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Record No. 5242

In the Supreme Court of Appeals of Virginia at Richmond

GLENS FALLS INSURANCE COMPANY

v.

VIRGINIA WEINSTEIN, ET AL.

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. 5242

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 6th day of October, 1960.

GLENS FALLS INSURANCE COMPANY, Appellant,

against

VIRGINIA WEINSTEIN, ET AL., Appellees.

From the Circuit Court of the City of Portsmouth

Upon the petition of Glens Falls Insurance Company an appeal and *supersedeas* is awarded it from a decree entered by the Circuit Court of the City of Portsmouth on the 16th day of February, 1960, in a certain proceeding then therein depending wherein Virginia Weinstein and Freda Rothenberg were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three thousand dollars, with condition as the law directs.

RECORD

* * * * *

To the Honorable Judge of said Court:

Plaintiffs, Virginia Weinstein and Freda Rothenberg, respectfully allege as follows:

1. That plaintiffs, Virginia Weinstein and Freda Rothenberg, owned two separate buildings which were known, numbered and designated according to present system of street numbering as 924 Seventh Street and 926 Seventh Street in the City of Portsmouth, Virginia.

2. That the building numbered 924 Seventh Street was a mercantile building and 926 Seventh Street was a dwelling.

3. That the two buildings were entirely separate from each other and located on lots continguous to each other.

4. That properties 924 Seventh Street and 926 Seventh Street were sold by plaintiffs to Melvin Swain, Henry Rhodes, Ivan Horton, John Moody and Samuel Overton, Jr., for part cash and a purchase price note secured by a deed of trust on said properties.

5. That on the 12th day of November, 1955 the Glens Falls Insurance Company for a cash consideration issued page 2 } by and through its authorized agent Fred G. Enos two fire insurance policies covering the two buildings, each in the amount of $2,500.00 for a three year period commencing on the 12th day of November, 1955 and expiring on the 12th day of November, 1958.

6. That on the 12th day of November, 1955 said agent delivered to plaintiffs what they believed to be two policies of fire insurance, but which were in fact written memorandums that two fire insurance policies had been issued and that upon satisfactory proof of loss by fire of either of said buildings, the company would pay to the trustee, the said sum of $2,500.00, or so much thereof as his interest may appear.

7. Plaintiffs noticed from said memorandum of insurance that the policy on 926 Seventh Street, Portsmouth, Virginia, erroneously described the building as a store-dwelling and thereupon called this error to the attention of the agent of Glens Falls Insurance Company, and the said agent, Fred G. Enos, issued a rider, and delivered the same to plaintiffs, correctly describing the said building as a dwelling.

8. Plaintiffs allege that Melvin Swain, Henry Rhodes, Ivan Horton, John Moody and Samuel Overton, Jr. thereafter defaulted in the payment of the debt secured by the deed of

trust and the trustee being directed so to do, made sale of the said properties in accordance with the terms of the trust deed, at which sale the said Fred G. Enos as auctioneer, cried off said property and the plaintiffs, being the highest bidder, became the purchasers and again the fee simple owners.

9. Your plaintiffs further allege that on the 24th day of July, 1957, Glens Falls Insurance Company, acting page 3 } by and through its authorized agent Fred G. Enos, delivered to plaintiffs a rider making the loss, if any, payable to plaintiffs, as the named insured, and also eliminated the trustee's interest.

10. Plaintiffs allege that on the 11th day of February, 1958 the building numbered 926 Seventh Street, Portsmouth, Virginia, was completely destroyed by fire and due proof of loss was properly filed with defendant.

11. Plaintiffs further allege that demand was made of defendant for payment and payment was denied.

12. That the reason assigned for non-payment was that the insert in the policy of insurance as issued by defendant's agent, Fred G. Enos, was for a mercantile building, and that said building was vacant for a period of more than ninety (90) days preceding the fire, and therefore the plaintiffs were not entitled to the benefits of said policy and this the defendant claims to be true even though the mistake in issuing the insert in the policy for a mercantile building was by its agent.

13. Plaintiffs have been informed (although plaintiffs are without personal knowledge) that the policy of insurance issued by Fred G. Enos, as agent for the Glens Falls Insurance Company, was mistakenly issued on a mercantile establishment insert rather than on a dwelling insert contrary to the intent of the parties.

14. Your plaintiffs further allege that the memorandum of insurance with the subsequently attached riders, delivered to your plaintiffs by the defendant's agent, recited that the policy was on a dwelling and not on a mercantile building.

15. Plaintiffs further allege that the said agent of the defendant erroneously and mistakenly failed to change page 4 } the insert of the policy at the time he issued and delivered to plaintiffs the rider to be attached to the policy and made a part thereof reciting the building to be a dwelling instead of a mercantile building.

16. Your plaintiffs further allege that fire insurance policies issued in the State of Virginia are uniform and are issued only after being approved by the Insurance Commissioner of Virginia.

17. Your plaintiffs further allege that the uniform and standard policy of fire insurance issued on a dwelling permits

the dwelling to be unoccupied or vacant without limit of time and that a fire insurance policy issued on a mercantile building does not cover loss occurring when the building is vacant or unoccupied beyond a period of ninety (90) consecutive days preceding the fire loss, unless consented to by the insurance company.

18. Your plaintiffs further allege that said original policy of insurance has never been delivered to them, and if delivered to the trustee has been lost or misplaced by said trustee.

19. Your plaintiffs further allege that they asked the agent for a copy of the policy and were told that all policies were numbered and that they could not give plaintiffs a copy and that they would have to rely upon the memorandum of insurance which was furnished to them.

20. Your plaintiffs further allege that the failure to insert in the policy the standard and uniform form of insert in the policy was caused by the mistake of Fred G. Enos, agent of defendant insurance company, which mistake was

page 5 } unknown to the plaintiffs, the insured; that the policy was without a provision of unlimited vacancy permit, which it should have and would have had but for the mutual inadvertence and mistake of the said insurance company and the insured, that said mistake was not known to plaintiffs until after the fire.

21. Your plaintiffs further allege that the memorandum of insurance and the riders are attached hereto and made a part of this bill of complaint as though fully written herein and are marked "Exhibit Number 1."

Your plaintiffs therefore pray that the said fire insurance policy be established; that said policy be reformed and that plaintiffs recover of the defendant the amount due plaintiffs under said policy of fire insurance.

VIRGINIA WEINSTEIN and
FREDA ROTHENBERG
By A. A. BANGEL
Of Counsel.

BANGEL, BANGEL & BANGEL, p. q.
Law Building
Portsmouth, Virginia.

Filed in the Clerk's Office the 5th day of May, 1959.

Teste:

R. W. BAIN, JR., Clerk
DORIS V. MAJOR, D. C.

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SPECIAL PLEA.

The defendant, Glens Falls Insurance Company, comes and says that the plaintiffs may not maintain this action against it because:

1. All matters in issue in this cause were adjudicated or properly might have been adjudicated between the parties hereto by this Court in an action at law lately pending herein styled "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 364" and by reason thereof, all issues raised by the Bill of Complaint are *res adjudicata* by the parties hereto.

2. That the plaintiffs are estopped by the judgment of this Court in an action at law lately pending herein styled "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 346" from asserting the matters against the defendant referred to in the Bill of Complaint.

3. The plaintiffs are estopped from asserting the cause of action alleged herein by virtue of their actions in alleging the matters set forth in the Motion for Judgment filed in the case lately pending in this Court under the style of "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 364," which allegations are inconsistent with the allegations of the Bill of Complaint filed in this cause.

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And of this the defendant is ready to verify.

GLENS FALLS INSURANCE COMPANY
By BERRYMAN GREEN
Its Attorney.

BREEDEN, HOWARD & MacMILLAN
612 Bank of Commerce Building
Norfolk 10, Virginia.

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Plaintiffs move to reject the Special Plea filed by the defendant as being insufficient in law.

ANSWER TO SPECIAL PLEA.

1. Plaintiffs deny that all matters in issue in this cause were adjudicated or properly might have been adjudicated between the parties hereto by the Court in an action at law styled "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 364" and denies that the issues raised by the Bill of Complaint are *res adjudicata* by the parties hereto.

2. Plaintiffs deny that they are estopped by any action of the Court in the action at law styled "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 346" from asserting the matters against the defendant referred to in the Bill of Complaint.

3. Plaintiffs deny that they are estopped from asserting the cause of action alleged herein by virtue of their actions in alleging the matters set forth in the Motion for Judgment filed in the Circuit Court of the City of Portsmouth under the style of "Virginia Weinstein and Freda Rothenberg, Plaintiffs, *v.* Glens Falls Insurance Company, Defendant, At Law No. 346" and deny that the allegations therein

page 10 } contained are inconsistent with the allegations of the Bill of Complaint filed in this cause.

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

Filed July 8th 1959.

D. V. M.

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page 11 }

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MOTION.

Now comes the defendant, Glens Falls Insurance Company, by counsel, and moves the Court to stay any further proceed-

ings in this cause until such time as a full and final determination of the action at law lately pending herein styled "Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company" is made by this Court and the Supreme Court of Appeals of Virginia.

GLENS FALLS INSURANCE COMPANY
By BERRYMAN GREEN
Its Attorney.

Filed 7/14/59.

H. W. M.

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page 12 }

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This day came the parties by their respective counsel, to be heard upon the Motion of the defendant, to stay further proceedings in this cause, pending for a final determination by the Supreme Court of Appeals of Virginia in the action at law lately pending in this Court under the style of Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company, and in support of said Motion the defendant tendered to the Court the record of the said action at law, with the request that the Court take judicial notice thereof, and the same was argued by counsel.

Whereupon, it appearing to the Court that the record of the action at law of the case of Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company is the proper subject of judicial notice of this Court, it is ADJUDGED, ORDERED and DECREED that the record in the said action at law, be and the same hereby is made part of the evidence in this cause, and

It further appearing to the Court that there are no grounds upon which this Court should properly stay the further proceedings in this cause pending the final determination of the Supreme Court of Appeals of Virginia in the action at law heretofore referred to herein, it is ADJUDGED, ORDERED and DECREED that the said Motion to stay be and

page 13 } it hereby is overruled, and

The parties by counsel having this day further been heard upon the special pleas filed by the defendant to the

Bill of Complaint, and the Court being of the opinion that the matters set forth in the Bill of Complaint are not *res adjudicata* between the parties hereto, and that the plaintiffs are not barred by any election or estoppel from prosecuting the causes of action set forth in the Bill of Complaint, it is ADJUDGED, ORDERED and DECREED that the said special pleas filed by the defendant be and the same hereby are overruled, and

The defendant is granted 21 days from the date hereof to file the responsive pleadings to the Bill of Complaint.

Enter 7/23/59.

H. W. M.

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Filed 9/28/59.

AMENDED ANSWER.

To the Honorable Judges of the Circuit Court of the City of Portsmouth:

The amended answer of Glens Falls Insurance Company to the Bill of Complainant filed herein against it.

This defendant, reserving unto itself the benefit of all just exceptions to the Bill of Complaint, for answer thereto, or to so much thereof as it is advised that it is material it should answer, answers and says:

1. The defendant is not advised as to the allegations contained in Paragraphs One, Three, Four, Eight, Sixteen, Seventeen and Eighteen of the Bill of Complaint and demands strict proof thereof.

2. The defendant denies the allegations contained in Paragraphs Two, Six, Seven, Fifteen and Twenty of the Bill of Complaint.

3. The defendant admits the allegations contained in Paragraphs Five and Eleven of the Bill of Complaint.

4. The defendant denies the allegations contained in Paragraph Nine of the Bill of Complaint but admits that on July 24, 1957, its authorized agent delivered to plaintiffs an en-

dorsement to the aforesaid policy, which recited that the interests of Melvin Swain, Henry Rhodes, Ivan Hor-
page 20 } ton, John Moody and Samuel Overton, Jr., had been transferred and the policy assigned to Virginia Weinstein and Freda Rothenberg.

5. The defendant admits that on February 11, 1958, the building numbered 926 Seventh Street, Portsmouth, Virginia, was completely destroyed by fire as alleged in Paragraph Ten of the Bill of Complaint but denies that due proof of loss was filed with the defendant.

6. The defendant denies any mistake on the part of its agent as alleged in Paragraph Twelve of the Bill of Complaint and avers that there were reasons assigned for non-payment other than those recited in Paragraph Twelve of the Bill of Complaint.

7. The defendant is without knowledge of what the plaintiffs may have been informed as alleged in Paragraph Thirteen of the Bill of Complaint and avers that such is irrelevant.

8. The defendant admits the allegations contained in Paragraph Nineteen of the Bill of Complaint but avers that plaintiffs did not ask the agent for a copy of the policy until after the loss had occurred and suit had been instituted by the plaintiffs to recover on the policy of insurance as originally issued, the reason for the said agent refusing to deliver a copy of the policy to the plaintiffs being that the policies which are furnished to the agent contain printed numbers and the agent was fully accountable for each and every policy.

9. The defendant is not advised as to whether or not the memorandum of insurance and riders attached to the Bill of Complaint referred to in Paragraph Twenty-one of the Bill of Complaint are authentic as said memorandum of insurance and riders were introduced in evidence in an action lately pending in this Court under the style of Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company as plaintiffs' Exhibit One.

page 21 } And for further answer, the defendant says:

10. The plaintiffs are barred from maintaining this action by virtue of the contractual limitation contained in said policy of insurance as required by law wherein it was provided that no suit or action on the policy for the recovery of any claim shall be sustainable in any Court of law or equity unless all the requirements of the policy have been complied with, and unless commenced within twelve months next after inception of the loss. The defendant avers that the loss out of which this action arose occurred on February 11, 1958 and

that this cause was not instituted until more than one year from such date.

11. The Bill of Complaint, insofar as it requests reformation of the insurance policy, is insufficient in law and does not set forth grounds upon which relief could be granted by the Court.

12. The plaintiffs are estopped to prosecute this cause as they have prosecuted to final judgment an action at law against the defendant concerning the same subject matter as the instant suit.

13. The plaintiffs are estopped from obtaining the relief sought in their Bill of Complaint because of their negligence in failing to obtain an/or examine the policy of insurance and in failing to promptly notify the defendant that the said policy of insurance did not comply with the coverage which the plaintiff alleged they sought to obtain.

14. The Court cannot grant the relief sought by the plaintiffs for if it did so it would be making an illegal agreement.

And now, having fully answered the Bill of Complaint, this defendant prays to be hence dismissed with its reasonable costs by it in this behalf expended.

GLENS FALLS INSURANCE COMPANY
By BERRYMAN GREEN
Its Attorney.

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AFFIDAVIT.

State of Virginia,
City of Norfolk, to-wit:

This day personally appeared before me, Betty Jean Rice, a notary public in and for the City and State aforesaid, Berryman Green, IV, who being duly sworn states under oath: That he is the agent and attorney for the defendant, Glens Falls Insurance Company, in the chancery cause now pending in the Circuit Court of the City of Portsmouth, Virginia under the style of Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company, the object of which is to establish and reform a certain policy of insurance issued by the defendant to the plaintiffs and to obtain a judgment upon

the policy as reformed in the amount of $2,500.00, such cause for reformation being upon grounds of mutual mistake.

The affiant further states that in the trial of this cause the outcome will be rendered doubtful by conflicting evidence in regard to

1. Whether or not the building which was owned by the plaintiffs at 926 7th Street, Portsmouth, Virginia and upon which the defendant had issued its policy of insurance was a mercantile building or a dwelling for the purposes of classifying the same for insurance for loss by fire.

2. Whether or not the plaintiffs called to the at-
page 23 } tention of the defendant's agent that the insurance policy in question contained an erroneous classification of the property insured as alleged in the Motion for Judgment and if so, the date when the same was called to the attention of the said agent.

3. Whether or not the plaintiffs' furnished a proof of loss to the defendant in the manner and form required by the policy of fire insurance issued by the defendant.

