Hundred and Fifty Dollars (\$250) on any one package shipped by Registered Mail or Government Insured Parcel Post. 10

It is hereby understood and agreed that this policy covers shipments made by others for the account of Cohn-Hall-Marx Company. It is also understood and agreed that the assured will keep a separate account of such shipments and will make a separate report each month to this Company of any and all such shipments.

Warranted by the insured that each package shipped by Government Insured Parcel Post, valued at One Hundred Dollars (\$100) or less, will be insured for at least fifty percent (50%) of the actual value and that each package valued in excess of One Hundred Dollars (\$100) will be insured with the Government for at least Fifty Dollars (\$50). 20

This policy does not insure against loss or damage to accounts, bills, currency, deeds, evidences of debt, money, notes or securities. 30

The assured hereby agrees to keep a true and accurate record of all shipments made and shall report the total aggregate shipments to the Company each month and the premium on this policy shall be computed on each monthly report at a rate of twenty-two and one-half cents (22½c.) for each One Hundred Dollars (\$100) of shipments. As soon as the total premiums so figured exceed the deposit premium of \$1500.00 then any and/or all 40

Exhibit P-2.

excess premiums shall be due and payable to this Company on each monthly report thereafter until the expiration of this policy.

10 In consideration of the above adjustment clause, this Company agrees to reimburse the assured for any portion of the deposit premium paid by the assured which shall be in excess of the actual amount earned by this company, by computing the premium at twenty-two and one half cents (22½c.) on the total aggregate amount of annual shipments.

20 The portion of this policy insuring Parcel Post shipments may be canceled at any time by either the assured or by this Company by giving fifteen (15) days notice in writing of such cancellation, provided, however, that such cancellation shall not effect any risks then pending. If this policy shall be cancelled, the deposit premium having actually been paid, the balance of the deposit premium not yet earned by the Company shall be returned to the assured.

In the event of loss the assured agrees to file a tracer with the Postal Authorities.

30 The Company agrees that payment for loss or damage will be made within thirty (30) days after the filing of proof of loss by the assured and that such payment will include necessary notary fees.

Upon making payment for any property lost or damaged under this policy this insurance company shall be subrogated to all rights of the assured for any amount or amounts recoverable from the Postal Authorities.

Attached to and forming part of Policy No. 330521 of the Fidelity-Phenix Fire Insurance Company.

Exhibit P-2.

John A. Eckert & Co.
 #90 John Street,
 New York, N. Y.

In consideration of additional premium of One Hundred (\$100-) Dollars this policy is extended to cover, against the risks of Fire and Lightning only, on merchandise (the property of the assured or that of any other owner for which the assured may be or may hold themselves liable in case of loss or damage) sent out on consignment and/or memorandum, wherever the same may be located in the United States and/or Canada, but this Company in no event shall be liable for an amount exceeding Twenty Thousand (\$20,000) Dollars in any one disaster in respect of such merchandise. 10

It is further understood and agreed that the above coverage is intended to apply where no other insurance is collectible and/or in a case where the property of the assured is not protected by the consignee with sufficient insurance, in which case, this endorsement is to apply only as excess over and above the specific insurance. 20

It is further understood and agreed that where claim has been made by this assured for loss of or damage to the property insured hereunder caused by perils insured against, this Company will reimburse the assured for such loss or damage within sixty (60) days after proofs of loss have been filed with this Company; it being further understood and agreed that this company shall be subrogated to all the rights of the assured upon making such payment. 30

Attached to and forming part of Policy No. 330521 of the Fidelity-Phenix Fire Insurance Company. 40

Exhibit P-2.

On all kinds of lawful goods and merchandise consisting principally of Cotton and/or Silk and/or Cotton and Silk Goods, their own or the property of any other owner for which the assured may be or may hold themselves liable in case of loss or damage.

- 10 Covering from the time the property insured passes into the custody of any railroad company; Express Company, truckman and/or transportation Company and/or U. S. Atlantic Coastwise, U. S. Gulf Coastwise and/or Great Lake Steamship Lines or any other carriers and/or bailee, for transportation between points and places in the United States and/or Canada and/or also while shipped on assured's own trucks and/or hired trucks, as specified below within the territorial limits named below, until delivered by the carrier or trucks at destination, but subject to the conditions specified below.

20

Permission is hereby granted for the assured to release licensed Public Truckman and/or Public Truckmen of liability in excess of \$50.00 per case, bale or shipping package. It is understood and agreed that the term "Public Truckmen" as used in this policy includes long distance motor transportation companies.

30

It is understood and agreed that on all shipments by express, permission is hereby granted to the assured to accept the ordinary receipts issued by the express companies limiting the liability of the carrier to 50c. per pound, but not less than \$50.00 unless the value of the shipment be less than \$50.00.

40

Privilege is granted to accept limited and/or released bills of lading on shipments via United States Atlantic Coastwise, United States Gulf

Exhibit P-2.

Coastwise and Great Lakes Steamship Lines, and other carriers and/or bailees not specifically mentioned in this special form.

Covering against the risks of fire, lightning, cyclone, tornado, flood, collision, derailment, overturning of vehicle, theft, pilferage, oil damage, hook damage and all other risks of physical loss or damage arising from any external cause whatsoever whether or not said loss or damage be of the same character as those specifically stated. 10

Subject to particular average irrespective of percentage.

It is the intention of this policy to cover merchandise in transit within the limits described above by car floats, lighters or other vessels, excluding sailing vessels, and while contained in trucks on ferries and also while in transit within these limits by all other customary conveyances. 20

It is also the intention of this policy to cover while merchandise is held in/or on trucks on premises of truckmen and/or carrier and/or elsewhere for not exceeding 48 hours at any one time, but if a holiday intervenes, then during such holiday and for 48 hours thereafter, and also elsewhere while held in own truck and/or hired trucks for not exceeding the same period and while contained in railroad cars on sidings. 30

It is especially understood and agreed that any claim under this policy amounting to less than \$2,500. will be reinstated free of charge.

Including risks on docks, wharves, piers, bulkheads, landing sheds, in depots, stations and/or on platforms awaiting shipment and/or after arrival while in the custody of a common carrier, and also after the liability of the common carrier as a common carrier has ceased, but for not more 40

Exhibit P-2.

than seven days at any one time after the cessation of this liability and provided notice is sent to this Company or John A. Eckert & Company prior to any known loss (premium to be computed at the rate of 1c. per \$100. per day on the amount at risk after the cessation of this liability).

10 This Company shall in no case be liable for more than the sum of \$25,000. any one loss, disaster or casualty either in case of partial or total loss or salvage or any other costs and expenses or all combined.

20 It is understood and agreed that goods shipped to purchaser are considered at assured's risk, regardless of selling contract but that any insurance granted herein shall not cover where any carrier or other bailee has insurance (whether prior or subsequent in date to this policy) which would attach if this policy had not been issued, and that any insurance granted herein shall not cover where the assured, the consignee or any other party has other insurance (whether prior or subsequent in date to this policy) which would attach if this policy had not been issued.

30 This policy may be cancelled by either party giving fifteen days notice in writing on the conditions customary with underwriters of fire policies.

Valued at cash market value, including the commission or profits of the assured, together with freight and other charges on the day of the disaster.

40 In all cases of loss when it shall be claimed by the Insurance Company that the carrier or other party in whose custody the property may be at the time of such loss is or may be liable, then the assured shall at the request of the said Company or its agents, assign and subrogate all their rights

Exhibit P-2.

and claims to this Company to an amount not exceeding the sum paid by this Company.

Strike and Riot Clause:

Covering also against the risk of loss and/or damage to the property hereby insured directly caused by Rioters, Strikers or persons taking part in Insurrection and/or Rebellions and/or Explosions of any nature other than Boiler Explosion. No claim to attach hereto for delay, deterioration and/or loss of market, or for confiscation or destruction by the Government of the Country in which the property is situate. Only to pay herein if not recoverable under any other existing policy of insurance. 10

Any and all clauses and conditions in the printed portion of this policy and customs of underwriters in conflict with the terms of this special form are waived and declared null and void. 20

To attach to and forming part of Policy No. 330521 of the Fidelity-Phenix Fire Insurance Company.

30

40

Exhibit P-3.

No. 33608

Claim No. C-22382

THE NATIONAL CITY BANK
OF NEW YORK.

New York, Mar 24 1926

10 Pay to the Order of Cohn-Hall-Marx Company
the sum of \$21000 and 00 cts \$21,000.00#
on account of all claims for loss disaster of Janu-
ary 1926 per transit
Covered under Policy No. 330521 issued at Marine
Office of America.
For account Fidelity Phenix Fire Insurance Co.
Nature of Loss—Loss.

MARINE OFFICE OF AMERICA,

20 , \$21,000.00# George Horton W. Jennings.
Office Manager.

(Endorsed)

S. D. McCOMB.

Pay Equitable Trust Co. of New York
Importers & Traders Office
or order
Cohn-Hall-Marx Co.

30 Jacob W. Schwab, Treas.

Exhibit P-4.

No. 34521

Claim No. C-22382

THE NATIONAL CITY BANK
OF NEW YORK.

New York, May 1, 1926.

Pay to the Order of Cohn-Hall-Marx Company
The sum of \$14923 and 53 cts. \$14923.53# 10
Balance of all claims for loss disaster of January
1926 per Transit
Covered under Policy No. 330521 issued at Marine
Office of America.
For account Fidelity Phenix Fire Ins. Co.
Nature of Loss—Loss.

MARINE OFFICE OF AMERICA,

\$14923.53# George Horton, W. Jennings. 20
Office Manager.

(Endorsed)

Pay Bank of the Manhattan Co.
31 Union Square
New York, or order
Cohn-Hall-Marx Co.
Jacob W. Schwab, Treas.
3—28X 3—28X 30

Exhibit P-5.

Transit
 Cohn-Hall-Marx Co.
 F. P. 330521
 Jan. 1926
 C-22382

Date 3/24/26

10 Received from the Fidelity Phenix Fire Insur-
 ance Company Twenty One Thousand and 00/100
 Dollars, being a loan without interest and repay-
 able only to the extent of any net recovery we may
 make from any third parties on account of loss of
 or damage to property (described below) by Loss
 or any net recovery we may make, from, on, or by
 reason of any insurance effected by us or by any
 third parties on said property, and as security for
 20 such repayment, we hereby pledge to the said Fi-
 delity Phenix Fire Insurance Company the said
 recovery; and deliver to them the bills of lading
 for said property, duly endorsed, and we agree to
 enter and prosecute suit against said third parties
 for the purpose of effecting any such recovery with
 all due diligence at the Expense and under the ex-
 clusive direction and control of the said Fidelity
 Phenix Fire Ins. Co.

30

COHN-HALL-MARX CO.,
 Signature Lawrence Marx,
 Pres.

Description of Property.

Shipped by Cohn-Hall-Marx Co.
 At Consolidated Piece Dye Works
 205 Paterson St., Paterson, N. J.
 Interest 155273-1/8 yards "Lido" voiles
 Marks and Numbers

40

Exhibit P-6.

Transit
Cohn-Hall-Marx Co.
F. P. 330521
Jan. 1926
C-22382

Date (Time stamp) Recd. 1 P. M.

Received from the Fidelity Phenix Fire Insurance Co. Fourteen Thousand Nine Hundred Twenty Three and 53/100 Dollars, being a loan without interest and repayable only to the extent of any net recovery we may make from any third parties on account of loss of or damage to property (described below) by Loss or any net recovery we may make, from, on, or by reason of any insurance effected by us or by any third parties on said property, and as security for such repayment, we hereby pledge to the said Fidelity Phoenix Fire Insurance Co. the said recovery; and deliver to them the bills of lading for said property, duly endorsed, and we agree to enter and prosecute suit against said third parties for the purpose of effecting any such recovery with all due diligence at the Expense and under the exclusive direction and control of the said Fidelity Phenix Fire Ins. Co.

10

20

COHN-HALL-MARX CO.,
Signature Lawrence Marx,
Pres.

30

Description of Property.

Shipped by Cohn-Hall-Marx Co.

At Consolidated Piece Dye Works

205 Paterson St., Paterson, N. J.

Interest 155273-1/8 yards Lido Voiles

Marks and Numbers

40

Exhibit P-7.

United States of America, }
 District of New Jersey. } ss.:

10 I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed is a true copy of the record in the case of Cohn-Hall-Marx Co. a corporation, Plaintiff, vs. Consolidated Piece Dye Works, a corporation, Defendant, as the same remains of record, and on file in my office; that I have compared said copy with the original record, and that it is a correct transcript therefrom, and of the whole of the original.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this eighteenth day of September, A. D. nineteen hundred and Twenty-nine.

(Seal)

20

GEORGE T. CRANMER,
 Clerk.

United States of America, }
 District of New Jersey. } ss.:

30 I, Wm. N. Runyon, Judge of the District Court of the United States for the District of New Jersey, do hereby certify that George T. Cranmer, whose name is attached to the foregoing certificate, was at the time of making the same, and still is, Clerk of the aforesaid Court, and full faith and credit are due all his acts as such; and that the seal affixed to said certificate is the seal of said Court, and the attestation thereto is in due form.

In testimony whereof, I have hereto subscribed my name, at Trenton, in said District, this

40

Exhibit P-7.

Eighteenth day of September A. D. nineteen hundred and Twenty-nine.

WM. N. RUNYON,
District Judge.

United States of America, }
District of New Jersey. } ss.: 10

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that Wm. N. Runyon, whose name is attached to the foregoing certificate, was at the time of making the same, and still is, Judge of said District Court, and that his signature to said certificate is genuine.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this Eighteenth day of September, A. D. nineteen hundred and Twenty-nine.

(Seal)

GEORGE T. CRANMER,
Clerk.

United States of America, }
District of New Jersey. } ss.: 30

The President of the United States of America
To

Consolidated Piece Dye Works,
a corporation of the State of
New Jersey

You are summoned to answer the annexed complaint of
Cohn-Hall-Marx Co., a corporation,
in an action at law in the District Court of the 40

Exhibit P-7.

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

Witness the Honorable John Rellstab,
 Judge of said Court, at Trenton,
 (Seal) this 14th day of August, A. D. nine-
 teen hundred and Twenty-six.

GEORGE T. CRANMER,
 Clerk.

By L. M. Zarp,
 Deputy.

20

Served the within Summons and Complaint on the Consolidated Piece Dye Works, a corporation by delivering to and leaving with Henry Smith, Registered Agent of the above named corporation, a copy thereof at Paterson in the District of New Jersey, on the 16th day of August, 1926, and at the same time showing the said person this original with the seal of Court attached and informing
 30 the said person of its contents.

F. C. SCHNEIDER,
 U. S. Marshal.

By Charles A. Demmer,
 Deputy.

40

Exhibit P-7.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

 COHN-HALL-MARX Co., a corpor-
 ation,

Plaintiff,

vs.

 CONSOLIDATED PIECE DYE WORKS,
 a corporation,
 Defendant.

10

Action at Law.

Complaint.

Plaintiff a corporation of the State of New York
 having its principal office at 93 Franklin Street,
 in the City, County and State of New York says,

20

FIRST COUNT.

1. Plaintiff is a resident and citizen of the State
 of New York.

2. Defendant is a corporation organized and
 existing under the laws of the State of New Jer-
 sey having its principal place of business in the
 City of Paterson, County of Passaic and State of
 New Jersey and is a citizen, resident and inhabit-
 ant of the said State of New Jersey.

30

3. The amount in controversy herein exceeds,
 exclusive of interest and costs, the sum and value
 of \$3,000.

4. Defendant at all the times hereinafter men-
 tioned was engaged in the business of printing in
 various patterns and colors, or finishing, cotton
 and other fabrics, delivered to it for that purpose,

40

Exhibit P-7.

by owners thereof and dealers therein and was also engaged, in connection therewith, in the business of warehousing and storing such fabrics so delivered to it, both before and after such printing and finishing work, until delivery of such fabrics in accordance with the directions and orders of the
10 owners and bailors thereof, for which services defendant charged and was paid an agreed compensation.

5. During the latter part of the year 1925 plaintiffs caused to be delivered to defendant, at defendant's factory and place of business at Hazel Street and Montclair Avenue, in the City of Paterson aforesaid, many thousand yards of dyed and plain cotton fabric, known as voiles, then owned by
20 the plaintiff, for the purpose of having printed thereon at said location certain patterns in various colors, or having the same finished, in accordance with specific directions and orders with respect thereto, given in writing by plaintiff to defendant, at or about the time of such delivery, upon the understanding and agreement that after completion of said work of printing or finishing said goods, defendant should store and keep said goods
30 safely, carefully and in a place free from risk of damage and loss thereto by fire or otherwise, for compensation to defendant in that behalf paid, until delivery of said goods pursuant to directions furnished to defendant by plaintiff.

6. While plaintiff was still the owner of said cotton fabrics so delivered to defendant for printing and finishing and after said cotton fabrics had been printed and finished by defendant in its factory at Hazel Street and Montclair Avenue, in the
40 City of Paterson, aforesaid, defendant, without the knowledge and consent and against the will of

Exhibit P-7.

plaintiff removed said goods from said factory at said location and placed the same in storage in a building of defendant at certain premises known as 205-207 Paterson Street in said City of Paterson, which said building was unusually hazardous on account of fire.

7. While said goods of plaintiff were so located in storage at Paterson Street aforesaid, without the knowledge and consent of plaintiff, defendant so carelessly and negligently kept, stored and protected the same that on or about January 13, 1926, a fire occurred at said premises 205-207 Paterson Street, whereby said cotton goods of plaintiff, so in the possession of the defendant, were greatly damaged by fire, smoke and water employed in and about extinguishing said fire. 10

8. Defendant had in its possession at the time of said fire in storage as aforesaid at said Paterson Street 155,273 $\frac{1}{8}$ yards of finished cotton fabric known as Lido voiles belonging to plaintiff the value of which, in storage as aforesaid, was Thirty-two and one half Cents (\$.32 $\frac{1}{2}$) a yard, being a total value of \$49,454.49. 20

9. Subsequent to said damage by fire, smoke and water as aforesaid certain salvaging operations were undertaken with the knowledge and consent of defendant, with respect to said damaged goods whereby the net sum of \$13,530.96 was realized from the sale of the said goods so damaged and salvaged, to the knowledge and with the consent of defendant so that the plaintiff was damaged and lost the net sum of \$35,923.53 by reason of the acts of defendant as aforesaid. 30

SECOND COUNT.

10. Plaintiff repeats and makes a part hereof the allegations of paragraphs one, two, three, four 40

Exhibit P-7.

five and six of the first count.

10 11. Prior to delivery of said goods to defendant by plaintiff and its agents and servants, for said work of finishing and storage thereof and at all times while said goods were being finished and stored by said defendant, defendant represented and stated that while it was engaged in finishing and handling said goods and keeping the same in storage and delivering the same, that said goods were and would be kept insured, to the full value thereof, against loss or damage by fire or causes resulting therefrom for the benefit of the owner thereof and so that in case of loss or damage to said goods by fire and/or causes arising in connection with fire, any loss or damage to said goods should be borne and paid by said defendant.

20 12. Plaintiff repeats and makes a part hereof the allegations of paragraphs seven, eight and nine of the complaint.

13. Plaintiff has demanded of defendant the sum of \$35,923.53 but defendant has not paid the same or any part thereof.

Plaintiff claims damages on both counts in the sum of \$35,923.53 together with interest from January 13, 1926.

