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Record No. 5112

In the Supreme Court of Appeals of Virginia at Richmond

VIRGINIA WEINSTEIN, ET AL.

v.

GLENS FALLS INSURANCE COMPANY

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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. 5112

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 27th day of November, 1959.

VIRGINIA WEINSTEIN, ET AL., Plaintiffs in Error,

against

GLENS FALLS INSURANCE COMPANY, Defendant in Error.

From the Circuit Court of the City of Portsmouth

Upon the petition of Virginia Weinstein and Freda Rothenberg a writ of error is awarded them to a judgment rendered by the Circuit Court of the City of Portsmouth on the 7th day of July, 1959, in a certain motion for judgment then therein depending wherein the said petitioners were plaintiffs and Glens Falls Insurance Company was defendant; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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* * * * *

February 23, 1959.

Mr. A. A. Bangel
Attorney at Law
Law Building
Portsmouth, Virginia

Mr. Berryman Green, IV
Attorney at Law
National Bank of Commerce Bldg.,
Norfolk, Virginia

Gentlemen:

After a review of the record and authorities cited in this case, I am of the opinion that my original ruling in striking the evidence was correct and judgment will be entered accordingly.

The plaintiff's proof fails to establish the contract alleged in the Motion for Judgment in that the memorandum relied upon by him shows on its face that it is not the insurance contract; but it does refer to the contract and indicates where it is and how it can be established. Plaintiff did not prove this contract but in effect offered to show what would have been a proper contract under his theory of the case. I feel evidence to this effect was properly excluded and when the plaintiff rested his case, he had not proved the contract alleged in the motion for judgment.

Plaintiff contends that any written paper issued by the insurance company through its agent, other than the memorandum offered in evidence, did not speak the agreement between the parties, and that he is entitled to prove the real agreement between them and recover theron in this law action. The annotation in 66 ALR 758 on this subject contains cases which seem to support the plaintiff's position. With the separation of law and equity in Virginia, I am certain Virginia follows the contrary view; furthermore, the record in this case does not establish the erroneous contract and

there is nothing to reform even if it could be done in this action. Judgment will be entered accordingly.

Very truly yours,

H. W. MacKENZIE, JR., Judge.

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April 28, 1959.

A. A. Bangel, Esq.
Attorney at Law
Law Building
Portsmouth, Virginia.

Berryman Green, IV, Esq.
Attorney at Law
National Bank of Commerce Bldg.
Norfolk, Virginia.

Gentlemen:

Upon re-argument of the motion to set aside the verdict of the jury in this case and award a new trial, the plaintiff contends that it is the law in Virginia, that when the agent of an insurance company in the issuance of a policy makes a mistake the insured is not required to go into equity to reform the policy, but may maintain his suit at law and prove the contract as it should have been written. He cites as authority *Glover* v. *National Fire Insurance Co.,* 85 Federal 125, *Massachusetts Bonding & Insurance Co.* v. *Piedmont Service Station,* 181 Southeast 397.

The two cases sustain the substantive rule contended for by the plaintiff, and it is upon the theory that the company is estopped to deny the mistake of its agent that such practice is allowed.

The question now before this court for decision is whether the verdict for the defendant by the jury in this case should be set aside. This in turn depends upon whether the court committed error in its rulings on the evidence at the trial of the case, and specifically whether the court erred in not

permitting the plaintiff to prove what would have been a proper policy to issue upon a dwelling house.

A review of the pleadings disclose the plaintiff's action is based upon policy No. 2115 issued by the defend-
page 21 } ant insurance company on November 12, 1955. Included in the grounds of defense of the defendant is a defense which would be a subject of a special plea at common law setting forth that the policy sued on by the plaintiff contained a provision that if the property were vacant for ninety days the property would not thereafter be covered and that the property had been vacant in excess of such period. There is no replication filed by the plaintiff to this defense.

Under this state of facts, the court finds no error in its previous ruling. If the plaintiff wished to rely upon the point of law first set out herein he should have pleaded such facts in his motion for judgment or he should have set up an estoppel by way of replication to the defendant's grounds of defense. As the matter stood at the time of the trial the defendant came into court prepared to make his defense to policy No. 2115, and particularly to sustain his allegations with respect to the ninety day vacancy clause. He was put on no notice by the pleadings that the plaintiff was going to prove a contract at variance with that declared upon in his motion for judgment. If a plaintiff is to be permitted to plead one case and prove another the subject of pleading might as well be abolished all together.

The court is therefore of the opinion that no error was committed at the trial which would justify the setting aside of this verdict, and the plaintiff will be left to such remedy as he has in chancery if he can establish that he has been hurt by a mistake of the defendants agent.

Very truly yours,

HWM; jr/lb

page 22 } Virginia:

In the Circuit Court of the City of Portsmouth on the 7th day of July, 1959.

* * * * *

At this day came again the parties by their Attorneys

and the Court having fully heard the motion of the plaintiffs, by counsel, to set aside the verdict of the jury heretofore rendered herein and grant them a new trial on the grounds that the said verdict is contrary to the law and evidence, and errors of the Court apparent on the records, doth overrule the same, to which action of the Court, the plaintiffs, by counsel, excepted; it is therefore considered by the Court, that the plaintiffs take nothing by their bill but for their false clamor be in Mercy, &c., and that the defendant go thereof without day and recover of the plaintiffs its costs by it about its defense in this behalf expended.

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ASSIGNMENT OF ERRORS.

Pursuant to Rules of the Supreme Court of Appeals of Virginia, plaintiffs, Virginia Weinstein and Freda Rothenberg, assign the following errors:

1. The Court erred in striking plaintiffs' evidence.
2. The Court erred in excluding the testimony of witness, Julian M. Blachman.
3. The Court erred in holding as a matter of law that plaintiffs had not proven their contract of fire insurance.
4. The Court erred in holding that plaintiffs were required to go into a Court of equity and reform the policy.

page 25 } 5. The Court erred in refusing to permit the plaintiffs to prove a standard policy.

6. The Court erred in refusing to set aside the verdict and award a new trial.
7. The Court erred in entering final judgment on the verdict.

VIRGINIA WEINSTEIN &
FREDA ROTHENBERG
By A. A. BANGEL, p. q.
Of Counsel.

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page 3 }

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SAMUEL WEINSTEIN,
called as a witness on behalf of the plaintiffs, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please, sir.

