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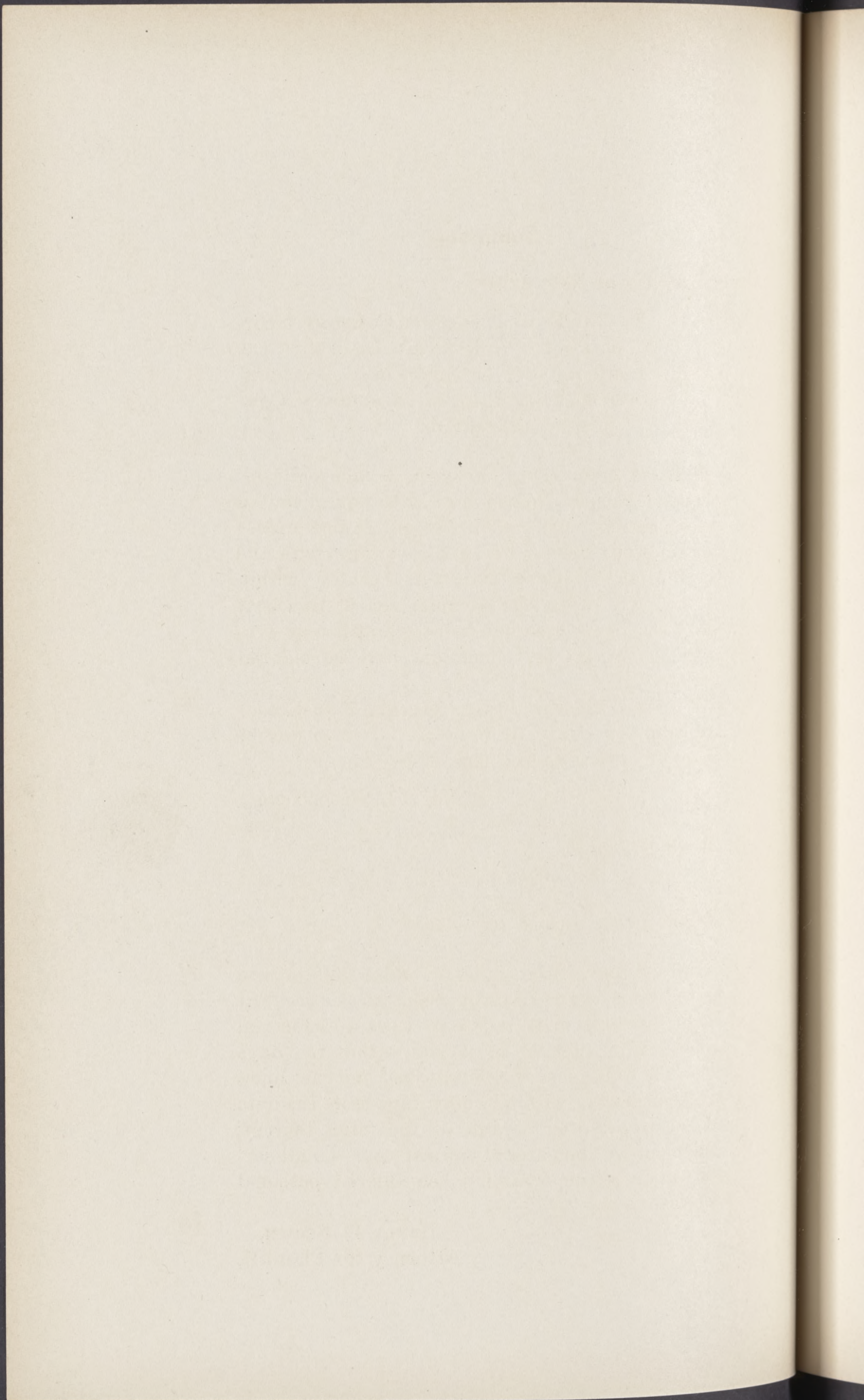

Summons.

The State of New Jersey:

(L. S.) To The Home Insurance Company, a corporation, Continental Insurance Co. of the City of New York, a corporation, The Western Assurance Company, a corporation.

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You are summoned to answer the annexed complaint of Watson Buckman in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, 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 may be entered against you.

20 Witness, Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this 20th day of May, Nineteen hundred and thirty-three.

Fred L. Bloodgood,
Clerk.

Henry P. Brown,
Attorney.

To the within named defendants:

30 In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to said action you must file an affidavit of merits within ten days from the date of service upon you, and you must file your answer within twenty days from the date of service, and in default of the filing thereof, judgment will be entered against you. Legal service upon a corporation is considered personal service.

40 Henry P. Brown,
Attorney for Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

WATSON BUCKMAN, Plaintiff, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation, Defendants.	Action at Law. Complaint.

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20

FIRST COUNT.

Watson Buckman, a resident of the Township of Hillsborough, in the County of Somerset and State of New Jersey, complaining against The Home Insurance Company, says:

1. That on or prior to the sixth day of August, 1931, plaintiff was lawfully seized and possessed of a certain tract of land on the east side of the road leading from Flagtown to Neshanic, in the Township of Hillsborough, County of Somerset and State of New Jersey.

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2. There was erected at that time upon said lands certain buildings occupied for dwelling purposes and a main barn including sheds and additions attached, all of which were of great value.

3. On the day and date above mentioned, the defendant, The Home Insurance Company, was, and still is, a corporation, being duly incorporated

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with power to insure risks against loss and damage by fire.

4. On the day and date above mentioned, the defendant, The Home Insurance Company, in consideration of the sum of Nine Dollars and Seventy Cents ($9.70), paid to the said defendant, did execute and deliver to the plaintiff, its policy No. 6733, in the sum of Twelve Hundred and Sixty Dollars ($1,260.00), insuring the plaintiff's property referred to in paragraph 2 herein, and as is more particularly set forth in the defendant's policy of insurance herein mentioned. 10

5. The defendant, The Home Insurance Company, by its policy of insurance, did covenant to indemnify the plaintiff for any and all loss and damage sustained by fire to the property insured. 20

6. On the twenty-third day of May, 1932, while this policy of insurance was in full force and effect, the property insured in and by the said policy was damaged and destroyed by fire.

7. The loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph 4 herein, was the sum of Forty Two Hundred and Eighty One Dollars and Eighty Cents ($4281.80), which was the amount fixed by appraisal and award under the terms and conditions of the policy, of which this defendant's proportion, and for which it is liable, is the sum of Two Hundred and Ninety Nine Dollars and Seventy Three Cents ($299.73). 30

8. The plaintiff has complied with all such covenants of the said policy of insurance as is and was requisite on his part to comply with, and has demanded of the defendant the sum of Two Hundred and Ninety Nine Dollars and Seventy Three Cents ($299.73). 40

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

Plaintiff demands damages against the defendant, The Home Insurance Company, under this Count, in the sum of Two Hundred and Ninety
10 Nine Dollars and Seventy Three Cents ($299.73), with interest and costs of suit to be taxed.

SECOND COUNT.

Watson Buckman, a resident of the Township of Hillsborough, in the County of Somerset and State of New Jersey, complaining against the Continental Insurance Co. of the City of New York, says:

20 1. That on or prior to the twenty-sixth day of March, 1932, plaintiff was lawfully seized and possessed of a certain tract of land on the east side of the road leading from Frankfort to Neshanic, in the Township of Hillsboro, County of Somerset and State of New Jersey.

2. There was erected at that time upon said lands certain buildings occupied for dwelling purposes and a main barn including sheds and additions attached, all of which were of great value.

30 3. On the day and date above mentioned, the defendant, the Continental Insurance Co. of the City of New York, was, and still is, a corporation, being duly incorporated with power to insure risks against loss and damage by fire.

4. On the day and date above mentioned, the defendant, the Continental Insurance Co. of the City of New York, in consideration of the sum of Twenty Eight Dollars and Forty Cents
40 ($28.40), paid to the said defendant, did execute

and deliver to the plaintiff, its policy No. 20185, in the sum of Three Thousand Dollars ($3,000.00), insuring the plaintiff's property referred to in paragraph 2 herein, and as is more particularly set forth in the defendant's policy of insurance herein mentioned.

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5. The defendant, the Continental Insurance Co. of the City of New York, by its policy of insurance, did covenant to indemnify the plaintiff for any and all loss and damage sustained by fire to the property insured.

6. On the twenty-third day of May, 1932, while this policy of insurance was in full force and effect, the property insured in and by the said policy was damaged and destroyed by fire.

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7. The loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph 4 herein, was the sum of Forty Two Hundred and Eighty One Dollars and Eighty Cents ($4281.80), of which this defendant's proportion, and for which it is liable, is the sum of Ten Hundred and Seventy Dollars and Forty Five Cents ($1070.45).

8. The plaintiff has complied with all such covenants of the said policy of insurance as is and was requisite on his part to comply with, and has demanded of the defendant the sum of Ten Hundred and Seventy Dollars and Forty Five Cents ($1070.45).

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

Plaintiff demands damages against the defendant, the Continental Insurance Co. of the City of New York, under this Count, in the sum of Ten

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Hundred and Seventy Dollars and Forty Five Cents ($1070.45).

THIRD COUNT.

Watson Buckman, a resident of the Township of Hillsborough, in the County of Somerset and State of New Jersey, complaining against The Western Assurance Company, says:

10

1. That on or prior to the twenty-sixth day of March, 1932, plaintiff was lawfully seized and possessed of a certain tract of land on the east side of the road leading from Frankfort to Neshanic, in the Township of Hillsborough, County of Somerset and State of New Jersey.

20

2. There was erected at that time upon said lands certain buildings occupied for dwelling purposes and a main barn including sheds and additions attached, all of which were of great value.

3. On the day and date above mentioned, the defendant, The Western Assurance Company, was, and still is, a corporation, being duly incorporated with power to insure risks against loss and damage by fire.

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4. On the day and date above mentioned, the defendant, The Western Assurance Company, in consideration of the sum of Twenty Eight Dollars and Forty Cents ($28.40), paid to the said defendant, did execute and deliver to the plaintiff, its policy No. 50416, in the sum of Three Thousand Dollars ($3,000.00), insuring the plaintiff's property referred to in paragraph 2 herein, and as is more particularly set forth in the defendant's policy of insurance herein mentioned.

40

5. The defendant, The Western Assurance Company, by its policy of insurance, did covenant

to indemnify the plaintiff for any and all loss and damage sustained by fire to the property insured.

6. On the twenty-third day of May, 1932, while this policy of insurance was in full force and effect, the property insured in and by the said policy was damaged and destroyed by fire. 10

7. The loss and damage sustained by the destruction of the property in question, insured under the policy described in paragraph 4 herein, was the sum of Forty Two Hundred and Eighty One Dollars and Eighty Cents ($4281.80), which was the amount fixed by appraisal and award under the terms and conditions of the policy, of which this defendant's proportion, and for which it is liable, is the sum of Ten Hundred and 20 Seventy Dollars and Forty Five Cents ($1070.45).

8. The plaintiff has complied with all such covenants of the said policy of insurance as is and was requisite on his part to comply with, and has demanded of the defendant the sum of Ten Hundred and Seventy Dollars and Forty Five Cents ($1070.45).

9. The defendant has not paid the amount of the loss and damage notwithstanding the divers demands made by the plaintiff in the premises. 30

Plaintiff demands damages against the defendant, The Western Assurance Company, under this Count, in the sum of Ten Hundred and Seventy Dollars and Forty Five Cents ($1070.45).

Henry P. Brown,
Attorney for Plaintiff.

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Affidavit of Merits.

(Filed May 28th, 1933.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

10

WATSON BUCKMAN,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation,
Defendants.

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Action at Law. Affidavit of Merits.

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

ARTHUR T. VANDERBILT, being duly sworn on his oath according to law, deposes and says that I am the attorney for the defendants in the above stated action and I believe that the said defendants have a just and legal defense to the said action on the merits of the case.

30

ARTHUR T. VANDERBILT.

Subscribed and sworn to before me this 26th day of May, 1933.

(L. S.)

40

EVELYN T. ADAM
A Notary Public of New Jersey.

Answer.

(Filed June 25, 1933.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

WATSON BUCKMAN, Plaintiff, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation, Defendants.	Action at Law. Answer.

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ANSWER TO FIRST COUNT.

The defendant, Home Insurance Company, a corporation, answering the complaint herein says that:

1. It has no knowledge or information sufficient to form a belief as to Paragraph 1 and therefore denies the same.

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2. It has no knowledge or information sufficient to form a belief as to Paragraph 2 and therefore denies the same.

3. It admits the allegations in Paragraph 3 of the complaint.

4. It admits the issuance of the policy, but as to the terms, provisions and conditions thereof

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begs leave to refer to the policy and its records thereof.

5. It denies the allegations in Paragraph 5 of the complaint.

6. It denies the allegations in Paragraph 6 of 10 the complaint.

7. It denies the allegations in Paragraph 7 of the complaint.

8. It denies the allegations in Paragraph 8 of the complaint.

9. It admits that it has not paid plaintiff any sum as alleged in Paragraph 9 of the complaint and denies that it is under any liability to plain-20 tiff.

10. *First separate defense to first count:*

Said policy contained the following provision:

> "If the dwelling be vacant or become unoccupied except in accordance with the conditions of this policy, the entire policy is void."

In violation of said policy provision the insured 30 dwelling was vacant or became unoccupied contrary to the conditions of the policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

11. *Second separate defense to first count:*

Said policy contained the following provision:

> "This entire policy, unless otherwise pro-40 vided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein

> described * * * be or become vacant or unoccupied and so remain for ten days."

In violation of said policy provision, a building described in said policy was or became vacant or unoccupied for a period in excess of that permitted by said policy provision, without it being so provided by agreement indorsed upon or added to said policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff. 10

12. *Third separate defense to first count:*

Said policy contains the following provisions:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy." 20

In violation of said policy provision, plaintiff procured other contracts of insurance covering property covered by this policy, without it being so provided by agreement endorsed upon or added to said policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff. 30

13. *Fourth separate defense to first count:*

Said policy contained the following provision and condition:

> "In consideration of the reduced rate at which this policy is written, it is hereby made 40

a condition of this policy that the buildings hereby insured or containing the property insured under the Nos. 1, 5 items of this policy are occupied by the owner of the premises herein described * * *. The rate of premium at which this policy is written and the validity
10 of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

In violation of said policy provision without permission being first endorsed thereon, a building insured by said policy under the above mentioned
20 items was not occupied by the owner of the premises. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

14. *Fifth separate defense to first count:*

Said policy contained the following provision and condition:

"In consideration of the reduced rate at
30 which this policy is written, it is hereby made a condition of this policy that the dwelling insured, or containing the property insured under the No. 1 item of this policy, is detached not less than 100 feet from any barn * * *. The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these con-
40 ditions, permission must first be endorsed

hereon, otherwise the entire policy will be void."

