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Record No. 5066

In the Supreme Court of Appeals of Virginia at Richmond

AMERICAN LIBERTY INSURANCE COMPANY, ETC., ET AL.

v.

LOUIS ALEXANDER BRESLERMAN

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5066

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Thursday the 3rd day of September, 1959.

AMERICAN LIBERTY INSURANCE COMPANY, ETC., ET AL., Appellants,

against

LOUIS ALEXANDER BRESLERMAN, Appellee.

From the Circuit Court of the City of Norfolk

Upon the petition of American Liberty Insurance Company, a corporation, and Commercial Union Fire Insurance Company, a corporation, an appeal and *supersedeas* is awarded them from a decree entered by the Circuit Court of the City of Norfolk on the 7th day of April, 1959, in a certain consolidated chancery cause then therein depending, wherein the said petitioners were plaintiffs and Louis Alexander Breslerman was defendant; and it appearing from the certificate of the clerk of the said court that a *supersedeas* bond in the penalty of five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

AMERICAN LIBERTY INSURANCE COMPANY,
Plaintiff

v.

LOUIS ALEXANDER BRESLERMAN, Defendant

COMPLAINT IN ACTION FOR DECLARATORY JUDGMENT.

To the Honorable Judge of said Court:

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama with its principal office in the City of Birmingham in said state and is duly licensed and authorized to transact the business of a fire insurance company and to write fire insurance upon properties located in the State of Virginia. Defendant is a citizen of the State of New York residing therein in the City of Brooklyn.

2. On or about the 19th day of August, 1957, the defendant made application to George N. Badran, agent of the plaintiff, in the City of Norfolk, Virginia, for policies of fire insurance on certain dwelling houses owned by defendant and located at #126 and #128 Bob Lane, in Princess Anne County, Virginia, and upon said application plaintiff through said agent issued to the defendant its policy #F-77294 insuring the property known as #126 Bob Lane, and its policy #F-77293 insuring the property known as #128 Bob Lane, each in the sum of $7,-500.00 against loss by fire and kindred perils for the term of one year from August 19, 1957.

page 2 } 3. Each of said policies of insurance were written on what is known as the Virginia Standard Form of Fire Insurance Policy, and each contained, as required by the terms and provisions of Section 38.1-366 and Section 38.1-363 the following provisions in lines 28 through 37 thereof:

"CONDITIONS SUSPENDING OR RESTRICTING INSURANCE. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring . .

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) *while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days;* or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

4. On or about the 13th day of November, 1957, the said dwelling houses insured under said respective policies of insurance issued by the plaintiff to the defendant were seriously damaged by fire and the defendant has filed with Tidewater Adjustment Company, independent adjusters employed by plaintiff to investigate and otherwise handle the claim, proofs of loss dated January 9, 1958, postmarked January 9, 1958, and received January 13, 1958, in which as to each of said insured dwelling houses the defendant states the sound value to be $14,515.20, his loss and damage to be $14,515.20, and makes a claim against plaintiff on the appropriate numbered policy in the amount of $7,500.00, making a total claim by defendant against plaintiff on account of both of said policies of insurance and the damage to both of said dwelling houses of $15,000.00.

5. At and for a long time prior to November 13, 1957 both of said dwelling houses known as #126 Bob Lane and #128 Bob Lane respectively were vacant and unoccupied and had been so vacant and unoccupied for more than sixty
page 3 } days at the date of said fire on November 13, 1957.

There has never been any writing added to either of the said policies altering or amending the above quoted provisions. By reason of which vacancy and unoccupancy plaintiff takes the position and contends that by reason of the above quoted provisions of the said Virginia Standard Fire Insurance Policy, it has no liability to the defendant on account of his said claims so made and advanced, and defendant takes the position that plaintiff is liable to him upon said policy of insurance for the full face amount of each of said respective policies.

6. Plaintiff therefore alleges that an actual *bona fide* controversy exists as between plaintiff and defendant as to the true intendment and meaning of said policies of fire insurance under the facts hereinabove alleged, and as to the liability of plaintiff to defendant upon the claims and demands made by defendant against it.

7. Plaintiff further alleges that there is at present no action or suit pending in any other court between the parties involving the matters herein put in issue between them, and that a declaration of the rights of the parties under the said respective policies of fire insurance would result in a binding

and final adjudication fully determinative of all of their respective mutual rights and obligations and fully end controversy between them.

WHEREFOR plaintiff prays:

1. That the mutual rights, duties and obligations of the parties under and by virtue of said policies of insurance numbered respectively #F-77294 and #F-77293, in the light of the facts alleged and proved in this action as to the vacancy and unoccupancy of the premises thereby respectively in-
page 4 } sured, may be adjudicated by this court.

2. That this court will hear evidence and determine that because of the vacancy and unoccupancy of the said insured premises for more than sixty days next preceding November 16, 1957, the plaintiff is not obligated in any respect to pay for the loss and damage suffered by the defendant in said fires of November 13, 1957.

3. That such other further and general relief as may be required to completely dispose of the controversy between the parties may be awarded.

Respectfully,

AMERICAN LIBERTY INSURANCE COMPANY
By Counsel.

ALEXANDER H. SANDS, JR.
EDWARD A. MARKS, JR.
of SANDS, MARKS & SANDS
315 American Building
Richmond, Virginia
Counsel for Plaintiff.

Filed in the Clerk's Office the 5th day of March, 1958.

Teste:

W. R. HANCKEL, Clerk
VIRGINIA MANNING, D. C.

* * * * *

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* * * * *

American Liberty Insurance Company,

v.

Louis Alexander Breslerman.

and

Commercial Union Fire Insurance Co.

v.

Louis Alexander Breslerman.

On motion of complainants, for good cause shown, it is ordered that these two causes be and they are hereby consolidated and that they shall henceforth proceed as one consolidated cause.

I ask for this:

EDW. A. MARKS, JR.
of counsel for complainant.

Seen and consented to:

A. JEFFERY BIVINS
of counsel for defendants.

Enter Mar. 27, '59.

C. H. J.

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American Liberty Insurance Company and Commercial Union Fire Insurance Company,

v.

Louis Alexander Breslerman.

FINAL DECREE IN CHANCERY.

These causes, having been heretofore consolidated, came on

this day to be heard upon the papers heretofore read, upon evidence heard *ore tenus* adduced by the complainants, and was argued by counsel.

At the conclusion of the complainants' evidence a motion was made on behalf of the defendant to strike all of the complainants' evidence, and after due consideration the Court granted such motion.

Whereupon it is ADJUDGED, ORDERED and DECREED that the four policies of fire insurance which are the subject of this suit are valid and subsisting.

To the above adjudication the complainants duly except, and give the following for their grounds: (a) the court erred in holding that the evidence did not make out at least a *prima facie* case for the relief sought; (b) the court erred in holding that the evidence as a matter of law established waiver by complainants of the vacancy and unoccupancy clauses of the policies; (c) the court erred in holding that complainants' evidence established that the policies were valid and subsisting on November 13, 1957 and covered loss by fire on that date.

