

New Jersey Court of Errors and Appeals.

Between

FLORENCE E. PALMER,
Complainant-Respondent,

AND

NIAGARA FIRE INSURANCE COM-
PANY,
Defendant-Appellant.

On Appeal from
Decree in Chan-
cery.

BRIEF FOR DEFENDANT- APPELLANT.

1. Statement of the Case.

Florence E. Palmer, the respondent above named, was the owner of certain lands in Elizabeth, New Jersey, and on March 11, 1911, executed a bond and mortgage thereon to secure the payment of \$3,500. to John A. McFadden, as Guardian of Marie McFadden (Exhibits C-2, C-3, Case; pp. 20, 40, 41). She afterwards secured a policy of insurance from Niagara Fire Insurance Company in the sum of \$3,500. which was originally issued to Sidney W. Eldridge and Florence E. Palmer, but was later made payable to Florence E. Palmer as owner. By an endorsement thereon duly made, the loss, if any, was made payable to John A. McFadden, Guardian, etc., as his interest might appear (Ex. C-1, pp. 20, 26). The mortgagee clause attached to the policy provided in part as follows:

“ Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage

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under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim" (Exhibit C-1, p. 28, line 35 to p. 29, line 15).

The policy also contained the following language:

"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" (Exhibit C-1, p. 37, lines 16 to 24).

After the execution of the policy and the making of the endorsements above referred to, a foreclosure proceeding was instituted by McFadden as Guardian, which resulted in a final decree in his favor for \$3,225., together with interest. In addition to the policy issued by appellant above referred to, there were in force upon the same premises a policy of the Scottish Union and National Insurance Company of Edinburgh for \$6,000. and another policy in the Northern Insurance Company of New York for \$5,000., making a total aggregate amount of insurance on said property of \$14,500. A fire occurred upon the mortgaged and insured premises on December 20, 1912, resulting in a loss (p. 23, lines 20, 31). The only evidence as to the value of the premises and the amount of the loss is contained in Exhibit C-7, pages 89, 93, and the testimony of John

Benjamin Beatty (pp. 24, 25), which shows the sound value of the property damaged to have been \$6,002.62 and the amount of damage to have been \$5,205.82. The respondent introduced no evidence in support of the allegations of the first paragraph of her replication (p. 18). After the fire respondent brought suit against the Scottish Union and National Insurance Company of Edinburgh upon the policy above referred to and recovered from the Scottish Union Company the sum of \$2,460. damages and \$57.12 costs, and from the Northern Insurance Company of New York the sum of \$2,150. damages and \$65.07 costs (Ex. C-5, pp. 48, 67; Ex. C-6, pp. 68, 87-88). These judgments were duly paid (Ex. C-5, p. 68; Ex. C-6, p. 88). After the fire Mr. McFadden made a demand upon the Niagara Fire Insurance Company for the payment to him of the amount due upon his mortgage, and thereafter, on December 17, 1914, appellant paid to McFadden the sum of \$3,416.67, being the amount due upon his decree with interest to the date of such payment. When making this payment it claimed that with respect to \$2,028.51 thereof no liability existed as between it and respondent and that it was entitled to subrogation under the securities held by McFadden and took from him an assignment of his bond, mortgage and decree and a subrogation receipt (Ex. C-1, pp. 38, 39; Ex. C-4, p. 46; p. 21, lines 10-21). The assignment of the bond and mortgage was duly recorded in the Register's office of Union County in Book 56 of assignments for said county, page 526 (p. 20, line 37; p. 21, line 9; Ex. C-4, p. 46). The assignment of the decree was duly filed with the Clerk of the Court of Chancery and such proceedings were thereafter had in the foreclosure suit that appellant was substituted as complainant therein in the place and stead of Mr. McFadden, and an execution was duly issued and placed in the hands of the Sheriff, the mortgaged premises were advertised for sale and the sale was restrained by the Court of Chancery by a decree

from which appellant has appealed to this court (pp. 21, 104-106).

The question involved is whether respondent is entitled to have the entire amount paid by appellant to McFadden credited upon her mortgage and to have her indebtedness extinguished and the mortgage cancelled of record, or whether on the other hand she is entitled only to credit for the amount which she could have recovered in an action against appellant on her policy and whether appellant is not entitled to enforce the lien of the mortgage in order to recover the excess paid by it above the amount which respondent could have recovered from it in an action on her policy. The question is raised by an appeal from a decree in Chancery adjudging that the mortgage has been paid and satisfied and that it be cancelled of record and be no longer a lien upon the premises described therein and enjoining appellant from collecting money upon it and from setting it up against the premises therein described.

2. Grounds of Appeal.

The grounds of appeal are that the decree in Chancery adjudges that the mortgage assigned to appellant as aforesaid has been fully paid and satisfied, whereas, there is in fact due upon the same the sum of \$2,028.51, with interest; that it is further ordered that the said mortgage be cancelled of record and be no longer a lien upon the said premises described therein against respondent or any person or persons claiming by, from or under her, although there is still due upon the said mortgage the sum of \$2,028.51, with interest; that it is further ordered that appellant and all persons claiming by, from or under it be debarred and perpetually enjoined from collecting money on the said mortgage and from setting up the same against the premises therein described, although there is due upon the said mortgage the sum of \$2,028.51, with interest; that it is

further ordered and decreed that the appellant pay the respondent the costs of this suit and that execution issue therefor, whereas, it should have been decreed that respondent pay to appellant the costs of this suit and that execution do issue therefor (Decree, pp. 104-106).

3. Brief of the Argument.

POINT I.

Respondent is only entitled to have the sum of \$1,388.16 credited on account of the amount due on the bond, mortgage and decree assigned by McFadden to appellant.

Under the provisions of the policy issued by appellant it was not to be liable to respondent thereunder for a greater proportion of any loss on the insured property than the amount thereby insured should bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property (Ex. C-1, p. 37, lines 16-24). The total amount of insurance in force on the property at the time of the loss was \$14,500 (p. 21, lines 27, 36). Of this the amount of the Niagara Fire Insurance Company's policy was \$3,500 (p. 21, lines 36, 37), or 7/29 of the whole. The loss by fire amounted to \$5,205.82, 7/29 of which, being the amount for which appellant was liable to respondent, is \$1,256.58. Interest on that amount from sixty days after the appraisal award until payment by it to Mr. McFadden as above set forth amounts to \$131.58, making the total amount due from the appellant to respondent at the date of the payment to McFadden of \$1,388.16. The amount

paid to McFadden was \$3,416.67 or \$2,028.51 more than the amount which respondent was entitled to recover from appellant. Appellant therefore claimed that as to this sum no liability existed to the respondent being the mortgagor or owner and that it was therefore entitled to subrogation to the rights of the mortgagee. The taking by appellant of the assignment of the bond, mortgage and decree sufficiently show a denial of liability to the mortgagor. *Insurance Co. of North America v. Martin*, 51 N. E. 361, where the Court said at page 367:

“In answer to the insistence of appellees that the complaint does not disclose that appellant denied its liability to the mortgagor or owner of the property at the time it paid the loss to the mortgagee, it may be said that it is true, as the authorities affirm, that appellant was not entitled to subrogation upon its mere denial of liability, but to entitle it to this right the facts in the case must justify such a denial. It does appear, however, from the averments of the complaint, that after the fire in question the mortgagee, under the policy, demanded of appellant payment for the loss of the house, and that the latter, in accordance with the policy and the provisions of the mortgage clause, paid said loss to the former, and took from it an assignment of the debt and mortgage lien, to the extent of the amount paid. These facts, we think, sufficiently show a denial of liability by appellant to the mortgagor or owner of the property.”

Appellant's right to subrogation is clear both at common law and under the language of the mortgage clause above set forth. Mr. McFadden conceded the justice of this claim and accordingly assigned to appellant the bond, mortgage and decree. Appellant was seeking to enforce his rights as such assignee when it was enjoined by the decree appealed from.

Respondent does not deny that in an action by her against the Insurance Company, had no payment been made to the mortgagee, she would have

been entitled to recover only the sum of \$1,256.58, being the appellant's *pro rata* proportion of her loss. Nor does she contend that had appellant refused to pay the mortgagee more than this amount she could have compelled it to do so. She does contend, however, that payment having been made she is entitled to have the entire amount paid applied in satisfaction of the mortgage and in reduction of her indebtedness, although more than \$2,000. in excess of the appellant's liability to her, and that she is entitled to have the mortgage cancelled of record as paid.

Upon the argument below respondent's counsel cited numerous cases to show that as against the mortgagee the *pro rata* clause in the policy was operative, and that the mortgagee had a right to enforce the policy against appellant for the full amount of its loss, notwithstanding the procuring by the respondent of additional insurance to the amount of \$11,000. and notwithstanding the *pro rata* clause. None of these cases were in point. It should be borne in mind that the question of appellant's liability to the mortgagee in this case is in nowise involved. Nor is the action one to enforce contribution among several insurers, but one to enforce the lien of a mortgage. The sole point involved is whether having paid the mortgagee more than respondent could have recovered from it or could have compelled it to pay, it is entitled to enforce the lien of the mortgage for such excess.

The rights of the parties in this case depend upon the proper construction of the provisions of the mortgagee clause in the policy with respect to subrogation which is set forth in Exhibit C-4, page 28, line 36, to page 29, line 15, and provides that whenever appellant should pay the mortgagee *any sum* for loss or damage under the policy and should claim that as to the mortgagor or owner no liability therefor existed, it should to the extent of such payment be legally subrogated to the rights of the mortgagee and entitled to an assignment of securi-

ties, etc. The rule that a mortgagor who has procured and paid for insurance which is payable to a mortgagee is entitled to have the amount paid by the insurer to the mortgagee upon a loss credited upon the mortgage in reduction of the owner's indebtedness is subject to the qualification that in order to entitle the owner to such a credit the money paid to the mortgagee by the insurer must be money which the owner would have been entitled to recover but for the mortgage. If for any reason the insurance contract has become unenforceable as between the owner and insurer, although the mortgagor is nevertheless entitled to recover on the policy to the extent of his loss, the owner is not entitled to have the amount so paid credited upon his indebtedness. The reason for this is obvious. In a case where the owner could have recovered had the mortgagee not done so, the money which the Insurance Company pays to the mortgagee is in fact money owing to the owner. The mortgagee is therefore bound to credit it upon the indebtedness. In a case, however, where the owner would not be entitled to recover the money from the insurer it cannot be said to have been the owner's money which the mortgagee received and the owner is therefore entitled to no credit upon his indebtedness for it. The doctrine was established in New Jersey in *Hare v. Headley*, 54 N. J. Eq. 545. The question there was whether fire insurance companies, who had paid a first mortgagee the loss to the mortgaged property occasioned by fire, were entitled to be subrogated therefor to the rights of the first mortgagee, or whether the second mortgagee was entitled to have the payment credited or applied as a payment on the first mortgage. It arose upon an application for surplus moneys in a foreclosure suit. It appeared that by an agreement between the mortgagee and the fire insurance companies, containing clauses similar to those appearing in the ordinary mortgagee clause of a standard fire policy, the in-

insurance companies agreed to pay the mortgagee the amount of its loss.

This agreement was unknown to the mortgagor. It also appeared that the policies were void as between the insurance companies and the mortgagor. Under these circumstances, Vice Chancellor Emery held that by reason of their payments to the mortgagee the insurance companies became subrogated to its interests in the security and that the subsequent mortgagee, claiming under the owner, was not entitled to have the payments credited on the decree in the foreclosure suit. The situation is very similar to the case at hand, because the policy was taken in the name of the mortgagee, and by agreement between the mortgagee and the insurance companies, the usual mortgagee clause became operative.

In discussing the matter Vice-Chancellor Emery said, at pages 555-556:

“The contention of defendant on this point, if valid, would of necessity make the mortgage clause nugatory, for the main object of this clause is to provide for a continuance of the policy as to the mortgagee, when it has been avoided by the neglect of the owner, and for a payment to the mortgagee after such avoidance as to the owner. To treat the payments made or claimed to be made under this mortgage clause, and while the company deny the obligation to the owner, as having the effect of reinstating the policy in favor of the owner, under the theory of waiver, is to hold that the mortgage clause cannot practically be carried out as against the owner. I conclude, therefore, that the policies were void as between the owner and the fire companies, and the next question is whether a payment of the loss to the mortgagee, who has been appointed by the owner to recover the loss, if made after the policy is void as against the owner, operates to the benefit of the owner and his subsequent mortgagees. * * * Mortgage clauses, so called, continuing the insurance covered by a policy, in favor of a mortgagee, where they are void as

to the owner or mortgagor by reason of his acts or defaults, have for many years been used and acted on in connection with policies, and where the clause is either incorporated in the policy itself, or otherwise attached by the consent of all parties (owner, mortgagee and insurance companies), no plausible ground can be urged against their validity, and the uniform opinion of the courts has sustained them. The reason is that the interest and relations of the mortgagee and of the owner, to the insured property, are, in some respects and to a certain extent, so distinct that the parties being competent to make the contract may provide that the policy may be good to the mortgagee, although not to the owner. *Hastings v. Insurance Co.*, 73 N. Y. 141 (1878), an earliest and leading case."

And on pages 557, 558:

"The validity of such independent contract between the mortgagee and insurance companies, existing at the time of the issuing of the policy, was expressly sustained in *Ulster County Savings Institution v. Leake*, 73 N. Y. 161 (1878), upon grounds which, as it seems to me, are solid and unquestionable. 'The contract', says Chief Justice Church (at p. 165), 'does not affect or purport to interfere with rights of any mortgagor who may procure or for whose benefit an insurance may be procured. It merely provides for protecting the interest of the mortgagee after the interest of the mortgagor has ceased, and I am unable to perceive any valid reason why such a contract may not be made and enforced'; and again (at p. 166): 'The mortgagor was not injured by this contract. If it had not been made she could not have received any benefit from the policy. It was an independent contract for the benefit of the mortgagee and the circumstance that the mortgagor also had a policy does not affect it when the contingency rendering it operative occurs.' These reasons, in my judgment, control this case. Defendant's counsel insist that the owner is harmed, inasmuch as the expense of the insurance is borne by him. But his insurance premium is paid for his

own insurance, under his own contract as to terms, conditions, &c., and his bargain with the mortgagee for payment of insurance only binds him to continue the insurance of his own interest and under his own contract. So long as the owner has all the interest in the insurance policy which he has contracted and paid for, it is difficult to see how he can be said to suffer any legal harm because the premium which he has paid does not give him the benefit of an additional insurance obtained by the mortgagee, to take effect after his interest has terminated. For this additional insurance, the mortgagee has, in this case, given additional consideration, viz., its own personal obligation to the insurance company to pay the premiums on demand if the mortgagor did not. I conclude, therefore, that the contract is valid, so far as relates to the independent insurance of the mortgagee after the policy had become forfeited as against the owner by reason of their failure to give notice of loss, or to make proofs of loss, as required by the policy, and *that the payments of loss having been made by the fire insurance company in satisfaction of the mortgagee's separate insurance of his interest under the independent contracts, the insurance companies are entitled, by reason of such payments, to be subrogated to the mortgagee's interest in the security, and that the subsequent mortgagee claiming under the owner is not entitled to have the payments credited on the decree.*"

In *Insurance Company of North America v. Martin*, 51 North Eastern 361, certain property was insured by the owner and the policy made payable to the mortgagee by the usual mortgage clause. The property was afterwards sold by the owner, which rendered the policy void except as to the rights of the mortgagee. After loss the insurer paid the mortgagee the amount of his encumbrance and took an assignment of his bond and mortgage. The Court held that the Insurance Company was entitled to enforce the lien of the mortgagee and said, at page 367:

"Upon the payment of the loss the mortgagee by endorsement assigned to appellant an

amount of the principal mortgage debt equal to the amount which appellant paid in satisfaction of the loss of the property destroyed, and at the same time the mortgagee, in accordance with the method prescribed by section 1107, Burns' Rev. St. 1894, also assigned to a like extent the mortgage security. In fact, appellant may be said by virtue of its subrogation under the agreement and the circumstances in the case, to virtually occupy the position of an assignee or purchaser from the mortgagee for value. * * * *This is not, as appellees seemingly insist, an action to enforce subrogation, but it is one for the foreclosure of a mortgage;* and the question, in the main, is, was the subrogation upon which appellant, under the facts, relies, warranted thereby? That it was, and that the debt, to the amount paid, with interest, in the light of the authorities cited, still exists in favor of appellant, there is no doubt."