In violation of said policy provision, without permission being first endorsed thereon, the dwelling insured by said policy under the above-mentioned item was detached less than 100 feet from any barn. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff. 10

15. *Sixth separate defense to first count:*

Said policy insured as Item No. 1, a two-story frame building and additions with shingle roof, including foundations and all permanent fixtures, while occupied for dwelling purposes. In violation of said provision, said building was not occupied for dwelling purposes. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff. 20

16. *Seventh separate defense to first count:*

Said policy insured as Item No. 5, a frame barn known as Barn No. 1, including sheds and additions attached. Proof of loss filed by plaintiff with defendant making claim for alleged loss or damage included a claim for alleged loss or damage to an additional farm building or buildings not an addition of or attached to Barn No. 1 above referred to and not covered by or insured under said policy of insurance, and this suit demands damages for alleged loss or damage to said additional farm building or buildings. Defendant's liability to plaintiff, if any, under said policy does not extend to or include alleged loss or damage to said additional farm building or buildings. 30 40

Answer.

17. *Eighth separate defense to first count:*

Said policy contains the following terms and conditions:

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

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

ANSWER TO SECOND COUNT.

The defendant, Continental Insurance Co. of the City of New York, a corporation, answering the complaint herein says:

1. It has no knowledge or information sufficient to form a belief as to Paragraph 1 and therefore denies the same. 10

2. It has no knowledge or information sufficient to form a belief as to Paragraph 2 and therefore denies the same.

3. It admits the allegations in Paragraph 3 of the complaint.

4. It admits the issuance of the policy, but as to the terms, provisions and conditions thereof begs leave to refer to the policy and its records thereof. 20

5. It denies the allegations in Paragraph 5 of the complaint.

6. It denies the allegations in Paragraph 6 of the complaint.

7. It denies the allegations in Paragraph 7 of the complaint.

8. It denies the allegations in Paragraph 8 of the complaint. 30

9. It admits that it has not paid plaintiff any sum as alleged in Paragraph 9 of the complaint and denies that it is under any liability to plaintiff.

10. *First separate defense to second count:*

Said policy contained the following provision:

"If the dwelling be vacant or become unoccupied except in accordance with the con- 40

ditions of this policy, the entire policy is void."

In violation of said policy provision the insured dwelling was vacant or became unoccupied contrary to the conditions of the policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

11. *Second separate defense to second count:*

Said policy contained the following provision:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein described * * * be or become vacant or unoccupied and so remain for ten days."

In violation of said policy provision, a building described in said policy be or became vacant or unoccupied for a period in excess of that permitted by said policy provision, without it being so provided by agreement endorsed upon or added to said policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

12. *Third separate defense to second count:*

Said policy contains the following provision:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy."

Answer.

By endorsement attached thereto, said policy further provided:

> "Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totaling $6,000 including the total amount of this policy, which is $3,000."

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In violation of said policy provision and endorsement, there was other concurrent insurance on the buildings and/or contents covered under said policy in excess of the amount permitted by said provision and endorsement. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

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13. *Fourth separate defense to second count:*

Said policy contained the following provision and condition:

> "In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the Nos. 1, 5 items of this policy are occupied by the owner of the premises herein described * * *. The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

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In violation of said policy provision without permission being first endorsed thereon, a build-

ing insured by said policy under the above mentioned items was not occupied by the owner of the premises. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

10 14. *Fifth separate defense to second count:*

Said policy contained the following provision and condition:

> "In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the dwelling insured, or containing the property insured under the No. 1 item of this policy, is detached not less than 100 feet from any barn
> 20 * * * The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

In violation of said policy provision, without
30 permission being first endorsed thereon, the dwelling insured by said policy under the above-mentioned item was detached less than 100 feet from any barn. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

15. *Sixth separate defense to second count:*

Said policy insured as Item No. 1, a two-story
40 frame building and additions with shingle roof,

including foundations and all permanent fixtures, while occupied, for dwelling purposes. In violation of said provision, said building was not occupied for dwelling purposes. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

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16. *Seventh separate defense to second count:*

Said policy insured as Item No. 5, a frame barn known as Barn No. 1, including sheds and additions attached. Proof of loss filed by plaintiff with defendant making claim for alleged loss or damage included a claim for alleged loss or damage to an additional building or buildings not an addition of or attached to Barn No. 1 above referred to and not covered by or insured under said policy of insurance, and this suit demands damages for alleged loss or damage to said additional farm building or buildings. Defendant's liability to plaintiff, if any, under said policy does not extend to or include alleged loss or damage to said additional farm building or buildings.

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17. *Eighth separate defense to second count:*

Said policy contains the following terms and conditions:

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

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Answer.

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

ANSWER TO THIRD COUNT.

The defendant, The Western Assurance Company, a corporation, answering the complaint
30 herein says:

1. It has no knowledge or information sufficient to form a belief as to Paragraph 1 and therefore denies the same.

2. It has no knowledge or information sufficient to form a belief as to Paragraph 2 and therefore denies the same.

3. It admits the allegations in Paragraph 3 of
40 the complaint.

Answer.

4. It admits the issuance of the policy, but as to the terms, provisions and conditions thereof begs leave to refer to the policy and its records thereof.

5. It denies the allegations in Paragraph 5 of the complaint.

6. It denies the allegations in Paragraph 6 of the complaint. 10

7. It denies the allegations in Paragraph 7 of the complaint.

8. It denies the allegations in Paragraph 8 of the complaint.

9. It admits that it has not paid plaintiff any sum as alleged in Paragraph 9 of the complaint and denies that it is under any liability to plaintiff. 20

10. *First separate defense to third count:*

Said policy contained the following provision:

> "If the dwelling be vacant or become unoccupied except in accordance with the conditions of this policy, the entire policy is void."

In violation of said policy provision the insured dwelling was vacant or became unoccupied contrary to the conditions of the policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff. 30

11. *Second separate defense to third count:*

Said policy contained the following provision:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein 40

described * * * be or become vacant or unoccupied and so remain for ten days."

In violation of said policy provision a building described in said policy was or became vacant or unoccupied for a period in excess of that permitted
10 by said policy provision, without it being so provided by agreement endorsed upon or added to said policy. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

12. *Third separate defense to third count:*

Said policy contains the following provision:

20 "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy."

By endorsement attached thereto, said policy further provided:

30 "Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totalling $6,000 including the total amount of this policy, which is $3,000."

In violation of said policy provision and endorsement, there was other concurrent insurance on the buildings and/or contents covered under said policy in excess of the amount permitted by said provision and endorsement. By reason
40 whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

Answer.

13. *Fourth separate defense to third count:*

Said policy contained the following provision and condition:

> "In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the Nos. 1, 5 items of this policy are occupied by the owner of the premises herein described. * * * The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

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In violation of said policy provision without permission being first endorsed thereon, a building insured by said policy under the above mentioned items was not occupied by the owner of the premises, by reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

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14. *Fifth separate defense to third count:*

Said policy contained the following provision and condition:

> "In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the dwelling insured, or containing the property insured under the No. 1 item of this policy, is detached not less than 100 feet from any barn.

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Answer.

> * * * The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

In violation of said policy provision, without permission being first endorsed thereon, the dwelling insured by said policy under the above-mentioned item was detached less than 100 feet from any barn. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

15. *Sixth separate defense to third count:*

Said policy insured as Item No. 1, a two-story frame building and additions with shingle roof, including foundations and all permanent fixtures, while occupied for dwelling purposes. In violation of said provision, said building was not occupied for dwelling purposes. By reason whereof, said policy became void and of no effect and defendant is under no liability to plaintiff.

16. *Seventh separate defense to third count:*

Said policy insured as Item No. 5, a frame barn known as Barn No. 1, including sheds and additions attached. Proof of loss filed by plaintiff with defendant making claim for alleged loss or damage included a claim for alleged loss or damage to an additional farm building or buildings not an addition of or attached to Barn No. 1 above referred to and not covered by or insured under

said policy of insurance, and this suit demands damages for alleged loss or damage to said additional farm building or buildings. Defendant's liability to plaintiff, if any, under said policy does not extend to or include alleged loss or damage to said additional farm building or buildings.

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17. *Eighth separate defense to third count:*

Said policy contains the following terms and conditions:

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

20

In violation of such terms and conditions, with intent to cheat and defraud defendant and gain an advantage over it and secure a sum of money not otherwise justly due the insured knowingly and wilfully, falsely and fraudulently misrepresented in writing and otherwise the amount and value of the property claimed by him to be involved in the fire, the cost of said property, the amount of damage caused by said fire, the origin and cause of said fire, the ownership of said property, well knowing that in truth and in fact the amount of property claimed to belong to him and involved in said fire and its value, the cost of said property and the amount of damage caused by said fire was much less than the amount repre-

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sented and stated by him, and well knowing that the origin and cause of the fire and the ownership of said property was otherwise than as represented and stated by him; all of which was done by said insured, with intent, as aforesaid, to secure the payment of a sum of money from this defendant not otherwise justly due.

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ARTHUR T. VANDERBILT,
Attorney of Defendants.

Consent is hereby given to the filing of the within Answer as within time.

HENRY P. BROWN,
Attorney for Plaintiff.

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Reply.

(Filed October 28, 1933.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

WATSON BUCKMAN, Plaintiff, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation, Defendants.	Action at Law. Reply.

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1. Plaintiff admits that the policy of insurance sued upon contains the excerpts set forth in all the Separate Defenses, but denies all the remaining allegations contained in the said Separate Defenses of the First, Second and Third Counts.

2. Plaintiff reserves the right, on or before the trial of the issue, to strike out the First, Fourth and Fifth Separate Defenses of the First, Second and Third Counts, and the Third Separate Defense of the Second and Third Counts, because they are sham and frivolous, and furthermore the excerpt set forth is not a part of the standard fire insurance policy, and therefore not binding on this plaintiff.

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3. The dwelling mentioned in the First, Second, Fourth and Fifth Separate Defenses of the First, Second and Third Counts, and insured under the

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policy sued upon, was not the building or buildings damaged or destroyed by fire, and therefore these Defenses are immaterial and insufficient under the policy contract.

4. The dwelling mentioned in the First and Second Separate Defenses of the First, Second and
10 Third Counts, and insured under the said policy, was not the building or buildings damaged or destroyed by fire. Said vacancy and unoccupancy of the dwelling insured was not a violation contrary to the terms and conditions of the policy, because the said vacancy and unoccupancy was immaterial and contributed in no wise toward the origin and cause of the fire which destroyed the barns with their additions.

20 5. As to the Third Separate Defense of the First, Second and Third Counts, plaintiff says that the policy permits other insurance, and provides for a pro-rating or payment of the loss on a contributive basis, taking into consideration all the other insurance covering the property damaged or destroyed.

Henry P. Brown,
Attorney of Plaintiff.

30 Service as of time of a copy of the within Reply is hereby acknowledged this 25th day of October, 1933.

Arthur T. Vanderbilt,
Attorney of Defendants.

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Agreed Statement of Facts as Revised.

(Filed June 27, 1935.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

WATSON BUCKMAN, Plaintiff, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation. Defendants.	Action at Law. Agreed Statement of Facts as Revised.

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1. The parties to this cause, plaintiff and defendants, by their respective attorneys, hereby agree that the following facts are admitted, and shall constitute a special case agreed between the parties without trial, regardless of the issues raised by the pleadings on file in the above cause, and shall be argued and submitted to the determination of the New Jersey Supreme Court upon said facts.

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2. This is a suit on three policies of fire insurance issued by the defendants to plaintiff insuring dwelling, barns and outbuildings located in Hillsboro Township, Somerset County, New Jersey.

3. On August 6th, 1931, the Home Insurance Company through its agent, L. M. Codington Co. of Somerville, N. J., issued its policy of fire in-

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surance No. 6733 to plaintiff, the policy running for a period of one year. This policy covered $700. on the dwelling and $560. "on the main barn * * * including sheds and additions attached, located 150 feet from dwelling and known as barn No. 1."

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4. On March 26, 1932, the Continental Insurance Company, through its agent, William D. Nolan Agency, Inc. of Somerville, N. J., issued its policy No. 20,185 to plaintiff for the period of one year. On the same date the Western Assurance Company likewise through the Nolan Agency issued its policy of insurance to plaintiff likewise covering for one year. Each of these policies was in the amount of $3,000, the two being considered

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together, covering $2,000 on the dwelling and $4,000 on "barn with shingle roof, including sheds, cow stable, machine shed and additions attached, located 100 feet from dwelling and known as barn No. 1."

5. These are the policies sued upon as the result of a fire destroying the barns and outbuildings on May 23, 1932. The fire did not damage the dwelling. These policies contained no mortgagee clauses and were payable to the assured.

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6. At the time of the fire the Hartford Fire Insurance Company had a valid policy of insurance covering these premises in the total amount of $3,000 including $1,400 on the dwelling, $1,470 on the main barn, $100 on the hog house and $30 on the wood house. At the time of the fire the Aetna Insurance Company had a policy on these premises in the amount of $4,000 including $1,900 on the dwelling, $1,970 on the main barn, $100 on the hog house and $30 on the wood house. The

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Hillsboro Mutual Fire Insurance Company had a

policy on the silo in the amount of $400 and on the produce contained therein in the amount of $300. these items not being covered by any of the other policies of insurance. All these last mentioned policies are not involved in the present action, payment having been made by the Hartford Fire Insurance Company and Aetna Insurance Company to the mortgagees there named in the standard mortgagee clauses attached thereto, payment as aforesaid having been made without subrogation or assignment of the mortgage.

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7. After the loss all the companies except the Continental Insurance Company and the Hillsboro Mutual Fire Insurance Company entered into an appraisal agreement with the assured and the appraisers found a total loss and damage of $4,281.80, which was made up of the following items:

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Barn No. 1	$ 266.49
" " 2	1,355.48
" " 3	1,672.37
" " 4	469.88
" " 5	517.58

8. The plaintiff has demanded damages in his complaint in the following amounts:

30

Against Home Insurance Company	$ 299.73
Against Continental Insurance Company	1,070.45
Against Western Assurance Company	1,070.45

These amounts are the respective proportions of the total appraisal award above mentioned, apportioned to each of the defendant companies in accordance with the general contribution clause

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contained in all the policies. The appraisal agreement specifically stated that the appraisal would not in any respect waive any of the provisions or conditions of any of the policies or any violations thereof.