And the complainants having expressed an intention to petition the Supreme Court of Appeals of Virginia
page 21 } for an appeal, execution of this decree is suspended until such petition is acted on by the Supreme Court of Appeals or until the time for presenting such petition shall have expired, upon the complainants, or someone for them, executing before the Clerk of this Court, within twenty-one days of the entry of this decree, bond with surety approved by said Clerk in the penalty of $500.00, and conditioned as required by Section 8-477 of the Code of Virginia.

Enter April 7, '59.

C. H. J

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Commercial Union Fire Insurance Company,

v.

Louis Alexander Breslerman.

IN CHANCERY.

PETITION FOR DECLARATORY JUDGMENT.

To the Honorable Judge of said Court:

Your petitioner, Commercial Union Fire Insurance Company, respectfully shows unto the court the following matters:

1. That it is a corporation organized and existing under the laws of New York, and that it is duly admitted, licensed and authorized to engage in the business of a fire insurance company in the State of Virginia, and to write policies of fire insurance upon properties located in the State of Virginia.

2. That on or about the 19th day of August, 1957, through its agent in the City of Norfolk, Virginia, upon application by the defendant, it issued to the defendant two certain policies of fire insurance upon Virginia Standard Fire Insurance Policy Forms, wherein it undertook to insure the defendant against loss by fire and kindred perils upon two certain dwelling houses located at or near Oceana, Princess Anne County, Virginia, said policies being each in the face amount of $7,500.00, and bearing numbers and insuring as follows: No. 24200 on No. 127 Matt Lane; and No. 24201 on No. 129 Matt Lane.

3. That on or about the 13th day of November, 1957 both of said dwelling houses were damaged and/or destroyed by fire, and the defendant has since filed with plaintiff proofs of loss in each of which he has claimed the sum of $7,500.00 as being due him under each of said policies on account of fire loss of November 13, 1957, which said proofs of loss are dated January 9, 1958, mailed January 9, 1958, and were received January 13, 1958.

page 23 } 4. That each of said policies contained the standard provisions required by law to be contained therein, as follows:

"CONDITIONS SUSPENDING OR RESTRICTING INSURANCE. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured: or

(b) *while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days;* or

(c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only."

5. That for more than sixty consecutive days next preceding November 13, 1957, both of the said dwelling houses had been vacant and unoccupied within the meaning and intendment of the said policies of insurance, and there never has been any writing added to either of said policies of insurance altering or otherwise affecting the provisions thereof in this respect.

6. Plaintiff and defendant are presently engaged in an actual controversy with reference to their respective rights, duties and obligations under said policies of fire insurance by reason of the facts herein alleged, plaintiff taking the position that it has no duty or liability to defendant because of the vacancy and unoccupancy of the insured buildings, and defendant maintaining that said policies entitle him to his total claim of $15,000.00.

7. There is no suit or action between the parties at this time seeking an adjudication of their respective claims in any other court.

Petitioner therefore prays that this court will hear the evidence and will adjudicate the rights of the respective parties under the facts hereinabove alleged, and declare such rights, determining that petitioner has no obligation under said respective policies of fire insurance to the said defendant by reason of the said fire of November 13, 1957, and that it may have such other further and general relief as the
page 24 } nature of the case may require, and that this court will proceed to fully adjudicate all of the rights of the parties incident to or otherwise arising from the matters and things hereinabove alleged.

Respectfully,

COMMERCIAL UNION FIRE INSURANCE COMPANY
By Counsel.

ALEXANDER H. SANDS, JR.
EDWARD A. MARKS, JR.
of SANDS, MARKS & SANDS
315 American Building
Richmond, Virginia
Counsel for petitioner.

Filed in the Clerk's Office the 5th day of March, 1958.

Teste:

W. R. HANCKEL, Clerk
VIRGINIA MANNING, D. C.

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Commercial Union Fire Insurance Company, Plaintiff,

v.

Louis Alexander Breslerman, Defendant.

ORDER.

UPON THE ANNEXED CONSENT of plaintiff's attorneys, it is hereby

ORDERED that the defendant's time to appear, specially, or generally, or to make any motion directed to the summons and the complaint or the service thereof, be, and the same hereby is, extended to and including the 12th day of September, 1958.

To the clerk of the circuit court of the city of Norfolk, enter this decree in vacation 9-11 1958.

The foregoing order is hereby consented to:

SANDS MARKS & SANDS
By EDW. A. MARKS, JR.
Attorneys for Plaintiff.

H. LAWRENCE BULLOCK
Judge of the Corporation Court of the City of Norfolk acting in vacation in the place and stead and at the request of the judge of this Court.

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Filed 9-11-58.

HELEN M. ROMULUS, D. C.

Commercial Union Fire Insurance Company, Plaintiff,

v.

Louis Alexander Breslerman, Defendant.

SPECIAL APPEARANCE AND MOTION TO QUASH PROCESS AND DISMISS COMPLAINT.

The defendant above named, LOUIS ALEXANDER BRESLERMAN, hereby appears specially herein for the sole purpose of objecting to the jurisdiction of this Court over the person of the defendant and moves to quash the process and dismiss the complaint on the following grounds:

1. That the service of the summons and complaint was effected on the 5th day of March, 1958, by fraud, trickery and enticement, as more particularly appears in the affidavit hereto annexed; and

2. That the Court lacks venue and jurisdiction of the action for the reason that this is an action for a declaratory judgment based upon fire insurance policies insuring property located in Princess Anne County and further that the defendant is a nonresident;

That the time to make these motions having been extended by stipulation of the attorneys for the respective parties herein to and including the 12th day of September, 1958.

LOUIS ALEXANDER BRESLERMAN
Defendant in Person, Notify Willcox, Cooke, Savage & Lawrence, p. d. 419 National Bank of Commerce Building, Norfolk, Virginia.

To:

SANDS, MARKS & SANDS, Esqs.
315 American Building,
Richmond, Virginia.

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* * * * *

Commercial Union Fire Insurance Company of New York,

v.

Louis Alexander Breslerman.

ORDER.

This day came the defendant and moved the Court to permit the late filing of his answer.

On consideration whereof, in the exercise of its discretion, the Court ORDERS that the defendant's answer be, and it hereby is, filed.

We ask for this:

A. JEFFERY BIVINS, p. d.

Seen:

EDW. A. MARKS, JR., p. q.

Enter Mar. 27, '59.

C. H. J.

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Filed 5-1-59.

VIRGINIA MANNING, D. C.

American Liberty Insurance Company and Commercial Union Fire Insurance Company, Complainants,

v.

Louis Alexander Breslerman, Defendant.

CONSOLIDATED CAUSES.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

American Liberty Insurance Company and Commercial Union Fire Insurance Company, both corporations, appeal from the judgment rendered herein in this consolidated cause on the 7th day of April, 1959, adjudging in declaration of the rights of the parties that two sets of fire insurance policies, two issued by each company, which were the subject of this suit are valid and subsisting, and notice of said appeal is hereby given.

American Liberty Insurance Company and Commercial Union Fire Insurance Company assign as error the following actions on the part of the trial court:

1. The court erred in permitting the defendant to file answers and amended answers on the day of trial, the defendant then being in default and showing no good cause for leave to file and amend.

2. The court erred in holding that the evidence adduced in the cause on behalf of complainants was insufficient to make out a *prima facie* case for the relief sought.

3. The court erred in holding that as a matter of law the evidence adduced by complainants established a waiver by complainants of the vacancy and unoccupancy clauses of the insurance policies.