A. Samuel Weinstein.

Q. You are the husband of Virginia Weinstein?

A. That is true.

Q. She and Freda Rothenberg owned property numbered 926-7th Street, Portsmouth, Virginia?

A. Yes, that is true.

Q. And do you recall when they first acquired ownership of that property?

A. Oh, it has been quite some time ago, 1940 or something like in the forties or late forties or fifty.

Q. After they had acquired ownership of this property, did they make sale of the property?

A. They did.

Q. And do you recall to whom it was sold?

A. To the man you mentioned, Swain, Overton, page 4 } several others.

Q. Was that sale consummated for cash or part cash?

A. No. We sold for part cash and we carried it on a mortgage payment.

Q. Was a policy of insurance issued to cover loss if any occurred by fire?

A. Yes, it was.

Q. Do you know how much that policy was for?

A. $2,500.

Q. I hand you a memorandum of insurance issued by the Glens Falls Insurance Company, Glens Falls, Illinois, and ask you whether or not that is the policy that was delivered to you covering the fire?

Mr. Green: Your Honor, I object to the introduction of this memorandum of insurance. We have been sued on a contract of insurance, a policy of insurance. The memorandum contains none of the provisions which were contained in the original policy. The only thing which appears on the memorandum is a description and three endorsements which were put on there at a later time. We have been sued on the contract and we call for the production of the original contract.

Mr. Bangel: Our position, if Your Honor please, is that that memorandum of insurance is all that was issued and de-

Samuel Weinstein.

livered to us and we relied entirely on it. The insur-
page 5 } ance company received our premium, issued that
policy and we are suing on that policy. Any other policy we know nothing at all about.

Mr. Green: Your Honor, I submit that the original policy was delivered to the trustee.

Mr. Bangel: Who says so?

Mr. Green: I also submit that this is not a contract of insurance. I hand it to Your Honor to examine.

(Handing to the Court.)

By Mr. Bangel:

Q. Mr. Rothenberg, was any policy delivered to you other than the policy which has now ben handed to the Court?

A. My name is Weinstein.

Q. I am sorry; Mr. Weinstein.

A. No, I have never seen a policy—

Q. —other than the one that is given there?

A. That is the only thing I have ever received from the agent I did busines with.

Q. That agent was who?

A. That was Mr. Enos, I think this gentleman sitting right there (indicating).

Q. Mr. Enos is the agent in this territory for the Glens Falls Insurance Company?

A. Insurance company, yes, sir.

Q. Did you try to locate any other paper writing
page 6 } purporting to be covering this particular property,
other than the paper writing now held by the Court?

A. When the fire occurred and I called the trustee who was holding the necessary papers and policies and so forth, and I asked him if he had a copy of the policy; he said no, he don't ever remember receiving one.

Q. Did you then go around and talk to Mr. Enos, try to get a copy of the policy?

A. I asked Mr. Enos for a policy and my lawyer instructed me, in fact advised me that he also went around, spoke to Mr. Enos about getting a copy of the policy.

Q. Did you ever receive anything other than that paper writing?

A. I have never received any other excepting that paper there in front of me.

Samuel Weinstein.

Mr. Green: I object. It is not a copy of the insurance policy. We have been sued on the policy.

The Court: You have a copy of the policy?

Mr. Green: Yes, sir.

The Court: You have not been taken by surprise. I will accept this in evidence subject to—

Mr. Green: I will agree, Your Honor, I will stipulate if Mr. Bangel will, that this copy of the policy that I have is a copy of the original policy.

The Court: I will give you an opportunity to
page 7 } introduce that at the proper time if you want to do it. The only thing before us now is the introduction of this memorandum here. I will receive that.

Mr. Bangel: Would Your Honor mark that Plaintiff's Exhibit 1?

Mr. Green: Your Honor, note my exception to it.

(The document referred to was marked Plaintiff's Exhibit 1.)

By Mr. Bangel:

Q. Mr. Weinstein, this paper writing marked Plaintiff's Exhibit 1 has a title endorsement on it which reads as follows: (Reading) "Title Endorsement Attached to and forming part of Policy No. 2115 of the Glens Falls Insurance Company of Glens Falls, New York. effective date of endorsement July 24, 1957"—signed Fred G. Enos, Agent. Name of the assured, Melvin Swain, Henry Rhodes, Ivan Horton, John Moody and Samuel Overton, Jr.; policy date inception November 12, '55; expiration November 12, '58; amount $2,500. Property insured, dwelling; location 926 - 7th Street, Portsmouth, Virginia. And then also typed in there is the name—it states "Notice is hereby acknowledged that the interest of the above insured in the property described in this policy has been transferred and this policy assigned to Virginia Weinstein and Freda Rothenberg and consent to such assignment is granted by the company." When did you get this title endorsement?

page 8 } A. This title endorsement, the one you just read?

Q. Yes, sir.

A. It was after I took over the—after we took the property back from the people we sold it to.

Q. Now, who cried that property off as auctioneer?

A. Mr. Enos over here.

Samuel Weinstein.

Q. And he is the same person who is the agent for the Glens Falls Insurance Company?

A. He is.

Q. Now, after the property had been cried off, you said you notified—

A. I called Mr. Enos' office and asked for Mr. Enos and he was out and I asked the young lady when he would be in. She said she didn't know just when, and I told her that I wanted the dwelling at 926 - 7th Street to be covered by the same amount of insurance that we had before.

Q. Was that when you were given this policy?

A. That is when I received this endorsement several days later.

Q. Now, when the prior endorsement was made it also showed the same property, same amount of insurance for $2,-500 on a property described as a dwelling?

A. That is right.

Q. Prior to that, however, it shows the property as being a dwelling, grocery store?

page 9 } A. Yes, but that was changed, Mr. Bangel. That was changed to a dwelling from—

Q. When your attention was directed to the fact that it showed—

A. That is right.

Q. You had it—

A. It was changed to a dwelling.

Q. Now, did you order and receive this paper writing in compliance with your request for a fire insurance policy of $2,500 on this dwelling?

A. I did, sir.

Q. Was there any other paper writing of any kind delivered to you by Mr. Enos, agent for the company, other than that paper writing?

A. There is nothing to my knowledge that I can know of that any other paper that I ever received was any other than what I have there on that table.

Q. Now, the property was destroyed by fire, was it not?

A. Yes, sir.

Q. And the proof filed with the company indicated it took place in July 19—

Mr. Green: Wait a minute, Mr. Bangel. I think you are leading this witness.

Mr. Bangel: All right, sir; I will stop it.

Samuel Weinstein.

page 10 } By Mr. Bangel:

Q. Was proof of loss filed with the company?

A. Yes, sir.

Q. Does the company still have the proof of loss?

A. Yes, sir.

(Mr. Green rose to object.)