4. Whether or not there was a mutual mistake of the defendant's agent and the plaintiffs which occasioned the issuance of a policy of insurance predicated upon the fact that the building in question was classified for insurance purposes as a mercantile establishment rather than a dwelling.

The defendant further presents that it will adduce evidence in this cause of the fact that the building at 926 7th Street, before the time referred to in the Motion for Judgment, was properly classified as a mercantile building for the purposes of insurance on same for loss by fire; that it will adduce evidence of the fact that the defendant did not call to the defendant's agent's attention that the policy of insurance which the defendant issued allegedly contained an erroneous classification of the property insured until suit had been instituted in an action at law lately pending in the Circuit Court of the Circuit Court of the City of Portsmouth styled Virginia Weinstein and Freda Rothenberg *v.* Glens Falls Insurance Company; that the defendant will adduce evidence of the fact that the plaintiffs did not furnish adequate and proper proof of loss to the defendant as required by the policy of insurance and that the defendant will adduce evidence of the fact that there was not a mutual mistake between the defendant's agent and the plaintiffs in the manner and form in which the policy was issued and by reason thereof there will be a conflict in evidence on the material issues involved in the cause.

For the reasons stated above, the affiant avers
page 24 } that upon knowledge, information and belief there will be a conflict of evidence between the plaintiffs and the defendant to such an extent that it will be doubtful on which side the preponderance of the evidence lies and that an issue out of chancery should be ordered.

BERRYMAN GREEN,

Subscribed and sworn to before me this 5th day of October, 1959.

BETTY JEAN RICE
Notary Public.

My Commission expires September 25, 1962.

Filed Oct. 6th 1959.

D. V. M.

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MOTION.

Now comes the defendant, Glens Falls Insurance Company, and moves the Court to direct an issue out of chancery in this cause upon grounds that the cause will be rendered doubtful by conflicting evidence of the opposing parties and in support thereof files its Affidavit herein.

GLENS FALLS INSURANCE COMPANY
By BERRYMAN GREEN
Of Counsel.

Filed Oct. 6th 1959.

D. V. M.

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This cause came on this day to be heard upon the bill of complaint and exhibits filed therewith, upon the amended Answer of the defendant, upon the motion for an issue out

of chancery filed by the Glens Falls Insurance Company, and upon the affidavit filed in support thereof, and the same was argued by counsel, and the Court being of the opinion from the said affidavit that this cause will be rendered doubtful by conflicting evidence, it is

ADJUDGED, ORDERED and DECREED that an issue be made up and tried by a jury at the bar of this Court to ascertain and try the issue of whether or not the building which was located at 926 Seventh Street, Portsmouth, Virginia, and upon which the defendant had issued its policy of insurance was being used as a mercantile building or dwelling on November 12, 1955; and

It is further ORDERED that on the trial of the said issue, the plaintiffs, Virginia Weinstein and Freda Rothenberg, shall maintain the affirmative and the defendant, Glens Falls Insurance Company, shall maintain the negative.

It further appearing to the Court that the issues raised in paragraphs Two, Three and Four of the affidavit
page 27 } filed herein are not material to the cause.

It is further ADJUDGED, ORDERED and DECREED that the defendant's motion for an issue out of chancery on such issues is overruled and the Court doth decline to order any issue out of chancery as to such issues, to which action of the Court, the defendant excepted.

Tendered by plaintiff and refused 1/12/59.

H. W. M.

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page 31 } INSTRUCTION 1.

The Court instructs the jury that the burden of proof in this case is upon the plaintiffs, Virginia Weinstein and Freda Rothenberg, to prove to you that the building at 926 7th Street was not a mercantile building for the purposes of classifying the same for insurance purposes and such proof must be the clearest and most satisfactory evidence.

The Court further instructs you that if you believe from the evidence the plaintiffs have failed to carry this burden which is imposed upon them by law, then you must find in favor of the defendant, Glens Falls Insurance Company, on the issue which you are considering.

Granted.

H. W. M.

page 32 } INSTRUCTION 1A.

The Court instructs the jury that the burden of proof in this case is upon the plaintiffs, Virginia Weinstein and Freda Rothenberg, to prove to you that the building at 926 7th Street was not a mercantile building for the purposes of classifying the same for insurance purposes and such proof must be the clearest and most satisfactory evidence, beyond a reasonable doubt.

The Court further instructs you that if the plaintiffs have failed to carry this burden which is imposed upon them by law, then you must find in favor of the defendant, Glens Falls Insurance Company, on the issue which you are considering.

Refused.

H. W. M.

page 33 } INSTRUCTION 3.

The Court instructs the jury that in determining the classification of the property in question for the purpose of fire insurance you must make your determination based upon the standards governing the Virginia Insurance Rating Bureau.

Refused.

H. W. M.

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DECREE.

This cause came on this 23rd day of October, 1959 to be heard upon the Bill of Complaint and exhibits filed therewith; upon the amended Answer of the defendant, upon the Motion for an issue out of chancery filed by the Glens Falls Insurance Company and upon the Affidavit filed in support thereof, and the same was argued by counsel and the Court being of the opinion from the said Affidavit that this cause will be rendered doubtful by conflicting evidence, it is

ADJUDGED, ORDERED and DECREED that an issue be made up and tried by a jury at the bar of this Court to ascertain and try the issue of whether or not the building which was located at 926 7th Street, Portsmouth, Virginia and upon which the defendant had issued its policy of insurance was a mercantile building or dwelling on November 12, 1955 for the purposes of classifying the same for insurance for loss by fire, and

It is further ORDERED that on the trial of the said issue, the plaintiffs, Virginia Weinstein and Freda Rothenberg, shall maintain the negative and the defendant, Glens Falls Insurance Company, shall maintain the affirmative.

It further appearing to the Court that the issues raised in Paragraphs Two, Three and Four of the Affidavit filed herein are not material to the cause,

page 36 } It is further ADJUDGED, ORDERED and DECREED that the defendant's Motion for an issue out of chancery on such issues is overruled and the Court doth decline to order any issue out of chancery as to such issues, to which action of the Court the defendant excepted.

Enter 11/12/59.

H. W. M.

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December 10th, 1959.

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

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

Re: Weinstein *v.* Glens Falls Ins., Co.

Gentlemen:

After mature consideration, I am sustaining the plaintiff's

motion to strike the special plea of the defendant that this suit is precluded by the limitation provided in the policy.

In the first place, this suit is not brought upon the policy, but is brought to reform the policy to speak the alleged contract of the parties. The limitation provided in the policy thus has no application and the chancery doctrine of laches would govern in its stead.

In the second place, the defendant Insurance Company, is attempting to use in its own defense, the provision in a policy which, if the plaintiff's allegations be sustained, could not be used as a basis for the plaintiff's action until the mistake for which the defendant was responsible had been legally corrected. It would be strange equity indeed, which would allow a defendant to plead the provisions of an erroneously issued policy in its own defense against its own unlawful action.

This ruling is sustained by *Hay* v. *Starr Fire Insurance Co.*, 77 N. Y. 235, and *Genuser* v. *Ocean Accident etc., Co.*, 57 Cal. Apps. (2nd) 979, 135 Pacific (2nd) 670.

Very truly yours,

H. W. MacKENZIE, JR.

HWM;jr/lb

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This day came again the parties and the Court having heard argument of counsel on the motion of plaintiffs to strike the defendant's special plea that this suit is precluded by the limitation provided in the policy, is of the opinion that said motion to strike should be sustained, it is adjudged, ordered and decreed that the motion to strike said special plea be, and it is hereby sustained. To which action of the Court, the defendant duly excepted.

Enter this 11th day of Jan. 1960.

H. W. M., Judge.

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MEMORANDUM.

Feb. 2, 1960.

This is a suit in chancery brought by the plaintiffs against the defendant, Insurance Company to reform a policy of insurance against fire issued on the property of the plaintiff's predecessor in title, which policy was subsequently endorsed to the plaintiffs upon their *acqusition* of the property. The policy was issued on November 12, 1955 for a period of three years to Melvin Swain, and others "On the Two Story Frame, approved roof, building occupied as a grocery store, situated No. 926 7th St., Portsmouth, Virginia." An endorsement issued effective the same date revised the rate charged and described the property as "Dwelling-Grocery Store." An endorsement issued July 24, 1957 acknowledged assignment of the policy to the plaintiffs and described the property insured as "Dwelling."

The mercantile form of policy which was issued provided that if the property is vacant beyond a period of ninety (90) days a company shall not be liable for loss. The form of policy issued upon a dwelling would not contain such a restriction. The complainants contend that the property was a dwelling and that the form of policy applicable to dwellings should have been issued and by this suit seek reformation accordingly. The defendant asked for an issue out of chancery which was granted and accordingly the case page 41 } was tried before a jury to whom the following issue was referred; "Whether the building which was located at 927 7th Street, Portsmouth, Virginia, and upon which the defendant has issued it's policy of insurance was a mercantile building or dwelling on November 12, 1955, for the purpose of classifying the same for insurance for loss by fire?" The jury found that the building was a dwelling.

The defendant now some months after the trial argues that the verdict should not be accepted or that it should be set aside for the reason there is no evidence to sustain it, and although taken by a reporter at the trial, the defendant has declined to have the same transcribed. The Court is therefore compelled to rely upon its recollection of the evidence, and such recollection does not support the condition now contended by the plaintiff to exist.

As I recalled the facts the policy in question was issued contemporaneously with a sale of the corner property which included a store building and the building in question by the plaintiffs in this case to "Five Vets." A deed of trust was taken back to secure the deferred purchase money and the

policy in question issued simultaneously with loss payable to Leonard G. Karp, Trustee under the purchase money deed of trust. One of the Five Vets testified that during the time they owned the property they stored certain merchandise in it. But I do not recall that any mercantile use was made of the property prior to the sale to the Five Vets; nor was there any evidence of continued commercial use after *forclosure* of the deed of trust and *reacqusition* of title by the plaintiffs.

page 42 } Granted that the Five Vets did use the property for mercantile purposes they had certainly no opportunity to do so prior to the time this policy was issued. The jury had ample grounds to infer that this was a dwelling and not a mercantile building at the time the policy was issued.

There being evidence to sustain the jury's verdict, and the issue having been fairly submitted to them, such verdict will be accepted by the Court and a final decree entered in this case accordingly.

H. W. MacKENZIE, Jr.

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* * * * *

This cause came on this day to be heard upon the papers formerly read, upon the evidence heard by the Court in open court, upon the verdict of the jury on the issue out of chancery, and was argued by counsel.

It appearing to the Court that the building, 926 Seventh Street, Portsmouth, Virginia, was a dwelling on November 12, 1955, for the purpose of classifying the same for insurance for loss by fire; that the defendant's agent erroneously classified the property in its fire insurance policy; that proof of loss has been filed with the defendant; that said building was destroyed by fire while said policy was in full force and effect; that the amount to which plaintiffs are entitled is TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS.

It is ADJUDGED, ORDERED and DECREED that the policy which was erroneously written by the agent for the defendant company as a mercantile building be and it is hereby reformed to a policy on a dwelling.

It is further ADJUDGED, ORDERED and DECREED that the plaintiffs, Virginia Weinstein and Freda Rothenberg,

page 44 } recover from the defendant, Glens Falls Insurance Company, the sum of TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS, with interest from the 11th day of February, 1958.

And nothing further remaining to be done in this cause, it is removed from the docket.

Enter 2/16/60.

H. W. M.

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NOTICE OF APPEAL.

Defendant, Glens Falls Insurance Company, hereby gives notice pursuant to Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia that it appeals from the final judgment of the Circuit Court of the City of Portsmouth, Portsmouth, Virginia, entered on the 16th day of February, 1960, in the above entitled cause and will apply to the Supreme Court of Appeals of Virginia for an appeal and *supersedeas*.

ASSIGNMENT OF ERROR.

Pursuant to the Rules of the Supreme Court of Appeals of Virginia defendant, Glens Falls Insurance Company, assigns the following errors:

1. The Trial Court erred in overruling defendant's Motion to Stay Proceedings in this cause pending a final determination by the Supreme Court of Appeals of Virginia of the companion action at law.
2. The Trial Court erred in holding that the matters set forth in the Bill of Complaint were *res judicata* between the parties.
3. The Trial Court erred in holding that the plaintiffs were not barred by an election and were not estopped from prosecuting this cause.
4. The Trial Court erred in refusing to direct an issue out of chancery in the issue of whether or not the plaintiffs called to the attention of the defendant's agent that the page 49 } insurance policy in question contained an erroneous classification of the property insured as alleged in the Motion for Judgment and if so, the date the same was called to the attention of the said agent.
5. The Trial Court erred in refusing to direct an issue out of chancery on the question of whether or not there was a

mutual mistake between defendant's agent and the plaintiffs which occasioned the issuance of a policy of insurance predicated upon the fact that the building in question was classified for insurance purposes as a mercantile establishment rather than a dwelling.

6. The Trial Court erred in overruling defendant's motion to strike plaintiffs evidence at conclusion of plaintiffs evidence on trial of issue out of chancery.

7. The Trial Court erred in overruling defendant's motion to strike plaintiffs evidence at conclusion of all evidence on trial of issue out of chancery.

8. The Trial Court erred in refusing to grant defendant's Instruction D-3.

9. The Trial Court erred in holding that plaintiffs action was not barred by the limitation provision of the contract of insurance.

10. The Trial Court erred in accepting jury's verdict in issue out of chancery and finding that the building in question should have been classified as a dwelling rather than a mercantile establishment for the purpose of classifying the same for insurance.

11. The Trial Court erred in holding that plaintiffs had carried the burden of proof on reformation of contract of insurance.

12. The Trial Court erred in entering final judgment for the plaintiffs.

GLENS FALLS INSURANCE COMPANY
By BERRYMAN GREEN
Attorney.

* * * * *

Vol. I
11/12/59
page 7 } Mr. Bangel: The property was then transferred by proper deed to these two ladies and the company through its agent, Mr. Enos, or T. B. Lee Company, was told to change the policy from the people who had formerly owned the property to the new owners, Mrs. Weinstein and Mrs. Rothenberg.

Mr. Green: Excuse me. I'd like for the record to show my objection to going into this phase of it; I don't think that's the issue before the jury; it has no connection with it.

Samuel Weinstein.

The Court: All right, note your exception.
Mr. Green: Note my exception.

At this time counsel for the defendant, Mr. Green, made his opening statement.

SAMUEL WEINSTEIN,
a witness for the plaintiffs, after having been first duly sworn, took the stand and testified as follows:

Vol. I
11/12/59 Examined by Mr. Bangel:
page 8 } Q. State your name.
A. Samuel Weinstein.
Q. You are the husband of Mrs. Virginia Weinstein?
A. That's correct.
Q. You live in the City of Portsmouth?
A. That's correct.
Q. You have lived here for how long?
A. Thirty or thirty-five years.
Q. Mr. Weinstein, did Mrs. Weinstein and Mrs. Rothenberg jointly own property at 924 and 926 Seventh Street, in the City of Portsmouth?
A. Yes, sir.
Q. What kind of building was 924?
A. 924 was a grocery store.
Q. What kind of building was 926?
A. It was a dwelling.
Q. Now, do you recall when your wife and Mrs. Rothenberg became the owners of that property?
A. In '40—late '40's.
Q. Will you describe the property at 926 Seventh Street, when they became the purchasers of it?
A. 926 was a two-story frame house, and it had one entrance—
Vol. I Q. Is that Seventh Street?
11/12/59 A. No, that's 924; Seventh and Edwards, I think,
page 9 } that's where the entrance was.
Q. Was there an entrance to the front of that building at all?
A. There was an entrance, but the place was boarded up.
Q. Was it boarded up when you bought it?
A. Yes, sir.
Q. Was there any store front on that when you bought it; that could be seen from the street?

Samuel Weinstein.

Mr. Green: I object to Mr. Bangel leading the witness. I think the witness is perfectly capable of describing the property without Mr. Bangel suggesting the answers to him.