In *The Ulster County Savings Institution v. Leake*, 73 N. Y. 161, plaintiff held a mortgage upon certain real estate, containing a clause requiring the mortgagor to procure an insurance for the benefit of the mortgagee. The owner of the real estate procured an insurance "loss payable to the mortgagee". Plaintiff had an independent contract with the insurance company, by the terms of which all policies of the company assigned to or held by plaintiff as mortgagee should be binding and its interest absolutely insured, and providing for subrogation in case the policy should be void as to the mortgagor. By breach of a condition in the policy, it became forfeited as to the owner. A loss having occurred, the company paid the loss to plaintiff, taking an assignment of so much of the mortgage subject to the payment of the balance due plaintiff. In a contest as to surplus moneys arising on sale, under a judgment in an action brought to foreclose the mortgage, it was held that the agreement between plaintiff and the insurer, and the assignment thereunder, was valid, and the latter was entitled to the surplus; that the owner, having forfeited her rights under

the policy, was not entitled to the benefit of the payment, and was not injured by the assignment; *that it could not be inferred that the insurer waived the forfeiture and so paid the insurance, as from the fact that it exacted and procured the assignment to which it was entitled under its contract with plaintiff, the conclusion was irresistible that it simply paid in compliance with the obligations of that contract.*

In the cases cited, the entire policy was void as against the mortgagor, but there is no reason why the doctrine should not be applied as well where the policy becomes void in part as against the mortgagor as where it becomes void in the entirety as against him. It was, in fact, applied to such a situation in *Phoenix Insurance Co. v. Floyd*, 19 Hun, 287, affirmed without opinion, 83 N. Y. 613, where the company insured Floyd & Newins, as owners, "loss payable to Hendrickson & Whitson, mortgagees, as interest may appear". The policy contained the usual mortgagee clause. After the issuance of the policy the property was conveyed to Ruth Gracie, whose name was inserted as owner in the policy, who thereafter, both companies assenting, procured additional insurance on the property from another company, and in case of loss it was agreed as between the two companies and Ruth Gracie that such loss was to be paid by the two companies in certain proportions. The property was injured by fire to the extent of \$2,788.44, of which, as between the owner and the two companies, the plaintiff company was responsible to pay \$1,507.69. The plaintiff having paid the mortgagees \$3 000.00, the amount of their mortgage as required by the mortgagee clause, took an assignment of the mortgage and brought its action to foreclose it. It was held that as against Ruth Gracie and Floyd & Newins, who, as mortgagors, were liable for any deficiency, plaintiff was only bound to credit upon the mortgage its proportionate part of the loss, to wit, \$1,507.69, and not the

amount it had paid the mortgagees, to wit, \$2,788.44. The Court said at page 289:

“The whole loss was \$2,788.44, and the amount which the plaintiff, in this action, was bound to pay, was adjusted at \$1,507.69; but as between Hendrickson & Whitson, the mortgagees and the plaintiff, the latter was bound to pay the full amount to them, their rights not being affected by the acts of the owners in procuring another insurance. The plaintiff accordingly paid to the mortgagees the amount of their mortgage, \$3,000. and took an assignment of it, and have brought this action to foreclose it. The appellants, Floyd & Newins, claim that, as against them, they being liable for any deficiency, the plaintiff is bound to credit the whole \$2,788.44 as a payment upon the mortgage. The plaintiff claiming that it is only bound to credit the \$1,507.69, being the portion of the loss for which, as between the plaintiff and Mrs. Gracie, the owner, the plaintiff became liable. The judge, at Special Term, sustained the position taken by the plaintiff, and, in my opinion, his decision was correct. The mortgagee clause was a contract between the company and the mortgagee exclusively, and gave the mortgagee a distinct and separate interest in the policy, independent of the owner. (*Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141.)

“In consideration of the increased security to the mortgagees, the company stipulated for and became entitled to subrogation. The right of the company to be subrogated, or to take an assignment of the mortgage, was wholly independent of the mortgagor, and the result of the contract directly made by the company with the mortgagee. When Floyd & Newins conveyed the property to Mrs. Gracie, and their names were erased from the policy, and that of Mrs. Gracie inserted as owner, they ceased to be parties to the contract of insurance, and were no longer entitled to any benefit from it. The substitution of names was equivalent to the making of a new policy. From that time forward, Mrs. Gracie was the owner and party assured, and her acts, in procuring the addi-

tional insurance, bound everybody interested in the property and in the insurance, except the mortgagees, Hendrickson & Whitson, who were protected by their separate contract with the company.

For these reasons, I think the appellants had no interest in or rights under the policy, and no right to require the plaintiff to credit on the mortgage any more than as between the plaintiff and Mrs. Gracie, the owner, they were bound to and did credit."

In *Hastings v. Westchester Fire Insurance Co.*, 73 N. Y. 141, the facts were very similar to the facts here involved. Defendant had issued a policy of fire insurance upon property covering which plaintiff held a mortgage. The policy was taken out by the owner and was made payable to the mortgagee by the ordinary mortgage clause containing the same provision as to subrogation as that here involved. There was also a provision that in case of other insurance the insurer should only be liable *pro rata* with such other insurance. There was additional insurance which as in this case was not made payable to the mortgagee.

In discussing the effect of the mortgage and subrogation clauses, Rapallo, *J.*, said on pages 154 and 155:

" I think the intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately, and to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts. It established a privity between the company and the mortgagees, and provided that, notwithstanding that the insurance might be invalidated as to the mortgagors, it should, nevertheless, protect the mortgagees; and, as a consideration for this undertaking, it was stipulated that, in case the company should be called upon to pay the mortgagees, under circumstances which discharged it from liability to the mortgagors, it should be indemnified by subroga-

tion, or an assignment of the mortgage and all securities held by the mortgagees for the mortgage debt. This provision, in case the policy were invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees, by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors. *The same consequences would follow, pro tanto, from a partial, as from an entire invalidation, or a reduction of the policy as to the mortgagors.*

There having been in the present case no additional insurance upon the interest of the mortgagees, which should reduce their claim to one for contribution, I do not think they are affected by the additional insurance on the interest of the mortgagors, even though it existed at the time of the issuing of the policy now in question, the mortgagees having been ignorant of, and having no interest in, such additional insurance. For whatever amount the defendant may have to pay the plaintiffs in excess of the sum which the mortgagors could have collected on the policy, were there no mortgage, the company is entitled to reimbursement, by enforcing the bond and the mortgage, to which it is entitled by subrogation to that extent; or it may pay them and take an assignment, in which case it would be bound to give credit thereon, only for its contributive share of the loss for which it is liable in respect of the interest of the mortgagors. If the security is insufficient to make the defendant whole for its excessive payment, that is no answer to the claim of the plaintiffs; it is a loss resulting from the contract of the defendant with the mortgagees.

The mortgagors derive no benefit from the sum paid by the defendant in excess of its contributive proportion. The mortgage debt is not reduced by that payment, but only to the extent of the contributive share for which the policy stood for the benefit of the mortgagors. The mortgagors remain liable on their bond for the amount payable thereon beyond this contributive share, in case the company takes an assignment. If the mortgaged premises should, on a foreclosure, prove insufficient to pay this excess, the mortgagors will be liable for the deficiency."

It was respondent's contention below that because when appellant took its assignments, it admitted that it was liable to respondent for a portion of the amount of the policy, it could not take advantage of the subrogation clause with respect to the balance thereof for which it did not admit liability. This view was adopted by the Court below (p. 100, line 35; p. 101, line 2). Such a construction of the subrogation clause of the policy is entirely unwarranted, and the finding of the Court is not supported by the facts, proved and admitted. Appellant paid McFadden the sum of \$3,416.67; of this it paid him \$1,388.16, admitting that to this extent it was liable to respondent. As to the balance of \$2,028.51 it claimed *that as to this particular sum of \$2,028.51* no liability existed as between it and the owner or mortgagor. This it had a right to do under the subrogation clause, the clear intent of which was to protect the insurance company in its right of subrogation in case it was compelled to pay the mortgagee a sum for the whole or any portion of which it was not liable to the owner. The conditions of the subrogation clause are "whenever this company shall pay the mortgagee or trustee *any sum* for loss or damage under this policy and shall claim that as to the mortgagor or owner no liability therefor existed", appellant should be entitled to subrogation. Appellant has in this case paid to Mr. McFadden a sum, to wit, \$2,028.51, with respect to which it claimed that as to the mortgagor or owner no liability therefor existed. It is with respect to this sum only that it seeks to be subrogated. It is clear that it has the right to such subrogation. The reasoning which is the foundation of the decision in *Hare v. Headley* applies with as much force to the case of a partial as to the case of an entire invalidity of a policy. In one case the insurer has paid to the mortgagee an amount no part of which the owner was entitled to recover against it and claims subrogation for the entire sum. In the other it has paid

the mortgagee a sum a portion of which the owner is not entitled to recover against it and claims subrogation only as to that portion. It is manifestly unjust to say that where the owner is entitled to recover nothing from the insurer he can have nothing credited upon his debt by reason of a payment to the mortgagee, but that where he is entitled to recover 10 cents on the dollar from the insurer he is entitled to have 100 cents on the dollar credited upon his indebtedness.

POINT II.

The result of the decree is to allow respondent to recover \$7,976.67 upon a loss of only \$5,205.82.

As a result of the decision of the Court below respondent has recovered for her loss of \$5,205 82, \$2,100. from the Northern Insurance Company of New York, \$2,460. from the Scottish Union Company in cash, and under the decree in Chancery she has had her indebtedness to Mr. McFadden extinguished to the amount of \$3,416.67. In other words she receives \$7,976.67 for a loss of \$5,205.82. That is to say, she makes a profit upon the burning of her buildings of \$2,770.85.

The contract of insurance is a contract for indemnity only. *Eager v. The Atlas Insurance Company*, 14 Pickering, 141, where the Court said, at page 146:

“All agree that the contract of insurance is one of indemnity, and that this is in truth the essence of the contract. The assured are entitled to a full indemnity from the underwriters, and nothing more.”

And in *Insurance Company v. Bailey*, 13 Wallace, 616, the Court said, at page 618:

“ * * * fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured.”

In *Spare v. Home Mutual Ins. Co.*, 15 Fed. 707, at 708, it is said:

“ Where the only interest that the assured has in the property is its destruction by fire, the transaction is a direct incentive to fraud and arson. A lawful contract of insurance against fire is, therefore, a contract of indemnity—an engagement to make good to the assured a pecuniary loss sustained by him on account of injury to the property in question.”

See also *Imperial Elevator Co. v. Bennett*, 149 N. W. 372, 374; 19 *Cyc.* 583; *Fire Association of Philadelphia v. Schellenger*, 83 N. J. Eq. 144. As is said in 16 *Am. & Eng. Ency. of Law*, page 840:

“ The purpose of property insurance is indemnity, and the contract by which this purpose is effected must be so construed as to advance this principle and to prevent its prostitution to illegal uses as a mode of speculation. A sound public policy forbids the enforcement of any contract by which the insured would derive a profit from the happening of the event insured against. The insured should have an interest in the preservation of the thing rather than in its destruction.”

The decision of the Court of Chancery, however, enables respondent not only to procure indemnity for her loss but to procure \$2,770.85 in excess of such indemnity. It enables her to make a profit of that amount from the destruction of her property. It gives her to that extent a direct pecuniary interest in its destruction instead of in its preservation. The error of such a decision is evident.

The decree of the Court of Chancery should be reversed, the restraining order made therein dissolved, the bill of complaint dismissed, and a decree entered in favor of the defendant Niagara Fire Insurance Company.

Respectfully submitted,

Lindabury, DePue & Paulsen

Of Counsel with Defendant-Appellant
Niagara Fire Insurance Company.

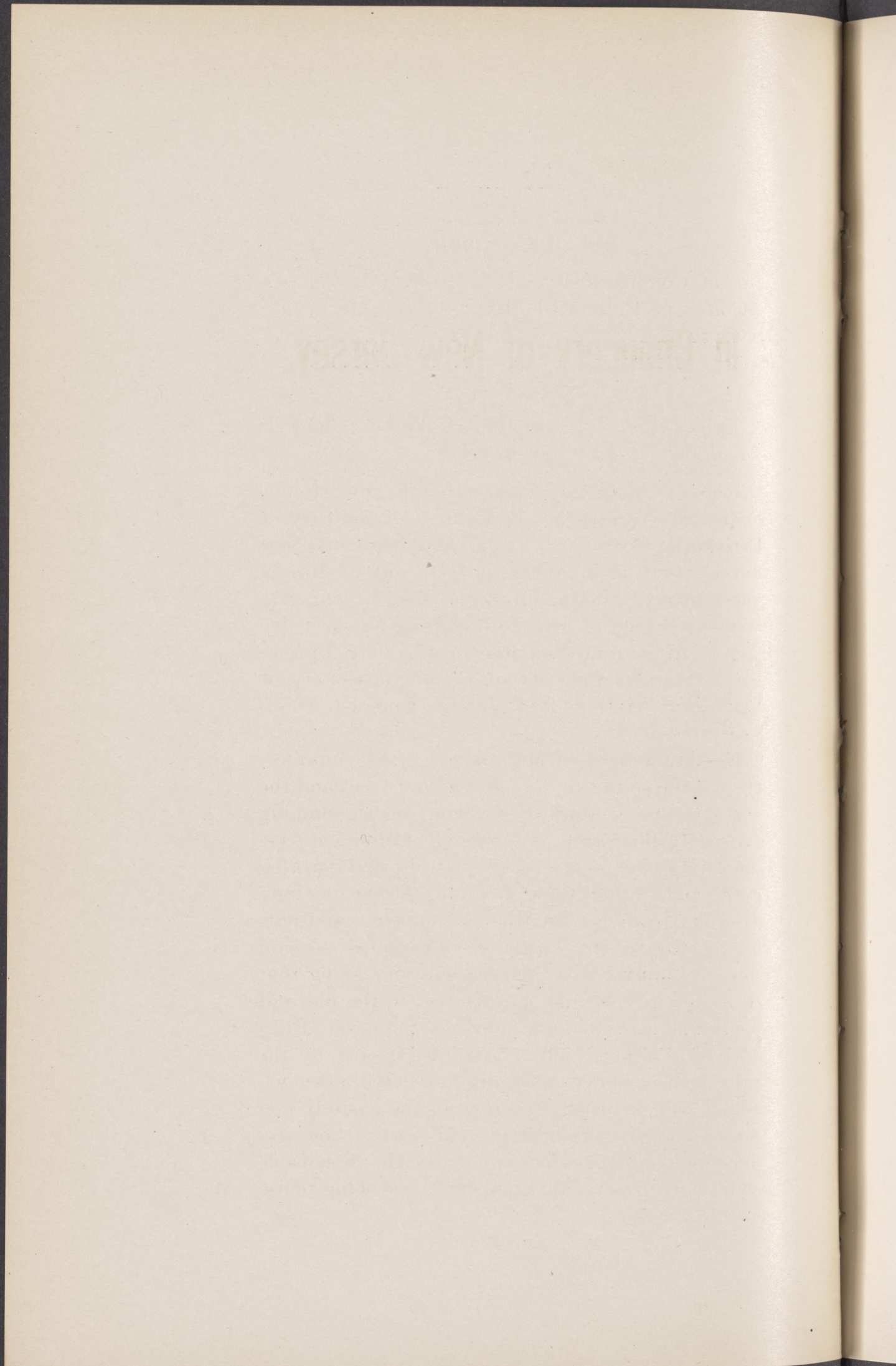
November Term, 1916.