30 PITNEY, HARDIN & SKINNER, .
Attorneys of Plaintiff

(Endorsed)

40 United States District Court, for the District of New Jersey. Cohn-Hall-Marx Co. a corporation, Plaintiff, vs. Consolidated Piece Dye Works, a corporation, Defendant. Summons and Complaint. Pitney, Hardin & Skinner, Prudential Building, Newark, N. J., Attys. of Plaintiff. Filed Aug. 18, 1926, at 9 o'clock A. M. George T. Cranmer, Clerk.

Exhibit P-7.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY,

COHN-HALL-MARX Co., a corpor- ation, Plaintiff, vs. CONSOLIDATED PIECE DYE WORKS, a corporation, Defendant.	}	10 Action at Law. Answer.
---	---	---

Defendant, a corporation of the State of New Jersey having its principal office at Hazel Street and Montclair Avenue, in the City of Paterson, County of Passaic and State of New Jersey, says that:

DEFENSE TO FIRST COUNT.

1. As to the statement in the first paragraph of this count, defendant has no knowledge or information thereof sufficient to form a belief.
2. Defendant admits the second paragraph.
3. Defendant admits the third paragraph.
4. Defendant admits that it was and is engaged in the business of printing in various colors and patterns, and denies the remainder of the fourth paragraph.
5. Defendant admits the delivery by the plaintiff to it, in the Spring of 1925, of many thousand yards of dyed and plain cotton fabrics known as voiles of which the plaintiff claimed to be the owner, for the purpose of having printed thereon cer-

Exhibit P-7.

tain patterns in various colors or having the same finished in accordance with specific directions with respect thereto given in writing by plaintiff to defendant at or about the time of such delivery, as set out in the fifth paragraph and denies the remainder of said paragraph.

10 6. Defendant admits that certain cotton fabrics of which the plaintiff claimed to be the owner were removed from its factory to a storehouse at 205-207 Paterson Street in the City of Paterson and denies the remainder of said sixth paragraph.

7. Defendant denies the seventh paragraph except that the fire occurred on or about January 13th, 1926, at the premises known as 205-207 Paterson Street in the City of Paterson, whereby the goods of plaintiff were damaged by water employed in and about extinguishing said fire.

20 8. Defendant denies the eighth paragraph.

9. Defendant admits the allegation in the ninth paragraph that certain salvaging operations were undertaken by plaintiff and denies the remainder of said paragraph.

10. The defendant at the special request of the plaintiff stored the goods in question at the storehouse aforesaid 205-207 Paterson Street in the City of Paterson.

30 11. The said fire was not caused by the negligence of the defendant or of its officers or employees or by any want of care.

DEFENSE TO SECOND COUNT.

1. Defendant repeats and makes a part hereof the allegations in paragraphs 1, 2, 3, 4, 5 and 6 of the answer to the first count.

40 2. Defendant denies paragraph eleven.

Exhibit P-7.

3. Defendant repeats and makes part hereof the allegations in paragraphs 7, 8 and 9 of the answer to the first count.

4. Defendant admits paragraph thirteen.

5. Defendant repeats and makes part hereof the allegations in paragraph 10 and 11 of the answer to the first count.

10

WILLIAM B. GOURLEY,
Attorney of Defendant.

(Endorsed)

United States District Court, District of New Jersey. Cohn-Hall-Marx Co., a corporation, Plaintiff, vs. Consolidated Piece Dye Works, a corporation, Defendant, Action at Law. Answer. William B. Gourley, Counsellor-at-Law, First National Bank Building, 125 Ellison St., Paterson, N. J. Filed Sep. 23, 1926, at 9 o'clock A. M., George T. Cranmer, Clerk.

20

30

40

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF NEW JERSEY,

COHN-HALL-MARX COMPANY,

vs.

10 CONSOLIDATED PIECE DYE WORKS,

} Case
No.L-1056

It appearing to the Court that the above case has been pending for more than six months without any proceeding having been taken therein, and no objection having been entered at a call of the calendar, it is on this 28th day of February, 1928

20 ORDERED that the above case be and the same hereby is dismissed in accordance with General Rule 27, without prejudice and without costs to either party.

J. L. BODINE,
Judge.

(Endorsed)

30 United States District Court, District of New Jersey. Cohn-Hall-Marx Company, vs. Consolidated Piece Dye Works, Order Dismissing Case Pursuant to General Rule 27. Filed Feb. 28, 1928, at 9 o'clock A. M. George T. Cranmer, Clerk.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY,

COHN-HALL-MARX Co., a corpor-
ation,

vs.

CONSOLIDATED PIECE DYE WORKS,
a corporation,

L-1056.

Action at Law. 10

Rule for
Judgment.

This action having been tried before Judge William Clark, with a jury, in the presence of counsel of the respective parties on April 20th, 1927; and the jury returned a verdict in favor of the defendant: 20

It is on this 28 day of October, 1929 ORDERED that Judgment final be entered in favor of the defendant, Consolidated Piece Dye Works and against the plaintiff, Cohn-Hall-Marx Company with costs to be taxed.

WILLIAM CLARK,
U. S. D. J.

(Endorsed) 30

United States District Court, District of New Jersey. Cohn-Hall-Marx Company, a corporation, Plaintiff vs. Consolidated Piece Dye Works, a corporation, Defendant. Rule for Judgment. Filed Oct. 28, 1929, George T. Cranmer, Clerk.

*Exhibit P-7.*DISTRICT COURT OF THE
UNITED STATES OF AMERICA.

DISTRICT OF NEW JERSEY.

10 I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Rule for Judgment on file, and now remaining among the records of the said Court, in my office.

(Seal) In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this 28th day of October, nineteen hundred and twenty-nine.

20

GEORGE T. CRANMER,
Clerk, District Court, U. S.
By Charles A. Chevrier,
Deputy.

30

40

Exhibit P-7.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY,

 COHN-HALL-MARX Co., a corpor-
 ation,

Plaintiff,

vs.

 CONSOLIDATED PIECE DYE WORKS,
 a corporation,

Defendant.

10

Action at Law.

Order.

This matter being opened to the Court by Albert Comstock for William B. Gourley, attorney of the defendant, upon consent of the plaintiff and it appearing that the order heretofore entered herein dismissing said cause in accordance with general rule 27 and without prejudice, should now be vacated:

20

It is on this 21st day of October, 1929 ORDERED that said order dismissing the above entitled cause for lack of prosecution be and the same is hereby vacated.

30

WILLIAM CLARK,
U. S. D. J.

We do hereby consent to the entry of the foregoing order.

PITNEY, HARDIN & SKINNER,
 Attorneys of Plaintiff.

40

Exhibit P-7.

(Endorsed)

United States District Court, District of New Jersey. Cohn-Hall-Marx Company, a corporation, Plaintiff vs. Consolidated Piece Dye Work, a corporation, Defendant. Order vacating Order dismissing cause &c. Filed: Oct. 28, 1929. George
 10 T. Cranmer, Clerk.

DISTRICT COURT OF THE
 UNITED STATES OF AMERICA.

DISTRICT OF NEW JERSEY,

I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do here-
 20 by certify the foregoing to be a true copy of the original Order vacating order dismissing cause, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this 28th day of October, nineteen hundred and twenty-nine.

(Seal)

30

GEORGE T. CRANMER,
 Clerk, District Court, U. S.
 By Charles A. Chevrier,
 Deputy.

40

Exhibit P-8.

Telephone Hanover 3080

MARINE OFFICE
OF
AMERICAS. D. McComb, Manager
53 Beaver Street—New York.

10

Feb. 16, 1928.

Att: Mr. Lawrence Marx.

R-815

Cohn-Hall-Marx Company,
93 Franklin Street,
New York, N. Y.Loss of Cotton Fabrics
by fire in Patterson, N. J.
January 13th, 1926.

20

Gentlemen:

In as much as the facts developed at the trial of the action brought by you against the Consolidated Piece Dye Works, Inc. in the Federal Court in New Jersey indicate that you had knowledge of the storage of the cotton fabrics in question in the warehouse in the building located at 205-207 Paterson Street, Paterson, N. J., and in view of the further fact that you assured us that you had no such knowledge, and relying thereon we paid the loss in question, we hereby make claim upon you for the repayment to us of the sum of \$35,923.53 with interest for two years at the rate of 6% making a total of \$40,234.35 now due to us.

30

This loss was paid by us without any legal liability on our part, we relying fully on the fact that you as our assured had a good cause of action against the Consolidated Piece Dye Works, when

40

Exhibit P-8.

as a matter of fact and as was developed at the trial, you had no such cause of action against the defendant in this action.

Accordingly we would respectfully request that you put us immediately in funds to the extent of \$40,234.35.

10

Very truly yours,

MARINE OFFICE OF AMERICA,
W. H. JONES,
Manager of Loss Dept.

TJT—HB.

(reverse side)

Feb. 17/28.

20 Marine Office of America,
53 Beaver St.,
New York City.

Att. Manager of Loss Dept.

Gentlemen:

We acknowledge receipt of your letter of the 16th addressed for the attention of Mr. Lawrence Marx.

30 Mr. Marx is at present out of town but is expected to return the early part of next week. Your letter is being held for his attention.

Very truly yours,

COHN-HALL-MARX CO.,
Treas.

JWS/M.

40

Exhibit P-9.

COHN-HALL-MARX CO.
 TEXTILES
 93 Franklin St., New York

May 19/26.

John A. Eckert & Co.,
 90 John St.,
 New York City.

10

Gentlemen:

Replying to your letter of the 18th enclosing copy of letter sent from the Marine Office, we have no written arrangement with the Consolidated as regards to where or how they could store our goods, but it is generally implied to the trade that they are to take good care of them.

We did not know that they had moved the goods from their main building to the Paterson Street location until after the fire. We did not know that the Consolidated was storing goods other than in their main building and they had given us no notice to this effect.

20

Yours truly,

COHN-HALL-MARX CO.

L. Marx,

Pres.

30

LM/MM.

40

Exhibit P-10.

October 29th, 1929

Cohn-Hall-Marx Company,
93 Franklin Street,
New York, N. Y.

Fidelity-Phenix Fire Insurance Co.

vs.

10

Cohn-Hall-Marx Co.

Dear Sirs:

Attention: Mr. Marx

We hereby tender to you certified check No. 3487 drawn to your order in the sum of \$1,029.27 which represents a payment of \$850.63 made to us by Cohn-Hall-Marx on May 1st, 1926, as additional premium under Transit Floater Policy No. T-330521, issued by the Fidelity-Phenix Fire Insurance Company of New York, together with interest at 6% per annum to date.

20

We received this premium from you on May 1st, 1926 after we had completed payment to you for a loss sustained by you at 207 Paterson Street by virtue of the destruction of a quantity of Lido Voiles by fire on January 13th, 1926. It was our understanding at that time (May 1st, 1926) that you did not know, prior to the fire, that the merchandise in question was stored on the premises known as 207 Paterson Street. Acting on the representation to this effect, the loss was paid, and we at that time received from Cohn-Hall-Marx the sum of \$850.63 as premium on the premises in question. It now appears that you did know of the fact of storage at 207 Paterson Street and that the payment made by us was made against

30

40

Exhibit P-10.

false representations as to such knowledge. Request is again made for the return to us of the amount so paid \$35,923.53, plus interest to date, or \$43,598.18.

Very truly yours,

MARINE OFFICE OF AMERICA,

10

Manager of Loss Dept.

TJT-EJ

20

30

40

Exhibit P-11.

COHN-HALL-MARX CO.
TEXTILES
93 Franklin Street
New York

In Reply Please
Refer to Dept.
W. C. Link
Bush Bldg. 19
Brooklyn, N. Y.
September 23, 1925.

10

Consolidated Pc. Dye Wks.
85 Hazel St.,
Paterson, N. J.

Gentlemen:

20

We have your letter of the 22nd, giving us your stock of Lido Voile supplies for which we thank you.

Will you kindly deliver to 93 Franklin St., New York City, marked for Bush Terminal, two boxes of Lido Voile Slydins?

Yours truly,

COHN-HALL-MARX CO.,
Per W. C. Link.

30 WCL.NL

40

Exhibit P-12.

COHN-HALL-MARX CO.
COTTON FABRICS
93 Franklin Street
New York

In Reply Please
Refer to Dept.
W. C. Link 10
Bush Bldg. 19
Brooklyn, N. Y.
Jan. 14, 1925.

Consolidated Print Wks.,
85 Hazel St.,
Paterson, N. J.

Gentlemen:

We are sending you today via express prepaid under package #2766, two bundles of blue wrapping paper for D/R goods. In the same package we are sending you 1000 each of our CHM54 plain hang tags and CHM3 foot tickets, as we understand you have not yet received the supply which we sent you on Jan. 12th via parcel post in package #75. 20

We will order delivered to our New York Office tomorrow morning eight more bundles of blue wrapping paper and would ask you to kindly have your truck call for same. 30

Will you also advise us whether or not you require any wrapping paper for the L/F goods.

We are shipping to you from Rhode Island via Bay State Line care of your truck about 400 veneer cases in two sizes to hold approximately 25 pcs. and 55/60 pcs.

Yours truly,

COHN-HALL-MARX CO.,
Per W. C. Link. 40

WCL:SE

Exhibit P-12.

COHN-HALL-MARX CO.

COTTON FABRICS

93 Franklin Street

New York

Dept. T-2766-2768

Jan. 16, 1925

10 Terms Net

Sold to

Consolidated Print Works

85 Hazel St.,

Paterson, N. J.

Package No.	Description	Amount	Total
2	Bundles Wrapping Paper 26 x 36 (4 Reams) 260 lbs. net at 7½ per lb	19 50	19 50
20	8 Bundles Ble Wrapping Paper (16 Reams) 850 lbs net at 7½ per lb. 10 sheets per lb.	63 75	63 75
			<hr/> 83 25

30

40

Exhibit P-13.

COHN-HALL-MARX CO.

TEXTILES

93 Franklin Street
New York

In Reply Please

Refer to Dept.

W. C. Link 10

Bush Bldg. 19

Brooklyn, N. Y.

October 20, 1925

Consolidated Pc. Dye Wks.

85 Hazel St.,
Paterson, N. J.

Gentlemen:

We have your invoice of October 14th for package #CW972 containing two pieces of style 2171— 20
J.

We also have your invoice of October 16th for the same package number, calling for two pieces each of colors F, H, J and K—style 2173.

Please advise the writer at Bush Bldg. 19, Brooklyn, N. Y., whether the case number on one of these invoices is not correct.

Yours truly,

COHN-HALL-MARX CO., 30
Per W. C. Link.

WCL.NL

10

20

Exhibit P-14.

(Photostat)

30

40

44

P. 1st
10/15/26
J.F.

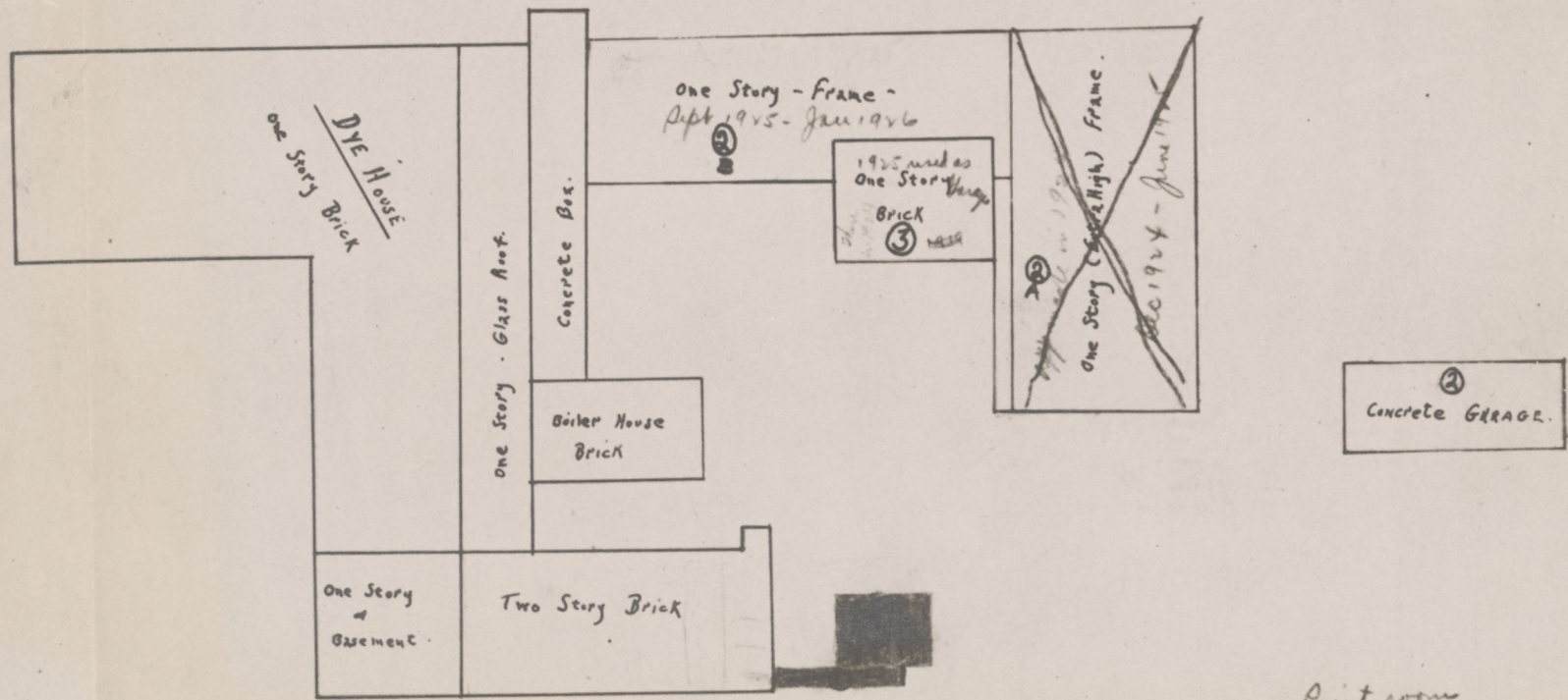
CONSOLIDATED PIECE DYE WORKS.

HAZEL ST. AND MONTCLAIR AVS., PATERSON, NEW JERSEY.

PRICE TO JANUARY 15, 1926.

DAKOTA ST.

BLOOMFIELD AVE.

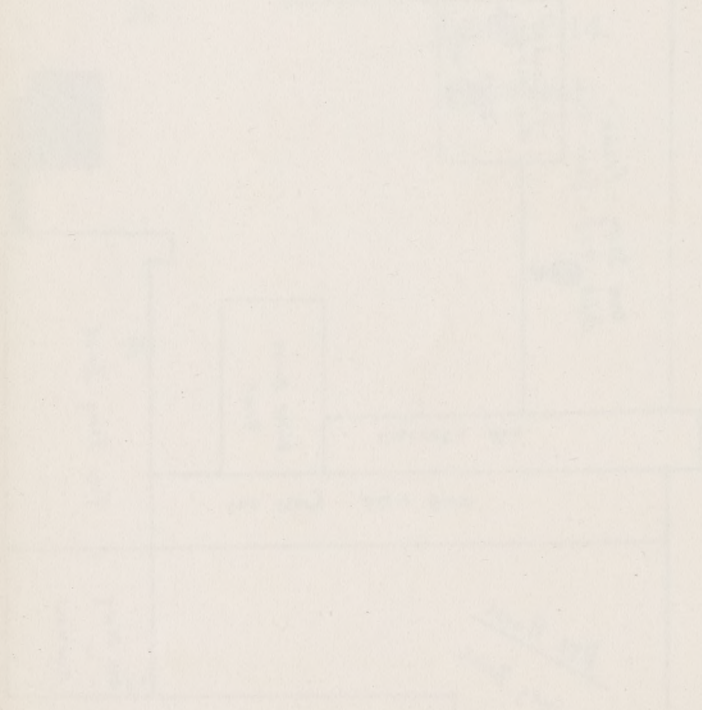
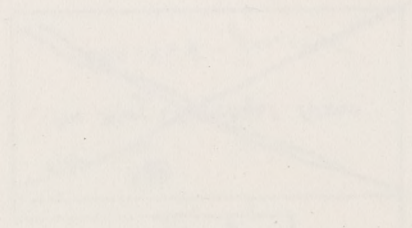


- 2A Print room
- 2B Receiving Dept - storage of raw goods and preparation of goods to be processed.