Examination by Mr. Bangel continued:

Q. What was the condition of the four sides?

A. Mr. Bangel, I will say this. There was no way of a person using it as a store, because it was all boarded up. The only way you could get into the building was from the side street. There was a little stoop that you could come into the side entrance there.

Q. Was there any way that you could enter from the front at all?

Vol. I
11/12/59 page 10 } Mr. Green: He's again leading the witness. I don't like to keep continually objecting, but Mr. Bangel knows that it's not a proper question.

The Court: I think it is a leading question.

Examination by Mr. Bangel continued:

Q. I understood, you testified there was one side entrance?

A. Yes, sir, that's correct.

Q. Was that the condition of it when your wife and Mrs. Rothenberg bought it in the late '40's?

A. Yes, sir.

Q. Was that the condition of it when the policy of insurance was issued by the Glens Falls Insurance Company on November 11, 1955?

A. Definitely.

Q. Now, in November, 1955, was that property sold?

A. Yes, it was.

Q. Was the policy—insurance then issued by Glens Falls Insurance?

A. Yes.

Vol. I
11/12/59 page 11 } Q. When you received the memorandum of the insurance on November 11, 1955, how did it describe the building known as 926 Seventh Street?

A. I think that it described it as a grocery store.

Q. Now, what that came, is this the description they had of the building—I hand you the Memorandum of Insurance and ask you—

A. Yes, this is it.

Q. That's the first one, was it?

A. That's right.

Samuel Weinstein.

Mr. Green: Let me see it.
Mr. Bangel: I thought you had already seen it.

Examination by Mr. Bangel continued:
Q. This indicates that the property was insured on November 12, 1955, for a three-year period on a two-story frame, approved roof building on Seventh Street, Portsmouth, Virginia?
A. Yes, sir.

Mr. Bangel: We offer this in evidence, if Your Honor please.

Examination by Mr. Bangel continued:
Vol. I 11/12/59 page 12 } Q. Upon receipt of that, did you notice at that time that it referred to it as a grocery store?
A. Yes, sir.
Q. What did you do?
A. I called my agent, Mr. Enos, and told him I wanted to change it, because it was not a grocery store, because it was a dwelling.
Q. I hand—before I offer—I hand you a paper writing showing endorsement and ask you whether you received this on November 28, 1955, or just about fourteen days later?
A. That's correct, it came back to me issued as a dwelling-grocery store.

Mr. Bangel: We offer this in evidence It shows the change that was made in the description of the property from a grocery store to a dwelling-grocery store on November 28—
Mr. Green: I object to Mr. Bangel testifying as to what the document shows. He's submitted it in evidence and the document speaks for itself.
The Court: The document speaks for itself.
Mr. Green: You stated that it changed that thing, which it does not do.
Mr. Bangel: I don't think I misquoted it.
Vol. I 11/12/59 page 13 } Mr. Green: I submit that document speaks for itself; the jury has it.
Mr. Bangel: I have a right to show it to the jury. You say it doesn't say so; I'll show them that it does.
Mr. Green: All right.

Samuel Weinstein.

Examination by Mr. Bangel continued:

Q. When you received the last paper writing, which is marked Plaintiffs' Exhibit #2, and that showed a change from the grocery store to dwelling-grocery, what did you do then?

A. I called Mr. Enos' office again and I told him that they still had it in error, and that it should be a dwelling, and not a grocery-dwelling, because the place was not a grocery store; that 924 was a grocery store. I think that's where the misconception was in error.

Q. Are you positive that you told him it was a dwelling?

A. Yes, sir.

Q. Did he make that change after you called him the second time?

A. Yes, he did. Then I received it—this next endorsement—and on this one to my satisfaction. It was marked like I asked that I wanted it as a dwelling, and that's what it was.

Vol. I 11/12/59 page 14 } Mr. Green: It seems to me we're getting pretty far afield from the issue which is before this jury. I think the issue, as the Court framed it, was pretty narrow. We are now going into things that happened a long time subsequent to the time of the matter referred to in the decree.

The Court: This could be—

Mr. Green: I'm trying to save time.

Examination by Mr. Bangel continued:

Q. You think you received this on December 6, 1955—

Mr. Green: Note my exception.

A. Yes, sir.

The Court: This will be Exhibit 3.

Examination by Mr. Bangel continued:

Q. I ask you whether or not subsequent to the issuance of the last rider, which describes it as a dwelling, whether Mrs. Virginia Weinstein and Mrs. Rothenberg became the owners of the property?

A. What was that?

Q. State whether or not in 1957—

Samuel Weinstein.

Vol. I 11/12/59 page 15 } Mr. Green: That's a grossly leading question; I think Mr. Bangel ought to rephrase it.

The Court: I don't see where it hurts anything.

Mr. Green: Note my exception.

Examination by Mr. Bangel continued:

Q. State whether or not in 19—July, 1957, Mrs. Virginia Weinstein and Mrs. Rothenberg again became the owners of that property?

A. Yes, they did.

Q. Upon the consummation of that ownership, did you then again communicate with the agent for the Glens Falls Insurance Company and ask that they put on an endorsement or rider on the policy?

A. I don't get that.

Q. Did you ask them to change the policy from the former owners—

Mr. Green: I object to that. Mr. Bangel, there's got to be a limit to everything.

Mr. Bangel: We want to show—

Mr. Green: This witness can testify, but you are doing the testifying.

Vol. I 11/12/59 page 16 } Examination by Mr. Bangel continued:

Q. I see. I hand you a paper writing dated July 24, 1957, and ask you whether or not that paper writing came to you, and if so, who from?

A. They come to me from Mr. Enos' office.

Q. That dealt with some people at 926 Seventh Street, Portsmouth, Virginia?

A. That's right.

Q. This shows the property from Melvin Swain, and others, went to Virginia Weinstein and Freda Rothenberg?

A. That's correct.

Q. And at that time, what was—how was the building described?

Mr. Green: I don't think this is complete.

Mr. Bangel: Why not?

Mr. Green: Certain portions have been taken from the top of it. I've probably got an endorsement here which—

Mr. Bangel: I'll take it. It's where it was all glued together. It's the same thing.

Samuel Weinstein.

Mr. Green: All right, wait a minute, I'll tell if you have the right title endorsement.

Mr. Bangel: Go ahead, I don't mind. You can see where the glue was stuck. We offer this in evidence as Plaintiff Exhibit 4.

Vol. I
11/12/59 Examination by Mr. Bangel continued:
page 17 } Q. This was in 1957?
A. That's correct.

Q. Same policy; same property?

A. That's what I received after the property was turned back to the ownership of Mrs. Weinstein and Mrs. Rothenberg.

Q. The fire occurred sometime in 1958?

A. That's right.

Q. When?

A. In 1958, about the last of the year—July, August, September, I don't remember exactly.

Mr. Bangel: Witness with you.

CROSS EXAMINATION.

Examined by Mr. Green:

Q. Mr. Weinstein, you did not own this property?

A. My wife owned it.

Q. Your wife owned it?

A. Yes, I act more or less as her agent, because I kept the records for her at my store.

Vol. I Q. Is your wife here today?
11/12/59 A. No, sir.
page 18 } Q. How about Mrs. Rothenberg?
A. She's not here.

Q. Now, when did you say you acquired this property?

A. I think it was in—do you mean originally?

Q. Yes.

A. It was in the '40's; I guess around fifteen or twenty years ago. I'd say about 1947 or '48; I don't remember exactly.

Q. Now, did you manage the property yourself while you you were an owner of it?

A. Yes, sir, I used to collect the rents. I collected the rents and kept the records on the property.

Q. Kept the records?

Samuel Weinstein.

A. Yes, sir.

Q. What form of records did you keep?

A. Such as any repairs that were made on the property; I kept bills.

Q. Do you have those records now?

A. I think so.

Q. Where are they?

A. At my store.

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Q. Now, you stated that this building only had one entrance?

A. That's right, only one that could be used; that was possible or humanly possible to be used unless you tore off the boards.

Q. Wasn't that building equipped with plate glass windows?

A. Not since my wife and Mrs. Rothenberg owned it.

Q. Describe what the front of the building looked like—you said it had been boarded up.

A. It had boards that was covering up the whole front and doorway.

Q. Boards were put there to protect the windows?

A. There were no windows there; they had boards there.

Q. You mean there was no place where plate glass windows had been?

A. There was places, but it was boarded up.

Q. It was a place where the plate glass windows had been in the building?

A. Yes, that's right. I presume it was a place for windows there, because there were boards across there.

Q. Let me ask you, how did you-all happen to acquire this property?

A. We bought it—what do you mean?

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Q. You inspected it before you bought it, did, you not?

A. That's right.

Q. Are you familiar with what the building had been used for prior to the time that you bought it?

A. No, I wouldn't know anything about that.

Q. Are you aware of a restaurant ever being operated in that building?

A. Not that I remember. It was no restaurant in there, definitely, or no business in that corner every since my wife and Mrs. Rothenberg owned it.

Q. Do you remember a restaurant being operated in the building at any time?

Samuel Weinstein.

A. No, sir.

Q. Do you ever remember a confectionery store being operated in that building?

A. Not to my knowledge.

Q. You don't remember that at all?

A. No, sir.

Q. Do you ever remember it being used in connection with a store for storage in connection with the building at 924?

A. No.

Q. You don't remember that?

A. No, sir.

Q. Who operated the store building while you were owner of the property?

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page 21 }

A. You mean the 924 property?

Q. That's right.

A. It was a group of young men that called themselves the "Five Vets."

Q. They are the ones that bought the property from you?

A. That's right; we sold it to them.

Q. Who occupied the premises while you actually owned it?

A. Which one?

Q. 924.

A. These "Five Vets."

Q. They were in there the whole time that you owned the property?

A. That's right.

Q. Now, you sold the property to them, did you not?

A. That's right.

Q. Well, before we get ahead of ourselves, let me ask you this, will you please describe the physical setup in the downstairs portion of 926 Seventh Street at the time you bought the property?

A. 926?

Q. Yes.

A. You mean—how do you mean that?

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page 22 }

Q. The physical layout.

A. It was a two-story frame building.

Q. How many rooms did the downstairs have?

A. It had a lot of cut up rooms in there. In other words, little passageways, halls running from one room to another.

Q. Exactly, how many rooms would you say, one, two, three or five?

Samuel Weinstein.

A. No, sir.

Q. The whole time you collected rent on the property—

A. I collected it from Winborne.

Q. Did he actually live on the property?

A. Yes, he lived in the property. After we took—let's see now—that's right, that's the only man I remember that was in there. We changed tenants in the grocery store, but to my recollection no one was in this one except Winborne.

Q. You changed tenants in the grocery store, who occupied the premises besides the "Five Vets" when you owned it?

A. After the property was sold back to my wife and Mrs. Rothenberg, the "Five Vets" moved out after a time and a party by the name of Johnson kept it for a short period of time; I'm talking about 924 now.

Vol. I 11/12/59 page 25 } Q. You got the property in '48, when did the "Five Vets" lease the property from you?

A. I think it was in 19—I wouldn't remember exactly, I would say about—I guess it was 1955, I'd say. I don't remember exactly.

Q. Who occupied the property between 1948, when you said you bought it, and 1955, I'm referring now to the property at 924?

A. Winborne.

Q. He occupied the grocery store?

A. No, he occupied the house.

Q. 924?

A. The "Five Vets."

Q. They occupied it from '48?

A. They occupied it from the time I bought it until the time I sold it to them. When I say "I" again I am referring to my wife.

Q. Were the "Five Vets" in the property at the time you bought it?

A. Yes.

Q. They were there at that time?

A. Yes.

Q. They occupied it during the whole time that you were there?

A. Until they came in and purchased it from us, yes.

Vol. I 11/12/59 page 26 } Q. They purchased it from you in November, 1955?

A. I don't remember the dates exactly; I have

Samuel Weinstein.

A. I'll say downstairs, five possibly, I don't remember because I haven't been in the building in a long time.

Q. I wonder if you could draw us a diagram as to what the physical setup was there in the building at that time?

A. Sure. I'm not too much at architectural drawing.

Mr. Green: Neither am I.

A. Something like this.

Q. Where is the front of the building?

A. Right here.

Q. How were the rooms divided inside?

A. They were divided something like this. A hall ran out this way and down to the front door. In other words, this is a hall that ran right into this room.

Q. Where was the door?

Vol. I A. The doorway was over here.

11/12/59 Q. That was the side entrance?

page 23 } A. That's right.

Q. Where was the door for the front entrance?

A. There wasn't a door; it was all blocked up in there.

Q. Where had the door been?

A. I presume it was in the middle of the room; I don't know.

Q. You could see some evidence where the door was framed?

A. It was probably in the center of the building.

Q. Probably, you know it was?

A. I say it was in the front of the building; I'll put it that way. There was a hall that ran right down to the front of the building, and all the way to the back of the building.

Mr. Green: I'd like to introduce that as Defendant Exhibit 1.

The Court: Defendant Exhibit 1.

Examination by Mr. Green continued:

Q. Who were the tenants in the building during the time that you owned it?

Vol. I A. Which building are you referring to?

11/12/59 Q. In 926.

page 24 } A. I collected the rent from a man by the name of Winborne.

Q. Did he occupy the whole building?

A. Yes, I guess he did; I collected rent from him.

Q. Did you collect rent from anybody else?

the records at the store and I can give you those records any time you want to look at them.

Q. When you sold the property, it was subject to mortgage?

A. That's correct.

Q. You sold them the entire premises, including 924 and 926?

A. That's correct.

Q. Now, with respect to the insurance that was on this property, Mr. Weinstein, you had sold that property, had you not, to the "Five Vets"?

A. That's right.

Q. And it was their obligation to take the insurance on it, was it not?

A. It was their obligation to pay for the insurance on it.

Q. Did you actually—

A. I kept insurance on it, because I was protecting my own interest.

Q. You only got the Memorandum of the insurance?

A. They send it to me.

Q. And the original policy went to the trustee?

Vol. I A. I never seen the original policy.

11/12/59 Q. Who was the trustee?

page 27 } A. Mr. Leonard Karp.

Q. Now, you state that you received the Memorandum describing this building as a mercantile?

A. That's right.

Q. And you then called Mr. Enos?

A. I called his office.

Q. Who did you talk with?

A. I talked either with Mr. Enos or the young lady there. Most of the time when the phone was answered, it was answered by a young lady, because Mr. Enos was out quite a bit. It's been quite a long time and whether Mr. Enos or the young lady answered the phone, I wouldn't remember after all this time. I think it's an unfair question.

Q. You seem to remember the rest of it pretty well.

A. Because I have my records, I wouldn't have a record of who I talked to over the telephone, but I'd make a record out of when the insurance was changed.

Q. You made a report of it?

A. I didn't make a record of the call; I have a record of the endorsement; the endorsements speak for themselves.

Q. I'm talking about some record that you were referring

to?

Vol. I 11/12/59 page 28 } A. I have records in my store showing when the insurance was paid for and so forth.

Q. Do you have any record in your store which would indicate when you called Mr. Enos?

A. I may have; I don't know; I don't think I'd put a record like that down, but I may have; it wouldn't surprise me.

Q. But you can't remember whether you talked to Mr. Enos or the young lady in the office?

A. I'd say I talked to Mr. Enos.

Q. You're not sure?

A. I can't go back that far in my memory.

Q. All I'm saying, if you don't know, say you don't know; I don't want you to say something you don't know.

A. I said I didn't know whether it was Mr. Enos or the young lady; I'm not positive.

Q. So you don't know who you talked to?

The witness gave no reply.

Examination by Mr. Green continued:

Q. What was the topic of that conversation?

Vol. I 11/12/59 page 29 } A. I called up the office and told them that they had the property at 926 listed as commercial and that I wanted it changed to a dwelling.

Q. Why did you do that?

A. Well, for obvious reasons, because I know that the commercial rate on property is much higher than it is on a dwelling.

Q. Now, when you called Mr. Enos and told him that, how did you know what use the "Five Vets" were putting that building to?