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Bill of Complaint.

Bill of Complaint.

Filed December 29, 1915.

In Chancery of New Jersey.

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To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

Humbly complaining, showeth unto your Honor, your oratrix, Florence E. Palmer, of the City of Elizabeth, County of Union and State of New Jersey, that on or about the 11th day of March, one thousand nine hundred and eleven, your oratrix was seized of an estate of inheritance in fee simple, of the following described lands and premises, situate in the City of Elizabeth, County of Union and State of New Jersey, bounded as follows, to wit,

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Beginning at a corner formed by the intersection of the southerly line of Fanny Street and the easterly line of Madison Avenue; thence running southerly along said easterly line of Madison Avenue sixty-two feet; thence easterly and parallel with said southerly line of Fanny Street one hundred and seventy feet; thence northerly and parallel with the first course sixty-two feet to said line of Fanny Street; thence westerly along that line one hundred and seventy feet to the place of beginning. Granted and conveyed to the said Florence E. Palmer, your oratrix, as in and by the said deed of conveyance, duly executed, acknowledged and recorded, and now in the custody and possession of your oratrix, and ready to be produced and proven when and where this honorable court may direct, will, upon reference being there-

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Bill of Complaint.

unto had, more fully and at large appear, and to which when produced, your oratrix prays leave to refer, if it so be necessary to do.

And your oratrix further shows unto your Honor that on or about the 11th day of March, in the year of our Lord one thousand nine hundred and eleven, your oratrix and Niblo A. Palmer, her husband, became and were indebted unto John A. McFadden, guardian of Marie E. McFadden, an infant, in the sum of Thirty-five Hundred (\$3,500) Dollars, and being so indebted, your oratrix, and Niblo A. Palmer, her husband, in order to secure the payment of the said sum of money with interest, did make and execute, under their hands and seals and deliver unto the said John A. McFadden, guardian of Marie E. McFadden, an infant, as aforesaid, a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of Seven Thousand (\$7,000) Dollars, lawful money of the United States, with a condition thereunder written that if the said Florence E. Palmer and Niblo A. Palmer, her husband, their heirs, executors, or administrators, should well and truly pay or cause to be paid unto John A. McFadden, guardian, etc.; his successors in office, administrators or assigns, the just and full sum of Thirty-five Hundred (\$3,500) Dollars, lawful money aforesaid in one year from the date thereof, with interest for the same at the rate of five per cent. per annum, payable semi-annually without any fraud or other delay.

Then the said obligation should be void, otherwise to remain in full force and virtue, as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear. And your oratrix fur-

Bill of Complaint.

ther shows, that the said Florence E. Palmer and Niblo A. Palmer, her husband, in order to secure the payment of the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto John A. McFadden, guardian, etc.; a certain indenture of mortgage, bearing date the same day and year last aforesaid made by your oratrix, Florence E. Palmer and Niblo A. Palmer, her husband, party of the first part, and John McFadden, guardian, etc., party of the second part, in and by which said indenture of mortgage the said party of the first part did grant, bargain, sell, alien, release, convey and confirm unto the said John A. McFadden, guardian, etc., said party of the second part, his successors in office, heirs and assigns, all that lot of land and premises hereinabove described. Provided, always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said Florence E. Palmer and Niblo A. Palmer, her husband, party of the first part to the said indenture of mortgage their heirs, executors or administrators should well and truly pay, or cause to be paid, unto John A. McFadden, guardian, etc., or his successors in office, certain attorney or attorneys, administrators or assigns, the said sum of money mentioned in the condition of the aforesaid bond or obligation, with the interest thereof, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, then the said indenture of mortgage, and the estate thereby granted, should cease, determine, and from thenceforth be null and void. And your oratrix further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by

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Bill of Complaint.

the said John A. McFadden, guardian, etc., before Bernard S. Capen, a Master in Chancery of New Jersey, and duly recorded in the office of the Register in and for the said County of Union in Book 295 of Mortgages, page 108 on the 13th day of March, in the year one thousand nine hundred and eleven, as by the certificate of the Register of the said county, endorsed on the said indenture of mortgage, more fully appears, and to which your oratrix for greater certainty, begs leave to refer, if it be necessary so to do.

Your oratrix further shows that on or about the 21st day of August, one thousand nine hundred and twelve, the said John A. McFadden, guardian, etc., did file a bill in this honorable court, for the foreclosure of said mortgage; that your oratrix, through her counsel, filed an answer setting up a defense of usury, and that after a hearing upon said bill and answer it was on the 18th day of December, one thousand nine hundred and thirteen, ordered, that your oratrix pay unto said John A. McFadden, guardian, etc., the sum of Three Thousand Two Hundred and Twenty-five (\$3,225.00) Dollars, without costs, which sum was to be raised and paid out of said mortgaged premises.

Your oratrix further shows that on or about the 17th day of October, one thousand nine hundred and twelve, your oratrix entered into a contract with the Niagara Fire Insurance Company, a corporation duly authorized to do business under the laws of the State of New Jersey, to insure the said property against loss by fire in the sum of Three Thousand Five Hundred (\$3,500.00) Dollars, attached to which policy was a mortgagee clause in which the loss to the amount of Three Thousand Five Hundred (\$3,500.00) Dol-

Bill of Complaint.

lars, was to be paid to the said John A. McFadden, guardian, etc.

Your oratrix further shows that on the 20th day of December, one thousand nine hundred and twelve, the dwelling house and tenement on the said premises were completely destroyed by fire; that under the terms of the policy aforesaid, the said insurance became at once due and payable. 10

And your oratrix further shows that the said Niagara Fire Insurance Company, has paid to the said John A. McFadden, guardian, etc., the sum of Three Thousand Two Hundred and Twenty-five (\$3,225.00) Dollars, called for in said mortgage, together with interest on the same, and received therefor an assignment of the said bond and mortgage, which assignment is recorded in Book 56 of Assignments in the Register's office in and for the said County of Union, page 526. 20

And your oratrix further shows, unto your Honor, that having discovered the said mortgage had been paid by the said Niagara Fire Insurance Company, your oratrix by herself and her agents has frequently and in a friendly manner applied to the said Niagara Fire Insurance Company, requesting them to deliver up to your oratrix the said bond and mortgage as aforesaid, issued and delivered by your oratrix to the said John A. McFadden, guardian, etc., and by him assigned to the said Niagara Fire Insurance Company, as aforesaid, that the same might be cancelled and made void. 30

And your oratrix further shows that the said Niagara Fire Insurance Company is proceeding to sell the equity of redemption of your oratrix in the said premises, by virtue of the bill of foreclosure heretofore filed and under the decree heretofore entered by the said John A. McFadden, 40

Bill of Complaint.

guardian, etc.; and that the said premises have been advertised for sale on the 29th day of December, one thousand nine hundred and fifteen.

In tender consideration whereof, and foreas-
much as your oratrix is without adequate remedy
in the premises by the strict rules of the common
10 law, and without the aid and intervention of this
honorable court, where matters of this nature are
properly cognizable and relievable; to the end,
therefor, that the said defendants, John A. Mc-
Fadden, guardian, and the Niagara Fire Insur-
ance Company, may without oath, full, true, per-
fect and distinct answer, make to all and every
the matters aforesaid, and that as fully and par-
ticularly as if the same were here again repeated
and they thereto particularly interrogated, para-
20 graph by paragraph. And that the said bond or
obligation so as aforesaid executed and delivered
by your oratrix to the said defendant, John A.
McFadden, guardian, etc.; and the indenture of
mortgage so as aforesaid executed and delivered
by your oratrix, and Niblo A. Palmer, her hus-
band, to the said defendant, John A. McFadden,
guardian, etc.; and assigned to the defendant, Ni-
agara Fire Insurance Company, may be declared
30 null and void, and that the same may be delivered
up to be cancelled; and that in the meantime the
said defendants, John A. McFadden, guardian,
etc., and the Niagara Fire Insurance Company,
may be restrained by the order and injunction of
this honorable court, from commencing or prose-
cuting any action at law against your oratrix upon
the said securities or either of them, or from con-
tinuing the bill for the foreclosure of said inden-
ture of mortgage in this honorable court, or from
commencing any other proceedings thereon, or
40 from assigning and transferring the said securi-

Bill of Complaint.

ties or either of them to any other person or persons, or from in any other manner in anywise parting with the custody and possession of the same; and that the said Niagara Fire Insurance Company be directed and decreed to pay over to your oratrix the sum of Two Hundred and Seventy-five \$(275.00) Dollars, together with interest 10
 from the 4th day of December, one thousand nine hundred and fourteen, which is the balance due your oratrix on said policy of insurance, and that your oratrix may have such further or other relief in the premises as the nature and circumstances of the case may require, and to your Honor shall seem meet and agreeable to equity and good conscience.

May it please your Honor, the premises considered to grant unto your oratrix not only the state's writ of injunction issuing out of and under 20
 the seal of this honorable court to be directed to the said John A. McFadden, guardian, etc., and the Niagara Fire Insurance Company, restraining and enjoining them from carrying on said sale or commencing or prosecuting any action at law or in equity, against your oratrix upon the said bond or obligation and indenture of mortgage executed by your oratrix and Niblo A. Palmer, her husband, to the said John A. McFadden, 30
 guardian, etc., on the 11th day of March, one thousand nine hundred and eleven, or from continuing with the bill of foreclosure of said indenture of mortgage, or from commencing any other proceedings thereon, or from assigning and transferring said bond and indenture of mortgage to any other person or persons, or from in any other manner in anywise parting with the custody and possession of the same, but also the state's writ of subpoena issuing out of and under the seal of 40

Bill of Complaint.

10 this honorable court, to be directed to the said John A. McFadden, guardian, etc., and the Niagara Fire Insurance Company, therein and thereby commanding them, on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this honorable court, then and there to answer the premises and to stand to, abide and perform such decree therein as to your Honor shall seem meet, etc.

And your oratrix as in duty bound, will ever pray, etc.

Solicitor for

Of Counsel with Complainant.

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Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss:

Florence E. Palmer, the above named petitioner, being duly sworn according to law, deposes and says:

30 That on or about the 11th day of March, one thousand nine hundred and eleven, this deponent with her husband, Niblo A. Palmer, made, executed and delivered a certain bond and mortgage to one John A. McFadden, guardian of Marie E. McFadden, an infant, to secure the sum of Three Thousand Five Hundred (\$3,500.00) Dollars.

40 Deponent further says that on or about the 21st day of August, one thousand nine hundred and twelve, the said John A. McFadden, guardian, etc., filed a bill for the foreclosure of the said mortgage; that an answer was filed by this deponent,

Bill of Complaint.

through her attorney, alleging usury and upon a hearing of said bill and answer, it was on the 18th day of December, one thousand nine hundred and thirteen, ordered, that deponent pay to the said John A. McFadden, guardian, etc., the sum of Three Thousand Two Hundred and Twenty-five (\$3,225.00) Dollars, without costs, which was to be raised out of the said mortgaged premises. 10

Deponent further says, that on or about the 17th day of October, one thousand nine hundred and twelve, deponent insured the mortgaged premises against loss by fire with the Niagara Fire Insurance Company, of the State of New Jersey, in the sum of Three Thousand Five Hundred (\$3,500.00) Dollars, attached to which policy was a mortgagee clause making loss, if any, payable to the said John A. McFadden, guardian, etc. 20

Deponent further says that on or about the 20th day of December, one thousand nine hundred and twelve, the dwelling house and tenement on said premises were completely destroyed by fire.

Deponent further says, that the said Niagara Fire Insurance Company has paid to the said John A. McFadden, guardian, etc., the said sum of Three Thousand Two Hundred and Twenty-five (\$3,225.00) Dollars, called for in said mortgage, and that they received therefor an assignment of said bond and mortgage, which assignment is recorded in the Register's office of Union County. 30

Deponent further says, that the said Niagara Fire Insurance Company is proceeding with a foreclosure of the said mortgaged premises, and that said premises have been advertised for sale for Wednesday, December 29th, one thousand nine hundred and fifteen. 40

Answer of Niagara Fire Insurance Company.

Deponent further says, that she verily believes that the said Niagara Fire Insurance Company intend to proceed with the sale of the said mortgaged premises on the above mentioned date, and she will be greatly harmed thereby.

10 Sworn and subscribed to
before me this 28th day of
December A. D., 1915.

Answer of Defendant, Niagara Fire Insurance Company.

Filed January 29, 1916.

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The answer of the Niagara Fire Insurance Company of the City of New York, one of the defendants in the above entitled cause, to the bill of complaint of Florence E. Palmer, complainant.

This defendant, answering unto so much and such parts of the complainant's bill of complaint as it is advised it is material and necessary for it to make answer unto, says:

30 1. It admits the allegations of the first, second and third paragraphs of said bill of complaint.

2. It admits that on or about October 17, 1912, a contract of insurance was entered into by it with the complainant and Sidney W. Eldridge, as their respective interests might appear, insuring the property described in the first paragraph of the said bill of complaint against all direct loss or damage by fire, except as therein provided, to an amount not exceeding \$3,500 to the property
40 described in the said policy while located and con-

Answer of Niagara Fire Insurance Company.

tained as described therein and not elsewhere. A true copy of said policy of insurance and of all endorsements and riders at any time placed thereon or attached thereto is hereto annexed and made a part hereof and marked "Schedule A," to which, or to the original of said policy in the possession of this defendant, ready to be produced and proved as directed by your Honor, reference is hereby made. Further answering this defendant says that by proper rider or endorsement attached to said policy of insurance, dated December 2, 1912, and duly issued on that day, it was provided that:

"The interest in this policy is now vested in Florence E. Palmer, as owner and not as heretofore; loss, if any, payable as before."

It admits that there was also attached to said policy of insurance, by proper rider or endorsement, dated October 17, 1912, and duly issued on that day, the standard mortgagee clause, and says that in and by said clause it was provided as follows:

"New York and New Jersey Standard,
MORTGAGEE CLAUSE.

Loss or damage, if any, under this policy, shall be payable to John A. McFadden, Guardian of Marie E. McFadden, Infant, as first mortgagee (or trustee) as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the

Answer of Niagara Fire Insurance Company.

occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

10 Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

20 This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

30 Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and

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Answer of Niagara Fire Insurance Company.

shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgage (or trustee) to recover the full amount of his claim.

Dated October 17th, 1912.

Attached to and forming part of policy No. 147819 of the Niagara Fire Ins. Co. of New York. 10

ERNEST A. LYON,
Mgr.”

Further answering this, defendant says that said policy of insurance also contained 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 an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers covering such property, and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon, or attached or appended hereto.” 20 30

3. It denies the allegations of the fifth paragraph of said bill of complaint, except that it admits that on or about December 20, 1912, the dwelling house and tenement mentioned in the said paragraph were damaged by fire.