Building permit application shown at last trial covered.

HAZEL ST.

1870



1870

Table D-1

Technical History Report

MARKING OFFICE

MARKING

U. S. National Maritime

50 Boston Street, New York

10

July 27, 1958

Dear Mr. [Name]

Reference is made to your letter of

July 23, 1958.

Enclosed are

two copies of

the report.

20

We thank you for your letter of the 23rd inst.

and we have noted the information therein.

It is our hope that the information

contained in the report will be of

some assistance to you in your work.

Sincerely yours,

Director, Office of Maritime

W. B. [Name]

Special Agent in Charge

30

W. B. [Name]

40

Exhibit D-1.

Telephone Hanover 3080

MARINE OFFICE
OF
AMERICA

S. D. McComb, Manager

10 53 Beaver Street—New York

May 25th, 1926.

*Loss a/c Cohn-Hall-Marx Co.
at Consolidated Piece Dye Works.*

Cohn-Hall-Marx Co.,
93 Franklin Street,
New York City.

20 Gentlemen:

We thank you for your letter of the 22nd inst., and we have asked Messrs. Pitney, Hardin & Skinner to communicate directly with you for any further information required.

We take this opportunity of thanking you for your cooperation with us in the attempt to recover from the Consolidated Piece Dye Works.

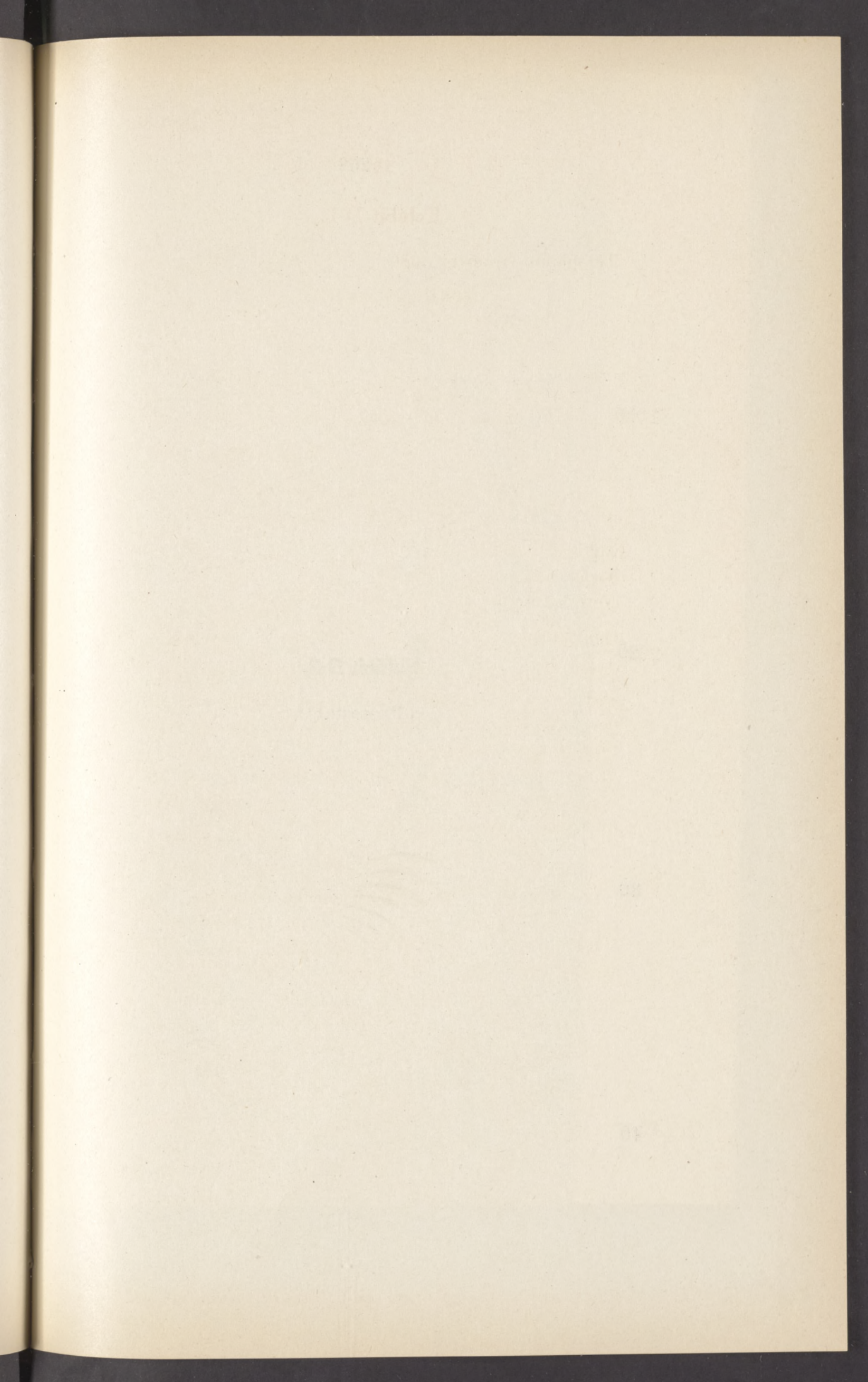
Yours very truly,

30

MARINE OFFICE OF AMERICA,
W. H. JONES,
Manager of Loss Dept.

WHJ:DRG

40



10

20

Exhibit D-2.

(Photostat)

30

40

Exhibit D-2

Copy

041

3140

Copy

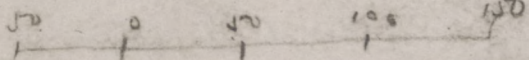
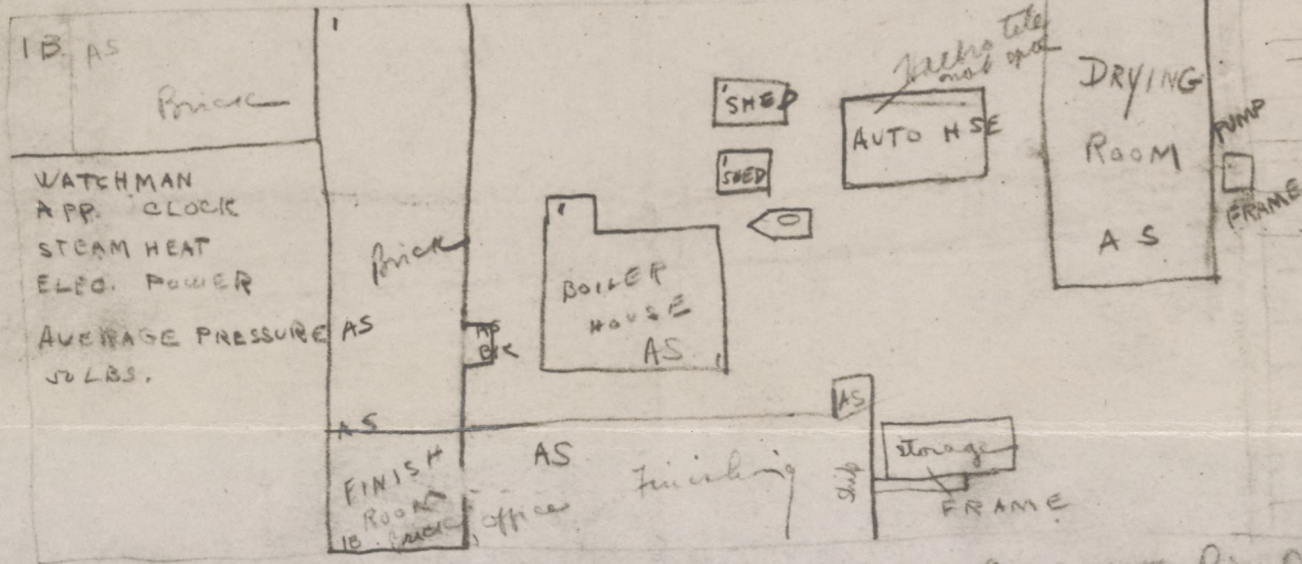
Exhibit DII

ed vs by
J.

(2)

F.I.A.
092 MDSE

DAKOTA ST.



HAZEL ST.

Consolidated Pipe & Iron Works

MONTCLAIR AVE.

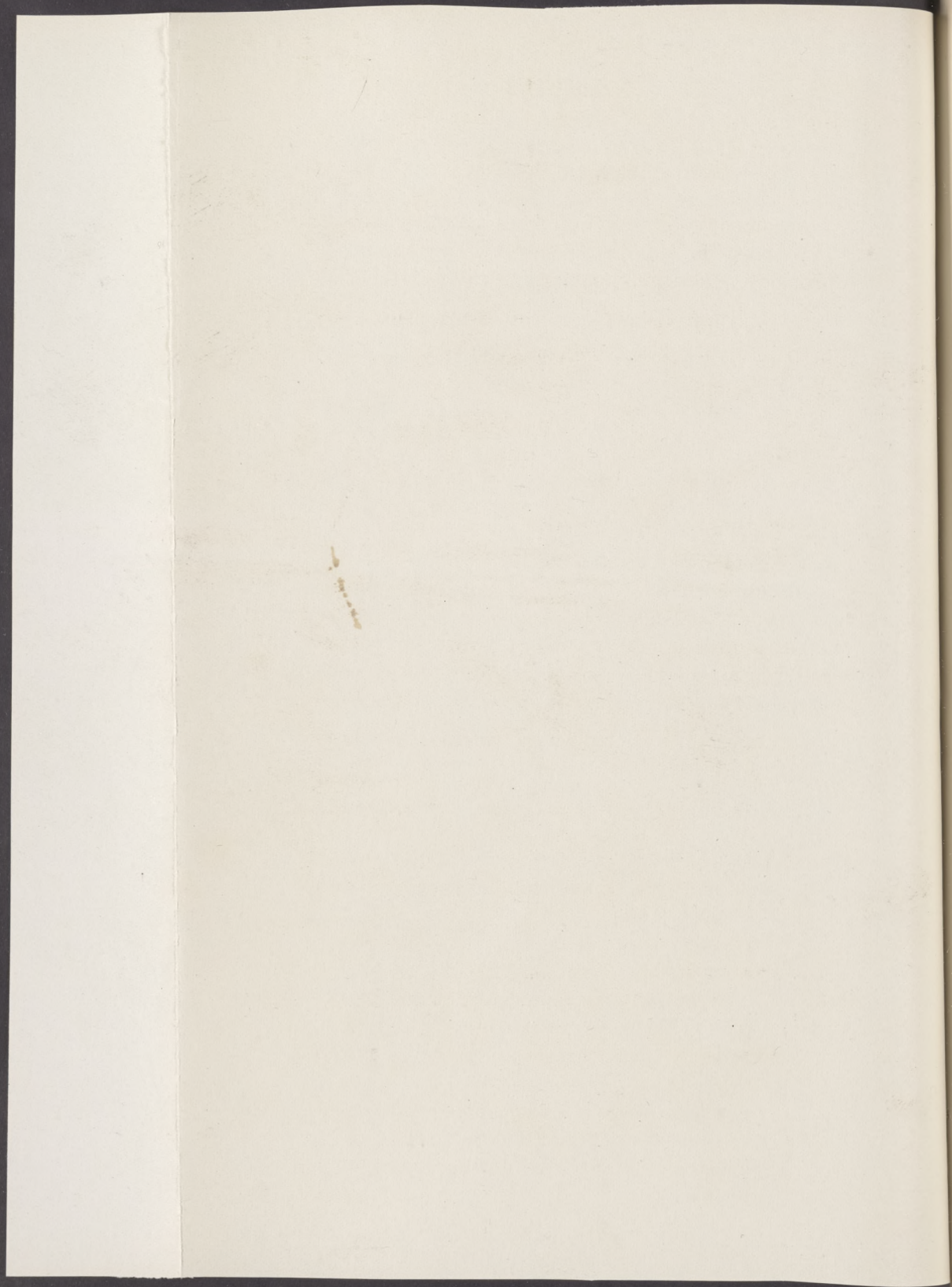


Exhibit D-3.

Accompanying (2) applications there must be (2) plans (in duplicate) showing the survey of property, Elevations and ground plans.

Application for Permit No. 1560.

DEPARTMENT OF BUILDINGS

City Hall.

10

Paterson, N. J. March 27, 1925

To the Inspector of Buildings:

I hereby make application for a permit to erect a building according to the following detailed statement, specified in the following report and plans herewith submitted; all provisions of the building ordinance will be complied with in the erection of said building if specified herein or not.

20

(Agent or owner must sign here in person)

T. Ivan Arnold.

(Address of Owner or Agent) 85 Hazle St.

1. Location: 85 Hazle St. No. of Buildings: one
2. Size of Building: 60 x 120. Size of Lot 200 x 200.
3. Building is of Frame.
4. No. of stories (with height) one.
5. Is the building to be erected on the front or rear of the lot? Rear.
6. Are there any other buildings to remain on this lot? No.
7. Percentage of lot to be occupied: 45%.
8. Purpose of building (See Sec. 106a) (Warehouse class): Storage during drying of materials.

30

40

Exhibit D-3.

9. If dwellings—No. of families —
 9. If dwellings—No. of Separate exits —
 9. No. of emergency exits —
 10. Estimated cost (exclusive of lot) of each building separate: \$5000.
- Remarks

10

FOUNDATIONS

1. What is the character of the ground; rock, clay, sand, etc? Rock.
2. Will the foundation be laid on earth, rock, timber, or piles? Rock and earth.
3. Will there be a cellar? No. Depth of foundation walls below curb: 2' 6".
4. Walls will be built of cement.
5. Walls water-proofed with No.
6. Footings No.
7. Material used for footings: None.

20

WOOD CONSTRUCTION

(Framed)

1. Of what material will frame be constructed of?
2. (Interior supports: Brick piers: None. Wooden posts: 6in. x 6in.
3. Size of outside studs: 2in. x 4in. distant apart on centers 16 in. corner posts 6in. x 6in., also every 10 ft.

30

Sill: 4in. x 6in. plate: 3in. x 6in. rafters double 3in. x 10in. hips: none valleys: none.
Give Size, Longest Span Distance between Centers of Joists and Columns.

Floors—First Floor.

40

Exhibit D-3.

Joists—Size: 2in. x 8in. Longest Span: 20in. x 0in.

Centers: 16in. Bridging: 10in x 0in.

Girders—Size: 6 x 8in. Longest Span 10ft.-0in.

Centers: 20ft. -0ft.

4. Bearing partitions made of None. Spaced on centers None.
5. Size of headers and trimmers None. 10
6. Outside walls covered with sheathing. How framed? Ballroom type.
7. Hall partitions How fireproofed?..
8. Flues, chimneys, etc., rest on distance from wood-work
9. Flues, chimneys, etc., lined with hearths
10. Will roof be peaked, flat or Mansard? Peak. Material of roofing: Slag. 20
11. Fire escapes (if any describe) None.
12. Scuttle on roof: Yes. Bulkhead on roof: No.
13. Will basement or cellar ceiling be plastered? None.
14. Any portion of building used for a store? No.
15. If so, (how isolated from dwelling parts)?—
16. If wood ceilings? —
If metal ceilings? —
17. If fire stops are provided — If any rear or side walls are supported by iron girders or lintels, give particulars, sizes, etc. 30

Note—Only persons having the proper authority to apply for this permit and make this application need sign this agreement, otherwise it must be signed by the owner of land and buildings.

Exhibit D-3.

Date Mar. 27, 1925

I, T. Ivan Arnold, residing at 433 Van Houten St., County of Passaic, City of Paterson, State, N. J.

10 The work proposed to be done upon the said premises will be done in accordance with the accompanying detailed statement, which is accompanied by plans of proposed work and according to the ordinance of the City of Paterson governing buildings.

Signed T. Ivan Arnold, Pres. Consolidated Piece Dye Works.

Date Mar. 27, 1925.

(This must be filled out before permit is valid).

20 (Diagram of Property).

Endorsed:

Permit No. 1560 Fee Charged \$15.00.

Application to Department of Buildings, Paterson, N. J. for a Permit to Construct a Building.

Location: 85 Hazle St.

Owner: Consolidated Piece Dye Works.

Contractor: C. Nyden.

Architect: A. R. Putan.

30

Office, Inspector of Buildings

City of Paterson, Mar. 27, 1925

I have this day received and examined the within application and the 2 sets plans and detailed specifications, and find that it is in accordance with the Building Ordinance of the City.

40

JOHN QUIGLEY,
Permit No. 1560.
Bldg. Inspector.

93
/

New Jersey Court of Errors and Appeals

FIDELITY PHOENIX FIRE INSUR-
ANCE COMPANY, a corporation,
Plaintiff-Appellee,

vs.

COHN-HALL-MARX COMPANY, a
corporation,
Defendant-Appellant.

Action at Law.

On Appeal
from Passaic
County Cir-
cuit Court.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal from a judgment of \$44,756.28 recovered in the Passaic County Circuit Court (Hon. William B. Mackay presiding).

The trial which resulted in the verdict on which this judgment was entered, was before a "struck jury," which was ordered on an application made by the plaintiff after two previous trials had resulted in disagreements. The basis of the application was that the case was too complicated for the ordinary petit jury to understand.

Plaintiff, a New York Insurance Company had issued to the defendant, a New York corporation engaged in the textile business, a policy of insurance, No. T 330521, which ran for one year from August 1st, 1925 to August 1st, 1926. This policy is a rather complicated and lengthy document, (Exhibit P-2) taking up pages 204 to 235 inclusive in the State of Case. But we are only concerned

with a very short portion of it. Among other things, the policy insured the defendant's property against loss by fire while being shipped from mill to mill, in which mills various work was being performed upon same before its ultimate sale and delivery.

That portion of the policy with which we are especially concerned, (State of Case, pages 211 to 218 inclusive), insured against fire the property of the defendant while at sixty-three different mills, warehouses, etc. in the United States, but the only one which is material here is the mill of the Consolidated Piece Dye Works at Paterson, New Jersey.

The location of this mill is described in the policy as follows: (State of Case, page 212) ;

"No. 13. Consolidated Pc. Dye
Works, Hazel St. &
Montclair Ave., Pat-
erson, N. J. \$150,000."

There are also four other portions of the policy which are really material, one a rider or endorsement, (Exhibit P-1a, State of Case, page 202), which will be discussed later, and the others, clauses reading as follows: (State of Case, page 215) :

"\$100,000. At each of any new premises in the United States of America located other than those mentioned above to which the assured may from time to time send this property; it being understood and agreed that the assured will cause this Company to be notified of any such new premises within thirty (30) days after the arrival of their property at such new premises."