A. What do you mean "what use"?

Q. The building was then occupied by the "Five Vets" and had been sold to the "Five Vets," had it not?

A. Yes.

Q. And the policy of insurance came to you?

A. That's right.

Q. Sometime after you sold the property and the "Five Vets" were in their occupying it?

A. That's right.

Q. How did you know, Mr. Weinstein, at the time you called the agent and told him all this that the building at

926 Seventh Street was not being used by the "Five Vets" in the operation of their grocery store?

The witness gave no reply.

Vol. I
11/12/59 Examination by Mr. Green continued:
page 30 } Q. Wasn't the call made at the time that you took the property back?

A. No.

Q. We are concerned with November, 1955?

A. I told you, I am not familiar with dates and the only way I could answer your question correctly, I can get my records.

Q. Let me ask you this, let's go back again, I don't want to belabor the point, you sold the property and Mr. Enos sent a Memorandum of Insurance, which is dated 11-12-1955, how long after you received this Memorandum of Insurance—

A. Let's take it slow and let's not try to make it confusing; I don't want to give any answer that isn't so. What you hand me here is the policy, is this the endorsement when the property was changed?

Q. Mr. Weinstein, you have just cited that Exhibit in answer to your counsel's question—

A. I feel like you are trying to confuse me; that's why I'm trying to take it slow here.

Q. You examine the document and tell me what it is.

A. This is an endorsement, you understand, that was made out to Melvin Swain in care of myself. In other
Vol. I words, it's the "Five Vets" endorsement when we
11/12/59 sold them the property.
page 31 } Q. That's an endorsement?

A. This is, isn't it?

Q. In answer to your counsel's questions, I believe you stated that—you identified document as being a Memorandum of Insurance which you received from Mr. Enos?

A. You can call it any name you want; again I say you are trying to be technical with me and I don't think it's fair.

Q. Let me say this to you. The only thing I am trying to do is to establish some dates; you have identified these documents in answer to Mr. Bangel's questions, and you identified that document for Mr. Bangel as being a Memorandum of Insurance.

A. That's right.

Q. When did you receive that Memorandum of Insurance from Mr. Enos?

Samuel Weinstein.

A. I couldn't tell you exactly, but if I had my records here, I could show it to you just as plain—
Q. Can you get your records?
A. I'll be glad to get them.

Mr. Bangel: Isn't it dated there?
Mr. Green: I'll put it to him.

A. I can't remember dates; I'm not going to stand here and say something I'm not certain of.

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page 32 } Mr. Bangel: Did you get it within a day or two—

The Court: Don't you ask questions; this is cross examination.

Examination by Mr. Green continued:
Q. You stated when you got the Memorandum of Insurance from Mr. Enos—
A. That's right.
Q. —that you called Mr. Enos and told him that the property had been misdescribed?
A. That's right.
Q. Now, the position taken by the pleadings in this case was that this was sometime near November of 1955—
A. That's right.
Q. Is that correct?
A. That's right.
Q. Now, you wouldn't have called Mr. Enos until you received this Memorandum, would you?
A. That's right.
Q. What I want to know is, how soon after you received that Memorandum did you call Mr. Enos and tell him that the building was misdescribed?

Vol. I
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page 33 } A. I wouldn't know exactly; I wouldn't know if it was one day, three days or a week. It would probably be—I'd say in a day or so after I received it; that would be the logical time for me to do it.
Q. Here's what I want to ask, at the time you received that, the property had been sold to the "Five Vets," had it not?
A. That's right.
Q. The property at 926 and at 924?

Samuel Weinstein.

A. That's right.

Q. How did you know when you called Mr. Enos and told him that the property was misdescribed, how did you know that at that time the "Five Vets" were not using 926 Seventh Street in connection with the operation of their grocery store?

A. Because it was not.

Q. How did you know?

A. Because I had been going by there.

Q. Did you go in the premises?

A. No, I don't remember going in the premises, but the boards were still across the front of the store and everything else, and I didn't see no reason for me to pay commercial rate on the property as long as they were not using it as such.

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Q. Didn't you just say that the "Five Vets" were paying the premium on the insurance?

A. They were paying the premium on the insurance.

Q. That wouldn't have affected you one way or the other?

A. I went back to look after my interests; I don't know what they intended to do there.

Q. You said that you—the reason that you called—I don't want to confuse you—you testified on direct examination that the reason that you called Mr. Enos and told him to change this was because there was a difference in rate?

A. That's right.

Q. You also testified that you were not paying the premium; that the "Five Vets" were paying it?

A. That's right.

Q. Now, the question that I put to you and I want you to answer in the best way you can—

A. All right.

Q. How was it that you knew at the time that you received this Memorandum of Insurance after you had sold the property in its entirety to somebody who was operating a grocery store there—

A. That's right.

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Q. How did you know what use was being put of the building when you called?

A. I think it could have been on several reasons. Like I say, you're asking me—

Q. Stop right there.

A. I don't want to—

Q. Stop right there.

Samuel Weinstein.

Mr. Bangel: Now, he asked him—
The Court: I overrule the objection.

Examination by Mr. Green continued:
Q. I don't want you to tell me that there could have been several reasons; I want you to tell me what the reasons were.
A. Aside from the fact—I already mentioned that it was probably because these boys were always coming to me for suggestions, and coming and asking me questions. They were not familiar with insurance and so forth; it may have been—
Q. Stop, I don't want to know what " may have been;" I want you to tell me what was—
A. I'm going back and try to answer your questions to the best of my ability. Like I said, I want to answer truthfully and correctly.
Vol. I Q. I want you to.
11/12/59 A. They may have had a conversation with me,
page 36 } asking me the difference in insurance rates. See, like I said—
Q. Wait a minute. If you don't know, say you don't know.
A. I am giving probably what may have occurred.

The Court: We don't want probabilities; we want to know exactly what you know, exactly; if you don't know, say so.

A. All I can say to that question is, I must have had a logical reason for doing it. I wouldn't have pulled it out of the air. When he asks me to go back approximately five years and remember—you understand—why I made certain decisions; I can't tell you right offhand.

Examination by Mr. Green continued:
Q. Let me ask you this; suppose this policy had been written as a dwelling policy and suppose the "Five Vets" had been using that building in connection with their grocery store—

Vol. I
11/12/59 Mr. Bangel: I object to "supposing." If Your
page 37 } Honor please, the witness said it was being used as a dwelling at the time the policy was issued,

and so far as he knows, it continued to be operated as a dwelling. We object to supposition or conjecture.

The Court: I am going to let him state his question in full and then I'll rule on it.

Examination by Mr. Green continued:

Q. Suppose you called Mr. Enos and told him that this building was not a grocery store, that it was a dwelling, as you contend that you did do, and suppose the policy had been changed to say that it was a dwelling, and suppose a loss had occurred there while it was being used as a grocery store, what would have been your position?

Mr. Bangel: We object to that; we're not dealing in conjecture or supposition; we're dealing in what actually occurred.

The Court: I sustain the objection.

Examination by Mr. Green continued:

Vol. I 11/12/59 page 38 } Q. Well, then, Mr. Weinstein, you don't really know then what use the building was being put to at the time you called?

A. To my knowledge, it was always used as a dwelling.

Q. To your knowledge, but you don't know?

A. I know, because I went by there; I never saw reasons or signs that it was ever used for anything beside the dwelling.

Q. Did you call the "Five Vets" to ask them what it was being used for?

A. I went in there on an average of once a month and talked to the owners; nothing led me to believe that it was being used for anything else but a dwelling.

Q. Actually, Mr. Weinstein, you had no authority to ask for any such changes, did you; you had no standing under this policy?

Mr. Bangel: That's a legal question. I say he's got a right—

Mr. Green: The trustee has that right—

Mr. Bangel: I don't know anybody that has a greater right, equal to that of the owner.

Samuel Weinstein.

Examination by Mr. Green continued:

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Q. Let's get back to that situation that you had with Mr. Enos, I think you said that was several days after you received this Memorandum, is that correct?

A. I said probably; I wouldn't know—remember exactly. Now, I think the Memorandum says—well, you can call it whatever name you want to call it by; I think that speaks for itself—when the changes were made, because that's dated accordingly.

Q. That's all right, I want to know about what your position is on these things. Now, I hand you Plaintiffs' Exhibit #2 and ask you when you received that endorsement?

A. Well, according to this here, it was around November 22, 1955.

Q. Around November 22?

A. I mean, November 12, excuse me.

Q. Do you have any knowledge of when you received that?

A. I presume it was around that date, if I received it.

Q. What's the date of the Memorandum of Insurance?

A. What's the date here?

Mr. Bangel: I submit that the paper writing speaks for itself; it shows the date it was made and the date—I don't see—

The Court: I overrule your objection.

Mr. Bangel: We save the point.

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Examination by Mr. Green continued:

Q. You said—I want to know—you said that you presumed you received this somewhere around November 12; now, look at the date—

A. I said this is dated the 12th, so I presume I received it a few days after; I don't know.

Q. When is the Memorandum dated?

A. It's dated—it has two dates on here; one is 11-12-55, another is dated 11-12-58.

Q. What's the effective date of the policy? What's the effective date on the policy?

A. I wouldn't know, because this may be in reference to this policy here.

Samuel Weinstein.

Q. Did you receive an endorsement before you received the Memorandum of Insurance?

A. Did I receive the endorsement before I received the Memorandum of Insurance? Now, to me—we'll say—refer to them as notices, I mean what you call the other names, I'm not too familiar with insurance terms.

Q. Did you receive this paper before or after you received this paper; referring first to Plaintiff Exhibit 2 and, second, to Plaintiff Exhibit 1?

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A. Well, I presume—you understand—in fact, I probably received the one marked "business" first and then the dwelling store afterwards. In other words—

Q. Let me say, if you don't know the answer to my question, just say, "I don't know."

A. I'll put it this way; I don't remember.

Q. That's fine. When you stated in answer to a question on direct examination that after you received this endorsement, you also called Mr. Enos and again called his attention to the fact that the building was misdescribed?

A. That's right, well, I took that as a natural action.

Q. Wait a minute.

A. I took that, because—

Q. Wait a minute; answer my questions, please.

A. Sure.

Q. On the second call after receiving this endorsement, who did you talk with?

A. I don't remember whether it was Mr. Enos or the girl in the office.

Q. You don't remember when you received that exhibit and you don't remember who you talked with, but you remember that you made the call?

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A. I remember making the call.

Q. When did you call Mr. Enos again?

A. You referring to when I received this document marked—

Q. No; you testified that you had called Mr. Enos, I think, on three occasions?

A. I called him on two occasions, wasn't it. I called him one time when I changed—wanted it changed to a dwelling instead of commercial. Then he sent me a notice—like I said, I'm going to call it my terms—when he sent me this notice showing that it was a dwelling grocery, I called back to tell him he was in error, and that it should be dwelling, and that's when I received the next endorsement, as I call it, or notice, that it was now a dwelling.

Samuel Weinstein.

Q. So you made two phone calls altogether?
A. It would have been three.
Q. What I'm trying to get at—I'm not trying to confuse you—
A. I can only go by the records. I know—I remember distinctly making the calls; as to the dates and precise times that the calls were made, I don't remember that.
Q. Let me ask you this, in all fairness I don't want to be put in the position of trying to confuse you or anything else; the only thing I'm trying to do is elicit the information from you as to actually what you contend happened—

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A. That's right.
Q. If it was important enough for you to call Mr. Enos in connection with these things, and according to your contention, every endorsement which came in was wrong—

Mr. Bangel: That's not true; the last endorsement was right.

Examination by Mr. Green continued:
Q. You have three endorsements here, two of which you contend were wrong?
A. That's right.
Q. You stated that you can't remember how many times you called and you can't remember who you talked with?
A. I know it was at least twice. If it was any more times, right offhand, I don't recall.
Q. Let me ask you this; after the property was sold to the "Five Vets," who attended to having the insurance changed from the name of the former owners?
A. I did.

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Q. Did you do that personally?
A. Yes, sir.
Q. How did you accomplish that?
A. By a telephone call.
Q. Now, let me ask you before we get into that phase of it—I hand you Plaintiffs' Exhibit 3, and ask you how the property is described in Plaintiffs' Exhibit 3?
A. It's described here as a dwelling.
Q. Now, had you called Mr. Enos before this endorsement came in?
A. Not that I recall, unless that's the endorsement changing from Weinstein and Rothenberg to the "Five Vets." I made one call to tell them that the property is now in the ownership

of the "Five Vets." I made another call when I suggested to Mr.—rather, I instructed Mr. Enos, or his office, to change it from grocery store to dwelling, and then when I received the endorsement, or notice, reading that it was grocery-dwelling, I called them again and told him that he was still in error; that I wanted it changed to a dwelling.

Q. Let's go back; what is the date of this endorsement, Plaintiffs' Exhibit #2?

A. According to this, it's dated November 12, 1955.

Mr. Green: Excuse me, let me look up here and get these exhibits straight, if I may.

The Court: All right.

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page 45 } Examination by Mr. Green continued:

Q. Did you ever receive any other endorsement?

A. The 26.

Q. Did you receive an endorsement effective July 24, 1957?

Mr. Bangel: It's in evidence; you have it. He can't remember the dates of those things; you got it there, July 24, 1957.

Examination by Mr. Green continued:

Q. Did you receive this endorsement on July 24, 1957, or thereabouts?

A. I don't remember; I think I did.

Q. Well, you identified it.

A. Well, if it's marked "dwelling" and if it was corrected —you understand from the previous one, then I received it.

Q. That was shortly after you had taken the property back?

Vol. I
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page 46 } A. That's right. Then I called the office again and that may have been the third call that you may have mentioned there, telling them that we are now owners of the property again, because the owners came to us and told us they could not continue with the payments, and told us it was satisfactory with them for us to take the property back.

Q. And you asked for the insurance to be transferred back to you?

A. That's right.

Bernard Rothenberg.

Q. Now, how long was that building vacant before the fire occurred?

Mr. Bangel: I don't think that's material, but I don't have any objections to going into it. I don't see the materiality in it. If my friend wants to go into it, I won't raise the point.

The Court: If you don't want to raise the point, it's all right.

Mr. Green: The only reason I'm going into it is, because Mr. Bangel went into it on direct examination.

Mr. Bangel: If you open the door, I won't object.

Mr. Green: I will withdraw the question.

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11/12/59 Examination by Mr. Green continued:
page 47 } Q. You can't remember—I want to be perfectly clear about this—you can't remember whether you talked to Mr. Enos in any of your telephone calls or whether you talked with someone in his office, or somebody that said they were in his office?

Mr. Bangel: I submit the witness has answered that three times or maybe four times and if we're going over the same questions over and over again, we'll be here a week. I don't know how he can make it more emphatic.

The Court: I think that's so; we've covered all that.

Mr. Green: Thank you, Mr. Weinstein.

Mr. Bangel: No questions.

At this time the witness withdrew from the witness stand.

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page 48 } BERNARD ROTHENBERG,
a witness for the plaintiffs, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Bangel:

Q. What is your name?

A. Bernard Rothenberg.

Q. Mrs. Freda Rothenberg is your wife, is she not?

A. Yes.

Q. She and Mrs. Weinstein were owners of the property at 924 and 926 Seventh Street, were they not?

Bernard Rothenberg.

A. Yes, sir.

Q. Do you recall when they first became owners of that property?

A. I think it was 1947.

Q. At the time it was purchased, can you describe the building, 924, what it was?

A. It was a single-story grocery store.

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Q. What was 926 when you bought it?

A. It was a two-story frame building; used as a home—used as a dwelling.

Q. Did it have store windows in it at all?

A. If there were, it was not visible. It was boarded up.

Q. Was it boarded up around on all four sides?

A. Yes, sir.

Q. Was there an entrance to that building on the front?

A. No, sir; on the side. As a matter of fact, you couldn't enter the front anyway, because there was a step-up—it must have been at least three and a half feet.