Mr. Bangel: That is the only way he can proceed, to file with the company. He can't keep it in his pocket.

By Mr. Bangel:

Q. You delivered it, did you not?

A. That is right.

Q. Now, the property had a fair market value of how much?

A. $4,000.

Q. And the amount of coverage is $2,500?

A. $2,500.

Q. Was it a complete loss or not?

A. It was a complete loss.

Q. Following the loss of the building by fire and after filing the proof of loss, did you make demand on the company for payment?

A. I did, several times.

Q. Have they paid you?

A. No, sir.

Q. The list dwelling, 926 - 7th Street, was it occu-
page 11 } pied or unoccupied at the time of its—

A. It was unoccupied.

Q. Was it occupied or unoccupied at the time of the loss?

A. It was unoccupied.

Q. It was vacant?

A. Vacant.

Q. And had it been vacant for some time?

A. Yes, it had. Several months I would say.

Q. I notice when the policy was originally issued on November 12, 1955, it recited the property as being a dwelling, grocery store. Was it a dwelling, grocery store?

A. The place was never a grocery store. Since we bought the property it was never used as a grocery store or any other kind of business.

Q. That was purchased by you in the latter part of 1949?

A. That is right.

Q. Well now, when your attention was directed to the fact

that it was a dwelling, grocery store, was the correction made showing a dwelling?

A. I think the papers will show that it was made just a few days later.

Q. And when you ordered your policy it was on—

A. I had it drawn the same way, on the dwelling.

page 12 } Q. And you ordered and paid for a standard policy?

Mr. Green: I object, Your Honor, Mr. Bangel is leading this witness.

The Court: I sustain the objection.

By Mr. Bangel:

Q. When you ordered a policy of insurance for a dwelling—which you said—were you expecting a policy that was usual or different from that usually issued by—

A. I received exactly—

Mr. Green: I object to this leading by Mr. Bangel. He is certainly suggesting the answers to the witness.

The Court: I sustain the objection.

By Mr. Bangel:

Q. Was there any paper writing ever delivered to you indicating that the policy was covering anything other than a dwelling?

A. No, sir, never.

Q. Was there any mortgage on the place after your wife and Mrs. Rothenberg became the purchasers?

A. No, sir.

Q. The title endorsement assigned by the agent, Fred G. Enos, shows that the mortgage clause—

Mr. Green: Your Honor, the document speaks for itself. I object to Mr. Bangel testifying in the case, Your Honor.

The Court: I sustain the objection.

page 13 } Mr. Bangel: I didn't think he would raise any question about his own paper.

Mr. Green: Your Honor, if he had the original policy I would raise no objection at all to it; but my contention is that this is not the policy. It is not the contract which we have been sued on.

The Court: The objection is to the form of the question.

Samuel Weinstein.

I have admitted this paper in evidence. The objection is to the form of the question and I think the objection is well taken as to that.

Mr. Bangel: All right, sir. The Witness is with you.

CROSS EXAMINATION.

By Mr. Green:

Q. You state that you never had any knowledge that this building was ever used as a grocery store or anything of that type?

A. The building was never used as a grocery store.

Q. But this was delivered to you, was it not, sir?

A. Which was?

Q. This memorandum of insurance?

A. Yes. All these papers were delivered to me.

Q. Would you read the description which appears on the face of the memorandum?

page 14 } A. On the two story frame building, approved roof, dwelling occupied as a grocery store situated at 926 - 7th Street, Portsmouth, Virginia. Now, after I received that, I received a correction if you will notice here, sir.

Q. No, sir.

Mr. Bangel: Let him finish.

Mr. Green: The document speaks for itself.

Mr. Bangel: He is showing you the—

A. I want to show you what you asked me, sir. I show you a few days later I had the correction, you understand, in my hands that it was changed from what you asked me to read and it was shown where it was changed to a dwelling.

By Mr. Green:

Q. Will you read that, please, sir? That is a recitation, is it not? That is not part of the policy?

A. It says here—that is all I am interested in, sir, that it was a dwelling.

Q. All right, sir. Now, you state that this building never has been used as a grocery store?

A. No, sir, not to my knowledge, not since the time I bought it.

Q. Not since the time you bought it?

A. That is right.

Q. But it was operated as a grocery store at the time these other gentlemen owned it?

page 15 } A. No, sir. You are getting confused, sir. If you don't mind me correcting you, that 924 is a grocery store.

Q. This building has never been used as—

A. No, sir, never has been used as a grocery store but 924 has for maybe five years before I bought it, but 926 was never a grocery store.

Q. All right, sir. Now, your wife owns the property, does she not?

A. Yes, sir. It is in her name.

Q. You stated that the proof of loss was filed?

A. Yes, sir.

Q. Did you file that proof of loss?

A. Signed by my wife and Mrs. Rothenberg.

Q. You filed it yourself?

A. I—my wife filed it.

Q. All right, sir. You know that for a fact?

A. I know it. I was there when she signed it. I was eye-witness.

Mr. Green: I think that is all at the present time.

BERNARD ROTHENBERG,

called as a witness on behalf of the plaintiffs, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please.

page 16 } A. Bernard Rothenberg.

Q. Mr. Rothenberg, your wife is Mrs. Freda Rothenberg?

A. That is right.

Q. She and Mrs. Virginia Weinstein are the owners of property numbered 926 - 7th Street, Portsmouth, Virginia?

A. That is correct.

Q. There has been something said about a grocery store. Did she also own 924 - 7th Street?

A. Yes, sir.

Q. Were the two buildings immediately adjoining each other?

A. Yes, sir.

Q. Was 926 - 7th Street ever operated as a grocery store since your wife became owner?

A. No, sir.

Bernard Rothenberg.

Q. When did she become half owner in that property?

A. I thought it was 1947. However, he said 1949. It was within that period, between '47 and '49.

Q. And from 1947 until the present—until it was destroyed by fire—was it ever occupied?

A. Never occupied as a grocery store.

Q. Was it occupied as a dwelling?

A. Always occupied as a dwelling.

Q. Now, the property 926 - 7th Street was insured with the Glens Falls Insurance Company?

page 17 } A. Yes, sir.

Q. And that was with Mr. Enos as its agent?

A. Yes, sir.

Q. Have you seen any paper writing purporting to cover the property for loss by fire, save and except the paper writing now held by the Court?

A. That is the only thing I have ever seen. We tried to get a copy of the insurance but we never could even get a copy of the insurance.