4. The court erred in holding that the evidence as a matter of law established that said insurance policies were valid and subsisting on November 13, 1957, and covered by fire on that date.

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5. The court erred in sustaining defendant's motion to strike the complainant's evidence made at the conclusion of such evidence.

6. The court erred in permitting the defendant to cross-examine witnesses on behalf of the plaintiff as to matters and things not relevant, pertinent and material to the controversy between the parties, over the objection and exception of the complainants, and in failing to sustain complainant's objections thereto, specifically in permitting defendant to introduce by such means evidence relating to prior insurance contracts not involved in the present suit.

Respectfully,

AMERICAN LIBERTY INSURANCE COMPANY COMMERCIAL UNION FIRE INSURANCE CO.
By Counsel.

EDW. A. MARKS, JR.

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page 3 }

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The Court: You can save that point, counsel. Your appearance in no way is to prejudice your right to appear. Now, gentlemen, the Clerk received yesterday a letter from counsel in New York requesting that the answer be filed, and an additional amended response to the answer. In this court order, responsive pleadings are to be filed within twenty-one days from the day shown on the papers, and the answer is only to be filed by order of the court. It cannot be filed with the Clerk—only by order of the court to file, after twenty-one days.

Mr. Strelzin: Well, Your Honor, our procedure is just a little different in the City of New York. We have page 4 } an additional defense. We have the right to serve notice on the other side, and the purpose of that notice is to prevent the pleading of surprise.

The Court: There was no issue made at all—attempted until yesterday. In other words that raising the motion, if it remains unanswered, under our rule responsive pleadings should be filed within twenty-one days after the process has been served on the defendant.

Mr. Strelzin: May I at this time respectfully move the court, as to these separate and distinct offenses, that they be accepted as part of the pleadings?

The Court: That can be done only by order of the court, and counsel can make any comment about them being accepted as part of the pleadings.

Mr. Marks: If Your Honor please, in view of the reservation that has been made with reference to the jurisdiction of the court, we would feel constrained to object to filing of late answers or amending late answers. On the other hand, if the objection as to jurisdiction is waived, and these gentlemen

consent to be here in good faith in every way, we have no objection.

Mr. Strelzin: Well, that portion, Your Honor, with reference to being here in good faith, I respectfully accept it. We are here in good faith in spite of jurisdiction.

The Court: When was the last proceeding ter-
page 5 } minated in New York in connection with this matter?

Mr. Strelzin: Approximately two days before the last Friday. We had a decision handed down on Wednesday before last Friday.

The Court: The court is of the opinion, in the exercise of this, that the court has to enter an order permitting an answer to be filed. You may prepare it, and the court will overrule the objection and permit it to be filed.

Mr. Marks: We except.

The Court: Exception noted.

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LOUIS ALEXANDER BRESLERMAN,

having been first duly sworn, was called as a witness by the plaintiff, and testified as follows:

DIRECT EXAMINATION.

* * * * *

By Mr. Marks:

Q. Mr. Breslerman, you are Mr. Louis Alexander Breslerman, the defendant in these two cases, are you not?

A. I am.

Q. What is your residence, sir?

A. It is 2850 Shore Parkway, Brooklyn, New York.

Q. Mr. Breslerman, how long prior to the fire had the properties insured under the Commercial Union and the American Liberty policies been vacant and unoccupied?

A. They were completely vacant and unoccupied from December 1, 1955 until the day of the fire.

The Court: December the 1st, 1955?

Witness: That's right, sir.

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FRANK M. POLLOCK,
having been first duly sworn, was called as a witness for the plaintiff, and testified as follows:

DIRECT EXAMINATION.

* * * * *

By Mr. Marks:

page 18 } Q. And upon your inspection what, if anything, were you able to ascertain with reference to the status of the properties with reference to occupancy and vacancy?

A. Two of the dwellings were rather badly damaged, and it might not have been apparent just with a cursory inspection whether they had been occupied or not. Two others were very slightly damaged, and it was apparent as soon as I went inside that they were not occupied. They had been completely vacant, in fact

* * * * *

Q. Upon information you received from any further contact with the agency and or Mr. Breslerman?

A. Yes.

Q. When did that take place, Mr. Pollock?

page 19 } A. Mr. Breslerman came to Norfolk and I met him when he arrived here.

Q. Where did you meet him, sir?

A. In the office of the agency.

Q. Are you able to establish the date of that meeting?

A. Not exactly.

Q. How long after the fires would your recollection tell you that that meeting took place?

A. A few days—probably three or four.

Q. At that time did you confer with Mr. Breslerman?

A. Yes.

Q. State what you told Mr. Breslerman when you first were introduced to him.

A. I told him that it appeared that there was a violation of the vacancy condition of the insurance policy, which was

Frank M. Pollock.

a matter over which I had no control, but and in order to discuss the matter with him, I would have to do so under the protection of a non-waiver agreement.

Q. Did you ask that he execute a non-waiver agreement?

A. Yes.

Q. Did he then do so?

A. Yes, sir.

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Q. Mr. Pollock, did you have that non-waiver agreement in your possession?

A. Yes, sir.

Q. Do you now have it?

A. No.

Q. What became of it?

A. It was destroyed along with my entire file in the Withers Building fire.

The Court: Permissible.

Q. When did the Withers Building fire occur, Mr. Pollock?

A. Christmas Eve, 1958.

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CROSS EXAMINATION.

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* * * * *

By Mr. Strelzin:

Q. I am asking you, Mr. Pollock, what conversation you had with George Badran prior to Mr. Breslerman's arrival in his office, and your conversation with Mr. Breslerman, if any, concerning the vacancy?

page 33 }

A. That I found on investigation that the dwell-

ings were apparently vacant, and such being the case, there appeared to be a policy violation.

Q. What did Mr. George Badran say to that?

A. He said that the first information he had that there was a vacancy was when he learned it in the newspaper.

Q. Now what did you say to that? I assume you had a continuing conversation. Now when he said to you, "The first thing I knew about the vacancy was when I read it in the newspapers," which might have been either the day of, or the day after the fire, November 13 or November 14, 1957, what did you say to him?

A. What remark would be called on. He gave me information.

Q. All I want to know is, did you say anything to him in response to that?

A. Well, I no doubt said that the newspaper was correct, that there were actually vacancies.

Q. What did he say?

A. He gave me a matter of information which wouldn't necessarily call for any specific reply.

Q. Well, did he tell you that—withdrawn. He told you that the first he knew that the premises were vacant was when he read it in the Pilot? Did he tell you he was

page 34 } surprised to learn it?

A. Yes.

Q. He told you he had never known it before?

A. That's right.

Q. Did he say anything else to you?

A. He said that had he known it, he wouldn't have insured the property.

Q. You say he told you that had he known that the premises were vacant, he would not have insured the property?

A. In other words—

Q. Is that what he told you?

A. Yes.

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Q. Now tell us what you said to Mr. Breslerman and what he said to you.

A. That was on the occasion of his first visit to Norfolk

Frank M. Pollock.

after the fire, and that is the conversation out of which the non-waiver agreement was signed and where we discussed efforts to reach some agreement as to loss and damage.