Q. Were there any steps from the ground—from that building to the street?

A. No, sir. The side entrance had a couple of steps up.

Q. Was it continuously used as a dwelling?

A. Yes, sir.

Q. That property was sold by your wife and Mrs. Weinstein in 1955, was it not?

A. Yes, sir, I think November.

Q. Do you recall to whom it was sold?

A. Sold to a group called the "Five Vets."

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Q. At the time it was sold to them, what was 926 used for?

A. Dwelling.

Q. The policy of insurance was issued by Glens Fall Insurance Company on November 11, 1955, what was that building used for?

A. Used as a dwelling.

Q. Was it a dwelling?

A. Yes, sir.

Q. The property was subsequently acquired by the same former owners, Mrs. Weinstein and Mrs. Rothenberg, was it not?

A. Yes, sir.

Q. Do you recall what year that was in?

A. I think it was in 1957.

Q. How did they happen to reacquire it?

Bernard Rothenberg.

A. Through failure to pay notes and we had to have a sale for it.

Q. Who conducted the auction sale?

A. Mr. Enos.

Q. Is he the same man that—

Mr. Green: That's completely irrelevant; I don't see where that has—the fact that Enos auctioned off the property—

Vol. I 11/12/59 page 51 } Mr. Bangel: I want to identify—well, subsequent to the acquiring of this same property by foreclosure sale which was conducted by Fred Enos, was a policy changed to the new owners?

A. Yes, sir.

Q. Was the building 926 described as a mercantile or dwelling?

A. As well as I recall, it was described as a dwelling. When we took over, the people were living in it and we went by there to see them about changing the rent; to pay us.

Q. Was there any change in the construction of that building from the time you first acquired it until it was destroyed by fire on July, 1957?

Mr. Green: If he knows.

A. None.

Examination by Mr. Bangel continued:

Q. Did it continue to remain as a dwelling from then until it was destroyed by fire?

A. Yes, sir, it was; people were in it.

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page 52 } CROSS EXAMINATION.

Examined by Mr. Green:

Q. Mr. Bangel just asked you from the time you reacquired it until the time of the loss it remained a dwelling, who collected the rents for that?

A. From the time we reacquired it?

Q. Yes, sir.

A. It was a dwelling and the people that were in there were not paying the rent, and we went by to see them about it.

Bernard Rothenberg.

When they didn't pay us any more rent, and didn't pay us on the final date, we gave them instructions to get out.

Q. Let's go back to 1947, when you acquired this property. Now, did you go down and look at the property; go over it?

A. Only on the outside. I was only interested in income and that's the only reason I bought it. I checked the outside; that's all I did.

Q. Let me ask you this, who was occupying 924?

Vol. I A. The "Five Vets."

11/12/59 Q. In 1947 when you bought it?

page 53 } A. Yes, sir, the "Five Vets."

Q. During the time that you owned that property was there ever a confectionery store operated in 1926?

A. No, sir.

Q. Are you sure?

A. I'm positive.

Q. Was the building equipped or had it been equipped with plate glass windows in front of it?

A. It was not visible. It wasn't what we say—there was no glass in there; in fact, there was no glass in there at all.

Q. Was there an area in there set off by a frame where a plate glass window had been?

A. I couldn't tell that from the outside, because it was boarded up.

Q. You never went inside the premises?

A. No, inside only the part that was rented. I never went upstairs until the damage after the fire. I looked inside the door; I never went inside.

Q. You only went inside to look at the part that was rented?

A. I only went to the side so that I could see the general layout. I looked from the door; I didn't go in-

Vol. I side.

11/12/59 Q. How was the building separated from up-

page 54 } stairs and downstairs?

A. There was a stairway.

Q. There was a separate entrance to the downstairs and a separate entrance to the upstairs portion?

A. No, the downstairs portion—you could walk in and there was a stairway that led upstairs. I never went up there.

Q. You never went up there?

A. No, sir.

Q. Was the downstairs portion set off as a separate apartment?

Bernard Rothenberg.

A. It looked like a separate apartment; like I said, I didn't examine it. I was only interested that the building was not ready to be condemned if we bought it.

Q. So, you didn't go in the downstairs portion of the building at all?

A. No.

Q. It was set off—you did notice it was set off individually?

A. I noticed it was a little apartment there; a little place there where people could live.

Q. But nobody was in there at the time?

A. A man by the name of "Winborne."

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page 55 }

Q. Was the upstairs occupied?

A. He occupied the whole building.

Q. Do you know what use he made of the downstairs portion of the building?

A. As a place to live in; he had a place—the room that I saw was a kitchen and then I saw a stairway leading upstairs. I presumed it had bedrooms upstairs; in fact, I'm sure there were.

Q. Do you know what use the "Five Vets" made of the building?

A. Only kept it rented.

Q. Well, let me ask you this, you testified in answer to Mr. Bangel's question that all during the time that the "Five Vets" had this property that they used it for a dwelling?

A. That's right.

Q. Do you know of your own knowledge whether the "Five Vets" ever used this building for storage of supplies in connection with the operation of their grocery store?

A. I can answer that by saying they couldn't have used it for grocery supplies for the store because they had a place in the rear of the store to use.

Q. Just a minute.

A. I want to finish.

Q. You're not responsive to my question.

A. I'm trying to answer it.

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Mr. Bangel: Do you want to read it back?

The Court: Go ahead.

A. They couldn't use it for storage, because the rear of the store was fixed for storage and they never bought enough

supplies to use that storage place. I was in there off and on.

Examination by Mr. Green continued:

Q. Did you ever see the storage in 926 Seventh Street next door?

A. No, sir.

Q. You never did?

A. No, sir.

Q. How often did you go there while the "Five Vets" were occupying the property?

A. I guess I passed that place once a week.

Q. How many times did you go in it?

A. None.

Q. Then you don't know what they were using 926 for, do you?

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A. Well, if they used it for any purpose, it was not visible from the front. I did not go inside, no, sir.

Q. So the answer to my question, Mr. Rothenberg, is that you do not know what the "Five Vets" used the premises for?

A. I guess you'd be right, because if they did it without opening the front door, you'd be right, but if they opened the front door, they couldn't, because it was still boarded up.

Q. Then your answer was that you do not know what use the "Five Vets" made of the premises at 926 Seventh Street?

A. I know it was still used as a dwelling, because they were still collecting rent from it.

Q. You knew part of it was used—

Mr. Bangel: He said he knew it was being used as a dwelling he never said part of it.

Examination by Mr. Green continued:

Q. Would you deny of your own personal knowledge—would you deny that 926 Seventh Street was not used—a portion of it was not used by the "Five Vets"?

A. I couldn't deny that, because as I said, the only—if there's an entrance from the rear, which I don't know about, if there's an entrance from the rear I imagine they could have used that, yes, it's possible.

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Q. You could not dispute that fact?

Robert G. Esleeck.

A. I couldn't dispute you because I never went inside, but there was no evidence of it from the outside.

Q. It wasn't of any moment to you what they used it for?

A. It depended on whether they made expenditures on it as far as remodeling, but—

Q. But other than that, you had no particular concern about what they used it for?

A. I never knew what they used it for.

Q. Do you know who the tenants were in this property?

A. Which property?

Q. In the property at 926?

A. The only tenants I know was the fellow by the name "Winborne."

Q. Did you have anything to do with the issuance of the insurance on the premises?

A. No, sir.

Q. Who did you leave that up to?

A. Mr. Weinstein.

Q. Does your wife actually own this property or do you own it?

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A. My wife and Mrs. Weinstein own it jointly.

Q. It's their property?

A. Yes, sir.

Q. You have no interest in it?

A. Other than the affiliate relationship we have.

Mr. Green: I think that's all.

At this time the witness withdrew from the witness stand.

ROBERT G. ESLEECK,

a witness for the plaintiffs, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Bangel:

Q. What is your name?

A. Robert G. Esleeck.

Q. Are you connected with the City of Portsmouth in any way?

A. Yes, sir.

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Q. In what capacity?

A. I'm license supervisor from the Commissioner of Revenue Office.

Q. You have been so employed for how long?

Robert G. Esleeck.

A. I have been with the City of Portsmouth for nearly ten years.

Q. What does your duties require you to do?

A. Inspect license and issue license in addition to inspecting.

Q. Are you familiar with the property known as 926 Seventh Street?

A. Yes, sir.

Q. Was that ever a store in the ten years you have been license inspector?

A. No, sir.

Q. Can you describe the condition of that property; do you know what it was used for?

A. Yes, it was used as a dwelling.

Q. Can you describe that property to the jury, please, sir?

A. It was an old frame house, two-story frame house. The front of it had no doorway. If it had one, it was boarded up. It had no porch, no steps; the only entrance I ever saw to the place was on the side of the building toward the rear. It had a couple of steps going up to it.

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Q. All four sides completely boarded up?

A. Yes, sir.

Q. Did you see any people—

Mr. Green: Mr. Bangel is leading the witness; I hate to continually object.

Mr. Bangel: I won't press that.

Examination by Mr. Bangel continued:

Q. Now, the property next to that, 924, what kind of building was that?

A. That was a grocery store.

Mr. Bangel: Witness with you.

CROSS EXAMINATION.

Examined by Mr. Green:

Q. Mr. Esleeck, is that the name?

A. Yes.

Q. When did you first go with the city?

A. January, 1950.

Robert G. Esleeck.

Q. Was that as a license inspector?
Vol. I A. Yes, sir.
11/12/59 Q. Let me ask you this, what type of business
page 62 } license did you inspect for?
A. All types of business license and professional.
Q. Any type of business license, is that correct?
A. Yes, sir.
Q. Do you have your records from the time you went there?
A. Let's see; I have them almost that far back.
Q. Do you have them available?
A. No, sir, I don't have them available.
Q. Do you ever recall this property being operated as a restaurant?
A. No, sir.
Q. Are you absolutely sure of that?
A. Positive.
Q. Do you have knowledge of it being operated as a confectionery?
A. No, sir.
Q. Have you ever been inside the building?
A. No, sir.
Q. Let me ask you this, would that—I mean, the "Five Vets" who operated on that property had a business license to a grocery store, did they not?
A. At 924, yes, sir.
Vol. I Q. Do you know—would you deny of your own
11/12/59 personal knowledge, Mr. Esleeck, that the "Five
page 63 } Vets" used the building at 926 Seventh Street for
storage of supplies in connection with the operation of their grocery store?

Mr. Bangel: We object to that "do you deny," that's the most negative thing he could possibly say.
The Court: I overrule the objection.
Mr. Bangel: We save the point.

Examination by Mr. Green continued:
Q. Have you ever been inside the building?
A. No, sir.
Q. Never been inside?
A. No, sir.
Q. So, you don't know what use was being made of the inside of the building?

Robert G. Esleeck.

A. I know it was being used as a dwelling.

Q. But you don't know what other use it was—or what other—or what the other portion of the building was being used for?

A. Anything that went through this building had to go through one door; I think that was a dwelling.

Q. Let's be fair?

A. I'm trying to be fair.

Vol. I
11/12/59 page 64 } Mr. Bangel: I think the witness has been fair. I don't think he ought to impute any unfairness.

Mr. Green: It boils down to whether he had reason for knowing what use was being made of the building.

A. Only as a dwelling.

Examination by Mr. Green continued:

Q. Had you ever been inside the building?

A. No, sir.

Q. You don't know what the physical setup was inside the building?

A. No, sir.

Q. You surmised it was being used as a dwelling because on occasion you saw people going in and out?

Mr. Bangel: I object to "surmise." The witness said it was being used as a dwelling.

Examination by Mr. Green continued:

Q. How did you know it was being used as a dwelling?

A. Well, only by people going in and out and children playing around the rear door and that was the only door to the place.

Vol. I
11/12/59 page 65 } Q. That's all I wanted to know. You saw people coming in and out and from that you surmised that the house was being used as a dwelling?

A. That's correct.

Q. You're not in a position to say what part of the building was being used for a dwelling, are you?

A. I can only say that there was no business transaction there as far as required a license.

Q. There wasn't anything going on there, far as as you know, that required a license?

Robert G. Esleeck.

A. That's right.

Q. You don't know whether the upstairs was being occupied by tenants and the downstairs for storage or not, do you?

A. No, sir, I don't know.

Q. You didn't specifically inspect the building or make any particular note of it, because that wasn't in your line of work, was it, Mr. Esleeck?

A. I didn't inspect the inside; I inspected the outside. My job is to inspect anything that could possibly be a place of business that required a license.

Q. There was something about this building that you thought might possibly be suitable for a business?

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A. No, sir, there was nothing about it that would make me think it would be suitable for business.

Q. So, for that reason you didn't make any detailed inspection of it?

A. Just the outside of the building; I remember that.

Q. You just looked at it like anybody else would look at it, didn't you, Mr. Esleeck?

A. I'm sure that there was no licensable business carried on there.

Mr. Green: I think that's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Bangel:

Q. That was your duty to find out if anything was operating —a business was operating—it was your business to find out about that?

A. That's right.

Q. That's what you were doing?

A. Yes, sir.

Q. Do you have any interest in this case one way or the other?

A. No, I don't even know the people involved.

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RE-CROSS EXAMINATION.

Examined by Mr. Green:

Q. In connection with what Mr. Bangel has just asked you, in looking at this house your duty as license inspector

wouldn't make any difference, because it wasn't anything to indicate that there was anything going on in there by the way of business?

A. Except that it appeared to be a dwelling to me.

Q. Did the condition of that building change at any time during the ten years?

A. Not to my knowledge. I can only say that it was boarded up. I remember it was one entrance from the side. In the ten years I've been with the city, I don't remember an entrance from the front. There was never a porch; never anything to lead me to believe that a business was carried on from there.

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Q. Let me ask you this, do you know when it was first boarded up?

A. No, sir, and I am sure it was before I went with the city.

Q. No question in your mind about that now?

A. No, I can't swear that the place was boarded up when I first went with the city. I can swear that it wasn't suitable for a store or place of business.

Q. It's a fair statement that you can't remember when these things took place and that type of thing?

A. I didn't pay any attention—I'm not trying to be unfair, but I'll say from the time I went with the city, I know that there was no license issued for 926 Seventh Street, and if there had been, or if there had been any reason to believe that there was a business being carried on from there, I would have gone on the inside and looked into it.

Q. One further question and that's all I am going to ask. If this building at 926 was being used in conjunction with the operation of a grocery store at 924 as a storeroom, would there have been any necessity for requiring a license for 926 when it was just being used as a storeroom?

A. No, sir, not if the place at 924 was licensed; it wouldn't have required a license.

Q. And 924 was licensed?

A. Yes, sir.

Mr. Green: That's all.

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At this time the witness withdrew from the witness stand.

Mr. Bangel: We rest.

Mr. Green: I have a motion I'd like to make.

At this time the Judge, counsel for both sides and the court reporter repaired to the Judge's Chambers.

Mr. Green: I make a motion to strike the plaintiffs' evidence.
The Court: Motion overruled.
Mr. Green: Note my exception to the Court's ruling.

At this time all parties to the trial returned to the courtroom.

Court was called to order.

Vol. I
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page 70 } Mr. Green: Call Donald C. Avery.

DONALD C. AVERY,
a witness for the defendant, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Green:
Q. Give us your name, please?
A. Donald C. Avery.
Q. What's your occupation?
A. Virginia Insurance Rating Bureau.
Q. How old are you?
A. I'm thirty years old.
Q. How long have you been with the Rating Bureau?
A. Seven years.
Q. Tell the jury, if you will, in as concise a way as you can, what the function of the Virginia Insurance Rating Bureau is?

A. Well, we set the fire insurance rates and
Vol. I we're responsible to see that the policies are writ-
11/12/59 ten at the proper rates and proper forms.
page 71 } Q. Are you controlled in any way by the State Corporation Commission of the State of Virginia?

Donald C. Avery.

A. That's right; we're under the jurisdiction of the State Corporation Commission.

Q. Now, explain to the jury, if you will, the mechanics in connection with the issuance of an insurance policy on a particular risk?