Q. Whom did you apply to for it?

A. Mr. Enos; as well as I recall he said they were numbered and he couldn't give one out.

Q. Were the premiums paid?

A. Yes, sir.

Q. Was the policy in full force and effect at the time of its loss?

A. Yes, sir.

Mr. Green: I object to that. That is a question of law.

Mr. Bangel: As far as he knows it was in full force.

Mr. Green: That is a contention in the case, Your Honor.

By Mr. Bangel:

Q. Now, no question was ever raised about the

page 18 } origin of the fire, was there? You never heard—

A. No, no.

Q. You didn't occupy it? Did any of your people occupy it?

A. (The witness shook his head.)

Mr. Green: I object to leading his witness. I hate to continually object. He is testifying.

By Mr. Bangel:

Q. Did you occupy the premises?

A. No, sir.
Q. Did the co-owner occupy it?
A. No, sir.
Q. Have they questioned the origin of that fire with you, the company?
A. No, sir. It was never any question as to the origin.
Q. All right, sir. Now, Mr. Rothenberg, the proof of loss was filed?
A. Yes, sir.
Q. And have you made demand for your money?
A. Yes, sir.
Q. At the time your wife and Mrs. Weinstein became owners, the last time, was it through foreclosure proceedings or not?
A. Yes, sir, through foreclosure.
page 19 } Q. Who acted as auctioneer?
A. Mr. Enos. I understood that. I wasn't there.
Q. You were not at the sale?
A. No, sir.

Mr. Bangel: You weren't there. You can't testify. All right, sir. That is all.
Mr. Green: I have no questions. Stay in the courtroom, please, sir; don't leave. I may need you.

Mr. Bangel: I might be putting on Mr. Esleeck out of order. I think their contention is that it was a mercantile establishment. If not I want—
Mr. Green: We stand on the policy as written. This is not a question of reformation.

ROBERT S. ESLEECK,
called as a witness on behalf of the plaintiffs, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:
Q. State your name, please, sir.
A. Robert Esleeck.
Q. Mr. Esleeck, you are connected with the City of Portsmouth, are you not?
A. Yes, sir.
Q. In what capacity?
page 20 } A. Assistant License Inspector.
Q. How long have you been so employed?

Robert S. Esleeck.

A. It will be nine years in January.

Q. State whether or not it is your duty to go around and inspect properties, particularly mercantile establishments.

A. It is, sir.

Q. Are you familiar with the property known, numbered and designated according to the present system of street numbering or at that time as 926 - 7th Street?

A. Yes, sir, I am.

Q. Was that a store or a dwelling?

A. It was a dwelling, sir.

Mr. Green: Your Honor, I don't think that this gentleman can testify as to that unless he lays some proper foundation concerning the basis of his knowledge.

Th Court: If he says he knows, I don't think that would require any expert knowledge. It is a matter of observation.

Mr. Green: All right. I object to his testimony as being irrelevant, too, Your Honor.

The Court: I overrule the objection.

Mr. Green: Yes, sir.

Mr. Bangel: The witness is with you.

page 21 } CROSS EXAMINATION.

By Mr. Green:

Q. Did you ever go to that property, Mr. Esleeck?

A. Not inside, no sir.

Q. Did you ever inspect it inside?

A. Not inside, no, sir. I do remember it being occupied as a dwelling.

Q. Did you ever go there in 1954?

A. 1954? Yes, I am sure. I have been there every year for the last nine years. I have been past it.

Q. I mean have you ever been in it?

A. Not in it, no, sir; never been inside.

Q. Have you been there in 1955?

A. Not inside; never been inside.

Q. Never been inside?

A. No, sir.

Q. So you were going by outside appearance, is that correct?

A. Well, I am going by the fact that it is my duty to take license. I remember 924 very distinctly being a grocery store.

Robert S. Esleeck.

RE-DIRECT EXAMINATION..

By Mr. Bangel:

Q. No license was ever issued for that place as a mercantile establishment since you were in the department?

A. 926, no, sir.

RE-CROSS EXAMINATION.

By Mr. Green:

Q. Let me ask you this: 926 you say is a grocery store?

A. 924 was a grocery store. It is vacant at this

page 22 } time.

Q. The two buildings are right there together, are they not?

A. They adjoin each other, yes, sir.

Q. Are they built together?

A. No, sir. Well, there is nothing in 926 now. At that time it was two separate buildings, I am sure of that, sir.

Q. Two separate buildings?

A. It was two separate buildings.

Q. Did you ever know whether 924 was used in conjunction with 926 in operation of a grocery store?

A. Not in the last nine years it wasn't.

Q. A storage room or anything of that type?

A. Storeroom?

Q. Yes.

A. 924 has a storage room of its own, I can tell you that. I have been inside there many times.

Q. What I am talking about is use of 926. You are sure that—

A. 926 I am positive was a dwelling because I remember seeing colored children running in and out. The main entrance is on the side.

Q. Was the first floor of that building designed, too, for a store?

page 23 } A. I couldn't tell you about the inside. The outside wasn't.

Q. You don't know whether the inside was designed for a store?

A. The inside of 926?

Q. Yes.

A. I have never been inside of it. The outside wasn't designed for a store, I can tell you that.

Q. The outside wasn't but you have never been inside?

A. I have never been inside.

Mr. Green: That is all.
Mr. Bangel: Thank you, sir.
Mr. Bangel: We rest.
Mr. Green: Your Honor, I have a motion.
The Court: Gentlemen, take about a ten-minute—
Mr. Bangel: Let me call one other witness while I think of it. I call Mr. Enos as an adverse witness. Take the stand.
Mr. Green: I object to Mr. Bangel, having rested, introducing additional testimony.
The Court: I overrule the objection.
Mr. Green: Note my exception.

page 24 } FRED G. ENOS,
called by the plaintiffs as an adverse witness, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:
Q. State your name, please, sir.
A. Fred G. Enos.
Q. Mr. Enos, are you the agent for the Glens Falls Insurance Company?
A. Yes, sir.
Q. And as such are you authorized to write policies of insurance for that company and receive premiums?
A. Yes, sir.
Q. Is it necessary for you to communicate with the Glens Falls Insurance Company to determine whether or not a particular policy should issue, without issuing that policy?
A. No, sir.
Q. Now, if a person was to apply to you for a policy of fire insurance covering a dwelling, what kind of policy would you issue?

Mr. Green: Your Honor, I object to that. I believe the only think that is material here is what happened in this particular case. And in view of the fact that Mr. Bangel has sued on a written contract, I believe that the testimony would also be inadmissible on that basis. The best evidence of the contract is the contract.