10 9. All of the policies in suit are standard fire insurance policies of the State of New Jersey. There is attached to each policy a farm form prescribed by the Schedule Rating office which specifies the risks covered and conditions imposed, because of the nature and location of the property insured. This farm form has been filed with the Department of Banking and Insurance of the State of New Jersey by the Schedule Rating Office, allegedly under the authority of P. L. 1913, Ch. 20 85 and amendments thereto and supplements thereof.

10. All the three policies in suit contain the following standard policy provisions:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by 30 this policy * * *."

The policies issued by the Continental Insurance Company and Western Assurance Company in addition each contain the following clause:

> "Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totalling $6,000, including the total amount of this policy which is $3,000, 40 and this company shall not be liable under this policy for a greater proportion of any loss on the described property than the

amount hereby insured shall bear to the whole insurance thereon, whether valid or not."

The policy issued by Home Insurance Company contains the following additional clause:

"Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totalling $, including the total amount of this policy which is $, and this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance thereon, whether valid or not."

10

11. On the back of the farm form above referred to attached to each policy in suit, there appears the following clause among others:

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"TERMS AND CONDITIONS

VACANCY AND UNOCCUPANCY: If the dwelling be vacant or become unoccupied except in accordance with the conditions of this policy, the entire policy is void."

12. The farm form attached to each policy in suit also contains the following provision among others:

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"FARM FORM STANDARD CONDITION CLAUSES. (the following Standard Condition Clauses apply only to the designated items):

No. 1. OWNER OCCUPANCY: In consideration of the reduced rate for which this policy is written it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the 1, 5 item(s) of this policy are occupied by the owner of the premises herein described. * * *

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"The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, other-
10 wise the entire policy will be void."

The item numbers mentioned in the last clause are the building and barn insured by these policies. The rate of premium was reduced in consideration of the above warranty by the assured.

13. Plaintiff, the owner of the insured premises, did not occupy the dwelling insured and described in the policies in suit at the time of the
20 fire or at any time after the policies in suit were issued.

14. The sketch of the outbuildings is hereto attached. It is agreed by counsel that an iron rail about 20 feet long was connected to the southeasterly corner of building No. 2 and the northwesterly corner of building No. 5, upon which there were runners attached to sliding doors, that being the pathway into the barns for the cattle. It is contended by the attorney for the defend-
30 ants that barn No. 5 is not insured or covered by the terms and conditions of the insurance policies herein sued upon, on the ground that it was not a shed or addition attached to the main barn covered under the policies of the defendants.

15. All of the policies mentioned in this stipulation, except that of the Hillsboro Mutual Fire Insurance Company are hereto attached and made a part of this stipulation. It is further agreed that both plaintiff and defendants file briefs as
40 may be agreed upon between counsel.

16. It is further agreed that if, upon the facts as admitted and agreed to, the court shall be of the opinion that any or all of the defendants are liable to the plaintiff, then judgment final in the amounts as specified in the 8th paragraph hereto, shall be entered in favor of the plaintiff and against any or all of the defendants so found liable; but if upon the facts so admitted and agreed to the court shall be of the opinion that the barn known as No. 5, was not insured under the policies sued upon, but that the defendants are liable to the plaintiff, then judgment shall be entered for the plaintiff in the sum of $2,145.61 apportioned among the defendants as follows:

Against Home Insurance Company....	$263.50
Against Continental Insurance Company	941.06
Against Western Assurance Company	941.05

If the court is of the opinion that any or all of the policies hereunder sued upon are void then judgment final shall be entered in favor of any or all of the defendants respectively. The right to turn this case into a special verdict or to take any other steps that may be advisable for the purpose of review, and the right to review the judgment thereon by appeal, or any other proper proceedings, is reserved to each party, plaintiff and defendants.

Henry P. Brown,
Attorney for Plaintiff.

Arthur T. Vanderbilt,
Attorney for Defendants.

(Sketch attached to original.)

10 20 30 40

Postea.

(Filed June 27, 1935.)

NEW JERSEY SUPREME COURT,
SOMERSET COUNTY.

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WATSON BUCKMAN,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, a corporation, and THE WESTERN ASSURANCE COMPANY, a corporation,
Defendants.

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Postea.

Action at Law. On stipulation of facts. Determination.

For plaintiff, Henry P. Brown.

For defendants, Arthur T. Vanderbilt.

Lawrence, C. C. J.:

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This case was submitted to the court without a jury, at the Somerset Circuit, on a stipulation of facts. On May 23, 1932, a fire destroyed the barns and outbuildings on a farm owned by plaintiff in Hillsboro Township. The dwelling house (which was not damaged) was not occupied at the time and had not been for a considerable period before the fire, although apparently plaintiff or a tenant had carried on farming operations or dairying and
40
used the barns and outbuildings in connection

therewith. After the fire, it developed that there were six policies of insurance covering the dwelling, various barns (five in number) and outbuildings on the property, that is to say, a policy issued by The Home Insurance Company (defendant), on August 6, 1931, on the dwelling for $700 and $560 on the main barn (referred to as No. 1), including sheds and additions attached; a policy of The Hartford Fire Insurance Company, dated August 17, 1931, for $3000, allocated as $1400 on the dwelling, $1470 on the main barn, $100 on the hog house and $30 on the wood house; a policy of The Aetna Insurance Company, under date of August 17, 1931, for $4000, made up of $1900 on the dwelling, $1970 on the main barn, $100 on the hog house, and $30 on the wood house; a policy of The Hillsboro Mutual Fire Insurance Company, for $700, covering the silo and its contents; a policy of the Continental Insurance Company (defendant), issued March 26, 1932, for $3000, and another of like date and amount of the Western Assurance Company (defendant) covering together $2000 on the dwelling and $4000 "on barn with shingle roof", including sheds, cow stable, machine shed and additions attached.

The policies of The Hillsboro Mutual Fire Insurance Company, The Hartford Fire Insurance Company and The Aetna Insurance Company are not here involved, the latter two had mortgagee clauses and were paid after the fire in proportion to the loss without exercise of the right to subrogation. Reference is made to them only as evidence of existing valid insurance at the time of the issuing of the policies of the defendants Continental and Western Companies. These policies and that of The Home Insurance Company contained no mortgagee provisions and were made

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payable directly to plaintiff. The suit is accordingly based on the policies in question. After the fire, proofs of loss were submitted by plaintiff and an appraisal agreement was entered into, without waiver of any condition or warranty in the policies or any violation thereof. The damage was apportioned as follows:

Against Home Insurance Company	$ 299.73
Against Continental Insurance pany	1,070.45
Against Western Assurance Company	1,070.45

All of the policies in suit are in the standard form prescribed by statute (P. L. 1902, Chap. 134; P. L. 1912, Chap. 295; and P. L. 1931, Chap. 328) and attached to each is a "farm form", approved and filed by the Schedule Rating Office, pursuant to P. L. 1913, Chap. 85, which specifies the risks covered and conditions imposed, because of the nature and location of the property insured.

Defendants declined to pay the loss under their respective policies on two grounds: first, because of the alleged breach of the prohibition against other insurance in excess of that permitted by stipulation in the "farm form", the policy of The Home Insurance Company excepted; and, second, that the buildings were not occupied by the owner as required by a provision of the policies in the nature of a warranty. A third ground that barn No. 5 was not covered by the policies was not urged at the trial.

In the "farm form" rider attached to the policies of The Continental and The Western appears the following:

Postea.

"1. Permission is granted for other concurrent insurance on buildings and all contents covered hereunder, covering $6000, including the total amount of this policy which is $3000. And this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount whereby insured shall bear to the whole insurance, whether valid or not." 10

The controversy as to this provision involves the question whether pertinent inconsistent provisions appear in the policies themselves which operate as a waiver or annulment of that cited. Obviously there was other insurance in excess of that permitted in the rider, and the policies of the defendants named would be void unless an implied waiver be found by reason of inconsistent provisions therein. Counsel for plaintiff urges that there are such inconsistent provisions and points out lines 1, 2 and 3, in each policy to the effect that the company should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and the loss or damage should be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and in no event to exceed what it would cost the insured to repair or replace the same with material of like kind and quality; likewise in lines 11, 12 and 13, the provision is that the entire policy, unless otherwise agreed by endorsement or addition, should be void, if the insured then had or should thereafter make or procure any other contract of insurance, whether valid or not, on property in whole or in part covered by it; while in lines 96, 97 and 98, there is still another indicating that the company should not be liable for a greater proportion of any loss on the described property than the 20 30 40

amount for which insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property.

Defendants' contention under the second ground of defense is that the policies are void because the owner did not occupy the premises de-
10 scribed and is made to rest on a condition in the "farm form" attached reciting that in consideration of the reduced rate for which the policy was written the buildings insured were to be occupied by the owner of the premises. It is admitted that plaintiff (owner) did not occupy the dwelling house. In each policy, however, there is the provision (lines 28, 29, and 30) that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, should be void if a
20 building therein described, either intended for occupancy by the owner *or tenant,* be or become vacant or unoccupied and so remains for ten days.

Conditions in a policy which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy. Carson *v.* Jersey City Insurance Co., 43 N. J. L., 300; while any doubtful or ambiguous meaning due to provisions in-
30 consistent with the contract, including those in a rider attached, such as a "farm form", must be construed in favor of the insured; and if the facts or conditions imposed by the latter are inconsistent with, or a waiver of, any of the provisions or conditions of the policy, then such provisions or conditions must be treated as a nullity. Corlies *v.* Westchester Fire Insurance Co., 92 N. J. L., 108; and Gans *v.* Columbia Insurance Co., 99 N. J. L., 44 (s. c. 100 *Id.,* 400). In the former case
40 it was said that courts are averse to forfeitures

and will seek a construction of a forfeiture clause in a policy which will sustain it, even though a construction which will defeat it is reasonably deducible from the terms and words used to express it.

It is sufficient to say in the present case that the inconsistent provisions found in the policies in suit and the "farm form" attached relating to other insurance and owner occupancy give rise to such doubt or ambiguity as to call for the application of the rules followed in the cited cases. In any event, it appears that each company is liable only for its proportionate amount of the loss and cannot be required to pay any greater sum because of other insurance, since even in the "farm form" purporting to limit the amount of such other insurance it is provided that the liability shall not be greater in proportion than the amount of the insurance bears to the whole, whether valid or not. The conclusion is that plaintiff is entitled to recover. Judgment may accordingly be entered against the defendants for the sum of $2,440.63, apportioned as follows: against The Home Insurance Company for $299.73; Continental Insurance Company of the City of New York, for $1,070.45; and the Western Assurance Company for $1,070.45, together with interest from the date indicated in the policies, and the costs of suit to be taxed.

RULIF B. LAWRENCE,
Judge.

10 20 30 40

Judgment.

NEW JERSEY SUPREME COURT.

WATSON BUCKMAN, Plaintiff, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, and THE WESTERN ASSURANCE COMPANY, a corporation, Defendants.	Action at Law. On Postea. Judgment.

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Damages........	$ 299.73	against Home Insurance Co.
Interest..........	35.96	
	$ 335.69	
Damages........	$1,070.45	against Continental Insurance Co.
Interest..........	128.65	
	$1,199.10	
Damages........	$1,070.45	against Western Assurance Co.
Interest..........	128.65	
	$1,199.10	

30

Costs
$

It is ordered that judgment be and hereby is entered in favor of plaintiff and against defendant The Home Insurance Company, a corporation, for the sum of two hundred ninety-nine dollars and seventy-three cents and thirty-five dollars and ninety-six cents interest, and against defendant Continental Insurance Company of the City of New York, a corporation, for the sum of ten

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hundred and seventy dollars and forty-five cents, and one hundred and twenty-eight dollars and sixty-five cents interest, and against the defendant The Western Assurance Company, a corporation, for the sum of ten hundred and seventy dollars and forty-five cents, and one hundred twenty-eight dollars and sixty-five cents interest, besides costs to be taxed *nisi*. 10

On motion of

Henry P. Brown,
Attorney.

Entered June 27, 1935.

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A true copy.

Fred L. Bloodgood,
Clerk.

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Notice of Appeal.

(Filed January 24, 1936.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

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WATSON BUCKMAN,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation,

20

Defendants.

Action at Law.

Notice of Appeal.

To Watson Buckman and Henry P. Brown, Esq., his attorney:

PLEASE TAKE NOTICE that the defendants in the above entitled cause appeal to the New Jersey Court of Errors and Appeals from the whole of
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the judgment entered in this cause in favor of the plaintiff and against defendants and every part thereof.

Respectfully yours,

ARTHUR T. VANDERBILT,
Attorney of Defendants.

Service of a copy of the within notice of appeal is hereby acknowledged this 23rd day of January,
40
1936.

HENRY P. BROWN,
Attorney of Plaintiff.

Grounds of Appeal.

(Filed January 30, 1936.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WATSON BUCKMAN, Plaintiff-Respondent, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, a corporation, and THE WESTERN ASSURANCE COMPANY, a corporation, Defendants-Appellants.	Action at Law. Grounds of Appeal.

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Defendants - Appellants state the following grounds of appeal:

1. The Trial Court erroneously entered judgment in favor of the plaintiff and against the defendants as follows: defendant Home Insurance Company for $299.03; defendant Continental Insurance Company of the City of New York $1070.45; defendant The Western Assurance Company $1070.45, together with interest and costs of suit.

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2. The Trial Court erroneously found as a matter of law that there was no violation of the provisions in the policy of insurance of defendant The Home Insurance Company against other insurance.

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Grounds of Appeal.

3. The Trial Court erroneously found as a matter of law that there was no violation of the provisions in the policy of insurance of defendant Continental Insurance Company against other insurance.

10 4. The Trial Court erroneously found as a matter of law that there was no violation of the provisions in the policy of insurance of defendant The Western Assurance Company against other insurance.

5. The Trial Court erroneously found as a matter of law that the provisions of the policy of insurance of the defendant The Home Insurance Company against other insurance are inconsistent with other provisions of the policy and were therefore waived by the defendant The Home Insurance Company.

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6. The Trial Court erroneously found as a matter of law that the provisions of the policy of insurance of the defendant Continental Insurance Company against other insurance are inconsistent with other provisions of the policy and were therefore waived by the defendant Continental Insurance Company.

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7. The Trial Court erroneously found as a matter of law that the provisions of the policy of insurance of the defendant The Western Assurance Company against other insurance are inconsistent with other provisions of the policy and were therefore waived by the defendant The Western Assurance Company.

8. The Trial Court erroneously found as a matter of law that there was no breach of the

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warranty in the policy of insurance of the defendant The Home Insurance Company that the dwelling described therein would be occupied by the owner.