4. It admits that it has paid to John A. McFadden, guardian of Marie E. McFadden, an infant, one of the defendants in this suit, \$3,225, being the amount declared to be due by the final decree 40

Answer of Niagara Fire Insurance Company.

in the foreclosure suit referred to in the third paragraph of said bill of complaint, together with interest thereon from the date of said final decree to December 17, 1914, the date of said payment, the total amount so paid being \$3,416.67. It admits that upon making such payment said John

10 A. McFadden, guardian as aforesaid, duly executed and delivered to it a proper assignment of said bond and mortgage, which was thereafter recorded as alleged in said sixth paragraph of said bill of complaint. Further answering, this defendant says that at the time of making the said payments, it also received from said John

20 A. McFadden, guardian, the original of said bond and mortgage; a duplicate receipt duly executed by said John A. McFadden, guardian as aforesaid, a true copy of which is attached to said "Schedule A" hereto annexed; a subrogation receipt duly executed by said guardian, a true copy of which is attached to said "Schedule A"; the original of said policy of insurance issued by this defendant, a true copy of which is attached hereto as "Schedule A," and the duly executed and acknowledged assignment to it of all of the right, title and interest of the said John A. McFadden, guardian as aforesaid, in and to the said final

30 decree in the said foreclosure suit and of all sums of money due or to become due thereon. Further answering, this defendant says that such proceedings were thereafter taken in said foreclosure suit that this defendant became substituted by order of this honorable Court as complainant in said suit in the place and stead of said John A. McFadden, guardian as aforesaid, all of which will more fully and at large appear from the files of this court in said cause pending in this court, wherein

40 John A. McFadden, guardian as aforesaid, is

Answer of Niagara Fire Insurance Company.

complainant and Florence E. Palmer and others are defendants, to which reference is hereby made.

5. It denies that as alleged in the seventh paragraph of said bill of complaint, the said mortgage therein mentioned has been paid. It admits that the complainant has requested it to deliver up to her the bond and mortgage mentioned in said bill of complaint. 10

6. It admits that after the substitution of this defendant as complainant in the foreclosure suit mentioned in the said bill of complaint, this defendant caused such proceedings to be taken in such foreclosure suit that a writ of *feri facias* was duly issued therein directed to the Sheriff of the County of Union, commanding him to make sale of the mortgaged premises as therein stated, as will more fully and at large appear from the files of this court in said foreclosure suit to which reference is hereby made. Further answering, this defendant says that said writ of *feri facias* is returnable on February 23, 1916, and that the sale thereunder originally advertised, as required by the rules and practice of this court in such cases, to be held on December 29, 1915, has been adjourned by reason of the restraint contained in the order made in this cause on December 28, 1915. 20 30

7. Further answering, this defendant says that at the time of the fire loss mentioned in the bill of complaint herein, the property damaged by said fire was also insured against direct loss or damage by fire to an amount not exceeding \$6,000 by the Scottish Union and National Insurance Company of Edinburg, and to an additional amount not exceeding \$5,000 by the Northern Insurance Company of New York, and that at the time of 40

Answer of Niagara Fire Insurance Company.

the occurrence of said fire loss, the total aggregate amount of insurance upon the property so damaged by fire was \$14,500.

10 8. Further answering, this defendant says that after the occurrence of the said fire loss and on or about January 20, 1913, an appraisal award of the sound value of the property destroyed and of the loss occasioned by said fire was made, as provided in the said policies of insurance; that by said appraisal award the amount of the sound value of the property insured was found to be \$6,006.26 and the amount of the loss occasioned by said fire \$5,205.82.

20 9. Further answering, this defendant says that it is informed and believes that after the making of said appraisal award the said Scottish Union and National Insurance Company of Edinburg and the said Northern Insurance Company of New York each paid the complainant herein or her nominee their respective pro-rata shares of said fire loss.

30 10. Further answering, this defendant says that it is advised and believes and therefore charges that its total liability to said complainant under its said policy occasioned by reason of said fire was a sum equal to the proportion of \$5,205.82 (the total loss to said complainant fixed and determined by said appraisal award), which \$3,500 (the total amount of this defendant's policy) bears to \$14,500 (the total amount of insurance on said property at the time of said loss), and that said sum is \$1,256.60.

40 11. Further answering, this defendant says that it is advised and believes and therefore charges that it is entitled to proceed with the sale of said mortgaged premises under said writ of *feri facias*

Answer of Niagara Fire Insurance Company.

and that upon said sale it is only bound to credit on said bond and mortgage said sum of \$1,256.60, together with proper allowances of interest thereon, and that after deducting from the proceeds of said sale said sum of \$1,256.60, together with proper allowances of interest thereon, it may retain for its own use and benefit the difference between said sum and interest and the amount paid as aforesaid to said John A. McFadden, guardian as aforesaid, together with proper allowances of interest thereon and the costs and expenses of said sale, paying the balance, if any, of the proceeds of said sale to such other persons as may be entitled thereto by law. 10

Wherefore, this defendant prays that it may be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained. 20

LINDABURY, DEPUE & FAULKES,
*Solicitors for and of Counsel with Niagara Fire
 Insurance Company of the City of New York.*LL

Copy of Exhibit C 1 attached.

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Replication.

Replication.

Filed February 10, 1916.

10 In reply to the defense stated in paragraphs 8 and 9 of the defendant "The Niagara Fire Insurance Company of the City of New York," answer and not anticipated in the Bill of Complaint, complainant, by leave of Court, says that:

1. That there was an appraisal award as set forth in paragraph 8, but denies that it was for the sums and in the proportions mentioned and further answering says that prior to the making of said appraisal award, an agreement was entered into between the Scottish Union and National Insurance Company of Edinburgh, The Northern Insurance Company of New York, The
20 Niagara Fire Insurance Company of the City of New York and this complainant, by the terms of which none of the parties were to be bound, if the said appraisal award was not satisfactory to all the parties and complainant declared herself dissatisfied with said appraisal.

2. Complainant further says that after expressing her dissatisfaction with such appraisal award, she brought suit in the New Jersey Supreme Court
30 at the Union Circuit against the said Scottish Union and National Insurance Company of Edinburgh and Northern Insurance Company of New York and obtained a judgment in said court against the said Scottish Union and National of Edinburgh in the sum of \$2,460.00 damages and \$57.12 costs; and against the said Northern Insurance Company of New York in the sum of \$2,100.00 damages and \$65.07 costs, as will more
40 fully and at large appear upon inspection of the record on file with the Clerk of the New Jersey

Replication.

Supreme Court in the suits of Florence E. Palmer, plaintiff, and Scottish Union and National Insurance Company of Edinburgh, defendant, and Florence E. Palmer, plaintiff, and Northern Insurance Company of New York, defendant, to which reference is hereby made.

Complainant joins issue upon the remainder of the answer. 10

WILLIAM E. REIBEL,
Solicitor of Complainant.

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Testimony.

Testimony.

10 Transcript of testimony and proceedings in the above entitled cause, before Hon. John E. Foster, Vice Chancellor, at the Chancellor Chambers, Newark, New Jersey, on April 17, 1916, at 10 A. M.

Appearances:

Mr. Harry J. Weiner and Mr. William F. Reibel for complainant.

Mr. John William Bishop, Jr., representing Lindabury, Depue & Faulks, for defendants.

20 *Mr. Weiner.* It is admitted that the Niagara Insurance Company issued its policy No. 147819, and it is consented that the policy be offered in evidence, together with the endorsements and the two receipts attached to it—and the receipts attached to the policy showing payments by the Insurance Company.

(Marked Exhibit C 1.)

30 *Mr. Weiner.* I offer the bond and mortgage set out in the bill and the assignment to the Niagara Fire Insurance Company. The bond and mortgage is made by Florence E. Palmer and Niblo A. Palmer to James A. McFadden, guardian of Marie E. McFadden, an infant, conditioned for the payment of \$3,500, covering property on Madison avenue, and described in the mortgage, and is recorded in Book 295 of Mortgages for Union County, pages 108, &c.

(Marked Exhibits C 2 and C 3.)

40 *Mr. Weiner.* I now offer in evidence the assignment of mortgage from John A. McFadden, guardian of Marie McFadden, to the Niagara Fire Insurance Company, dated December

Testimony.

4, 1914, and recorded in Book 56 of Assignments of Mortgages for Union County, pages 526 &c., assigning the mortgage marked as Exhibit C 3, stating that there is now due \$3,225, together with interest from the 18th of December, 1913.

(Marked Exhibit C 4.)

It is admitted that the final decree in the foreclosure suit brought by John A. McFadden, guardian, &c., on the bond and mortgage C 2 and C 3, was assigned to the Niagara Fire Insurance Company by assignment dated December 4, 1914, on the payment of \$3,416.67, and that the said assignment was duly filed with the Clerk of this Court, and such proceedings were thereafter had in foreclosure suit; that the Niagara Fire Insurance Company was substituted as complainant therein, in the place and stead of the said John A. McFadden, guardian, &c., and that an execution was thereafter duly issued and placed in the hands of the sheriff, and the mortgaged premises were advertised for sale, which sale was restrained by an order made in these proceedings.

It is admitted that on the twentieth of December, 1912, a fire occurred on the insured premises, and that at the time of the fire there were three fire insurance policies in force covering the insured premises; one for \$6,000, issued by the Scottish Union and National Insurance Company of Edinburgh, and one for \$5,000 by the Northern Insurance Company of New York, and one for \$3,500 by the Niagara Insurance Company, the defendant. This latter policy having endorsed thereon and attached thereto the standard mortgagee clause, making loss, if any, first payable to John A. McFadden, mortgagee,

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Testimony.

as the same may appear, and the other two policies having no such mortgagee clause attached.

10 It is admitted that the complainant's loss was appraised at \$5,205.82, and the sound value of the property was appraised at \$6,006.26, under an agreement made between Miss McFadden, or
 10 her representative, and the Niagara Fire Insurance Company, and its representative and also the representatives of the other insurance companies, and that the complainant claims that by the terms of this agreement of appraisal, she reserved the right not to be bound by the finding of the appraisal, either as to the amount of the loss or the sound value of the property.

20 *Mr. Weiner.* I offer in evidence certified copy of the record in the action brought in the New Jersey Supreme Court by Florence E. Palmer against the Northern Insurance Company of New York for the recovery of the amount due on the policy of insurance issued by that company for \$5,000, covering the premises in question, and showing judgment was obtained against the company in favor of the complainant for \$2,100 damages and \$65.07 costs, the date of judgment being November 8, 1915; also showing that the judgment has been paid.

30 (Marked Exhibit C 5.)

Mr. Weiner. I offer certified copy of the record in an action brought in the New Jersey Supreme Court by Florence E. Palmer against the Scottish Union and National Insurance Company on its policy of \$6,000, showing judgment was obtained for \$2,460 damages and \$57.12 costs; judgment was entered November 5, 1915; satisfied December 8, 1915.

40 (Marked Exhibit C 6.)

Niblo A. Palmer, direct.

Mr. Weiner. I also offer in evidence appraisal agreement dated 17th day of February, 1913.

(Marked Exhibit C 7.)

It is also admitted that from the amount recovered on the two judgments mentioned against the two insurance companies \$1,785 has been deposited with Newton P. Kinsey, under an agreement which is set out in the affidavit of Mr. Lyons filed in this court.

10

Mr. Weiner. I also offer in evidence the non-waiver agreement dated February 17, 1913, between Florence E. Palmer, of the first part, and the defendant, Niagara Fire Insurance Company, and others, of the second part.

(Marked Exhibit C 8.)

20

NIBLO A. PALMER, sworn for complainant.

Direct examination by Mr. Weiner.

Q You are the husband of Florence E. Palmer, the complainant in this case? A Yes, sir.

Q Your wife was the owner of property No. 841 and 843 Madison avenue, Elizabeth, New Jersey? A Yes.

Q On December 20, 1912, was there a fire there? A Yes, sir.

30

Q Just tell us what was destroyed there? A The property was all destroyed.

Q What did the property consist of? A There was a seventeen-room mansion house; the main part is 22x20, I believe, or 21, and the extension between 22 and 23; three stories high; it was all the improvements in that house.

40

John Benjamin Beatty, direct.

By the Court.

Q Were there any other buildings on the plot besides the dwelling house? A No.

By the Court.

10 Q No barn or garage? A No.

Q You say it was entirely destroyed by fire?
A Yes, sir.

No cross examination.

It is admitted that the company has paid no money to the complainant on account of the loss under this policy, except the money paid under the insurance policy to Mr. McFadden for the assignment of the bond and mortgage and decree.

20 Complainant rests.

JOHN BENJAMIN BEATTY, sworn for defendants.

Direct examination by Mr. Bishop.

Q Where do you live? A 15 North Reid street, Elizabeth, New Jersey.

Q What is your business? A Architect.

30 Q How long have you been an architect? A
A good many years.

Q In business in Elizabeth? A For a good many years back.

Q Do you recognize this paper, Exhibit C 7, being the appraisal agreement? A Yes.

Q Is that your signature to the paragraph entitled Declaration of Appraisers? A Yes.

Q I also ask you if that is your signature to the portion of it entitled "Award"? A Yes.

40 Q Were you sworn at the time you made this appraisal? A Yes.

John Benjamin Beatty, direct.

Q And you acted under oath? A Yes.

Q Did you make an examination of the property referred to? A Yes, several.

Q I call your attention to the fact that in the award, the value of the property is stated at \$6,006.26? A Yes.

Q Is that a correct statement of the figures arrived at by the three appraisers? 10

Mr. Weiner. I object, the paper speaks for itself.

Court. It is offered by both sides; why do you question it?

Q Is that a fair statement of the sound value of the property? A I should judge so.

Court. It is offered by both sides; I presume they performed their duty under the oath; that will be the presumption, unless there is something shown to the contrary. 20

No cross examination.

BOTH SIDES REST.

30

40

*Exhibit C. 1.***EXHIBITS.****Exhibit C. 1.**

No. 147819.

10 NIAGARA FIRE INSURANCE COMPANY,
NEW YORK.

Cash Capital \$1,000,000.

Amount \$3,500, rate .30, premium \$10.50.

In consideration of the stipulations herein named and of ten and 50/100 dollars premium, does insure Sidney W. Eldridge and Florence E. Palmer, as their respective interests may appear, for the term of one year, from the 17th day of October, 1912, at noon to the 17th day of October, 1913, at noon against all direct loss or
20 damage by fire, except as hereinafter provided, to an amount not exceeding thirty-five hundred and 00/100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

Printed form attached to and forming part of this policy, No. 147819.

DWELLING HOUSE FORM.

30 \$3,500....on....frame....building with adjoining and communicating additions, including foundations, heating apparatus, piping, plumbing, and other permanent fixtures, while occupied as a dwelling, situate Nos. 841-843½ Madison avenue, corner of Fanny street, Elizabeth, N. J.

It is understood and agreed that foreclosure proceedings have commenced.

40 Privilege for mechanics to make ordinary alterations and repairs, but it is understood and

Exhibit C. 1.

agreed that extraordinary alterations, repairs, or additions are prohibited without notice to, and consent of this company in writing.

NEW YORK AND NEW JERSEY
STANDARD LIGHTNING CLAUSE.

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 wind storm) 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.

Other insurance permitted without notice until required.

Attached to and forming part of Policy No. 147819 of the Niagara Fire Insurance Company, New York.

NEWARK BRANCH,

ERNEST A. LYON,
Mgr.

Niagara Building, 185 Market street.

Printed form attached to and forming part of this policy No. 147819.

New York and New Jersey Standard,

MORTGAGEE CLAUSE.

Loss or damage, if any, under this policy, shall be payable to John McFadden, guardian of Marie E. McFadden, infant, as first mortgagee

Exhibit C. 1.

(or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

PROVIDED, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time, as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of

Exhibit C. 1.

such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim. 10

Dated October 17th, 1912.

Attached to and forming part of policy No. 147819 of the Niagara Fire Insurance Co., New York.

ERNEST A. LYON, 20
Mgr.

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 30
40

Exhibit C. 1.

exist or be claimed by the insured unless so written or attached.

“Provisions required by law to be stated in this policy.”—This policy is in a stock corporation, and is issued under and in pursuance of sections 130, 131 and 132 of the Insurance Law
10 of the State of New York.

IN WITNESS WHEREOF, this company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of the company at Newark, N. J.

HAROLD HERRICK,
President.

GEORGE W. DEWEY,
Secretary.

20 Countersigned at Newark, N. J., this 9th day of November, 1912.

(Signed) ERNEST A. LYON,
Manager.