A. Well, the insurance agent will call us; notify us in writing, or possibly an assured, about rating a building, and we make an inspection and determine the fire insurance rate and notify the agent through a publication called "Rate Card."

Q. Can insurance be written on a building by an agent without intervention of the Virginia Insurance Rating Bureau?

A. No, sir.

Q. In other words, he's bound to come to you for determination of the type of risk?

A. That's right. If it's not rated or published, they have to come to us to get it.

Q. By virtue of that, could an insurance company rate insurance on a particular building without going to you to determine the classification?

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A. No, sir, not the Glens Falls Company.

Q. Let me ask you this, Mr. Avery. How do you arrive at a particular classification for insurance; what is the criteria for classifying a building as a dwelling as opposed to mercantile and *vice versa?*

A. If it's occupied, we go to the occupants. If it's used for commercial storage or in commercial retail or wholesale business—anything of a business venture—then it's commercial. If it's occupied in part as a dwelling; it's part commercial and dwelling.

Q. There's a difference in rate?

A. There is a great deal of difference.

Q. What classification would storage fall within?

A. Mercantile commercial.

Q. Now, assume, if you will, Mr. Avery, that you were faced with the proposition of rating a piece of property which was partially occupied by tenants and partially occupied by storage space for a grocery store, how would you rate that particular building for—

Mr. Bangel: There's no evidence at all—I submit until there's evidence of it, it's highly improper. He's assuming a great deal and not establishing anything.

Donald C. Avery.

The Court: I think that's put in the form of a hypothetical question, and he's testified that he represents the Rating Bureau. I think it's under the hypothetical question.

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Mr. Green: That's correct.

Mr. Bangel: May I save the point?

A. We'd have to rate it as commercial property.

Examination by Mr. Green continued:

Q. Commercial property?

A. Yes.

Q. How are your standards for rating arrived at?

A. Well, by experience; through experience in each type of occupancy; each type of construction down through the years. We change the rates according to experience that each shows.

Q. Mr. Avery, do you have any records which would indicate how the Rating Bureau rated property at 926 Seventh Street, Portsmouth, Virginia?

A. Yes, we do.

Q. In 1955?

A. Yes.

Q. What classification was assigned to that building?

A. Mercantile and dwelling.

Q. Mercantile and dwelling?

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A. That's right.

Q. Let me ask you one further question. I think you may have already answered it, but I will ask you again. If a building were classified by you as commercial and dwelling, how would the insurance policy be written on that particular risk?

A. As mercantile.

Mr. Green: Answer Mr. Bangel's questions.

CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. I understood you to say, Mr. Avery, that you all approve rates and the forms?

A. That's correct.

Q. There is a standard form for dwellings issued by all companies, are there not, as to conditions and provisions—all the same?

Donald C. Avery.

A. That's right.
Q. That's true as to mercantile?
A. Yes, sir.

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Q. Where an agent writes a policy, that property is described by the agent and is also described as to the rate, the type of building it is and the like?
A. Yes, sir.
Q. You never have seen this particular piece of property, to your knowledge?
A. I can't remember ever seeing it.
Q. The forms are approved?
A. Yes.
Q. In a policy issued, there is such a thing as a store being converted to a dwelling and the dwelling being converted to a store?
A. Yes, sir.
Q. When a person has a dwelling and it appears on your rating that it's a store, and the policy comes through your Bureau, don't you send a man out there to look and see whether it's a dwelling or see whether it's a store?
A. That we do.
Q. Is there anything in your file to indicate that you-all went out to look at this building after you-all had received this form or the policy showing it to be a dwelling?
A. No.

Mr. Bangel: That's all, sir.

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RE-DIRECT EXAMINATION.

Examined by Mr. Green:
Q. That's done in the normal course of your business, is it not?
A. Yes, it is.
Q. Let me ask you, in connection with Plaintiff Exhibit 2, in connection with the rate prescribed therein and ask you what rating there applies to what classification?
A. There is an endorsement which changes the rate from $1.96 less some credits to $1.15 less some credits; both of which have mercantile rates.
Q. Mercantile rates?

Donald C. Avery.

A. Yes, sir. It's described "dwelling and mercantile"—"dwelling and grocery," I'm sorry.

Q. Dwelling and grocery store?

A. Yes, sir.

Q. I hand you Plaintiff Exhibit 3, Mr. Avery, and ask you to examine the rate set forth in that endorsement.

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A. This is identical to the other. It changes the rate from 1.96 less 35¢ plus seven per cent to 1.15 less 35¢ plus seven per cent.

Q. What rate—what type of rate is that?

A. That's still mercantile rate.

Q. How is the building described there?

A. It's described here as a dwelling, but it has a mercantile form.

Mr. Green: Thank you, Mr. Avery.

RE-CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. Did not the policy itself, but didn't a similar form come through your office describing this as a dwelling several years before any fire occurred?

A. Possibly.

Q. Look at it.

A. Let me have it.

Q. Look at Plaintiff Exhibit 3, how is that building described?

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A. As a dwelling.

Q. When that came through as a dwelling, your records do not show that you-all went out to determine whether it was dwelling or mercantile?

A. Our records do not indicate, because we don't have the date on our records.

Q. I hand you Plaintiff Exhibit #4, and ask you how the building is described.

A. This is the title endorsement and describes it as a dwelling. We do not check title endorsement.

Q. You don't check it?

A. No, sir.

Q. Does an insured come over—have you ever had an insurer come over there and look at the records—all the records during all the years?

A. Yes, sir.

Q. How many?

A I don't know how many; several.

Donald C. Avery.

Q. In other words, when the policy is written; it's written by the agent, is it not?
A. That's correct.
Q. And the policy is delivered by the agent?
A. That's correct.
Q. And the copy of it goes through your office?
A. That's correct.

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Q. It indicates whether it's a store, mercantile establishment or dwelling?
A. That's correct.
Q. When the paper comes through indicating that it's a dwelling and your records may show it's a mercantile, you-all don't turn the policy down, but you send someone out to look and see if it's a dwelling, is that true?
A. That's correct.
Q. I understood you to say that your records do not indicate that anything took place like that for the property at 926 Seventh Street?
A. That's right.
Q. The rates are higher or lower for mercantile business?
A. Higher for mercantile.
Q. So, it would be lower if it was a dwelling?
A. That's correct.
Q. I think the only other difference would be the provision for co-insurance and the dwelling does not?
A. There are other differences in the form, but one is for mercantile form and there's one for the dwelling form.
Q. But mercantile shows co-insurance clause and dwelling does not?
A. That's correct.

Mr. Bangel: That's all.

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RE-DIRECT EXAMINATION.

Examined by Mr. Green:
Q. In answer to Mr. Bangel's questions with respect to the inspection; your records indicate I believe you said that this building was classified as a dwelling-mercantile?
A. That's correct.
Q. And when something comes through your office, as Mr.

Bangel mentioned, an inspection is carried out in the ordinary course of your business, is it not?

A. That's correct.

Q. How many of these things do you think you inspect in the course of a period of time?

A. About thirty a week.

Q. This would indicate the inspection was made in 1955?

Mr. Bangel: The witness says there's nothing in his office to indicate any inspection was made even after the form had come through his office indicating that it was a dwelling.

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page 81 } Examination by Mr. Green continued:

Q. You have no particular knowledge as to whether this thing was actually inspected or not, is that correct?

A. Well, as to those dates, I do not.

Q. It's the usual course of your business that the inspection would take place?

A. Yes, sir.

Mr. Bangel: We object to that.

Mr. Green: I think it's obvious he can't be expected to remember everyone.

Mr. Bangel: That's all right.

Mr. Green: That's all.

At this time the witness withdrew from the witness stand.

Vol. I
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page 82 } FRED G. ENOS,

a witness for the defendant, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Green:

Q. Will you give the jury your name?

A. Fred G. Enos.

Q. What's your occupation?

A Secretary and manager of T. B. Lee, Incorporated.

Q. You're the agent for Glen Falls Insurance?

A. It's one of my company's.

Fred G. Enos.

Q. And you were agent for Glen Falls Insurance Company in 1955, is that correct?

A. Yes, sir.

Q. Mr. Enos, you heard the testimony of Mr. Weinstein and Mr. Rothenberg in connection with this case. Now, let me ask you this, when you write a policy of insurance as an agent, how are you controlled in writing that policy with respect to classification of the risk involved?

Mr. Bangel: We submit that it's quite clear from the evidence that it goes through the Rating Bureau and if there's a mistake, they go out and inspect it.

Vol. I 11/12/59 page 83 } The Court: I think the question is proper.
Mr. Bangel: We save the point.

Examination by Mr. Green continued:

Q. Go ahead.

The Court: Answer the question.

A. Would you repeat that?

Q I say, if somebody called up and asked you to write insurance on a particular piece of property, how do you obtain the classification of that building?

A. From the Rating Bureau.

Q. Is that mandatory?

A. Well, it's a rule of the insurance industry—we won't write anything unless it's submitted each day at the close of each business day.

Q. Do you have any authority to change any description of anything of that type in a policy without submitting it to the Virginia Rating Bureau?

A. No, sir.

Q. Now, I believe the testimony is that you wrote this policy in November, 1959?

A. It was a renewal of a policy that we had in our office.

Q. How was the property described?

Vol. I 11/12/59 page 84 } A. It's described on that memorandum of insurance; the original going to the Trustee, Mr. Karp.

Q. How was that?

A. This was renewed through our agency, November 12, 1955, for a period of three years. It describes the amount at $2,500; showing mercantile rating. Description $2,500;

Fred G. Enos.

75% co-insurance covering a two-story frame building located at 926 Seventh Street, Portsmouth, Virginia.

Q. Where did the original of this policy go?

A. The original went to the Trustee.

Q. The Trustee in the deed of trust?

A. Yes, sir.

Q. Is that standard practice?

A. Yes, sir, it is. The memorandum goes to the insured.

Q. Let me ask you this. After this policy was issued, did you ever receive any call from Mr. Weinstein in connection with the description of this property?

A. It's rather hard to remember back through the years.

Q. Whoever handles the incoming calls, takes down the necessary information?

A. Yes, sir.

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Q. Can you make those changes in your office or do you have to refer them to the Rating Bureau?

A. No, they are first submitted to the Rating Bureau.

Q. Your change is determined by the Rating Bureau?

A. Yes, sir.

Q. You, or the Glen Falls Insurance Company, have any control over that rating at all?

A. No, sir.

Q. You have no particular individual knowledge of this particular dwelling-grocery store, do you?

A. No, sir, I have no knowledge of it; I have never seen the property physically.

Q. Now, let me ask you this, Mr. Ennos, in connection with Plaintiff Exhibit 3, what does that accomplish insofar as the policy is concerned?

A. It's a title endorsement.

Q. What was the purpose of that endorsement?

A. It's marked "Title Endorsement," there's a change in rate.

Q. That was for the purpose of changing the rate?

A. That's the way it appears to be.

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Q. I hand you Plaintiff Exhibit 4 and ask you what was the purpose of that endorsement?

A. This was strictly a title endorsement eliminating quite a few names; it's an assignment of insurance from these several people—

Q. Is there any rate mentioned?

A. No rate is mentioned.

Fred G. Enos.

CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. You said #3 was change of tenant endorsement, aren't you mistaken about #3?

A. I was going by what's at the top.

Q. Is that "title endorsement"?

A. No, sir, it's not.

Q. You evidently use your own form?

A. It appears to be that.

Q. That's described as a dwelling, isn't it?

A. Yes, it is.

Q. I hand you Plaintiff Exhibit #1 and ask you does this provide for any co-insurance on it?

A. Yes.

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Q. What percentage co-insurance is Plaintiff Exhibit 1?

A. Seventy-five per cent.

Q. That is the form that shows it as being a mercantile establishment?

A. Yes, sir.

Q. Look at the one where it was changed from mercantile to dwelling; I ask you whether or not it shows any co-insurance clause on that?

A. No, it doesn't; not on the endorsement.

Q. That's what you sent over to the Rating Bureau, isn't it?

A. This is the endorsement.

Q. Doesn't it provide for insurance where the change is from mercantile to dwelling; it does show co-insurance on the policy?

A. I don't believe that's necessary; Mr. Avery can answer that better than I.

Q. When it was co-insurance—when it changed to dwelling, it says "none."

A. It doesn't say anything there.

Q. Do you put anything in there when there is no co-insurance applicable?

Mr. Green: Where do you see where it says "none"?

Mr. Bangel: Right here.

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Examination by Mr. Bangel continued:

Q. I will ask you this—

Fred G. Enos.

Mr. Green: Where is it deleted?
Mr. Bangel: Let me take the witness, if you don't mind.

Examination by Mr. Bangel continued:
Q. Isn't it true that if there is no co-insurance applicable to the particular property involved, you leave it blank?
A. Yes, ordinarily.
Q. Was it left—
A. Under a dwelling policy, it's not at all necessary to put the co-insurance.
Q. It's left blank, isn't it?
A. That's right.
Q. When it was changed from mercantile to dwelling, the 75% co-insurance clause was left off of the one for it?
A. It's depicted under the main policy. This endorsement doesn't change that at all. This doesn't delete or add to co-insurance.

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Q. Don't you fill out the form properly when you send it through?
A. What I'm trying to say, the endorsement does not necessarily have to show every minute detail, because it's not the original policy.
Q. I understood you to say the insurer—the person that carries insurance on the building never sees the original policy when there's a mortgage on it, isn't that true?
A. Seldom do; it's an established principle of all agents that the original goes to the Trustee.
Q. This is the only thing the person insuring the property gets?
A. That's right.
Q. And that one shows the mercantile business and showed 75% co-insurance clause?
A. The original does, yes, sir.
Q. It was changed from a mercantile to a dwelling?
A. It wasn't changed—it was changed to a lower mercantile rate.
Q. What does this say?
A. It says "dwelling." The rate has only been changed from higher mercantile to a lower one.

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Q. When the policy endorsement—or whatever you may refer to it as being, when it was changed from the use of the word "mercantile" to "dwelling," did you then drop the co-insurance on the policy? Look at it.

Fred G. Enos.

Mr. Green: I think the documents speak for themselves. There's absolutely no reference in the endorsement as to co-insurance in no way, shape or form. As to the legal import of these documents, I think it's strictly a question of law for the Court and I submit that this is a memorandum of the original policy and the endorsement. I say there being no reference to co-insurance clause, the main policy still controls.

Examination by Mr. Bangel continued:

Q. Doesn't it provide in the change of endorsement—doesn't it say—look at the paper writing here—I ask you if that is the title endorsement and ask if that wasn't issued by you within fourteen days—

A. This isn't a title endorsement.

Q. I hand you Plaintiff Exhibit #2, which was the original policy dated November 22, 1955?

A. Right.

Q. This endorsement was made November 28, 1955, or within six days?

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A. Yes, sir.

Q. Was the rate cut on that?

A. Yes, but it's still the mercantile rate.

Q. Would you mind telling me one thing, please, sir; if I came to you as an authorized agent of Glen Falls Insurance Company and asked you to write a policy on a dwelling and you issued me a policy, have you ever had anybody question you whether it was a higher rate or lower rate, or don't they assume that you, as agent, know what the standard rate is and accept that?

Mr. Green: He can't possibly answer that; as to what somebody else might assume.

Mr. Bangel: We paid more than we should have.

Mr. Green: The testimony is that the people who brought the suit never paid the premium.

Examination by Mr. Bangel continued:

Q. Why was the insurance rate lower on a dwelling than it was on mercantile?

A. May I answer it this way—

Q No, you just—

Mr. Green: Let him answer the question.

Fred G. Enos.

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Mr. Bangel: If he will answer the question and then make any explanation he wants, but each time I ask a question he goes off on an explanation.

Mr. Green: He didn't get two words out of his mouth.

Examination by Mr. Bangel continued:

Q. Let me ask the question again. I asked you whether the rate on a dwelling isn't cheaper than on a mercantile building?