Mr. Bangel: We never have gotten a contract.
page 25 } We paid for it, never got it. I want to show what he would have done.

Fred G. Enos.

A. The contract was delivered as usual to the trustee; not at all unusual in the insurance industry.

By Mr. Bangel:

Q. Mr. Enos, as agent for the Glens Falls Insurance Company, you are familiar with the different clauses, provisions and stipulations in these policies, are you not?

A. Fairly. I am not an expert on it.

Q. Well, it is your duty as insurance agent to know, be familiar with your policies? Are you not?

A. Right.

Q. Now, if you were told to issue a policy of insurance on a dwelling, what kind of policy would you issue?

A. I would have issued in this case we weren't—wasn't requested.

Mr. Green: It isn't a question of what he would do, it is a question of what he did in this particular case.

The Court: Overruled.

Mr. Green: Exception.

A. That wasn't the request.

By Mr. Bangel:

Q. We will get to whether it was or was not the request. Let's get down to the kind of policy you would issue.

page 26 } A. Naturally, if I were requested to issue a policy on a dwelling, I would issue one to cover a dwelling.

Q. What provision would it have, if any, with respect to a vacancy?

A. On a dwelling, none.

Q. Could a dwelling remain unoccupied for any unlimited period of time and still be covered by a policy?

A. Yes, it could.

Q. And we are dealing now with a policy issued by the Glens Falls Insurance Company?

A. Right.

Q. That is different, however, from a commercial one, is it?

A. Yes. The form is different.

Q. The form is different; but a dwelling has no prohibition against its remaining vacant for any length of time?

A. No, sir.

Q. And even if the property may be vacant for months, if it

Fred G. Enos.

is a dwelling and insured as such, in the event of loss by fire the policy would be in full force and effect?

A. Right.

Mr. Bangel: That is all, sir.

CROSS EXAMINATION.

By Mr. Green:

Q. Mr. Enos, under the standard fire policy, is it not true that there is a vacancy provision which provides page 27 } for forfeiture of the policy when it is vacant or unoccupied beyond a period of 60 consecutive days?

A. That is mercantile or residence?

Q. Residence.

A. Well, if it is—

Q. And standard policy.

A. I am ashamed of myself; I can't honestly answer that.

Q. In other words, you don't know?

A. I don't know.

Q. So in answer to what Mr. Bangel has asked about the vacancy—

A. I have always been of the opinion the residence was covered.

Q. You say you are not an expert on that?

A. No, I am not.

Q. You don't know?

A. No, sir.

Q. So having answered Mr. Bangel's question with reference to vacancy, as far as the dwelling is concerned your answer now is that you don't know whether there is a vacancy provision?

A. As I said, I am no expert in insurance. I have always been of the opinion that the residence was covered.

page 28 } RE-DIRECT EAMINATION.

By Mr. Bangel:

Q. I hand you a paper writing which appears to be on dwelling and contents, Form No. 131-4, Virginia, and ask you if that is not the terms, conditions, provisions and limitations put in the policy of fire insurance on a dwelling issued by the Glens Falls Insurance Company?

A. That is for your dwelling, yes, sir.

Fred G. Enos.

Mr. Bangel: We offer it in evidence.

By Mr. Bangel:
Q. I ask you if you will, please—
Mr. Green: Your Honor, I object to this. I don't believe this endorsement was effective until June of 1956.

By Mr. Bangel:
Q. That same endorsement would be on it in 1955, is that right? This fire took place in 1957.

Mr. Green: That is all right. The policy was written in 1955.
The Court: Written in 1955. How can I say that this is material?
The Witness: I would like to throw some light on this, all these questions.

By Mr. Bangel:
page 29 } Q. Is the clause any different in that paper writing than it was in 1955; any different, in the clause provided for in the paper writing I have just shown you as to vacancy and that which existed prior to 1955?
A. I don't know.
Q. As agent for the company, wouldn't you know?
A. Maybe I am supposed to know but I am honestly answering I don't know.
Q. Would it take you very long to find out for us?
A. Well, I would have to read the policy; probably confer with my office, who handles the details of the insurance office.
Q. Well, you were agent for that company in '55, were you not?
A. I have been agent since '52 for them.
Q. And you have written many policies since 1952?
A. My office has, Mr. Bangel, yes.
Q. Is there anyone in your office who could throw any light on whether or not there is any difference in the clause dealing with vacancy?
A. Yes. I believe I have one but I don't see where this is relevant. I think I could throw a lot more light on this without all these questions.
Q. Let's see if we can't do it my way.

Mr. Green: I again call for the production of the original

Fred G. Enos.

page 30 } policy here, on the basis that we are talking about something which is completely irrelevant to the case that the plaintiff has pled. We have been sued on a policy of insurance. The policy has never been produced. We are talking about a dozen different things here. Admittedly the date is changed, various things have been changed, and it is just the wildest kind of speculation, Your Honor, as to what the—

The Court: There is something to what you say, because there is nothing in this paper here that says that Glens Falls Insurance Company agrees to insure these people against fire.

The Witness: Only three things here I would like to bring out.

Mr. Bangel: It is in there, Judge.

The Court: I haven't seen it.

By Mr. Bangel:

Q. Well, Mr. Enos, was there a policy of fire insurance issued to Mrs. Virginia Weinstein and Mrs. Freda Rothenberg insuring property numbered 726—

A. 926.

Q. 926 - 7th Street, against loss by fire to the extent of $2,500?

A. The original policy, Mr. Bangel—

Mr. Green: Let him answer the question.

Mr. Bangel: Let's answer these questions.

page 31 } A. The original policy was issued and delivered to Mr. Karp, trustee.

Mr. Bangel: Mr. Karp has been around—

The Witness: I don't know who that original was—the endorsements I have made were nothing but title endorsements, that is all they were.

By Mr. Bangel:

Q. You know that Mr. Karp has been to your office trying to get a copy of this policy, do you not?

A. The copy is the one you have, sir, a memorandum. I can't issue another policy. If he has lost his original policy, that policy has to be cancelled and another one reissued.

(The reporter asked the spelling of the name Karp.)

Fred G. Enos.

The Witness: Attorney Leonard Karp, trustee.

By Mr. Bangel:

Q. Well now, let's see. You were the agent for the Glens Falls Company?

A. Yes, sir.

Q. As such agent, did you receive a premium to cover the property in question?

A. The premiums were paid on these policies, I will say that.

Q. Let me finish; maybe we can save some time. Did you receive the premium for the company, agreeing to

page 32 } pay in the event of loss by fire $2,500 on the property in question?