Also at page 218:

"This policy shall not be voided by failure

to comply with any of these terms and conditions in any premises over which the assured has no control."

Also at pages 234-235:

"In all cases of loss when it shall be claimed by the Insurance Company that the carrier or other party in whose custody the property may be at the time of such loss is or may be liable, then the assured shall at the request of the said Company or its agents, assign and subrogate all their rights and claims to this Company to an amount not exceeding the sum paid by this Company."

On January 13th, 1926, during the term of this policy of insurance, a fire occurred at 205-207 Paterson Street, Paterson, N. J., which destroyed goods belonging to the defendant corporation valued at \$49,455.00, the loss of which, after salvaging what was left, was agreed to be \$35,923.53. The first knowledge that either the plaintiff or the defendant companies had of the exact location of the fire which had been reported, (State of Case, page 38) was when the plaintiff's adjuster, a Mr. Browning, and the defendant's representative returned from Paterson where they had gone to inspect the damaged property, (State of Case, pages 68 to 72).

The plaintiff insurance company at first refused to pay the loss, taking the position that it was not liable because defendant's goods were not at the time of the fire, at the Consolidated Piece Dye Works' mill at Hazel Street and Montclair Ave., Paterson, N. J., the location described in the policy of insurance, (State of Case, page 43, lines 10 to 40).

At a subsequent conference or conferences at which the plaintiff's position of not being liable was being discussed, the officers of the defendant

corporation stated that they did not know their goods were at the Paterson Street location, but had always believed that all of their goods were kept by the Consolidated Piece Dye Works at their Hazel Street plant, which was the location described in the policy of insurance.

(State of Case, page 122, lines 2 to 20;
 “ pages 128, 129, entire pages;
 “ page 173, lines 37 to 40;
 “ page 174, lines 1, 2;
 “ page 175, entire page;
 “ page 176, lines 1 to 10).

Plaintiff's officers then stated that under such circumstances *it was their opinion* that the defendant company had a good cause of action against the Consolidated Piece Dye Works for removing defendants' goods from the mill at Hazel Street and Montclair Avenue, to Nos. 205-7 Paterson Street, Paterson, N. J. (State of Case, page 43, lines 10 to 33; page 176, lines 10-21).

Plaintiff then agreed to pay the amount of the admitted loss under agreements termed “loan agreements”. (Exhibits P-5 and 6, State of Case, pages 238, 239). This was in pursuance of the term of the policy already quoted, which provided for the subrogation of the Insurance Company to the defendant's claim against any party in whose custody the property was at the time of loss. (State of Case, pages 234, 235).

The agreement of settlement between the plaintiff and the defendant also provided that a suit was to be commenced by the plaintiff herein, in the name of the defendant herein, against the Consolidated Piece Dye Works, at the expense of the insurance company, in an attempt to recover as dam-

ages the same amount of money which the insurance company was paying.

The loan agreements herein mentioned apparently are quite common in marine insurance matters and are used for the express purpose of permitting the insurance company to institute suits in the name of the assured against some third party who may be responsible for having caused the loss for which the insurance company is liable to its assured.

Under these two agreements, plaintiff paid to the defendant on March 29th, 1926, \$21,000.00, and on May 1st, 1926, \$14,923.53. (See checks, Exhibits P-3 and 4, State of Case, pages 236-237).

As between the plaintiff and the defendant, there can be no doubt that these payments represented payments by the insurance company of the loss to the defendant payable under its policy of insurance issued by the plaintiff.

(State of Case, page 50, lines 35 to 40;
 “ page 51, lines 1, 2;
 “ page 52, lines 30 to 40;
 “ page 53, lines 1 to 37;
 “ page 65, lines 10 to 20).

It will also be noted in this connection that the two checks (Exhibits P-3 and 4) just referred to, on their face indicated that the payments were made for claims of the defendant under the policy T 330521.

Plaintiff then retained Pitney, Hardin & Skinner as attorneys, to institute suit in New Jersey, in the name of the defendant against the Consolidated Piece Dye Works, for the recovery of this \$35,923.53.

Plaintiff also insisted and made the defendant company agree that in consideration of this agreement of settlement, the defendant should pay to it,

the plaintiff, the difference in the premium on the sound value of defendant's property, to wit: \$49,455.00, between the rate for the insurance at the place of the fire, to wit: 205-7 Paterson Street, Paterson, N. J., and the mill described in the policy. This difference amounted to \$850.63 and was paid on May 1st, 1926 by the defendant to the plaintiff, (State of Case, page 35, lines 24, 25). Upon payment of this additional premium, the plaintiff company then issued a rider or endorsement which was previously referred to, (Exhibit P-1a, State of Case, page 202).

Because of its importance in this case, a photostatic copy has been attached to the State of Case. This rider or endorsement modified the policy T 330521 and being retroactive as to time, insured property belonging to the defendant having a value of \$49,455.00 located at 205-207 Paterson Street, Paterson, N. J. from August 1st, 1925 to August 1st, 1926;

(State of Case, page 32, lines 20 to 40;
 “ page 33, entire page;
 “ page 42, lines 21 to 23;
 “ page 57, lines 37 to 40;
 “ page 58, entire page;
 “ page 59, lines 1 to 20).

On April 20th, 1927 (State of Case, page 46, lines 20 to 28) the trial of the suit started by the attorneys of the plaintiff in the name of the defendant against the Consolidated Piece Dye Works, came on in the United States District Court for the District of New Jersey, at Newark, and resulted in a verdict in favor of the defendant. At that trial the defendant co-operated with the plaintiff herein, as it had agreed to, and its officers and agents testified practically to the same effect as they did in the present suit with reference to the

fact that the defendant company did not know that its property or goods were ever located at 205-207 Paterson Street, Paterson, New Jersey. Apparently, and most naturally, the officers of the Consolidated Piece Dye Works testified to the same facts as are contained in the within record, which indicated a knowledge on the part of the defendant company that their goods had been moved from the mill at Hazel Street and Montclair Avenue to 205-207 Paterson Street, Paterson, N. J.

From April 20th, 1927 until February 16th, 1928, nothing was done by the within plaintiff, but on the latter date the plaintiff company wrote a letter to the defendant, (Exhibit P-8, State of Case, pages 255-256) demanding repayment of the \$35,923.53 for the following reason:

“This loss was paid by us without any legal liability on our part, we relying fully on the fact that you as our assured had a good cause of action against the Consolidated Piece Dye Works, when, as a matter of fact and as was developed at the trial, you had no such cause of action against the defendant in this action.”

In July, 1928, the within plaintiff issued a writ of attachment against the defendant, attaching certain property belonging to it located in Paterson, Passaic County. The amended complaint which was filed in that action contains among other things, the following allegations: (State of Case, pages 13 and 14)

“6. At the time of the said reporting of said loss and damage to said cotton fabrics and the submission of said alleged proofs of loss, the defendant made to this plaintiff certain false and fraudulent statements, knowing the same to be false and fraudulent and with the intent to deceive this plaintiff and

to induce it to pay said alleged loss not covered by said policy, which statements were to the effect that the said Consolidated Piece Dye Works, without the knowledge or consent of this defendant and in breach of its contract with this defendant had stored said cotton fabrics in one of its warehouses which was a location not enumerated in said rider attached to said policy and that this defendant did not know that said cotton fabrics had been so stored in said location not enumerated in said rider and defendant agreed that it would bring an action in its name for the benefit of this plaintiff against said Consolidated Piece Dye Works, and would repay said sums so paid to it from the proceeds of said action."

"7. This plaintiff relying on the said false and fraudulent statement of the defendant and also upon the agreement of the defendant to bring an action against the Consolidated Piece Dye Works for breach of its contract for the care and custody of said cotton fabrics, did on the 24th day of March, 1926, and again on the 1st day of May, 1926, pay to the defendant sums of money aggregating \$35,925.53, the total amount of its aforesaid alleged loss, although it was not and knew that it was not liable for said loss under said policy."

The defense on the facts was a denial on the part of the defendant that it had any knowledge that its property was located at 205-207 Paterson Street, Paterson, N. J. Defendant's most vigorous contention throughout all three trials centered around the special defense pleaded in the answer (State of Case, page 18) :

"Any money paid to it, the defendant, by the plaintiff, was paid in accordance with the terms of a contract of insurance as it existed between the plaintiff and the defend-

ant on the date and/or dates of said payment or payments.”

It will be noted that there are very few disputed facts, practically the only dispute being whether or not the defendant knew that its goods had been moved from the plant of the Consolidated Piece Dye Works at Hazel Street and Montclair Avenue, Paterson, to 205-207 Paterson Street, Paterson, N. J. prior to the fire of January 13th, 1926.

Defendant contended at the trial when plaintiff closed its case, that there should be a judgment of non-suit. This motion was denied and exception taken. Defendant moved for a direction of verdict at the close of the case, which was denied, and exception taken. Defendant requested certain charges, Nos. 8 and 9 (State of Case, pages 199-200) which were denied and exception taken. All these motions and requests to charge centered around the same legal proposition. The points, briefly stated, upon which appellant relies for a reversal of this judgment, are as follows:

1. **Misrepresentation.**
2. **Inducement.**
3. **Waiver and Rescission.**
4. **Plaintiff paid the loss because it was legally liable to do so under the policy of insurance and the rider thereto attached, and was therefore not entitled to recover the money paid.**

ARGUMENT.

POINT I.

Misrepresentation.

(a) *There was no misrepresentation as to any material facts.*

The specifications in the policy of the location of the assured's property were merely descriptive, and at most, a warranty in praesenti, and not a promissory warranty that the property would remain in the location described.

One of the reasons urged at the trial why judgment of non-suit and a direction of a verdict in favor of the defendant should be granted, was that the representations of the defendant which the plaintiff alleged were made, were not material representations.

It is so elementary that it need no citations of authority that two of the most important elements in a suit for the recovery of money paid by reason of misrepresentations or an action for damages based on misrepresentations, are that the representations were of material facts and that the person complaining must prove that he relied on such material representations.

There is a serious question whether the description of the place where defendant's goods were to be located during the existence of the insurance policy, was a promissory warranty, so that a breach of the same would have constituted a good defense in a suit by the insured for the fire loss of January 13th, 1926. Surely, under the circumstances and conditions of the defendant's business,

known to the plaintiff by virtue of various terms of the insurance policy, the defendant's property being shipped from place to place all over the country, in at least sixty-three different mills, with an almost continuous movement of its property from mill to mill and with no physical control by the defendant company over its goods while in the possession of the different mills, it can hardly be believed it was ever the intention of the insurance company or the defendant that the latter was doing more than merely describing the various mills to which it would ship its property, and was not warranting that its goods would be kept in any special or separate place or building. If this be so, then the representations made by the defendant with regard to its knowledge of the fact that some of its goods were being kept by the Consolidated Piece Dye Works at the Paterson Street location instead of the Hazel Street mill, were not representations of material facts in connection with the plaintiff insurance company's liability under its policy.

There is considerable authority for the proposition that the description of location in an insurance policy covering personal property is merely intended for identification and that, although it may be a warranty in praesenti, it is not, in the absence of an express stipulation, a promissory warranty that the property will remain in the location described.

See

Couch Cyclopedia of Insurance Law
(1930) (Vol. 4, page 3333)

"The rule also applies where the property is, and is known by insurer to be, of such a character in connection with the business in which it is employed as necessitates its tem-

porary removal, and its being kept temporarily in place other than the owner's premises, and where the description of location may be merely intended for identification. In fact, except as to personal property that has a distinct and definite abiding place, a description as to location, although it may be a warranty in praesenti, is not, in the absence of an express stipulation, a promissory warranty that the property will remain in the location described."

See also

May on Insurance (2nd Ed. 1930, Par. 704).

Cooley's, Briefs on Insurance (2nd Ed. 1927) Vol. 3, page 2562. Vol. 6, page 4926.

Plaintiff failed to establish the materiality of the representations in another respect. As already pointed out, the policy of insurance (State of Case, page 215) provided as follows:

"\$100,000. At each of any new premises in the United States of America located other than those mentioned above to which the assured may from time to time send this property; it being understood and agreed that the assured will cause this Company to be notified of any such new premises within thirty (30) days after the arrival of their property at such new premises."

To prove that the representation by the defendant with regard to the location of its goods was material, it was incumbent upon the plaintiff to establish such facts as would show that it was not liable on the policy of insurance, as it originally stood, for if the plaintiff were liable on the policy, then a fraudulent representation inducing it to perform its legal obligation would be immaterial

and not actionable. This proposition is definitely established in *Musconetcong Iron Works vs. D. L. & W. R. R. Co.*, 78 N. J. L. 717 (Court of Errors and Appeals 1910).

The policy covered the goods of the defendant while in the mill of the Consolidated Piece Dye Works, located at Hazel Street and Montclair Avenue, Paterson, N. J. It is also beyond dispute that all of the defendant's property which eventually found its way to the scene of the fire, was originally in the mill for treatment. If the goods had been at the mill at the time of the fire and there destroyed, the liability of the plaintiff would be unquestioned. It is also clear from the portion of the policy just quoted, that the goods which were at the mill were covered at any other place for a period of thirty days after their arrival at such new destination. That the defendant knew of the removal did not affect the plaintiff's liability, so long as a period of thirty days had not elapsed from the time of the arrival of the goods at the new destination.

The defendant therefore urges that the burden was upon the plaintiff to establish that the goods which were destroyed had been removed from the mill more than thirty days before the happening of the fire. Plaintiff failed to introduce a scintilla of evidence on that vital point. The records show that at the time of the fire, the goods were kept on "open stock" at the Paterson Street address. (State of Case, page 75 *et seq.*). The goods there stored were being shipped to customers of the defendant with great rapidity, sometimes every day. Plaintiff's witnesses so testified (State of Case, pp. 84 and 101):

"Q. Now, how often were shipments made from open stock? A. Sometime every day.

Q. You had a large volume going in and out of open stock? A. Yes."

At the time of the fire 152,000 yards of material were on open stock. This amount apparently was small when compared with the quantity that had passed through the mill and warehouse over a period of time, for plaintiff's witnesses testified that the mill at times would print as much as 50,000 yards in one day. (See State of Case, page 103).

"Q. How often would you take it from Hazel Street down to Paterson Street?

A. Oh, every day, and sometime every couple of days.

Q. Every day? A. Yes, and every couple of days.

Q. I thought you said you accumulated it there until the end of the order? A. We used to print 50,000 yards some days."

The amount of materials sent to the mill company for treatment, and which ultimately reached the warehouse, was so great that the defendant urged the mill company to do the defendant's work exclusively. (See State of Case, page 107). It appears from the above that the plaintiff, instead of proving that the goods which were destroyed had left the mill more than thirty days before the fire, tended to prove quite the contrary. Defendant submits that the plaintiff failed to introduce any testimony to prove one of the essential elements of fraud, to wit: the materiality of the representation and that therefore, the motion for nonsuit on that ground should have been granted.

(b) *There was no motive for the defendant to misrepresent.*

While it is true the policy described in it specific

locations at which defendant's property was to be insured, it must be remembered that the policy also contained a clause permitting the assured to add new or changed locations by giving notice to the insurance company. This clause has been set forth in full in the State of Facts in this brief, and will be found in the State of Case, page 225.

Consequently, there was no reason or motive for the defendant to conceal from the plaintiff any change in the location of its goods in Paterson, because all it had to do as soon as it discovered or agreed to any such change or location, was to notify the plaintiff company and there would have been immediate coverage by the terms of the policy, or at the worst, a notice of cancellation and an opportunity of obtaining new insurance from some other company.

(c) The opinion of plaintiff's representatives that defendant had a good cause of action for recovery against a third party was not a misrepresentation.

With full and complete knowledge of all the facts, which would in any way be material, what did the insurance company do? Its officials came to the conclusion that the defendant had a good cause of action against the Consolidated Piece Dye Works. At no time did the defendant make any statement or representations with regard to whether or not it had a good cause of action or thought it had a good cause of action, but it will be noted that all these statements came from the officials of the plaintiff insurance company.

This is conclusively shown by the following excerpt taken from the State of Case, page 43, lines 24 to 32 (testimony of William H. Jones) :

“And we said in that case it appeared to us that they had a good cause of action against the Consolidated for moving their goods from a sprinkled mill to a very hazardous building in another part of the town, and we suggested that they sue the Consolidated, to which he replied that that would take a long time and that he needed the money, and wouldn't we arrange to advance him the money and he would agree to sue the Consolidated.”

Even if the representations of the defendant had expressed an opinion as to whether or not they had a good cause of action against the Consolidated Piece Dye Works, this, it seems to us without citing authorities, would never amount to a representation, because an opinion is never a representation.

Incidentally, it will be noted that even the opinion of the plaintiff was that the defendant had a good cause of action against the Consolidated Piece Dye Works and that there never was any opinion expressed, either by a representative of the plaintiff or defendant, as to the likelihood of the success of the contemplated litigation. That the defendant did have a good cause of action is conclusively proven by reason of the fact that the case in the U. S. District Court passed the point of non-suit and was submitted to the jury after the defendant had put in its case.

(d) *There was no reliance by the plaintiff on any representation made by the defendant.*

It will be noted that the insurance company did not ask the defendant to guarantee that such a suit would be successful (State of Case, page 54, lines 17 to 24) :

"Q. Now, there was no agreement or guarantee by Cohn-Hall-Marx at any of these conferences or in any of these documents that they would recover against the Consolidated Piece Dye Works in this litigation, was there?

A. There was no guarantee?

Q. That is what I said.

A. No, there was no guarantee."

Nor did it exact any guarantee from the defendant that the \$35,923.53 would be repayable to it, except under the terms of the loan receipts (Exhibits P-5 and 6) which agreements distinctly stated that the money advanced by the plaintiff to the defendant would be repayable "*only to the extent*" of any net recovery he (plaintiff) may make from any third parties on account of the loss or damage to the property of the defendant at 205-207 Paterson Street, Paterson, N. J.

In this same connection let us quote a very significant statement, an excerpt from Exhibit D-1 (State of Case, page 266). This is a letter from the plaintiff to the defendant, dated May 25, 1926:

"We take this opportunity of thanking you for your cooperation with us in the attempt to recover from the Consolidated Piece Dye Works."

Certainly, if the representation as to the location of the defendant's goods was only to be used as a basis for an "*attempt*" to recover, as stated in this letter, then certainly, the plaintiff did not rely on the representation of the defendant in paying the admitted loss, but was simply taking a chance at a possible recovery and therefore was not defrauded, nor did it sustain any damage because of its reliance on the defendant's statement as to its knowledge of the location of its property at the time of the fire.

The insurance company knew two days after the fire where the defendant's goods were located, which had been destroyed by the fire, and made an investigation of its own at that time as will be seen from a reading of the testimony of Arthur P. Browning. (State of Case, pages 68 to 72).

There is authority for the proposition that where a party makes an independent investigation or has an opportunity for same, and where the other party invites rather than retards or obstructs him in making such investigation, then the defrauded party cannot take the position that the representations of the defendant were the inducing cause of the loss of which he complains.

Mount v. Loizeaux, 86 N. J. L. 515;

Condon v. Sandhowe, 97 N. J. Eq. 204.