Q. Now what was the substance of that conversation?

A. The substance was that I would secure some figures from a contractor to serve as a basis for determining loss and damages, and when some figures had been available that we would go into the matter further.

Q. Was anything else said, sir?

A. Not that I recall.

Q. Well, did you say anything to Mr. Bresler-
page 37 } man about the vacancy?

A. Of course I have been over that before.

Q. Tell us what you said to Mr. Breslerman?

A. I thought that was covered. I told Mr. Breslerman when I first met him that it would be necessary for him to sign this non-waiver agreement if I could discuss the entire matter with him, and of course pointed out to him the necessity for it was because of the vacancy solely and only for that reason.

Q. What did Mr. Breslerman say in answer to that?

A. He said he would sign it, and he did sign it.

Q. Did he say anything else?

A. He said he knew of the existence of the vacancy.

Q. Who did?

A. Mr. Breslerman.

Q. He said he knew of the existence of the vacancy?

A. I don't know whether he knew.

Q. No, I am not interested in how or why he knew it. You said Mr. Breslerman told you he knew of the existence of the vacancy?

A. That's right.

Q. Did he tell you anything else about the existence of the vacancy?

A. Not that I recall.

Q. Did he tell you how long the properties had
page 38 } been vacant?

A. My recollection he said they had been vacant some considerable matter, maybe a matter of years, and probably vacant all or most of the time since they had been built.

Q. Well, did he tell you for how long a period of time without interruption they had been vacant prior to the fire? Continuous vacancy?

A. I don't recall any particular length of time, but it was to the effect that it had been a matter of at least several months that that condition had existed continuously.

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GEORGE N. BADRAN,
having been first duly sworn, was called as a witness by the plaintiff, and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Marks:

Q. Mr. Badran, will you give your name, if you will, to the reporter, please?

A. George N. Badran.

Q. And what is your business, sir?

A. Real estate and insurance.

Q. What is your business address?

A. Number 9 in the Selden Arcade, Norfolk, Virginia.

Q. How long have you been engaged in the real estate and insurance business, sir?

A. Approximately twenty years.

Q. Mr. Badran, was your company in August of 1957 in the insurance business?

page 56 } A. Yes, sir.

Q. In what capacity?

A. Writing insurance policies.

Q. Were you authorized to write policies for American Liberty and American Union Insurance Companies at that time?

A. Yes, sir.

Q. Mr. Badran, what kind of insurance agent was your agency in August of 1957?

A. We were sub-agents of insurance companies. We issued the policies. In other words we were not general agents. We were policy-writing agents.

Q. Mr. Badran, do you know Mr. Louis Alexander Breslerman, sitting over here?

A. Yes, sir.

Q. How long have you known him?

George N. Badran.

A. Approximately four years.

Q. I will ask you, sir, to look at Plaintiff Exhibits 2, 1, 3 and 4 and tell us whether or not these insurance policies were issued by your agency?

A. Yes, sir.

Q. Will you state the date—the inception dates—of the coverage?

A. August 19, 1957.

Mr. Strelzin: May I inquire if that is the same date as the date on the policy?

page 57 } Witness: Yes, sir. He said "the inception date" of the policy.

Mr. Strelzin: Perhaps we would have understood each other if you had asked him whether he issued the policy on the date stamped on the policy. I wouldn't have said anything.

Witness: It is on all four policies.

Q. Now, sir, was it actually issued on that date?

A. No, sir.

Q. When were they issued?

A. We usually send them out—

Mr. Strelzin: I object to what he usually does.

The Court: Objection sustained.

A. According to these policies, they were issued at the same time, accordingly signed August 19, 1957.

Q. Mr. Badran, in what ways did you first connect with Mr. Breslerman?

A. Back in 1955, if I am not mistaken, he called our company and asked us to sell some property he had on 37th Street. It was a duplex, double house, and we were successful in selling that house.

Q. And did you have subsequent contacts with him in connection with the sale of real estate?

A. Not too far from that time. He called me, or mentioned the fact that he had these six houses at Oceana and

page 58 } that he had built them for an investment and wanted to sell them.

Q. Did he list those properties with you?

A. At that time he did; yes, sir.

Q. Mr. Badran, what houses were they?

A. There were three houses fronting on Matt Lane and three houses backing up to them on Bob Lane.

George N. Badran.

Q. Now where were they located?
A. In the section of Oceana.
Q. Did you undertake to sell those houses?
A. I did my very best at that time. I advertised them, put my signs on the property. He had some tenants in them at that time, and I tried even to sell them to the tenants; and I told Mr. Breslerman that houses about that time were hard to sell in that particular section; and we tried to sell them under FHA, and the Federal Housing Administration wouldn't approve a loan in that section due to no streets and no sidewalks or curbing.
Q. How long were you engaged in trying to sell the houses, Mr. Badran?
A. I don't exactly recall; I imagine six months.
Q. During that time, sir, did you have any letters or correspondence with Mr. Breslerman?
A. Yes, sir.
Q. Did you have any letters from him?
page 59 } A. Yes, sir; I did.
Q. In point of time what was the first letter—point of date?
A. The first letter I have here is April 7, 1955.
Q. Mr. Badran, I hand you a paper which appears to be in the handwriting on notebook paper, and ask you to tell us what that is.
A. It is a memorandum from Louis Breslerman telling me that he had to rush back to New York and that I had keys for two houses on Matt Lane and two houses on Bob Lane and that Dave Miller had keys for one house on Bob Lane, says "good luck. Hope you can sell it."
Q. Would that be prior, in point of time, or after this letter of April the 7th?
A. It would be after that letter.

Mr. Marks: We will offer the two letters.
The Court: Plaintiff Exhibits 14 and 15.

Q. Now do you have any further letters from Mr. Breslerman?
A. We worked on these houses for approximately six months, because here I have a letter dated November 18, 1955, telling that he had turned the house over to Dave Miller.

Mr. Strelzin: I object to what he told to Mr. Miller.
Mr. Marks: I offer this letter.

George N. Badran.

The Court: Marked Plaintiff 16.

page 60 } Q. Pursuant to your letter of November 18, 1955, which is identified as Plaintiff Exhibit 16, what did you do, sir?

A. We ceased our efforts toward selling the houses because Dave Miller had them. They spent too much time—

Mr. Strelzin: I am sorry. I didn't hear it. You did what, sir?

Witness: We ceased our effort. We didn't continue to try to sell them, or work as hard as we had been, because someone else had them too. We kept them in mind and didn't spend the money or the time towards selling them.

Q. Which is the last time you had those houses in hand for sale, Mr. Badran?

A. We had them in mind all the time, Mr. Marks, but we never spent any time. The last actual time we had was what we are discussing now.

Q. Will you look in your files specifically for a letter from Mr. Breslerman of May 21, 1956?

A. Yes, sir. I have a letter from Mr. Breslerman dated May 21, 1956.

Q. Mr. Badran, I hand you this letter and ask you if this is the letter dated May 21, 1956, received from your company by Mr. Breslerman and attached to that May the 28th is your reply?

A. That's right.

The Court: This is Plaintiff Exhibit 18.

page 61 } Q. Mr. Badran, by reference to Exhibits 17 and 18 I note that Mr. Breslerman asked in Exhibit 18—which is his letter of May the 21st—that you return the keys; and in your letter of May the 28th you state that you returning the keys. Was that done?