A. The policy—yes, sir, the premiums were paid. There is no question about the premiums not having been paid.

Q. No question about the premium being paid or that the company will pay $2,500 to the insured in the event of loss by fire?

A. My answer was, the first part—he has two questions there. The policy speaks—the premium has been paid, the policy speaks for itself. It is a contract.

Q. Well, you received on behalf of the company the premium and you issued the policy?

A. A-hum.

Q. And that policy provided, among other things, that it would pay to the named assured $2,500 in the event of loss by fire?

A. Right.

Q. Now, based upon that policy the original of which we do not have—and it has not been offered—did you thereafter cause to be issued the riders shown here, dated Julv 24, 1957?

A. Yes, sir, I did. The title endorsements; it is all we can—both title endorsements.

Q. Let's not pass too quickly. That recites that there was a policy outstanding No. 2115 issued by the Glens Falls Insurance Company which agreed to pay—

page 33 } A. Melvin Swain, Henry Rhodes, et als., here.

Q. —$2,500 in the event of loss by fire. And that was subsequently changed to make it payable to Virginia Weinstein and Freda Rothenberg?

A. Right.

Q. Am I correct in that?

A. You are right.

Fred G. Enos.

Q. What is that property described as being? Mercantile or dwelling?

A. The title endorsement in error recites the property as a dwelling, but this is only—

Q. You say in error?

Mr. Green: Let him finish.

A. This title endorsement becomes part of the original contract which was written as a building and grocery store.

By Mr. Bangel:

Q. Let's see if I understand. Did you say that there was an error appearing in that?

A. This does not change anything except the assignment of interest from Melvin Swain et als. to Virginia Weinstein and Freda Rothenberg. That is all that piece of paper does.

Q. Would you mind telling me, where does the error appear in that paper?

A. In the property insured. It recites it as a dwelling.

Q. Well—

page 34 } A. This becomes part and parcel of the original contract.

Q. Suppose an individual had a piece of property insured with your company which was a mercantile establishment, subsequently converted into a dwelling. Would you put a rider on it making it a dwelling or would you keep it as mercantile?

Mr. Green: I object to that, again,as not what occurred—

Mr. Bangel: He is an expert.

The Witness: I have so testified, I am no expert.

By Mr. Bangel:

Q. You are the company's agent?

A. That doesn't make me an expert.

Mr. Bangel: If Your Honor please, in fire insurance it is different from life insurance. In life insurance you have to bring home notice to the company's home office. In fire insurance, the local agent is the company for all purposes, in Virginia. And all knowledge is that of the agent and—

Mr. Green: I object.

Mr. Bangel: That is true, he is the agent. He occupies the position of the president. He has the right to issue the policy,

page 35 } receive the premium, do everything. He does not have to write up to New York and have it done. I say I have a legal right to ask these questions.

The Court: Well, I can't say that you don't. I will let him answer it.

Mr. Green: Note my exception.

The Witness: What is the question?

By Mr. Bangel:

Q. All right, Mr. Enos. Let's assume that you as the agent for your company had issued a policy of insurance on a mercantile building which was subsequently converted into a dwelling. Would you put a rider or endorsement on it the same as you have there?

A. I would at the request of my principal, the assured.

Q. The insured?

A. The insured; notify me as his agent it's been changed from mercantile to dwelling.

Q. Would there be any change in the policy save and except the endorsement that you now hold in your hand showing it to be—

A. No. As long as the title is not changed, you are just changing—you are changing a description in your question. This was not changing the description, Mr. Bangel; this was request to change title and title only.

Q. All right, sir. Let's say that they requested that it be done, title and description; how would you do it?

page 36 } (Mr. Green rose to object.)

The Witness: I will answer the question.

The Court: Wait a minute. All right, Mr. Green.

Mr. Green: Your Honor, I just want to show my continuing objection to this line of testimony concerning what he would have done under other circumstances than those existing in the case which is being tried.

By Mr. Bangel:

Q. You understand we are dealing with general practice, your general practice, do you not? You understand that, don't you?

A. Does the judge—

Q. You understand we are dealing with your general practice?

A. Yes.

Fred G. Enos.

Q. What you would do?
A. Yes.
Q. All right. I will ask you if a person owned a piece of property—

Mr. Green: Note my exception.

By Mr. Bangel:
Q. —and you acting as the agent for the Glens Falls Insurance Company issued a policy and thereafter that assured came to you and said, "Mr. Enos, we have converted this building, we have changed it to a dwelling
page 37 } and the name of the owner of this property is someone else," how would you change it on your policy?
A. I would show the change from the mercantile to dwelling, or dwelling to mercantile, and change the title.
Q. Where would it differ from the one that you have in your hand showing the change in this property from—
A. Mr. Bangel, I contend that this request of my office was nothing more than title endorsement which is so marked at the top, title endorsement.

The Court: That is not responsive to the question, Mr. Enos. He is asking you what type, what form of endorsement would you put on there to change from mercantile to dwelling.
Mr. Bangel: And the name of the person.

A. Now, I don't know the form number. I can't answer that.

By Mr. Bangel:
Q. Would it be different from the one that you have in your hands?
A. No. It would be very similar to this. I don't know whether that form would be the same or not.
Q. Well, do you know of any paper writing that you would issue acting as agent for your company and given to you by the—
A. There would be an endorsement issued from
page 38 } my office.
Q. Would it be the same as that endorsement you have there?
A. I am not sure it would be exactly the same as this. It

would be an endorsement of some type. I can't keep up with forms of insurance, I will tell you that.

Q. Do you know any difference from what you have there? You testified a moment ago it would be the same as what you have there. Do you want to change that?

A. You have got me rather confused, I will be honest.

Q. Who signed that endorsement showing that?

A. I signed it.

Q. That is your name?

A. That is right.

Q. It shows the property being a dwelling and shows the ownership being—

A. —being changed from Melvin Swain, et als., to Virginia Weinstein and Freda Rothenberg.

Q. All right. Now, you take the prior endorsement, the endorsement before that; what does it show, mercantile or dwelling, the one immediately preceding it?

Mr. Green: Your Honor, let me state at this time that my position in this case is that the recovery has to be governed by the policy which Mr. Bangel sued on. I object to any testimony which would come in to alter the terms of that agreement, under the parol evidence rule. page 39 } The documents which Mr. Bangel has introduced speak for themselves. This line of testimony that he is going into I submit is improper under the parol evidence rule and it is also irrelevant to the questions before the Court at this time.

The Court: I think his point is well taken, Mr. Bangel. This court is going to have to be governed by what was actually issued. It is not a question of what would be issued under any other circumstances.