9. The Trial Court erroneously found as a a matter of law that there was no breach of the warranty in the policy of insurance of the defendant Continental Insurance Company that the dwelling described therein would be occupied by the owner.

10. The Trial Court erroneously found as a matter of law that there was no breach of the warranty in the policy of insurance of the defendant The Western Assurance Company that the dwelling described therein would be occupied by the owner.

11. The Trial Court erroneously found as a matter of law that the warranty in the policy of insurance of the defendant The Home Insurance Company that the dwelling described therein would be occupied by the owner is inconsistent with the other provisions of the policy of insurance and is therefore a nullity.

12. The Trial Court erroneously found as a matter of law that the warranty in the policy of insurance of the defendant Continental Insurance Company that the dwelling described therein would be occupied by the owner is inconsistent with the other provisions of the policy of insurance and is therefore a nullity.

13. The Trial Court erroneously found as a matter of law that the warranty in the policy of insurance of the defendant The Western Assur-

ance Company that the dwelling described therein would be occupied by the owner is inconsistent with the other provisions of the policy of insurance and is therefore a nullity.

Arthur T. Vanderbilt,
Attorney of Defendants-Appellants.

Service of a copy of the within grounds of appeal is hereby acknowledged as within time this 29th day of January, 1936.

Henry P. Brown,
Attorney of Plaintiff-Respondent.

Exhibit A.

The original policies have been lost. The three policies in suit were in the same form as the policy of insurance and the standard farm form attached thereto which constitute this exhibit.

No.

EXHIBIT "A"

Standard Fire Policy

Amount $.............. Rate.............. Premium $..............

In Consideration of the Stipulations herein named and of

.... Dollars Premium

Does Insure ....

....................................for the term of.......................

from the.....................day of.....................19......at noon

to the..........................day of.....................19......at noon

against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding

Exhibit A.

.... Dollars,
to the following described property while located and contained as described herein, and not elsewhere, to-wit:

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

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IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent at the Company at........................

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Countersigned at ....,
this................ *day of* .... *19*.....

....*Agent.*

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to

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such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if
10 they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised
20 value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

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

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance,
40 whether valid or not, on property covered in

Exhibit A.

whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurace (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which

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last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner
10 or tenant, be or become vacant or unoccupied and so remain for ten days.

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

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

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

tion of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured. 10

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void. 20

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium. 30

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest 40

as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the
10 value of property remaining in the original location, shall for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount
20 hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and
30 the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other other insurance, whether valid
40 or not, covering any of said property; and a copy

of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, 10
verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify. 20

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof 30
to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value 40

and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and
10 umpire.

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

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by
30 this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

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

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such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. 10

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

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall 20 apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

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Exhibit A.

Standard Farm Form

Item:	Amount Insured:		Farm Property Condition Clauses:	Rate:
1.	$2,000	On .... story .... building and additions with .... roof, including foundations and all permanent fixtures, while occupied for dwelling purposes.	1, 6, 9	.62
2.	$ Nil	On household furniture and personal property of every description such as is usual or incidental to a dwelling, belonging to the assured, or any member or servant of the family, but excluding articles specifically insured and farm products in excess of the amount required for family use, all while contained in the above described dwelling	....	....
3.	$ Nil	On farm products in excess of the amount required for family use, all while contained in the above described dwelling	....	....
4.	$ Nil	On .... building with .... roof located .... feet from dwelling, and occupied as private garage, with privilege to house not over .... automobiles or tractors, subject to conditions of Automobile Permit No. 1 attached........	....	....
5.	$4,000	On barn with shingle roof, including sheds, cow stable, Machine shed and additions attached, located 100 feet from dwelling and known as barn No. 1. Permit for 1 car	1, 5,	1.07x104
6.	$ Nil	On farm produce, feed, commercial fertilizers and containers, while contained therein or in the open in stacks within 100 feet........	....	....
7.	$ Nil	On	....	....
8.	$ Nil	On .... barn with .... roof, including sheds and additions attached, located .... feet from dwelling and known as barn No. 2........	....	....
9.	$ Nil	On contents as described in Item No. 6 while therein or in the open in stacks within 100 feet........	....	....
10.	$ Nil	On	....	....
11.	$ Nil	On .... barn with .... roof, including sheds and additions attached, located .... feet from dwelling and known as barn No. 3........	....	....
12.	$ Nil	On contents as described in Item No. 6 while therein or in the open in stacks within 100 feet........	....	....
13.	$ Nil	On	....	....
14.	$ Nil	On .... granary with .... roof, located .... feet from dwelling and known as building No. 4	....	....
15.	$ Nil	On farm produce, feed and containers while contained therein	....	....

Exhibit A.

16.(†) $ Nil On farming machines and machinery of every description, tools, horse and carriage equipment and vehicles (excluding motor vehicles and/or tractors and their equipment) while in said barns or outbuildings, subject to the Pro Rata Distribution Clause printed below. If harness and/or robes are covered by this item this policy shall extend to cover same while contained in the dwelling.

Pro Rata Distribution Clause: It is understood and agreed that the amount insured by this item shall attach in each of the places named in the proportion that the value of the property covered by this item, contained in each of said places, shall bear to the value of such property contained in all of said places.......... ....

10

17.(†) $ Nil On horses, while in said barns or outbuildings, in case of loss no one horse to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

18.(†) $ Nil On cows, oxen and bulls two years old or over, while in said barns or outbuildings, in case of loss no one such animal to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

19.(†) $ Nil On young cattle under two years of age, while in said barns or outbuildings, in case of loss no one such animal to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

20

20.(†) $ Nil On hogs, while in said barns or outbuildings, in case of loss no one such animal to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

21.(†) $ Nil On sheep, while in said barns or outbuildings, in case of loss no one such animal to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

22.(†) $ Nil On poultry, while in said barns or outbuildings, in case of loss no one fowl to be valued at over $..........; subject to Livestock Pro Rata Clause below.......... ....

(†) It is understood and agreed that Items Nos. 16 to 22, inclusive, do not cover in any building where gasoline motor vehicles or tractors are kept or used unless specifically extended to such buildings and additional rate charged therefor; the storage and use of motor vehicles or tractors using gasoline being prohibited unless permission is specifically indorsed hereon.

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23. $ Nil On .... tractor( ) while contained in building described under Item No. .... Automobile Permit No. 1 attached for .... tractors in said building ....

24. $ Nil On ....

25. $ Nil On ....

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Exhibit A.

$6,000 Total Insurance.

Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totaling $6,000, including the total amount of this policy, which is $3,000 and this Company shall not be liable under this policy for
10 a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance thereon, whether valid or not.

All situated on the farm owned by assured while occupied by assured on the east side of Road (Road or Highway) leading from Frankfort to Neshanic in the Township of Hillsboro, County of Somerset, State of N. J. and corner of road leading to Belle Meade.

20 Property Not Covered Unless Specifically Insured: Power machines of all kinds (excepting mower, reapers and hand or animal power machinery), wool, tobacco, hops, poultry and dressed animals must be insured specifically, not being covered under any general term.

Livestock: If livestock is insured hereunder, it is insured subject to the provisions of the Livestock Pro Rata Clause, as follows:

Livestock Pro Rata Clause: In consideration
30 of the rate of premium at which this policy is written, it is made a condition of this contract that under each item covering on livestock the amount insured shall, at time of loss, apply upon each animal or fowl in proportion as the value of each animal or fowl shall bear to the total value of all the animals and/or fowl insured under that item.

Livestock, if insured by this policy, is also covered against death directly caused by lightning (meaning thereby the commonly accepted use of
40 the term "lightning," and in no case to include

Exhibit A.

loss or damage by cyclone, tornado, or windstorm), in said barns, or while at large on owner's premises or elsewhere.

Application and Plan Clause: This policy is based upon an application and plan of the property on file which is hereby referred to as forming part of this policy. Date of Application 10
.... Where Filed ....
.... Company.

The provisions printed above and on the back of this form are hereby referred to and made a part of this policy.

Attached to and made part of Policy No. 20185 of the Continental Insurance Company, issued at its Somerville, N. J. Agency, subject, however, to the Terms, Conditions and Clauses printed on the back hereof. 20

William D. Nolan Agency, Inc.,
Agent.

Mary B. Nolan,
Sec'y.

Dated March 26th, 193 .

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Exhibit A.

Terms and Conditions

Vacancy and Unoccupancy: If the dwelling be vacant or become unoccupied except in accordance with the conditions of this policy, the entire policy is void.

10 *Open Lights:* This company shall not be liable for any loss arising from, or occasioned by the use of open lights in any barn or outbuilding insured or containing property insured by this policy.

Use of Kerosene Oil: Permission is hereby granted for the use of refined kerosene oil for lighting and heating purposes in the dwelling and for lighting purposes in the barns and outbuildings in enclosed glass lanterns only. It is further
20 stipulated and made a condition of this contract that oil will be drawn and the lamps and stoves trimmed and filled by daylight only.

Electricity: Permission is hereby granted to use electricity for light, heat and power in dwellings and for light and power in barns and outbuildings.

Incubators and Brooders: The use of any incubator or brooder in or within fifty feet of any building described in this policy without specific permission endorsed herein renders the entire
30 policy void.

Mechanic's Privilege: Permission granted during the life of this policy to employ mechanics to make alterations, additions and repairs, and this policy (so far as it applies to building) shall also cover in accordance with its conditions such alterations or additions and all materials and supplies therefor, therein, or adjacent thereto, and (so far as it applies to contents of said building)
40 shall extend to cover in such additions.

Exhibit A.

Radios: Privilege is hereby granted to install and operate radio receiving equipment.

Steam Thresher Permit: Permission to use steam as a motive power for threshing grain is granted, subject to the following conditions:

First—When there is a fire in the furnace of the boiler, it shall not be located nearer than twenty-five feet from any building or stack of hay or straw, nor shall any litter or straw be allowed to collect or remain within fifteen feet of said furnace, and mineral coal (or wood for kindling) only shall be used for fuel. 10

Second—A cap or screen of wire, in perfect order, shall cover the smokestack during all the time a fire is in the furnace and all modern means used for safety and protection shall be attached to the boiler and engine, and shall be in good condition. 20

Third—At least three pails of water shall be kept within ten feet of the furnace, while there is any fire in the furnace.

Fourth—During the absence of persons engaged in threshing, a competent watchman shall be in attendance until all the fire is extinguished. Violation or non-observance of any of these conditions or restrictions renders this entire policy void. 30

Portable Gasoline Engine Permit: Permission is hereby granted, where not in violation of any law, statute or municipal restriction, without charge for the use of a portable gasoline engine as motive power for threshing grain and other farm work, it being warranted by the assured and made a part of this contract that when same is in use it shall not be located nearer than 25 feet from any building or stack of hay or straw, nor shall 40

any litter or straw be allowed to collect or remain within 15 feet of same.

It is further warranted that no gasoline shall be kept in the building insured, or containing or exposing property insured by this policy, and that when said engine is not in use and is stored in
10 any building on these premises, that all gasoline shall first be removed therefrom.

This permit gives no additional privilege for the use or storage of gasoline, except as may be provided for under specific additional permits for the use, sale, storage, or the operation of any gasoline device.

If any of these warranties is in any way disregarded, all insurance by this policy shall immediately cease and the policy be void.

20

Automobile Form of Permit No. 1

(This permit is void unless number of automobiles and item number are stated.)

In consideration of additional premium, and the compliance by the insured with the following warranties, permission is hereby given to keep a total of not more than .... (state number here)
30 automobiles, motorcycles, motorboats, tractors, or other vehicles or machines propelled by gasoline, in the building described in the .... item of this policy.

The conditions of this permit so far as they are within control of the insured are as follows:

First—That no claim shall be made for loss or damage to any vehicle or machine, or any of its parts, unless specifically mentioned as insured under this policy.

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Exhibit A.

Second—That the handling of gasoline by opening, filling or emptying any container, shall be done only by daylight or electric light, and there shall be no other light or blaze in the same room, or in any communicating room.

Third—That any supply of gasoline shall be kept outside, at least five feet from building, additions or connections to which this permit applies, or shall be contained in an underground tank, or in chamber of pump. 10

This permit gives no additional privilege for the use or storage of gasoline, except as may be provided under specific additional permits for the use, sale, storage or the operation of any gasoline device.

Privilege is also granted under this permit temporarily to keep the above-mentioned number of vehicles belonging to guests in addition to the number for which this permit is granted. 20

The term "gasoline" shall be held to include naphtha, benzine or any of the light products of petroleum or coal tar.

Lightning Clause.—New Jersey Standard.—This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term "lightning," and in no case to include loss or damage by cyclone, tornado, or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not. 30 40

Exhibit A.

Dynamo Clause.—If dynamos, exciters, lamps, motors, switches, radio apparatus, electric automobiles or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices, whether from artificial or natural causes, including lightning; but if fire ensues, then this company shall be liable for its proportion of loss or damage caused by such ensuing fire, but not exceeding the sum insured and subject in all respects to the terms and conditions of this policy.

Farm Property Standard Condition Clauses

(The following Standard Condition Clauses apply only to the designated items):

No. 1. Owner Occupancy: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the *1, 5 item(s) of this policy are occupied by the owner of the premises herein described.

No. 2. No Mortgage on Property: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that no mortgage exists on the buildings hereby insured or containing the property insured or on the contents insured under the *.................................. item(s) of this policy.

No. 3. Fire Department and Hydrant—Recognized Public Protection (Applicable only to Barns and Outbuildings): In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the

buildings hereby insured or containing the property insured under the *.. item(s) of this policy are within 500 feet of a recognized public fire hydrant and within 2 miles of a fire department in the town of ....

No. 4. Fire Department—Not To Apply When Clause No. 3 applies (Applicable to Dwellings, Barns and Outbuildings): In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the *1, 5 item(s) of this policy are within 2 miles of a regularly organized and equipped fire department situate in the town of 10

....

No. 5. Prohibiting Use of Fire Heat: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that no fire heat will be used in the buildings insured or containing the property insured under the *5 item(s) of this policy except that heat required for incubators or brooders, when specific privilege for their use has been granted hereon. 20

No. 6. Chimneys: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings insured, or containing the property insured under the *1 item(s) of this policy, have none other than chimneys and/or flues constructed of brick, stone, concrete and/or concrete block built from the ground or from a living or work room, and not from an attic, and that all smoke pipes enter chimneys unobstructed from view at a point below the attic. 30

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Exhibit A.

No. 7. Roofing: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings insured or containing the property insured under the *.................................. item(s) of this policy, do not have a wood or wood shingle roof.