A. Yes, sir.

Q. Now, sir, with that information before you, will you state when it was that you last had any connection with Oceana houses?

A. When I received a phone call from Mr. Breslerman telling me that he was leaving shortly for Mexico, and it was pertaining to a letter we had written him about renewing the insurance policies on the houses.

George N. Badran.

Q. Did you have the houses for sale after that correspondence in May of '56?

A. No, sir.

Q. Now with reference to the telephone call, will you state the circumstances surrounding that?

A. It was regarding renewing the insurance policies on the houses, and in conversation with Mr. Breslerman I asked him what had happened to the houses, and he said he had turned them over to a colored real estate agent named W. R. Singleton, and practically all of them had been sold under contract.

Q. When was that telephone call?

page 62 } A. Sometime during 1957.

Q. Can you point it out in point of time at all in 1957?

A. It was just about the time that we were up to renew the policies—policies up for renewal.

Q. The policies speak of August 19, 1957. Would that be of any assistance to you in attempting to establish the date?

A. Just about that time.

The Court: He told you he had sold them?

Witness: That they had been sold, practically all had been sold by W. R. Singleton, the colored real estate broker; and I told him I was sorry to see him do that, and it was something I wasn't very happy to be involved in, breaking the colored line, because I have never done that.

Q. On August 19, 1957, did you or did you not know whether or not those properties were vacant or occupied?

A. I did not know it, that they were vacant at all, because ordinarliy we wouldn't have written the policy.

Mr. Strelzin: I object to that.

The Court: Objection sustained.

Mr. Strelzin: May I get that date?

Mr. Marks: August 19, 1957.

The Court: Did you know at any time during the duration of the policy which was in force that the property

page 63 } was vacant?

Witness: You mean from '56 to '57?

The Court: August, 1957. Take it for three years, or one year?

Witness: One year.

The Court: Did you know at any time during that period

from August, 1957 until the date of the fire on November 13, 1957, that the property was vacant?

Witness: No, sir; I did not. It is approximately twenty miles from the office, and in talking to him when he told me on the phone, I assumed they were occupied.

The Court: What does your record show as to the last premium you collected? Have you a record of that?

Witness: I have no record of when it was paid, but I have a record of the policy when issued, and evidently they were paid.

The Court: At the time you collected that premium, did you know there was a controversy about the place being unoccupied?

Witness: No, sir.

Q. When did you, Mr. Badran, first learn of the fire?

A. That morning, the next morning when I read it in the paper at breakfast. Your Honor, I knew these houses had been vacant back in '55 and '56 when I was trying to sell them.

The Court: During that period when the policy was in effect, August, 1957, until the date of the fire, you
page 64 } said you didn't know that it was unoccupied?

Witness: That's right.

The Court: Had you information that it was unoccupied at the time you collected the last premium?

Witness: No, sir.

* * * * *

Q. All right, Mr. Badran, when did you first learn after August 19, 1957 that the properties were vacant and unoccupied?

A. Well, from the write-up in the newspaper it appeared that they were vacant, and also after talking to my
page 65 } adjuster.

Q. That was done after the fire?

A. Yes, sir.

The Court: You say that you had no knowledge prior to the fire that the premises were unoccupied?

Witness: No, sir.

The Court: Except the time you were trying to sell it?

George N. Badran.

(The witness nodded his head.)

Q. Mr. Badran, did I understand you to say that Mr. Breslerman phoned you to say that Mr. Singleton was representing the sale of these houses?
A. Yes, sir.
Q. Did Mr. Singleton ever get in touch with you concerning these houses for Mr. Breslerman?
A. Yes, sir. He called the office.
Q. When?
A. Just prior to the fire.

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Q. Mr. Badran, at our request, during lunch hour did you ascertain from your office records the date upon which the premium for the policies involved in this suit was paid to you?
A. Yes, sir; I did.
Q. What was that date?
A. October 16, 1957.

The Court: Repeat that question, please. October the what?
Witness: The 16th, 1957.

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CROSS EXAMINATION:

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By Mr. Strelzin:
Q. Did you inspect the houses in the early part of '55?
A. Yes, sir.
Q. Did you know whether any of them were unoccupied?

George N. Badran.

A. If my memory serves me right, there were two tenants in the front houses on this side at that time.

Q. Yes; one house was occupied by Mr. Grimes, and one by Mr. Brown?

A. I don't know.

Q. Well, in any event four of the houses were unoccupied?

A. That's right.

Q. You went through these houses, did you?

A. I don't think I went through all of them. I went through a couple of them, Mr. Strelzin.

Q. But in the early part of '55 you knew four of the houses were unoccupied?

A. Yes, sir.

Q. Now did you have occasion to meet the tenants at that time, the tenants occupying the houses that had been occupied?

A. Yes, sir; I did.

page 71 } Q. Did you have a conversation with these tenants?

A Yes, sir.

Q. And was the substance of your conversation the purpose of their buying these houses?

A. Yes, sir.

Q. How much time on that occasion did you spend with Mr. Breslerman in Oceana?

A. I don't recall. I think just that day, and he went back that night.

Q. Did Mr. Breslerman go back to your office with you?

A. I don't recall. He may have.

Q. Well, do you recall him assigning authority to you to sell those houses?

A. Yes, he did. He gave me authority to sell them.

Q. And he gave you exclusive authority?

A. That's right.

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Q. Were any keps left with you at that time to these houses?

A. Yes, sir.

Q. To how many?

George N. Badran.

A. I think four of them.

Q. Now after Mr. Breslerman left on that day, did you have occasion to write to him thereafter?

A. On many occasions, yes, sir.

Q. Well you wrote to him, in any event, on April 26, 1955, did you not, sir?

A. Yes, sir.

* * * * *

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Q. Had you been told prior to issuance of Defendant Exhibit 11, or had you known that Mr. Brown, who was the tenant on the premises 127 Matt Lane, had vacated the premises on June 1, 1955, and at the time you issued the policy, Defendant Exhibit 11, there were then five houses vacant?

A. No, sir.

Q. You say you had not been told that by Mr. Breslerman?

A. Not that I can recall; no, sir.

Q. You might have been told it, but you don't remember?

A. I don't know. We didn't collect the rents.

Q. When, after June of 1955, did you again visit the premises?

A. I don't recall. Did you ask when after June did I again visit them?

Q. June, 1955.

A. I don't recall whether I visited them or not. I think I was still trying to sell them, but I was running an ad.

Q. Well between June of '55 and November 13,
page 76 } 1957, how many times had you visited the premises in Oceana?

A. I don't think—two or three times at most.

Q. Now how long after June of 1955 was the first time?

A. I think about that time was when he turned them over to Dave Miller and I got out of the picture.

Q. No, no, no. How long after June of 1955 was the first time you visited the premises?

A. I don't recall. I am sorry.

Q. Well, that was the first time you don't recall when you visited them. Now the second time you say you visited the premises, when was that after June of 1955?

A. I don't know. I probably went there two or three times

George N. Badran.

to show the property for sale, or work out some financing for him.

Q. When was the last time, to the best of your knowledge, the best of your recollection, you visited those premises?

A. The latter part of '55 or the early part of '56.

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Q. Let's get back to 1955. Do you remember visiting a Mr. Charters?