Mr. Bangel: Your Honor understands that our position is briefly this: We have never seen any original policy. That has been testified to today. We say that if any policy has ever been issued, it was never issued to my clients. We maintain that the only paper writing which they received is the paper writing he now has in his hands, marked Exhibit 1 by this Court.

The Court: Which refers to a certain numbered policy issued with all the provisions incorporated in it.

Mr. Bangel: All right, sir. There is a standard policy in Virginia. Mr. Enos has testified to that. Let's assume the policy was lost; we don't know that it was ever issued; say it was issued and lost; we still have to have a way of

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proving it. That is the only way we could prove it, just the way we are doing it. It was never contended that page 40} if the policy was lost, there could be no suit on it.

The Court: I sustain the objection to the question. You have a right to call for the policy as it was originally issued.

Mr. Bange: We are not bound by what they say was originally issued.

The Court: This paper here refers to a certain numbered policy issued at a certain time of which a copy is in the possession of the insurance company. You have the right to call for that copy. If there is any question about whether that is a copy or not, you can go into that. But that constitutes a contract and the Court is ruling that as a matter of law, because the Court has to construe what the contract is.

Mr. Bangel: We save the point.

By Mr. Bangel:

Q. Mr. Enos, do you have a copy of the original policy of insurance?

A. All—

Mr. Green: I can stipulate if you want.

A. All my office has, Mr. Bangel, is what is known as the "Daily," and, of course, that does not take in all the fine print that was in the original. We can't—we can reconstruct an original from it—original policy.

Q. You mean then you would have to depend page 41 } upon memory as to what it was in order to reconstruct it?

A. No, sir.

Q. What?

A. No, sir.

Q. You would have to reconstruct? You don't have any copy of it?

A. I have a "Daily" in my file for the property.

Q. Would your "Daily" show whether or not this policy was issued by you as the agent for the Glens Falls Insurance Company?

A. Yes, sir.

Q. Would it show the name of the assured?

A. Yes, sir.
Q. Would it show the amount of insurance issued?
A. Yes, sir.
Q. Would it show the paper?
A. The standard form?
Q. Standard form.
A. Yes.
Q. I hand you this paper right here and ask you if this is the standard form that was in existence when this policy was—
A. I would rather go from that because of that reconstruction. I am not familiar enough with these forms to say that is it or not but I have one over here that has
page 42 } been reconstructed.

Mr. Bangel: If Your Honor please, I have called him as an adverse witness. He is here in court. I ask that he be required—

By Mr. Bangel:
Q. Would it take you very long to get a true copy?
A. I have it, sir.

Mr. Green: He has it right here.

A. I brought it in court.

Mr. Green: I have it right here. I am talking about the policy as written.
The Witness: There is the "Daily."
Mr. Green: There is the "Daily" right there.
The Witness: There is the "Daily" from my files.
Mr. Green: And it refers to the form which was in use, right there: "Subject to bureau form 115-3."
The Witness: That is right from my file, my office. I don't have to go down get it; I brought it with me.

By Mr. Bangel:
Q. I am asking you this: If you were requested to issue a policy, fire insurance policy on a dwelling, would you write it on Form 115-3 or Form 131-4?
A. I do not know. My office handles that.

Mr. Green: I object.

Fred G. Enos.

The Court: I sustain the objection. It is a
page 43 } question of what he did write it on, what is the contract, not what he would write on today or yesterday or some other time, but what he did write it on.

Mr. Bangel: Would Your Honor hear us in chambers?

The Court: Yes, sir.

(In the judge's chambers, in the absence of the jury, the following occurred:)

Mr. Bangel: In order that Your Honor might know what has taken place and not be completely in the dark as to what I am trying to establish, I want to make this statement: Under the law, Mr. Enos is the company so far as the writing, receiving a premium and delivering the policies. If a person goes to the agent of the company—speaking about fire insurance agent—and says, "I want a policy of fire insurance on a dwelling numbered a certain number," and pays the premium, he is entitled to a standard form policy issued by that company which deals with a dwelling and which states all the terms, conditions, provisions, limitations of a fire insurance policy issued by that company on a dwelling. Now, apparently, from this evidence, it is clear to the Court—it is to everyone else—that there has been an error made by the agent. Here is what happened. Instead of the agent
going ahead—from what I can gather—instead
page 44 } of the agent going ahead and writing the policy on the standard form of policy No. 131-4, which permist unlimited vacancy, someone in his office had put in the policy there a mercantile establishment, which limits it to 90 days. That is what I was told by Mr. Enos when I talked to him about this thing. I said, "Well, how can you do that, put that on when right in front of you shows that the man ordered a dwelling policy?" Well, if it had been a dwelling policy, the clauses would have provided for unlimited vacancy.

The Court: If what you contend is true, you are in the wrong forum. You have to ask for a revision of the contract. Your suit is on the contract as it stands.

Mr. Bangel: Your Honor hasn't let me finish.

The Court: All right.

Mr. Bangel: They gave us the policy; when I say "policy": the memorandum of insurance. I brought a suit on it. Now Mr. Green says, "But let me get in the record here that we issued on another form."

Mr. Green: All I want to see is the policy you brought suit on.

The Court: You couldn't sue on the memorandum. You have to sue on the entire contract and you have to sue on the contract as it stands. If the paper doesn't express the actual agreement of the parties, you have got to page 45 } reform in chancery.

(After further argument by counsel, Mr. Bangel made an offer of proof and the following occurred:)

The Court: I am not going to be in a position of letting the jury hear evidence that I am going to exclude. I am going to give you the opportunity to put your evidence in the record here.

Mr. Green: Let the record show that I have called for the production of the original policy which Mr. Bangel brought his suit on and that I object to any evidence aside from the policy as to what the terms and conditions of that policy were, under the parol evidence rule.

The Court: Go ahead, call Mr. Blachman. I am sustaining his objection.

Mr. Bangel: And we save the point, if Your Honor please, on the ground that we maintain that we have to show, where we do not have the policy ourselves and none has been delivered so far as we know other than the paper writing we offered in evidence, we have a right to show what the policy would be, having paid the premiums.

page 46 } JULIAN M. BLACHMAN,

called as a witness on behalf of the plaintiffs, and having been first duly sworn, testified as follows: (In chambers)

Examined by Mr. Bangel:

Q. State your name, please, sir.

A. Julian M. Blachman.

Q. Mr. Blachman, you are engaged in the fire insurance business, are you?

A. Yes, sir.

Q. And you have been so engaged for how long?

A. Around 30 odd years.

Mr. Green: I will stipulate Mr. Blachman's qualifications.