10

No. 8. Lightning Rod: In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the buildings insured, or containing the property insured under the *.................................. item(s) of this policy, are equipped with lightning rod system, manufactured by ....
(give name of manufacturer of system) at ....
.... (give name of place where manu-

20 factured) and installed by manufacturer or his authorized agent, and bearing the following label:

MASTER LABEL

No. ....

UNDERWRITERS' LABORATORIES
Inspected

LIGHTNING ROD EQUIPMENT

Installed-Date ....

30

NOTICE

Additions to this building may render protection afforded by this equipment ineffective. Notify the company making installation when additions to building are contemplated or when equipment has been damaged in any manner.

UNDERWRITERS' LABORATORIES
Chicago

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Exhibit A.

No. 9. Clear Space (Applicable to Dwellings Only): In consideration of the reduced rate at which this policy is written, it is hereby made a condition of this policy that the dwelling insured, or containing the property insured under the *1.............................. item(s) of this policy, is detached not less than 100 feet from any barn. (Small ice houses, corn cribs, granaries, hog pens, chicken houses and private garages are not classed as exposures.)

10

NOTE—The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void.

20

This policy shall not be affected by failure of the insured to comply with any of the conditions endorsed hereon in any portion of the premises over which the insured has no control.

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* State definitely to which item or items respective condition clauses apply.

30

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(6038)

101FEB.T.1936

New Jersey Court of Errors and Appeals

WATSON BUCKMAN, Plaintiff-Respondent, *vs.* THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO., of the City of New York, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation, Defendants-Appellants.	**Action at Law.** **On Appeal from the Supreme Court.**

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Preliminary Statement.

This appeal brings up for review a judgment entered in the Supreme Court in favor of the plaintiff and against the defendants.

The action is predicated upon three policies of insurance issued by the defendants and the case was submitted to the Trial Court to be tried without a jury on an agreed set of facts (S. C. 29-35).

The agreed set of facts discloses that on August 6, 1931, defendant Home Insurance Company issued its policy in the sum of $1,260.00, insuring plaintiff against loss by fire to the premises described therein. On March 26, 1932, defendant Continental Insurance Company of the City of New York, issued its policy in the amount of

$3,000.00, insuring plaintiff against loss by fire to the premises described therein. On the same date defendant Western Assurance Company issued its policy in the amount of $3,000.00, insuring plaintiff against loss by fire to the premises described therein. All of the policies covered the same premises. Each of the policies was in the standard form and contained the following provision (S. C. 50-51):

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

Attached to each of the policies was a standard farm form clause. In the standard farm form attached to the policies of the defendants Continental and Western there was contained the following provision (S. C. 60):

> "Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totalling *$6,000* including the total amount of this policy which is *$3,000. . . .*"

The policy of the defendant, Home Insurance Company, contained a similar provision, but blanks providing for the amount of other insurance permitted were not filled in. Notwithstanding these conditions in the policies of the defendants Continental and Western giving the insured permission for concurrent insurance to the extent of $6,000.00, including the policy, the agreed set of facts shows that there was actually issued and outstanding at the time these two policies were issued a policy of the Hartford Fire Insurance Company in the amount of $3,000.00 and a policy of the Aetna Insurance Company in the amount

of $4,000.00, in addition to the policy of the defendant Home Insurance Company in the amount of $1,260.00.

All of the policies involved in this suit also contained in the standard farm form attached to each the following provision (S. C. 66-69):

> "FARM FORM STANDARD CONDITION CLAUSES. (The following Standard Condition Clauses apply only to the designated items):
>
> No. 1. OWNER OCCUPANCY: In consideration of the reduced rate for which this policy is written it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the 1, 5 item(s) of this policy are occupied by the owner of the premises herein described. * * *
>
> "The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

It is also agreed that at the time the policies in question were issued and down to and including the date of the fire, the dwelling house described in the policy was not occupied by the owner as required by the foregoing condition of the policies but was occupied by a third person.

The parties agreed as to the extent of the damage and the amount that each defendant would be liable for if the Court found defendants to be liable at all.

The defendants contend that the provisions of the policies above quoted were violated and that they were therefore under no liability for the damage sustained by the plaintiff by reason of the fire which occurred to the insured premises on May 23, 1932.

Notwithstanding the undisputed fact that there was insurance covering the premises in excess of the amount permitted by the clauses in the standard farm form already quoted, and notwithstanding the undisputed fact that the dwelling described in the policy was not occupied by the owner as required by the provision of the policies referred to, the Trial Court found that these provisions of the policies were inconsistent with or in conflict with other provisions of the policies and were therefore invalid or waived by the defendants and entered judgment in favor of the plaintiff (S. C. 36-41).

The sole question therefore presented by this appeal is the propriety of the action of the Trial Court in finding that the provisions of the policies with respect to other insurance and occupancy are inconsistent with other provisions of the standard fire insurance policy, and are therefore waived by the defendants or rendered invalid.

POINT I.

The Trial Court erred in holding that the provisions in the policies of insurance prohibiting other insurance were inconsistent with other provisions of the policies and therefore invalid.

Grounds of appeal numbered 1 to 7, inclusive, will be considered as one in our discussion under this point as they all relate to the propriety of the action of the Trial Court with respect to its conclusions of law on this phase of the case (S. C. 45-46).

All of the policies in question were in the standard form prescribed by the legislature of this State. Each of the policies contained the following provision (S. C. 50-51):

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The law is well settled that such provisions prohibiting other insurance without the consent of the company are reasonable and valid. Professor COOLEY in his learned Briefs on Insurance says, citing many cases (*3 Cooley's Briefs on Insurance* (2d Edition), 2845):

"It is the settled policy of insurers against loss by fire to protect themselves against incendiarism and negligence by compelling the insured to bear some part of the risk, so that if the property shall be destroyed he will suffer loss notwithstanding his insurance. To this end the insurer limits the amount of his own insurance upon the property to a sum less than its value, and guards against other insurance being effected upon the same property without his consent by stipulations, etc. The object of such stipulations is to place the insured in such a position respecting the property that, from considerations of self-interest, he not only will not willfully burn it, but will be watchful and careful in guarding against fire. This being the purpose of the stipulations against other insurance, they are not contrary to public policy, but are valid and enforceable conditions, and constitute a material part of the contract."

Mr. Justice SHIRAS in *Northern Assurance Company* v. *Grandview Building & Loan Association*, 183 U. S. 308, 46 L. ed. 213 (1902), said (46 L. ed., p. 218):

"Over insurance by concurrent policies on the same property tends to carelessness and fraud, and hence a clause in the policies ren-

dering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable."

Similar or identical provisions have been recognized as valid by the courts of New Jersey for many years.

Schenck v. *Insurance Co.,* 24 N. J. L. 447 (Sup. Ct. 1854);
Warbasse v. *Sussex Insurance Co.,* 42 N. J. L. 203 (Sup. Ct. 1880);
Warwick v. *Monmouth Insurance Co.,* 44 N. J. L. 83 (1882);
New Jersey Rubber Company v. *Commercial Union Assurance Company,* 64 N. J. L. 580 (E. & A. 1900) (standard policy clause).

So it has been held that where a policy contains a provision similar to the provision contained in the policies in this suit the existence of or the procurement of additional insurance, without the consent of the insurer, voids the policy.

Northern Assurance Company v. *Grandview Building and Loan Association,* 183 U. S. 308, 46 L. ed. 213 (1902);
Georgia Home Insurance Co. v. *Rosenfield,* 95 Fed. 358 (C. C. A. 6th);
Tilton v. *Farmers Insurance Co. of Town of Palatine,* 83 Misc. Rep. 79, 143 N. Y. S. 107;
Warwick v. *Monmouth Insurance Co.,* 44 N. J. L. 83 (1882);
3 Cooley's Briefs on Insurance (2d Edition) 2851, and numerous cases cited therein.

In the standard farm form attached to the policies of the defendants Continental and Western, the following permission was granted (S. C. 60):

> "Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totalling *$6,000* including the total amount of this policy which is *$3,000*. . . ."

It is admitted that there was additional insurance covering the premises in question far in excess of the amount permitted by the foregoing provision. Under such circumstances the law is equally well settled that the policies are void if the insured has or obtains insurance in excess of the amount permitted. *3 Cooley's Briefs on Insurance* (2d Edition), 2281 and 2284, and cases cited therein.

> *Allen* v. *German-American Insurance Co.*, 123 N. Y. 6, 25 N. E. 309;
> *Home Insurance Co.* v. *Williams*, 237 Fed. 171 (C. C. A. 5th, 1916).

In the latter case the Court said:

> "It is also contended by counsel for plaintiff below that, the company having given authority for concurrent insurance, the amount of such insurance is of no moment, and the company cannot object to overinsurance. We think this position not well taken in the light of the adjudged cases, and considering the object of the clause and the reasons inducing the company to incorporate it in its policies. *Northern Assurance Co.* v. *Grandview Assn.*, 183 U. S. 317, 22 Sup. Ct. 133, 46 L. Ed. 213; *Works, Pritchett & May* v. *Springfield F. & M. Ins. Co.* (Tex. Civ. App.), 79 S. W. 42; *Senor* v. *Western Millers Mut. F. Ins. Co.*, 181 Mo. 104, 79 S. W. 690; *Gross* v. *Colonial Assurance Co.*, 56 Tex. Civ.

App. 627, 121 S. W. 517; *Home Insurance Co.* v. *Morrow,* 145 Ala. 284, 39 South. 587. We are therefore of opinion that error was committed in sustaining the demurrer to the second plea.''

The blanks in the standard farm form attached to the policy of the defendant Home Insurance Company, granting permission for other insurance, were not filled in. It is therefore obvious that this clause in the standard farm form permitting other insurance did not become operative and the provision in the standard policy against other insurance previously quoted is controlling. If the parties had desired to have this provision become operative they would have contracted with respect thereto by inserting in the blanks provided therein the amount of insurance desired by the assured on the one hand and permitted by the defendant on the other, as was done in the policies of the defendants Continental and Western. In view of the fact that it is admitted that there was other insurance on the property, and that no other insurance was permitted, the policy of defendant Home Insurance Company was rendered void and the plaintiff is not entitled to recover thereunder.

It was argued by the plaintiff before the Trial Court that the provisions in the policies of insurance against other insurance were inconsistent with lines 96, 97 and 98 of the policies, which provided as follows (S. C. 56):

> ''This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurers, covering such property, * * *''

This argument was adopted by the Trial Court and formed the basis of its finding that the provisions previously quoted are inconsistent with the foregoing provision contained in the standard fire policy. It is assumed that the same argument will be made by the plaintiff here. The fallacy of this argument is apparent. There is no inconsistency between the two provisions of the policies. The one provision clearly provides that there shall be no other insurance without the consent of the company. This necessarily implies that with the consent of the company there can be additional insurance. The provision that the company shall not be liable beyond the greater proportion of any loss than the amount of insurance bears to the whole insurance covering such property does not permit other insurance nor is it inconsistent with the provision against other insurance. It merely provides a method of establishing the extent of the insurer's liability if the insurer exercises its rights under the policy and permits other insurance, which all of the authorities agree it may do.

Furthermore, the construction of the policies urged by the plaintiff and adopted by the Trial Court renders the provision in the policies that the insured cannot have or acquire other insurance without the consent of the company a nullity. As the cases just quoted point out, the policy in question is in the standard form prescribed by the legislature of this State. To render null a provision therein by employing the happy expression that it is inconsistent with another provision is contrary to accepted principles of construction of contracts. The principle of construction that a contract shall be construed to give effect to all of its terms is particularly applicable to a contract specifically prescribed by the legislature. Under the circumstances such a construction should not be adopted, particularly when it is apparent that in no event are the two provisions inconsistent.

These provisions are not inconsistent and are certainly not ambiguous. Under such circumstances the doctrine that provisions in a policy of insurance creating forfeiture must be construed more strongly against the insurer, which the Trial Court expressed in its findings (S. C. 40-41) and which will doubtless be urged by the plaintiff, has no application to this case.

In *Kupfersmith* v. *Delaware Insurance Company,* 84 N. J. L. 271, at 275, Gummere, C. J., delivering the unanimous opinion of the Court of Errors and Appeals, said:

> "*The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce a contract as it is written.* In the present case the parties agreed that the responsibility of the company to answer to the plaintiff for loss sustained by him through damage done to his property by fire should cease if he left it unoccupied for more than ten days, and this without regard to the reason for his doing so. If he had seen fit, he might have insisted that the policy should contain a provision that the vacancy clause should not be applicable in case the building should be rendered uninhabitable through a cause for which he was not responsible, and have refused to accept it unless the defendant would so agree. He did not see fit to do this, but entered into an agreement by which he obligated himself, without condition or limitation, not to permit the insured premises to remain unoccupied for a period longer than ten days, and consented that, if he should do so, the policy should become void. As was said by Chief Justice Whelpley, speaking for the Supreme Court, in *School Trustees* v. *Bennett,* 3 Dutcher 513: 'No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract,

creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *The law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement.*' "

In dealing specifically with the standard fire insurance policy, Parker, J., speaking for the Court of Errors and Appeals in *Mick* v. *Corporation of Royal Exchange,* 87 N. J. L. 607, at 611, said:

> "It is apparently of the standard form, approved by the commissioner of banking and insurance of this state, pursuant to legislative authority (*Com. Stat., p. 2862, par. 77; Pamp. L. 1902, pp. 407, 436, 437*), and, consequently, there is no special applicability of the maxim *verba chartarum fortius accipiuntur contra proferentem. Nelson* v. *Traders Insurance Co.,* 181 N. Y. 472."

To like effect, Walker, C., in delivering the unanimous opinion of the Court of Errors and Appeals in *Del Guidici* v. *Importers & Exporters Insurance Company,* 98 N. J. L. 435, at 436, reiterated this rule as follows:

> "The State of New Jersey has enacted that fire insurance policies shall conform in all particulars as to contract, provisions, agreements and conditions, with a certain standard, and that no other or different provisions, agreement, condition or clause shall in any manner be made a part of such policy, &c. See the act of *April 3d, 1902,* concerning insurance, *2 Comp. Sta., p. 2862, par. 77.* And the policy in the case before us is a standard policy. This makes pertinent the doctrine of *Mick* v. *Corp. of Royal Ex., &c.,* 87 N. J. L. 607, in which it was decided that where a

policy of fire insurance is written in a standard form approved by governmental authority, as is this one, the maxim *verba chartarum fortius accipiuntur contra proferentem* has no special application.