As was very aptly said by Vice Chancellor Van Fleet in the case of *De Witt vs. Van Sickle*, 29 N. J. Eq. 209:

“A person who wilfully closes his eyes to avoid seeing what he believes he would see if he kept them open, must be considered to have seen what any man with his eyes open would have seen.”

Not only did Mr. Browning, the representative of the plaintiff insurance company interview an officer of the Consolidated Piece Dye Works and actually investigate the situation in Paterson two days after the fire, but it is respectfully submitted that the insurance company knew from the very beginning that the Consolidated Piece Dye Works denied any liability for the fire loss, because of the charge that it had removed the defendant's goods from the Hazel Street plant to the Paterson Street warehouse. In this connection note the

testimony of plaintiff's witness, William H. Jones, (State of Case, page 45, lines 22 to 30) :

“Q. Now what did you next do in connection with the claim by Cohn-Hall-Marx against Consolidated?

A. We engaged attorneys to start the action.

Q. Did you prepare a claim form or a claim letter to be sent by Cohn-Hall-Marx to the Consolidated? A. Yes.”

Surely, if the insurance company prepared a claim or claim letter to be sent by Cohn-Hall-Marx the defendant herein to the Consolidated Piece Dye Works, making a claim for damages because of the removal of the within defendant's goods, they must have known that the mill owners denied liability, because the very next thing the plaintiff company did was to hire attorneys to start a suit against the Consolidated Piece Dye Works. Certainly such a suit would have been unnecessary if the Consolidated Piece Dye Works had admitted that they had moved the goods of the defendant without the defendant's knowledge or consent.

There is nothing in the record of this case to indicate that the defendant, by either word or action, retarded the plaintiff or obstructed it from making any investigation or inquiry as to the facts connected with its property being at the Paterson Street location, and the plaintiff's opportunity for such an investigation was complete and available.

We therefore respectfully submit on behalf of the defendant-appellant, that the testimony which we have pointed out, and with the authority we have quoted, that the judgment of non-suit or direction of a verdict in favor of the defendant should have

been granted by the Trial Court, for the following reasons:

First: There was no misrepresentation of any material facts.

Second: There was no motive for the defendant to misrepresent any material facts.

Third: The opinion of the plaintiff's representatives that the defendant had a good cause of action for recovery against the Consolidated Piece Dye Works was not a misrepresentation by defendant.

Fourth: There was no reliance by the plaintiff upon any representation made by the defendant.

Fifth: Because the facts showed that the plaintiff had made an independent investigation of its own, and that if this investigation had been made diligently, all the facts which developed at the trial of this case would have been discovered by the plaintiff before it paid the defendant the amount of the fire loss.

POINT II.**Inducement.**

There was no inducement, i. e. plaintiff was not induced to make the payment to defendant as a direct or proximate result of the alleged misrepresentation.

It is rather significant, that in paragraph seven of the plaintiff's amended complaint, set forth in full in State of Facts, the plaintiff used the following language:

*"This plaintiff, relying on certain false and fraudulent statements of the defendant and also upon the agreement of the defendant to bring an action against the Consolidated Piece Dye Works * * *".*

The language just quoted is in the conjunctive and shows that the plaintiff itself did not allege that it was induced to make the payments, exclusively and solely because of the defendant's alleged false statements, but coupled with it the allegation that the agreement of the defendant to bring an action against the Consolidated Piece Dye Works, was one of the inducing cause which led it to make the payments in question.

Defendant also contends that an analysis of some of the testimony in the record, indicates that the plaintiff's action in paying the loss was based upon something entirely outside of the representations or the defendants' agreement to bring an action against the Consolidated Piece Dye Works. Some of the witnesses intimated the reasons which actuated the company in the payment of this claim.

See testimony of Joseph M. Trask (State of Case, page 119, lines 35 to 40)

“Q. Did he say on what ground he was going to pay the loss?

A. Yes, on the broad ground that the policy was intended to cover all of Cohn-Hall-Marx's goods from the time they received them in the unfinished state until they were processed and sent to the customers.”

Also page 122, lines 12 to 19;

“Q. But in Mr. Marx having said that he didn't know, Cohn-Hall-Marx didn't know, that the goods were at 205-207 Paterson Street, on that representation they were willing to go ahead and make this loan?

A. That was one of the reasons, yes.”

Also testimony of Lawrence Marx, page 129, lines 30 to 40; page 130, lines 1 to 4;

“Q. Well, now, at the second conference what did the insurance officials say, with regard to what they were going to do, I mean?

A. Well in regard to what they were going to do, Mr. McCoomb said that he wanted to be very fair in this transaction, that we had always been good customers of theirs, and he felt that under the broad terms of the policy there was a responsibility, even though the goods had been moved. He also stated that he felt that if the goods had been moved by the Consolidated Piece Dye Works without our knowledge, that the Consolidated was liable for having moved the goods.”

Even the plaintiff's manager of the New York office, Mr. McCoomb, on cross-examination said, State of Case, page 174, lines 3 to 16:

“Q. Do you recall in those conferences or at one of them making a statement that because of the fact that Eckert and Company

were quite a substantial customer of your office and that Cohn-Hall-Marx was rather a heavy insurer, that you were inclined to offer this solution of the difficulty?

A. Well, you don't offer this solution to anybody except people whom you see are thoroughly all right and doing a good volume of business with you."

In the statement of facts in this brief, we have pointed out among other things, the following clause of the policy, which may also have induced the plaintiff to make payment of the loss sustained by the defendant. See State of Case, page 218:

"This policy shall not be voided by failure to comply with any of these terms and conditions in any premises over which the assured has no control."

A thorough examination of the record now before the Court will indicate that the defendant herein, the assured, had absolutely no control over the premises of the Consolidated Piece Dye Works described in the policy, to wit: Hazel Street and Montclair Avenue, Paterson, N. J. or the premises at which the fire occurred, 205-207 Paterson Street, Paterson, N. J. *It is the contention of the defendant that in view of this provision in the policy, it may well be that the plaintiff company was liable in any event to make payment to the defendant under its policy for the loss; that therefore, they were not induced by the alleged misrepresentation to make the payment.*

POINT III.**Waiver and Rescission.**

(a) *Plaintiff waived its right to demand the return of the payment made by it because it waited an extremely long time and because the defendant was prejudiced by such delay.*

(b) *Plaintiff could not recover, because it was suing on the wrong theory. Plaintiff should have rescinded and tendered back the additional premium of \$850.63 paid to it by the defendant within a reasonable time after it acquired knowledge of the alleged misrepresentation. Plaintiff's silence and inactivity from April 20th, 1927 to February 16th, 1928, after the discovery of the apparent untruth of the defendant's representation, was such a lapse of time under circumstances as to constitute proof of an election not to rescind.*

With the policy of insurance between the plaintiff and the defendant in the condition described in the statement of facts, plaintiff started this suit to recover without attempting to rescind its agreement or tender back the additional premium defendant paid.

After the first trial of this action, which was in September, 1929, and just a day or two prior to the time set for the second trial, the plaintiff, on October 29th, 1929, (Exhibit P-10, State of Case, page 258) tendered to defendant the \$850.63 which had been paid on May 1st, 1926. Appellant strenuously argues that this tender came much too late; that it should have been made at the very latest, prior to the time the suit was started by the plaintiff, which was in July, 1928.

To support this contention, we respectfully refer to the following authorities:

Doughten v. Camden Building and Loan Ass'n, 41 N. J. Eq., 556:

"It is a well-settled principle of law and equity that a party cannot rescind a contract by his own will, and at the same time keep possession of the consideration, in whole or in part, which he has received under it. So far as it is practicable, he must put the other party in *statu quo* before he can exercise his right of rescission. The rule is that there shall be '*prompt repudiation and restoration as far as possible.*' *Byard v. Holmes*, 4 Vr. 119; *Gay v. Alter*, 102 U. S. 79; *Hunt v. Silk*, 5 East 449; *Clough v. London & N. W. Ry. Co.*, L. R. (7 Ex) 324; Pollock's Principles of Contracts 509; 2 Parsons Cont. 679."

The rescission must be before suit is brought. See *Byard v. Holmes*, 33 N. J. L. 119.

See *Russell v. Russell*, 63 N. J. Eq. 282; (Court of Errors & Appeals, 1901).

"It is entirely settled that a party to a contract cannot, at one and the same time, repudiate it and retain a benefit from its partial execution. In order to entitle him to rescind he must first restore what he has received under the contract, and thus put the other party to the agreement in his original position."

In the case of *Hanrahan vs. National Building, Loan & Provident Association*, 66 N. J. L. 80 (Supreme Court 1901), it will be noted that the court held that the plaintiff could not recover without offering to return the stock certificates which she alleged was purchased on a misrepresentation.

Later, plaintiff rescinded, sued again and recovered.

See *Hanrahan vs. National Building, Loan & Provident Association*, 67 N. J. L. 526.

See also

Roberts vs. Jones, 83 N. J. L. 192;

Pearson vs. National Equitable Investment Co., 104 N. J. L. 564 (Court of Errors and Appeals, 1928).

13 Corpus Juris, 620,

“The general rule is that a party seeking to rescind must restore, or offer to restore, whatever he has received under the contract. This rule does not depend on the reason for rescission, unless the contract is void for illegality. * * * *”

“Generally, to rescind a contract, an offer to return property reserved thereunder must be made before suit, a return afterwards being proper only where the thing returned is a mere promise, as a check or note, and not property. It is not sufficient to offer to set off the amount against what is claimed from the other party.”

Black on Rescission and Cancellation (2nd Ed. 1929) Sec. 617:

“In pursuance of the rule set forth in the preceding section, and on the principle that he who seeks equity must do equity, it is well settled that any person demanding the rescission of a contract to which he is a party must restore or offer to restore to the other party whatever he may have received under the contract in the way of money, property, or other consideration or benefit. It is only by doing this that he can entitle himself to the return of what he, on his part, may have given or paid, and to be released from the

obligation of the contract. * * * * In other words, a party will not be permitted to rescind a contract so as to reclaim what he has parted with, and at the same time retain what he has received in the transaction."

Assuming that the defendant committed fraud or misrepresented material facts, in connection with the contract of settlement of the plaintiff company and its issuance of the rider (Exhibit P-1a), still, appellant argues strenuously that the plaintiff's failure to disaffirm either the contract of settlement or the rider (Exhibit P-1a) promptly, and its failure to return or offer to return the additional premium, constituted a waiver of the fraud and creates a legal bar to recovery by the plaintiff.

As has been pointed out, both the allegations of the complaint and the plaintiff's proofs tended to establish the fact that the plaintiff, on the sixteenth day of April, 1927, upon the occasion of the trial of the suit between the defendant Cohn-Hall-Marx and the Consolidated Piece Dye Works in the United States District Court for the District of New Jersey, at Newark, discovered that the statements and representations made by the defendant with regard to its knowledge of the fact that its goods were stored or kept at the Consolidated Piece Dye Works' warehouse, 205-207 Paterson Street, Paterson, New Jersey, were apparently false and untrue. Admittedly, no action was taken by the plaintiff until February 16th, 1928 (Exhibit P-10) to demand a payment from the defendant of the money paid to it in 1926.

Plaintiff's acceptance of the additional premium and annexation of the endorsement to the policy, constituted a new contract between plaintiff and defendant. Before plaintiff could commence this suit, it was required to rescind such new contract and tender it back to the defendant, the addition-

al premium accepted by it—all within a reasonable time after plaintiff's discovery of the alleged misrepresentation.

There is authority for the proposition that a contract of settlement between the insured and the assured, is a contract separate and distinct from the policy of insurance.

The following quotation is taken from Couch, *Cyclopedia of Insurance Law* (1930), Vol. 7, page 5575:

“An adjustment of loss entered into with the claimant, together with a promise to pay the insurer at the time of the adjustment, having full knowledge of all the facts, will relieve the claimant from making the formal proofs of loss required by the policy, and will operate as a waiver of all defenses known to the insurer at the time of entering into such adjustment. The adjustment and promise to pay create a new contract, and the right of action is dependent upon this new contract, and not on the terms of the policy, so that, having elected to adjust the claim, the company cannot, in the absence of fraud, repudiate this new and independent contract, and claim that there is no right of action against it, on the ground of noncompliance with the conditions or warranties of the policy.”

This seems also to be supported by the following head-note of a New Jersey case:

“A compromise of a disputed claim under an insurance policy, made after an investigation of the circumstances concerning loss, furnishes a good consideration to support a contract to pay an agreed sum to the insured.”

Dobbs v. New Amsterdam Casualty Co.,
101 N. J. L., 176; (Court of Errors and
Appeals, 1925).

In this connection the following statement is also quite pertinent :

“Under the rules applicable to the recovery of payments generally, the company may recover back a payment induced by the fraud of insured, or induced by a mistake of fact as to the happening of the contingency on which it is payable, or as to a breach of a condition avoiding the policy. But it cannot recover a voluntary payment made with full knowledge of the facts. The company cannot recover back a payment merely because it has changed its mind with regard to a matter of policy, or because it has come to a better position so far as the facilities and probable result of a defense are concerned. Where the fraud of insured goes, not to the right to recover, but to the extent of recovery, the company can recover only so much as, in equity and in good conscience, it ought not to have paid. The company, having paid the loss, cannot recover back the payment upon any ground, except fraud, merely affecting the validity of the original contract known, or which upon inquiry might have been known, when they paid the loss and which would have been a defense to an action on the policy.”

33 Corpus Juris, Sec. 711, page 42.

The theory apparently of the rule just quoted is set forth in a citation contained in a note at the bottom of the above quoted page, which reads as follows :

“Otherwise there would be no end of controversy and litigation, and the party receiving the money would hold it subject to a lawsuit until the statute of limitations intervened.”

Reverting now to the main theory of this point, to wit: *that the lapse of such a length of time un-*

der the circumstances affords plenary proof of an election not to rescind, to which conclusive effect should have been given, which, incidently, is framed in almost the exact language used by Justice Garrison in *Faulkner vs. Wassmer*, 77 N. J. Eq. 537; (Court of Errors and Appeals, 1910), which same theory was restated by Justice Katzenbach in the case of *Kvedar vs. Shapiro*, 98 N. J. L. at page 299, in the following language:

“Delay in the rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid.”

The following authorities are also given in support of this argument:

Norfolk & New Brunswick Hosiery Co. v. Arnold, 49 N. J. Eq., 390;
Clampitt v. Doyle, 73 N. J. Eq., 678.

The case of *Faulkner v. Wassmer*, quoted *supra*, contains some additional language by Justice Garrison which is also quite pertinent.

“The learned vice-chancellor was in error in testing the complainant’s right to elect solely by the doctrine of laches and notably so in conceiving that the decision of this court in *Dennis v. Jones*, 44 N. J. Eq. (17 Stew.) 513, turned upon that doctrine which, in point of fact, was not even mentioned in the opinion of Chancellor McGill in this court. *Dennis v. Jones* was decided not upon the quasi-estoppel that is involved in the doctrine of laches, but upon a totally different ground, viz., that of conduct-evidence.”

At page 543 of the same opinion:

“The question in itself is not peculiar to this class of cases; it is present in all cases involving a reasonable time, concerning which, it is admitted, that no hard and fast

rule obtains and also that the difficulty that exists in cases that lie close to the line disappears with the lapse of time that has been permitted to intervene. Thus the question whether a landowner, who is under a duty to make repairs upon notice, is in default on the very day he had notice or the day after may present difficulties that entirely disappear if he has suffered weeks and months to elapse. The case before us is of this latter character in that an election that could in reason have been made within a few days, or at most a few weeks after the right to make it arose, was, without any adequate excuse that was consistent with promptitude of action, delayed for months. It is precisely this conduct that (as we decided in *Dennis v. Jones* and *Clampitt v. Doyle*) affords plenary proof of an election to abide by the contract, which is irrevocable."

See also *Reed vs. Benzine-ated Soap Co.*, 81 N. J. Eq. 182; *Maioran vs. Calabrese*, 100 N. J. Eq. 315.

Inasmuch as a great many of the authorities just cited were cases in the Court of Chancery or involved contracts in connection with purchase of land, appellant would now like to direct the court's attention to some cases in the law courts which also establish the same principle.

In the case of *New Jersey Rubber Company vs. Commercial Union Assurance Co.*, 64 N. J. L. 580; (Court of Errors and Appeals, 1900), it appears that there was a fire insurance policy issued by the defendant covering several items of property, and that there would have been a defense to an action on the policy, because, as a condition precedent to the effectiveness of the policy, the assured was to take out \$75,000.00 worth of insurance, which should be concurrent and proportionate with the policy of the defendant company, and that by ac-

cepting the defendant's policy, the assured represented in effect that he had taken out this additional insurance. This was false. The fire occurred on October 21st, 1897. On the day following the insurance company discovered the facts which would have constituted its defense. On November 20th, 1897 the company gave five days' notice of cancellation in accordance with the terms of its policy and returned the unearned premium for the period after November 20th, retaining however, the pro rata premium due for valid insurance from August 1st, 1897 to the time of cancellation.

Justice Dixon, who wrote the opinion, said at page 586:

“Clearly the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitely waived every objection on which its validity could be denied.”

The court's attention is especially directed to the case just quoted, because in that case the insurance company did not obtain knowledge of the grounds which would have given it a right to rescind until after the fire loss. It is urged that the case now before the court is stronger in one respect than the one just quoted. In the quoted case, the contract was partly executory. In the case now before the court the contract was wholly executed. Appellant contends that where the contract is executed the duty is to act more promptly than in the case on executory contracts.

Where the plaintiff is seeking affirmative relief its duty would seem to be to act with greater

promptness than where a party is relying upon the alleged fraud as a defense. In support of this idea there is quoted the following cases:

Roberts v. James, 83 N. J. L. 492;
 Baron v. Buermann, 6 N. J. A. R. 1097,
 142 Atl. 248.

As was said by Vice Chancellor Backes in the last quoted case:

“The duty of promptly rescinding a fraudulently procured contract, as pointed out by Mr. Justice Swayze in *Roberts v. James* (cited supra), applies ordinarily to executed or partly executed contracts where the injured party is required to first make restitution.”

Chief Justice Gummere, in this court, in the case of *Kozloski vs. Prudential Insurance Co.*, 95 N. J. L. 101: (Court of Errors and Appeals, 1921) said:

“But in this situation the company had the option when it learned what the real situation was, of returning the premiums so received and declaring the policy void, or it might, if it saw fit, waive that right and retain the premiums which were received by it. By following the latter course it elected to keep the policies in force. And this is so, notwithstanding that the company did not formally notify the representative of the insured how it had exercised its option. Its action expressed its intention as fully and completely as could have been done by verbal or written statement. That is to say, it could not declare the policy to be void, and at the same time retain moneys paid to it on account of the insured, and to which it had no legal right, except upon the theory that the policy was in full force and virtue. This is the underlying principle upon which the

decision in *Melick v. Metropolitan Life Insurance Co.*, 84 N. J. L. 437; affirmed, 85 Id. 727, is rested."

One of the best statements of the rights of a party claiming to have been damaged by fraud or misrepresentation is contained in the opinion of the late Justice Katzenbach in the case of *Kvedar vs. Shapiro*, (cited *supra*), which statement, according to the opinion, is taken from an opinion of Circuit Court Judge Sanborn in the case of *Wilson v. United States Cattle Ranch Co.*, 73 Fed. Rep. 994, in these words:

"When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. He cannot, however, do both. It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission, and one for damages for the fraud which induced it, and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in opposite directions. Upon a rescission of a contract of purchase, the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered. Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made."