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
30 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 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
40 policy shall be payable sixty days after due no-

Exhibit C. 1.

tice, 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 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. 10

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. 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; 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 in- 30 40

Exhibit C. 1.

terest 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
10 the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or
20 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
30 any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten
40 days.

Exhibit C. 1.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. 10

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. 20

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described. 30

If an application, survey, plan, or description of property be referred to in this policy it 40

Exhibit C. 1.

shall be a part of this contract and a warranty by the insured.

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

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

40 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 value of property remaining in the

Exhibit C. 1.

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 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. 10

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were 20 30 40

Exhibit C. 1.

occupied at the time of fire; and shall furnish, if required, 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
10 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.

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
20 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 to be made.

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

Exhibit C. 1.

bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. 10

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon. 20 30

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. 40-

Exhibit C. 1.

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."

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

Printed form attached to and forming part of this policy.

December 2nd, 1912.

The interest in this policy is now vested in Florence E. Palmer, as owner and not as heretofore; loss, if any, payable as before.

30 Attached to policy No. 147819 of the Niagara Fire Insurance Company.

ERNEST A. LYON,
Mgr.

SUBROGATION RECEIPT.

40 Received of the Niagara Fire Insurance Company, New York, by the hand of Ernest A. Lyon, manager, the sum of Thirty-four Hundred and Sixteen and 67/100 Dollars, being in full of all claims and demands for loss and damage

Exhibit C. 1.

by fire on the 20th day of December, 1912, to the property insured by policy No. 147819, issued at the Newark, New Jersey (branch office) agency of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons or property, arising from or connected with such loss or damage (and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons or property in the premises), to the extent of the amount above named and does hereby authorize the said Niagara Fire Insurance Company, in my name or otherwise, to ask, demand, sue for, attach, levy, recover, and receive all such sum or sums of money, and the same to have and enjoy to its own use, due or to grow due upon said claims and demands as fully to all intents and purposes as I might or could do if personally present. But at its own proper costs and charges.

Dated this 18th day of December, 1914, at Newark, New Jersey.

(Signed) JOHN A. McFADDEN,
Guardian of Marie E. McFadden, infant.
 [L. s.]

This duplicate of receipt to be signed by all parties in interest and attached to policy.
 \$3,416.67

Newark, New Jersey, December 17, 1914.

Received of The Niagara Fire Insurance Company a sight draft for the sum of thirty-four hundred and sixteen and 67/100 dollars, which when paid will be in full satisfaction compromise and indemnity of all claims and demands for loss

Exhibit C. 2.

and damage by fire on the 20th day of December, 1912, to the property insured by policy No. 147819, issued at the Newark, New Jersey (branch office) agency of said company and said policy is hereby canceled and surrendered to said company.

10 (Signed) JOHN A. McFADDEN,
Guardian of Marie E. McFadden, infant.

Claim, \$3,416.67.

Less interest, \$. \$3,416.67.

Exhibit C. 2.

KNOW ALL MEN BY THESE PRESENTS,
That we, Florence E. Palmer and Niblo A.
20 Palmer, are held and firmly bound unto John
A. McFadden, guardian of Marie E. McFadden,
an infant, in the sum of seven thousand dollars,
lawful money of the United States of America, to
be paid to the said John A. McFadden, guardian
as aforesaid or to his successors or assigns; to
which payment well and truly to be made, we
bind ourselves, our heirs, executors and adminis-
trators, jointly and severally, firmly by these
presents. Sealed with our seals and dated the
30 eleventh day of March in the year of Our Lord
One Thousand Nine Hundred and Eleven.

The condition of this obligation is such, that
if the above bounden Florence E. Palmer and
Niblo A. Palmer, their heirs, executors, adminis-
trators, or any of them, shall and do well and
truly pay, or cause to be paid, unto the above
mentioned John A. McFadden, guardian as
aforesaid, or to his successors or assigns, the
40 just and full sum of three thousand five hundred
dollars, lawful money aforesaid in one year

Exhibit C. 3.

from the date hereof with interest for the same at the rate of five per cent. per annum, payable semi-annually, without any fraud or other delay, then this obligation to be void, or else to be and remain in full force and virtue.

FLORENCE E. PALMER, [L. s.] 10
NIBLO A. PALMER, [L. s.]

Sealed and delivered
in the presence of

BERNARD S. CAPEN.

Exhibit C. 3.

THIS INDENTURE,

Made the eleventh day of March, in the year of our Lord One Thousand Nine Hundred and Eleven, between Florence E. Palmer and Niblo A. Palmer, her husband, of the city of Elizabeth, in the County of Union, and State of New Jersey, of the first part; and John A. McFadden, guardian of Marie E. McFadden, an infant, of the city of Newark, in the County of Essex, and State of New Jersey, of the second part: 20

Witnesseth, That the said party of the first part, for and in consideration of the sum of three thousand five hundred dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents, do give, grant, bargain, sell, 30 40

Exhibit C. 3.

alien, enfeoff, convey and confirm to the said party of the second part and to his successors and assigns forever, all that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the city of Elizabeth, in the County of Union and State of

10 New Jersey.

BEGINNING at a corner formed by the intersection of the southerly line of Fanny street and the easterly line of Madison avenue; thence running southerly along said easterly line of Madison avenue sixty-two feet; thence easterly and parallel with said southerly line of Fanny street one hundred and seventy feet; thence northerly and parallel with the first course sixty-two feet to said line of Fanny street; thence

20 westerly along that line one hundred and seventy feet to the place of BEGINNING.

Being the same premises conveyed to Florence E. Palmer by Charles E. Hill and Maud S. Swords, administrators with the will annexed of Robert S. Swords, by deed dated the ninth day of March, 1906, and recorded in the Register's Office of the County of Union in book 475 of deeds for said county on pages 3 &c.

And should any default be made in the pay-

30 ment of interest due on account of this mortgage, and remain unpaid for the space of thirty days, then and in that event, the principal sum secured by this mortgage shall become due and payable immediately upon said default, anything herein contained to the contrary, notwithstanding.

Together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging, or in anywise

40 appertaining. Also, all the estate, right, title, in-

Exhibit C. 3.

terest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof: To have and to hold all and singular the above described tract or lot of land and premises, with the appurtenances, unto the said party of the second part, his successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, his successors and assigns forever. 10

Provided, always, and it is agreed by and between the parties to these presents, that if the said Florence E. Palmer and Niblo A. Palmer, her husband, their heirs, executors, or administrators, do and shall well and truly pay or cause to be paid, to the said party of the second part, or to his successors or assigns, the sum of three thousand five hundred dollars, in one year from the date hereof, with lawful interest for the same, at the rate of five per centum per annum, payable semi-annually, according to the condition of a certain bond bearing even date herewith, in the penal sum of seven thousand dollars, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever; then and from thereof, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained, to the contrary in anywise notwithstanding. 20 30

And the said party of the first part, their heirs, executors and administrators, do covenant and grant to and with the said party of the second part, his successors and assigns, that the said party of the first part, their heirs and assigns, shall not nor will claim or demand or be entitled to receive any credit or credits on the 40

Exhibit C. 3.

interest payable hereon or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; and that the said party of the second part,
10 his successors and assigns, shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, their heirs or assigns, or of any other person or persons whatsoever.
20

And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible insurance company or companies, to an amount not less than three thousand five hundred dollars, and assign the policy and certificate thereof to the said party of the
30 second part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the second part, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand with legal interest.

Exhibit C. 3.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

FLORENCE E. PALMER, [L. s.]
NIBLO A. PALMER, [L. s.]

Signed, sealed and delivered 10
in the presence of
BERNARD S. CAPEN.

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

Be It Remembered, That on this eleventh day of March, in the year of Our Lord One Thousand Nine Hundred and Eleven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Florence E. Palmer and Niblo A. Palmer, her husband, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Florence E. Palmer, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband. 20
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BERNARD S. CAPEN,
Master in Chancery of New Jersey.

*Exhibit C. 4.***Exhibit C. 4.**

KNOW ALL MEN BY THESE PRESENTS,
That I, John A. McFadden, guardian of Marie
E. McFadden, party of the first part, in consid-
eration of the sum of one dollar and other good
and valuable consideration, lawful money of the
10 United States of America, to him in hand paid
by The Niagara Fire Insurance Company, a
corporation, party of the second part, at or be-
fore the ensealing and delivery of these pres-
ents, the receipt whereof is hereby acknowledged,
have granted, bargained, sold, assigned, trans-
ferred and set over and by these presents do
grant, bargain, sell, assign, transfer and set over
unto the said party of the second part a certain
Indenture of Mortgage, bearing date the eleventh
20 day of March, One Thousand Nine Hundred and
Eleven, made by Florence E. Palmer and Niblo
A. Palmer, her husband, on lands in Elizabeth,
N. J., to secure the payment of the sum of three
thousand five hundred dollars, which mortgage
is recorded in the Register's office of the County
of Union in Book 295 of Mortgages, pages 108,
etc. Together with the bond or obligation
therein described, and the money due and to
30 grow due thereon, with the interest. To have
and to hold, the same unto the said party of the
second part, its successors or assigns for its and
their uses forever, subject only to the proviso
in the said Indenture of Mortgage mentioned:
And I do hereby make, constitute and appoint
the said party of the second part, its successors
or assigns my true and lawful attorney, irrevoc-
able, in my name, or otherwise, but at its or
their proper costs and charges, to have, use
and take all lawful ways and means for the re-
40 covery of all the said money and interest; and

Exhibit C. 4.

in case of payment, to discharge the same as fully as it might or could do if these presents were not made: And I do hereby covenant, promise and agree, to and with the said party of the second part, its successors and assigns, that there is now due and owing upon the said bond and mortgage the sum of three thousand two hundred and twenty-five dollars, together with interest from the eighteenth day of December, Nineteen Hundred and Thirteen. 10

In Witness Whereof, I have hereunto set my hand and seal the fourth day of December, in the year of Our Lord One Thousand Nine Hundred and Fourteen.

JOHN A. McFADDEN,
Guardian of Marie E. McFadden.

Signed, Sealed and Delivered
in the presence of
JOSEPH J. PALLITTA. 20

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } s:

Be It Remembered, That on this eighth day of December in the year of Our Lord One Thousand Nine Hundred and Fourteen, before me, an Attorney at Law of the State of New Jersey, personally appeared John A. McFadden, guardian of Marie E. McFadden, who, I am satisfied is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did then acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 30

JOSEPH J. PALLITTA,
Attorney at Law. 40

Exhibit C. 5.

Exhibit C. 5.

THE STATE OF NEW JERSEY to Northern Insurance Company of New York.

[L. s.] YOU ARE SUMMONED to answer the annexed complaint of Florence E. Palmer in an action at law in the
 10 Supreme Court and take notice that unless you file your answer in said Complaint with the Clerk of the said 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 (And see endorsement hereon.)

20 WITNESS, William S. Gummere, Chief Justice of the said Court at Trenton, this twenty-fifth day of April, Nineteen Hundred and Thirteen.

WILLIAM C. GEBHARDT,
Clerk.

W. D. WOLFSKEIL,
Attorney.

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Exhibit C. 5.

NEW JERSEY SUPREME COURT.

FLORENCE E. PALMER, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> NORTHERN INSURANCE COMPANY OF NEW YORK, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>On Contract.</i> <i>Complaint.</i>	10
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Plaintiff, residing at No. 1073 Fanny street, Elizabeth, New Jersey, says that:—

1. Plaintiff was the owner of a dwelling house known as No. 841 Madison avenue, Elizabeth, New Jersey, at the time of its insurance, and of the fire herein stated.

2. On November 14th, 1912, the defendant was, and still is, a corporation duly incorporated with power to insure risks by fire.

3. On that day, in consideration of \$12.00 to it paid, the defendant executed to plaintiff a policy of insurance on said house, a copy of which is hereto annexed.

4. On December 20th, 1912 said house was totally destroyed by fire.

5. Plaintiff's loss thereby was \$14,500.00.

6. On January 21st, 1913, plaintiff furnished defendant with proof of her loss and interest in said property, and otherwise duly performed all the conditions of said policy on her part.

Plaintiff demands \$5,000.00 damages.

W. D. WOLFSKEIL,
Attorney of Plaintiff.

Exhibit C. 5.

The following is a copy of the policy of insurance mentioned in the within complaint.

STOCK COMPANY.

No. 56891. \$5,000.00.

NORTHERN INSURANCE COMPANY OF NEW YORK.

10 In consideration of the stipulations herein named and of Twelve Dollars Premium does insure Florence E. Palmer for the term of One Year from the 14th day of November, 1912, at noon, to the 14th day of November, 1913, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding FIVE THOUSAND DOLLARS, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

20 F. 81 N. Middle States.

\$5,000 on the three-story frame dwelling house and additions, including decorations and frescoes on walls and ceilings, plate and stained glass in doors and windows, heating and electric apparatus, stoops, sidewalks, fences and yard fixtures, and all permanent fixtures contained in or attached to said building, situate No. 841 Madison avenue, Elizabeth, N. J. Other insurance permitted.

30 Loss, if any, payable to.....Mortgagee.

Subject to clause hereto attached.

40 Privilege is granted to make ordinary alterations and repairs, it being expressly agreed and made a condition of this policy that extraordinary alterations, additions and repairs shall not be made in or upon the premises insured or containing the property insured, without the consent of this company endorsed on this policy.

Exhibit C. 5.

STANDARD PERMIT FOR USE OF ELECTRICITY.

Underwriters' Association of the Middle Department.

This permit is issued and the same is hereby accepted with the understanding that it shall not (in whole or in part) be held, implied or construed to mean that dynamos, exciters, lamps, switches, motors or other electrical appliances or devices are insured when not specifically mentioned in form of policy. 10

Permission is granted under this policy for the use of the electric current in accordance with Certificate No. issued by the secretary or authorized representative of this association.

It is warranted by the assured, that no change, alteration and or additions shall be made without written notice to said Underwriters' Association of the Middle Department; such changes, alterations or additions when made to be subject to its approval. 20

DYNAMO CLAUSE.

This insurance excludes any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices such as may be caused by electrical currents artificial or natural, and will be liable only for such loss or damage to them as may occur in consequence of fire outside of the machines themselves. 30

LIGHTNING CLAUSE.

(Excluding damage to electrical apparatus.)

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 40

Exhibit C. 5.

in the property and subject in all other respects to the terms and conditions of this policy. Provided, however, that 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
 10 such other insurance be against direct loss by lightning or not; and provided, further, that if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

20 Other insurance permitted without notice until requested.

\$5,000 at 24% per cent. 12 months from November 14th, 1912.

Attached to and forming part of Policy No. 56891 of the Northern Ins. Co. of N. Y.

CLARENCE SEWARD,
Agent.

30 This policy is made and accepted subject 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
 40 added hereto; and as to such provisions and

Exhibit C. 5.

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. 10

IN WITNESS WHEREOF this company has executed and attested these presents this 14th day of November, 1912.

LEANDER N. LOWELL,
President.

JAMES MARSHALL,
Secretary.

This policy shall not be valid until countersigned by the duly authorized agent of the company at Cranford, N. J. 20

CLARENCE SEWARD,
Agent.

Countersigned by C.
JUD.

Stipulations and conditions forming part of this policy:

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for 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 they differ, then by 30
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Exhibit C. 5.

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

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

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or, if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it

Exhibit C. 5.

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

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Exhibit C. 5.

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

10 This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire en-
 20 sues, 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.

30 This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater
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Exhibit C. 5.

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.

This policy shall be cancelled 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 cancelled 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 cancelled by this company by giving notice it shall retain only the pro rata premium. 20 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 as shall be written upon, attached, or appended hereto. 40

Exhibit C. 5.

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 value of property remaining in the original location, shall, for the ensuing
10 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 hereby insured shall bear to the total insurance on the whole property at the time of fire,
20 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 the amount claimed thereon; and,
30 within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip-
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Exhibit C. 5.

tions 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, 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.