A. Yes, it is. Ordinarily, it is.

Q. When is there an exception?

A. I'm sorry, it's always lower.

Q. If I call and ask you to write an insurance policy, fire insurance, on my home for me, have I any way of determining whether the rate you charged me was a higher or lower rate?

A. The only way you have is by checking it directly with the Bureau.

Q. Do you know of anyone who's ever written a policy of fire insurance with you that knew there was such a thing as a Bureau and that they could check with the Bureau?

A. Frankly, no.

Q. So, when the change was made from a mercantile to a dwelling, there was a substantial reduction in the rate, was it not; here's the original $85.20 and here's the last one showing $35.20?

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A. Substantial reduction was made in the rate. May I modify that?

Q. Yes, sir.

A. The modification rate was made from strictly mercantile, which carries a very high rate, and here it is brought from—dropped from the high rate to a lower rate taking into consideration a partial residence and partial mercantile; it's still not as cheap as strictly as a dwelling rate.

Q. I ask you if the rate didn't drop substantially from the mercantile building and with a co-insurance clause of 75% to a reduction in the rate when it went to dwelling-mercantile, and ask you if it didn't drop then?

A. It dropped, but the 75% co-insurance clause is not eliminated.

Q. Does that show on the endorsement of the policy?

Mr. Green: He's dwelled on this point about co-insurance. I submit that the matter does not appear on the endorsement;

there's no reference in the endorsement in any way, shape or form to the co-insurance clause. I submit that unless it's specifically mentioned in the endorsement, the main policy controls and I fail to see what Mr. Bangel's purpose is in continually hounding this witness with something which has no application.

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Mr. Bangel: It has this; where it's a mercantile establishment the rate is higher. They have a co-insurance clause. When it's changed from a mercantile policy—the policy changed from mercantile to a dwelling, you then cut down on the insurance rate and the co-insurance clause is eliminated, because it does not apply to the residence in the corporate limits in the City of Portsmouth, Virginia.

The Court: Is there anything in the policy—co-insurance policy—in the original policy which was eliminated?

A. No, sir.

Mr. Bangel: It says here—it asked about co-insurance.

Mr. Green: That's not the one you showed him.

Examination by Mr. Bangel continued:

Q. What does this paper writing say?

A. It says "dwelling," but the rate isn't a strict dwelling rate.

The Court: This shows "dwelling-grocery store."

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The Court: Where is the one that you're talking about?

Mr. Bangel: This is the one that I'm examining him on.

Examination by Mr. Bangel continued:

Q. Mr. Enos, the original memorandum of insurance shows a store with 75% co-insurance clause?

A. Yes, sir.

Q. It shows a rate of five—insurance rate of $85.20?

A. Right.

Q. I hand you that, Plaintiff Exhibit #1.

A. That's the original contract.

Q. I hand you Plaintiff Exhibit #3, which was issued by your office on 12-6-55, which is about twenty-six days later?

A. That's right.

Fred G. Enos.

Q. And I ask you whether this Exhibit 3 does not show the building involved to be a dwelling?

A. The answer to that is "yes," but the rate is not a dwelling rate. The rate is a dwelling and mercantile rate.

Q. Now, the man that gets the fire insurance, he depends on the agent?

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A. Yes, sir.

Q. I ask you to look at Plaintiff Exhibit 3, which was issued less than a month, and ask you if that does not show dwelling?

A. I just answered that.

Q. What percentage of co-insurance applies to this building?

A. It has a space for it, but it's not required on this endorsement.

Q. Suppose it was a dwelling, what would you put in there?

A. If it had been restricted to a dwelling, possibly the rate would have been about sixteen cents a hundred.

Q. Let's forget about the rate.

A. Then, you could have changed the entire contract, but it has not been done.

Q. Let's forget about the rate; I think we understand each other on that. I'm trying to find out about the form you use.

A. Mercantile form.

Q. Is there anything in there that says "mercantile" on there?

A. I'm talking about Plaintiff Exhibit 3.

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Q. I'm asking you if that's a true photograph because—I ask you to look at Exhibit #3, is there anything on there that says "mercantile"?

A. Here it is; it doesn't specifically say "mercantile," but it's 1-153.

Q. Then, you say that the insured knows that's a mercantile policy because it has the number 115-3?

A. That's the form required by the Virginia Insurance Rating Bureau, where it's been rated mercantile.

Q. I'm trying to find out from you—

Mr. Green: Let me interpose an objection. It seems to me this testimony Mr. Bangel is going into is completely irrelevant to the issue which is before the Court at this time.

Mr. Bangel: He's on cross examination.

Mr. Green: The issue before the Court at this time is

Fred G. Enos.

whether this building was properly classified for purposes of insurance at the time this policy was issued.

Mr. Bangel: We're going into that.

Mr. Green: Here he's concerned with something that happened long after that.

Mr. Bangel: No, a few days, twenty-some days.

The Court: I'm going to overrule the objection.

Mr. Green: Note my exception.

Vol. I Examination by Mr. Bangel continued:
11/12/59 Q. I ask you to look at Plaintiff Exhibit #3
page 98 } and tell us where there appears on that anywhere "mercantile" or mercantile or building or other than a dwelling?

A. I can't answer; it doesn't.

Q. Well, thats the form that was issued within a few weeks after the original policy was issued?

A. This is the form.

Q. That shows "dwelling," does it not?

A. It's typed in here "dwelling."

Q. If you were putting that endorsement out for a policy issued on a dwelling, would there be any—would there be anything put in here or typed in the paragraph marked "Per Cent of Co-Insurance," would you write the word "none" or would you leave it blank?

A. Frankly, I can't answer that; I have nothing to do with writing the detail policies in my office.

Q. You've been an agent for years?

A. I know, but I don't type policies up; I've been living for thirty-six years without pounding a typewriter.

Q. You're familiar with policies?

A. I wouldn't say I'm too familiar; I'm no expert.

Q. You've issued a policy as agent for Glen
Vol. I Falls Insurance Company?
11/12/59 A. My agency has, yes.
page 99 } Q. You are the agent for the company, are you not?

A. I'm one of them.

Q. You mean the company has hundreds of agents; I'm talking about here in Portsmouth.

A. I have other agents in my office; licensed agents.

Q. They are authorized to write and sign it too, are they?

A. Yes, sir

Q. But they are all right there in your office and they are under your supervision?

Fred G. Enos.

A. That's right.

Q. I ask you if it isn't true when you issue a policy on a dwelling, isn't it proper on a policy of your own and when you are writing one for the Glen Falls Insurance Company or any other company, where the word "Per Cent of Co-Insurance" you leave that blank where it says "dwelling"?

A. Yes, sir.

Q. When it's mercantile, you put in there the percentage of co-insurance?

A. That's right.

Vol. I 11/12/59 page 100 } Q. I ask you to look at Plaintiff Exhibit 3 and ask you which was issued in December, 1955, and ask you if that shows "dwelling"?

A. Yes, sir.

Q. Does it show a blank under the clause "Co-Insurance"?

A. Yes, it's blank.

Q. If you deliver that to me, how would I know that 115-3 means "mercantile"?

A. Frankly, I wouldn't know how you'd know.

Q. So, I have to depend on the agent, do I not?

A. Yes, sir.

Mr. Bangel: That's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Green:

Q. Who was the policy issued to?

A. Originally it was issued to these people right here; here's a list of the names.

Q. Who else would have an interest in the policy?

A. The Trustee.

Vol. I 11/12/59 page 101 } Q. Would Mr. Weinstein and Mr. Rothenberg be entitled to receive from you, as agent of Glen Falls Insurance Company, anything in connection with this insurance?

Mr. Bangel: That's a legal question.

Mr. Green: My position is that Mr. Karp and the named insured are entitled to receive the policy, and Mr. Weinstein and Mr. Rothenberg who have tried to show they were entitled to receive something have no standing in the world between Glen Falls Insurance Company and the insured; their interest is represented by the Trustee.

Fred G. Enos.

Mr. Bangel: If I take a policy and they transfer that policy to me; I have no interest in that policy?

Mr. Green: The interest goes to the Trustee and the policy so reflects.

The Court: Objection sustained.

Examination by Mr. Green continued:

Q. Who in this transaction had any interest in this policy?

A. These people listed right here.

Q. Would there be any obligation on you as insurance agent or did Mr. Rothenberg or Mr. Weinstein have any interest at all in the policy?

A. Not the way this policy is written, no, sir.

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Q. They're not the named assured?

A. No, sir.

Q. They're not the Trustee?

A. No.

Q. This was sent to the named assured, was it not?

A. I can't answer that; I don't know where the memorandum went.

Q. It's addressed to the named assured, is it not?

A. Yes, sir.

Q. This was not sent to Mr. Weinstein?

A. It was sent to this address.

Q. But it wasn't sent to these people?

A. That's right.

Q. I show you—let me ask you this, Mr. Enos. When you as an experienced agent write a policy of insurance on a piece of property which is subject to a mortgage, who is your named assured?

A. When I issue a fire policy to John Jones, and his wife, Sarah Jones, the policy is issued to John Jones and Sarah Jones showing the loss payable clause to whoever put up the money.

Q. To the Trustee, is it not?

A. Yes.

Q. Is there any obligation on you as insurance agent to track down—

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Mr. Bangel: Wait a minute.

The Court: I sustain the objection to that.

Fred G. Enos.

Examination by Mr. Green continued:

Q. Let me ask you this, Mr. Enos, when you write a policy of insurance where the property is subject to a mortgage, are you required to find out who the mortgage holder is when you write that insurance?

A. No, we're not required to do that; that's usually given to us by the closing attorney.

Q. Who has the only interest in the property besides the assured?

A. The Trustee.

Q. In the event of loss, how is it handled?

A. The check is made payable to the named assured and Trustee.

Q. Are the people who actually lend the money ever included in the draft?

A. No, it's always the Trustee.

Q. Let me ask you this, Mr. Enos; would you have any authority where you knew that you had an insured and there was a Trustee on the property, would you have any authority if somebody called up on the telephone and told you without the verification that "I own this property; I want you to change the policy, would you be authorized to change the policy?

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page 104

A. It would have to come from the Trustee; you can't eliminate the Trustee without having authority from the Trustee.

Q. Let me ask you this, would Mr. Weinstein and Mr. Rothenberg ever have gotten anything from you under this policy of insurance if this had not been made to these people listed here in this exhibit?

A. No, sir.

Q. Mr. Weinstein and Mr. Rothenberg would not have gotten anything?

A. No, sir.

Q. This original policy shows that this property is subject to a 75% co-insurance clause, is that correct?

A. Right.

Q. Is there anything in either of these endorsements which alters this policy to eliminate the 75% co-insurance clause?

A. No, sir.

Mr. Bangel: He has already answered that.

The Court: We'll let him answer the same question.

Fred G. Enos.

Vol. I
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page 105 } Examination by Mr. Green continued:

Q. Is there anything in either of those endorsements which eliminates the 75% co-insurance clause?

A. No, sir.

Q. This recitation in this endorsement refers to property as a dwelling?

A. Yes, sir, it does.

Q. Could you have changed in your office as agent of Glen Falls Insurance Company—could you have changed the type of risk involved on this policy without the matter going through the Virginia Rating Bureau?

A. No, sir, we couldn't.

Q. What type rate did you say is promulgated here?

A. It's still mercantile rating; it has here dwelling and mercantile.

Q. In other words, it says dwelling here; this rate is the rate for the dwelling and mercantile?

A. That's right.

Q. It's less than the full mercantile rate as on Exhibit 1?

A. Yes, sir.

Vol. I
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page 106 } Q. Is there anything in any of these endorsements that would reflect a dwelling rate alone?

A. Nothing other than that word "dwelling." This has to clear through the Bureau.

Q. Do you or Glen Falls Insurance Company have any control over the determination of those descriptions and promulgation?

Mr. Bangel: He's answered it three or four times and I think it's pretty clear.

The Court: I think that's repetitious.

Mr. Green: That's all.

RE-CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. Maybe I didn't follow the line of examination by Mr. Green, but as I understand it, it's your contention if I sell a person a piece of property and you write a policy of insurance on that property, and the man makes me a downpayment and I have a mortgage or note secured by a deed of trust on that property, that I have no interest in that insurance

Fred G. Enos.

policy?

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page 107 }

A. Only through the Trustee.
Q. Isn't that the holder of the note?
A. There's no named interest in the policy.
Q. Isn't the lawyer the holder of the note an interest?
A. Yes, but your name would not appear on the policy; your Trustee's name would.
Q. In 1957, you sold that property as agent at public auction?
A. I don't remember that; I have a book full of auctions.
Q. In 1957, when the property became the property of Mrs. Virginia Weinstein and Mrs. Rothenberg—and that was a long time before any fire occurred—didn't you put on there that this policy belongs to Virginia Weinstein and Freda Rothenberg?
A. I believe you'll find title endorsement to that effect.
Q. Was that this policy?
A. That's right.
Q. If that was true, you'd have to cancel out the short term rate and buy a new policy on a new form and nobody does that or very few?
A. Very few.

Mr. Bangel: That's all.

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RE-DIRECT EXAMINATION.

Examined by Mr. Green:
Q. Mr. Bangel has made some point of the fact that you sold this property. This was some considerable time, if you did sell it, it was some considerable time after November 12, 1955, was it not?
A. Frankly, I don't remember having sold it.
Q. In a situation where there's a mortgage involved, do you make a person come in and produce their note to show that they have some interest in the property?
A. No, sir.
Q. Is there any way that you could determine who was the holder of the note at the time you issue a policy?
A. You sure can't.

Fred G. Enos.

Vol. I
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page 109 } RE-CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. If I called up and I said I want you to insure a home that I'm living in, you don't go look and see whether I own it or not?

A. No, sir.

Q. You issue the policy, do you not?

A. Yes, sir. I might ask the agent if there's any loss payable clause needed.

Q. If I say I own the property and you collect my premium and send it to the company—

A. Yes.

Q. —and then it develops that I didn't own it, they won't pay it?

A. That's right.

Vol. I
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page 110 } RE-DIRECT EXAMINATION.

Examined by Mr. Green:

Q. Under the same circumstances you probably have many policies which are subject to a mortgage, are you authorized everytime anybody calls up on the phone and says, "I'm holder of a note secured by a mortgage; I want it changed," can you make the change without permission of the Trustee or named insured?

Mr. Bangel: That's entirely different.

Examination by Mr. Green continued:

Q. Who can order you to change a policy of insurance?

A. With a Trustee clause?

Q. Yes.

A. The Trustee.

Q. No one else?

A. No one else.

The Court: I think you-all have had a fair opportunity to examine and cross-examine; I'm going to cut it off now.

Vol. I
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page 111 } At this time the witness withdrew from the witness stand.

The Court: We'll adjourn until 2:00 o'clock, and let me ask the members of the jury not to discuss this case with anybody on the outside or let anybody discuss the case in your presence.

At this time the Court recessed for lunch.

At this time the Court was called to order.

JOHN MOODY,

a witness for the defendant, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Green:

Q. Will you state your name?

A. John Moody.

Q. Where do you live?

Vol. I A. 624 Edwards Street.

11/12/59 Q. Where is that address, 624 Edwards, with
page 112 } reference to the property at 926 Seventh Street?

A. Just around the corner.

Q. How long have you lived at 624 Edwards Street?

A. Since August 17, 1950.

Q. John, I think you were one of the people who were referred to here as the "Five Vets," is that true?

A. That's correct.

Q. Do you remember the names of the other ones?

A. Yes, sir, Melvin Swain, Sam Overton, Ivan Horton, Henry Rhodes and myself.

Q. What did you have to do with this property at 924 and 926 Seventh Street?

A. The property at 924 was a grocery business and I was one of the partners; I was continuously over there in the business.

Q. When did you go into business?

A. We started the business in 1948.

Q. Were you one of the original partners?

A. Yes, sir, if I am not mistaken, it was March, 1948.

Q. Are you familiar with the property which was at 926

Seventh Street?

Vol. I
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page 113 } A. Very much so.
Q. Can you tell the jury what that property was used for, to your knowledge?
A. Yes, sir, I can.