It is apparent from a study of the plaintiff's

amended complaint that it thereby intended to and did allege a cause of action seeking a return of the money paid by it to the defendant. Likewise, a study of the plaintiff's evidence in the State of Case will indicate that no attempt was made to prove that it was damaged by the alleged misrepresentations of the defendant, but that it was seeking a return of the money paid by it to the defendant, on the theory that it was rescinding a contract rather than affirming it.

Again, attention is directed to the plaintiff's own letter, dated October 29th, 1929, when it attempted to tender back to the defendant the additional premium received by it on May 1st, 1926—surely, the very attempt to return the additional premium indicated that the plaintiff's theory of the case was a rescission of the contract of settlement, and the issuance of the rider of May 13th, 1926 (Exhibit P-1a).

Note the language used in the letter dated October 29th, 1929, (State of Case, page 258):

“We hereby tender to you certified check No. 3487 drawn to your order in the sum of \$1,029.27 which represents a payment of \$850.63 made to us by Cohn-Hall-Marx on May 1st, 1926, as additional premium under Transit Floater Policy No. T-330521, issued by the Fidelity-Phenix Fire Insurance Company of New York, together with interest at 6% per annum to date.”

This conclusively proves that the plaintiff's case was based on rescission and an attempt to recover back the money which it paid allegedly by reason of the defendant's representations. Should appellee however contend, in accordance with the quotation just given from Justice Katzenbach's opinion, namely, that its suit is one for damages sustained by it by reason of defendant's alleged

misrepresentation and fraud, then appellant urges that the motion of nonsuit made by it should have been granted, because, as a necessary and material foundation for such a case, plaintiff should have proved that it was not liable under the facts as they existed before and without the alleged representations of the defendant.

Also, appellant absolutely believes and urges that the same principle established by the authorities which have been cited as to the legal situation created by the lapse of an unreasonable time after discovery of the alleged fraud, applies to a suit for damages caused by the fraud as well as to one based on rescission and attempt to recover on the money paid on the contract, induced by the fraud.

(d) The most important factor in connection with the argument that the plaintiff, by its conduct, created a legal bar to a recovery in this case, and that a judgment of non-suit should have been entered, is the fact that the defendant was seriously and substantially prejudiced by the conduct of the plaintiff.

By reason of the contract of settlement suggested by the plaintiff and agreed to by the defendant, and because of the necessary time consumed in the plaintiff's institution of a suit against the Consolidated Piece Dye Works in the name of the defendant, the defendant's right to institute suit against the plaintiff insurance company for the recovery of the loss occasioned by the fire of January 13th, 1926 was lost, because of the limitation in the policy itself that such a suit should be instituted within a year after the happening of the fire so that now, because of the plaintiff's conduct, the defendant is absolutely without any right to even test the question of the plaintiff's liability to

it under the policy of insurance, and is without remedy for the recovery of the admitted loss of \$35,923.53.

POINT IV.

Plaintiff paid the loss because it was legally liable to do so under the policy of insurance and the rider thereto attached, and was therefore not entitled to recover the money paid.

Even at the expense of repetition, may we point out that when the fire of January 13th, 1926 occurred, both the plaintiff and defendant herein were under the impression that it had destroyed some of the defendant's property or goods at the mill of the Consolidated Piece Dye Works at Hazel Street and Montclair Avenue, Paterson, N. J. and it was not until the representative of the plaintiff, Mr. Browning and a representative of the defendant had interviewed a representative of the Consolidated Piece Dye Works at Paterson, that they learned the fire had been at 205-207 Paterson Street, Paterson, N. J. It will be recalled that they inspected the damaged goods and returned to New York and reported the fire to their principals. Then, as has already been pointed out, followed the conferences between the representatives of the plaintiff and the representatives of the defendant. The amount of the loss was quickly fixed and determined and the question of liability was discussed. The insurance company contended that it was not liable because the location where the fire occurred was not covered by its policy. The defendant contended it did not know the goods had been moved. It was after all of these conferences and after the parties had acquired all of

this knowledge and notice that the plaintiff then agreed to pay the defendant the sum of \$35,923.53, and in accordance with the subrogation features of the policy, which have been pointed out, insisted that an attempt be made to recover this money from the Consolidated Piece Dye Works on the theory that the mill had breached its contract with the defendant by removing the goods from the location where the defendant thought they were to be kept, to the place where the fire occurred.

As has already been pointed out, as a part of the contract of settlement of the fire loss, the insurance company insisted that the defendant pay it an additional premium, based on the value of the defendant's goods located at the Paterson Street address prior to their destruction by fire and representing the difference between the rate provided for in the policy of insurance and the rate for insurance at the Paterson Street address. This additional premium amounted to \$850.63 and was paid by the defendant to the plaintiff. It therefore became necessary for the plaintiff, both from an accounting standpoint, in order to keep its records clear, and also because the rules of the New York State Department of Insurance demand that such be done, that a rider of endorsement (Exhibit P-1a, State of Case, page 65, lines 21 to 38) was issued. This rider will be found, upon examination, to be attached to and forming a part of the policy of insurance which then existed between the parties to this suit, to wit: T 330521. This rider expressly insured goods of the defendant from August 1st, 1925 to August 1st, 1926 at value of \$49,455.00 (the exact value of the goods before the fire) at 205-207 Paterson Street, Paterson, N. J. This effectually, and from every possible standpoint, made a valid and existing contract of insurance between the plaintiff and the defendant, covering the

goods destroyed in the fire of January 13th, 1926, and this was a question raised in the case, which was for the Court to decide and not for the jury, and it is respectfully submitted that the Trial Court's duty in this respect should have been performed either at the close of the plaintiff's case or at the close of the entire case, and not left by the Trial Court for the jury to decide, as was done in the charge to the jury (See State of Case, page 188, lines 38 to 40; page 189, lines 1-12). No exception was taken to this portion of the charge, because it was felt the exception to the Court's refusal to non-suit and the exception to the Court's refusal to direct a verdict in favor of the defendant amply protected defendant's rights in connection with this alleged harmful error.

The policy of insurance, modified by this rider, *was never cancelled* and continued to exist in the same form and condition up to and including the time of the third trial, which resulted in the verdict now under review.

Appellant therefore contends that the payments by the plaintiff to the defendant were in discharge of its contractual liability as the contract legally existed when the payments were made. We therefore respectfully and most strenuously contend that the plaintiff was legally bound by virtue of the provisions of its own contract and rider, to pay the loss. It paid the loss. It cannot now recover it.

Conclusion.

It is therefore respectfully submitted that either at the close of the plaintiff's case or at the close of the entire case, the motion made by the defendant for a judgment of non-suit, or for a directed verdict, should have been granted.

There were no disputed facts in this case except on the question of whether or not the defendant knew that its goods had been moved from Hazel Street and Montclair Avenue to Paterson Street, Paterson, New Jersey. All the testimony with reference to everything else in the case was either contained in documents, or, established by oral testimony, and was not disputed.

It is therefore respectfully submitted that the trial Court should have either directed a judgment of non-suit or a verdict in favor of the defendant, and that therefore, for the reasons herein contained, the judgment now under review should be reversed and the record remitted with directions that a judgment of non-suit or a verdict in favor of the defendant be entered in the court below.

Respectfully,

STEIN, MCGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

EDWARD R. MCGLYNN,
Of Counsel.

93

New Jersey Court of Errors and Appeals

Fidelity Phoenix Fire Insurance Company, a corporation,

Plaintiff-Appellee,

vs.

Cohn-Hall-Marx Company, a corporation,

Defendant-Appellant.

Action at Law.

Brief for Plaintiff-Appellee

STATEMENT

The Fidelity Phoenix Fire Insurance Company on August 1, 1925, insured the goods of the defendant, Cohn-Hall-Marx Company against loss by fire to August 1, 1926, in the sum of \$9,600,000. while stored in certain locations enumerated in a certain rider attached to the policy, p. 212. Location No. 13 was The Consolidated Piece Dye Works, at Hazel Street and Montclair Avenue, in the City of Paterson. The amount of insurance at this location was \$150,000. The Consolidated Piece Dye Works, not having sufficient space on its

premises to keep what is called open stock for the defendant, that is to say, to keep goods in storage subject to daily orders for removal, placed them in a building on Paterson Street, in the City of Paterson, about a mile from the place named in the policy, with the assent of the defendant. This warehouse was just a second story loft in an old brick building, was without a sprinkler system, was in the neighborhood of automobile supply stores and was in the language of the insurance men, an extra hazardous risk. A fire took place there in January, 1926, with the result that the goods of the defendant were consumed or damaged to the amount of \$35,923.53. There is no dispute whatever about the fire or the amount of the loss.

The plaintiff, immediately after the fire sent its representatives to the place and then discovered for the first time that the goods were not stored at the plant of the Consolidated Piece Dye Works, the place named in the policy. Thereafter several meetings were held between the representatives of the respective companies and their agents in relation to the loss. Three such conferences were held. Mr. Marx, the president of the defendant company, assured the plaintiff that his company had no knowledge whatever that the goods were stored at the place of the fire. Upon receiving this information a representative of the plaintiff said that in such case Cohn-Hall-Marx Company had a claim against the Consolidated Piece Dye Works for removing their goods from the place named in the policy to a more hazardous location, without their knowledge.

Perhaps the testimony of some of the witnesses will make this clearer.

Mr. McCoomb, the manager of the Marine Office of America which acted as agent for seven insurance companies among which was the plaintiff, when asked to describe what took place at one of the meetings said:

“Well, Mr. Brown told us where he had found the fire had taken place and Mr. Jones explained to them that they had no coverage in there in the location that burnt—I don’t know the number and Mr. Marx said he was an innocent assured; that the goods were there without his knowledge and he thought the goods were up in the sprinkler place and the story we got was that this was supposed to be in the sprinkler place but his production was going along so fast that Marx wasn’t able to take his goods as fast as they furnished them and these people had put them in this place temporarily because goods were finished faster than Marx would take them, something of that nature—he wanted to know if there was some way that we could help and then we discussed—we told him very frankly that his recourse was against the Consolidated Piece Dye Works people and that if they had taken the goods that were in the sprinkler warehouse and put them in the second floor of a warehouse with gasoline and oil down below, then we

thought he had a perfect good right of recovery against the Consolidated Piece Dye Works," p. 175-176.

Mr. William H. Jones, Manager of the loss department of the Marine Office of America, said:

"Mr. Marx to the suggestion that his company sue the Consolidated replied that that would take a long time and that he needed the money and wouldn't we arrange to advance him the money and he would agree to sue the company, p. 43 — We told Mr. Marx we would take the thing under advisement to see if we could advance him the money and as I recall, about a week later we decided we would advance the money to him on a loan on his undertaking to sue the Consolidated — The final adjustment of the loss had not been finished and we agreed to advance \$21,000. on account leaving a balance to be delivered when the adjustment was finished. Roughly the balance was about \$14,900." p. 44.

A check for \$21,000. on March 24th, 1926, p. 237, and a check for \$14,923.53 on May 1, 1926, p. 236, which are exhibits P-3 and P-4 were accordingly paid, a total of \$35,923.53.

Loan receipts for these amounts are Exhibits, P-5 and P-6, and are found on pages 238 and 239, signed by Cohn-Hall-Marx Company on the same date as the checks. They are in the usual form of loan receipts used by insurance companies pay-

able only to the extent of any net recovery against the third party.

Mr. Jones describes his conception of a loan receipt. He said:

The loan receipt is a form of receipt used in connection with the payment by the insurance company where a bailee or a third party is responsible. It allows claims to be presented and suit brought in the name of the assured under the policy. P. 50.

It was then suggested that if the money was advanced that the plaintiff was entitled to receive the premium which it would have received had it actually insured the goods at the place of the fire—the difference between the rate at the location of the fire and the rate prevailing at the original location. This was agreed to, p. 32, 33. The amount, \$850.63, was not deducted from the checks representing the loss but was paid by the defendant by its check, on May 13, 1926.

The original policy of Cohn-Hall-Marx Company was not produced at the trial. The office copy of the insurance company was produced with the memorandum as shown on page 203. This memorandum is dated May 13th, 1926.

Thereafter the Fidelity Phoenix Fire Insurance Company, in the name of the Cohn-Hall-Marx Company brought suit in the United States Dis-

trict Court for the District of New Jersey, against the Consolidated Piece Dye Works, to recover the loss, p. 241. The case was tried at Newark on April 20th, 1927. A verdict was returned in favor of the Consolidated Piece Dye Works, p. 251. The certified record of this trial was produced in evidence and is found on p. 240, etc. It appeared at the trial that the Cohn-Hall-Marx Company knew that their goods were stored at the Paterson Street building and that this building was used for such purpose. This knowledge was denied by them and was the chief point in the controversy which is the subject of this appeal. The jury by their verdict established the fact that they did know that the goods were stored at the hazardous location. Therefore their statement that they did not know upon the truth of which they obtained \$35,923.53, was fraudulent misrepresentation.

On February 16th, 1928, the insurance company through the Marine Office of America made demand upon the Cohn-Hall-Marx Company for the sum of \$35,923.53 which was the amount paid by it, with interest, p. 255. This was refused.

It is not necessary to discuss the evidence in detail. The facts are found against the defendant. The simple question is, was the trial Judge in error in refusing the motion for a non-suit and the motion to direct a verdict for the defendant. The reasons advanced to support these motions are found on pages 117 and 181. They may be summarized as follows: (1) that plaintiff did not de-

mand its money back in time; (2) that it did not return the premium in time; (3) that the acceptance of the premium for the extra-hazardous location made the plaintiff legally chargeable for the loss; and (4) that the case did not disclose any misrepresentation of a material fact known by the defendant to be false upon which the plaintiff relied.

It is respectfully submitted that none of these reasons is supported by the facts and the law in the case. It is not necessary to discuss the reason number (4) as the verdict upon the testimony of T. Ivan Arnold, p. 82, 83, 84, 93, 95; Justino Calatarci, p. 102, 103, 104; and Thomas J. Arnold, p. 110, 113, 114, and 115 is conclusive on this appeal. The facts were fully covered by the jury and its verdict is conclusive as against defendant.

Counsel attempts to argue that the goods were covered at the Paterson Street location because of the following provision in the policy, (State of Case, p. 215):

“\$100,000. At each of any new premises in the United States of America located other than those mentioned above to which the assured may from time to time send this property; it being understood and agreed that the assured will cause this Company to be notified of any such new premises within thirty (30) days after the arrival of their property at such new premises.”

The fallacy of the argument becomes very apparent by the mere reading of this provision of the policy. It provides for coverage "to which the assured may from time to time send this property". It is of course not contended that the assured sent its property to No. 205 Paterson Street. On the contrary they disclaim any knowledge that the goods had been so removed. Therefore this provision of the policy can have absolutely no bearing on the case.

As a matter of fact testimony was introduced at the trial, p. 79 of the record, showing that the goods had been sent to Paterson Street in February, 1925. The fire occurred the following January—January 13th, 1926. This of course was long after the thirty day period and it is admitted no notice of such removal was given.

This point which is discussed by counsel in his brief was not raised at the trial of the cause. It was not used as an argument or urged as a ground for a non-suit or direction nor was any request to charge based on it. It is raised and discussed for the first time in this court. Of course if the thirty days notice had been given, the Company had the right to cancel its policy because of the extra hazardous location. The company was deprived of this right because no such notice was given.

THIS IS AN ACTION FOR DECEIT.

The complaint contains the necessary allegations for this action. There is no demand for the recovery of money. It contains substantially the same allegations as are found in numerous forms in 2 Chitty on Pleading, pages 680 to 708. They are all actions of trespass on the case. The present English practice is to the same effect. The practice there is that a statement of claim should have a clear and distinct allegation of fraud upon the pleadings and though it is not necessary that the word fraud be used the facts must be so stated as to show distinctly that fraud is charged. *Davey v. Garrett*, 7 Ch. D. 473,489; 47 L. J. Ch. 218; *Wallingford v. Mutual, etc. Society*, 5 App. Cas. 697,701,709. To the same effect are the forms in *Bullen & Leake*, p. 400; also 8 *Wentworth*, 365 to 372. Our own forms of complaint in *Hartshorne's Practice Act*, p. 165, 166 and 167 are to the same effect. There is not a word in the present complaint indicating a rescission of the contract. This is required in a pleading for rescission. In *assumpsit* on rescission the tender is always pleaded, 2 *Chit. Pl.* 273, etc.

This complaint was drawn in New York. Nevertheless it conforms to our practice. It sets forth the fraud in detail and asks for damages. The 10th paragraph is as follows, p. 15:

10. By reason of the aforesaid fraudulent statements and conduct of this defendant, and the fraud perpetrated by the de-

fendant aforesaid, on this plaintiff, the plaintiff has sustained damage in the sum of \$35,923.53.

There is no allegation of tender of a sum due the defendant. Paragraph 9 speaks of the demand for payment. But this demand is the usual demand to avoid suit. It is unnecessary but it does not change the ex-delicto features of the case. There are two counts in the complaint, one for fraud and one for money had and received; one in trespass on the case and one in assumpsit. Even if a complaint contained allegations relating to a rescission of the contract and stated a good cause of action for fraud and deceit the allegations relating to rescission may be disregarded, 27 C. J. 29.

In *Bonhard v. Gindin*, 104 N. J. L. 599,606 Justice Katzenbach said:

There is therefore nothing improper in joining in one suit an action for deceit, and an action for the recovery of money loaned****There is now but one form of court action, known as an "action at law".

The essential difference between rescission and deceit may be stated thus: If a man sell me a horse and fraudulently represent its qualities I have four courses open to me at law: (1) I can return the horse within a reasonable time after the discovery of the fraud, rescind the contract and sue for my money; or (2) I can waive the

fraud and proceed for a breach of the original contract; or (3) I can retain the horse and bring an action for deceit; or (4) I can return the horse and still bring an action for deceit.

A purchaser who is defrauded has of course a right to elect whether he will rescind or not. If nothing is done he still has the period within the statute of limitations to bring an action for deceit. If he try to rescind at a time that would be regarded as unreasonable under the circumstances of the case his delay affords proof of an election not to rescind, (*Faulkner v. Wassmer*, 77 N. J. Eq. 537) but this does not bar his action for deceit. If the contract is affirmed as to one it is affirmed as to both. If there is no rescission the contract stands subject to an action under it for damages for the deceit. *Knedar v. Shapiro*, 98 N. J. L. 225,227 is authority that deceit will lie whether the contract be affirmed or disaffirmed.

Bullen, J. in *Pasley v. Freeman*, 3 T. R. 59; 2 Smith Lead. Cas. 64; 12 Eng. Rul. Cas. 235,245 which is the leading case in actions for deceit says:

“The fraud is that the defendant procured the plaintiff to sell goods on credit to one whom they would not otherwise have trusted by asserting that which he knew to be false.”

“A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives dam-

ages is the ground of an action upon the case in the nature of deceit." Ibid.

Lord Kenyon C. J. in support of his opinion in *Pasley v. Freeman* quotes Lord Ch. B. Comyns, Com. Dig. Tit. that

"An action upon the case for deceit lies when a man does any deceit to the damage of another."

The syllabus to this case in 12 Eng. Rul. Cas. 235 states the law as follows:

"When a person with a view to influence the conduct of another wilfully leads him into a false belief and this other person acts accordingly to his hurt, the act is said to have been induced by fraud, and the former is liable to the latter in an action for deceit."