A. Yes, sir. I took Mr. Breslerman with me.

Q. That was in September of 1955?

A. I don't know when it occurred, but it was
page 78 } during that time and we sat down and tried to work out the financing so Mr. Breslerman could carry over the account and pay up stocks in the corporation.

Q. Did you know the condition of the houses at that time when they were vacant?

A. At that time no. There were at least two tenants there, and I was trying to work this deal out with Mr. Breslerman so they could buy it, and any other prospects I had.

Q. You say in September, 1955, there were at least two tenants in those houses?

A. If my memory serves me, yes, sir.

Q. Then you don't know?

A. I couldn't be positive.

Q. If I tell you that Brown, who lived in one of the two houses that hadn't been occupied in the latter part of '55, that Brown moved out on June 1, 1955, and you were so advised by Mr. Breslerman by telephone, would you say that is so?

A. I don't know. I don't remember, sir.

Q. Well, in September of 1955, when you and Mr. Breslerman went to visit Mr. Charters, who was president of the investment corporation of Norfolk, did you visit the houses in Oceana?

A. No, sir.

page 79 } Q. When after that—search your memory. You were there three times after June. When for the last time? In '55 did you visit those premises after June of '55?

George N. Badran.

A. I can't recall, sir; probably the next month or so in the year '55.

Q. Now when in '56 did you visit the premises?

A. I don't know whether I did in '56. Can I look at that (indicating some papers before the court)? I received a letter on May—

Q. No, the question was, when in 1956 you visited the premises in Oceana?

A. I have no record. I have no recollection if I visited them or what I did.

Q. Well, in 1956 you know whether or not all the premises were vacant?

A. No, sir.

Q. Do you know whether there was one or two or three or all six?

A. I know that I talked to Lou Breslerman, I think, a couple of times on the phone; and here is a letter of May 19, '56, where I returned the keys to him.

Q. No—

Mr. Marks: I think the witness has a right to answer the question.

The Court: Sustained.

page 80 } Witness: Mr. Breslerman wrote a letter in May to return the keys to him. I had not been able to do anything. I know you tried, George, and regret you have been unsuccessful.

The Court: Counsel wants to know if you have any recollection of those letters to refresh your memory whether you visited the property in '56.

Witness: I have no recollection. I believe the first part of '56 I must have gone there one time to look at them. I don't know.

Q. Now when you went in there in the time, 1956, do you know how many of the houses were vacant?

A. No, sir. I think about four of them were vacant in the early part of '56.

Q. In other words you believe two of them were still occupied?

A. Yes, sir.

Q. Now in—

Witness: Mr. Breslerman was renting those and trying to

sell them. He had other agents working on the property too.

Q. You said he was renting them?
A. He had some people in the house.
Q. Were you ever asked to rent them?
A. No, sir.

page 81 } Q. When you first met Mr. Breslerman in '55—February—and after that were you asked to rent those houses?

A. No, sir.
Q. You were merely asked to sell them, weren't you?
A. That's right.
Q. And isn't it a fact you told Mr. Breslerman that those houses could be rented at a good rental and he said, "I don't want to rent them. I want to sell them."?
A. That is about it, and as I said, it was a shame to keep money tied up.
Q. And until the time he sold them he was going to keep them vacant. Didn't he tell you that?
A. I am not sure that is the exact words.
Q. But in substance?
A. It could be.
Q. Now you issued a policy—Defendant Exhibit 11—on August 19, 1955, and you testified that you knew at least four of the apartments were vacant at that time, from February, 1955. You issued a policy in August of 1955. You knew he didn't want to rent the houses, because you so testified. You knew you had the exclusive agency for the sales of those houses. Now will you tell His Honor just what clause in that policy protects Mr. Breslerman and gives him the insurance that he asked for, you knowing that the houses were vacant when you issued the policy?

page 82 } A. I don't know whether I had exclusive on the houses for sale at that time. He gave me sixty days, and they expired—sixty or ninety days. We wrote the policy for one year, August 19, 1955.

Q. Yes, at the time you wrote, you testified, the houses were vacant?
A. Yes, sir; some of the houses were vacant, and we were trying to sell them, and two or three houses in the others.
Q. As to the houses vacant, will you explain to His Honor what portion of the policy, Defendant Exhibit 11, was the proper coverage for the vacant houses?

Mr. Marks: May we understand our objection to the other insurance continues to the whole line of testimony?

The Court: Yes.

Mr. MacMillan: He is calling on the witness to determine the policy, and I don't think he is qualified. The policy speaks for itself.

The Court: The witness can quickly answer that question. He can read it from the policy.

Witness: The policy said forty thousand dollars—$6,666.67 on each of the six one-story houses.

The Court: The point counsel is asking, is there any provision in that policy which would protect the owner if the property remained vacant over sixty days.

page 83 } Witness: I don't know. My brother could answer that. He handled it.

Q. Did you sign the policy?

A. Yes, sir.

Q. You acted for the Company?

A. My company issued the policy.

Q. You signed the policy and you are the agent for the Company? Now will you please read this provision? Will you read page 2, beginning with line 33 of this policy; and then also read where it says permission granted. Read this first up here, thirty-three, and read the rider down there, and tell me whether you properly protected, in your opinion, the plaintiff with insurance issued.

A. Thirty-three says—

Q. Never mind what it says. First tell us whether in your opinion you are properly—

Mr. Marks: I object.

The Court: Objection sustained. The insurance agent is not the agent of the insured under any circumstance. He is the agent of the company.

Mr. Strelzin: And I want to know if he as agent of the Company was giving the defendant the proper kind of insurance.

The Court: You can ask in what respect he was protecting the insured.

Q. In what respect were you protecting the insured on the vacant houses on the vacant property?

page 84 } A. I don't get the meaning of your question, what something.

George N. Badran.

Q. You knew the houses were vacant, did you not?
A. I knew some of them were vacant.
Q. And that policy covered the vacant houses?
A. Certainly.
Q. Will you read the clause, please, that covers the vacant houses?
A. While the described building intended for occupancy beyond a period of sixty consecutive days.
Q. Now you knew in February of '55 when you first visited the premises they were vacant?
A. Yes, sir.
Q. And you knew in August of '55 when you issued the policy they were vacant?
A. Some of them, yes, sir.
Q. And you knew in 1956, when that policy had been in effect several months, they were still vacant?
A. Some of them.
Q. And did you believe that policy hadn't been covered for the defendant?
A. Yes, sir.
Q. And why did you so believe it?
A. Because the houses were up for sale. Some of the houses were occupied.
page 85 } Q. How about the four that weren't that you were sure?
A. We were trying to sell them, working on financing of them.
Q. Then is it your opinion that as long as you knew some of the houses were vacant and they were trying to be sold, that policy was sufficient?
A. That's right: yes, sir.
Q. In spite of the fact that the policy had a clause which provided a suspension of the policy if they were vacant for sixty days, your answer is yes?
A. That's right.
Q. Now you renewed those policies in '5—Withdrawn. You renewed the policy covering the insurance—fire insurance—on these houses in 1956, did you not?
A. Yes, sir.
Q. Now at that time did you issue a single policy, or more than one?
A. We issued six policies.
Q. Six separate policies?
A. That's right.
Q. One on each house. Is that right?