Q. Over a period of time?

A. To begin with, during the time of the war and up until the war was over, it was used as a—

Mr. Bangel: We object to what it may have been used for during the war; we're dealing with the—

Mr. Green: I think that goes to the construction of the building and that type of thing; how it was laid out.

The Court: I think it's proper.

Mr. Bangel: We save the point.

A. As I was saying, up until about in the spring of '46, it was used as a place called "Honey Drippers Inn," which had a juke box.

Examination by Mr. Green continued:

Q. What was the physical layout of the property as far as the outside and inside?

Mr. Bangel: We'll have to renew the objection each time as to what occurred.

The Court: You can save the point.

Vol. I
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page 114 } A. For the outside, it was—it was a two-story building. It had three rooms in the lower part and it also had a one-story part on the back, which was on the west side. That was two rooms, which was the kitchen and the dining room, and the front part had a large area which was a big room that was used for the "Honey Drippers Inn," which had the booths, and so forth, in there; a beer joint. Then, it had a small room to the right facing the front and on the back of the same side, which was the north side, it had another room; a door that led in from that on the west end.

Examination by Mr. Green continued:

Q. How about the windows in the building, can you describe them for the jury?

John Moody.

A. Yes, I can; it was a big plate glass window on each side of the door.

Q. Which door?

A. That's the front door. It's the door which is on the east side of the building and there were approximately eight by ten, or ten by twelve windows in there.

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Q. Now, what was the building used for, to your knowledge, after it was used by the—as the "Honey Drippers Inn"?

A. Well, the next thing it was used for, to my knowledge, was a little confectionery type business.

Q. Can you describe to the jury how that was operated; briefly, what type operation was that?

A. Well, they sold candy, cigarettes, chewing gum, tobacco and so forth like that.

Q. You stated that you went into business in the premises next door about August 15, 1950?

A. About March, 1948.

Q. When did you go into business there?

A. That was March, 1948; we started this business there.

Q. How long was the building used for a confectionery store?

A. I'll say approximately three or four months.

Q. Moody, did you-all use that building in connection with your business?

A. Yes, we did.

Q. What did you use it for?

A We used it for storage, placing coal, wood, baskets and boxes and so forth that we didn't have ample room for; we stored them over there in that building.

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Q. How long did you use it for that?

A. Very close to two years. We used it for storage almost the whole time that we were buying the property.

Q. Did anybody live in that section of the building while you-all were using it for storage?

A. No, they didn't.

Q. What part of the building were you using for storage?

A. We were using the front. In other words, the complete bottom on the front.

Q. The complete bottom on the front?

A. Yes, sir.

Q. Which was the two-story part?

A. Yes, sir.

John Moody.

Q. Did you have any tenants in that building?
A. Yes, we did.
Q. Where did the tenants live?
A. They lived in the two rooms on the back, which I told you was a one-story building, and then in the upper part.
Q. What was the appearance of the building with respect to the front of it at the time you were using it for storage?
A. Well, it wasn't in too good a shape; to be frank with you, the building wasn't so very well equipped and just by being in the condition it was in—

Vol. I
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page 117 } Mr. Bangel: Can we go into that?
Mr. Green: He's talking about 926.

A. It wasn't hardly equipped for a dwelling, so we used it as storage and let the people use the other part of it.

Examination by Mr. Green continued:
Q. Did you use it for storage up until the time the property was taken away from you?
A. That's right. In fact, Mr. Green, it was something even left in there then.
Q. At the time—
A. That's when we turned it back over to them.
Q. At the time you turned it back over to them, there was something still in that building?
A. Yes, sir.
Q. How was the upstairs utilized during this period?
A. It had a bathroom, and I had five or six other rooms in there. One of those rooms was located back next
Vol. I to the bathroom and there was another one right
11/12/59 on the side which was next to the stairway, and
page 118 } the other three were up in front.
Q. Were people living in that area?
A. Yes, they were.
Q. You heard Mr. Esleeck testify this morning that he was the license inspector, do you recall his ever coming to your store to inspect it?
A. No, I don't.
Q. Do you ever recall, of your own knowledge, of his having inspected the premises next door, the one which is known as 926?
A. No.

John Moody.

Q. What did the front of the building look like? I think there's been some testimony that it was boarded up, can you describe it for the jury?

A. It had steps—in other words, concrete steps right at the center. The door was approximately in the center of the building. That step was made quite wide; I guess about eight or ten feet wide, and it had three steps to the doorway, and it had a double door in front.

Q. Double door in front?

A. That's right; double door in front, which you could open to use either door you wanted, and that was mostly where we'd store coal and stuff in, because we'd back the truck up there and place it inside.

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Q. Did you use that door while storing your things there?

A. Yes, sir.

Q. What about where the plate glass windows had been, what was the situation there?

A. Up until the time the people stopped having their business in front, they were in fair shape. They were cracked a little, you know, but when they vacated the front, the boys started throwing rocks and broke it up. After that, we boarded it up to protect the windows.

Q. How did you board it up?

A. Well, we just grabbed any kind of board we could get and nailed the boards up on the outside in front and on the inside.

Q. Did you make any attempt to finish in the windows or just to board them up to protect them?

A. We just put the boards up.

Q. In referring to the "Five Vets," you-all were the ones that boarded that thing up?

A. Yes, we did.

Q. Do you know when that was boarded up?

A. Well, it was approximately—I'd say—I'll say about December, '55. The weather started to get bad and we wanted to use that for other purposes; we decided to fix that up in there. We didn't have ample room in the store.

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Q. You boarded it up in December, 1955?

A. That's right.

Mr. Green: Thank you; answer Mr. Bangel.

John Moody.

CROSS EXAMINATION.

Examined by Mr. Bangel:

Q. Did I understand you to say that this 926 had three steps made of concrete on the front doors and that there were two double doors leading to the street?

A. That's right.

Q. And there was no boards clean across the front, and you-all used the doors to get in and out, is that what you're telling us?

A. That's right. Will you pardon me, please, if I remember correctly, I don't thnik I said there was no boards on the windows.

Q. I understood you to say that what you did or someone did, you put boards across the windows and not across the doors?

A. That's correct.

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Q. The building could be used to go in and out of from the front?

A. That's right.

Q. You and the other men had bought this property and had defaulted in payment of the debt and the property was sold at public auction, wasn't it?

A. That's right.

Q. And at that time Mr. Enos was the auctioneer, wasn't he?

A. Well, according to the records I received, he was but I didn't see him personally.

Q. You didn't attend the sale?

A. No, I didn't.

Q. Were you summoned here today?

A. No, I wasn't.

Q. You came here of your own accord?

A. No.

Q. Well, if you weren't summoned somebody asked you to come here. You weren't summoned by this court to be here, were you?

A. No, sir.

Mr. Bangel: All right.

John Moody.

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page 122 } RE-DIRECT EXAMINATION.

Examined by Mr. Green:

Q. John, when did you first talk with me about this case?

A. Last night.

Q. When was the first time you ever talked to anybody about the case that's being tried here today?

A. Last night.

Q. Who did you talk with?

A. You.

Q. What did I ask you to do this morning?

A. You asked me to come down here.

Q. Do you have any interest in the world in the outcome in this case or any question about it, John?

A. None whatsoever.

Mr. Green: Thank you very much.

At this time the witness withdrew from the witness stand.

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page 123 } Mr. Green: Your Honor, that's the defendant's case.

Mr. Bangel: We rest.

At this time the Court, counsel for both sides and the court reporter retired to the Judge's Chambers.

Mr. Green: I would like to renew my motion previously made at this time on the basis of the fact that Mr. Avery has now testified as an expert as to the classification which would be applicable in the event that the building of this type was used for storage in connection with a grocery store. His testimony there was that it was to be used as a mercantile-dwelling—I mean written on mercantile form. The undisputed evidence; the uncontradicted evidence at this point was that the building was being used as storage in connection with a grocery store, and I submit there's no evidence in this case at this time in any shape or form in which the jury could possibly infer that there could be another classification. You recall the testimony of Mr. Rothenberg and Mr. Weinstein was to the effect that they did not have any knowledge

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page 124 } of the use to which it was put after the property was sold. I submit under that evidence, it's absolutely nothing for the jury to pass upon.

The Court: This is an issue out of chancery. I'm not only going to have to decide whether there's any evidence to support the verdict, but I'm also in the position of having to determine whether that verdict is in accord with conscience of the court. So, I figure I've got ample time to take that into account at a later time. I'm going to let the matter go to the jury anyhow.

Mr. Green: Note my exception to the Court's ruling on my motion.

The Court at this time read the instructions to the jury.

At this time counsel for the plaintiffs made his argument.

Mr. Green, counsel for the defendant, made his closing argument.

At this time Mr. Bangel, counsel for the plaintiffs, made his closing argument.

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page 125 } At this time counsel for the plaintiffs dictated the following objections and exceptions to the instructions:

The plaintiff objects and excepts to the Court's refusing to grant Instruction A as this clearly states the law and submits to the jury the question of whether they believe from the evidence that the building, 926 Seventh Street, was a dwelling at the time the policy was issued.

The plaintiff objects and excepts to the Court's refusing to grant Instruction B. This instruction tells the jury that if they believe from it that the defendant at the time the policy was assigned from Moody, and others, to Weinstein and Rothenberg in 1957, if it was a dwelling then the plaintiff is entitled to recover. The issue should be decided by the jury for the plaintiff.

Counsel for the defendant, Mr. Green, at this time dictated the following objections and exceptions to the instructions:

The defendant objects and excepts to the action of the Trial

Vol. I
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page 126 } Court in its refusal to grant Defendant Instruction 1 as originally offered, and in the action of the Trial Court in deleting the words "and beyond a reasonable doubt," this is the proper language to be used in an instruction in a case of this type, and this language has been approved by the Virginia Supreme Court of Appeals in several cases.

The defendant objects and excepts to the action of the Court in its refusal to grant Instruction D-3, upon the grounds that the jury was not given any standard upon which to predicate its findings as to whether the building in question was a mercantile building or a dwelling. The jury in this case could not take into consideration their own idea of whether this building was a mercantile establishment or a dwelling, but was bound by the standards which are applicable to the Virginia Insurance Rating Bureau. By the refusal of the Court to grant Instruction #3, the jury was not given any standard and were left to their own devices to determine whether the building was in fact a mercantile establishment or a dwelling.

The foregoing objections and exceptions, as dictated by counsel for both sides, were given in the absence of the jury.

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page 127 } After deliberation by the jury, the jury at this time returned to the courtroom and the Clerk of the Court read as follows:

"We, the jury, find that the building located at 926 Seventh Street was a dwelling on November 12, 1955.

ROBERT L. GRANT, Foreman."

The jury was polled.

Mr. Green: I'll make the appropriate motion if it's necessary.

The Court: I don't think it's necessary.

* * * * *

Vol. II
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page 6 } BERNARD ROTHENBERG,

a witness for the plaintiff, after having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Bangel:

Q. State your name, please.

A. Bernard Rothenberg.

Q. You are the husband of Mrs. Freda Rothenberg?

A. Yes, sir.

Q. Upon the fire loss occurring second day of February, 1958, of the property, 926 Seventh Street, Portsmouth, Virginia, did you notify the company?

A. Yes, sir.

Q. Following that notification, did a Mr. S. W. Rockwell, Jr. from the General Adjustment Bureau, Incorporated come to see you?

A. I believe he came to see Mr. Weinstein, but he also saw me too.

Q. Was a non-waiver agreement filed with them?

A. Yes, sir.

Vol. II
11/20/59 Mr. Bangel: May I have the non-waiver agree-
page 7 } ment?

Mr. Green: Yes, sir.

Examination by Mr. Bangel continued:

Q. This is a non-waiver agreement?

A. Yes, sir.

Mr. Bangel: We offer this in evidence and ask that it be marked as an exhibit.

The Court: This will be Plaintiff Exhibit "X."

Examination by Mr. Bangel continued:

Q. Did he also leave a card indicating where he wanted the non-waiver premium mailed to?

A. Yes, sir.

Mr. Bangel: We offer this in evidence.

The Court: This will be Plaintiffs' Exhibit "Y."

Examination by Mr. Bangel continued:

Q. Following his leaving the non-waiver agreement and his card, was it mailed to the General Adjustment Bureau?

Bernard Rothenberg.

A. Yes, sir.

Vol. II 11/20/59 page 8 } Q. Thereafter, did you continue trying to adjust this matter?

A. Yes, sir, almost daily.

Q. Did you receive this from R. G. Anderson, Branch Manager, 246 West Bute Street, Norfolk?

A. Yes, sir.

Q. Of course, that memorandum was that you had complied with the request?

A. Yes, sir.

The Court: This will be marked Plaintiffs' Exhibit "Z."

Examination by Mr. Bangel continued:

Q. Was the proof of loss which he sent to you mailed to the General Adjustment Bureau?

A. Yes, sir.

Q. And they were the agents of Glens Falls for the purpose of adjusting this loss, were they not?

A. That's right.

Q. I hand you a paper writing handed to me by counsel for Glen Falls Insurance which says "Sworn Statements of Proof of Loss" and ask you whether or not that was mailed to the General Adjustment Bureau?

A. Yes, sir.

Vol. II 11/20/59 page 9 } Mr. Bangel: We offer this in evidence and ask that it be marked as an exhibit.

The Court: Plaintiffs' Exhibit "X-X."

Examination by Mr. Bangel continued:

Q. I hand you a letter dated June 11, 1958, from the General Adjustment Bureau, Incorporated, signed by Mr. S. W. Rockwell, Jr., Adjuster for the General Adjusting Bureau, Incorporated, and acting for Glens Falls Insurance Company, and ask you whether that letter excepting the pencil notations and the ink notations above here were signed by you?

A. Yes, sir.

Q. There are certain pencil notations on that letter, what do they represent?

A. They represent where we made calls to Richmond and calls to Glens Falls Insurance in New York and we tried to find out the reason why they wouldn't pay off the claim, and they never would say. We were waiting for them to settle the

claim. They kept saying they were waiting for this information and for that information and they never did settle. They were just waiting.

Mr. Bangel: We offer this in evidence.
The Court: This is Plaintiffs' Exhibit "Y-Y."

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page 10 } Examination by Mr. Bangel continued:
Q. I have two letters—copies of two letters which were written to General Adjustment Bureau, Incorporated; one dated June 25, 1958, and one dated July 14, 1958.
A. Yes, sir.

Mr. Bangel: I offer in evidence, if Your Honor please, the letter dated June 25, 1958, a copy of the original of which is in counsel for the defendant's files.
The Court: Plaintiffs' Exhibit "Z-Z."
Mr. Bangel: I offer in evidence, if Your Honor please, a copy of the letter dated July 14, 1958, original which is held by counsel.
The Court: This will be Plaintiffs' Exhibit "R."
Mr. Bangel: Witness with you.
Mr. Green: I assume this evidence is being introduced by Mr. Bangel in an effort to show some waiver. That matter has not been raised in the pleadings. I object to it and move that it be expunged from the record.
The Court: I overrule your motion.
Mr. Green: Note my exception.

Mr. Green: I have no questions.

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page 11 } Mr. Bangel: We rest, if Your Honor please.
Mr. Green: I think we already made the record of the other case a part of the record in this case, and that record will show the filing date on the action in law. I think the Court's record in this case will show the filing date of the suit which was brought for reformation. Those dates, we think, are material and I don't think I have to put any evidence on.
The Court: Those are matters of record.

At this time the Court heard considerable argument by counsel for both sides.

At this time the Court made no ruling.

Mr. Green: After leaving here the other day after the verdict came in, that, of course, that issue was being tried by the Court as an action at law. The issue went out from the chancery side to the law side and I did not make any motion on the verdict at that time.

The Court: I don't think you have to make any motion. It is tried under the law procedure, but it's still a chancery case.

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Mr. Green: I would like for the record to show that I made such a motion just to protect myself in record; to set the verdict aside as contrary to law and evidence.

The Court: That's all right.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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