"The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false and that the defendant knew it to be."

In *Bingham v. Fish*, 86 N. J. L. 316, this court held that:

"If the representations be false to the defendant's knowledge and made with intent to deceive, the fraudulent intent is conclusive, irrespective of the fact whether

or not the defendant would profit by his act."

In *Bonhard v. Gindin*, 104 N. J. L. 599, it was stated:

"If he had received nothing under the contract he can make no tender but for this reason he is not debarred from instituting an action for fraud or deceit."

Justice Garrison speaking for this court in *Faulkner v. Wassmer*, 77 N. J. Eq. 537, said that:

In the rescission of a contract, "the complainant must show a material misrepresentation not necessarily untrue to the knowledge of the defendant; whereas the gist of the action for deceit is conscious falsification."

The plaintiff in this case alleged in the complaint and proved at the trial conscious falsification. Justice Garrison speaks of this onerous burden having to be sustained at law. I may add that this onerous burden has been completely sustained in this case.

This was the issue in the present case. It is shown in the pleadings, in the evidence and in the charge of the court. The trial Judge said to the jury:

"Now I charge you as a matter of law, that the burden of proof in this case is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the defendant made the representations to the plaintiff, which the plaintiff claims were made and which I read to you from those paragraphs, meaning that the plaintiff should act upon them; second, that such representations were false and that the defendant when it made them, knew them to be false; and third, that the plaintiff, believing the said representations to be true, acted upon them and was thereby injured. That is the burden of proof that is upon the plaintiff in this case to satisfy you of by a fair preponderance of the testimony.

Let me give it to you again. The burden upon the plaintiff by the fair preponderance of the testimony is to prove, first, that the defendant made the representations to the plaintiff meaning that it should act upon them; second, that such representations were false and that the defendant when it made them knew them to be false; and third, that the plaintiff, believing the said representations to be true, acted upon them and was thereby injured." P. 186,187.

If the case had only been a case of rescission of a contract it would have been error so to charge. For rescission the plaintiff must show only a material misrepresentation not necessarily untrue to

the knowledge of the defendant, but in deceit it is otherwise, 77 N. J. Eq. 537,544.

Counsel for plaintiff took no exception to this part of the charge because it was a correct statement of the law of deceit. Counsel for defendant specifically requested the court to charge the law touching deceit. His third request to charge is as follows:

“In this case, the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony, that the defendant made certain false and fraudulent statements, meaning that plaintiff should act upon them, knowing the same to be false and fraudulent when it made them, and with intent to deceive the plaintiff and to induce it to pay a loss not covered by the policy of insurance; and that plaintiff believing the said representations to be true, acted upon them and was injured. If you find that the plaintiff has failed to sustain any of the above described allegations by a fair preponderance of the evidence, or that the evidence is evenly balanced or preponderates in favor of the defendant, then your verdict should be for the defendant.” P. 197.

This was charged by the Judge as stated. He asked the court to charge his sixth request which is as follows:

"In order to find a verdict in this case in favor of the plaintiff, you must by a fair preponderance of the evidence find that when plaintiff paid the defendant the sum of \$35,923.53 representing the loss occasioned by the fire which occurred on January 13, 1926, solely and exclusively because of the representations made by the defendant to the plaintiff, that the defendant did not know that its property was stored by the Consolidated Piece Dye Works at the Paterson location and also that the defendant knew that the representations thus made were false when made and also that the defendant made the representations to the plaintiff, meaning that the plaintiff should act upon them and also that the plaintiff, believing these representations to be true, acted upon them and was thereby injured." P. 199.

Thus he shared the view of the court and opposing counsel that the action was one for deceit. He heard the trial Judge put the case on the ground of fraud requiring conscious falsification as a condition precedent to plaintiff's recovery which is not at all the law in a case of rescission. There is no rule requiring him to speak at the time. But when the "more onerous burden" of Justice Garrison is sustained by the plaintiff, does the rule in such case permit him to appeal and to say to the appellate tribunal "I thought this was a case of rescission of the contract?" It would appear that conduct-evidence of counsel should bind the client.

The sole issue under this pleading was the fraud. The damages were fixed by the nature of things. All that was asked was damages to the amount of the money advanced. Both in the complaint and orally in the respective trials counsel declared this sum to be the measure of damages. The only defense in the answer beyond a denial of the fraud, is found in the first separate defense, p. 18. This is to the effect that any money paid to the defendant was paid in accordance with the terms of a contract of insurance between the parties to which later reference is made.

In a suit for deceit there is no limitation as to time. Laches or delay which might preclude the defrauded party from rescinding a contract induced by fraud does not affect his right to an action for damages, but he may bring his action for deceit at any time within the period fixed by the statute of limitations, 27 C. J. 65.

THE MEASURE OF DAMAGES IN SUCH CASES.

The measure of damages in a case for deceit and a case for rescission of a contract has been stated in *Knedar v. Shapiro*, 98 N. J. L. 225,229, by Justice Katzenbach, quoting from Circuit Judge Sanford in *Wilson v. U. S. Cattle Ranch Co.* 73 Fed. Rep. 994, as follows:

“Upon a rescission of a contract of purchase the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered. Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made.”

What the plaintiff lost in the present case was the difference between the two checks and the check of the defendant. This with interest is the exact amount of the verdict.

Chief Justice Beasley in *Crater v. Binninger*, 33 N. J. L. 513, states the rule for damages in a case of deceit after reviewing the authorities. He approved the charge of the judge below:

“that the proper measure of damages was the entire loss sustained by the plaintiff in

this transaction into which he was inveigled by the fraud of the defendant."

The defendant in *Crater V. Binninger* was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business which moneys were lost less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. The language of Chief Justice Beasley in this case was approved by the Supreme Court of the United States in *Smith v. Bolles*, 132 U. S. 125; 33 L. Ed. 279.

Justice Katzenbach in *Maioran v. Calabrese*, 100 N. J. Eq. 315, 317, speaking for this court said:

"Where rescission is had the measure of damages is the consideration paid plus the amount expended before the discovery of the fraud."

"Where an action at law from fraud is instituted the measure of damages is the amount the wronged party has lost by the transaction.

"The damages recoverable in an action for deceit in England, are such as are the direct and natural consequence to the plaintiff of acting upon the faith of the fraudulent representations made to him by the defendant.

"*Mullet v. Mason*, L. R. I. C. P. 559.

"*Waddell v. Blockey*, 4 Q. B. D. 678."

Upon rescission, plaintiff recovers what he had parted with but cannot recover damages for the fraud. 27 C. J. 20.

In an action for deceit arising out of the fraudulent sale of a horse the plaintiff must prove the value of the horse which he retained in order to fix the damages, so also in sales of stock. *Lams v. Fish*, 86 N. J. L. 321; *Bingham v. Fish* 89 N. J. L. 688; *McMullan v. Dallas*, 88 N. J. L. 690. It is otherwise where money is withheld.

In the present case the plaintiff had a right to retain the \$850.63 paid to it, and bring suit for the damages; the damages being the money paid less this amount or, in other words, the difference between what the plaintiff retained and the loss. It is the same substantially as if the \$850.63 were subtracted from the amount of the loan and the remainder paid to the defendant. No set-off or counter-claim was filed.

Juror Cook speaking for the jury at their request said:

“we find for the plaintiff in the sum of \$35,923.58 with interest on \$21,000 since March 24, 1926, and on \$14,923.53 with interest since May 1, 1926, less \$850.63 with interest since May 1, 1926.” P. 195.

This was in accordance with the charge of the court, p. 192. Counsel on both sides had agreed

that if recovery was to be had, that this was the correct figure, p. 194. The court said:

"I understand it is agreed by counsel for the plaintiff and for the defendant that the correct figure under the jury's verdict is \$44,620.07; is that correct?

Mr. McGlynn—That is right.

Mr. Comstock—Yes, sir." P. 195.

This suit was begun by attachment. An attachment will lie for a fixed and certain sum. (*Barber v. Robeson*, 15 N. J. L. 17) where the damages may be ascertained with certainty (*Jeffrey v. Wooley* 10 N. J. L. 123). The action is confined to the collection of a specific debt or liquidated damages amounting to a debt (*Wynant v. Nautical Prep. School* 27 N. J. L. J. 202, 206). The writ will issue against corporations "not created or recognized as corporations of this state", 1 Comp. St. 136. The plaintiff's preliminary affidavit in attachment is not conclusive as to the nature of his claim, *Hecksher v. Griffin*, 38 N. J. L. 419.

The defendant entered its appearance and gave notice of its willingness to accept a complaint in the suit of plaintiff. No objection was made to any irregularity in the attachment. Defendant, upon its appearance and notice, filed its bond and accepted a complaint in an action for deceit; filed its answer thereto and cannot now be heard that the action is of another character.

EVEN IF THE CASE HAD BEEN ONE OF RESCISSION, BOTH PRECEDENT AND PRINCIPLE ARE WITH THE PLAINTIFF.

The theory of the appellant is that this is a suit for money had and received. No argument was made at the trial to this effect beyond what may be inferred from the motion for non-suit which was in conflict with their requests to charge. No tender is alleged in the complaint. Such a course is indispensable in rescission cases. It is said the time intervening between the discovery of the fraud and the demand for payment is too great, therefore as a matter of law, the court was bound to grant a non-suit. The fraud was discovered at the time of the trial in the United States District Court at Newark, April 20, 1927 and the letter demanding payment was February 16, 1928.

The cases cited by counsel however, do not furnish them support. They rest upon principles not applicable to this case. It is quite just that if a man discover he has been defrauded in the sale of any article or property, whether real or personal, that the property in his hands should be returned to the person guilty of the fraud before suit is brought for the sum paid for the reason that such person might be able to dispose of the property to some advantage. The whole foundation of such practice is to save even the wrong-doer from further detriment. This rule does not in any way attach to a case involving two persons indebted to each other. If a man owe me \$1000 and I owe him \$500 the law does not force me to offer him

the \$500 before bringing suit for my \$1000 if the matter arose out of two different causes of action. Where the matter is limited to money only, is there any difference between this state of facts and one where the indebtedness of each to the other arose from the same transaction? The basis of the rule for the return of things other than money is that by retention of the article, the situation of the other party is changed to his detriment. But what change is there here to the detriment of Cohn-Hall-Marx Company? What detriment has it suffered? The plaintiff withheld the money for its own protection. The jury settled the difference between them by deducting the sum from the verdict notwithstanding the fact that the defendant filed no answer to this effect. As the rule rests on possible detriment to the party guilty of fraud; if there be no detriment, the rule does not apply. **Cessante racione, cessat ipsa lex.** Therefore what is a reasonable time within which to rescind if at all operative where only money is involved on both sides, must be greatly enlarged beyond the ordinary rule.

In *Harrahan v. Nat. Bld. Loan & Prov. Ass'n.* 66 N. J. L. 80, 86, suit was begun without offering to return the certificate of withdrawal. It was held that the rescission was not complete. Plaintiff was entitled to the money in November, 1899. The case was heard at the February term, 1901, and decided against her. She later offered the certificate back and began a second suit. This second argument was heard at the February term, 1902, 67 N. J. L. 526. Thus a year and a half or

perhaps nearly two years elapsed between her possession of the certificate and her rescission or three years since the fraud. Manifestly in the case of a purchase of a horse through fraudulent misrepresentations such a period would be too long. So also in the case of a steamboat. *Clampitt v. Doyle*, 73 N. J. Eq. 678. This case is supported by our decisions to the effect that the offer to return in a given case depends upon the peculiar circumstances of that case. It would have been difficult I have no doubt for the Building & Loan Association to have shown any detriment to it because of the late tender. It is held that if in the exchange of real property one refuses to proceed, the other can file a bill for specific performance without a tender. *Oakey v. Cook*, 41 N. J. Eq. 350, 362. The rule varies according to the facts.

But if such delay under the whole circumstances of the case will afford plenary proof of an election not to rescind then the contract is affirmed and an action for deceit stands. *Cohn-Hall-Marx Company* paid \$850.63 and it received \$35,923.53. If this sum of \$850.63 had been deducted from the \$35,923.53 the checks would have been for \$35,072.70. Suit would have been begun and that would have been the measure of damages. The defendant does not lose the interest on its money because the plaintiff is charged with the payment of this interest. The defendant is alike charged with the payment of interest.

This court in the administration of justice has established the rule that an action for deceit may be maintained whether the contract has been disaffirmed or not. The language of Justice Katzenbach in *Knedar v. Shapiro*, 98 N. J. L. 225, 227, is:

“An action for deceit may be maintained where there has been no disaffirmance of the contract. An action for deceit may also be maintained where there has been a disaffirmance of the contract. The only difference in the two actions is in the measure of damages.”

It is strongly urged that the view of counsel is a mistaken conception of the law. It does not best subserve “the undoing of wrong and the vindication of the right.”

Counsel aware of the rule seek to suggest a detriment to their client. This detriment is stated to be the defendant's right to institute suit against the plaintiff for recovery of the loss occasioned by the fire because of the limitation of the policy itself that such a suit should be instituted within a year after the fire. The answer to this is a simple one. The fire occurred in January 1926, and the fraud was not discovered until the trial of the case in the United States District Court in April, 1927. It is difficult too, to see how suit could be maintained for the loss when the defendant had the insurance money in its treasury.

The two measures of damages in this case are identical as only the amount paid was to be recovered. There was no additional damage for the legal expenses of the trial in the United States District Court, because under the terms of the loan receipts or subrogation agreements these were to be borne by the plaintiff, p. 238, 239. In any case none was asked.

The brief of the defendant contains no authorities requiring the return of moneys between two persons indebted to each other where the fraud-doer is the smaller creditor. An examination of the authorities cited will support this statement. They are cases covering generally the return of chattels, steam-boats, sewing machines, shares of stock, etc. A list of these cases follows: *Clampitt v. Doyle*, 73 N. J. Eq. 678 (sale of steam-boat); *Dennis v. Jones*, 43 N. J. Eq. 513, (foreclosure); *Williamson v. Southern R. R. Co.* 29 N. J. Eq. 311, 319 (title through a fraudulent vendee); *Doughten v. Camden B. & L. Ass'n.* 41 N. J. Eq. 556 (shares of stock) *Byard v. Holmes*, 33 N. J. L. 120 (shares of stock); *Russell v. Russell*, 63 N. J. Eq. 282 (suit to set aside a legacy for fraud); *Hanrahan v. Nat'l Bldg. Loan & Prov. Ass'n.* 66 N. J. L. 80, and 67 N. J. L. 526, (shares of stock); *Roberts v. James*, 83 N. J. L. 492 (purchase price of lots); *Pearson v. Nat'l Equitable Invest. Co.* 104 N. J. L. 564, (stock returned but dividends withheld); *Faulkner v. Wassmer*, 77 N. J. Eq. 537 (purchase of lots); *Kvedar v. Shapiro* 98 N. J. L. 225, 229 (sale of truck); *Norfold N. Brunswick Hosiery Co. v. Arnold*, 49 N. J. Eq. 390

(motion to dissolve injunction—had more than 4 years use of machine); *Dennis v. Jones*, 44 N. J. Eq. 513 (sale of skating rink); *Reed v. Benzinated Soap Co.* 81 N. J. Eq. (whether cross bill tendered rescission of contract); *Maioran v. Calabrese*, 100 N. J. Eq. 315 (conveyance); *Baron v. Buermann*, 142 Atl. R. 248 (specific performance—exchange of property); *Kozloski v. Prudential Ins. Co.* 95 N. J. L. 101 (premium on insurance policy); *Wilson v. U. S. Cattle Ranch Co.* 73 Fed. Rep. 994 (purchase of ranch); *Mount v. Loizeaux*, 86 N. J. L. 511, 515 (deceit for misrepresentation of timberland); *Condon v. Sandhowe*, 97 N. J. Eq. 204 *DeWitt v. Van Sickle*, 29 N. J. Eq. 209 (mortgage by an insolvent).

The only case cited upon the motion for a non-suit by counsel before the trial court was the case of *Clampitt v. Doyle*, 73 N. J. Eq. 678, which was on appeal from the Court of Chancery. *Doyle* was the owner of a steamboat and falsely represented its earnings to a broker who nearly a year later communicated them to the complainants who purchased the boat. Before running the boat they were told by *Doyle* that the boat was worn out and that they would be unable to make both ends meet. They continued to operate the boat for a year and not until December 16, 1906 was an election to rescind made. In other words, the purchaser was speculating as to whether he would make more profit running the boat or returning it. This was to the detriment of *Doyle*. The court said:

“The status of the parties had widely altered from what it had been at the time of the purchase of the boat or from what it would have been had the purchasers elected to rescind their contract with reasonable promptness upon their discovery of the falsity of Doyle’s representations.”

Dennis v. Jones, 43 N. J. Eq. 513, was a foreclosure of a mortgage. The purchaser had paid money on account and until foreclosure never intimated that he had been defrauded. Chancellor McGill said:

“There is plenary evidence of an election to abide by the contract.”

And further:

“It would be most inequitable to permit them to hold the rink and its business in apparent acquiescence in the fraud until the collapse of the business was assured and then rescind their contract.”

In Williamson v. N. J. Southern Railway Co. 29 N. J. Eq. 311, 319, Justice Depue said:

“Delay in exercising the power of rescission is evidence of an election to treat the sale as valid of more or less weight according to the circumstances of the case, but of itself does not operate as an estop-

pel unless in the meantime, superior rights of third persons have intervened.”

Where money is the sole difference between parties it is unnecessary to offer the sum of money to the person guilty of the fraud, as a condition precedent to recover. This would seem to be an idle gesture. The defrauded party is entitled to retain what is in his hands and sue for the difference. The defendant may plead a set-off or counter-claim and the jury fixes the damages. To offer back the smaller sum of money instead of holding it as part of his damage, or security therefore, until judgment, would frequently result in the loss of both sums. This is to aid the fraud, not to vindicate the law.

The plaintiff has suffered in a larger degree in the present case in this regard. The plaintiff's loss is more than 40 times that of the defendant. It comes with singular grace for a wrong-doer to say, after two verdicts establishing his fraud, one in the United States District Court, and one before a struck jury in the present case, “I can keep your large sum of money because you didn't within a reasonable time, offer to return my smaller sum”. Money balances money.

The letter of plaintiff written February 16, 1928, p. 255, was for the amount of money paid with interest and speaks of the fraud. This does not indicate any rescission. It is the same as a lawyer might write to a prospective defendant before suit. This is the universal practice and but

common courtesy to avoid expensive litigation. The amount of damages was \$35,923.53 and the demand was for this amount.

But if the letter did not disaffirm the contract then of course an action for deceit would lie. We now know that if it did disaffirm the contract an action for deceit would also lie. *Knedar v. Shapiro, supra*.

But if I grant for the sake of argument and for the sake of argument only the contention of the defendant that the letter of February 16, 1928, was notice to rescind the contract then such letter was within reasonable time after the discovery of the fraud allowed by the law when the circumstances of the present case are taken into consideration.

In *Piddock v. Swift* 51 N. J. Eq. 405, 408, the facts were that a judgment creditor sold his judgment for a trifling consideration. Vice Chancellor VanFleet, a respected name in our jurisprudence, held that he had no right to insist that the purchaser judgment creditor should, before bringing suit to set aside the assignment, return to him the consideration paid for the assignment. After speaking of the general rule he said:

“But this like other rules of justice must be so applied in the practical administration of justice as shall best subserve in each particular case, the undoing of wrong and the vindication of the right.”