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 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

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Exhibit C. 5.

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

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

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

30 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 re-

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Exhibit C. 5.

covery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. 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 apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto. 20

Judgment will be claimed for \$5,000.00 with interest thereon from the 20th day of January A. D., 1913.

W. D. WOLFSKEIL,
Plaintiff's Attorney. 30

NOTICE TO THE WITHIN NAMED DEFENDANT.

In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an Affidavit of Merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and 40

Exhibit C. 5.

answer judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice (P. L. 1912, p. 394, Rule 56).

W. D. WOLFSKEIL,
Plaintiff's Attorney.

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AFFIDAVIT OF MERITS.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, }*ss:*

James Marshall, of full age, being duly sworn, according to law, on his oath, says that he is a resident of the State of New Jersey, and is secretary of Northern Insurance Company of New York, a corporation, and the defendant in the above entitled cause.

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Deponent further says that he is authorized to make this affidavit and that he believes that the defendant has a just and legal defense to said action on the merits of the case.

JAMES MARSHALL.

Subscribed and sworn to before me this 30th day of April, 1913.

JOHN F. FAUGHNAN,
Attorney at Law of New Jersey.

30

ANSWER.

The defendant a corporation of the State of New York with its principal office located in the City of New York, and duly licensed to transact business in the State of New Jersey, says that
First Defense.

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

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*Exhibit C. 5.**Second Defense.*

The policy of insurance mentioned in the complaint was void at the time of the loss because the plaintiff was not the sole and unconditional owner of the premises as provided in the conditions of said policy.

Third Defense.

10

The policy was void at the time of the loss because the plaintiff had knowledge of foreclosure proceedings being instituted upon a mortgage which was a lien upon the premises as provided in the conditions of said policy.

Fourth Defense.

The policy never became operative and was void because the plaintiff at the time of the issuing of the same concealed from the defendant material facts concerning the subject matter of the insurance contrary to the conditions of the policy, namely, that she had executed and delivered an agreement in writing to one De Georgio to convey on or before December Twentieth, nineteen hundred and twelve, the premises mentioned in paragraph one of the complaint, and that she had knowledge of foreclosure proceedings, which had been instituted upon a mortgage which was then a lien upon the said premises.

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Fifth Defense.

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

Sixth Defense.

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

Seventh Defense.

According to the conditions of the policy, an appraisal of the loss was had and the sound 40

Exhibit C. 5.

value of the property determined to be \$6,006.26 and that the loss or damage was \$5,205.82, and that the whole insurance upon the premises amounted to \$20,000, and defendant is liable only for its proportion of said loss.

Eighth Defense.

10 Under the conditions of the policy the loss was not payable until sixty days after the award of the appraisers and that suit was instituted before the expiration of said time.

Ninth Defense.

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

NEWTON P. KINSEY,
Attorney of Defendant.

20

REPLY.

The plaintiff denies every allegation contained in the Answer.

W. D. WOLFSKEIL,
Attorney of Plaintiff,
207 Broad street, Elizabeth, N. J.

ORDER.

30 A motion having been made at the trial of the above case, at the May term of the Union County Circuit, under the Practice Act of 1912, by the plaintiff to strike out that portion of the defendant's answer, which reads as follows:

40 "Eighth Defense. Under the conditions of the policy, the loss was not payable until 60 days after the award of the appraisers, and that suit was instituted before the expiration of said time," upon the ground that the said defense was a plea in abatement or a dilatory plea, and that properly made by answer, and said mo-

Exhibit C. 5.

tion having come on regularly to be heard, and after hearing George P. Laible, attorney for the plaintiff, and Newton P. Kinsey, Esq., attorney for defendant, it is thereupon on this twenty-sixth day of August, 1915,

ORDERED, that the 8th Defense, which reads as follows: "8th Defense. Under the conditions of the policy, the loss was not payable until 60 days after the award of the appraisers, and that suit was instituted before the expiration of said time," be and the same is hereby stricken out of defendant's answer. 10

Let the rule be entered in the minutes.

WILLIAM H. SPEER,
Union County Circuit Court Judge.

POSTEA.

This case was tried before Judge George S. Silzer, with a jury, at the Union County Circuit Court, on October 13th and 14th, 1915. 20

The jury rendered a verdict against the defendant and in favor of the plaintiff for \$2,100.00/100.

GEO. S. SILZER,
Judge.

To the Clerk of the New Jersey Supreme Court of the State of New Jersey: 30

WHEREAS, Florence E. Palmer heretofore, to wit, on the eighth day of November in the year of our Lord, nineteen hundred and fifteen, obtained final judgment in the New Jersey Supreme Court of the State of New Jersey, against Northern Insurance Company of New York, for Twenty-one Hundred Dollars' damages, and Sixty-five Dollars and Seven Cents costs, as by the record thereof may appear; and 40

Exhibit C. 5.

WHEREAS, Florence E. Palmer has received satisfaction for the same, these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said judgment, and for your so doing this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, the said Florence E. Palmer hereunto set her hand and affixed her seal, the sixth day of December in the year of our Lord, nineteen hundred and fifteen.

FLORENCE E. PALMER,
[L. S.]

Signed, sealed and delivered
in the presence of

WM. E. REIBEL.

20

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

BE IT REMEMBERED, that on this sixth day of December in the year nineteen hundred and fifteen, before me, an attorney at law of New Jersey, personally appeared Florence E. Palmer, who, I am satisfied, is the person named in, and who executed the foregoing instrument, and I, having first made known to her the contents thereof she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

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WILLIAM E. REIBEL,
Atty of Law of N. J.

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Exhibit C. 5.

NEW JERSEY SUPREME COURT.

 FLORENCE E. PALMER,
vs.
 NORTHERN INSURANCE COMPANY
 OF NEW YORK.

*Action at Law.**On Postea.*

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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Two Thousand One Hundred Dollars besides costs to be taxed nisi.

Entered November 8, 1915.

On motion of

GEORGE P. LAIBLE,

Attorney.

20

NEW JERSEY SUPREME COURT.

 FLORENCE E. PALMER,
vs.
 NORTHERN INSURANCE COMPANY
 OF NEW YORK.

On Postea.

GEORGE P. LAIBLE,

Attorney.

30

Judgment entered this eighth day of November A. D., nineteen hundred and fifteen, for the sum of Twenty-one Hundred Dollars damages and Sixty-five Dollars and Seven Cents costs.

WILLIAM S. GUMMERE,

C. J.

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Exhibit C. 6.

\$2100.00

65.07

 \$2165.07

10 I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, by virtue of a special warrant of attorney, to me directed from the plaintiff within named hereby acknowledge that said plaintiff is satisfied of her damages & costs.

Dated Dec. 8, 1915.

WM. C. GEBHARDT,
Clerk.

20 I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and seal of said court at
[L. s.] Trenton, this thirteenth day of January A. D., nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

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Exhibit C. 6.

THE STATE OF NEW JERSEY to Scottish Union & National Insurance
[L. s.] Company of Edinburgh.

40 YOU ARE SUMMONED to answer the annexed complaint of Florence E. Palmer 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

Exhibit C. 6.

said 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 (and see notice endorsed hereon.)

WITNESS, William S. Gummere, Chief Justice of the said Court at Trenton, this twenty-fifth day of April, nineteen hundred and thirteen. 10

WILLIAM C. GEBHARDT,
Clerk.

W. D. WOLFSKEIL,
Attorney.

NEW JERSEY SUPREME COURT.

FLORENCE E. PALMER,

Plaintiff,

vs.

SCOTTISH UNION AND NATIONAL
INSURANCE COMPANY OF EDIN-
BURGH,

Defendant.

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Action at Law.

On Contract.

Complaint.

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Plaintiff, residing at No. 1073 Fanny street, Elizabeth, New Jersey, says that:

1. Plaintiff was the owner of a dwelling house known as No. 841 Madison avenue, Elizabeth, New Jersey, at the time of its insurance, and of the fire herein stated.

2. On November 15th, 1912, the defendant was, and still is, a corporation duly incorporated, with power to insure risks by fire.

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Exhibit C. 6.

3. On that day, in consideration of \$14.40 to it paid, the defendant executed to plaintiff, a policy of insurance on said house, a copy of which is hereto annexed.

4. On December 20th, 1912, said house was totally destroyed by fire.

10 5. Plaintiff's loss thereby was \$14,500.00.

6. On January 21st, 1913, plaintiff furnished defendant with proof of her loss and interest in said property, and otherwise duly performed all the conditions of said policy on her part.

Plaintiff demands \$6,000.00 damages.

W. D. WOLFSKEIL,
Attorney of Plaintiff.

20 The following is a copy of the policy of insurance mentioned in the within complaint.
No. 4611006.

Established 1824.

SCOTTISH UNION & NATIONAL
INSURANCE COMPANY.

United States Branch Hartford, Connecticut,
James H. Brewster, U. S. Manager.

Amount \$6,000. Rate 24c. Premium \$14.40.

30 In consideration of the stipulations herein named and of Fourteen 40/100 Dollars premium does insure Florence E. Palmer for the term of one year from the 15th day of Nov., 1912, at noon to the 15th day of November, 1913, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Six Thousand Dollars, to the following described property while located and

Exhibit C. 6.

contained as described herein, and not elsewhere, to wit:

FLORENCE E. PALMER

General Form No. 1½. Dwelling House Form.

SCOTTISH UNION & NATIONAL
INSURANCE CO.

\$6,000 on the three story tin roof building and additions, including foundations, plumbing, steam, gas and water pipes and fixtures, while occupied by assured as a dwelling house, and situated No. 841 on the side of Madison avenue, Elizabeth, N. J. Other insurance permitted. This insurance is effected subject to the conditions of the lightning clause.

10

LIGHTNING CLAUSE.

(Excluding Damage to Electrical Apparatus)

20

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, that 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; and provided further that, if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, un-

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Exhibit C. 6.

less fire ensues, and then for the loss by fire only.

Attached to and forming a part of Policy No. 4611006 25 M. 6-28-09.

CLARENCE SEWARD,

Agent.

10

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 herein 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

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so written or attached.

“Provisions required by law to be stated in this policy.” This policy is in a stock corporation and it is hereby provided always that none of the shareholders of the company shall be liable, in respect of any obligation hereunder, for more than the unpaid portion for the time being of his, her or their, share, or shares of the capital of the company.

In Witness Whereof this company has executed and attested these presents; but this pol-

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Exhibit C. 6.

icy shall not be valid unless countersigned by the duly authorized agent of the company at Cranford, N. J.

Countersigned at Cranford, N. J.,
this 15th day of November, 1912.

JAMES H. BREWSTER,
Manager.

10

CLARENCE SEWARD,
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 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 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 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

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Exhibit C. 6.

abandonment to this company of the property described.

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

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; 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 or 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;

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Exhibit C. 6.

or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage of custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

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

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Exhibit C. 6.

sion 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
10 ly cease.

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

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

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
40 policy shall be void.

Exhibit C. 6.

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. 10

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 as shall be written upon, attached, or appended hereto. 20

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 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 hereby insured shall bear to the total insurance on the whole property at 30 40

Exhibit C. 6.

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 the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, 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

Exhibit C. 6.

to the amount that such magistrate or notary public shall certify.

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 to be made. 10

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. 20 30

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 re- 40

Exhibit C. 6.

quired have been received by this company, including an award by appraisers when appraisal has been required.

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

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

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

40 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."

Exhibit C. 6.

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

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Judgment will be claimed for \$6,000.00 with interest thereon from the 20th day of January, A. D., 1913.

W. D. WOLFSKEIL,
Plaintiff's Attorney.

Notice to the Within Named Defendant.

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice. (P. L. 1912, p. 394, Rule 56.)

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W. D. WOLFSKEIL,
Plaintiff's Attorney.

30

AFFIDAVIT OF MERITS.

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

Newton P. Kinsey, of full age, being duly sworn, according to law, on his oath, says that he is the attorney of the defendant in the above entitled cause; that said defendant is a corpor-

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Exhibit C. 6.

ation not incorporated under the laws of the State of New Jersey, and that all of the officers of the defendant corporation are absent from this State.

Deponent further says that he believes the defendant has a just and legal defense to said
 10 action on the merits of the case.

NEWTON P. KINSEY.

Subscribed and sworn to before
 me this 1st day of May, A. D.,
 1913.

JOHN F. FAUGHNAN,
Attorney at Law of New Jersey.

ANSWER.

20 The defendant, a corporation of Scotland, with its principal office in the United States located at Hartford, in the State of Connecticut, and duly licensed to transact business in the State of New Jersey, says that:

First Defense.

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

Second Defense.

30 The policy of insurance mentioned in the complaint was void at the time of the loss because the plaintiff was not the sole and unconditional owner of the premises as provided in the conditions of said policy.

Third Defense.

The policy was void at the time of the loss because the plaintiff had knowledge of foreclosure proceedings being instituted upon a mortgage which was a lien upon the premises
 40 as provided in the conditions of said policy.

*Exhibit C. 6.**Fourth Defense.*

The policy never became operative and was void because the plaintiff at the time of the issuing of the same concealed from the defendant material facts concerning the subject matter of the insurance contrary to the conditions of the policy, namely, that she had executed and delivered an agreement in writing to one De Georgio to convey on or before December 20th, nineteen hundred and twelve, the premises mentioned in paragraph one of the complaint, and that she had knowledge of foreclosure proceedings which had been instituted upon a mortgage which was then a lien upon the said premises. 10

Fifth Defense.

It denies the truth of the matters contained in paragraph four of the complaint. 20

Sixth Defense.

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

Seventh Defense.

According to the conditions of the policy, an appraisal of the loss was had and the sound value of the property determined to be \$6,006.26 and that the loss or damage was \$5,205.82 and that the whole insurance upon the premises amounted to \$20,000 and defendant is liable only for its proportion of said loss. 30

Eighth Defense.

Under the conditions of the policy the loss was not payable until sixty days after the award of the appraisers and that suit was instituted before the expiration of said time.

Exhibit C. 6.

Ninth Defense.

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

NEWTON P. KINSEY,
Attorney of Defendant.

10

REPLY.

The plaintiff denies every allegation contained in the answer.

W. D. WOLFSKEIL,
Attorney of Plaintiff,
207 Broad street,
Elizabeth, N. J.

ORDER.

20 A motion having been made at the trial of the above case, at the May Term of the Union County Circuit, under the Practice Act of 1912, by the plaintiff to strike out that portion of the defendant's answer which reads as follows:

30 "Eighth Defense: Under the conditions of the policy, the loss was not payable until 60 days after the award of the appraisers, and that suit was instituted before the expiration of said time" upon the ground that the said defense was a plea in abatement or a dilatory plea, and not properly made by answer, and said motion having come on regularly to be heard, and after hearing George P. Laible, attorney for the plaintiff, and Newton P. Kinsey, Esq., attorney for defendant, it is thereupon on this twenty-sixth day of August, 1915.

ORDERED, that the Eighth Defense, which reads as follows:

40 "Eighth Defense. "Under the conditions of the policy, the loss was not payable until 60

Exhibit C. 6.

days after the award of the appraisers, and that suit was instituted before the expiration of said time" be and the same is hereby stricken out of defendant's answer.

Let the rule be entered
in the minutes.

WILLIAM H. SPEER,
Union County Circuit Court Judge.

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POSTEA.

This case was tried before Judge George S. Silzer, with a jury, at the Union County Circuit Court, on October 13th, and 14th, 1915.

The jury rendered a verdict against the defendant and in favor of the plaintiff for \$2,460 00-100.

GEO. S. SILZER,
Judge.

20

To the Clerk of the New Jersey Supreme Court of the State of New Jersey.