Julian M. Blachman.

By Mr. Bangel:

Q. Now, where an owner of a building goes to the agent of the fire insurance company for the purpose of obtaining a fire insurance policy on a dwelling, what is the standard Virginia form for the dwelling?

A. Today it would be 131-4.

Q. I hand you what purports to be Form No. 131-4, Virginia, and ask you whether that is the standard?

A. That is it. That is the one on the policy written today.

Mr. Green: I want the record to show that this is in the form of an offer of proof.

page 47 } The Court: Yes. I will mark this P-X-1.

(The document referred to was marked P-X-1.)

By Mr. Bangel:

Q. Is this refused exhibit, P-X-1, a standard form that is attached to policies of fire insurance issued on residences in the state of Virginia?

A. Yes, sir.

Q. You said something about its being one that would be placed on it as of now. How about any time during the year 1955?

A. Well, at that time it was 131-3. This was amended on June—in June '56.

Q. Prior to amendment, was there any change in the forms as to the unoccupied or vacancy limit?

A. No, sir.

Q. Would the policy issued on a dwelling in the years 1954 and 1955 have this provision: "Permission granted (a) For other insurance (b) For such use of premises as is usual or incidental to the described occupancy (c) To be unoccupied or vacant without limit of time, and, (d) To make alterations, additions and repairs and to complete structures in course of construction, and this policy (so far as it applies to building) covers all lumber and materials on the premises or adjacent thereto."

A. That was not changed, no, sir.

page 48 } Q. And that has been in force prior to the year 1955 and until the present time?

A. That is right, sir.

Q. When a policy is issued by the agent, Mr. Blachman, he places the forms thereon which conform with the use of

the property whether it be a dwelling or a mercantile establishment?

A. Yes, sir.

Q. Is that correct?

A. In effect at that time, the forms in effect at that time.

Q. And in the year 1955 a policy of fire insurance applied for, for a dwelling, would if issued properly by the agent contain the form that you have just referred to?

A. It would contain a form No. 131 which would have had this same provision in it but it would have been No. 131-3 because there were some changes made in the form in June of 1956 but not relating to the particular question. There was no change in the particular question. The changes, Judge, made in that form were on the reverse side, in the extended coverage. They were limited by the State where formerly there was no deductible; in case of a damage by windstorm they put into the form a fifty-dollar deductible for windstorm and it was changed at that time in June '56 but that only applied to the extended coverage which is on—sometimes people don't even have that in their policies. It is optional whether or not you do that.

page 49 } Q. That is the change that was made in the new form?

A. Yes.

CROSS EXAMINATION.

By Mr. Green:

Q. Mr. Blachman, if a policy had been written the subject bureau form 115-3 would have been a mercantile form, would it not?

A. That is right.

Q. And that mercantile form provides for a forfeiture of insurance in the event that the premises are vacant and unoccupied for a period in excess of 90 days?

A. That is true.

RE-DIRECT EXAMINATION.

By Mr. Bangel:

Q. Mr. Blachman, would the Form 115—what was that?

A. 115.

Mr. Green: 3.

A. 115-3.

Julian M. Blachman.

By Mr. Bangel:

Q. Would that be put on a policy of fire insurance issued in this state on a dwelling?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Green:

page 50 } Q. It would be put on a policy, though, that was issued for a grocery store, would it not?

A. Yes.

Mr. Green: Thank you, Mr. Blachman.

The Court: Is there anybody else you want to put on?

Mr. Bangel: That is all.

Mr. Green: I move the Court to strike the plaintiff's evidence in this case on the ground that it failed to carry the burden of proof incumbent upon them—

Mr. Bangel: May I go back? Your Honor is sustaining the motion to strike out that evidence, not allow that evidence to go in, is that right?

The Court: That is right. That was stated in the beginning.

Mr. Bangel: We want to except to the Court's refusal to allow the evidence of Mr. Blachman to be heard in this case and we except to the Court's exclusion.

Mr. Green: Your Honor, I move the Court to strike the plaintiff's evidence on the ground that they have failed to prove the policy provisions. They have brought suit on a written contract of insurance as alleged in the motion for judgment. They have failed to prove the provisions of that policy. And on the basis of Your Honor having

page 51 } sustained the objection to the introduction of parol testimony to vary the terms of the policy as written, I move the Court to strike the evidence.

The Court: I sustain the motion.

Mr. Bangel: We save the point.

(Back in the courtroom, in the presence of the jury, the following occurred:)

The Court: Gentlemen of the jury, the Court tells you as a matter of law that there is no evidence before you on which a verdict for the plaintiff could be sustained in this

case, so I am going to ask that you retire, appoint a foreman and return a verdict; you will find for the defendant.

(The jury retired to consider their verdict, but returned to make the following inquiry of the Court:)

The Foreman: Judge, some of the jurymen didn't understand your last statement you made.

The Court: Well, gentlemen, I will go into it a little bit further. You see, the plaintiff has the burden of proving his case in order to recover. The plaintiff has completed putting on of his evidence and because of matters of law with which you are not concerned, the Court has ruled that he has not as a matter of law established such a case as would enable the jury to bring in a verdict for the plain-
page 52 } tiff. Consequently, there is nothing to do except to find for the defendant. Does that make it clear? It is rather an involved proposition, one that we deal with every day but you gentlemen who are only exposed to this thing every once in so often might find it a little on the side of beating around the bush, you might say. But that is the situation. The jury only has to decide when there is an issue of fact to be determined as to which side you believe, one as against the other. But for technical reasons as a matter of law if on the evidence that has been presented the jury brought in a verdict in favor of the plaintiff, the Court would have to set it aside and enter up judgment for the defendant. So having struck all of the evidence, there is no evidence before you on which you could find a verdict for the plaintiff. So I will ask you to retire and find accordingly.

(The jury retired to consider their verdict.)

Mr. Bangel: If Your Honor please, I desire to object and except to the Court's ruling and instructing the jury that they must return a verdict for the defendant, on the ground that it is contrary to the statute in Virginia which prohibits the Court instructing the jury to return a verdict for the defendant, and for the further reason that we say the evidence does not warrant the Court's instructing the jury to return a verdict for the defendant.

(The jury returned with the following: "We,
page 53 } the jury, find for the defendant.")

Mr. Bangel: If Your Honor please, I move to set aside the jury verdict as being contrary to the law and the evidence

and for errors that occurred during the trial of the case.

The Court: We will continue the motion generally until the record is written up.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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