Our cases hold that stipulations in policies of insurance of the kind under discussion, when violated, work a forfeiture. See *Dewees* v. *Manhattan Ins. Co.,* 35 N. J. L. 366; *Franklin Fire Ins. Co.* v. *Martin,* 40 *Id.* 568; *Martin* v. *State Fire Ins. Co.,* 44 *Id.* 485; *Martin* v. *Ins. Co. of N. A.,* 57 *Id.* 623; *Dougherty* v. *Greenwich Ins. Co.,* 64 *Id.* 716; *Plockzek* v. *St. Paul, &c.,* 91 Atl. Rep. 812."

Recently Justice Case in speaking for this Court in *Vozne* v. *Springfield Fire and Marine Insurance Company,* 115 N. J. L. 449 (E. & A. 1935) reiterated the rule as follows (p. 451):

"The policy provision is clear and unmistakable. Quite as clear and unmistakable is the existence, at the inception of the contract, of the factual contingency upon which the entire policy was, according to its terms, to be void. *An insurance contract, like any other contract, should be enforced in accordance with its plain provisions. Precipio* v. *Insurance Company of Pennsylvania,* 103 N. J. L. 589."

The following cases are to the same effect:

Precipio v. *Insurance Company of the State of Pennsylvania,* 103 N. J. L. 589 (E. & A. 1927);

Smith v. *Fidelity & Deposit Company,* 98 N. J. L. 534 (E. & A. 1922);

Perry v. *North American Accident Insurance Company,* 104 N. J. L. 117 (E. & A., 1927).

The rule is, therefore, well established in this State that contracts of insurance, especially those

in the standard form prescribed by the legislature (as in the case at bar), are to be interpreted where their language is clear and unambiguous according to their ordinary and usual meaning, and that the doctrine *verba chartarum fortius accipiuntur contra proferentem* has no application except where there is an ambiguity in the wording of the policy.

There can be no question that if the test laid down by Chief Justice Gummere in the *Kupfersmith* case is applied the defendants must prevail, for the plaintiff is here seeking to make a better contract for himself than was embodied in his agreement. The policies in question specifically provide that they shall be void if the assured has or shall procure other insurance covering the same property. The farm form attached to the policies of the Continental and Western permitted him to have additional insurance to the extent of $6,000.00, including the amount of their policies. These provisions were admittedly violated. As has already been pointed out these provisions are not inconsistent with nor contrary to the provisions of the standard policy in respect to pro rating.

It is therefore submitted that the finding of the Trial Court that the provision against other insurance is inconsistent with, and therefore waived by the provision for pro rating, is erroneous and the judgment in favor of the plaintiff should therefore be reversed.

POINT II.

The Trial Court erred in holding that the warranty in the policies of insurance that the dwelling described therein would be occupied by the owner is inconsistent with other provisions in the policies and is therefore a nullity.

There was attached to each of the policies in suit a standard farm form which contained the following warranty (S. C. 66-69):

> "Farm Form Standard Condition Clauses.
>
> (The following Standard Condition Clauses apply only to the designated items):
>
> No. 1. Owner Occupancy: In consideration of the reduced rate for which this policy is written it is hereby made a condition of this policy that the buildings hereby insured or containing the property insured under the 1, 5 item(s) of this policy are occupied by the owner of the premises herein described. * * *
>
> "The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is the intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

The items referred to are the dwelling and the barn. It is admitted that the plaintiff, the owner of the premises, did not occupy the dwelling insured and described in the policies at the time of the fire or at any time after the policies in suit were issued. The authorities in this State uniformly hold that provisions relating to the use and occupancy of insured premises are warran-

ties and that the policy is rendered null and void by a violation thereof.

> *Dewees* v. *Manhattan Insurance Co.,* 35 N. J. L. 366 (Sup. Ct. 1872);
> *Franklin Fire Ins. Co.* v. *Martin,* 40 N. J. L. 568 (E. & A. 1878);
> *Martin* v. *State Ins. Co.,* 44 N. J. L. 486 (Sup. Ct. 1882);
> *Dougherty* v. *Greenwich Ins. Co.,* 64 N. J. L. 716 (E. & A. 1900).

In *Sonneborn* v. *Insurance Co.,* 44 N. J. L. 220 (E. & A. 1882) Judge Green spoke as follows:

> "According to the well settled rules of construction laid down in all the modern text-books and repeatedly recognized and enforced in our own courts, the written agreement in this policy, as to use and occupation of the premises containing the insured property, must be construed as an express promissory warranty on the part of the plaintiff, in the nature of a condition precedent. An actual and literal compliance with this condition and warranty is essential to the plaintiff's right of recovery."

The policies in suit were indivisible and consequently occupancy of both barn and dwelling by the owner was required. The agreed set of facts discloses that the dwelling was not occupied by the owner as warranted, and it is submitted that the policies were thereby rendered void.

The Trial Court found, however, and it will doubtless be argued here by the plaintiff that the provision in the standard farm form above quoted is inconsistent with the provisions of the standard policy and is therefore ineffective under the authority of *Corlies* v. *Westchester Fire Insurance Co.,* 92 N. J. L. 108 (Sup. Ct. 1918).

This contention is based upon the following provision contained in the standard policy (Ex. A, S. C. 50-51):

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The Trial Court found that the provision in the standard farm form previously quoted, providing that the owner shall occupy the insured premises, is inconsistent with that portion of the above provision in the standard policy which says "whether intended for occupancy by owner or tenant." This holding is patently unsound. It overlooks the significant words "whether intended." The policy leaves open to the contracting parties the right to determine who shall occupy the insured premises. It is their intention which controls. Here the assured desired a reduced rate of premium which was granted to him by the defendant insurance companies upon condition that he occupy the premises. It was therefore the intention of the parties that the owner occupy them, and it is the intention of the parties as expressed by their contract which controls under the provision of the standard policy previously quoted.

There is no provision whatsoever in the policy which says that the parties cannot contract that the premises insured shall be occupied by either the owner, a tenant or some third person. The only thing the policy says is that it shall be void, irrespective of whether or not it is to be occupied by *owner* or tenant, if it become vacant and unoccupied and remain so for ten days. If the parties had seen fit, it was perfectly consistent under the

foregoing provision, to have provided that a tenant occupy the premises. They did not do so, however, but on the contrary provided by an agreement, which was entered into at a reduced rate of premium, that the owner occupy the premises. It is admitted that the owner did not occupy the premises as warranted, and it is therefore submitted that the policy became void.

The case of *Corlies* v. *Westchester Fire Insurance Co.*, 92 N. J. L. 108 (Sup. Ct. 1918), does not aid the argument of the plaintiff and the reasoning of the Trial Court that the owner occupancy provision of the farm form is inconsistent with the provisions of the standard policy. In that case it was held that a provision in the farm form that the policy should become void if the *dwelling* became unoccupied was inconsistent with the provisions in the standard policy, which expressly provided that the building insured and described in the policy must become unoccupied in order for the policy to become void. The dwelling mentioned in the farm form was not one of the buildings insured under the policy. It was for that reason that the Court held the two provisions inconsistent. This decision is clearly sound, but has no application here. It is significant to note that Justice Kalisch, in writing the opinion, emphasized the fact that "the standard policy *expressly* provides that the building insured and described in the policy must become vacant or unoccupied and remain so for ten days in order to render the policy void." In the face of this *express* provision in the policy, the provision in the standard farm form under consideration in that case which rendered the policy void because of non-occupancy of building not mentioned in the policy was obviously inconsistent and the decision of the Court was undeniably proper.

Here, however, there is no *express* provision in the policy that the parties cannot agree as to who shall occupy the insured building. On the contrary, the policy says whether "intended for occupancy by owner or tenant," thereby expressly providing that the parties may express their intention as to who shall occupy the insured premises by appropriate provision. Here the contracting parties did so express their intention by providing that the owner should occupy the premises.

It is therefore submitted that the Trial Court erred in holding that the provisions of the standard farm form were inconsistent with the provisions of the standard fire policy, and the judgment entered in the Supreme Court should therefore be reversed.

Conclusion.

For the reasons urged herein, under Point I and Point II, it is submitted that the judgment entered in favor of the plaintiff and against the defendants should be reversed.

Respectfully submitted,

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On the Brief.

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New Jersey Court of Errors and Appeals

WATSON BUCKMAN, Plaintiff-Respondent, vs. THE HOME INSURANCE COMPANY, a corporation, CONTINENTAL INSURANCE CO., of the City of New York, a corporation, THE WESTERN ASSURANCE COMPANY, a corporation, Defendants-Appellants.	Action at Law On Appeal from the Supreme Court.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

Statement.

This is a suit upon policies of insurance for damages caused by a fire. The policies sued upon are all in the standard form required by the laws of this State. (S. C. 48-57 inc.). Attached to each of the policies was a form known as the "farm form". (S. C., 58-69 inc.). The issues in dispute as raised by the defendants-appellants are as follows:

1. That the policies are void because there was other insurance contrary to the terms of the policy and also because there was other and further insurance in excess of that permitted by the conditions of the "farm form"; except that the Home

New Jersey State Library

Insurance Company's policy had attached thereto a clause permitting other insurance up to an amount not stated.

2. That the policies in suit are void because the premises insured were not occupied by the owner as conditioned in the "farm form".

It is of course admitted that there were other policies and further insurance than that permitted by the "farm form". (The form which it is to be remarked is termed and captioned, erroneously, "Standard Farm Form" (S. C. 58). It is also admitted that the premises were not occupied by the assured, the owner, but by a tenant.

The learned trial Judge found that the policies were not avoided because provisions in the standard fire policy and in the "farm form" created an ambiguity and uncertainty which should be construed in favor of the plaintiff; and further, because the permission in the "farm form" for other insurance was a waiver of the prohibition in the standard policy. The "farm form" permission for other insurance was itself ambiguous and contrary to the standard policy provisions, and not therefore binding on the assured.

But the policy of the defendant, Home Insurance Company, while it contained the permission for other insurance, similar to that which was attached to the other two policies, did not have the "form" filled in, but was a permission for other insurance in blank amount, which the defendant-appellant, Home Insurance Company, now seeks to maintain is and was, not permission for other insurance; and so wishes to revert back to the standard policy prohibition against other insurance.

Furthermore, the learned trial Judge held that the "farm form", conditioned upon the occupancy by the owner of the premises insured could not

waive that provision of the standard policy which permitted the occupancy by *owner or tenant.* A summary of respondent's points will be found at the end of this brief.

Answer to Defendants-Appellants Point I.

The defendants' contention that the policies are void because of other and excessive insurance is based, upon that condition of the *"farm form"*, attached to the policy, (S. C., 60, lines 1-13 inc.) which reads as follows:

> $6000 Total Insurance
> "Permission is granted for *other concurrent insurance* on buildings and/or contents covered hereunder, totaling $6000 including the total amount of this policy, which is $3000. And this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured, shall bear to the whole insurance thereon, whether valid or not."

It is to be observed that while the *policy proper* permits no other insurance, in lines 11, 12 and 13 of the standard policy (S. C. 50, lines 36-40 inc. and in line 1 page 51) that condition is waived by the defendants, upon the inclusion in the "farm form" of the stipulation permitting other insurance; which other insurance the defendants argue is not to exceed $6000, including the amount of the policy issued. The controlling clause then becomes the subsequent condition of the "farm form"; and the condition against other insurance in the standard fire policy, is to be treated as waived or annulled. *Corlies* vs. *Westchester Fire*, 92 N. J. L. 108 (1918).

It is elementary, and therefore no citations are

necessary to prove that a subsequent *written* endorsement or addition permitting other insurance, attached to the main contract, supersedes, annuls or waives the *printed* term or condition forbidding or prohibiting other insurance. So that for the moment we are concerned only with the "farm form" as it relates to other insurance in excess of that which it pretends to limit.

In the policy issued by the Home Insurance Company, the blanks were left unfilled. This therefore is a permission to contract other insurance; for the balance of that clause, above set out provides for pro rating in the event of a loss if there exist other insurance, whether valid or not. In the case of *Carson* v. *Jersey City Fire Insurance Co.,* 43 N. J. L. 300, it was held:

> "If the insurer issues a policy upon an uncompleted application for the insurance, it cannot afterwards avoid the policy on the ground that the answers were not full."

So here, if the blanks were not completed by the company, the permission is nevertheless granted, for the blanks to be completed, related only to the amount of other insurance permitted and the voids left by the blanks do not in any way tend to misconstrue the meaning granting permission for other insurance. Permission for other insurance is definite and precise. The permission for other insurance on the Home policy reads as follows:

> "1270 Total Insurance
> Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder totaling $ including the total amount of this policy, which is $ and this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall

> bear to the whole insurance thereon, whether valid or not.''

Comes the defendant, on page 8 of their brief, to say, that that clause, because unfilled was inoperative. Hence, they wish to go back to the policy proper. It is much like saying that because a note is undated, it is never payable. The fallacy in such an argument is that neither the policy nor the ''farm form'' nowheres provides it is not to apply. In the first place it is partly filled. The amount of the policy $1270 is stated to be Total Insurance. But the permission is nevertheless there. If it were not meant to apply, the company should have eliminated it in some way, plain to be understood. But to leave it in that condition, and to complain later, is not to be countenanced. The assured should not be made to suffer, if he is mislead. Secondly, the clause is obviously intended as a *waiver of the standard provision against other insurance.* Hence, what was waived, is gone; and we are to be guided either by this clause or neither one. Therefore as to the Home policy, there is no prohibition against other insurance.

The standard policy in lines 11, 12 and 13 (S. C., page 50, line 36) prohibits other insurance as follows:

> ''This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.''

Standing alone this condition of the policy may avoid the contract where other insurance has been affected (we are now speaking of standard fire insurance policy). Yet, way down, towards the end

of the policy in lines 96, 97, 98 (S. C., 56, line 21) is the following:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurers, covering such property, * *"

This second provision provides for the pro rating of a loss between the insuring policy and any other policy, whether such other policy at the time of the fire was valid or not; and *agrees* to pay its proportion of any loss as the amount which it insures bears to all the insurance on the property. According to lines 96, 97 and 98 just above quoted, it makes small difference whether there is other insurance or how many other policies. For this clause, *providing* for a pro rata payment of damage, *decreases* the companies liability proportionately with other insurance. Certainly these two separate provisions, one *prohibiting* any insurance, and the other *agreeing* to pay the proportionate amount of all insurance, are to say the least, contradictory and ambiguous, in the single policy. *A fortiori,* the permission is strengthened by a reference to lines 1, 2 and 3 of the standard policy, which state that the company (S. C., page 49, line 37):

> "Shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to *such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality* * * *"

The appellants' brief at top of page 9 states that there is nothing inconsistent between the prohibition against other insurance and the provision for pro rating the loss. They maintain that the company may if it wishes, after a loss, pay its proportionate part of the loss even though the policy may have been avoided because of other insurance. If the policy is void, why should the company have a pro rating clause? Is it to protect itself, even though not liable? Or to make sure, if liable, it pays no more than its proportionate part? To believe that a company must protect itself against paying too much on a loss, when its policy is void, is laughable.