George N. Badran.

A. Yes, sir.

Q. And prior to the issuance of those six single policies did you have a conference with Mr. Breslerman, whether on the telephone or in person?

page 86 } A. With reference to what?

Q. With reference to the issuance of six policies on the place instead of one?

A. I received some correspondence from him in that regard.

Q. Well you remember having talked with Mr. Breslerman then about the necessity of issuing six policies instead of one policy?

A. My letter—

Q. I don't hear you, sir.

A. My letter of June 27, 1957 to Mr. Breslerman was returned by him to me stating that he expected to sell the six houses shortly; the mortgage would be about $7,500, and would suggest individual coverage on each house for at least $7,500.

Q. Then you knew at the time you issued those policies and prior to that in 1956 that the houses were still vacant, did you not?

A. About this time he said he thought he had sold them.

Q. He thought he might sell them?

A. Yes.

Q. He didn't say sold them, did he?

A. No.

Q. So at the time he issued the renewals on the

page 87 } policies in '56, you also knew they were vacant, did you not?

A. Some of them, yes, sir.

Q. Hadn't you known they were all vacant at that time?

A. No.

Q. Didn't you know all the houses became vacant after November the 1st, 1955 when the last tenant vacated it?

A. Just about that time I think the last tenant skipped out.

Q. So all the houses became vacant after November, 1955. Isn't that so?

A. I presume so, sir.

Q. Did you suggest to Mr. Breslerman that he rent these houses in the spring of '56?

A. I think I suggested it to him.

Q. And isn't it a fact that Mr. Breslerman kept saying to you, "I don't want to rent them. I want to sell them."?

George N. Badran.

A. Kept saying that, yes, sir.

Q. And didn't you keep telling him that was a good renting area?

A. I don't know about that. He had other real estate firms working on his house too, all the companies down to the beach.

Q. Now you remember, do you not, sending this letter and this bill to Mr. Breslerman sometime in August of 1956?

A. Yes, sir; the same letter I just read that we
page 88 } held up the policies until he wanted to send them direct to the new owners.

Q. And is that the bill you sent him?

A. Yes, sir.

Mr. Strelzin: I offer this.

Mr. Marks: No objection.

The Court: Defendant 12.

Q. Now in any event, Mr. Badran, knowing that the premises were vacant in August, 1956, when you renewed the policies and you issued one policy for each house—six individual policies—I ask you whether these four policies were issued, two by the American Liberty Insurance Company—by your company—and two by the Commercial Union Fire Insurance Company?

A. Yes, sir.

Mr. Strelzin: I offer them in evidence.

Mr. Marks: Same objection as to the others.

Mr. Strelzin: Two are not the subject of this suit, so I am withholding them.

The Court: Thirteen, 14, 15 and 16 inclusive.

Q. Now is it your opinion, sir, that these four policies, Defendant Exhibits 13, 14, 15 and 16, properly and adequately cover the defendant, Mr. Breslerman, even though the houses were vacant?

A. Yes, sir. All this time he was trying to sell them, and a great many times I think he had tentative con-
page 89 } tracts on the houses, I think. I don't know.

Q. But you knew he hadn't sold them?

A. Naturally. They were written in his name.

Q. Well, in August of 1956 you knew they weren't sold?

A. Because they were written in his name. Still the owner, it could have been under conditional sales contract.

George N. Badran.

Q. Did you or not know in August of 1956 they were not sold, they were vacant?

A. I knew they were not sold, but I don't know how many were vacant or unoccupied.

Q. You knew some of them were unoccupied?

A. Yes, sir.

Q. How many were you sure of, all six?

A. No.

Q. Four?

A. About four, yes, sir.

Q. Well, haven't you testified previously that in November of 1955 all of the houses became vacant, the last one being vacated by Mr. Grimes on November the 1st of 1955?

A. I don't know. I don't recall. I never handled Mr. Grimes'.

Q. Didn't you so testify a few moments ago that you knew when the last tenant moved out?

A. I don't know whether I testified that way or not. It has been so long ago.

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Q. Now you testified that you knew when you issued the policies—Defendant Exhibits 13 to 16—that you knew the houses were vacant?

A. Some of them.

Q. And for how long a period of time after that did you continue to know they were vacant?

A. I don't know.

The Court: I think his testimony shows that from the first policy in 1955 that he has known at least four had been vacant all the time. I think that is what his testimony is.

Mr. Strelzin: That is right, sir, and we are now page 94 } concerned with the policies re-issued in '56.

Q. And how long after you issued the renewal policies in '56 did you know the houses were vacant?

A. I don't recall, except when we renewed them in '57, when Mr. Singleton, the colored man—

Q. No; before you issued them in '57?

A. I don't think I saw the house any more.

George N. Badran.

Q. But you knew they were vacant after you issued the policy in '56?

A. I may have known the date, but how long they stayed vacant, I don't recall.

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Q. In any event you sent Mr. Breslerman a letter on July 19, '57?

A. Yes, sir.

Q. Asking him about the renewal of the policies?

A. Yes, sir.

Q. You knew, then, did you not, that they were not occupied?

A. No, sir. I didn't know whether he had tenants in there or not. He could have had tenants.

Q. But you didn't know?

A. No, sir.

Q. You didn't know whether they were vacant or occupied?

A. That's right.

Q. And because of that you sent him this letter of July 9, 1956?

A. That's the customary letter for renewal when the policies are expiring.

Mr. Strelzin: I offer this in evidence.

The Court: Defendant 18.

page 99 } Q. Now when you sent—after you sent the letter of June 9, 1957 to Mr. Breslerman, did he return it to you with a memorandum on Defendant Exhibit 18, "Dear George, just returned from Europe and found the above. Thank you. Please renew. Lou."?

A. Yes, sir.

Q. And did you proceed to renew those policies?

A. Yes, sir.

Q. And at that time you didn't know that the houses were occupied or unoccupied. Is that right?

A. Yes, sir.

Q. And you issued the same policies in August, 1957 that

you issued in August of '56 and you issued in August of '55. Is that right, sir? I don't hear you.

A. Yes, sir. I had a conversation with Mr. Breslerman before we issued these policies, and he was getting ready to go to Mexico when he called.

Q. That would be in September?

A. No, it was before we renewed these.

Q. Before he renewed these he told you he was going to Mexico?

A. I don't recall, but it was around that time the policy was up for renewal.

Q. If I tell you, sir, he spoke to you in May of 1957 and told you he was leaving for Europe, and in September of 1957 he again spoke to you and told you he was leaving

page 100 } for Mexico, might that refresh your recollection?

A. No, because I don't think I ever talked to him about going to Europe; but I know just about the time we renewed these policies. He called me and I asked over the phone should we renew them, and I asked about the houses, and he said he had turned them over to Mr. W. W. Singleton, the colored real estate broker.

Q. For possible sale?

A. Yes, and he said he thought they were all sold. Singleton called me and I was glad—

Q. Never mind Singleton. Mr. Breslerman told you, though, he was leaving for Mexico?

A. Yes, sir.

Q. And he thought they were all sold?

A. Yes, sir.

Q. And for you to renew the policies in his name?

A. Yes, sir.

Q. He didn't tell you they were sold?

A. He said—

Q. Thought they were sold, you said?

A. Said conditional contracts was on through Singleton.

Q. When did he tell you that?

A. When I talked on the phone, and it was corroborated when I talked to Singleton.

Mr. Strelzin: I move to strike that.

page 101 } The Court: Read the question. Wait.