WHEREAS, Florence E. Palmer heretofore, to wit, on the fifth day of November in the year of our Lord nineteen hundred and fifteen, obtained final judgment in the New Jersey Supreme Court of the State of New Jersey, against Scottish Union & National Insurance Company, for Two Thousand Four Hundred and Sixty Dollars, damages, and Fifty-seven Dollars and Twelve Cents, costs as by the record thereof may appear;

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AND WHEREAS, Florence E. Palmer has received satisfaction for the same, these are therefore, to desire and authorize you to enter an acknowledgement and satisfaction upon the record of the said judgment, and for your so

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Exhibit C. 6.

doing this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, the said Florence E. Palmer hereunto set her hand and affixed her seal, the sixth day of December in the year of our Lord nineteen hundred and fifteen.

10

FLORENCE E. PALMER.

Signed, Sealed and Delivered
in the presence of

WM. E. REIBEL.

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

20

BE IT REMEMBERED, That on this sixth day of December in the year nineteen hundred and fifteen, before me an attorney at law of New Jersey personally appeared Florence E. Palmer who, I am satisfied, is the person named in, and who executed the foregoing instrument, and I, having first made known to her the contents thereof she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

30

WM. E. REIBEL,
Atty at Law of New Jersey.

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Exhibit C. 6.

NEW JERSEY SUPREME COURT.

 FLORENCE E. PALMER,
vs.
 SCOTTISH UNION & NATIONAL
 INSURANCE COMPANY OF EDIN-
 BURG.

*Action at Law.**On Postea.* 10

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Two Thousand Four Hundred and Sixty Dollars besides costs to be taxed nisi.

Entered November 5, 1915,

On motion of

GEORGE P. LAIBLE,

Attorney.

20

NEW JERSEY SUPREME COURT.

 FLORENCE E. PALMER,
vs.
 SCOTTISH UNION & NATIONAL
 INSURANCE COMPANY OF EDIN-
 BURG.

On Postea.

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GEORGE P. LAIBLE,

Attorney.

Judgment entered this fifth day of November, A. D., nineteen hundred and fifteen for the sum of two thousand four hundred and sixty dollars

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Exhibit C. 6.

damages and fifty-seven dollars and twelve cents costs.

WM. S. GUMMERE,
C. J.

10 \$2460.00
 57.12

 \$2517.12

I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, by virtue of a special warrant of attorney, to me directed from the plaintiff within named hereby acknowledge that said plaintiff is satisfied of her damages & costs.

Dated Dec. 8, 1915.

20

WM. C. GEBHARDT,
Clerk.

I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

30

IN TESTIMONY WHEREOF, I have set my hand and seal of said court at
[L. s.] Trenton, this thirteenth day of January A. D., nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

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Exhibit C. 7.

Exhibit C. 7.

AGREEMENT FOR APPRAISAL.

This agreement by and between Florence E. Palmer of Elizabeth, N. J., of the first part, and the Insurance Company, or companies, whose names are signed hereto, each for itself and not jointly, of the second part; 10

WITNESSETH, That whereas the party of the first part claims to have sustained a loss by fire occurring on the 20th day of December, 1912, to and upon the following described property, to wit: On the 3 story frame shingle & tin roof building occupied as a dwelling by owner and situate 841 Madison avenue, Elizabeth, N. J., and,

WHEREAS, a disagreement has arisen between the parties hereto, as to the amount of such loss, and 20

WHEREAS, it is provided by the policy (or policies) of said party (or parties) of the second part, held by said party of the first, that in the event of disagreement as to the amount of loss the same shall, as in said policy (or policies) provided be ascertained by appraisers.

THEREFORE, this agreement witnesseth, that in conformity to the terms and conditions of the policy (or policies) of the party (or parties) of the second part, Mr. B. F. Robinson, of Newark, N. J., and Mr. J. Ben Beatty, of Elizabeth, N. J., for Florence E. Palmer have been selected and are hereby appointed appraisers to estimate and appraise in accordance with the terms and conditions of said policy (or policies) the sound value of said property and the amount of loss or damage directly caused by said fire to and upon the same. 30 40

Exhibit C. 7.

The said appraisers shall first select a competent and disinterested umpire, as provided by said policy (or policies); the said two appraisers together shall then estimate and appraise the loss, in conformity to the conditions of said policy (or policies) stating separately sound value and damage and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. Such loss or damage shall be ascertained or estimated according to the actual cash value of said property at the time of the occurrence of said fire, 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, but such appraisalment does not in any respect waive any of the provisions or conditions of said policy (or policies) of insurance, or any forfeiture thereof, or the proof of such loss and damage required by the policy (or policies) of insurance thereon.

Witness our hands (in duplicate) at Newark, N. J., this 17 day of February, 1913.

FLORENCE E. PALMER,

J. A. KIERNAN

as to Mrs. Palmer.

A. MacKECHNIE, JR..

For Northern Insurance Company, Scottish Union & National Ins. Co.

Niagara Fire Ins. Co. of New York, by

ERNEST A. LYON,

Mgr.

Exhibit C. 7.

DECLARATION OF APPRAISERS.

STATE OF NEW JERSEY, }
 COUNTY OF UNION, } ss:

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisal and estimate of the sound value and loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of the same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon. 10

B. F. ROBINSON, 20
 J. BEN BEATTY,

Appraisers.

Subscribed and sworn to before me this first day of March A. D., 1913.

[SEAL] ROBERT L. PATTERSON,
Notary Public.

SELECTION OF UMPIRE.

We, the undersigned, hereby select and appoint Wm. Clifford, Sr., to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment. 30

Witness our hands this 1st day of March A. D., 1913.

B. F. ROBINSON,
 J. BEN BEATTY.

Exhibit C. 7.

QUALIFICATION OF UMPIRE.

STATE OF NEW JERSEY, }
 COUNTY OF UNION. }^{ss:}

10 I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties to this agreement, nor interested as a creditor or otherwise in said property or insurance.

WILLIAM CLIFFORD.

20 Subscribed and sworn to before me this 17th day of March, 1913.

[SEAL]

STANLEY L. REED,
Notary Public of N. J.

AWARD.

30 We, the undersigned, pursuant to the within appointment, Do HEREBY CERTIFY that we have truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined and do hereby award as the sound value of said property on the 20th day of December, 1912, and the actual damage thereto by the fire on that day, the following sums, to wit:

	Sound Value	Loss and Damage
1st Item	\$6,006.26	\$5,205.82
2nd Item		
3rd Item		
40 4th Item		

Exhibit C. 8.

5th Item

6th Item

Total sound value and
total loss and damage \$6,006.26 \$5,205.82

Witness our hands this 19th day of March,
1913.

B. F. ROBINSON,
J. BEN BEATTY,

10

Appraisers.

WILLIAM CLIFFORD,

*Umpire.***Exhibit C. 8.****SCOTTISH UNION & NATIONAL INSURANCE CO. OF EDINBURGH, SCOTLAND.**

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JAMES H. BREWSTER
MANAGER

Hartford, Conn.

NON-WAIVER AGREEMENT.

It is hereby mutually understood and agreed by and between Florence E. Palmer, of Elizabeth, N. J., party of the first part and the Northern Insurance Company of N. Y., Scottish Union & National Insurance Company of Scotland, and Niagara Fire Insurance Company of N. Y., and other companies signing this agreement, parties of the second part, that any action taken by said parties of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on the 20th day of December, 1912, shall not waive or invalidate any of the conditions of the policies of the parties

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Exhibit C. 8.

of the second part held by the party of the first part and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

10 The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of loss or damage without regard to the liability of the parties of the second part.

FLORENCE E. PALMER,
Party of the First Part.

Northern Insurance Company, Scottish Union
and National Insurance Company.

Niagara Fire Insurance Company

by

20

A. MacKECHNIE, JR.,
ERNEST A. LYON,

Mgr.

Witness:

J. A. KIERNAN

as to Mrs. Palmer.

Dated February 17, 1913.

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Opinion.

Opinion.

Filed July 13, 1916.

IN CHANCERY OF NEW JERSEY.

Between

FLORENCE E. PALMER,
Complainant,

and

JOHN A. MCFADDEN, Guardian,
et als.,
Defendants.

On Bill, etc.

Submitted
June 30, 1916.

Decided July
6, 1916.

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Mr. Harry J. Weiner and Mr. William F. Reibel, for complainant.

Lindabury, Depue & Faulks, for defendant.

FOSTER, V. C.

The bill in this cause is filed to have the defendant, the Niagara Fire Insurance Company, enjoined from proceeding to collect any part of the amount due on a bond and mortgage made by the complainant to defendant, John A. McFadden, as guardian, and on the decree entered in foreclosure proceedings thereon, and which bond, mortgage and decree were duly assigned by McFadden to the Insurance Company. The bill also seeks to have this mortgage surrendered for cancellation; and also to compel the Niagara Fire Insurance Company to pay the complainant the difference between the amount of its insurance policy and the amount paid to the

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Opinion.

mortgagee when the bond, mortgage and decree of foreclosure were assigned to it under the following circumstances.

10 On March 11th, 1911, complainant and her husband executed and delivered to the defendant, John A. McFadden, as guardian, their bond, together with a mortgage on property in the City of Elizabeth, in this state, to secure the payment of \$3,500 and interest thereon.

In August, 1912, McFadden began foreclosure proceedings on this mortgage and on December 18th, 1913, he obtained a decree therein for \$3,225.

20 On October 17th, 1912, the defendant, the Niagara Fire Insurance Company, issued its policy to complainant and one Sidney W. Eldridge payable as their respective interests should appear, insuring the mortgaged premises against loss by fire in the sum of \$3,500. Attached to this policy was the standard mortgagee clause, without contribution, by which loss, if any, under the policy was made payable to McFadden, mortgagee as his interest might appear. On December 2nd, 1912, the interest of Sidney W. Eldridge, in the policy, ceased.

30 The Scottish Union and National Insurance Co. of Edinburgh, at this time, also had, in effect, a policy of insurance against fire covering said premises for the sum of \$6,000, and the Northern Insurance Company of New York, also had, in effect, a policy of insurance covering said premises against fire for the sum of \$5,000, but neither of these policies were made payable to the mortgagee in the event of a loss.

On December 20th, 1912, the insured dwelling of complainant was completely destroyed by fire.

40 Under the terms of the several policies, an

Opinion.

appraisal was had and the sound value of the property was appraised at \$6,002.62 and the loss from the fire was appraised at \$5,205.82.

Of this loss the Scottish Union and the National Insurance Co. was compelled, by suit, to pay to complainant \$2,460 for its proportion of the appraised loss, and the Northern Insurance Co. was, also, compelled, by suit, to pay complainant \$2,150 for its proportion of the loss. 10

The defendant, the Niagara Fire Insurance Co., because of the mortgagee clause attached to its policy, paid to the defendant, McFadden, Guardian, on his demand, \$3,416.67, being the amount of his decree and interest thereon, and took from him an assignment of the bond and mortgage and the decree in the foreclosure proceedings; and also an agreement subrogating the Niagara Insurance Company to all the rights of McFadden as mortgagee. 20

The total amount of the insurance in force on the property, at the time of the loss, was \$14,500. The proportion the Niagara Fire Insurance Co. would have to pay, except for the mortgagee clause, as its proportionate contribution towards the loss of \$5,205.82, is the sum of \$1,256.58; by reason of delay in making settlement of the loss, interest had accrued to the mortgagee, up to date of the assignment of the decree, amounting to \$131.58, making a total proportion of the loss for which the Niagara Fire Insurance Co. admits liability of \$1,388.16; and the Niagara Fire Insurance Co. claims that in making a settlement with the mortgagee under the policy and mortgagee clause for \$3,416.67 it paid him \$2,028.51 more than complainant would have been entitled to recover from it for its proportion of the loss. 30 40

Opinion.

The defendant, Niagara Fire Insurance Co., is now seeking to enforce the decree assigned to it (and which has been duly filed with the clerk of this court, and under which it has been substituted for McFadden, as complainant in the foreclosure suit), by the sale of the mortgaged premises to recover this alleged excess payment of \$2,028.50, with interest from the date of its settlement with the mortgagee, contending that by the terms of the policy and the mortgagee clause and by the assignment of the bond, mortgage and decree of foreclosure it is entitled to be subrogated to the rights of the mortgagee to recover the amount it claims to have paid, in excess of the amount it was liable to pay, under its policy, to complainant as owner and mortgagor.

Complainant contends, however, that she is entitled to have the amount paid by the Niagara Fire Insurance Co. to the mortgagee credited and applied in satisfaction of the debt secured by the mortgage; and to have the mortgage surrendered for cancellation; and that she is also entitled to have paid to her, by the Niagara Fire Insurance Co. the difference between \$3,500, the amount of the policy, and the amount of \$3,416.67 paid by the Niagara Fire Insurance Co. to the mortgagee.

There is no dispute regarding the liability of the Niagara Fire Insurance Co. under the mortgagee clause to pay the mortgagee the amount of his claim.

The policy of the Niagara Fire Insurance Co. contained the following provision:

“This company shall not be liable under the policy for a greater proportion of any loss on the described property or for loss

Opinion.

by any expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon or attached or appended hereto." 10

The mortgagee clause attached to this policy reads in part as follows:

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made under all securities held as collateral to the mortgage debt, or may, at its option, pay to mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim." 20 30

The questions to be determined are the extent of the liability, under its policy, of the defendant, the Niagara Fire Insurance Co., to the complainant, as owner and mortgagor, and its equity, if any, to be subrogated to the rights of the mortgagee. 40

Opinion.

The insurance company admits that, under the terms of the policy and mortgagee clause, it was compelled to pay the mortgagee the principal and interest of the debt due him, up to the amount of the policy, if necessary, but it insists that notwithstanding this liability to the mortgagee, it was only liable, by reason of the limitation imposed by the contribution clause of the policy, to pay complainant, as owner, such proportionate share of her loss, that the amount of its policy bore to the total amount of insurance upon the premises, and that as it was compelled by the terms of the mortgagee clause to pay the mortgagee \$2,028.51 in excess of the amount for which it was liable to complainant, as owner, it is entitled to be subrogated to the rights of the mortgagee to the amount of such excess payment; and should be permitted to collect the same by a sale of the mortgaged premises, and, if necessary, by an action against complainant on her bond for any deficiency.

The situation presented is this: Complainant at her own expense procured insurance from the Niagara Fire Insurance Co., payable to herself and her mortgagee; the amount she could recover, from this company and each of the other insurers, in the event of loss, was limited by the contribution clause of the policy, and the amount the mortgagee could recover was limited only by the amount of the debt due him and the amount of the policy

The insurance company, in the language of the mortgagee clause, does not "claim that as to the mortgagor or owner no liability" for the payment made by it to the mortgagee existed, on the contrary it admits a total liability to the mortgagee, and also admits its liability to complain-

Opinion.

ant, as owner or mortgagor, for its full contribution of the loss called for by the policy.

The rule governing the rights of the parties, under such circumstances is stated as follows, in 19 Cyc., p. 895, &c.:

“If insurance is taken by a mortgagor for his own benefit or for the benefit of the mortgagee, or by the mortgagee in the mortgagor’s interest and at his expense, payment of insurance money to the mortgagee goes to the benefit of the mortgagor in satisfaction pro tanto of the mortgage debt, but where the insurance is for the mortgagee’s sole protection and the mortgagor has not procured it, or has lost the right to rely upon it, the company, in paying to the mortgagee the insurance money, becomes entitled to equitable subrogation pro tanto to the security held by the mortgagee, and this right of subrogation is usually made a contract right by a provision in the policy that on the payment of loss under the policy the mortgagee shall assign his mortgage to the company in full or pro tanto as the case may be.”

This rule has been followed in *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Pearman v. Gould*, 42 Eq., p. 4; *Nelson v. Bound Brook Mut. Ins. Co.*, 43 Eq. 256; *Hare v. Hedley*, 54 Eq. 546 &c.; *Leyden v. Lawrence*, 78 Eq., p. 113.