We are concerned only with the policies in suit. Each policy is separately to be considered according to its own terms. If a policy by a clause prohibits other insurance, and then the same policy, in a subsequent clause, agrees to pay its proportionate part of all the insurance on the property, it must be inferred as reforming the first clause. If such is not the assumption, then to say the least, it is ambiguous, and the meaning uncertain. Our law, in such cases, have held that the subsequent clause is to control. It will be noticed that the latter clause providing for pro rata payment does not say "*if*" there be other insurance. Yet certain other provisions of the policy so reads. It says simply that:

> "This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property."

In any event, it is an unconditional agreement to pay its proportionate share of all the insurance

on the property, and what is more, it says it will pay whether such other insurance is "valid or not, or by solvent or insolvent insurers". It is not uncertain that it promises to pay.

But so much for the terms against other insurance in the standard fire policy. They are clearly ambiguous, confusing and conflicting. And whether so or not these provisions are annulled, *waived and abandoned* by the "farm form" attached to the policies. (S. C., page 60 at top). *Corlies* v. *Westchester Fire,* 92 N. J. L. 108; *Placitum II,* Chap. 328, pg. 813, Laws of 1931.

The condition of the "farm form" erroneously denominated, "Standard Farm Form" is as follows:

> $6000 Total Insurance
> Permission is granted for other concurrent insurance on buildings and/or contents covered hereunder, totaling $6000, including the total amount of this policy, which is $3000 and this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance thereon, whether valid or not."

Let us assume for the sake of argument that the standard policy conditions prohibits other insurance. The attachment of the "farm form" permitting other insurance to a limited amount is beyond doubt, a waiver of the prohibition in the standard policy. Yet, what does the clause mean? Does the "farm form" permit only $6000 insurance, including the policy in question, or does it permit $9000 other insurance including the policy in question; or does it permit $12000 other insurance; or may it possibly mean $15000 other insurance including the one in question? Exam-

ined closely, this clause might meet all of these possibilities. For example, the clause says:

> *$6000 Total Insurance*
> "Permission is granted for *other concurrent insurance* on buildings and/or contents covered hereunder, *totaling $6000,* including the total amount of this policy *which is $3000.*"

The words *other concurrent insurance* have a definite and fixed meaning, which in any sense means *other insurance running with this policy.* "Concurrent" is defined by Webster's New International Dictionary as "running together, existing or happening at the same time; acting in conjunction; cooperating; joint or equal in authority." Synonymous with "meeting; uniting; accompanying; conjoined; associated; coincident; united." If the clause permits *other concurrent insurance totaling $6000,* does it mean $6000 more than the $6000 totaled insurance; or does it mean $9000 more plus the $3000 to make the $12000; or does it mean $12000 plus the $3000. If the company intends to restrict the additional insurance to $3000 more than the instant policy, could it not in plain language have stated $3000 additional insurance was all that the assured may have?

In the case of *Globe & Rutgers Fire Insurance Co.* v. *Alaska-Portland Packers Association,* 205 Fed. 32—123 C. C. A. 340, C. J. Gilbert, said:

> "What is concurrent insurance, as those words are used in the contract? The word 'concurrent', while its primary meaning is 'running with,' is used in different senses. *It does not appear that in insurance contracts it has any settled, definite, technical meaning.* But few insurance cases are reported in which the courts have been called upon to determine its meaning."

In *Gough* v. *Davis,* 52 N. Y. Supp. 947, the Court held that:

> "It is contended in the case at bar, however, that the permission for other insurance was intentionally restricted to 'concurrent' insurance for the purpose of avoiding the difficulty of apportioning the loss among the different insurers, where some of the policies cover all of the property and others cover only specific parts of it. *If insurers want to express such a meaning and make such a severe alternative of a forfeiture they should do it unequivocally, for that is the rule applicable. If the words are uncertain, or reasonably susceptible of two constructions, the construction of the insured will be upheld."*

In the case of *Schench* v. *Insurance Company,* 24 N. J. L. 447, cited by the appellants on page 9 of their brief, the clause prohibiting other insurance was in a form different than that which is today in use in the Standard Fire Policy. There the clause limited other insurance, in the same paragraph with the contribution clause. Yet Justice Potts in that case said:

> "It has been held, and I think correctly, that where a notice of the existence of another policy is required, *in such loose phraseology,* as we find in this article, it is not necessary that it should be in writing—verbal notice is sufficient. * * * * If the defendants require a more strict rule as to notice, they have only to say in their contracts of insurance that the notice should be in writing, and given to some specified officer of the company within a specified time."

Suppose again, that the assured carried $6000 on his *building* with one company and subsequently wrote an additional policy for any amount

(whether $1000, $5000 or $6000) on the *contents* of that building with another company. Would the prior policy on the *building,* because of other insurance on the *contents,* which the clause plainly prohibits, be void? It will be noticed that the permission is granted for *"other concurrent insurance on buildings and/or contents."* The intention of the company, if plain to the defendants is not so plainly intended.

Again, though the company pretends to limit other insurance the clause continues immediately with:

> "* * * and this company shall not be liable for a greater proportion of any loss than the amount hereby insured, shall bear to the whole insurance thereon, whether valid or not."

Is it possible that the company intended to pay its proportion of any loss up to $6000 by restricting its liability in that manner? The clause says that it will pay its proportion whether the other insurance is valid or not. In any event, the clause itself is so ambiguous as to be decided according to rules adopted by the Court, on all cases where a forfeiture is involved, as the learned trial Court held.

It is well settled in our State and undisputed that Courts are averse to forfeitures.

Bew v. *Travelers Insurance Co.,* 112 Atl. 859; 95 N. J. L. 533;

Corlies v. *Westchester Fire,* 108 Atl. 152; 92 N. J. L. 108;

Snyder v. *Dwelling House Ins. Co.,* 37 Atl. 1022; 59 N. J. L. 544;

Lupino v. *Firemans Ins. Co.,* 177 Atl. 446, 13 N. J. Misc. 223;

Hampton v. *Hartford Fire,* 47 Atl. 433; 65 N. J. L. 265;
Michler v. *New Amsterdam Casualty Co.,* 139 Atl. 725; 104 N. J. L. 30, aff. 141 Atl. 920; 104 N. J. L. 663;
Kessinger v. *North American Union,* 158 Atl. 756; 108 N. J. L. 405;
Evans v. *London Assurance Co.,* 151 Atl. 613; 107 N. J. L. 183.

In the *Corlies* case, *supra,* it was held that:

> "Courts are averse to forfeitures. They frown upon them. A Court will seek a construction of a forfeiture clause in a policy which will sustain it, even though a construction which will defeat it is reasonably deducible from the terms or words used to express it."

Corlies v. *Westchester Fire Insurance Co.,* supra, continuing:

> "At any rate this much is clear, that the condition in the "farm form" and the one in the standard policy, relating to the forfeiture, tends to create, at least, an ambiguity, and therefore a construction which will avoid a forfeiture will be adopted."

The rule prompting the construction of conditions creating forfeitures is of course applied in cases of doubtful and ambiguous phrases.

> "Any doubtful meaning of a policy of insurance must be construed in favor of the insured."

Gans v. *Columbia Insurance Co.,* 110 N. J. L. 400;
Corlies v. *Westchester Fire,* supra;
Rochmis v. *N. J. Mfrs. Ass'n.,* 169 Atl. 663, 112 N. J. L. 136;

Budrechi v. *Firemens' Ins. Co.,* 176 Atl. 143, 114 N. J. L. 187;
Jablonski v. *Girard Fire,* 174 Atl. 689; 113 N. J. L. 465.

Now, it is apparent that if more than $6000 or $9000 or $12000 or $15000, whichever is meant, is carried on the risk, the excess may be void or invalid. Yet the company says it will pay only its contributive part of the loss; or it will pay its proportionate part whether the insurance is $6000 or $10000 or $50000. What does the clause mean? Its meaning is shielded by some intention not clearly expressed nor easily comprehended. Must the assured be penalized because he himself is confused on that which is not fully comprehensible to more learned and experienced men than he?

In order to make uniform the terms and conditions of fire policies to be issued in this state, which up to that time were both confusing and divergent, our Legislature enacted P. L. 1902, P. 437, Section 77 as amended in 1931, page 812, Chapter 328—which reads as follows:

> "The commissioner of banking and insurance shall prepare a printed form in blank, of a contract or policy of fire insurance together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy, and file the same in the office of the department of banking and insurance, on or before the first day of July, One Thousand Nine Hundred and Thirty-One, and which form so filed shall be identical in respect to the conditions contained in lines one to one hundred and twelve, both inclusive, of the contract or policy of fire insurance filed by the said commissioner, as required by law, in the office of the Secretary

of State, on the first day of July, one thousand eight hundred and ninety-two, and the provisions, agreements or conditions as may be endorsed thereon or added thereto and form a part of such contract or policy so to be filed, shall also be identical with the provisions, agreements or conditions forming a part of the contract or policy of fire insurance previously filed by the said commissioner in the office of the Secretary of State, as aforesaid, and such form when filed shall be known and designated as "standard fire insurance policy", which designation shall include the State of New Jersey and may include the name of any other State or States in which it is used as standard and no fire insurance company, corporation or association, their officers or agents, except as hereinafter provided, shall make, issue, use or deliver for use, any fire insurance policy, or renewal of any fire policy on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions, with such printed form of contract or policy filed in the office of the Secretary of State as aforesaid, and no other or different provisions, agreement, condition or clause, shall in any manner be made a part of said contract or policy, or be endorsed thereon and delivered herewith, except that appropriate forms of supplemental contract or contracts whereby the property described in such policy shall be insured against one or more of the risks specified in sub-division I, XII and XIV of Section one of this act, in addition to the risk of direct loss or damage by fire, may be approved by the Commissioner of Banking and Insurance, and their use in connection with the standard fire insurance policy may be authorized by him, and except also as follows, to wit: * * *

2. Printed or written forms of description and specification, or schedules of the

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

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

It is apparent therefore that the ''farm form'' being inconsistent with a standard terms of the policy, is to be treated as a nullity. *Corlies* v. *Westchester Fire*, supra; P. L. 1902, pg. 437, Sec. 77 as amended in 1931, Chap. 328.

And because the permission for other insurance in the ''farm form'' waived the prohibition against other insurance, the assured was not bound by any restrictions as to other insurance. *Any condition, contrary to the statute above cited, is to be treated as binding only on the company, and not on the assured.* The statute is explicit concerning that.

I have been unable to find any case reported in this State dealing with the question of other insurance since the adoption of our standard policy. And only the *Corlies* case in our state deals with the ''farm form'', as it relates to the standard form. The brief of the appellant contains several cases dealing with other insurance; but each of these old cases are of policies in many particulars unlike ours.

The excerpts and citations used by the appellants as a reason against other insurance is but the oft repeated fear of incendiarism and the ob-

solete logic from the days of yore. Then, before the adoption of our so-called "standard policy" (which is but the result of a compromise between various companies' policies then in use, and political endeavors) the assured was accustomed to order a policy upon an application, which he signed and which in most instances was made part of the policy and subject to its terms. Our old reported cases are evidence of that custom then prevailing. That situation does not exist today. The old policies were issued under laws which did not supervise the management of insurance companies. It was proper then to restrict other insurance because of a fear the language employed in the policies made the companies' liability uncertain. Only recently, and since the adoption of the standard policy, with its pro rata clause, with its "actual cash value payment clause", does a company feel assured of its position, as far as other insurance is concerned.

Times have changed, and in most if not all of the policies issued today, permission for other insurance is incorporated in the forms attached to all policies and are unrestricted as to amount of other insurance. It is therefore neither "customary" nor "reasonable", as appellants state. Now to assume that other insurance may be harmful to the companies is not supported by possibilities. If it is sequential to prohibit other insurance to guard against the evils of fraud and carelessness then the case of *N. J. Rubber Co.* v. *Commercial Union Assurance,* 64 N. J. L. 580, cited by the appellants, page 6, is not analogous, except to disprove their own theory and logic. In that case the company wished to provide against the entire payment of the loss. Therefore it incorporated in the policy a condition precedent that there *be* other insurance to the amount of $75000,

its own policy being coverage for $25000. When the assured failed to secure such other insurance, the insuring policy was of course declared void. There is no analogy, between that case and the instant one. For in one, more insurance was contracted for, which would limit the liability of the insuring company to 25% of the loss; and in the instant case other insurance will reduce and divide the company's liability, (which is always desirable, when a loss occurs).

Suppose the assured to be the owner of a house valued at $10000, which he insured with "A" company for $2500. In the event of a partial loss, less than $2500, that company pays the entire loss; and if a total loss it pays $2500. Yet if the assured secures another policy for $2500 with "B" company, either or both companies could deny liability because of other insurance without their permission. The hazard, moral or physical was not increased, nor would either company pay more. And certainly the incentive to preserve the property was no less with $5000 than with $2500. To maintain the contrary is without reason. Did not the company promise and agree to indemnify the assured? Will not each company in the event of a partial loss pay exactly half of what it would have paid if on the risk alone? And in the event of a total loss it is plain that each company would pay no more than it had contracted to pay. Under the circumstances, can the assured, in any event, secure more of a payment or collect more in damages than the actual cash value in spite of other insurance. Is a house worth $10000 and insured for $5000 under two policies more liable to burn, than the house with one policy for $5000 or $2,-500. The appellants inject the question of good morals and public policy. Such questions are not involved, except in their refusal to pay. If the company be explicit and definite in its prohibition

against other insurance, it may well do so. It would not be contrary to public policy to prohibit other insurance, provided, it is done in clear, unambiguous and precise language.

The defendants have urged that other insurance creates a moral hazard and that the insurance company desires that the assured carry some part of the risk, (Appellants' brief on page 5). In other words, it would appear from the logic used that an assured with a house valued at $10000 should insure it for no more than perhaps $8000. Is it the purpose of insurance that the assured sustain some part of the loss? In that respect an assured could not secure indemnity if he were to be a co-insurer. If companies wished to make an assured bear part of the loss, it is proper to ask how much of a loss should he bear. No company investigates the property insured. How can they tell then what proportion of the risk they will not insure. And in the event of a loss, what proportion of the loss will they pay, and what proportion of that loss must the assured himself sustain? Is the loss to be sustained by the assured, to be the first calculated; or is the company to pay first? And many more of like and similar questions might be put.