(The reporter complied.)

Q. Let's be a little more specific. You understand this is

more important. You testified a few moments ago that Mr. Breslerman told you when you were about to renew those policies in August of 1957 that he thought they were all sold? Is that what you said—yes or no?

The Court: That is what he said.

Q. So that you had no assurance that at the time of the renewal of the policies in '57 the houses were sold. You knew they might be sold or would be sold, and isn't that the reason you issued the policies in the name of Lou Breslerman as the owner?

A. I don't know what you mean; what reason?

Q. Well, you issued the policies to Lou Breslerman as owner?

A. Just like I had done previously; yes, sir.

Q. And previously you knew the houses were vacant?

A. Some of them.

Q. And this itme if they were vacant, you felt they would be covered?

A. This time we were reluctant, until—

Mr. Strelzin: I move to strike it out. It calls for a conclusion.

Q. You did renew them?

page 102 } A. After talking to Mr. Breslerman and Mr. Singleton.

Mr. Strelzin: Did I get a ruling on the reluctancy, Your Honor?

The Court: His statement wasn't responsive.

Q. Now you knew, did you not, that if the premises were vacant at the time you renewed these policies in August of '57, Mr. Breslerman would be covered, and if they were not vacant, he would also be covered?

A. I didn't know they were vacant at all when we renewed these policies.

Q. You did not know?

A. No, sir.

Q. You weren't sure, in any event?

A. I didn't know they were vacant. Otherwise we wouldn't have renewed them.

Q. Hadn't you renewed them in '55?

A. We had; yes, sir.
Q. Hadn't you renewed them in '56 when they were vacant?
A. Yes, sir.
Q. And you renewed them in '57?
A. We did, assuming—
Q. Well, did you?
A. We did.

page 103 } Q. That is your company?
A. My company.
Q. You are the agent of the insurance company?
A. Yes, sir.
Q. And you weren't sure whether they were vacant or not? Isn't that so?
A. I didn't know they were vacant at all when we renewed them.

The Court: Pardon. I think we need not pursue it further. The court gathers from the testimony he didn't know, one way or other.

Q. Is this the receipt that you sent to Mr. Breslerman for the payment of the premium on the policy issued in '57?
A. It is the receipt for the insurance premium, 17250; yes, sir.
Q. What date is that premium?
A. October the 16th.
Q. Nineteen fifty-seven?
A. That's right.

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Q. In any event, Mr. Badran, up until the time of the holocaust, the fire in November of 1957, you were never asked to change the insured on the policy, were you?
A. No, sir.
Q. And were those policies in force and effect at the time of the fire?
A. Yes, sir.
Q. Now I show you Defendant Exhibits 3 and 4—I will

George N. Badran.

withdraw that—yes, Defendant Exhibits 3 and 4, and ask you whether you remember signing these notices of cancellations?

A. Yes, sir.

Q. And when was the cancellation effective?

A. As of the 26th day of February, '58.

Q. Well up until February 26, 1958 you arranged to keep premiums for the policy that was issued in August

page 105 } of 1957?

A. Yes, sir.

Q. You returned no premiums?

A. No, sir—$172.50.

Q. And will you look at Defendant Exhibits 1 and 2 and tell His Honor when those were cancelled?

A. The notice of cancellation was sent out November 19, 1957 stating that the policy would be—the explanation, final date on this notice.

Q. And these policies then were cancelled the 24th of November, 1957?

A. Five days after receipt, probably the 25th to the 27th.

Q. Did you return the premiums on this policy after the 24th of November, 1957?

A. No, sir.

Q. So that premiums were paid for on those two policies for a period of time of about eleven days after November 13, 1957, the date of the fire?

A. Yes.

* * * * *

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Mr. Bivins: If Your Honor please, at this time the defendant moves to strike all the plaintiffs' evidence on the ground that they have not established a *prima facie* case. First of all, we maintain that although the witness Badran testified positively in the record in response to the court's questions that he did not know some of the dates of the policy, I think it was August 19, 1957. His testimony on cross

page 108 } examination is to this effect: He admits that he knew that Mr. Breslerman intended to keep the houses vacant. He admits that repeatedly. He had been asked to rent them, and Mr. Breslerman absolutely refused to do so, told him he wanted to sell them. He didn't want

to rent them. Now he as agent of the Company certainly knew when he wrote the policy on August 19, 1957 that Mr. Breslerman was yet the owner of the property, then nobody had occupied it, because there had been no sale, and it was the avowed action of the defendant here not to rent these premises out. Now if we establish—

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Mr. Bivins: I realize that all the motions that we have of this type we have to take all inferences in favor of the plaintiff. I think it is pretty much established, and I am not going into this too much, that if the agent had knowledge that the premises were vacant for sixty days there was waiver or estoppel of this provision which suspends the operation of the insurance. I have had to give the law on that question.

Now the second point we wish to raise is admittedly the Company here has carried this man's claim
page 109 } through February, 1958. They have retained these agreements. I would like to quote New York Rubber Company and Community Insurance Company, a New Jersey case, 64 New Jersey, Law 80, where vacancy was involved, just as in this case. The premium was received in the above cited case, the court holding the Company could not hold the right to the premium and at the same time require there was no coverage as to a condition of which it had knowledge. Now there is no question the Company had knowledge right immediately after the fire that the premises were not occupied, and had not been for a period of years, but nevertheless they have for a long time retained the premium. Now they cannot—they can't blow hot and cold. They can't keep the premium and yet maintain there was no coverage.

• • • • •

Mr. Bivins: Well that is exactly what they have done in this case. They held the premium, and they simply retained it through February.

And a third proposition, they have required Mr. Breslerman to come down here to Norfolk and to go to considerable expense as to full knowledge.

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Mr. Bivins: Now we have prepared here a trial
page 110 } memorandum, and for the reasons outlined here, we respectfully submit that on the basis of the

plaintiff's own testimony that judgment should be for the defendant here, and consequently we move that all of the evidence be struck.

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page 113 }

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The Court: The case at bar is that if the company, the companies through him, knew from time of the original policy up until the time of the fire that they were not occupied, they are liable on the evidence. Our Court of Appeals has gone right far in saying if the company in business is an agent, great latitude is given the assured, and that whatever the agent knows, the home office knows. The home office has the same knowledge as the agent.

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The Court: It is the law of Virginia that the acceptance of the premium wipes out all the provisions of the policy.

* * * * *

The Court: There is no evidence here that
page 115 } from the date of the issuance of the latter policy, November—

Mr. Marks: August, '57.

The Court: That there was ever any occupancy of the houses known to the company, and while the company was collecting insurance—and there is before this court some other authorities. Have you finished? I don't want to cut you off.

* * * * *

The Court: The court is of the opinion they waived when they insured this property, knowing through their agent that it was not occupied. They took the risk that the insured

should not be responsible for. The court will, in accordance with the Statute, hold that the Company was liable.

Mr. Marks: We respectfully except to Your Honor's ruling.

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A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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