From the facts stated it is apparent that neither of the requisites to entitle the insurance company to subrogation, viz.: an insurance effected by the mortgagee at his own expense, or a denial of liability to the owner or mortgagor, is present in this case. The insurer by its contention is asking the court in effect to add a provi-

Opinion.

sion to the contract of insurance, which it neglected to impose when the mortgagee clause was attached to the policy, that is, it asks that a contribution clause be read into the mortgagee clause, limiting its liability thereunder as a similar clause limits its liability to the owner under the policy.

10 It is a matter of common knowledge that insurance companies issue the standard form of mortgagee clause both with and without the clause for full contribution from other insurers; and limiting liability thereby. In the present case the Niagara Fire Insurance Co. saw fit to issue and to attach to complainant's policy the mortgagee clause, without the provision for contribution by other insurers; and without limiting thereby its liability for a greater proportion
20 of any loss or damage sustained than the amount of its policy bore to the whole amount of insurance upon the property; whether such insurance was issued to or held by the owner or mortgagee, and it now asks the court by its contention to supply this omission from the mortgagee clause under consideration.

This, of course, cannot be done and as complainant procured the insurance at her own expense, and as the insurance company does not disclaim, but admits liability to her as owner and mortgagor, she is entitled to have the amount
30 paid the mortgagee credited in satisfaction of the mortgage debt, and to have the bond, mortgage and decree of foreclosure surrendered for cancellation, but complainant is not entitled to have paid her the difference between the amount of the policy and the amount paid the mortgagee.

The contract of insurance is a contract of indemnity. *Kase v. Hartford Fire Ins. Co.*, 58 L.
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Opinion.

523. By its payment to the mortgagee, in which payment was included the total amount for which the insurance company had agreed to indemnify complainant for her loss, the company has performed its obligation under the contract, set forth in the policy and in the mortgagee clause, and it is not liable for further payment to complainant as the amount of such payment is beyond the amount for which it agreed to indemnify her. 10

A decree will be advised in accordance with the views herein expressed.

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*Decree.***Decree.**

Filed July 19, 1916.

IN CHANCERY OF NEW JERSEY.

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*Between*FLORENCE E. PALMER,
*Complainant,**and*JOHN A. McFADDEN, Guardian,
*et als.,**Defendants.**On Bill, etc.**Decree.*

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This cause being opened to the court by William E. Reibel, solicitor of complainant, and upon reading the pleadings and proofs taken in said cause, whereby it appears that the mortgage made and executed by the said Florence E. Palmer and Niblo A. Palmer, her husband, to John A. McFadden, guardian of Marie E. McFadden, an infant, referred to in the bill filed in this cause, bearing date the 11th day of March, 1911, and recorded in the register's office of the County of Union, in Book 295 of mortgages, page 108, to secure the sum of thirty-five hundred dollars (\$35,000.00) in one year from the date thereof, with interest, still appears to be a subsisting lien upon the premises in the said bill of complaint particularly described; and it further appearing that the said Niagara Fire Insurance Company having paid to the said McFadden, guardian as aforesaid, the whole amount of principal and interest and costs due on the said bond and mortgage, and the decree from foreclosure thereon,

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Decree.

and it further appearing that the said complainant being entitled to the benefits of the payment so as aforesaid made by the said Niagara Fire Insurance Company to the said McFadden, as mortgagee, and being entitled to have the same charged in satisfaction of the mortgage debt and the complainant being entitled to the surrender of the mortgage, bond and decree of foreclosure herein. 10

IT IS on this eighteenth day of July, 1916, by his honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED that the said mortgage hereinbefore referred to and described has been fully paid and satisfied, and

IT IS FURTHER ORDERED that the same be cancelled of record and be no longer a lien upon the said premises therein described against the said complainant, or any person or persons claiming by, from or under her, and that the said defendant and all persons claiming by, from or under him be debarred and perpetually enjoined from collecting money upon the said deed of mortgage and from setting up the same against the premises therein described, and 20

IT IS FURTHER ORDERED AND DECREED that the defendant, Niagara Fire Insurance Company, pay to the complainant the costs of this suit to be taxed, and that execution issue therefor according to the practice of this court, and 30

IT IS FURTHER ORDERED AND DECREED that this decree shall not become effective until the expiration of ten days from the entry thereof and that if within the said period of ten days the defendant, Niagara Fire Insurance Company, shall serve and file its notice of appeal to the Court of Errors and Appeals and shall thereafter 40

Decree.

diligently prosecute its said appeal in accordance with the rules and practice of said Court of Errors and Appeals, then this decree shall not become effective and no proceedings shall be had thereunder until its affirmance by the said Court of Errors and Appeals.

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Respectfully advised,

JOHN E. FOSTER,
V. C.

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Notice of Appeal.

Notice of Appeal.

Filed July 21, 1916.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>FLORENCE E. PALMER, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JOHN A. McFADDEN, Guardian <i>etc., et als.,</i></p> <p style="text-align: right;"><i>Defendants.</i></p>	}	<p><i>On Bill, etc.</i></p> <p><i>Notice of</i> <i>Appeal of</i> <i>Defendant,</i> <i>Niagara Fire</i> <i>Insurance</i> <i>Company.</i></p>	<p>10</p>
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The defendant, Niagara Fire Insurance Com- 20
 pany, hereby appeals from so much of the decree
 made by this court in the above stated cause on
 the 18th day of July, 1916, as provides that the
 said complainant is entitled to the benefits of the
 payment made by your petitioner to the de-
 fendant, John A. McFadden, and that complain-
 ant is entitled to have the same charged in satis-
 faction of the mortgage debt and is entitled to
 the surrender of the mortgage, bond and decree
 of foreclosure therein referred to and that the 30
 said mortgage therein made has been fully paid
 and satisfied and that the same be cancelled
 of record and be no longer a lien upon the
 premises therein described against the said com-
 plainant, or any person or persons claiming by,
 from or under her, and that the said defendant
 and all persons claiming by, from or under him
 be debarred and perpetually enjoined from col-
 lecting money upon the said deed of mortgage

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Notice of Appeal.

and from setting up the same against the premises therein described, and that the defendant, Niagara Fire Insurance Company, pay to the complainant the costs of this suit to be taxed and that execution issue therefor according to the practice of this court, to the Court of Errors and Appeals in the last resort in all causes.
 10 Dated, July 18, 1916.

LINDABURY, DEPUE & FAULKS,
*Solicitors of Defendant, Niagara
 Fire Insurance Company.*

JOHN WILLIAM BISHOP, JR.,
Of Counsel.

I conceive that there is good cause for appeal in the above stated cause.
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JOHN WILLIAM BISHOP, JR.,
*Of Counsel with Defendant, Niagara
 Fire Insurance Company.*

Service of the within notice of appeal is hereby acknowledged this 19th day of July, 1916.

WM. E. REIBEL,
Solicitor of Complainant.

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Petition of Appeal.

Petition of Appeal.

Filed July 21, 1916.

New Jersey Court of Errors and Appeals

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Between

FLORENCE E. PALMER,
Complainant-Respondent,

and

NIAGARA FIRE INSURANCE COM-
PANY,
Defendant-Appellant.

*On Appeal
from Decree
in Chancery.*

*Petition of
Appeal of
Niagara Fire
Insurance
Company.*

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To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Niagara Fire Insurance Company respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 18th day of July, 1916, wherein Florence E. Palmer was complainant and John A. McFadden, guardian, etc., and your petitioner were defendants in this respect, to wit: that the said decree adjudges that the said complainant is entitled to the benefits of the payment made by your petitioner to the defendant, John A. McFadden, and that complainant is entitled to have the same charged in satisfaction of the mortgage debt and is entitled to the surrender of the mortgage, bond and decree of foreclosure therein referred to and that the said mortgage therein

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Petition of Appeal.

made has been fully paid and satisfied and that the same be cancelled of record and be no longer a lien upon the premises therein described against the said complainant, or any person or persons claiming by, from or under her, and that the said defendant and all persons claiming by, from or under him be debarred and perpetually enjoined from collecting money upon the said deed of mortgage and from setting up the same against the premises therein described and that the defendant, Niagara Fire Insurance Company, pay to the complainant the costs of this suit to be taxed and that execution issue therefor according to the practice of this court. And your petitioner humbly appeals from that part of the decree of the Chancellor which provides or decrees as aforesaid upon the ground that the same is erroneous, and that the said complainant is not lawfully or equitably entitled to the benefits of the payment made by your petitioner to the defendant, John A. McFadden and is not entitled to have the same charged in satisfaction of the mortgage debt and is not entitled to the surrender of the mortgage, bond and decree of foreclosure and that the said mortgage has not been fully paid and satisfied and that the same should not be cancelled of record and be no longer a lien upon the premises therein described against the said complainant or any person or persons claiming by, from or under her and that the said defendant and all persons claiming by, from or under him should not be debarred and perpetually enjoined from collecting money upon the said deed of mortgage and from setting up the same against the premises therein described and that your petitioner ought not to be required to pay to the complainant the costs of this suit to

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Petition of Appeal.

be taxed and that execution should not issue therefor, but that on the contrary your petitioner should be allowed to proceed to a sale of the said mortgaged property under the said mortgage and decree of foreclosure thereon and that the proceeds of said sale or so much thereof as may be necessary for the purpose should be applied to the payment of the amount due to your petitioner under the said mortgage and foreclosure decree. 10

Your petitioner therefor prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LINDABURY, DEPUE & FAULKS, 20
Solicitors of Appellant.

JOHN WILLIAM BISHOP, JR.,
Of Counsel with Appellant.

Service of the within petition of appeal is hereby acknowledged this 19th day of July, 1916.

WM. E. REIBEL,
Solicitor of Respondent.

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New Jersey Court of Errors and Appeals

Between FLORENCE E. PALMER, Complainant-Respondent, and NIAGARA FIRE INSURANCE CO., Defendant-Appellant.	} On Appeal from Decree in Chancery.
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BRIEF FOR COMPLAINANT-RESPONDENT.

1. Statement of the Case.

Florence E. Palmer, the respondent above named, was the owner of certain lands in Elizabeth, New Jersey, and on March 11, 1911, executed a bond and mortgage thereon to secure the payment of \$3,500, to John A. McFadden, as Guardian of Marie McFadden (Exhibits C-2, C-3, Case, pp. 20, 40, 41). She afterwards secured a policy of insurance from Niagara Fire Insurance Company in the sum of \$3,500, which was originally issued to Sidney W. Eldridge and Florence E. Palmer, but was later made payable to Florence E. Palmer as owner. By an endorsement thereon duly made, the loss, if any, was made payable to John A. McFadden, Guardian, etc., as his interest might appear (Ex. C-1, pp. 20, 26). The mortgagee clause attached to the policy provided in part as follows:

“Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this mortgage and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the

party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim" (Exhibit C-1, p. 28, line 35 to p. 29, line 15).

The appellant thereupon demanded and procured from said McFadden an assignment of his bond and mortgage and decree and subrogation receipt.

After the execution of the policy and the making of the endorsements above referred to, a foreclosure proceeding was instituted by McFadden as Guardian, which resulted in a final decree in his favor for \$33,225, together with interest. In addition to the policy issued by appellant above referred to, there were in force upon the same premises a policy of the Scottish Union and National Insurance Company of Edinburgh for \$6,000, and another policy in the Northern Insurance Company of New York for \$5,000, making a total aggregate amount of insurance on said property of \$14,500. The fire occurred upon the mortgaged and insured premises on December 20th, 1912, resulting in a total loss. After the fire respondent brought suit against the Scottish Union and National Insurance Company of Edinburgh upon the policy above referred to and recovered from the said company the sum of \$2,460 damages, and from the Northern Insurance Company of New York the sum of \$2,150 damages. These judgments were duly paid (Ex. C-5, pp. 68; Ex. C-6, p. 88). After the fire Mr. McFadden was paid by the Niagara Insurance Company, the appellant herein, on December 17,

1914, the sum of \$3,416.67, and thereupon procured from said McFadden an assignment of the bond and mortgage held by McFadden and a subrogation receipt (Ex. C-1, pp. 38, 39; Ex. C-4, p. 46; p. 21, lines 10-21). By virtue of the said assignment the appellant proceeded with the foreclosure of the mortgage and a restraining order was procured from the Court of Chancery restraining the appellant from proceeding with the foreclosure.

In pursuance to this restraining order and after a hearing, the restraining order was made absolute and a decree was entered cancelling the mortgage. From this decree the appellant has appealed to this Court (pp. 104-106).

2. Brief of the Argument.

POINT I.

It is conceded by the Appellant as to the original mortgagor, John A. McFadden, Guardian, etc., the insurer was obligated to pay the amount paid by it under the policy.

A mortgagee is entitled to collection of the amount due on his policy regardless of any claim of any other policy, being in existence at the time of the loss; this matter is fully discussed in the case of *Eddy v. L. A. Corporation*, 143 N. Y. 311, and has been found in many cases in this State. It is not necessary to go into this point because it is admitted by both sides.

POINT II.**Appellant admits indebtedness to the Respondent, but only questions the amount of the indebtedness.**

It is admitted in the case and in respondent's brief that the amount of \$1,388.16 is due to the complainant and has been credited on account of the amount of the amount due on the bond and mortgage in making this admission, and the facts justify, this case is taken completely out of the clause in the contract which provides that:

"Whenever this Company shall pay to the mortgagee (or trustee) any sum for loss or damages under this policy and shall claim as to the mortgagor or owner, no liability therefore existed, this Company shall to the extent of such payment be thereby legally subrogated to all the rights of the party to whom such payment shall be made."

In this case the appellant does not make the claim that as to the mortgagor or owner, no liability existed, but unqualifiedly admits liability in part, under this clause, of course, there can be no right to subrogation, by the appellant, and therefore, the contention of the appellant is wrong in that he is not entitled, under this clause, to any right of subrogation.

Appellant's right to subrogation can only be based on either the contract or the law relating to subrogation, and the law is very clearly explained in the case of *Leyden v. Lawrence*, 79 Eq. 113. Vice-Chancellor Lehman, at page 114, says:

"It may be stated to be equally settled that as the insurance has been taken by the mort-

gagee at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor will have the right in case of a loss to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. *Pearman v. Gould*, 42 Eq. 4."

The facts in this case bring in exactly under the ruling held by the Court, in *Pearman v. Gould* and *Leyden v. Lawrence*, and it being admitted that the policy was taken out for the benefit of the mortgagor as well as for the protection of the mortgagee, respondent herein is entitled to have the avails of the policy applied for his benefit, toward the discharge of his indebtedness.

POINT III.

That the Appellant is not entitled to have the right of subrogation to the rights of the mortgagee.

This point has been taken up in Point 2 and as it is clearly a question similar to the cases cited where a policy is taken out for the benefit of the mortgagor as well as for the benefit of the mortgagee. *Pearman v. Gould*, 42 Eq. 4; *Leyden v. Lawrence*, 78 Eq. 453, and *Leyden v. Lawrence*, 79 Eq. 113.

POINT IV.

That by the payment of the insurance to the mortgagee the mortgage claim has been wiped out and the mortgage should therefor be cancelled.

The payment by the respondent to the mortgagee was a payment of insurance moneys under a policy

which contracted for its payment and appellant had no right to assignment being made of the mortgage as they were under a contract to pay the insurance and the payment operated as a cancellation of the mortgage.

In the case of *Pearman v. Gould* this matter was decided in exactly the same way and the mortgage was declared to have been cancelled by the company's payment thereof, and was directed to be cancelled of record. *Pearman v. Gould*, Eq. 42-4. The learned Vice-Chancellor in his opinion rightfully said:

"The * * * by its contention, is asking the Court in effect to add a provision to the contract which it neglected to impose when the mortgagee clause was attached to the policy."

**The decree of the Court of Chancery
should be affirmed with costs.**

Respectfully submitted,

Harry J. Werner
John S. Rusk...
Solicitor of Complainant-Respondent.

W. R. Wilson
Of Counsel.

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