If the companies wish an assured to suffer some part of a loss why was the following law enacted (P. L. 1902 Page 438):

> "78. Requiring additional fire insurance; co-insurance.—No fire insurance company doing business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the insured shall be liable as co-insurer

with the company issuing the policy for any part of the loss or damage which may be caused by fire or lightning, to the property described in such policy, and that any such clause or provision shall be null and void and of no effect; provided, that it may be optional with the insured to accept a policy or contract of insurance containing a co-insurance clause or provision when a reduction in the rate for insurance on the property described in such policy is the consideration named in such clause, and when so accepted the co-insurance clause or provision shall be binding on the insured."

Now it is certain that unless other insurance was so dangerous, from a companies standpoint, the necessity for protecting the assured against the demands of the company for other insurance would not have to be legally restricted in the manner of the statute.

In construing the policy all the terms of a policy must be read to gather the true intent and meaning.

> "In the construction of an insurance policy, the entire policy, in all its parts must be considered so that each clause shall take effect."

> *Smith* v. *Fidelity & Deposit Co.*, 98 N. J. L. 534, 12 Atl. 322;
> *A. A. Griffing Iron Co.* v. *London, Liverpool Globe Assurance Co.,* 54 Atl. 409, 68 N. J. L. 398.

The appellants say, page 9 of their brief

> "The principal of construction that a contract shall be construed to give effect to all of its terms is particularly applicable to a contract specifically prescribed by the Legislature."

This is exactly what may sometimes be needed for Legislature enactments. And it is exactly what we mean concerning the clauses under discussion. Suffice it to say, that the meaning is not apparent with a reading of all the clauses. And if the appellants beg indulgence for reading the whole policy to gather the meaning and construction they wish to imply, how is an assured, not trained in mass verbage or legal technicalities, to know what is meant. Even my worthy opponent, in his brief, page 9, representing the insurance company says, the whole contract should be read. But thinking better of it, he says in the very next sentence, that the whole policy need not be read because the two clauses are not inconsistent. I am feared lest the whole matter is become so. So plain are the clauses.

There is nothing in the "farm form" clause permitting other insurance, which says, that for a greater amount than that permitted, the policy will be avoided. Yet it will be noticed, the standard policy prohibition says exactly that: the policy will be void if the assured have other insurance. (S. C. 50, line 36). Having waived that provision, the insurance beyond that permitted by the "farm form" does not create a forfeiture. That a forfeiture is not intended is manifest by the failure to avoid the policy, and unconditional promise to pay.

The appellants point to the provision of the standard fire policy, to maintain their position that the policy was void for other insurance. But they forget, that that provision, was waived by their permission for other insurance in the "farm form". Therefore, the policy should not be declared void, if the company has not seen fit to have it so declared.

May I respectfully urge to your attention that

since this glaringly apparent omission exists in respect of other insurance, the appellants have not omitted to make it plain in the clause taken up under Point II of their brief. There, the owner is conditioned to occupy the premises insured, and if he does not occupy the insured premises, the policy is void. Void—because a clause in the "farm form" so says. But the "farm form" does not say the policy will be void if there be more insurance than the form seeks to limit. The appellants wrongly revert to a provision of the policy which has been waived. The "farm form" says (S. C. page 69, line 14)

> "The rate of premium at which this policy is written and the validity of this contract depends on compliance with the stipulated conditions. If it is intent to make any changes that will violate any of these conditions, permission must first be endorsed hereon, otherwise the entire policy will be void."

But the "conditions" the clause above set out, obviously refers to those beginning on page 66 of the State of the Case, line 17; and those conditions mentioned under "terms and conditions", page 62 of State of Case. But the permit for other insurance (S. C. 60) is outside of such conditions to be avoided. Therefore, even if the assured has other insurance, it does not avoid the policy or create a forfeiture. If the company so intended, it should have so stated in its clause permitting other insurance.

The citation from *Kupersmith* v. *Delaware Ins. Co.* page 10 of appellants' brief is misleading in that no one will feel quarrelsome with a statement that

> "The Court of law should enforce a contract as it is written."

But the point is that to do so, the intent and meaning must be perfectly clear and understandable, especially when by its terms the contract is to be forfeited. *Where it is ambiguous, then the construction which favors the validity of the policy, is superior to and desirable to that which favors forfeiture.* The case just above mentioned concerns a clear violation about which there can be no confusion and difference of mind. It does not concern the question of other insurance.

On page 11 of the appellants' brief is cited the case of *Mich.* v. *Corporation of Royal Exchange.* The significant part of this comparison and citation is that the clause in the "farm form" is no part of the standard policy and can not be made so by its acceptance by the Commissioner of Banking and Insurance. The authority of the Commissioner of Banking and Insurance is to approve supplemental contract or contracts, except that the terms and conditions of such supplemental contract.

> "Shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for." Laws of 1931, Chapter 326, pages 812-813.

The mere filing for approval with the Commissioner of Banking and Insurance of any additional or supplemental appendage to the standard policy if inconsistent with the standard terms of the policy is at best unauthorized under our statute. The commissioner may approve only supplemental contracts but his powers are strictly limited by the act; and may only contain printed or written forms of description and specification schedules of the property covered, and any other matter necessary to clearly express all the facts and

conditions of any particular risk. *In other words, the sole criteria is to be the Standard Fire Policy of New Jersey.*

We are not urging the doctrine of "*verba chartorum fortius accipiuntur contra proferentem*". Appellants' brief page 11 and 12. The appellants themselves urge the doctrine beginning at the bottom of brief page 12 in which they say that this doctrine is to be used only when the language is clear and unambiguous. We agree. But we insist the language is not clear, is not unambiguous; therefore the doctrine is not applicable.

The citation from the case of *Del Guidici* v. *Importers & Exporters Ins. Co.,* 98 N. J. L. 436 cited by the appellants, page 11 of their brief is particularly in favor of our argument. *It is plain that no different or other provisions can be made a part of a fire contract issued in this State. And where such is done, it is binding* on the company only; not on the assured.

The cases cited by the appellants at the top of page 12 of their brief, are all conditions precisely stated which conditions were by the assured violated. Under such circumstances, a forfeiture must result.

The case of *Vozne* v. *Springfield Fire,* 165 N. J. L. 449 cited by the appellant in its brief page 12 is also of violation of the condition definitely stated in the policy. The policy precisely states that a chattel mortgage avoids the policy. The company has an excellent reason for refusing to insure one whose property is encumbered by a chattel mortgage without its permission. In such a case, the existence of a chattel mortgage prior to the issuance of a policy means that the policy never became effective and if a chattel mortgage should be placed on the property after the issuance of a policy, the validity of the policy

ceases. In any event, the company makes no bones about its unwillingness to insure mortgaged furniture or stock, if I may put it that way.

The *Vozne* policy did not subsequently read, that it will pay the loss—any part of it—or any proportion of the loss—if the property insured be encumbered by a chattel mortgage. *But the policy in suit prohibits other insurance, and subsequently agrees to pay its proportion.* Where is the applicability? The *Vozne* case holds according to appellants excerpts: "The policy provision is clear and unmistakable" Need more be said?

Answer to Defendants-Appellants Point 2.

The defendants-appellants' contention that the policies are void because the owner did not occupy the premises described in the policy is based upon a condition in the "farm form" attached to the standard fire policy, in which reads as follows (S. C., 66, line 17):

> "*Farm Form Standard Condition Clauses.*
> (The following Standard Condition Clauses apply only to the designated items.
> No. 1. *Owner Occupancy:* In consideration of the reduced rate for which this policy is written it is hereby made a condition of this policy that the buildings hereby insured under the 1, 5 item(s) of this policy are occupied by the owner of the premises herein described. * * *

It is agreed of course, that the owner did not occupy the dwelling house insured under the policies involved under this suit. But this condition of the "farm form" is in direct conflict and is inconsistent with the terms and conditions of the standard policy. Lines 28, 29 and 30 of the standard policy (S. C. 52, lines 9, 10, 11) permitted

the property insured to be occupied either by the owner or a tenant and read as follows:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by *owner or tenant* be or become vacant or unoccupied and so remain for ten days."

By the statute of 1931 mentioned *supra,* the standard policy terms, as contained within lines 1 to 112, as mentioned, are the only terms and conditions which may be binding on the assured, and no other or different terms and conditions. Our Court in the case of *Corlies* v. *Westchester Fire,* supra, held that:

> "What the effect of this provision (Placitum II of section 77) of the act of One Thousand Nine Hundred and Twelve, P. L. pg. 524) is, leads to the inquiry whether or not the facts or conditions imposed by the "farm form" are inconsistent with, or a waiver of, any of the provisions or conditions of the said policy, and if this should prove to be the case, then such provisions or conditions, of the "farm form", as are inconsistent with or a waiver must be treated as a *nullity.* Is, therefore, the provision in the "farm form", 'if the building be or become vacant or unoccupied, except in accordance with the conditions of this policy, the entire policy is void,' inconsistent with or a waiver of the provisions or conditions of the standard policy, which provides that the 'entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void, if a building therein described, whether intended for occupancy by the owner or tenant be or become unoc-

> cupied or vacant, and so remain for ten days.' "

Now, if the standard form policy states that the premises may be occupied by the owner or tenant, and the "farm form" provides that the owner must occupy the premises, then, the inconsistency is notoriously apparent and consequently void, and not binding on the assured.

A further inconsistency between the "farm form" and the standard policy condition is contained in lines 11, 20 and 21 of the standard policy. (S. C., page 50, lines 36, 37, 38; page 51, lines 23, 24, 25, 26, 27) read as follows:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * any change other than by the death of an assured, take place in the interest, title or possession of the subject of insurance *(except change of occupants* without increase of hazard) * * *."

Here again is an indication that it permits the premises to be occupied by owner or tenant and permits a change of such occupancy where the hazard is not increased. The condition in the "farm form" which would tend to restrict the occupancy of the owner is inconsistent with the standard policy terms and is therefore, as was said in the *Corlies* case—a waiver and must therefore be treated as a nullity.

The appellants place much stress on the fact that the rate was reduced in consideration of the "owner occupancy". That argument would be a good one were it not for the fact that the purpose sought to be accomplished is not permissible under our laws. I do not believe, citations necessary to prove that that which the laws forbids

and prohibits cannot be made lawful because the company allows a lower or reduced rate to the assured in consideration.

My worthy opponent in his brief, pages 14 and 15 assumes that the violation of this particular clause is a warranty violation and cites cases to prove that "provisions relating to the use and occupancy of the assured premises are warranties". But the argument is inapplicable in this case. First, because the use and occupancy of the dwelling has not been changed. They are occupied according to the uses for which they were constructed and represented in the insurance contract. *Corlies* v. *Westchester*, supra. *Hampton* v. *Hartford Fire*, 65 N. J. L. 265.

What the appellants mean by a warranty violation would be a violation which would concern a different use of the premises than that for which they were constructed; or that the premises were differently used than that which was contemplated by the warranty description in the policy. But the fact that the owner did not occupy the premises and that they were occupied by a tenant is not a violation of the use and occupancy, as the cases cited would tend to indicate. If a building is insured as a dwelling house and is used as a store and dwelling house, the warranty is broken; because the use to which the premises were put was not contemplated by the parties under their insurance contract. And if used for dwelling purposes a change of occupancy without the increase of hazard is no violation of any warranty in the use and occupancy of the premises.

The appellants on page 16 of their brief attempt to overcome the inconsistency between the "farm form" and the standard provisions as it relates to occupancy by the use of words "whether intended for occupancy by owner or tenant" which

appears in the standard form. The fact that these words are used does not leave "open to the contracting parties the right to determine who shall occupy the insured premises." The standard form, by statutory enactment controls that situation.

Clearly it is the intention that the standard policy shall permit the occupancy of the premises by either owner or tenant, the only thing to be guarded against is an increase of hazard. And that which may increase the risk must relate to any change in the interest, title or possession of the building; but a change of occupancy or tenants is clearly permitted and is not considered a change of either interest, title or possession, for the policy specifically mentions "except change of occupants, without increase of hazard."

The learned Trial Court found that the provisions in the standard form were inconsistent with that in the "farm form" concerning the occupants or the premises.

That these two clauses are inconsistent with each other is I believe amply demonstrated and should be construed in favor of the respondent-assured. But the trial Court found that the two clauses were inconsistent and therefore the terms in the standard policy were to control; and that the "farm form" condition providing for "owner occupancy", was not binding on the assured. There was said in the *Corlies* case, above

> "This "farm form" contains the following condition:
> 'If the dwelling be or becomes vacant or unoccupied, except in accordance with the conditions of this policy, the entire policy is void.'
>
> It is important to mention here that none of the above recited conditions is to be

found in the standard form policy. The latter contains this provision:

'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.'

The Act of 1912 (P. L. p. 524), amendatory of the Act of 1902, entitled "An act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this state" (Comp. Stat. p. 2862), by section 7, placitum 3, among other things, provides:

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

It is therefore urged that the Trial Court be sustained in holding that the provision of the "farm form" was inconsistent with those in the standard fire policy.

Summary.

The respondent urges the affirmation of the decision reached, by the learned Trial Judge upon the following grounds:

1. The permission for other insurance in the "farm form" is a waiver of the prohibition in the standard policy.

2. The permission for other insurance in the "farm form" is not binding on the insured because inconsistent with and contrary to the standard policy prohibitions.

Therefore, having waived the prohibition, and given permission, which permission is itself binding only on the company, the insured is not bound by either provision or condition.

3. If the prohibition in the standard policy is considered together with the pro rata or contribution clause of the standard policy, together with the permission of the "farm form" the ambiguity arising therefrom should be construed in favor of the assured.

4. The permission for other insurance in the "farm form" is itself so ambiguous that it should be construed in favor of the assured.

5. The permission for other insurance in the "farm form" is ambiguous as to the amount of other concurrent insurance and should be construed in favor of the assured.

6. The "farm form" permission for other insurance, does not say the policy will be void if the other insurance is in excess of that permitted by the "farm form". And therefore the policy should not be declared void.

7. The "owner occupancy" clause being inconsistent with the standard policy is not binding on the assured and is to be treated as a nullity.

8. The "owner occupancy" clause is ambiguous when considered with the standard policy provisions, and therefore to be construed in favor of the assured.

9. The Commissioner of Banking and Insurance has no right to approve any supplemental contract if its terms or conditions are inconsistent

with that of the 112 lines of the standard fire insurance policy adopted by our Legislature.

Conclusion.

For the reasons urged herein, under Point 1 and Point 2, it is submitted that the judgment in favor of the plaintiff and against the defendants be affirmed.

Respectfully submitted,

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