The smaller amount was $1/10$ of the larger amount. Here it is $1/40$ th.

Justice Swayze speaking for this court in *Roberts v. James*, 83 N. J. L. 493, adopted the language of Vice Chancellor VanFleet in *Piddock v. Swift*, *supra*. He further said:

"It is settled in the English courts that unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it and he may keep the question open as long as he does nothing to affirm the contract." Quoting English cases.

Justice Swayze further said in this case, quoting from *N. J. Southern Railway Company*, 29 N. J. Eq. 311, 319:

"The vendor may rescind the contract of sale and reclaim the property until, with a knowledge of the fraud he elects to satisfy and confirm the sale or third persons acting on the apparent ownership of the property by the fraudulent vendee acquire rights therein bona fide and for a valuable consideration."

He further said:

"Here there is no proof that the plaintiff, the vendor was in anyway prejudiced except by his failure to receive the purchase

money and to that he was not entitled if the contract was induced by fraud."

In *Kley v. Healy*, 127 N. Y. 555, the Court of Appeals held that:

"One who attempts to rescind a contract on the ground of fraud is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to set aside or on an original liability."

Guckheimer v. Angevine, 81 N. Y. 394;
Allerton v. Allerton, 49 N. Y. 670.

It was further held in *Kley v. Healy*:

"While the sum paid to the defendant should be taken into account in the award of relief an offer to restore it was not a condition precedent to bringing the action."

In *Allerton v. Allerton*, 50 N. Y. 670, it was held that:

"The rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that

result and in such case no offer to return that which was received is necessary."

In *Nicholas v. Michael*, 23 N. Y. 264, 267, it was said:

"It is true as a general rule that a party who would disaffirm a contract must return or offer to return whatever he has received upon it. But in cases of fraud, when nothing is parted with by the fraudulent vendor but his own promissory notes, such a return or offer to return is not necessary before action brought; it is enough if the notes are produced on the trial ready to be cancelled."

In *Oakey v. Cook*, 41 N. J. Eq. 350, 362, Vice Chancellor Bird said:

"The defendant having refused to go on with his contract I think the law permitted Cook to file his bill without a tender on his part, which being so, it would seem to follow that all he need do is to allege himself ready and willing as has been done in this case. And this is shown to be the law."

This case was affirmed by the Court of Errors and Appeals.

In *Mead v. Welch*, 67 N. H. 341; 29 A. 970, it was held that:

“Persons who had performed services under a contract which they were induced to make by fraud, might rescind the contract and recover the reasonable value of their services, without restoring a sum advanced to them on the contract where such sum was less than the reasonable value of the services performed.”

In *Allerton v. Allerton*, *supra*, the plaintiffs asked that the sale of an interest in a partnership be declared void, and that they have judgment for their portion of the profits under the agreement less the amount they had received. The Court of Appeals held that:

“The fraud was established and that no tender of the amount received was necessary before suit was brought as the judgment sought for and given allowed it to defendant and this was in fact an actual return of the consideration paid.”

The rule of directing persons who desire to rescind a contract to do so in a reasonable time is not to be extended to conditions not warranted by the rule. To hold that such tender of goods and chattels to the wrong-doer would include the return of moneys is not supported by authority or principle. In these modern days when courts, legislatures and bar associations are united in an effort to administer justice in simpler forms it is strongly believed that our courts unless bound by the doctrine of *stare decisis*, will in the promotion of jus-

tice look at the substance of things and will be less concerned about inconsequential forms.

It is argued that the plaintiff offered to return the \$850.63 by letter of December 29th, 1929, p. 258. This letter was written after the suit was begun; indeed after the first trial at the Passaic Circuit Court. Manifestly it would not affect the rights of the respective parties before suit was brought as rescission must precede the suit. *Hanrahan v. Nat'l. Bldg. Loan and Prov. Ass'n.* 67 N. J. L. 526; *Id.* 66 N. J. L. 80; *Byard v. Holmes*, 33 N. J. L. 119. It is quite reasonable to assume what the purpose of this letter was. It was written after the first trial at the Circuit Court when counsel for the defendant had pressed upon the jury the fact that the plaintiff had retained their money for the insurance and that such insurance was retroactive and the plaintiff was without legal claim. It is fair to assume that it was an argument of this sort that caused the misunderstanding between the two common juries before whom the case had been tried. It is also fair to assume that the plaintiff might wish to have it appear at the later trial that it did offer the return of this money which was rejected by the defendant. In one form or another these affairs get before the jury although the rights of the parties were fixed when the case was begun.

Concerning the motion to direct a verdict it is enough to say that whether the transaction is fraudulent or not is a question of fact for the jury. *Mitter v. Pancrast*, 29 N. J. L. 250.

**MEMORANDUM OF THE PAYMENT OF
THE ADDITIONAL PREMIUM.**

When it was finally agreed to advance the money as a loan under the terms of the loan receipt it was suggested that in that case the defendant should pay the additional premium which would have had to be paid if insurance had been applied for at the extra hazardous place where the fire occurred. P. 32, 33. Mr. Steinbugler, p. 34, said "the loss was actually paid before this question was brought up". The two checks of plaintiff are dated March 24th, 1926, and May 1, 1926. The memorandum is dated May 13, 1926, Exhibits P-1 A, P-3 and P-4, p. 203, 236, 237. Mr. Steinbugler further said "This memorandum was simply put through our office record as a charge on this policy but there was no endorsement on the policy. The original policy had not been affected at all. It was just simply an office record to show that a charge of the amount of eight hundred and some odd dollars was made." P. 36. "I knew that the first payment had been made ***** I don't know whether the entire amount had been advanced or not." Mr. William H. Jones said "It is a carbon copy of something that was never attached to the policy as I understand it." "There are things on the office copy that are not on the original policy," p. 59. It is not without significance that the defendant did not produce the original policy.

"Q. All you know is it is a memorandum in your office copy files? A. Yes.

Q. You don't know whether the assured ever got it or whether it was ever sent out by your company? A. No." P. 60.

The form was of one of the company's printed forms used for additional premiums while the policy was in force before a fire. How could this memorandum be retroactive when the fire had taken place? It recited the number of the policy and time covered by the insurance so as to identify the policy on which payments had been made. The insurance cases cited in brief of counsel relate to agreements before the fire and are consequently not in point.

Counsel in their brief say that the plaintiff insisted and made the defendant company agree to pay the difference in the premium. This is very far from the fact. On March 24th, 1926, \$21,000 was paid without the slightest suggestion of such payment. It was not until the first conversation was had on this subject which was about a week prior to the issuance of the memorandum of May 13th. This is the testimony of Mr. Steinbugler whose name is subscribed to the memorandum. The second payment amounting to \$14,923.53 was made May 1, 1926, p. 237.

Counsel in support of his non-suit, p. 117, said that the memorandum constituted a contract between the parties and caused an extension of the policy of insurance to cover the goods at the new location and in consequence made the plaintiff

legally liable to indemnify defendant for its loss. It is upon this theory apparently that he says the terms of the contract were retroactive. It is difficult to follow this reasoning.

How the acceptance of \$850.63 which was equal to what the premium would have been if the defendant had disclosed the location before the fire can protect the defendant from its fraudulent representations which were not known to be false at the time the money was accepted, is I repeat difficult to follow. The defendant in effect said to the plaintiff, I will give you \$850.63 for your \$35,923.53 and it is quite understood between us that the fraud by which I receive this large sum shall never be inquired into. It is not difficult to believe if this had been stated what the reply of the plaintiff would have been. The fraud was not discovered for more than a year after the acceptance of the money. The most effective way to answer such an argument is merely to state the facts. Contracts of insurance are said to be **uberrimae fidei**; *Bates v. Hewitt*, L. R. 2 Q. B. 595, 612; 6 Eng. Rul. Cas. 817. If this novel doctrine is engrafted on the body of the insurance law this expression will have to be changed.

In whatever form of action therefore the defendant may consider the case the plaintiff was entitled to a verdict.

In conclusion I repeat the language of Vice Chancellor VanFleet:

“But this like other rules of justice must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of the right.”

It is respectfully submitted that the judgment below should be affirmed.

WILLIAM B. GOURLEY,
Of Counsel with Plaintiff-Appellee.

... of the ...
... of the ...
... of the ...
... of the ...

... of the ...
... of the ...
... of the ...
... of the ...

93.

New Jersey Court of Errors and Appeals

FIDELITY PHOENIX FIRE INSUR-
ANCE COMPANY, a corporation,
Plaintiff-Appellee,

vs.

COHN-HALL-MARX COMPANY, a
corporation,
Defendant-Appellant.

Action at Law.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

In reply to appellant's contention that appellee had failed to sustain its burden of proving the materiality of the alleged representation, appellee argues that the record shows that the goods which were destroyed in the fire of January, 1926 were removed to the scene of the loss in February, 1925. The record merely shows that keeping open stock at the Paterson Street address was begun at that time. There is no evidence that the goods destroyed were the same as the goods placed there in February, 1925. As a matter of fact, the record of the case, as appellant has already pointed out in its earlier brief, tends to establish the contrary. At any rate, appellee did not sustain its burden.

Appellee also suggests that the contention was not argued below. The record shows that counsel for appellant, in his motions for non-suit and directed verdict, asserted as a reason for the grant-

ing of the same that the appellee had failed to prove a representation which was material.

It is difficult to follow the train of thought of the appellee in its brief, but apparently much of it centers around its construction of the case of *Kvedar vs. Shapiro*, 98 N. J. L. 225 (Err. & App. 1922). Appellee argues (at page 10 of Brief for plaintiff-appellee) as follows:

“If a man sell me a horse and fraudulently represents its qualities I have four courses open to me at law: (1) I can return the horse within a reasonable time after the discovery of the fraud, rescind the contract and sue for my money; or (2) I can waive the fraud and proceed for a breach of the original contract; or (3) I can retain the horse and bring an action for deceit; or (4) I can return the horse and still bring an action for deceit.”

The first three remedies may be conceded, but appellant is unaware of any authority, anywhere, which sanctions the fourth asserted remedy. It is elementary that a defrauded party cannot both affirm and disaffirm a contract. He cannot keep the consideration received and at the same time sue for the purchase price paid, nor can he return the consideration, thereby rescinding the contract, and at the same time assert an affirmance of the contract by maintaining a tort action for deceit. But appellee, it seems, contends that the case of *Kvedar vs. Shapiro* is at variance with this universal rule and allows a *pot pouri* of remedies. It is respectfully submitted that the opinion of this Honorable Court in that case will bear no such construction.

In that case, the plaintiff was induced to purchase a one ton truck on the false representation that it was a one and one half-ton truck. Upon dis-

covering the fraud, the plaintiff returned the truck and instituted his action to recover, as appears from counsel's opening set forth in the opinion, "the money paid under the conditional contract of sale." The plaintiff's theory obviously was one of rescission. The defendant argued that the complaint sounded in tort, because of the allegations of fraud, and was therefore an action in the nature of a common law action of deceit. For the alleged variance between the complaint and the opening, the defendant sought a non-suit. This was denied.

The court simply held that where a party to a contract has been defrauded, he may either rescind and recover his purchase price (which the plaintiff therein sought to do) or affirm and recover the consequential damages; and that allegations of fraud are not inconsistent with a rescission. In short, whichever remedy the plaintiff seeks, it is based on a deception and therefore, it is proper and necessary to allege all of the essentials of a deceit. The Court further says that the action may be on the theory of a rescission even though the complaint does not state in so many words that the contract has been disaffirmed. This is precisely the situation in the instant case.

Appellee relies on that portion of the opinion which says that (p. 227):

"An action for deceit may be maintained where there has been no disaffirmance of the contract. An action for deceit may also be maintained where there has been a disaffirmance of the contract."

The words "action for deceit" do not mean "a common law action in tort," but simply "an action based on deception" perpetrated on the plaintiff. The language quoted does not abolish the distinction between a rescission and an affirmance of the

contract, and thereby empower a plaintiff to proceed on both theories at the same time, vacillating between the two, as the exigency of the case may invite. It means, as appears in the quotation from Circuit Court Judge Sanborn's opinion which follows the language quoted above, that for the *same deception*, a plaintiff may have either of two remedies; but he can have but one, and an effort to maintain both is as impossible "as it is to ride at the same time two horses that are traveling in opposite directions." Although the common law forms of action have been abolished in name, the distinctions based on substantive law nevertheless persist, and the plaintiff-appellee having elected to proceed on the theory of a rescission, cannot now swing to the other extreme and claim that the contract of insurance and the contract of settlement were affirmed by appellee and that the action was a tort action in deceit.

It is noteworthy that the relief sought by appellee was not the consequential damages flowing from the alleged deception, but rather the consideration paid, precisely as in the *Kvedar* case. If the complaint were really based on an affirmance, it is strange that appellee did not ask for compensation for the expenses entailed in investigating and prosecuting the first action against the Consolidated Dyeing Co. This failure to include this item of damage, which must have been far from negligible, can hardly be explained on any ground other than that the instant action is one in contract and not in tort.

The appellee further argues on behalf of its contention that the action is in tort, that only a tort action would be consistent with (1) the Court's charge and the request for charge made by counsel for appellant, and (2) the action in attach-

ment. These contentions will be taken up in that order.

In the first place, counsel's request to charge, coming after the trial Court's denial of the defendant's motions for non-suit and direction of verdict, can hardly bolster up and supply the deficiencies in appellee's case. In the second place, both the request of counsel and the charge of the court are consistent with an action for rescission.

Appellee seems to be under the impression that a defrauded party may recover his consideration at law by establishing a material misrepresentation, and without showing scienter. Appellee obviously is confusing the legal doctrine of rescission for fraud with the equitable doctrine of rescission for material mistake. It is perfectly true that *in equity* rescission may be had without proof of scienter because a false material representation amounts to a mutual mistake of a material fact. See 77 N. J. Eq. 537. But *at law*, whether the suit is based on a rescission or on an affirmance, it is still necessary to establish all five elements of fraud. This is elementary and is the basis of the Court's opinion in *Kvedar vs. Shapiro*. Hence the request of counsel and the trial judge's charge which set forth the five elements of fraud cannot be said to be consistent only with a tort action at law.

Appellee further urges that the nature of this action (attachment) shows that its action is based on an affirmance of the contract. It is respectfully submitted that it proves exactly the contrary. An action based on an affirmance of the contract is a tort action, and the damages are always consequential and unliquidated. For such damages the present action in attachment therefore would not lie. But in an action to recover the consideration paid, *i. e.*, on the theory of rescission, the

amount of recovery is always liquidated, being essentially an action in quasi contract and therefore a writ of attachment is proper. The fact that appellee sought relief in attachment further corroborates appellant's contention that the instant suit was based on a disaffirmance of the contracts of insurance and the contract of settlement of the loss.

Appellant, in its earlier brief, pointed out that the doctrine requiring a defrauded party to act promptly applies equally well, whether the action be based on a rescission or on affirmance of the contract. It is probably true as appellee contends that such an action may be instituted any time before the period of limitations expires. It does not follow, however, that a party, after learning of his supposed injury may wait for that period of time to decide whether he has been defrauded and whether he will pursue his supposed wrongdoer. In either case, the party who feels that he is defrauded must act with reasonable promptness to inform his adversary that he believes himself to have been defrauded and will hold him accordingly. After having thus made a prompt election, he may, of course, wait for the full period of limitations before actually instituting his suit to enforce the election which he has already made. The New Jersey cases quite clearly point out that the delay is not merely a waiver of the right to rescind, but also a waiver of the fraud itself.

Appellee proceeds to argue that even if the action was based on a rescission, still the failure to rescind promptly should not bar recovery because there was no prejudice to the appellant. If prejudice be necessary, it was present as appellant has already pointed out in its earlier brief. But it is not a matter of prejudice or estoppel. As this

Honorable Court said in *Faulkner vs. Wassmer*, 77 N. J. Eq. 537 (Err. & App. 1910) : (Italics ours)

“The learned Vice-Chancellor was in error in testing the complainant’s right to elect solely by the doctrine of laches and notably so in conceiving that the decision of this court in *Dennis vs. Jones*, 44 N. J. Eq. (17 Stew.) 513, turned upon that doctrine which, in point of fact, was not even mentioned in the opinion of Chancellor McGill in this court. *Dennis vs. Jones was decided not upon the quasi-estoppel that is involved in the doctrine of laches, but upon a totally different ground, viz, that of conduct-evidence.*”

Substantially the same criticism may be offered to the appellee’s argument that the failure to tender the consideration (the extra premium) should not bar recovery because it is a small sum of money which can be deducted from an ultimate verdict. This argument loses sight of the reasoning behind the requirement that a party who rescinds must make restitution. In this case we have a retroactive rider designed to cover the loss, issued in consideration of the additional insurance premium. We have also the contract of settlement based on the same pecuniary consideration plus the release for the contractual obligations of liability under the original insurance policy. So long as these contracts stand, the payment to the appellant was made pursuant to a binding contract and as such cannot be recovered. As a condition precedent to a recovery back, the appellee must first free itself from the bonds of these contracts by exercising its alleged right to rescind. This can only be done by making restitution of the consideration received so far as restitution is possible. The law will not permit a party to a transaction to play fast and loose, and both retain what he received and

reclaim what he paid. It is not in the least a question of prejudice or estoppel.

Hence it is definitely settled in this state that even though the consideration received is money, and the plaintiff seeks a money verdict, still restitution is necessary to perfect rescission of the otherwise binding contract. The following cases are controlling:

Russell vs. Russell, 63 N. J. Eq. 282 (Err. and App. 1901). Complainant sought to avoid an antenuptial agreement between herself and her deceased husband. HELD failure to return sum of \$500.00 received pursuant to such agreement prevented successful prosecution of action.

Pearson vs. National Equitable Investment Co., 104 N. J. L. 564 (Err. & App. 1928). Suit to recover money paid for stock. Stock tendered back, but dividend received thereon was not tendered. HELD rescission not complete and therefore no recovery.

N. J. Rubber Co. vs. Commercial Union Assurance Co., 64 N. J. L. 580 (Err. & App. 1900). Fire insurance policy after the loss occurred, the insurance company discovered that it had a defense to liability. It refused to pay, but at the same time retained the premium. HELD failure to return the premium affirmed the validity of the policy.

Kozlaski vs. Prudential Insurance Co., 95 N. J. L. 101 (Err. & App. 1921). Life insurance policy. Insured died and thereafter in ignorance of his death, the company accepted payment of past premiums. After learning that it had a defense to a suit on the policy, the company nevertheless retained the premium. HELD such retention waived the right to rescind.

Appellee argues that such is not the law "where the fraud-doer is the smaller creditor". Wherein the distinction lies, is not made clear. At any

rate, in the cases cited immediately above, the fraud-doer was the smaller creditor, so that they therefore disprove appellee's contention.

It is well to notice that the *N. J. Rubber Co.* and the *Kozloski* cases definitely blast any notion that the doctrine requiring prompt rescission were based on estoppel. In both cases, the *loss had already occurred*, so that the conduct of the insurance companies could not have injured the assured; yet retention of the premium was held to be inconsistent with a disaffirmance of the contract, and because of the resulting affirmance, the liability of the companies upon the policies was established.

Appellant therefore contends that appellee in its brief advances no sound argument why the verdict in this case should stand, and that for the reasons set forth in the original brief, the judgment herein should be reversed.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant-Appellant.

E. R. McGLYNN,
Of Counsel.

